BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KAROL SUSAN WELCH, BEVERLY DAVIS
and MICHELLE MICKELSON,
*Petitioners,*

vs.

YAMHILL COUNTY,
*Respondent,*

and

JOHN KROO,
*Intervenor-Respondent.*

LUBA No. 2007-111

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Anne C. Davies, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Yamhill County.

Samuel R. Justice, McMinnville, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Haugeberg Rueter Gowell Fredricks Higgins & McKeegan PC.

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

REMANDED 02/20/2008

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

Opinion by Ryan.

**NATURE OF THE DECISION**

Petitioners appeal a decision by the county approving a 10-lot subdivision pursuant to Ballot Measure 37 waivers.

**FACTS**

The subject property is a 31.03 acre parcel zoned Agriculture/Forestry Large Holding (AF-20). In September, 2005, intervenor filed a claim with the Oregon Department of Land Conservation and Development (DLCD) seeking compensation under ORS 197.352(1) (2005) (Ballot Measure 37) in the amount of $1,925,000 for the reduction in the fair market value of the property as a result of land use regulations that intervenor alleged restricted the use of the property. Record 45. In lieu of paying compensation, DLCD issued a final order authorizing intervenor (and his wife) to subdivide the property into 2.5 acre parcels and site a dwelling on each parcel. Record 39-48.

Intervenor also filed a claim with the county, and the county approved the claim in Board Order 06-153 (County Order). The County Order is not in the record in this appeal, but a portion of it is referenced in the decision and a staff report. Record 5-6, 359.

In August, 2006, intervenor applied to subdivide the property into 12 lots ranging from 2.1 to 3.2 acres in size. Record 425. The planning commission approved the subdivision application, and some of the petitioners appealed. Intervenor subsequently reduced the proposed number of lots to 10. Record 104. On May 23, 2007, the board of commissioners approved a 10-lot subdivision.[1] This appeal followed.

[1] In November 2007, the voters adopted Ballot Measure 49, a measure referred to the voters by the legislature that comprehensively amended ORS 197.352, and for all practical purposes replaced it with a different system for treating claims for compensation, codified at ORS 195.300 et seq. *See Frank v. DLCD*, 217 Or App 498, 503, __ P3d __ (2008) (discussing the new system for treating claims for compensation under ORS 197.352(2005)). Ballot Measure 49 became effective on December 6, 2007.

## FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners argue that the county erred in approving a 10-lot subdivision because intervenor's original application sought approval of a 12-lot subdivision. As explained above, intervenor originally applied for approval of a 12-lot subdivision, and the planning commission approved a 12-lot subdivision. After petitioners appealed the planning commission's decision, intervenor subsequently reduced the number of proposed subdivision lots to 10 lots. Record 104.

### A. Fourth Subassignment of Error

In their fourth subassignment of error, petitioners argue that the decision is not supported by substantial evidence because the record does not include a plat depicting the 10-lot subdivision. Intervenor first responds by explaining that a map located at Record 215 identifies the location of the new lot lines, and the submission of a revised plat was referenced in other documents submitted into the record. Record 99-104. Intervenor also notes, correctly, that at least one petitioner commented on the map located at Record 215. Record 28 (letter from petitioner Welch referring to a map entitled "Figure 3, Proposed Developed Conditions"). Therefore, intervenor argues, petitioners were provided an opportunity to comment on the revised plat.

Record 215 is a map entitled "Proposed Developed Conditions" and appears to be a map showing the location of drainage systems for the subdivision. The new property lines and lot numbers are visible on that drainage map.[2] However, Yamhill County Land Development Ordinance (LDO) 5.010 specifies the requirements for a preliminary plat, and includes, in particular, a requirement that the plat show "[a]ppropriate identification of the

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In the petition for review, petitioners generally assert that the amendments to ORS 197.352(2005) render the present appeal moot. However, petitioners do not develop an argument regarding that issue that is sufficient for us to review, and we therefore do not consider the issue.

[2] Record 419 is the original "tentative subdivision map" submitted by intervenor showing the 12-lot proposal.

drawing as a preliminary plat" as well as a requirement that "[t]he location of all existing and proposed structures on the area to be subdivided that are to be created or remain in place." LDO 5.010(E) and (M). The drainage map located at Record 215 is not identified as a preliminary plat, and does not show the location of existing and proposed structures. Therefore, to the extent intervenor argues that the map at Record 215 is a revised preliminary plat, we disagree with intervenor. In addition, the fact that one of the petitioners commented on the map at Record 215 does not indicate that, absent its identification as a revised preliminary plat, that petitioner was aware that a revised plat had been submitted.

This subassignment of error is sustained.

**B. First Subassignment of Error**

In their first subassignment of error, petitioners argue that the change from a proposed 12-lot subdivision to a proposed 10-lot subdivision required the submittal of a new application. Petitioners argue that the new proposed configuration "* * * required a completely new and different analysis of the applicable criteria." Petition for Review 9. For example, petitioners argue, the change to a 10-lot subdivision appeared to change the proposal from a community water system to individual wells. However, petitioners do not specify how the criteria should have been analyzed differently after the proposal was changed to a 10-lot subdivision. The mere fact that a plat or an application is modified does not automatically require a new application to be filed. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466, 486 (2005); *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601, 606-607 (1993) (a new application is not required if the original proposal remains "fundamentally intact"). Petitioners have not explained how the change to a 10-lot subdivision caused the application to fail to remain "fundamentally intact." As such, petitioners have not provided a basis for reversal or remand of the decision.

This subassignment of error is denied.

**C. Second Subassignment of Error**

In their second subassignment of error, petitioners argue that the county erred in failing to provide notice of the revised proposal for a 10-lot subdivision and in failing to give petitioners an opportunity to comment on the revised plat. In support of their subassignment of error, petitioners cite ORS 197.830(5).[3] That statute provides for additional appeal rights to parties where a local government makes a decision that is different from the proposal described in the notice. That statute does not require notice of a change to an application. As such, petitioners' subassignment of error provides no basis for reversal or remand.

This subassignment of error is denied.

**D. Third Subassignment of Error**

In their third subassignment of error, petitioners argue that the county committed a procedural error in approving the 10-lot subdivision without prior action by the planning commission. According to petitioners, LDO 16.000 limits the authority of board of commissioners to reviewing the planning commission's (or hearings officer's) decision and, consequently, the board of commissioners did not have the authority to approve intervenor's modified request for a 10-lot subdivision. In support of their argument, petitioners cite LDO 16.000(5) and (6).[4] The provisions cited by petitioners allow the board of

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[3] ORS 197.830(5) provides:

> "If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

[4] LDO 16.000 provides the framework for appeals of planning director, hearings officer, or planning commission decisions, and provides in relevant part:

commissioners to choose to hear an application "*de novo*," and to allow the admission of additional testimony without holding a *de novo* hearing. Significantly, LDO 16.000(7) gives the board of commissioners the authority to "* * * *modify*, reverse, or affirm" all or part of the decision below. We disagree with petitioners that LDO 16.000 prohibits the board of commissioners from approving intervenor's modified application, simply because that application was different from the one approved by the planning commission. LDO 16.000(7) gives the board authority to approve a modified application.

This subassignment of error is denied.

The first assignment of error is sustained, in part.

**SECOND ASSIGNMENT OF ERROR**

In their second assignment of error, petitioners argue that because the county's Measure 37 order is not included in the record, the county failed to make a decision based on

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"5. The Board upon its own motion or upon the motion by a party may elect to hear the application *de novo* or allow testimony and other evidence in addition to that already on the record.

"6. The Board may admit additional testimony and other evidence without holding a *de novo* hearing if it is satisfied that the testimony or other evidence could not have been presented upon initial hearing and action. In deciding such admission, the Board shall make findings addressing the following:

"A. Prejudice to parties;

"B. Convenience of locating the evidence at the time of initial hearing;

"C. Surprise to opposing parties;

"D. Time when notice was given to other parties of a party's intent to give additional testimony or introduce additional evidence.

"E. The competency, relevancy and materiality of the proposed testimony or other evidence.

"7. In hearing and deciding an appeal, the Board may modify, reverse or affirm all or part of the order, requirements, decision, or determination of the reviewing body, or may remand the matter back to the reviewing body for additional information. In all cases the Board shall make findings based on the record before it and any testimony or other evidence received by it as justification for its action."

the applicable criteria and that the decision is not supported by substantial evidence. Intervenor responds by requesting that LUBA take official notice of the County Order, and attaches a copy of the order to his brief. The County Order determines which county laws do or do not apply to the disputed subdivision and, in our view, therefore constitutes applicable law subject to official notice. We agree with intervenor that we may take official notice of the County Order under ORS 40.090(7), and we do so.[5]

Further, even if the record does not include the County Order, the decision and a staff report presented to the board of commissioners summarize the portion of the County Order that describes what the County Order approved.[6] Petitioners do not identify any applicable criteria set forth in the County Order that the county failed to consider. The county identified the relevant approval criteria for the application and addressed those criteria in its decision. Record 7-10. Petitioners have not explained why the absence of the County Order in the record constitutes error.

The second assignment of error is denied.

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[5] ORS 40.090 (Oregon Evidence Code 202) provides in relevant part:

> "Law judicially noticed is defined as:
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> " * * * * *
>
> "(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom.* * *"

[6] The county's decision explains:

> "[Intervenor] * * * filed an application under Measure 37 (2004) to remove, modify, or not apply the land use regulations in effect when [intervenor] first acquired the property. In [the] claim he requested:
>
> > "All uses allowed owner as time of owner's acquisition of property. Specifically, but not limited to, the ability to create buildable parcels averaging two and one-half acres in size, more or less, as owner sees fit…
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> "Their claim was approved as detailed in Board Order 06-153. The Board Order allowed land division and dwelling approvals under the land use regulations in effect on February 20, 1965." Record 5.

**THIRD ASSIGNMENT OF ERROR**

In their third assignment of error, petitioners argue that the county erred in approving the application because the recipients of the DLCD Order waiving land use regulations are John and Elizabeth Kroo, individually, but the named applicant for subdivision approval is the "Kroo Family Living Trust."[7] According to petitioners, "the applicant for a post-Measure 37 land use application must be the person or persons who have a valid Measure 37 waiver." Petition for Review 16.

LDO 4.010 requires the "owner," as defined in LDO 3.010, to apply for subdivision approval on the form prescribed by the county.[8] The county's application form contains a section for information on the "applicant" as well as a section for information on the "legal owner (if different) [from the applicant]." Record 425. Thus it appears that the county allows parties to act as agents for an owner, and submit an application on the owner's behalf. We understand petitioners to argue that because the application submitted by intervenor identifies the "Kroo Family Living Trust" as the "applicant," the county could not approve the subdivision application based on the Measure 37 waiver that was issued to John Kroo, as set forth in the DLCD Order.

We think it is clear from the record that John Kroo, a holder of a valid Measure 37 claim under the DLCD Order, is the person who sought approval for the subdivision. John Kroo appeared throughout during the proceedings below. There is nothing in the LDO or

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[7] As explained in the DLCD Order, John and Elizabeth Kroo submitted a claim for compensation under ORS 197.352(1). The DLCD Order acknowledges that the Kroos transferred the subject property to their revocable living trust in 2003, and concludes that their transfer to a revocable trust was not a change in ownership for purposes of Measure 37. Record 44.

[8] LDO 3.010(38) defines "owner" as:

> "All persons having right, title or interest in a parcel. For the purpose of this ordinance, owner shall also refer to the owner's authorized agent except when the owner's signature is required."

any other law cited by petitioners that prohibits a properly authorized agent for John Kroo, in this case the "Kroo Family Living Trust," from submitting the application on behalf of John Kroo.

Petitioners also argue that the county erred in determining that John and Elizabeth Kroo are the trustees of the Kroo Family Living Trust because the trust document is not in the record. Because we have determined that nothing prohibited the Kroo Family Living Trust from acting as the agent for John and Elizabeth Kroo, the holders of the valid Measure 37 claim, we need not determine whether the record supports the county's conclusion that John Kroo and Elizabeth Kroo are the trustees of the Kroo Family Living Trust.

The DLCD Order determines that the Kroos are the owners of the subject property for purposes of ORS 197.352, and that the 2003 transfer of legal title to the property to a revocable trust was not a change in ownership for purposes of that statute. Petitioners argue that DLCD erred in determining that the Kroos are the current owners of the property, for purposes of ORS 197.352. Under ORS 197.352(9), we do not have jurisdiction to review petitioners' challenge to the DLCD Order. *See* n 12, *infra*. *Friends of Linn County v. Linn County*, 54 Or LUBA 191, 203 (2007).

The third assignment of error is denied.

**FOURTH ASSIGNMENT OF ERROR**

Petitioners withdrew their fourth assignment of error at oral argument.

**FIFTH AND SIXTH ASSIGNMENTS OF ERROR**

**A. The County Order**

The County Order that determined to "not * * * apply" land use regulations under ORS 197.352(8) provided in relevant part:

> "In lieu of payment of just compensation, the Yamhill County land use regulations identified in Exhibit 'A' are modified, removed, or not applied against the subject property with the following effect: * * *" Response Brief App. 12.

Exhibit A attached to the County Order is a staff report prepared by the planning director in connection with intervenor's Measure 37 claim. Exhibit A contains the following recommendation:

> "* * * the Planning Director recommends that the Board of Commissioners modify remove or not apply land use regulations listed in Section (B)(1) [of the staff report] against the subject property when the current owner seeks development permits on the subject property." Response Brief App. 18.

Section (B)(1) lists the following land use regulations:

> "a. Ordinance 29, Yamhill County Zoning Ordinance, adopted August 30, 1968.
>
> "b. Ordinance 62, Yamhill County Comprehensive Plan, adopted 1974.
>
> "c. Ordinance 83, adopted February 11, 1976.
>
> "d. Ordinance 205, as amended, adopted June, 1979.
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> "e. Ordinance 310, as amended, adopted December 1, 1982."[9] Response Brief App. 16.

The staff report also contains the following statement:

> "The challenged land use regulations do not constitute an 'exempt land use regulation' as defined in Section 1(3) of Ordinance 749."[10] Response Brief App. 16.

The County Order was not challenged in circuit court.

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[9] The county's first subdivision ordinance, the predecessor of the current LDO, was adopted by Ordinance 205.

[10] Ordinance 749 is the county's "Measure 37" Ordinance. Section 1(3) defines "exempt land use regulation" in relevant part as:

> "(3) Exempt Land Use Regulation. A land use regulation that:
>
> "* * * * *
>
> "(b) Restricts or prohibits activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations[.]"

Notwithstanding the County Order, however, in its decision approving the subdivision, the county found that various parts of its land use regulations are "health and safety regulations" that applied to intervenor's proposed subdivision. The county found:

> "The applicant has applied using the present subdivision standards. The planning staff noted that many of the standards would not be applied when the owner first acquired the property. Notably, the measure does not allow the local jurisdiction to remove, modify, or not apply regulations related to public health and safety, Section 1.3(b) of Ordinance 749 defines exempt land use regulation as a regulation that:
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> > "(b) Restricts or prohibits activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations."
>
> "Therefore, health and safety regulations, like the requirement to have the soil evaluated for the safe installation of a sewage disposal system, will need to be complied with in evaluating this land division. Standards unrelated to health and safety issues will not be required.* * *" Record 6.

In making such a finding, the county appears to have determined that the County Order deferred determination of whether particular parts of the county land use regulations that were waived by the County Order are exempt "health and safety regulations," that is, regulations that continued to apply to the property and to the decision on the subdivision application. The above findings seem to us to be inconsistent with the County Order which appears to both waive the county's subdivision and zoning regulations in their entirety and find that they are not "exempt land use regulations" under Ordinance 749. The above findings then proceed to say the county will nevertheless apply LDO standards that presumably were waived by the County Order. The only legal theory the county suggests for proceeding in that manner is that the applicant is seeking approval under present subdivision standards.

During the proceedings below, and in the response brief, intervenor agreed that exempt health and safety regulations continued to apply to intervenor's proposed subdivision of the property. Record 101, 309, 339; Response Brief 24-25. Intervenor does not challenge

or otherwise assign error to the county's finding that, notwithstanding the terms of the County Order, certain LDO and Yamhill County Zoning Ordinance (YCZO) sections were not waived by the County Order. Because no party assigns error to that finding, we do not consider that finding further. Therefore, for purposes of this appeal, no issue is presented regarding whether the county erred by determining that it would in the subdivision approval proceeding determine whether particular disputed sections of the LDO and the YCZO must be applied because they are "health and safety" land use regulations under ORS 197.352(3)(2005).

**B. Fifth Assignment of Error**

In their fifth assignment of error, petitioners argue that the county's findings regarding LDO 6.020 are inadequate and are not supported by substantial evidence. LDO 6.020 requires in relevant part that "each anticipated homesite shall be capable of being provided access that meets minimum requirements for access by fire protection equipment."[11] Although petitioners apparently raised an issue below regarding the subdivision's compliance with LDO 6.020, the decision does not mention or address LDO 6.020.

Intervenor responds that the county's silence regarding LDO 6.020 is a decision by the county under ORS 197.352(8)(2005) to "not * * * apply" LDO 6.020, and that under ORS 197.352(9)(2005), this part of the county's decision is not a land use decision subject to LUBA's jurisdiction.[12] Thus, intervenor argues, LUBA does not have jurisdiction to decide

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[11] LDO 6.020 provides in relevant part:

> "1. There shall be direct legal access to and abutting on every lot or parcel. In addition, each anticipated homesite shall be capable of being provided access that meets minimum requirements for access by fire protection equipment."

[12] ORS 197.352 (2005) provides in relevant part:

> "(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the

petitioners' challenge. Rather, intervenor argues, a challenge to the county's decision to "not * * * apply" LDO 6.020 must be brought in circuit court through a writ of review.

We disagree with intervenor that the county's failure to address LDO 6.020 amounted to a decision to "not * * * apply" that regulation under ORS 197.352(8). We also reject intervenor's argument that we do not have jurisdiction to review that part of the decision that is before us in this appeal. The decision that is before us on appeal specifically identifies certain regulations as exempt "health and safety regulations" that applied to the proposed subdivision. The decision also discusses other land use regulations, and finds that the proposal meets those other provisions of the LDO. If the county has determined that it may not apply LDO 6.020 to the subdivision because it was waived by the County Order and because it is not an exempt health and safety regulation, that determination must be explained in the decision. We will not construe the county's silence on the applicability of the regulation in the manner proposed by intervenor.

The fifth assignment of error is sustained. On remand, the county must determine whether LDO 6.020 applies to the subdivision and if it applies, it must determine whether the subdivision meets the criterion.

**C. Sixth Assignment of Error**

In their sixth assignment of error, petitioners argue that the county misconstrued LDO 6.090, and that its findings addressing that provision are inadequate and are not supported by substantial evidence. In their first subassignment of error, petitioners argue that the county

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governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

"(9) A decision by a governing body under this section shall not be considered a land use decision as defined in ORS 197.015 (10)."

has improperly failed to make a determination that the subdivision has an adequate quantity and quality of water as required by LDO 6.090.[13]

Intervenor responds by arguing that the county did not find that LDO 6.090 was an exempt health and safety regulation that applied to the subject property. Therefore, we understand intervenor to argue, the county's finding that the subdivision meets the criterion was not necessary for the decision, and any error the county made in applying LDO 6.090 is not a basis for reversal or remand of the decision.

As with the fifth assignment of error above, it is unclear from the decision whether the county determined that LDO 6.090 applies to the proposed subdivision because it is an exempt health and safety regulation. The relevant finding does not contain similar language

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[13]LDO 6.090 is entitled "Water Supply" and provides:

> "All lots within a partition or subdivision shall have an adequate quantity and quality of water to support the proposed use of the land. No final plat of a subdivision or partition shall be approved unless the Director and engineer have received and accepted:
>
> "1. A certification by a municipal, public utility or community water supply system, subject to the regulation by the Public Utility Commission of Oregon, that water will be provided to the parcel line of each and every parcel depicted in the final plat; or
>
> "2. A bond, contract or other assurance by the subdivider or partitioner to the county that a domestic water supply system will be installed on behalf of the subdivider or partitioner to the parcel line of each and every parcel depicted on the final plat. * * *; or
>
> "3. A water well report filed with the State of Oregon Water Resources Department for each well provided within a subdivision or partition. The location of such wells and an appropriate disclosure shall be placed on the face of the final plat. If the subdivider or partitioner intends that domestic water will be provided to the proposed lot or lots by well(s) and no test wells have been drilled, the Director may require that test wells be drilled prior to final approval. The number and location of such wells shall be determined by the director and watermaster having jurisdiction; or
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> "4. In lieu of Subsections (1), (2), and (3) of this Section, when a municipal, public utility, community water supply or private well system is not available, then a statement must be placed on the final plat or map which states:
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> "'No municipal, public utility, community water supply or private well system will be provided to the purchaser of those lots noted hereon.'"

to other findings that unquestionably conclude that a regulation is a health and safety regulation.[14] The findings do note that "* * * due to the applicant's Measure 37 approval, no local land use approval is required to establish the community water system." Record 9. Intervenor may be correct that the county did not think that LDO 6.090 is an exempt health and safety regulation, but we will not surmise that from the absence of language indicating that is what the county determined. On remand, the county must determine whether LDO 6.090 is an exempt health and safety regulation that applies to the proposed subdivision, and if so, it must determine whether the criterion is met.

In their second subassignment of error, petitioners argue that the county erred in failing to determine whether the proposed subdivision would have off-site water supply impacts. Petitioners acknowledge that in our decision in *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003), we concluded that LDO 6.090 does not require analysis of the subdivision's off-site water supply impacts. However, petitioners argue that such a determination is required by Goal 1, Policies C and D of the Yamhill County Comprehensive Plan (YCCP), as well as Section II.C (Water Resources) of the YCCP.[15]

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[14] For example, the county's findings regarding LDO Section 6.010(1) state: "[t]he Planning Department believes the installation and completion of a safe road system is a matter of public safety." Record 7. The findings regarding YCZO 403.10 state: "* * * Section 403.10 of the [YCZO] lists fire siting and construction standards for dwellings in the AF-20 zone. Since these are safety standards they have not been removed, modified, or not applied. * * *" Record 8. Finally, the county's findings regarding LDO 6.100 state: "The provision of adequate sewage disposal is a health and safety issue that is exempt from Measure 37 so it will be required on any approval." Record 9.

[15] Section I.B, Goal 1, Policies C and D of the YCCP require in relevant part a demonstration that:

> "C. All proposed rural area development and facilities:
>
> > "1. Shall be appropriately, if not uniquely, suited to the area or site proposed for development."
> >
> > "* * * * *
>
> "D. No proposed rural area development shall require or substantially influence the extension of costly services and facilities normally associated with urban centers, such as municipal water supply * * *."

Intervenor responds that the county waived the application of the YCCP in the County Order, and argues that the provisions cited by petitioners are not applicable to the proposed subdivision because they are not exempt health and safety regulations. However, as explained above, because we understand the county to have deferred determination as to which health and safety regulations would continue to apply to the proposed subdivision during the subdivision approval process, we cannot assume from the county's silence that it determined that the approval criteria set forth in the YCCP cited by petitioners were not applicable to the subdivision because they were not health and safety regulations. On remand, the county must determine whether the provisions of the YCCP cited by petitioners are health and safety regulations that were not waived by the County Order, and if so, whether the subdivision complies with those provisions.

The sixth assignment of error is sustained.

**SEVENTH ASSIGNMENT OF ERROR**

In their seventh assignment of error, petitioners argue that the county erred in failing to determine whether the subdivision complies with ORS 215.730(1)(b)(C), under which local governments must require evidence that the water supply for a dwelling that is to be sited on forest land is from a source authorized by the Oregon Water Resources Department and is not from a Class II stream.

Intervenor responds that petitioners failed to raise this issue prior to the close of the record, and under ORS 197.763(1), petitioners cannot raise the issue for the first time in their

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Section II.C of the YCCP contains a goal statement regarding water resources and provides in relevant part that one of the goals is:

> "1. To conserve and to manage efficiently our water resources in order to sustain and enhance the quantity and quality of flows for all consumptive and non-consumptive uses and to abate flood, erosion and sedimentation problems."

appeal to LUBA. Petitioners have not responded to intervenor's assertion. We agree with intervenor that the issue is waived.[16]

The seventh assignment of error is denied.

**EIGHTH ASSIGNMENT OF ERROR**

In their eighth assignment of error, petitioners argue that the county's findings regarding LDO 6.100 are inadequate and are not supported by substantial evidence in the record. As noted above, the county determined that LDO 6.100 was an exempt health and safety regulation that applied to the subdivision. LDO 6.100 provides in relevant part:

> "All lots within a partition or subdivision to be used for residential purposes shall have either an approved subsurface septic site evaluation or be connected to a sewer treatment facility approved by the State Department of Environment Quality. * * *"

The county found:

> "No public or city sewer services are available, so each lot will be required to be served by an individual on-site subsurface sewage disposal system. In August 2006 the applicant applied for septic site evaluations for each newly created parcel. In September 2006, the County Sanitarian completed review of the septic site evaluations for each proposed vacant parcel. Each proposed lot has approval for either a standard or alternative sewage system." Record 9-10.

Petitioners argue that the septic evaluations that were the basis for the county's conclusion that each proposed lot has approval for a septic system were based on intervenor's 12-lot proposal, rather than his 10-lot proposal, and for that reason, the findings are not supported by substantial evidence. Intervenor responds that the record contains a letter dated March 22, 2007 from intervenor that explains that the 12 lots were all approved for a septic system, and that because intervenor reduced the proposal to 10 lots, there are two septic approvals for lots 1 and 2.

[16] Because we find the issue was waived, we need not address intervenor's other responses to the seventh assignment of error.

The original septic evaluations for the 12-lot proposal are found at Record 124-50. Those approvals specify where the septic systems and drainfields are to be located on the lots. When intervenor reconfigured the lots, however, it is possible that at least some of those approved locations may have changed due to a change in lot lines or dwelling locations. Those September, 2006 septic approvals do not specify where on each of the 10 reconfigured lots the septic is to be located. To the extent that intervenor argues that a map found at Record 111 shows the location of each septic system on the 10-lot plot plan, we disagree with intervenor.[17]

We agree with petitioners that the evidence in the record regarding the septic approvals relates only to intervenor's 12-lot subdivision proposal, and that it was error for the county to rely on the September 2006 site evaluations and sanitarian review for the 12-lot proposal to conclude that each of the proposed 10 lots has approval for a septic system. Other than intervenor's assertion that lots 1 and 2 each have two septic approvals, there is no evidence in the record evaluating the availability or location of septic systems for the 10-lot proposal.

The eighth assignment of error is sustained.

**NINTH ASSIGNMENT OF ERROR**

In their ninth assignment of error, petitioners argue that the county erred in determining that YCZO 403.10(B) was satisfied. YCZO 403.10(B) provides in relevant part that a dwelling shall not be sited on a slope of greater than 40 percent. The county found:

> "The soils map shows that the north portion of the property, containing proposed lots 1-3 have slopes of 30-60 percent. Some of these proposed lots may not be able to have [dwellings placed] on them due to steep slopes. *Applicant has submitted a contour map with contour intervals at 5-feet that demonstrate that there are building sites that comply with this section on each of the proposed lots*." Record 8 (Emphasis added).

[17] Record 215 appears to be a larger copy of the same map that appears at Record 111, and it does not show the location of septic systems on any of the 10 lots.

In addition to finding that each lot contains a building site that satisfies YCZO 403.10(B), the county imposed a condition of approval that prohibits the issuance of a building permit on lots 1, 2 and 3 until an engineer certifies that the soils on each of those lots are stable enough to support a dwelling, septic system, and water supply.

We understand the county to have found that although there was some initial question as to whether dwellings could be sited on the lots that had some slopes greater than 40 percent, the applicant submitted enough information to show that each of the lots contain some portion that has slopes that are less than 40 percent. The condition of approval appears to separately require that the dwellings be located on stable soils. We see no error in the county's finding that YCZO 403.10(B) was satisfied and imposing a condition of approval that requires an additional certification by an engineer that the slopes on the lot are stable enough to support the dwelling.

The ninth assignment of error is denied.

The county's decision is remanded.