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

FRIENDS OF INDIAN FORD, HOWARD)
PAINE, and MARET PAJUTEE,)
)
Petitioners,)
)
vs.)
)
DESCHUTES COUNTY,)
)
Respondent,)
)
and)
)
RICHARD MOONEY and SHARON MOONEY,)
)
Intervenors-Respondent.)

LUBA No. 95-247
FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Daniel J. Stotter, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Bahr & Stotter Law Offices.

Bruce W. White, Assistant County Counsel, Bend, filed a response brief and argued on behalf of respondent.

Robert S. Lovlien, Bend, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Bryant, Lovlien & Jarvis.

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

AFFIRMED 05/31/96

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's approval of a minor
4 partition application.

5 **MOTION TO INTERVENE**

6 Richard and Sharon Mooney (intervenors), the applicants
7 below, move to intervene on the side of respondent. There
8 is no opposition to the motion, and it is allowed.

9 **FACTS**

10 Intervenors applied to the county to partition their
11 38.57-acre parcel into three lots. The property is
12 designated Rural Residential and zoned RR-10 (rural
13 residential, 10-acre minimum), and with the exception of a
14 barn and a single septic system, is presently undeveloped.
15 The property is bisected by Indian Ford Creek. It is not
16 within a floodplain mapped by the Federal Emergency
17 Management Agency (FEMA), nor is it in the county's
18 floodplain overlay zone. Surrounding properties are
19 developed with residences, consistent with the RR-10 zone.

20 The county hearings officer denied intervenor's
21 application on the basis that intervenors had not
22 demonstrated the parcels could accommodate on-site sewage
23 disposal. Intervenors appealed that denial to the board of
24 county commissioners (board), arguing that the hearings
25 officer erred in requiring evidence of the suitability of
26 each parcel for on-site sewage disposal prior to tentative

1 plat approval. The board chose to consider the appeal
2 because, while it agreed that a determination of the
3 suitability of the site for on-site sewage was necessary
4 prior to tentative plat approval, this finding differed from
5 the staff's past interpretation that suitability of a site
6 for on-site sewage disposal was not necessary until final
7 plat approval.¹

8 The board conducted a de novo hearing on June 14, 1995.
9 At the close of that hearing, an opponent to the proposal
10 requested that the record remain open for seven days.
11 During that seven-day period, intervenors requested that the
12 record remain open to allow them to submit septic system
13 evaluations for the two additional lots created by the
14 proposed partition. The board granted the request, and left
15 the record open until July 7, 1995 for intervenors to submit
16 the required evaluations, and until July 14, 1995, for other
17 parties to respond. On July 6, 1995, intervenors submitted
18 septic system evaluations from the Deschutes County Health
19 Division for the two additional lots. Petitioners submitted
20 no response to those evaluations.

21 The county adopted findings approving intervenors'
22 application on November 22, 1995. This appeal followed.

23 **FIRST ASSIGNMENT OF ERROR**

24 Petitioners contend the county erred by failing to

¹Consideration of appeals to the board is discretionary under the county's code.

1 consider applicable standards for floodplain and natural
2 hazard protection. Specifically, petitioners argue
3 Deschutes County Code (DCC) 17.22.050(5) requires an
4 evaluation of the natural hazards associated with the
5 property's location in a floodplain before the county can
6 find that the property is suited for the intended use.

7 DCC 17.22.050(5) states:

8 "No application for partition shall be approved
9 unless the following requirements are met:

10 * * * * *

11 "(5) Each parcel is suited for the use
12 intended or offered, considering the
13 size of the parcels, natural hazards,
14 and topography and access." (Emphasis
15 added.)

16 Petitioners argue that even though the property is not
17 in a designated floodplain area, it is nonetheless in a "de
18 facto floodplain area" which constitutes a "natural hazards"
19 area for purposes of DCC 17.22.050(5). Petitioners also
20 argue it is inconsistent with DCC 18.96.020(2) "that de
21 facto floodplains, which were never reviewed by FEMA, are
22 not included within the Deschutes County Flood Plain Zone."²

²DCC 18.96.020 states:

* * * * *

"The Flood Plain Zone shall include all areas designated as
'Base Flood' areas by the Flood Insurance Study for Deschutes
County. When base flood elevation data has not been provided
in the flood insurance study, the Planning Division will
obtain, review and reasonably utilize any base flood elevation
or floodway data available from federal, state or other

1 We address petitioners' second argument first. The
2 county specifically determined that DCC 18.96 does not apply
3 to the subject property, finding as follows:

4 "The Board finds that the opponents have
5 misconstrued the ordinance. The Board finds that
6 the flood plain zone is limited to those areas
7 delineated by the [Flood Insurance Rate Maps] FIRM
8 as being special flood hazard areas inundated by
9 100-year flooding. Because the subject property
10 is not located within any 100-year flood plain
11 area mapped in any adopted FIRM map, the Board
12 finds that the subject property is not subject to
13 the provisions of 18.96.

14 "The Board finds that the scope of the second
15 sentence of D.C.C. 18.96.020(2) [sic] is limited
16 to apply only to a subset of areas described in
17 the first sentence of that provision. The Board
18 finds that the intent of this language is to
19 recognize that there are areas included and mapped
20 as special flood hazard areas in the FEMA study,
21 for which complete evaluation of flood data were
22 not developed and for which such interpretation
23 might be needed in applying particular provisions
24 of the zoning ordinance. The Board finds that the
25 language, itself, suggests such an
26 interpretation." Record 12.

27 We will affirm the county's interpretation of its own
28 regulations, unless those provisions are contrary to their
29 express language, or are clearly wrong. ORS 197.829(1);
30 Zippel v. Josephine County, 128 Or App 458, 461, 876 P2d 854
31 (1994). See Clark v. Jackson County, 313 Or 508, 836 P2d
32 710 (1992). In this instance, the county's interpretation

sources, in determining the location of a floodplain or
floodway."

Neither our copy of the DCC, nor the copy of DCC 18.96.020 appended to
petitioners' brief contains a subsection (2).

1 is correct.

2 The subject property is not within the floodplain zone.
3 That petitioners believe the property is within a de facto
4 floodplain does not make it part of the floodplain zone.
5 Intervenors' application is based upon the current zoning of
6 the property, not on the zoning petitioners believe is
7 appropriate. Petitioners cannot collaterally attack the
8 zoning of the subject property through this partition
9 application. Mission Bottom Assoc. v. Marion County, 29 Or
10 LUBA 281, 291, aff'd 136 Or App 275 (1995). The county
11 correctly concluded that the provisions of DCC 18.96.020,
12 which apply only to properties located within the floodplain
13 zone, do not apply to the challenged decision.³

14 In their first argument, petitioners suggests that,
15 regardless of the zoning, the fact that the property is in a
16 de facto floodplain makes it a natural hazard, requiring
17 findings under DCC 17.22.020(5). The county responds that
18 petitioners did not raise this issue with sufficient
19 specificity during the local proceedings and, therefore,
20 have waived their right to raise in in this appeal.
21 Petitioners do not refer us to the record where this issue

³Petitioners also argue that the county erred by not requiring intervenors to obtain a conditional use permit pursuant to DCC 18.96.060(C), which provides that "[n]o subdivision or partition shall be allowed which creates the potential for additional residential dwellings in the flood plain." Since DCC Ch. 18.96 addresses only activities within the Flood Plain Zone, and the subject property is not in the floodplain zone, DCC 19.96.060(C) does not apply to this application.

1 was raised below. Rather, at oral argument, petitioner
2 responded that during the local proceedings, the county
3 violated one or more provisions of ORS 197.763, thereby
4 excusing petitioners from any requirement to raise issues
5 before the county before raising them on appeal.
6 Petitioners rely on ORS 197.835(2)(a) (1993 Edition), in
7 which any violation of ORS 197.763 relieved petitioners from
8 the "raise it or waive it" requirement of ORS 197.835(2).
9 ORS 197.835(2)(b) (1995 Edition) now requires a relationship
10 between the error and the allegation raised. That amendment
11 became effective on September 12, 1995, and we have
12 determined that it applies to all appeals filed subsequent
13 to that date. Ramsay v. Linn County, 30 Or LUBA ____ (LUBA
14 No. 94-202, January 5, 1996). Petitioners have not
15 established that the purported violations of ORS 197.763
16 related to the new issue petitioners now seek to raise.

17 Since petitioners have neither established that they
18 raised this issue during the local proceedings, nor
19 established a violation of ORS 197.763 related to the issue
20 they now wish to raise, they have waived their right to
21 raise this issue for the first time in this appeal.⁴

22 The first assignment of error is denied.

⁴Moreover, even if petitioners had raised this issue below, we agree with the county and intervenors that DCC 17.22.050 does not require findings regarding floodplain natural hazards.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioners challenge the county's process in allowing
3 intervenors to provide septic system evaluations after the
4 final hearing on this matter.

5 Petitioners first contend the county violated DCC
6 17.36.170 by allowing intervenors to provide their septic
7 system evaluations after the initial application was
8 submitted. DCC 17.36.170 requires that

9 "[a]ny problems posed by soil structure and water
10 table and related to sewage disposal by septic
11 tank shall be addressed and resolved in the
12 applicant's initial plan."

13 Petitioners argue this section mandates that the
14 applicants' septic system evaluations were required to be
15 part of the initial application, and that the county erred
16 in allowing intervenors to provide this information after
17 the application was submitted. We disagree. DCC 17.36.170
18 requires the applicant to address and resolve relevant
19 issues with the initial plan, not the initial application.
20 Nothing in the language of that provision precludes an
21 applicant from supplementing the information provided with
22 the application in order to adequately address and resolve
23 issues regarding septic system feasibility prior to approval
24 of the initial plan.

25 Petitioners also argue the county's procedures violated
26 DCC 17.12.050(B) because the planning director did not
27 solicit comments regarding the septic system evaluations

1 from the appropriate agencies. DCC 17.12.050(B) states:

2 "Before making an administrative decision on a
3 subdivision or partition application, the Planning
4 Director shall solicit comments on the proposal
5 from the Director of Public Works, the County
6 Environmental Health Division, and representatives
7 of any other appropriate county, city, state or
8 federal agency."

9 The essence of petitioners' argument is that DCC
10 17.12.050(B) requires the planning director to solicit
11 comments regarding the septic system evaluations from each
12 agency from which comments on the application had been
13 previously solicited. Petitioners are incorrect.

14 DCC 17.12.050(B) does not apply to the review of this
15 application. By its terms, it applies only to subdivisions
16 and partitions reviewed administratively by the planning
17 director.⁵

18 Finally, petitioners argue that by allowing intervenors
19 to submit the analysis after the hearing, petitioners'
20 procedural rights were substantially violated because
21 petitioners had only seven days to respond to the
22 evaluations without the benefit of other agencies' potential
23 responses to them. Petitioners' only explanation as to why

⁵DCC 17.12.050(C) applies to subdivision and partition applications referred by the planning director for review by the hearings officer and requires the planning director to solicit comments "before referring to the hearings officer and completing the staff report." (Emphasis added.) Petitioners did not appeal the county's compliance with this provision. Moreover, even if it had been properly appealed, this provision does not mandate that the planning director solicit additional comments regarding supplemental information submitted on appeal to the board.

1 they were unable to respond to the evaluations within seven
2 days is that, during the hearings process, they relied on
3 the advice and responses of other responding agencies to
4 form their own analysis. Since other agencies were not sent
5 the septic system evaluations, and therefore did not have
6 the opportunity to respond to them, petitioners argue they
7 were unable to evaluate potential problems with them.

8 Petitioners have not established that their procedural
9 rights were violated by the process used by the county to
10 allow intervenors to provide the required septic system
11 evaluations. Petitioners were provided time to respond to
12 the study, and had the benefit of the analysis of the health
13 division, as the agency with expertise over the evaluations.
14 Petitioners did not have a procedural or substantive "right"
15 to the responses of other agencies in order to form their
16 reaction to the study.

17 The second assignment of error is denied.

18 **THIRD ASSIGNMENT OF ERROR**

19 DCC 17.22.020(A)(1) requires that petitioners comply
20 with applicable comprehensive plan policies. Petitioners
21 contend the county failed to consider the following land use
22 standards regarding water quality and quantity, which
23 petitioners argue are applicable to the challenged
24 partition:

25 Deschutes County Comprehensive Plan (plan) Water
26 Resources Goal 1, which states:

1 "To maintain existing water supplies at present
2 quality and quantity."

3 Plan Water Resources Policy 10, which states:

4 "Any project that would endanger the purity of
5 local ground water shall be vigorously
6 discouraged."

7 Plan Natural Hazard Policy 6, which states:

8 "Plans (public and private) shall consider and
9 reflect the effect of drought on the proposed
10 projects."

11 The county asserts petitioners did not raise the
12 applicability of Water Resources Policy 10 below.
13 Petitioners do not either cite to the record where it was
14 raised, or establish a violation of ORS 197.763 related to
15 the issue they wish to raise. Therefore, petitioners have
16 waived their right to raise issues regarding that policy for
17 the first time here.

18 With regard to the other challenges, both the county
19 and intervenors acknowledge no findings were made regarding
20 the applicability of those provisions, but argue that
21 neither of these is a mandatory review criterion for
22 approval of the proposed partition.

23 Petitioners have not established that these
24 comprehensive plan policies apply to the challenged three-
25 lot partition. The subject property is designated for rural
26 residential development. Yet, the scope of the inquiry
27 urged by petitioners suggests a desire to revisit the policy
28 decisions made when this property was designated and zoned

1 for rural residential development. However, regardless of
2 the questions petitioners may now have regarding the
3 appropriateness of residential development on the subject
4 parcel, a quasi-judicial land use application is not the
5 forum in which these policy questions are appropriately
6 addressed. Rather, this application must be viewed within
7 the context of the present zoning, and the uses determined
8 to be appropriate at the time the policies of the
9 comprehensive plan were applied to this property. Thus,
10 while DCC 17.22.020(A)(1) requires compliance with
11 applicable comprehensive plan policies, the applicability of
12 particular policies to this partition application is framed
13 by the policy decisions previously made to allow rural
14 residential development on this and neighboring properties.

15 Under ORS 197.829(2), in the absence of local findings,
16 this Board may interpret the applicability of the challenged
17 provisions in the first instance. See Canby Quality of Life
18 v. City of Canby, 30 Or LUBA ____ (LUBA No. 95-059, October
19 31, 1995). We find no error in the county's failure to
20 consider Water Resources Goal 1 or Natural Hazard Policy 6
21 as applicable to an individual, three-lot partition
22 application.

23 The third assignment of error is denied.

24 **FOURTH ASSIGNMENT OF ERROR**

25 Petitioners contend the county erred by failing to
26 consider what petitioners consider to be applicable land use

1 criteria for protection of riparian natural resources and
2 wildlife. The criteria petitioners consider applicable
3 include:

4 Deschutes River Corridor Wildlife Policy No. 2, which
5 states:

6 "Deschutes County, in cooperation with ODFW, USFS
7 shall consider wetlands habitat due to their
8 scarcity and unique characteristics to serve a
9 range of wildlife species and shall protect them.
10 Modification/alteration of these areas may only be
11 permitted in unique situations and after
12 consultation with ODFW."

13 Deschutes River Corridor Wildlife Policy No. 4, which
14 states:

15 "Deschutes County, in cooperation with the USFS
16 and ODFW, shall protect and enhance lands
17 containing wildlife habitat."

18 Rural Development Policy No. 15, which states:

19 "Construction on open lands shall be in a manner
20 least intrusive to the aesthetic and natural
21 character of those lands and neighboring lands
22 (fences and access roads shall not be considered
23 structures.)"

24 Open Space Policy No. 10, which states:

25 "As part of subdivision or other development
26 review the County shall consider the impact of the
27 proposal on the air, water, scenic and natural
28 resources of the County. Specific Criteria for
29 such review should be developed. Compatibility of
30 the development with those resources shall be
31 required as deemed appropriate at the time given
32 the importance of those resources to the County
33 while considering the public need for the proposed
34 development." (Emphasis added.)

35 With regard to Open Space Policy 10, the county

1 responds that it did adopt findings establishing that this
2 policy is inapplicable to the proposed partition.
3 Petitioners do not challenge those findings.

4 With regard to the other challenged policies, both
5 intervenor and the county respond that petitioners did not
6 raise the applicability of any of these policies with
7 sufficient specificity to afford the county an opportunity
8 to respond. While it appears that general issues
9 regarding riparian resources and wildlife were raised below,
10 petitioners have not cited to any portion of the record
11 where the applicability of these policies was raised.
12 Neither have petitioners established a violation of ORS
13 197.763 related to the issues they wish to raise.
14 Therefore, petitioners cannot raise those issues here.⁶

15 The fourth assignment of error is denied.

16 **FIFTH ASSIGNMENT OF ERROR**

17 Petitioners assign as error the county's failure to
18 consider the following plan policy regarding school
19 capacity:

20 "In light of existing problems with providing

⁶Moreover, even if they had been raised, these comprehensive plan goals and policies provide policy direction and guidance to the county for purposes of implementation of specific development regulations. While they were applicable when the county determined to designate and zone the subject property, and neighboring properties, for residential development, their language does not indicate the county's intent to apply them directly to a quasi-judicial application for a three-lot partition. Petitioners' desire to revisit the county's policy decisions does not render these policies applicable.

1 school facilities all new development shall be
2 reviewed for its impact on schools. Substantial
3 expansion of school bus routes shall be
4 discouraged, and the County shall require the
5 dedication of adequate land for new schools
6 required to meet the needs generated by major new
7 developments. In addition, the County shall
8 consider designating appropriate County lands for
9 schools." Public Facilities Policy 23.

10 Petitioners argue the county erred by failing to apply this
11 provision, presumably for the purpose of evaluating the
12 impact on schools of the two additional dwellings which
13 would be facilitated through the proposed partition.⁷

14 Petitioners are correct that the county did not apply
15 this policy to the proposed partition. However, petitioners
16 do not establish that any concern has been raised regarding
17 the ability of the school system to accommodate students
18 from the two homes this proposal would facilitate.
19 Intervenors note that the school district was advised of the
20 proposal and had no comment.

21 While this comprehensive plan policy may be couched in
22 mandatory terms, we discern no approval standard mandated by
23 it. Rather, the focus of the policy appears to be on how
24 the county will respond to needs for schools generated by
25 new development. In the case of "major new developments,"

⁷Intervenors contend this policy was not raised with sufficient specificity to permit petitioners to challenge it here. However, while intervenors may argue on the merits that the issue was not sufficiently presented to compel the county to find this policy applicable, petitioners point out that the applicability of Policy 23 was raised verbatim at Record 167.

1 that response would include requiring dedication of land
2 needed for new schools. The proposed three-lot partition is
3 not "major" development.

4 We find no error in the county's failure to address
5 this policy.⁸

6 **SIXTH ASSIGNMENT OF ERROR**

7 Petitioners challenge the county's compliance with
8 comprehensive plan and ordinance provisions which
9 petitioners argue require findings regarding fire risk and
10 fire protection measures. Specifically, petitioners argue
11 the county erred in failing to adopt findings of compliance
12 with Fire Policies 29 and 30.⁹ Petitioners also allege

⁸Moreover, even if this policy could be read to impose an approval standard applicable to this individual partition application, given the lack of any indication from the school district that this partition would cause any concern regarding the adequacy of school facilities, the county's failure to address it would provide no basis for remand.

⁹Fire Policies 29 and 30 state:

"29. Hydrant spacing should not exceed 1000 feet with minimum fire flow of 500 gallons per minute on subdivisions or developments with a population density of 2 or less single family units per acre; on subdivisions or developments where population density exceeds two single family dwellings per acre, hydrant spacing should not exceed 500 feet with a minimum fire flow of 750 gallons per minute. Where structural considerations warrant, additional requirements should be considered. Urbanizing area standards shall be those of the incorporated city. In rural fire protection districts final determination of standards will be made after discussion with the F.R.P.D.

"30. Water source or storage shall have a capacity to support the required fire flow for a period of two hours in addition to maximum daily flow requirements for other consumer uses. Refer

1 intervenors' application was deficient for failure to
2 include a statement regarding fire protection and access, as
3 required by DCC 17.202.010(B)(5). That filing requirement
4 states:

5 "B. The tentative plan shall include the
6 following:

7 "* * * * *

8 "5. A statement regarding contemplated water
9 supply, telephone and electric service,
10 sewage disposal, fire protection and
11 access, etc. * * *

12 "* * * * *."

13 The requirements of DCC 17.22.010, identified as
14 "filing procedures and requirements," are not stated as
15 approval criteria; rather, they are the list of items to be
16 included in the tentative plan in order to facilitate review
17 under the approval standards identified in DCC 17.22.020,
18 "Requirements for approval." Since the filing requirement
19 of DCC 17.22.010(5) is not an approval criterion, we find no
20 error in the county's decision based on intervenors'
21 apparent failure to identify "contemplated * * * fire
22 protection and access" in the tentative plan initially
23 submitted to the county.

24 Moreover, the county was able to evaluate the proposal
25 to determine that adequate fire protection and access would
26 be available. Under the approval criteria of DCC 17.22.020

to 'Water Supply Systems for Rural Fire Protection.' NFPA
Pamphlet #1231, 1975." (Emphasis added.)

1 is the requirement of DCC 17.22.020(A)(6) that

2 "[a]ll required utilities, public services and
3 facilities are available and adequate and are
4 proposed to be provided by the [applicant]."

5 In finding that intervenors complied with DCC
6 17.22.020(A)(6), the county stated:

7 "The Sisters/Camp Sherman Fire District has
8 responded that the Applicant will be required to
9 supply a year-round water supply for fire
10 suppression, including fire safety and road
11 standards. * * *"

12 The Fire District response consists of 16 standards
13 necessary for fire protection and access, all of which are
14 made conditions of approval.

15 The county did not specifically identify policies 29
16 and 30 in finding that adequate fire protection and access
17 could be made available. However, the 16 conditions, which
18 the fire marshal determined necessary for the proposed
19 partition, address the substance of policies 29 and 30.
20 Given the express statement in policy 29 that "[i]n rural
21 fire protection districts final determination of standards
22 will be made after discussion with the R.F.P.D.," to the
23 extent the policies may apply to individual partition
24 applications, adoption of the standards listed by the fire
25 department as conditions of approval establishes compliance
26 with the express language of those policies.

27 The sixth assignment of error is denied.

28 **SEVENTH ASSIGNMENT OF ERROR**

29 Petitioners contend the county erred by failing to

1 consider applicable land use criteria regarding impacts to
2 public access easements. DCC 17.22.020(A)(2) requires a
3 finding that the proposed partition "does not conflict with
4 existing public access easements within or adjacent to the
5 partition." The easement to which petitioners direct this
6 assignment is a water line easement operated by the Indian
7 Meadows Water Company. That water line easement is not a
8 public access easement.

9 Petitioners have not established that the county failed
10 to properly consider any public access easements on the
11 property.

12 This assignment of error is denied.

13 The county's decision is affirmed.