

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

MARTIN PLOTKIN, ROBIN PLOTKIN,)
O. MEREDITH WILSON, JR., and)
THEODORA ANNE WILSON,)
Petitioners,)
vs.)
WASHINGTON COUNTY,)
Respondent,)
and)
BOB POWNE,)
Intervenor-Respondent.)

LUBA No. 98-133
FINAL OPINION
AND ORDER

Appeal from Washington County.

O. Meredith Wilson, Jr., Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Lane Powell Spears Lubersky.

Alan R. Rappleyea, County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

Bob Powne, Portland, filed a response brief. Katherine A. Dreyfus, Portland, argued on behalf of intervenor-respondent.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member; participated in the decision.

REMANDED 07/02/99

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

1 Opinion by Briggs.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's preliminary approval of a 12-lot subdivision and
4 development review for 10 attached single-family units.

5 **MOTION TO INTERVENE**

6 Bob Powne moves to intervene on the side of the county. At oral argument,
7 petitioners objected to the motion to intervene. Petitioners claim that because intervenor-
8 respondent (intervenor) failed to file a motion to intervene within 21 days of the date
9 petitioners filed their notice of intent to appeal (NITA), he is precluded from intervening in
10 this appeal.

11 Petitioners filed a NITA by certified mail on August 7, 1998. LUBA received the
12 NITA on August 10, 1998. On August 26, 1998, intervenor mailed a letter to LUBA,
13 requesting "to become an intervenor when and if this appeal goes forward." Intervenor's
14 letter provided information showing that he had appeared before the county in writing on the
15 matter, and therefore had standing to intervene in this appeal.

16 LUBA received intervenor's letter on August 28, 1998. Intervenor was informed by
17 LUBA staff that the August 26, 1998 letter did not follow the format prescribed in OAR 661-
18 010-0050(2). On September 1, 1998, intervenor filed a formal motion to intervene, entitled
19 "MOTION TO INTERVENE (AMENDED)." The motion to intervene included a certificate
20 of service showing that copies of the motion had been mailed to all parties on September 1,
21 1998. LUBA received the motion to intervene on September 3, 1998. LUBA mailed a letter
22 acknowledging receipt of the motion to all parties on September 4, 1998.

23 Petitioners filed their brief on October 5, 1998, and mailed a copy of the brief to
24 intervenor. Intervenor filed a response brief on October 30, 1998. At oral argument on
25 January 7, 1999, petitioners orally objected to intervenor's status.

26

1 ORS 197.830(6)(a) provides:

2 "Within 21 days after a notice of intent to appeal has been filed with the board
3 under [ORS 197.830(1)], any person may intervene in and be made a party to
4 the review proceeding upon a showing of compliance with [ORS
5 197.830(2)]."

6 If a person fails to intervene within the 21 day deadline, LUBA shall deny the motion to
7 intervene. ORS 197.830(6)(c).

8 Under ORS 197.830(2) and (6) a potential intervenor may intervene by showing that
9 the person has standing to appeal. Here, intervenor sent a letter to this Board indicating an
10 intent to intervene, and providing information to show that he had appeared in writing before
11 the county. The August 26, 1998 letter contained all of the information required by statute,
12 but was not in the form required by OAR 661-010-0050 and 661-010-0065. A motion in the
13 proper form was promptly filed once intervenor was informed of the deficiencies.

14 LUBA may waive a technical violation of its rules unless the violation causes
15 substantial prejudice to the parties or the violation interferes with Board review of the land
16 use decision. Winner v. Multnomah County, 30 Or LUBA 420, 424 (1996). The parties'
17 substantial rights to which the rules refer are rights to (1) the speediest practicable review;
18 (2) a reasonable opportunity to prepare and submit argument; and (3) a full and fair hearing.
19 Markham v. Coos County, 31 Or LUBA 529, 530 (1996). Petitioners have failed to show
20 how they were harmed by the technical failure to file a motion in accordance with LUBA's
21 administrative rules within the requisite time period, and we find that there was no
22 interference with a timely review of the matter. The filing of the August 28, 1998 letter, in
23 the circumstances presented by this appeal, is sufficient to comply with the 21-day deadline
24 for intervention established by ORS 197.830(6).

25 The motion to intervene is allowed.

26 **FACTS**

27 The applicant, Shelburne Development Corporation, proposes to build 12 residential

1 units, comprised of five duplexes and two single-family dwellings, on the eastern half of the
2 4.78 acre property. The subject property is zoned R-9 (Residential-9 units per acre). It is
3 bordered on the north by a tributary of Johnson Creek. Undeveloped residential property lies
4 further to the north. The site is bordered on the east by single-family residences on large
5 lots, on the west by a 32-unit condominium complex (Trillium Hollow), and on the south by
6 the Fox Hollow #1 single-family dwelling subdivision. The applicant proposes to access the
7 property from 94th Terrace to the south, with a secondary access to Ash Street, located to the
8 east of the site. Because the adjacent property to the east has not been developed, the access
9 on the subject parcel will terminate at the eastern boundary until such time as the eastern
10 property is developed.

11 The site is undeveloped and covered by a dense thicket of broadleaf deciduous and
12 evergreen trees. The entire acreage is designated "Wildlife Habitat" in the Cedar Hills-Cedar
13 Mill Community Plan. The community plan also designates the Johnson Creek tributary as a
14 "Drainage Hazard Area" (25-year floodplain) and "Water Areas and Wetlands and Fish and
15 Wildlife Habitat." A detailed site review included with the application indicates that there
16 are two wetlands located on the property in addition to the wetlands identified in the
17 community plan. The applicant proposes to preserve approximately 2.7 acres of the property
18 as open space, including .37 acres of wetland and buffer and to create a 40-50 foot building
19 setback from the center of the Johnson Creek tributary.

20 An initial application submitted to the county contained a proposal for a 14-unit,
21 single-family dwelling subdivision. The application was revised after comment by staff,
22 affected agencies, and neighbors. The revised application was submitted to the Washington
23 County hearings officer for hearing and decision. After review of the testimony and record,
24 the hearings officer approved the application, with conditions. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioners argue that the hearings officer incorrectly determined that the application
3 satisfied code provisions regarding (1) street length and (2) alterations to identified Riparian
4 Zones and significant resource areas. Petitioners also argue that there are insufficient
5 findings to support the county's determination that the proposed development, with
6 mitigation efforts, will not seriously interfere with the preservation of fish and wildlife
7 habitat identified in the community plan.

8 **A. Compliance with neighborhood circulation requirements (CDC 408-5.1)**

9 Petitioners argue that the proposed access does not comply with the Washington
10 County Community Development Code (CDC) neighborhood circulation requirements in
11 that the proposed block length exceeds 600 feet and that the total perimeter of the proposed
12 block exceeds 1800 feet.

13 CDC 408.5.1 provides:

14 "For single-family or duplex residential development, on-site streets shall be
15 provided which meet the following:

16 "A. Block lengths for local streets and collectors shall not exceed 600 feet
17 between through streets * * * except when the provisions of Sections
18 408-5.1D, 408-5.5, 408-5.6 or 408.6 are met.

19 "B. The total length of a perimeter of a block for local and collector streets
20 shall not exceed 1,800 feet between through streets * * * except when
21 the provisions of Sections 408-5.1D, 408-5.5, 408-5.6 or 408.6 are
22 met."

23 The hearings officer found that the preliminary plat showed that the proposed block
24 length exceeds 600 feet, and that eventual block perimeters will exceed 1,800 feet.
25 Nonetheless, the hearings officer determined that the application could be approved because
26 the applicant showed that the proposal falls within the exception criteria found in CDC 408-
27 5.1D.

28 CDC 408-5.1D provides, in relevant part:

1 "The Review Authority may modify the review standards of Section 408-5.1A
2 * * * based on findings that the modification is the minimum necessary to
3 address the constraint and the application of the standard is impracticable due
4 to the following:

5 "(1) Topography, although grades that may be too steep for a street are not
6 necessarily too steep for an accessway;

7 "(2) Drainage hazard areas, wetlands, flood plains, or a Significant Natural
8 Resource area;

9 "(3) Existing development patterns on abutting property which preclude the
10 logical connection of streets or accessways[.]"

11 The hearings officer found:

12 "CDC 408-5.1D provides that the Review Authority may modify th[e CDC
13 408-5.1A and B] standards if the application of the standards is impractical
14 due to such factors as topography, drainage hazard areas, wetlands, flood
15 plains, a Significant Natural Resource Area and existing development on
16 abutting property, which precludes the logical connection of streets. A review
17 of the maps contained in the file show drainage hazard areas, wetlands and
18 wildlife habitat on the western portion of the Site which make roads
19 impracticable and would be contrary to the [policy] requirements of CDC
20 422-3.6.^{1]} On the northern part of the Site are precipitous slopes up to 75
21 percent, which make the construction of roads impractical. On the south of
22 the Site, there is an existing development with a road, 94th Terrace, with
23 which the Road on the Site will connect. In the Hearings Officer's
24 judgement[,] each of the factors noted above makes it impractical to apply the
25 standards of CDC 408.5.1[A] and [B]. The modification of the standards, as
26 proposed by the Applicant, is the minimum necessary to address the
27 constraints imposed by these factors." Record 14.

28 Petitioners argue that the modification does not address the basic failure of the
29 development proposal to comply with the access standards. They assert that even if the site
30 constraints were not present, the proposed streets would exceed block length and perimeter
31 standards found in CDC 408-5.1A and B. Therefore, petitioners argue, failure to comply

¹CDC 422-3.6 provides:

"For any proposed use in a Significant Natural Resource Area, there shall be a finding that the proposed use will not seriously interfere with the preservation of fish and wildlife areas and habitat identified in the Washington County Comprehensive Plan, or how the interference can be mitigated. * * *"

1 with the standards require a denial of the permit, rather than approval with modifying
2 conditions.

3 Intervenor argues that the CDC does not require compliance with the block length
4 and perimeter standards if those standards are impracticable. Further, CDC 422-3.6 does not
5 prohibit development in Wildlife Habitat areas, it merely requires that the development that
6 does occur be sufficiently mitigated to have the least impact possible. Intervenor argues the
7 hearings officer identified the constraints and properly determined that the proposed access
8 design is consistent with the aims of the code.

9 We agree with intervenor. The applicant could have proposed a circulation plan that
10 complied with the provisions of CDC 408-5.1A and B, but resulted in destruction of the
11 wetlands areas. Instead, the applicant proposed a circulation plan that takes the site
12 constraints into consideration. The code clearly allows a modification of the street standards
13 because of identified site constraints, upon findings that the modification is the minimum
14 necessary to address the constraint and findings that the application of the CDC 408-5.1
15 standard is impracticable. The hearings officer determined that compliance with the
16 standards is impracticable, and that the design sufficiently mitigates adverse impacts so as to
17 comply with the provisions of CDC 408-5.1D. Petitioners' arguments do not demonstrate
18 error in the hearings officer's findings concerning CDC 408-5.1D.

19 The first subassignment of error is denied.

20 **B. Compliance with alteration standards for Significant Natural Resource**
21 **areas and Riparian Zones (CDC 422-3.3)**

22 The parties' arguments under this subassignment of error are based on an apparent
23 inconsistency between two subsections of CDC 422. First, CDC 422-2 identifies lands
24 subject to regulation under CDC 422.² The county argues that only those lands described in

²CDC 422-2 provides:

"Lands Subject to this Section:

1 CDC 422-2 are subject to regulation under CDC 422. Second, CDC 422-3 identifies criteria
2 for development affecting Significant Natural Resources. CDC 422-3.3 provides

3 "Development Within a Riparian Zone³, Water Areas and Wetlands, and
4 Water Areas and Wetlands and Fish and Wildlife Habitat:

5 "A. No new or expanded alteration of the vegetation or terrain of the
6 Riparian Zone (as defined in Section 106) or a significant water area
7 or wetland (as identified in the applicable Community Plan or the
8 Rural/Natural Resource Plan Element) shall be allowed [with nine
9 specified exceptions.]"

10 Petitioners argue that Riparian Zones are clearly regulated by CDC 422-3.3 even though a
11 particular Riparian Zone may not be among the four categories described under CDC 422-2.

12 Two wetlands, located in the southern central portion of the property, are identified in
13 the applicant's site survey. The applicant proposes to fill a portion of these wetlands to
14 construct a segment of 94th Terrace and to provide a foundation site for one of the proposed
15 duplexes. Petitioners argue that the two wetlands fall within the CDC definition of "Riparian

"Those areas identified in the applicable Community plan or the Rural/Natural Resource Plan Element as Significant Natural Resources.

"Significant Natural Resources have been classified in the Community Plans or the Rural/Natural Resource Plan Element by the following categories:

"422-2.1 Water Areas and Wetlands – 100 year flood plan, drainage hazard areas and ponds, except for those already developed.

"422-2.2 Water Areas and Wetlands and Fish and Wildlife Habitat – Water Areas and wetlands that are also fish and wildlife habitat.

"422-2.3 Wildlife Habitat – Sensitive habitats identified by the Oregon Department of Fish and Wildlife, the Audubon Society Urban Wildlife Habitat Map, and forested areas coincidental with water areas and wetlands.

"422-2.4 Significant Natural Areas – Sites of special importance, in their natural condition, for their ecologic, scientific, and educational value."

³The current CDC uses the phrase "Riparian Corridor" rather than "Riparian Zone." Because the petitioners attached the code provisions which arguably were applicable at the time the application was approved, we shall retain the word "zone." The word change does not affect our analysis.

1 Zone."⁴ However, neither the "applicable Community plan" nor the "Rural/Natural Resource
2 Plan Element" designates the two wetlands as "Water Areas and Wetlands" or "Water Areas
3 and Wetlands and Fish and Wildlife Habitat."⁵ Therefore, CDC 422-3.3 only applies to the
4 disputed wetlands if the regulatory scope of CDC 422 includes "Riparian Areas" that are not
5 also within the lands described as "Significant Natural Resources" under CDC 422-2.

6 Petitioners argue that CDC 422-3.3 applies because the two wetlands fall within the
7 CDC definition of "Riparian Zone." Therefore, petitioners argue, because the county failed to
8 show the proposed improvements within the two wetlands comply with the exceptions set out
9 in CDC 422-3.3, the challenged decision must be remanded.⁶ We understand the county to
10 respond that while the two wetlands may fall within the CDC definition of "Riparian Zone,"
11 CDC 422-3.3 does not apply because the scope of CDC 422 is strictly limited by CDC 422-2
12 to designated "Significant Natural Resources."

13 A fundamental principle of statutory construction is that all sections of a statute are to
14 be given effect, if possible. ORS 174.010.; Lane County v. LCDC, 325 Or 569, 578, 942
15 P2d 278 (1997) (whenever possible, the court should construe together statutes on the same

⁴CDC 106-185 provides:

"Riparian Zone The area, adjacent to a water area, which is characterized by moisture-dependent vegetation, compared with vegetation on the surrounding upland, as determined by a qualified botanist or plant ecologist, or in no case less than a ground distance of twenty-five feet on either side of the channel. Where, in its existing condition, a wetland or watercourse has no discernible channel which conveys surface water runoff, the Riparian Zone shall be measured from the center of the topographic trough, depression or canyon in which it is located."

⁵Neither are the two wetlands designated "Wildlife Habitat" or "Significant Natural Areas." The county explains that not all wetlands are designated as Significant Natural Resources in the community plans and the Rural/Natural Resource Plan Element, only those that are found to be significant under Statewide Planning Goal 5. Apparently, the two wetlands at issue in this assignment of error were not found to be significant wetlands under Goal 5.

⁶One of its nine specified exceptions to the general prohibition in CDC 422-3.3 against alteration of Riparian Zones is for "Crossings for streets, roads or other public transportation facilities." CDC 422-3.3(A)(1). An exception is also provided for "detached dwellings" in certain circumstances, but we are uncertain whether that exception would authorize the proposed alterations for the proposed duplex. CDC 422-3.3(A)(6).

1 subject as consistent with and in harmony with each other.); Davis v. Wasco IED, 286 Or
2 261, 267, 272, 593 P2d 1152 (1979) (same); Tatum v. Clackamas County, 19 Or App 770,
3 775, 529 P2d 393 (1974). If CDC 422-2 is interpreted as limiting the application of CDC
4 422 in the manner the county argues, the reference in CDC 422-3.3 to "Riparian Zone" is
5 meaningless. On the other hand, if CDC 422-2 is interpreted as identifying lands subject to
6 CDC 422, but not necessarily all such lands, then the reference to "Riparian Zone" in CDC
7 422-3.3 can be given meaning and such lands are subject to the criteria set out in that section
8 even though they may not be designated as "Significant Natural Resources." Although this
9 latter interpretation is somewhat awkward, it does far less damage to the language of CDC
10 422 than the interpretation offered by the county in its brief, which would require essentially
11 ignoring the references to Riparian Zones in CDC 422-3.3.

12 Although it appears the two wetlands identified on the applicant's site survey
13 constitute "Riparian Zones" as defined by CDC 106-185, we believe it is appropriate for the
14 county to make that determination. If they do constitute Riparian Zones, the county can
15 identify the extent of the Riparian Zones and determine whether this proposal complies with
16 the restrictions and exceptions set out in CDC 422-3.3.

17 This subassignment of error is sustained.

18 **C. Compliance with non-interference and mitigation requirements (CDC**
19 **422-3.6)**

20 Petitioners argue that because the entire site is designated as Wildlife Habitat in the
21 community plan, and because CDC 422-3.6 requires a finding that the proposed use will not
22 seriously interfere with the preservation of fish and wildlife areas and habitat identified in the
23 Washington County Comprehensive Plan, it is difficult, if not impossible, for any
24 development to be approved on the subject parcel. Petitioners recognize that CDC 422-3.6
25 allows identified interference to be mitigated, but allege that the applicant failed to comply
26 with mitigation standards, because there will inevitably be some impact on the wildlife in the
27 area. Presumably, petitioners interpret the mitigation provisions to require an interference

1 attributable to the development be mitigated in a way that will result in no impact on fish and
2 wildlife. In the alternative, petitioners argue that there is insufficient evidence in the record
3 to support a finding that the interference with the preservation of fish and wildlife areas and
4 habitat will be satisfactorily mitigated, as required by CDC 422-3.6. See n 1.

5 CDC 106-129 defines "mitigation" as:

6 "Reducing the impacts of a proposed development and/or offsetting the loss of
7 habitat values resulting from development. In fish[and] wildlife * * * areas,
8 mitigation may include, but is not necessarily limited to, requiring: 1)
9 clustering of structures near each other and roads, controlling location of
10 structures on a parcel to avoid habitat conflicts, minimizing [the] extent of
11 road construction to that required for the proposed use; and, 2) replacing
12 unavoidable loss of values by reestablishing resources for those lost, such as:
13 forage for food production, escape or thermal shelter. In other areas of
14 significant wildlife value, such as wetlands, riparian vegetation and special
15 bird nesting sites, maintenance and enhancement of remaining habitat,
16 setbacks and restoration of damage and avoiding damage would be
17 appropriate."

18 Intervenor responds first, and we agree, that the mitigation standards in the code do
19 not prohibit serious interference from occurring, merely that the interference be mitigated.
20 Intervenor next argues that the hearings officer made a finding, based on the testimony of
21 applicant's wildlife biologist, that the proposed development would not seriously interfere
22 with the preservation of fish and wildlife areas and habitat areas. Even if the proposed
23 development does seriously interfere with wildlife habitat, the hearings officer determined
24 that the effects are mitigated by: (1) limiting the number of dwellings constructed on the site;
25 (2) limiting the construction of dwellings and vehicular access to the eastern portion of the
26 site, (3) developing wetlands to replace the area to be filled; and (4) establishing setbacks
27 from the centerline of the Johnson Creek tributary.

28 When a party raises issues regarding compliance with any particular approval
29 criterion, the hearings officer must address those issues. Hillcrest Vineyard v. Bd. of Comm.
30 Douglas Co., 45 Or App 285, 293, 608 P2d 201 (1980). Here, the hearings officer responded
31 to petitioners' issue regarding compliance with the CDC 422-3.6 by relying on the testimony

1 of the applicant's wildlife biologist to determine that the proposed mitigation measures are
2 adequate to minimize the adverse impact of development. Petitioners have not shown why
3 those findings are inadequate to address the issue they raised.

4 This subassignment of error is denied.

5 The first assignment of error is sustained, in part.

6 **SECOND ASSIGNMENT OF ERROR**

7 In this assignment of error, petitioners argue that the findings that the application
8 complies with the provisions challenged in the first assignment of error are not supported by
9 substantial evidence in the whole record, and therefore, the county's decision must be
10 remanded. Respondent and intervenor argue that there is substantial evidence in the record
11 to support the hearings officer's findings of compliance with the applicable standards.

12 As a review body, we are authorized to reverse or remand the challenged decision if it
13 is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C).
14 Substantial evidence is evidence a reasonable person could rely on to reach a decision. City
15 of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Carsey v.
16 Deschutes County, 21 Or LUBA 118, 123, aff'd 108 Or App 339, 815 P2d 233 (1991). In
17 reviewing the evidence, however, we may not substitute our judgment for that of the local
18 decision maker. Rather, we must consider and weigh all the evidence in the record to which
19 we are directed, and determine whether, based on that evidence, the local decision maker's
20 conclusion is supported by substantial evidence. Younger v. City of Portland, 305 Or 346,
21 358-60, 752 P2d 262 (1988). If there is substantial evidence in the whole record to support
22 the local governments' decision, LUBA will defer to it, notwithstanding that reasonable
23 people could draw different conclusions from the evidence. Where the evidence is
24 conflicting, if a reasonable person could reach the decision the local government made, in
25 view of all the evidence in the record, LUBA will defer to the local government's choice
26 between conflicting evidence. Tigard Sand and Gravel, Inc. v. Clackamas County, 33 Or

1 LUBA 124 (1997), aff'd 149 Or App 417, 943 P2d 1106 (1997) adhered to 131 Or App- 16,
2 949 P2d 1225, rev den 327 Or 83 (1998).

3 Based on the discussion in the first assignment of error, we find sufficient evidence in
4 the record to support findings of compliance with the neighborhood circulation requirements
5 found in CDC 408-5.1 and with the non-interference and mitigation requirements found in
6 CDC 422-3.6.

7 Because the county failed to address whether the two newly identified wetlands fall
8 within the definition of "Riparian Zone" and, if so, whether the proposal complies with CDC
9 422-3.3, the county's findings concerning CDC 422-3.3 are inadequate. We therefore do not
10 consider petitioners' substantial evidence challenge under CDC 422-3.3. DLCD v. Columbia
11 County, 15 Or LUBA 302, 305 (1987); McNulty v. City of Lake Oswego, 14 Or LUBA 366,
12 373 (1986), aff'd 83 Or App 275, 730 P2d 628 (1987).

13 The second assignment of error is denied.

14 The decision is remanded.