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

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JOHN B. PEYTON and)
ELEANOR PEYTON,)
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Petitioners,)
)
vs.)
)
WASHINGTON COUNTY,)
)
Respondent,)
)
and)
)
JOSEPH VAN HAVERBEKE,)
)
Intervenor-Respondent.)

LUBA No. 88-048
FINAL OPINION
AND ORDER

Appeal from Washington County.

Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Respondent Washington County.

Kenneth M. Elliott and Michael C. Robinson, Portland, filed a response brief and Kenneth M. Elliott argued on behalf of intervenor-respondent. With them on the brief was O'Donnell, Ramis, Elliott & Crew.

BAGG, Chief Referee; HOLSTUN, Referee; SHERTON, Referee, participated in the decision.

REMANDED 11/02/88

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 This is an appeal of an order granting approval of a mobile
4 home park.¹

5 INTERVENTION

6 Joseph Van Haverbeke moves to intervene in this review
7 proceeding. There is no objection to the motion, and the
8 intervention is allowed. We will refer to the
9 intervenor-respondent as respondent.

10 FACTS

11 The proposed 122 unit mobile home park site is a 20.9 acre
12 parcel at the intersection of S.W. Rigert Road and S.W. 170th
13 Avenue. These roadways are designated as urban major
14 collectors on the Aloha-Reedville-Cooper Mountain Community
15 Plan (ARCM plan) map, but are only 22 feet in width and have no
16 curbs or sidewalks. The property is zoned R-9 (Residential 9
17 Units Per Acre). The R-9 district allows mobile home parks as
18 a permitted use.

19 ASSIGNMENT OF ERROR

20 "The county misconstrued the applicable law and made
21 findings not supported by substantial evidence when it
22 found that the applicant has met his burden of proof
to show that the approval criteria for the proposed
mobile home park are satisfied."

23 A. Compliance with Comprehensive Plan

24 Petitioners argue that Washington County Community
25 Development Code (CDC) Section 104-1 requires all development
26 in the county must comply with the comprehensive plan.

1 Petitioners argue the ARCM plan is violated by this proposal.
2 The transportation element of that community plan provides in
3 part as follows:

4 "4. Redesign and improve the 170th-Rigert and
5 Rigert-Reusser intersections to increase traffic
6 safety and allow a smooth flow of traffic."

7 Petitioners argue that the intersections mentioned are on the
8 north slope of Cooper Mountain and are often icy in the
9 winter. There are frequent accidents. The improvements called
10 for in the plan "will require substantial right-of-way from the
11 applicants' property" to replace a right angle turn with a
12 larger radius turn, according to petitioners. Petitioners
13 advise

14 "** * * Because it is on the Cooper Mountain slope, a
15 similar improvement of the Rigert and Reusser
16 intersection will require realignment of the Rigert
17 right-of-way downslope to the north into the
18 applicants' property. All of the alternative designs
19 to comply with Plan required improvements will be
20 rendered impossible or more difficult by the proposed
21 development." Petition for Review 8-9.

22 Petitioners claim the county and the applicant will be
23 unable to comply with the community plan requirement for road
24 realignment "without considering the relationship of the
25 proposed development to the requirement and at least explaining
26 why the two are not inconsistent." Petition for Review 9. We
understand petitioners to argue that the plan for development
of the property and the changes to the roadways mandated by the
ARCM plan are not consistent.

Respondent advises there will be improvements as required

1 by the ARCM plan, but the improvements will simply not be in
2 the design contemplated by the petitioners. Respondent says
3 the county imposed conditions of approval which will ensure
4 safety in the area. In addition, the county elected to route
5 S.W. 170th Avenue to the south and east and connect it to
6 Murray Road via Satterberg Road. These changes, while not
7 those contemplated by petitioners, are sufficient to constitute
8 the improvements called for in the transportation element of
9 the ARCM plan, according to respondent.

10 The county's order includes a number of conditions
11 concerning the roadways. These conditions include (1) required
12 dedication of additional right-of-way along S.W. 170th Avenue
13 and S.W. Rigert Road; (2) a waiver of remonstrance against
14 formation of a local improvement district to improve S.W. 170th
15 Avenue and S.W. Rigert Road; (3) an acceleration/deceleration
16 lane on S.W. 170th Avenue; (4) a required site distance
17 easement; (5) clearing, grading and illumination along S.W.
18 Rigert Road and S.W. 170th Avenue; (6) and a required private
19 roadway maintenance agreement for all interior roadways within
20 the mobile home park. Record 91-95.

21 The petitioners do not explain why these conditions, along
22 with improvements to and realignment of S.W. 170th Avenue, are
23 not sufficient to satisfy the comprehensive plan requirement
24 for the redesign and improvement of the intersections. Without
25 an explanation of why the realignment and required improvements
26 are not sufficient to satisfy the plan, we decline to find

1 fault as charged by the petitioners.²

2 This subassignment of error is denied.

3 B. Flood Plain and Drainage Hazard Area Development

4 Petitioners advise that the southern boundary of the
5 property includes a drainage hazard area. A condition of
6 approval provides that if a sidewalk cannot be constructed on
7 the Rigert Road frontage (because of physical limitations),
8 then the sidewalk, along with the creek crossing, will be
9 constructed in the drainage hazard area. The condition
10 requires that the sidewalk and bridge must be constructed
11 pursuant to a sidewalk permit under CDC 502-5. Record 91.

12 The applicant, according to petitioners, attempts to bring
13 these improvements under an exception to development permit
14 requirements in CDC 421-3.3.D. This provision excuses from the
15 requirement of a development permit any improvement within a
16 floodplain ordinance hazard area which is not a

17 "structure."³ A structure is defined in the ordinance as

18 "[a]nything which is built, erected or constructed and
19 located on or under the ground, or attached to
20 something fixed to the ground. Structures include but
are not limited to buildings, towers, walls, fences,
billboards and utilities." CDC 106-101.

21 Petitioners reject the notion that the sidewalk and footbridge
22 are not structures as defined in CDC 106-101 and, therefore,
23 are not exempt from development permit requirements under CDC
24 421-3.3.D.

25 Petitioners explain that if the sidewalk and bridge are to
26 be in the drainage hazard area and are not exempted from the

1 development permit requirement, then CDC 421-3.1 will be
2 violated. CDC 421-3.1 requires that development in the
3 drainage hazard area be only as specified in the ARCM plan.
4 Petitioners then quote from the community plan as follows:

5 "1. In the design of new development, * * * drainage
6 hazard areas * * * shall be:

7 * * * * *

8 "b. preserved and protected to enhance the
9 economic, social, wildlife, open space,
scenic, recreation qualities of the
community * * *." ARCM plan 7.

10 Petitioners claim there is no finding or evidence that
11 development of the proposed improvements will comply with this
12 plan requirement.

13 Respondent answers that the issue is whether placement of
14 the sidewalk and footbridge in a drainage hazard area is a
15 development requiring a development permit. Respondent agrees
16 that the county order presumes development in the drainage
17 hazard area will be limited to improvements which do not
18 require a development permit. Record 77.⁴

19 Respondent points out that the sidewalk might be located
20 outside the drainage hazard area and petitioners' argument is
21 therefore speculative. However, respondent goes on to explain
22 that even if the improvements must be constructed within the
23 hazard area, the improvements meet county requirements.

24 Respondent explains that CDC 421-3.3.A-F exempts certain
25 uses from development permit requirements. Characteristics of
26 exempt uses are that they pose a minimal flood hazard and

1 preserve the natural character of the area. CDC 421-3.3.D
2 specifically exempts uses accessory to residential uses,
3 including lawns, gardens and play areas. Exemption is given
4 also for recreational and accessory recreational uses such as
5 parks or game fields. CDC 421-3.3.(D), (E). The exempt
6 residential and recreational uses are allowed, however, only
7 "provided that no structure is permitted."

8 Respondent explains that the county was correct in finding
9 that a sidewalk and pedestrian footbridge are exempt accessory
10 residential uses or accessory recreational uses. Respondent
11 argues sidewalks and footbridges are found in residential areas
12 and in parks.

13 Respondent goes on to explain that the county also
14 correctly concluded that the sidewalk and footbridge are not
15 structures. Respondent claims this interpretation is
16 consistent with the rationale in the ordinance exempting from
17 development permit requirements those uses which do not detract
18 from the natural character of the area or present a flood
19 hazard. Respondent argues that the examples of uses qualifying
20 as structures included in CDC 106-101 (quoted supra) do not
21 include a mention of any use such as a sidewalk or footbridge.
22 According to respondent, this omission is further evidence that
23 sidewalks and footbridges are not structures under the code.

24 We do not agree with respondent's interpretation. While
25 there may be persuasive policy reasons for not identifying
26 sidewalks and footbridges as structures, the language of the

1 county code does not do so. The definition of structure within
2 the code is extremely broad. As defined in CDC 106-101,
3 "[a]nything * * * constructed and located on * * * the ground"
4 is a structure. The exemptions found in CDC 421-3.3.D for uses
5 accessory to a residential or recreational use apply only if no
6 structure is permitted. "Play areas," "gardens" and "lawns"
7 are different than sidewalks and bridges in that they need not
8 include structures.

9 We find, therefore, that the sidewalks and footbridges, if
10 ultimately located in the drainage hazard area, are subject to
11 the development permit requirement of CDC 421-3.1. Therefore,
12 the county was obliged to explain how it would comply with CDC
13 421-3.1 and the ARCM plan requirement governing development in
14 drainage hazard areas. There is no such explanation in the
15 county's order.

16 We sustain this subassignment of error.

17 C. Significant Natural Resource

18 Petitioners argue that the ARCM plan map identifies the
19 drainage hazard area on the southern portion of this property
20 as a "water use and wetland and fish and wildlife habitat."
21 Petition for Review 11. According to petitioners, this area is
22 therefore a significant natural resource, as is a small
23 additional portion of the southern corner of the property which
24 is recognized as a "wildlife habitat" in the ARCM plan.
25 Petitioners explain that CDC 422-3.1 requires that the
26 applicants' site analysis identify the location of natural

1 resources and describe their treatment and alteration, if any.
2 Petitioners also say that under CDC 122.3.1, the proposed
3 improvements must comply with design elements in the applicable
4 community plan. Petitioners complain the applicant has not
5 complied with these requirements.

6 Respondent advises the applicant submitted a site plan
7 delineating the drainage area. Further, the approved plan
8 shows the drainage area left undisturbed in its natural state
9 except for the sidewalk and pedestrian footbridge. Respondent
10 also advises the ARCM plan does not include design elements
11 applicable to this drainage area.

12 The county's order identifies the location of the sidewalk
13 and pedestrian footbridge. There is sufficient information in
14 the county's order from which we can discern the location of
15 the drainage area. The county's order concluded as follows:

16 " * * * this development conforms with the intent and
17 purpose of CDC Section 421-1 in that no development
18 requiring a permit will occur within the drainage
19 hazard area, as delineated by the plans submitted by
20 applicant's registered engineer in conformance with
21 CDC Section 421-2.2.B." Record 77.

22 The conditions of approval discuss the location of the
23 sidewalk and footbridge. The county order at Record 43-44
24 discusses existing vegetation within the drainage hazard area
25 and provides that there will be slight disturbance of the
26 underbrush in the event the sidewalk is built. There is
additional discussion about vegetation at Record 48 and
discussion of the drainage hazard area generally along with

1 discussion of the construction to occur within it at
2 Record 76-78. The order notes a map of the drainage hazard
3 area was submitted, and that a plan was submitted by the
4 applicants' engineer.

5 Petitioners do not explain why this information is not
6 sufficient to comply with CDC 422-3.1. We are mindful that the
7 county's order does not mention CDC 422-3.1, but the
8 information required by this section appears to be contained in
9 other portions of the county's order.⁵ Without more specific
10 argument as to why petitioners believe the findings are not
11 adequate, we will not sustain petitioners' subassignment of
12 error.

13 We add that petitioners do not cite any specific design
14 element in the applicable community plan. That is, petitioners
15 do not explain to us what portion of the ARCM plan, if any,
16 constitutes a design element applicable to the subject area.
17 Without such identification, we decline to find the county
18 failed to address adequately the community plan.

19 We deny this subassignment of error.

20 D. Public Facility and Service Requirements

21 CDC 501-4.1 divides public facilities and services into
22 three categories: critical services, essential services and
23 desirable services. The code provides:

24 "Implementation strategies of the comprehensive plan
25 have placed Public Facilities and Services into three
(3) categories for development:

26 "A. Critical Services -- public water, public

1 sewer, fire protection, drainage and access
(local and minor collector roads);

2 "B. Essential Services -- schools, arterial
3 (including state highways) and major
4 collector road (including transit streets),
on-site transit improvements, police
protection and pedestrian walkways; and

5 "C. Desirable Services -- public transportation
6 service, parks and pedestrian and bicycle
paths."

7 Petitioners argue that adequate transit service (bus routes) is
8 an essential service under the code, and the development must
9 be denied if it does not ensure essential services within the
10 time frame required by the CDC. Petitioners argue the county
11 should have denied the development permit for this mobile home
12 park because evidence from Tri-Met shows that bus service is
13 not adequate. Petitioners reach this conclusion by reference
14 to CDC 501-5.2.A, Essential Services, which provides that:

15 "An applicant shall provide documentation from the
16 * * * transit agency that adequate levels of service
17 are available or will be available to the proposed
development within five (5) years of development
approval."

18 On the other hand, CDC 501-5.4, Desirable Services,
19 provides that:

20 "An applicant shall provide documentation from the
21 appropriate Transit * * * District identifying
22 existing or proposed transit * * * facilities within
one (1) mile of the proposed development."

23 CDC 501-5.4 further provides with regard to desirable services
24 that:

25 "Applications may be conditioned to provide on and
26 off-site transit * * * improvements * * *."

1 Petitioners recognize public transportation service is
2 listed as a desirable service under CDC 501-4.1.C. However,
3 petitioners argue that because CDC 501-5.2.A (controlling
4 essential services) requires an applicant to show that adequate
5 levels of transit service are available or will be available
6 within five years, transit service is actually an essential
7 service. Adequate public transportation service must,
8 therefore, be available now or within five years of development
9 approval, according to petitioners.

10 Petitioners further argue this standard is not satisfied
11 because Tri-Met stated no bus service is within one-half mile
12 of the site. According to petitioners, Tri-Met has a minimum
13 level of service requiring there be no greater distance from
14 the proposed development to bus service than one-half mile.
15 Petitioners argue that the code provides four methods of
16 dealing with a proposed development not meeting the Tri-Met
17 standard: (1) the applicant may demonstrate the standard will
18 be met within five years of approval; (2) application of the
19 standard to a phased development may be deferred to a
20 subsequent phase; (3) the applicant may offer data to rebut the
21 applicability of the Tri-Met standard; or (4) the applicant can
22 seek an exception to the standard under CDC 501-5.3. We
23 understand petitioners to argue that the proposed development
24 (1) cannot meet the Tri-Met standard, (2) did not avoid
25 application of the standard by following one of the four paths
26 listed above, and (3) must therefore be denied.

1 Respondent argues that CDC 501-4.1.B very clearly provides
2 that only on-site transit improvements are essential services.
3 There is no mention in CDC 501-4.1.B of transit service as an
4 essential service. Thus, according to respondent, transit
5 streets are an essential service under CDC 501-4.1.B, but
6 transit streets are only roadways which can serve transit. We
7 understand the respondent to say that streets adequate to serve
8 public transportation must be provided as an essential service,
9 but the public transportation service itself is not an
10 essential service under CDC 501-4.1.B and 501-5.2.A. CDC
11 501-5.2.A requires an adequate level of service only for those
12 services classified by the code as essential services.
13 Respondent argues that because public transportation service is
14 not an essential service, the county correctly concluded it had
15 no basis under CDC 501-5.2.A upon which to deny approval of the
16 application.

17 Furthermore, respondent points out that nowhere in the
18 Washington County Code is the Tri-Met one-half mile standard
19 mentioned. Simply because Tri-Met has not extended bus service
20 to within one-half mile of the site is not determinative of
21 compliance with applicable CDC criteria, according to
22 respondent. Respondent explains that were the code to be read
23 as petitioners request, the county would be required to deny
24 any development approval if the site is not shown to be within
25 one-half mile of a Tri-Met line and Tri-Met does not intend to
26 extend transit service to such a proximity within five years.

1 Nothing in the code suggests such an interpretation is
2 intended, according to respondent.

3 We agree with respondent. The code provides transportation
4 services are desirable services, not essential services. We
5 are mindful CDC 501-5.2.A does require an applicant to show
6 documentation from a transit agency that adequate levels of
7 service are available or will be available, and CDC section
8 501-5.2 does indeed control "essential services." However, CDC
9 501-4.1.C clearly identifies public transportation service as
10 only a desirable service. CDC 501-4.1 is the definitional
11 standard classifying types of public facilities and services.
12 While certainly some ambiguity is created when reading these
13 two provisions together, we believe respondent's argument is
14 the more persuasive. The mere mention of a document from a
15 transit agency in CDC 501-5.2.A is not sufficient to overcome
16 the clear definition in Section 501-4.1.C of public
17 transportation service as a desirable service rather than an
18 essential one.

19 Lastly, we turn to petitioners' argument that the code
20 prohibits a development without a showing that Tri-Met transit
21 service either exists within one half mile of the site or will
22 be provided within a particular period of time. We find
23 nothing in the code adopts the Tri-Met one half mile standard
24 for transit service. We therefore decline to adopt
25 petitioners' argument.

26 We deny this subassignment of error.

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The decision is remanded.

FOOTNOTES

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The county's approval of the mobile home park is before us for the third time. The first appeal (Everts v. Washington County, LUBA No. 86-006) ended with a voluntary remand. The second appeal (Everts v. Washington County, LUBA No. 86-091) ended with a remand from this Board issued on April 8, 1987. The records in both of the prior cases are part of the record in this case. For clarity, the parties cite the record as follows: LUBA No. 86-006 is Record (1), LUBA No. 86-091 is Record (2) and the record compiled following our last remand, is Record (3). We only cite to Record (3) in this opinion. Although the Washington County Community Development Code (CDC) has been amended since the original application was submitted to the county, the substantive provisions of the CDC in effect when the original application was submitted, found in Ordinance No. 279, control the application.

2
We do not find it necessary to read the plan to require only the improvements listed. Providing the stated objective "to increase traffic safety and allow a smooth flow of traffic" is achieved, we find the plan satisfied.

3
CDC 421-3.3 D and E provide as follows:
"D. Accessory residential or institutional uses such as lawns, gardens and play areas, provided that no structure is permitted;
"E. Recreational and accessory recreational uses such as parks or game fields provided that no structure is permitted."

4
The county found that CDC 421-1 states it is the intent of that provision to permit limited and safe development in a flood plain or drainage hazard area. The county concluded that this development conformed to this requirement
"in that no development requiring a permit will occur within the drainage hazard area, as delineated by the plan submitted by the applicants' registered engineer in conformance with CDC Section 421-2.2(B)."
Record 77.

1 This finding seems to contradict the finding that the sidewalks
2 and bridge, if constructed in the drainage hazard area, must be
3 constructed pursuant to a sidewalk permit. See, Record 77.

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4 We add findings need not be in any specific form.
5 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 23,
6 569 P2d 1063 (1977).

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