

1                           BEFORE THE LAND USE BOARD OF APPEALS  
2                           OF THE STATE OF OREGON  
3

4 J.C. REEVES CORPORATION,           )  
5    )  
6                    Petitioner,            )  
7    )  
8            vs.                            )  
9    )  
10 CLACKAMAS COUNTY,                    )  
11    )  
12                    Respondent.            )

LUBA No. 94-027  
  
FINAL OPINION  
AND ORDER

13  
14  
15            Appeal from Clackamas County.

16  
17            William C. Cox, Portland, filed the petition for review  
18 and argued on behalf of petitioner.

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20            Michael E. Judd, Chief Assistant County Counsel, Oregon  
21 City, filed the response brief and argued on behalf of  
22 respondent.

23  
24            KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,  
25 Referee, participated in the decision.

26  
27                           AFFIRMED                           06/07/94

28  
29            You are entitled to judicial review of this Order.  
30 Judicial review is governed by the provisions of ORS  
31 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the county hearings  
4 officer imposing conditions of approval on its application  
5 for a 21 lot "flexible lot size" residential subdivision.

6 **FACTS**

7 The subject property is approximately 4.9 acres in size  
8 and is zoned Low Density Residential (R-8.5). The subject  
9 property is essentially undeveloped and is located within  
10 the Portland Metropolitan Area Urban Growth Boundary. The  
11 proposed subdivision is a permitted use in the R-8.5 zoning  
12 district. The subject property is located in an area  
13 developed with single family residences.

14 To the east of the subject property is S.E. 122nd  
15 Avenue, to the northwest is an existing residential  
16 subdivision. An undeveloped 3.97 acre parcel, Tax Lot 301,  
17 adjoins the southern border of the subject property. In  
18 addition, S.E. 119th Drive currently ends at the subject  
19 property's northern boundary. Access to the proposed lots  
20 will be provided by a new east-west street (Arthur's Court)  
21 along the southern border of the subject property, via S.E.  
22 119th Drive, which will be extended to the southern border  
23 of the subject property.

24 The county planning department recommended denial of  
25 the proposal. After a public hearing, the hearings officer  
26 approved the proposal with several conditions. Three of

1 those conditions are the subject of this appeal and require  
2 (1) elimination of a one-foot "spite strip" on the proposed  
3 subdivision plat separating Arthur's Court from Tax Lot 301,  
4 (2) construction of certain street improvements along the  
5 portion of S.E. 122nd Avenue abutting the subject property,  
6 and (3) that no roads be constructed within a wetland  
7 located on the subject property. Petitioner requested a  
8 rehearing on the conditions of approval applied to the  
9 proposed development. The hearings officer adopted an order  
10 denying the request for rehearing.<sup>1</sup> This appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 On the proposed plat, petitioner included a one-foot  
13 spite strip to separate Arthur's Court from Tax Lot 301 to  
14 the south. The challenged decision requires that the spite  
15 strip be eliminated and that Arthur's Court run along the  
16 border between the subject property and Tax Lot 301. Under  
17 this assignment of error, petitioner complains about the  
18 following condition of approval:

19 "Conditions of approval will require that the  
20 proposed [one]-foot strip of land between the  
21 east-west road to be constructed and [Tax Lot 301]  
22 be eliminated, and the road dedicated to the  
23 property line. It is evident that [petitioner's]  
24 proposed design is an attempt to require that [Tax  
25 Lot 301] contribute to the cost of the  
26 [construction of Arthur's Court.] While that

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<sup>1</sup>In this opinion, we refer to the hearings officer's original decision as the challenged decision. When referring specifically to the order denying rehearing, we refer to the order as "challenged decision (rehearing)."

1 effort is understandable, it cannot be justified  
2 under the [Clackamas County Zoning and Development  
3 Ordinance (ZDO). The planning department] has  
4 determined that it is necessary to dedicate  
5 [Arthur's Court] to the property line to provide  
6 access to [Tax Lot 301]. [The planning  
7 department's] reasoning is that [Tax Lot 301] is  
8 too narrow to develop lots and provide for an  
9 additional east-west roadway, and [Tax Lot 301]  
10 will require access to [Arthur's Court] when  
11 development occurs. [The planning department's]  
12 analysis appears to be correct. The condition of  
13 approval deleting this [one-]foot spite strip is  
14 authorized by [the ZDO]." Record 13.

15 Petitioner argues the county has no authority to  
16 require it to place Arthur's Court in any particular  
17 location. Petitioner specifically contends the county lacks  
18 authority to require elimination of the one-foot "spite  
19 strip" separating Arthur's Court from Tax Lot 301.  
20 Petitioner maintains the county cannot require dedication of  
21 Arthur's Court so that another property may have access to  
22 it. Petitioner claims it is entitled to control the strip  
23 of land it currently owns, between Arthur's Court and Tax  
24 Lot 301, so that if the owner of Tax Lot 301 ever desires to  
25 use Arthur's Court, the owner can be required to pay for a  
26 share of its construction costs.

27 ZDO 1003.12 allows the county to impose conditions of  
28 approval "reasonably calculated to fulfill public needs."  
29 In addition, ZDO 1007.03F(1) allows the county to require  
30 land dedication and road improvements. Further, ZDO  
31 1007.03A provides authority for requiring applicants for  
32 development approval to dedicate road rights-of-way and make

1 road improvements "as deemed necessary by the Department of  
2 Transportation and Development."

3 We believe the ZDO provisions cited above authorize the  
4 county to require the modification of petitioner's proposed  
5 plat and to require the one-foot "spite strip" between  
6 Arthur's Court and Tax Lot 301 be eliminated.

7 Petitioner argues that even if the county possesses  
8 authority to require that the "spite strip" on the proposed  
9 subdivision plat be eliminated, the condition prohibiting  
10 the spite strip constitutes a taking of petitioner's  
11 property in violation of the Fifth Amendment to the United  
12 States Constitution<sup>2</sup> and Article 1, section 18, of the  
13 Oregon Constitution.<sup>3</sup> Petitioner contends this condition  
14 constitutes a taking because it deprives petitioner of  
15 leverage to charge the owner of Tax Lot 301 with costs  
16 associated with the construction of Arthur's Court.  
17 Petitioner contends that if Tax Lot 301 were ever developed,  
18 its owner would receive an unfair financial windfall because  
19 the owner would be free to use Arthur's Court without

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<sup>2</sup>The Taking Clause of the Fifth Amendment to the United States Constitution provides:

"[N]or shall private property be taken for public use without just compensation."

<sup>3</sup>Article I, section 18, of the Oregon Constitution states in pertinent part:

"Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation \* \* \*."

1 charge, after it is constructed at petitioner's expense for  
2 the proposed development and dedicated to the county.

3 We disagree that the challenged condition constitutes  
4 an unconstitutional taking. The relocation of Arthur's  
5 Court to the southern boundary of the subject property  
6 required by the condition of approval does not effect an  
7 unconstitutional taking under either the United States or  
8 Oregon Constitution so long as there is a "reasonable  
9 relationship" between the purposes the condition is designed  
10 to serve and the impacts associated with the development  
11 proposal. Dolan v. City of Tigard, 317 Or 110, 853 P2d  
12 1311, cert granted 114 S Ct 544 (1993). The regulations in  
13 the ZDO discussed under the second assignment of error,  
14 infra, provide authority for requiring Arthur's Court to be  
15 located along the property line separating the subject  
16 property from Tax Lot 301, and eliminating the one-foot  
17 spite strip petitioner proposes to establish to prevent the  
18 owner of Tax Lot 301 from using Arthur's Court.

19 Arthur's Court will intersect S.E. 119th Drive, a local  
20 street which currently terminates at the northern boundary  
21 of the proposed subdivision and will be extended to connect  
22 with Arthur's Court. Tax Lot 301 is a narrow property that  
23 has limited access opportunities. The proposed spite strip  
24 potentially would cut off, or severely limit, access from  
25 Tax Lot 301 to Arthur's Court. The county has a legitimate  
26 interest in the adequacy of its street systems. It is not

1 unreasonable for the county to insist that Arthur's Court be  
2 located in such a way that once it becomes part of the  
3 county road system, access to adjoining undeveloped  
4 properties is facilitated. We conclude the challenged  
5 condition is reasonably related to the impacts of the  
6 proposed development. That the condition may also result in  
7 financial advantage to the owner of Tax Lot 301 is  
8 irrelevant to the taking analysis.<sup>4</sup>

9 The first assignment of error is denied.

10 **SECOND ASSIGNMENT OF ERROR**

11 As we understand it, under this assignment of error,  
12 petitioner contends the condition discussed above violates  
13 ORS 215.416(8) and is not authorized by the ZDO.<sup>5</sup> Under the  
14 preceding assignment of error, we cite several ZDO  
15 provisions authorizing imposition of the challenged  
16 condition of approval requiring elimination of the "spite  
17 strip" and requiring that Arthur's Court be placed along the

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<sup>4</sup>In fact, petitioner itself is the recipient of such an advantage, as S.E. 119th Drive currently stubs to the subject property and, as far as we can tell, petitioner is not bearing any portion of the adjacent subdivision developer's costs of improving S.E. 119th Drive to the northern boundary of the subject property.

<sup>5</sup>ORS 215.416(8) provides:

"Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county, and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

1 border between the subject property and Tax Lot 301. We do  
2 not see how the challenged condition violates  
3 ORS 215.416(8).

4 The second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 Petitioner argues the county erroneously applied  
7 certain ZDO wetland regulations to the proposal because one  
8 day after adoption of the challenged decision, the county  
9 eliminated many of the ZDO wetland provisions.

10 Under ORS 215.428(3), the standards applicable to a  
11 proposal are those in effect at the time the application is  
12 submitted. There is no dispute that on the date the subject  
13 development application was submitted to the county, all the  
14 ZDO wetland standards the county applied to the proposal  
15 were in effect. The county did not err in applying  
16 standards to the proposal that were in effect at the time  
17 the development application was submitted.

18 The third assignment of error is denied.

19 **FOURTH AND SIXTH ASSIGNMENTS OF ERROR**

20 Petitioner asserts that because the proposal is a  
21 permitted use in the R-8.5 zoning district, and is within an  
22 urban growth boundary, certain conditions of approval  
23 protecting a wetland area located on the subject property  
24 violate Statewide Planning Goal (Goal) 2 (Land Use  
25 Planning), Goal 5 (Open Spaces, Scenic and Historic Areas,  
26 and Natural Resources) and administrative rules implementing

1 Goal 5, Goal 10 (Housing) and Goal 14 (Urbanization).  
2 Further, petitioner contends that because this wetland is  
3 not listed on the county's acknowledged Goal 5 inventory,  
4 the challenged decision effectively adds the wetland to the  
5 inventory and, thus, amends the inventory without following  
6 the Goal 5 process required for such an amendment.

7 The county's comprehensive plan and land use  
8 regulations have been acknowledged by the Land Conservation  
9 and Development Commission pursuant to ORS 197.251.  
10 Therefore, the goals are directly applicable to the  
11 challenged decision only if the decision amends the county  
12 plan. Foland v. Jackson County, 311 Or App 167, 807 P2d 801  
13 (1991); 1000 Friends of Oregon v. Jackson County, 79 Or App  
14 93, 718 P2d 753 (1986), rev den 301 Or 445 (1987); Murray v.  
15 Marion County, 23 Or LUBA 268 (1992).

16 The challenged decision does not amend the county  
17 comprehensive plan. Similarly, we do not believe the  
18 challenged decision amends any county wetland inventory  
19 adopted as part of the county's plan. Further, petitioner  
20 cites no provisions of the administrative rules implementing  
21 Goals 5, 10 and 14 that apply directly to the challenged  
22 decision approving a subdivision, in the absence of any  
23 amendment to the county plan. These assignments of error  
24 provide no basis for reversal or remand of the challenged  
25 decision.

26 The fourth and sixth assignments of error are denied.

1 **FIFTH ASSIGNMENT OF ERROR**

2 This assignment of error concerns the conditions of  
3 approval prohibiting road construction within a wetland  
4 area. There is no dispute the ZDO prohibits road  
5 construction related to residential development in wetland  
6 areas, but generally allows road construction related to  
7 commercial or industrial developments in wetland areas.<sup>6</sup>

8 Petitioner argues the application of the conditions of  
9 approval prohibiting road construction in the wetland area  
10 violates the equal privileges and immunities guarantee of  
11 Article 1, section 20, of the Oregon Constitution,<sup>7</sup> as well  
12 as the equal protection provisions of the Fourteenth  
13 Amendment to the United States Constitution.<sup>8</sup> Petitioner

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<sup>6</sup>However, certain restrictions do apply to commercial and industrial construction in some wetland areas. ZDO 1011.03(B) provides:

"Commercial or industrial developments affecting wetlands \* \* \* may be allowed, subject to the provisions of [ZDO] 1011.04."

ZDO 1011.04 provides:

"High priority open space wetlands and significant natural areas shall not be disturbed unless approved by the Planning Director, \* \* \* pursuant to [ZDO] 1305.02, for a specific commercial or industrial development plan."

<sup>7</sup>Article I, section 20, of the Oregon Constitution provides:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which upon the same terms, shall not equally belong to all citizens."

<sup>8</sup>The Fourteenth Amendment to the United States Constitution provides in part:

1 contends regulatory distinctions between use types must have  
2 a rational basis to justify such distinctions.<sup>9</sup> Petitioner  
3 argues there is no rational basis for applying the disputed  
4 roadway condition to residential developments, but not to  
5 industrial or commercial developments.

6 The county cites one rational basis for prohibiting  
7 residential road construction in wetland areas, but not  
8 prohibiting road construction related to commercial or  
9 industrial developments. That rational basis is that  
10 ZDO 1012 provides a procedure for density transfers for  
11 residential development limited by natural features,  
12 including wetlands, but there is no corresponding density  
13 transfer provision for commercial or industrial  
14 developments.<sup>10</sup>

15 We agree with the county that the existence of ZDO  
16 density transfer provisions for residential developments and  
17 the lack of such ZDO density transfer provisions for  
18 commercial or industrial developments, provides a rational

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"No State shall make or enforce any law which shall abridge the  
privileges or immunities of citizens of the Unites States;  
\* \* \* nor deny to any person within its jurisdiction the equal  
protection of the laws."

<sup>9</sup>There is no dispute between the parties that if there is a rational  
basis for distinguishing residential developments from industrial or  
commercial developments for the purpose of applying the subject wetland  
regulations, then those regulations are not unconstitutional under the  
cited constitutional provisions.

<sup>10</sup>In addition, we note the challenged condition does not render the  
subject property undevelopable. Rather, it simply means that petitioner  
must construct a small bridge over the wetland area.

1 basis to justify disparate treatment of residential versus  
2 commercial or industrial developments.<sup>11</sup>

3 The fifth assignment of error is denied.

4 **SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR**

5 Under these assignments of error, petitioner argues  
6 conditions of approval requiring the construction of  
7 sidewalks, storm sewers and other improvements to the  
8 portion of S.E. 122nd Avenue adjacent to the subject  
9 property are improper and unconstitutional. Specifically,  
10 petitioner contends the improvements required by the  
11 disputed conditions are improvements to which comprehensive  
12 plan Roadway Policy 9.0 applies, and the county failed to  
13 properly apply Roadway Policy 9.0 to the proposal.<sup>12</sup>

14 Roadway Policy 9.0 states:

15 "Assess off-site traffic impacts expected to be  
16 caused by new developments and subdivisions. The  
17 developer or subdivider may be required to  
18 participate financially in the provision of off-  
19 site improvements required to handle traffic

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<sup>11</sup>We do not mean to suggest there may not be other rational bases for the regulatory distinction in the ZDO between residential and commercial or industrial developments.

<sup>12</sup>Petitioner also argues the challenged decision fails to establish compliance with ZDO 1007.03F(3), which provides:

"New Developments and subdivisions which substantially impact off-site roadways may be required to participate financially in improving the roadways sufficient to accommodate traffic generated by development. \* \* \*"

However, the county points out ZDO 1007.03 was repealed in 1992, long before the subject application was submitted to the county. Therefore, we do not consider petitioner's arguments concerning ZDO 1007.03F(3).

1 generated by the development." (Emphasis  
2 supplied.)

3 Roadway Policy 9.0 relates to off-site improvements.

4 The challenged decision (rehearing) states the following:

5 "[T]he applicant is not being required to make any  
6 'Off-site' improvements to accommodate the traffic  
7 generated by the 21 lots in [the proposed]  
8 development. It is reasonable to require that the  
9 property frontage be improved to arterial  
10 standards as required by the ZDO." Record 2.

11 We agree with the county that Roadway Policy 9.0 does  
12 not apply to the proposal because the improvements to  
13 S.E. 122nd Avenue required by the conditions in the  
14 challenged decision are not "off-site" improvements.  
15 Rather, the required improvements are contemplated to occur  
16 within the subject property's frontage along S.E. 122nd  
17 Avenue.

18 Concerning petitioner's unconstitutional taking  
19 arguments, we do not believe petitioner has established the  
20 conditions challenged under these assignments amount to a  
21 "taking" of its property in violation of the Fifth Amendment  
22 to the United States Constitution or Article 1, section 18,  
23 of the Oregon Constitution. S.E. 122nd Avenue is the  
24 nearest arterial street to the proposed development. While  
25 Arthur's Court and S.E. 119th Drive will provide direct  
26 local access to the proposed subdivision, S.E. 122nd Avenue  
27 will provide arterial access for the residents of the  
28 proposed 21 new dwellings. There is no dispute the  
29 residents of the proposed development will use S.E. 122nd

1 Avenue. The requirement that petitioner provide 167 feet of  
2 frontage improvements along S.E. 122nd Avenue is reasonably  
3 related to the impacts of a development proposal which will  
4 add traffic to S.E. 122nd Avenue. See Dolan v. City of  
5 Tigard, supra.

6 The seventh and eighth assignments of error are denied.

7 The county's decision is affirmed.