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

CHRISTOPHER W. ANGIUS,)
)
Petitioner,)
)
vs.)
)
WASHINGTON COUNTY,)
)
Respondent,)
)
and)
)
EDWARDS DEVELOPMENT,)
)
Intervenor-Respondent.)

LUBA No. 98-148

FINAL OPINION
AND ORDER

Appeal from Washington County.

Steven P. Hultberg, Portland, represented the petitioner and filed the petition for review. With him on the brief was Perkins Coie.

No appearance by respondent.

D. Daniel Chandler, Vancouver, Washington, represented the intervenor-respondent and filed the response brief. With him on the brief was O'Donnell Ramis Crew Corrigan & Bachrach.

HOLSTUN, Board Member; GUSTAFSON, Board Chair; and HANNA, Board Member, participated in the decision.

REVERSED 02/11/99

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county hearings officer decision approving a six-lot subdivision
4 in the R-6 (Residential 6 units/acre) zone.

5 **MOTION TO INTERVENE**

6 Edwards Development, the applicant below, moves to intervene on the side of
7 respondent. There is no opposition to the motion, and it is allowed.

8 **FACTS**

9 The proposed subdivision is located at the intersection of NW Evergreen Road and
10 NW Thompson Road. Four of the proposed lots front directly on NW Evergreen Road or
11 NW Thompson Road; lots 4 and 5 do not. Lot 4 is located approximately 100 feet south of
12 NW Evergreen Road, and Lot 5 is located approximately 150 feet south of NW Evergreen
13 Road. The only road frontage for lots 4 and 5 is provided by what is shown on the
14 preliminary plat as Tract A. Tract A is a strip of land 16 feet wide that extends south 150
15 feet from Evergreen Road. The questions presented in this appeal are whether lots 4 and 5
16 have the lot depth required under the Washington County Community Development Code
17 (CDC) and whether lot 5 has the required lot width at the street.

18 **ASSIGNMENT OF ERROR**

19 New lots in the R-6 zone must have an average lot depth of 80 feet. CDC 303-6.4(B).
20 Such new lots also must be at least 40 feet wide at the street, unless they are approved as flag
21 lots under CDC 430-45. CDC 303-6.4(C). Petitioner contends that if the depths of lots 4 and
22 5 are measured in the manner required by the CDC, neither lot has an average lot depth of 80
23 feet. Petitioner also contends that lot 5 does not measure at least 40 feet wide where it fronts
24 on Tract A and that lot 5 does not qualify as a flag lot.

25 Petitioner is correct. The county has not appeared in this proceeding, and intervenor-
26 respondent (intervenor) concedes that the findings supporting the decision do not

1 demonstrate that lots 4 and 5 satisfy the lot depth requirements of CDC 303-6.4(B). As the
2 proposed subdivision is presently configured, it is also clear that lot 5 does not satisfy the
3 CDC 303-6.4(C) requirement for lot width at the street.

4 Intervenor argues that the challenged decision should be remanded rather than
5 reversed:

6 "In this case, any errors in the decision may be legally corrected in a number
7 of ways. First, the applicant might make Lots 4 and 5 into double flag lots.
8 This would require only widening Tract A to 20 feet, and making it a double
9 flag as allowed by CDC 430-45.6. If this is not feasible, the applicant could
10 otherwise reconfigure or eliminate the challenged lots." Intervenor's Brief 2.

11 Intervenor does not argue that the county could adopt additional findings on remand to
12 explain that the subdivision as proposed meets applicable CDC standards. Rather, intervenor
13 argues that the subdivision can be amended to reconfigure the lots so that they comply with
14 the cited CDC requirements.

15 In Seitz v. City of Ashland, 24 Or LUBA 311, 314 (1992), we described the
16 circumstances when reversal rather than a remand is appropriate:

17 "* * * A reversal of a land use decision by this Board, unlike a remand, means
18 that a local government will not be able to correct all of the identified errors
19 by adopting new findings, by accepting additional evidence, or both. In other
20 words, reversal of a land use decision approving an application for permit
21 approval simply means the subject application, as submitted, cannot be
22 approved under the applicable criteria, as a matter of law. This means that an
23 amended [application] or a new application is required to correct at least one
24 of the allegations of error sustained in the Board's final opinion reversing the
25 decision. * * *" (Emphasis in original.)

26 In the present appeal, the county will not be able to correct "the identified errors by adopting
27 new findings [or] by accepting additional evidence, or both." Id. The intervenor will be
28 required to submit a new or amended application that reconfigures lots 4 and 5 in a manner
29 that complies with the CDC.¹ Therefore, the decision to approve the disputed subdivision

¹While petitioner has demonstrated that the proposed subdivision as presently configured does not comply with the relevant lot depth and width-at-street requirements of the CDC, we do not understand petitioner to take

1 with lots 4 and 5, as they are configured on the proposed plan, "is prohibited as a matter of
2 law" and must be reversed under OAR 661-010-0071(1)(c).

3 Intervenor's reliance on language in our decision in Koo v. Polk County, 33 Or
4 LUBA 487 (1997) is misplaced.² The distinction that must be drawn is whether it is the
5 decision or the proposal that must be corrected. Remand is appropriate in the first
6 circumstance; reversal is appropriate in the latter circumstance. Under Koo and OAR 661-
7 010-0071(1)(c), reversal rather than remand is appropriate where a subdivision cannot be
8 approved as proposed because it violates one or more applicable approval criteria.³ Where
9 LUBA concludes on review that a local decision approving a proposed subdivision cannot be
10 corrected unless the subdivision is first revised by modifying the original application or
11 submitting a new application, reversal rather than remand is appropriate. In such a
12 circumstance, it is the application or proposal, rather than the decision, that must be
13 corrected. That is the circumstance presented in this appeal. This is not a case where the
14 county's decision could be corrected on remand by adopting additional findings or accepting
15 additional evidence.

16 The county's decision is reversed.

a position concerning whether the proposed subdivision could be amended to conform with those CDC requirements.

²In Koo we explained:

"Reversal, rather than remand, is appropriate only when the local decision is wrong as a matter of law and cannot be legally corrected." 33 Or LUBA at 499.

³OAR 661-010-0071(1)(c) provides that reversal rather than remand is appropriate where "[t]he decision violates a provision of applicable law and is prohibited as a matter of law."