

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 WILMINGTON NEIGHBORS,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 95-134
10 CITY OF BEND,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 NORTH PACIFIC AND DANA, L.L.C.)
17 and RAINBOW DEVELOPMENT CO.,)
18)
19 Intervenors-Respondent.)

22 Appeal from City of Bend.

24 Peggy Hennessy, Portland, filed the petition for review
25 and argued on behalf of petitioner. With her on the brief
26 was Reeves, Kahn & Eder.

28 No appearance by respondent.

30 Steve C. Morasch, Portland, and Sharon R. Smith, Bend,
31 filed the response brief on behalf of intervenors-
32 respondent. With them on the brief was Schwabe, Williamson
33 & Wyatt, and Bryant, Lovlien & Jarvis. Steve C. Morasch
34 argued on behalf of intervenor-respondent North Pacific and
35 Dana, L.L.C.

37 GUSTAFSON, Referee; HANNA, Referee, participated in the
38 decision.

39

42 You are entitled to judicial review of this Order.
43 Judicial review is governed by the provisions of ORS
44 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a
4 subdivision application.

5 **MOTION TO INTERVENE**

6 North Pacific and Dana L.L.C., and Rainbow Development
7 Co. (intervenors) move to intervene on the side of
8 respondent. There is no objection to the motion, and it is
9 allowed.

10 **FACTS**

11 Intervenors applied to the county for approval of a
12 subdivision in a residential zone.¹ The proposed
13 subdivision is directly north of the established Wilmington
14 residential neighborhood.

15 Access to the proposed development will be from both
16 the north and the south. As originally proposed, the access
17 from the south would be through the Wilmington neighborhood,
18 via Second Street. At the request of the city staff, the
19 street layout was reconfigured. Access to Second Street was
20 eliminated. Instead, access into the development from the
21 south will be via "B" Street, which is near the southwest
22 corner of the development, and does not extend through the

¹Intervenor Rainbow Development Co. was the original applicant before the city. Prior to completion of the local proceedings, intervenor North Pacific and Dana L.L.C. purchased the subject property from Rainbow Development Co. For purposes of this opinion, we refer to them collectively as "intervenors".

1 Wilmington neighborhood. In addition, a possible future
2 access from First Street was added. First Street extends
3 through the Wilmington Neighborhood, and ends at the
4 property line of the proposed development. As reconfigured,
5 the proposed development includes a reserve strip to
6 facilitate a future connection of First Street to the
7 proposed development's internal street system. According to
8 intervenors and the city, the primary purpose of that
9 potential connection to First Street would be to facilitate
10 access to property owned by the Tumalo Water District
11 immediately east of the proposed development, and northeast
12 of the Wilmington Neighborhood.

13 The hearings officer approved the subdivision
14 application on May 15, 1995. Petitioners did not appeal
15 that approval to the city council within the city's ten-day
16 appeal period. However, on May 24, 1995, the hearings
17 officer issued an amended decision of approval. The amended
18 decision added some clarifying language; corrected the
19 number of lots in the subdivision, from 67 to 66; and added
20 or revised three conditions of approval. A cover sheet to
21 the amended approval stated that only amendments to the
22 approval could be appealed, but did not list the amendments.
23 Rather, all amendments were incorporated into the original
24 decision, which the hearings officer then re-approved as a
25 single, comprehensive document.

26 Petitioners timely appealed the amended decision to the

1 city council. The city council declined review, thereby
2 upholding the hearings officer's amended decision.

3 Petitioners' appeal the city's amended decision.

4 **MOTION TO DISMISS**

5 Intervenors move to dismiss this appeal for
6 petitioners' failure to exhaust administrative remedies.
7 According to intervenors, all of petitioners' assignments of
8 error relate to the original decision, which petitioners did
9 not appeal locally. Intervenors acknowledge that the
10 amended decision re-adopted the original decision. However,
11 intervenors argue that since petitioners did not exhaust
12 their administrative remedies as to the original decision,
13 they are now precluded from raising issues related to that
14 original decision. Since petitioners' appeal does not
15 challenge any findings unique to the amended decision,
16 intervenors contend this appeal must be dismissed.

17 Petitioners respond, essentially, that the amended
18 decision superseded the original decision, and that their
19 appeal of the amended decision was an appeal of the city's
20 final decision on the application in its entirety.

21 Affirmation of a previous land use decision does not
22 create a new appealable decision. Smith v. Douglas County,
23 17 Or LUBA 809, 817 aff'd 98 Or App 379, rev den 308 Or 608
24 (1989). In addition, clerical corrections to previous land
25 use decisions do not extend the time period for appealing
26 the previous decision. Rather, to the extent those

1 corrections constitute a separate land use decision, and the
2 time for appealing the previous decision has passed, an
3 appeal of the decision as corrected is limited to the
4 corrections. Kalmiopsis Audobon Society v. Curry County,
5 131 Or App 308, 884 P2d 894 (1994); see also Caraher v.
6 City of Kalmath Falls, ___ Or LUBA ___ (LUBA No. 95-060,
7 November 20, 1995).

8 In this case, had the city adopted a separate
9 "amendment" to the original decision, or an "errata sheet"
10 to correct clerical errors in their original decision,
11 perhaps petitioners' appeal would be limited to the
12 corrections. However, that is not what the city did here.
13 The hearings officer adopted an amended decision, through
14 which he re-adopted the original decision and revisions as a
15 single, comprehensive document. Without comparing the
16 language of each page of the original and amended decisions,
17 it is not possible to detect how the original decision was
18 amended.

19 Petitioners' appeal of the amended decision was an
20 appeal of all of the language included in and adopted
21 through the amended decision. Petitioners exhausted their
22 local administrative remedies by locally appealing the
23 amended decision.

24 Intervenors' motion to dismiss is denied.

25 **ASSIGNMENTS OF ERROR**

26 In petitioners' first, second and fourth assignments of

1 error, petitioners argue the city's decision does not
2 provide for orderly development of the city's transportation
3 system, in contravention of city's code requirements.
4 According to petitioners, before the city can approve
5 intervenors' development, the city must establish a
6 comprehensive transportation plan to ensure overall orderly
7 development of the city's overall transportation and street
8 system. At oral argument, petitioners' attorney
9 acknowledged that to deny or defer development until such a
10 comprehensive transportation plan is completed would result
11 in a de facto moratorium in violation of ORS 197.505. See
12 Home Builders v. City of Wilsonville, ___ Or LUBA ___ (LUBA
13 No. 94-166, December 21, 1995). If that is the case,
14 petitioners urge that it is incumbent upon intervenors to
15 compel the city to complete such a comprehensive study.

16 In their third assignment of error, petitioners state
17 generally that the city has not adequately required
18 compliance with certain "conditions" of ORS 92.010 (the
19 subdivision and partitioning statute). In their fifth
20 assignment of error, petitioners assert a street-width
21 variance granted in conjunction with the challenged approval
22 improperly construes the variance requirements and lacks
23 evidentiary support.

24 None of petitioners assignments of error establish any
25 basis for remand or reversal of the county's decision.
26 Pursuant to ORS 197.835(16), the city's decision is

1 affirmed.