

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

JUN 13 1 50 PM '83

ROBERT STEPHENS

Petitioner,

vs.

CLACKAMAS COUNTY,
PAUL RICE, CAROLYN SMITH,
MACC/ECOS, and LOWELL NJUST,

Respondents.

LUBA No. 83-020

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Deanne L. Darling, Oregon City, filed the Petition for Review and argued the cause on behalf of Petitioner. With her on the brief were Biggs, Hutchison, Hammond and Walsh, P.C.

Jeffrey J. Bennett, Portland, filed the brief and argued the cause on behalf of Respondents Paul Rice and Lowell Njust. With him on the brief were Spies and Rune, P.C.

James Hunt Miller, Portland, filed the brief and argued the cause on behalf of Respondents Carolyn Smith and MACC/ECOS.

BAGG, Board Member; COX, Board Member participated in this decision.

REMANDED

6/13/83

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioner appeals approval of a 185 unit mobile home
4 subdivision near Brightwood in rural Clackamas County.

5 FACTS

6 In July, 1982, the applicants submitted an amended
7 preliminary plot plan for a three phase 185 unit mobile home
8 park to be known as "Alderwood Mobile Home Park." It is
9 located on 48 acres south of the Mt. Hood loop highway near
10 Brightwood. The site includes 1.67 acres of wetland in the
11 southwest corner of the project, although there is some
12 argument as to the total extent of wetland on the property.
13 The site is forested, and some of the site contains slopes of
14 up to 20%. It is within one quarter mile of the Salmon and
15 Sandy Rivers and bears a "Principal River Conservation Area"
16 designation in the Clackamas County plan. See Clackamas County
17 Comprehensive Plan at 15-16, 37. The county plan also shows
18 this area as a winter deer and elk range.

19 The property is zoned Hoodland Residential (HR) and is
20 classified as low density residential in the county's Mt. Hood
21 plan. It is within a school district and has police and fire
22 protection. The proposal would develop the property with 14.36
23 acres for open space, 8.61 acres for streets, parking and
24 recreational vehicle storage and 23.36 acres in lots for mobile
25 homes. The mobile home lots would be clustered. One point
26 three acres would be left for a stubroad to be constructed in

1 anticipation of future growth on adjacent property.

2 A hearing was held before the county commissioners on
3 January 10, 1983. The commissioners issued an order and
4 findings approving the project on January 13, 1983, and this
5 appeal followed.

6 ASSIGNMENT OF ERROR NO. 1

7 "The Decision of the County is Inadequate Due to a
8 Failure to Make Adequate Findings of Fact, Conclusions
9 of Law and a Lack of Substantial Evidence in the
10 Record."

11 "A.

12 The Findings Regarding Wetlands are Inadequate and
13 Contrary to the Evidence"

14 Under this subassignment of error, petitioner asserts the
15 county erred in finding only 1.76 acres of wetland in one area
16 in the southwest corner of the project site. Petitioner says
17 the finding fails to say why only 1.76 acres of wetland was
18 found when evidence was introduced showing a much larger
19 wetland area. Petitioner refers to county staff identification
20 of a wetland in the center of the project site. See record, p.
21 66, 358-359. This staff finding is consistent, according to
22 petitioner, with findings in the Mt. Hood plan showing a larger
23 wetland area on the project site. See record, p. 93.

24 Petitioner adds that Section 1002.06(B) of the Zoning and
25 Development Ordinance (ZDO) regulates development within 100
26 feet of a wetland, and 15 of the proposed units are within the
wetland area. Petitioner does not specify which wetland area.

1 Petitioner adds that none of the criteria in Section
2 1002.06(B), controlling development near "natural" wetlands, is
3 addressed in the findings.¹

4 Respondents answer this subassignment of error first by
5 noting that the wetland described in the center of the project
6 site is not a wetland, but a pond. Section 202 of the zoning
7 ordinance defines "wetlands" as:

8 "Areas inundated by surface or ground water sufficient
9 to support a prevalence of vegetation or quatic life
10 which requires saturated or seasonally saturated soil
11 conditions for growth and reproduction. Wetlands
generally include swamps, marshes, bogs, sloughs, wet
meadows, river overflows, mudflats, natural ponds and
other similar areas."

12 Respondents argue this pond is not a "natural wetland."

13 Respondents refer to the history of the area as a loading place
14 for logtrucks. Respondents do not, however, claim outright
15 that the pond is a manmade log holding pond. Respondents
16 appear only to suggest such a conclusion.

17 Respondents dismiss petitioner's claim that additional
18 wetland exists because there are some shown in the
19 comprehensive plan. Respondents say the plan map is not as
20 reliable as on-site inspection. The map was regarded by the
21 county as "figurative only," and the county placed greater
22 weight on testimony and on-site inspection. This specific
23 information is to be trusted over the plan map, according to
24 respondents.

25 We agree with the respondents that on-site inspection and
26

1 other site specific information is substantial evidence that
2 may be used to designate wetlands. We agree a comprehensive
3 plan is generally not site specific and therefore may be less
4 reliable than more specific information. However, we do not
5 agree that the county has adequately addressed the wetlands
6 issue particularly in the face of evidence regarding other
7 wetland sites on the property. The county has not adequately
8 explained how it is that the "wetland" or "pond" near the
9 center of the project site is not a wetland.² The county has
10 a duty to address contradictory evidence. Sane Orderly
11 Development v Douglas County, 2 Or LUBA 196, 206 (1981). See
12 generally, Constant v Lake Oswego, 5 Or LUBA 311, 325 (1982).

13 We sustain this subassignment of error in part.

14 "B.

15 "The Findings Relating to Deer Habitat are Contrary to
16 the Comprehensive Plan, Based on Evidence not in the
Record and are Inadequate."

17 Under this subassignment of error, petitioner advises the
18 county found the project to be within a deer and elk winter
19 range. Petitioner complains the county's plan mandates
20 maintenance and improvement of wildlife habitats, and the
21 county failed to follow this mandate. See Comprehensive Plan,
22 p. 34. Petitioner also says the plan requires cooperation
23 between the county and Oregon Department of Fish and Wildlife,
24 and there is testimony from the Department of Fish and Wildlife
25 that the development would be detrimental to wildlife in the
26

1 area. Record, p. 133. Petitioner concludes the county failed
2 to meet this cooperation requirement. In support of this
3 argument, petitioner asserts finding 15D (record, p. 8),
4 stating other acreage is available to accommodate wildlife, is
5 not supported by specific evidence about this other acreage.

6 Petitioner again argues from ZDO 1002.06 and says all
7 developments must be planned so as to minimize adverse affects
8 on sensitive habitats. Petitioner argues there were no
9 findings made pursuant to Section 1002.06(A)(2) showing the
10 development was so designed. Petitioner says the county's
11 apparent justification for this omission, that Section 1002.06
12 is somehow inconsistent with ZDO Section 312 (the HR district)
13 and inapplicable to this development, is "beyond
14 comprehension." Petitioner recognizes Section 312.09 provides
15 for a conflict resolution process between Section 1000, et
16 seq., of the ordinance and other sections.³ However, Section
17 312.09 requires a finding of conflict before the provisions of
18 Section 312 can be found to govern over those of Section 1000,
19 and no such finding was made, according to petitioner.

20 Respondents agree Section 312.09 of the HR zoning
21 designation provides that developments are subject to Section
22 1000 of the zoning ordinance, but when the provisions of
23 Section 1000 conflict with the provisions of Section 312.09 or
24 with the Mt. Hood Community Plan, Section 312.09 and the
25 community plan will govern. Respondents posit there is such a
26 conflict in this case. The property was designated as low

1 density residential, and its presence within the Hoodland
2 Service District shows further that the site is to be impacted
3 by development. Respondents argue that conclusion 14 of the
4 county's order notes this conflict.

5 "[T]he provisions of Section 1002.06 relating to
6 wildlife habitats and in particular winter deer and
7 elk ranges, are inconsistent with the purposes of the
8 HR district and therefore inapplicable to this case."
9 Record, p. 16.

10 We understand respondents to say the designation as deer and
11 elk habitat and the zoning of the property for development mean
12 a conflict exists.

13 The respondents argue that even if there were no conflict,
14 the county considered the impact the development would have on
15 wildlife as required by ZDO 1002.06(A). The county found
16 wildlife movement would be impeded because the site is between
17 two highways, and the county found that other land was
18 available for wildlife. Respondents point to evidence in the
19 record that 1000 acres of land owned by the Bureau of Land
20 Management is reserved for wildlife near Rhododendron. See,
21 record, exhibit 5, p. 142-143.

22 We do not read ZDO 312.09 to override the county plan.
23 Were such blanket authorization given in ZDO 312.09, that
24 section would not begin, as it does, with "All development
25 shall be subject to the applicable provisions of Section
26 1000." We believe ZDO 312.09 recognizes the county is under an
obligation to protect wildlife resources unless specific

1 conflict is found between the provisions of 312.09 and ZDO
2 1000, et seq. It is not sufficient to say as the finding does
3 that a conflict exists with the "purposes" section of ZDO 312.
4 The county must explain exactly where this conflict exists and
5 with what provisions. No such explanation exists in the county
6 order.

7 The county order does include a finding that significant
8 acreage outside the Hoodland Service District exists to
9 accommodate wildlife. Record, p. 8. Also, the county found
10 the deer and elk frequent lower south-facing slopes in winter,
11 not the southeast to northeast slopes as exist in this
12 development. The county concluded the area was of "low value"
13 for wildlife in comparison with other areas. The record
14 reveals evidence the county could use to support such a
15 finding. Record, exhibit 5, pp. 142-144. Our problem with the
16 finding, however, is it fails to consider other evidence from
17 petitioners and the Oregon Department of Fish and Wildlife that
18 the development would harm wildlife. See record marked exhibit
19 19. The county needs to explain its choice of such conflicting
20 and apparently competent evidence. See Sane Orderly
21 Development v Douglas County, supra. We therefore do not agree
22 with respondents' alternative argument that the county has met
23 the applicable wildlife preservation criteria.

24 This subassignment of error is sustained.

25 "C.

26 "The finding of Adequate Public Facilities to Support

1 the Project is Contrary to the Evidence, and
2 Inadequate"

3 Petitioner claims ZDO Section 1013 along with Policy 7.2 of
4 the comprehensive plan (land use section) requires all
5 developments to provide adequate utilities, and the county has
6 failed to do so. Petitioner says finding 12 (record, p. 6-7)
7 concludes the Hoodland Service District has sufficient design
8 capacity to serve the project with sewage service, but there is
9 no evidence to support this finding. Petitioner points to a
10 statement by the county's own Utility Division to show that no
11 sewer service review had been made.

12 "We are unable to review the proposed sanitary sewer
13 plan and/or approval any such plan until such time as
14 there has been a joint meeting with all three
15 developers in the area to coordinate and carry out a
16 facilities plan for the total developable area."
17 Record, exhibit 5, p. 117.

18 Petitioner also says there is no support for the county
19 finding that water service would be provided by the Salmon
20 Valley Water Company, Inc. Finding 12, p. 6. The company has
21 only expressed "an interest" in serving the project. See
22 record, exhibit 5, p. 156-157.⁴

23 As to water, respondents claim an analysis of water needs
24 was included in the applicants' impact study, and three sources
25 of water were identified. A commitment was obtained, according
26 to respondents, from the Salmon Valley Water Company. See
27 record, p. 214.⁵ The commitment directly supports finding 12
28 wherein the county states that water service will be available,

1 according to respondents.

2 As to sewer service, respondents argue the Utility Division
3 letter referred to above was modified by a later letter stating
4 as follows:

5 "On May 19, 1981, this office sent you comments
6 regarding the above subdivision. We would like to
7 modify those comments as follows:

8 "1. We recommend that the preliminary plat be
9 approved as to overall lot layout, etc., but not
10 to underground utilities (water, sewer, etc.)
11 locations.

12 "2. Final plat cannot be approved until there has
13 been a sanitary sewer facilities plan approved
14 for the area, which involves all three proposed
15 developments." Record, exhibit 5, p. 116.

16 Respondents claim this letter shows all that is needed for
17 conditional approval of a sewage system. Conditional approval
18 for sewage disposal is permissible under ZDO 1204.06, according
19 to respondents.

20 We do not believe the county has adequately addressed the
21 feasibility of providing sewer service. We agree that the
22 county is permitted to condition approval of its developments,
23 but this development is subject to the provisions of ZDO
24 1013.05. Under ZDO 1013.05(9), utilities are to be approved by
25 the appropriate county agencies and

26 "all sewer and water provisions shall be approved by
the appropriate agencies before the plans are approved
by the planning commission." ZDO 1013.05(9)(b).

While conclusion 10, record, p. 14, states that water and sewer
will be integrated into the development, and while we believe

1 there is sufficient evidence in the record to show that water
2 may feasibly be provided to this development, we cannot say the
3 same for sewer. The citations to the record made by
4 respondents do not show that a sewer system is feasible or has
5 been approved, but rather show the sewer system is not
6 approved. As we understand ZDO 1013, et seq., such approval
7 must be made at this preliminary stage.

8 We do not mean to say that the approval must be in detailed
9 form, but we do believe that the county must make a finding
10 that domestic water and sewer service is feasible. Details of
11 services provision may be the subject of later review or
12 conditions of compliance, but there must be initial findings of
13 feasibility based upon adequate evidence in the record to show
14 the county that indeed these services may be provided.⁶

15 We sustain this subassignment of error.

16 "D.

17 "The Findings Regarding Allowing Private Roads within
18 the Development in Violation of the Comprehensive Plan
are Inadequate"

19 Petitioner cites policy 9 of the Clackamas County
20 Comprehensive Plan allowing private roads to serve subdivisions
21 "where appropriate." Petitioner claims there is no standard
22 for determining appropriateness and no finding in this case to
23 support the granting of private roadways. Petitioner complains
24 that approving the project with a private road system is in
25 violation of the comprehensive plan.
26

1 Respondents concede policy 9 of the comprehensive plan
2 expresses a preference for county roadways. Clackamas County
3 Comprehensive Plan, p. 54. However, the county may approve
4 private roads "where appropriate." Respondents say the
5 "appropriate" standard is perfectly acceptable and cites Lee v
6 City of Portland, 57 Or App 798, 646 P2d 662 (1982) in support
7 of this assertion. Respondents argue finding 10 (record, p. 5)
8 defers to the staff for a determination of how much area is
9 needed for new roads. Staff found the need for a public road
10 to be only 1.3 acres. Therefore, according to respondents,
11 staff has determined private roadways are appropriate to
12 provide "interior circulation". Respondents' brief at 13.
13 Respondents conclude the "appropriate" standard is adequate in
14 this case.

15 A plan that has "appropriateness" alone as a standard is
16 defective for lack of standards. However, the plan must be
17 considered along with all of its policies and its implementing
18 ordinances. Presumably, the appropriate use of private
19 roadways will be determined in part by other considerations
20 arising out of standards in the plan and out of the
21 circumstances of each individual case. The question is whether
22 there are sufficient standards in this plan and implementing
23 ordinances to determine whether a private roadway is
24 appropriate. See Lee v City of Portland, supra. We do not
25 find such other standards and criteria sufficient to allow the
26 county and the public to know when a private road is likely to

1 be considered "appropriate." On remand, the county must
2 explain the term or make clear how it is to be interpreted
3 along with other criteria so as to have sufficient clarity to
4 be applied consistently. See Lee v Portland, supra.

5 We will sustain this subassignment of error.

6 "E.

7 "The Finding and Conclusions Fail to Adequately
8 Address the Applicable Criteria and are Vague and
9 Conclusory"

10 This subassignment of error is a catchall. Petitioner
11 argues findings 15, 15A, 15B, 15E, conclusion 11 and conclusion
12 12 are conclusional and not supported by substantial evidence
13 in the record. The findings and conclusions complained of are
14 conclusions that the project meets ordinance criteria. We do
15 not understand these conclusions to be objectionable when there
16 is no substantial evidence in the record casting doubt on the
17 findings and conclusions. See Publishers Paper v Benton
18 County, 6 Or LUBA 182 (1982). Petitioner cites us to no
19 evidence in the record explaining how it is that the county's
20 conclusions are inadequate. We, therefore, deny this
21 subassignment of error.

22 ASSIGNMENT OF ERROR NO. 2

23 "THE COUNTY IMPROPERLY CONSTRUED THE APPLICABLE LAW IN
24 APPROVING THIS PROJECT

25 "A.

26 "The Project is a Flexible Lot Development, and the
Minimum Lot Size Requirement is not met"

1 We are a bit confused by this subassignment of error.
2 Petitioner initially appears to be objecting to the development
3 on the ground the required minimum lot size area per dwelling
4 unit in the HR zone is 10,890 square feet, and this development
5 provides for lots of much smaller size. Later in the
6 subassignment, however, petitioner recognizes smaller lot sizes
7 are allowable under certain circumstances, including lots of
8 5,000 square feet. Petitioner then complains that no finding
9 was made on the matter of minimum lot sizes, and petitioner
10 further complains there are lots of less than 5,000 square feet
11 in this development. As we understand the subassignment, then,
12 petitioner is complaining that the lots are too small for the
13 Hoodland Residential District; and even, if smaller lots are
14 permitted under other ordinance provisions, the lots are still
15 too small.

16 Respondents correctly note ZDO 1013.02 requires all
17 developments of 50 or more lots or dwelling units must be
18 developed as planned unit developments. This project is such a
19 development. Under ZDO 312.09A, a PUD in the HR zone is to be
20 Zontrolled by ZDO 1013. ZDO 1013.05(3)(a) incorporates density
21 formulas in ZDO 1012. Petitioner has not challenged the lot
22 size density under ZDO 1012. We therefore do not find error in
23 the county's density calculations in the manner claimed by
24 petitioner.

25 As to the alternative argument about the lots smaller than
26 5,000 square feet, respondents say all but one of the 185 lots

1 are equal to or greater than 5,000 square feet. The one
2 nonconforming lot is lot 11 of tract A, and respondents say it
3 was a "scrivener's error." Respondents say that a "minor
4 adjustment" may be made before final approval. We understand
5 this statement to be an agreement to correct the error. We
6 decline, therefore, to sustain this subassignment of error.

7 "B.

8 "The Density Calculations Based on the Area Attributed
9 to New Roads is Contrary to Applicable Ordinances"

10 Petitioner complains the county's density calculation is
11 wrong because the area required for roadways was not properly
12 considered. The county attributed 1.3 acres to new roadways,
13 but that figure was based upon public roadways. The county
14 interpreted ZDO 312.07 to require that allowance be made only
15 for public roadways, not for private ones. Petitioner says
16 this interpretation is error and area for private roadways
17 should be included in the calculation.

18 Respondents argue "new roads" means public rights-of-way.
19 They argue that roadways only providing interior circulation
20 are not controlled by ZDO 312.07C(1)(c). ZDO 312.07 states
21 that the area required for new roads is to be subtracted from
22 gross land area. ZDO 312.07C(1)(c) provides:

23 "No land within a public right-of-way shall be
24 included in the net site area (NSA) except those
25 strips of land adjacent to existing rights-of-way
26 which are required to be dedicated as a condition of
approval of a land use action."

1 We understand the density calculations are to be based upon
2 ZDO 1012 planned unit development standards. We believe an
3 element of the density calculation is the amount of land to be
4 subtracted for roadways, and we find provisions in ZDO 1012
5 controlling roadway area in density computations. We,
6 therefore, do not understand respondents' reference to density
7 calculations in ZDO 312, et seq. However, both ZDO 312 and ZDO
8 1012 refer to essentially the same formula for subtraction of
9 roadway area. ZDO 312.07(C)(1)(c) refers to area required for
10 "new roads" as follows:

11 "Land area required for new roads (NR) serving the
12 development up to a maximum of fifteen (15) percent of
13 the gross land area. (No land within a public
14 right-of-way shall be included in the Net Site Area
(NSA) except those strips of land adjacent to existing
rights-of-way which are required to be dedicated as a
condition of approval of a land use action.)"

15 ZDO 1012.03(B)(1) talks of a 15% reduction of area "to be
16 dedicated for new roads serving the development." ZDO
17 1012.03(C) provides for subtraction of area "to be dedicated
18 for new roads serving the development...." It adds that land
19 within a public right-of-way is not to be included in the net
20 site area with certain exceptions. These provisions do not
21 make it clear to us whether private roadways are to be
22 considered "new roads" in the density formula or not. The
23 parenthetical about public right of way may only be an
24 admonition, not a statement that only public rights-of-way are
25 to be subtracted from gross land area. We do not believe the
26

1 issue is precisely clear, and on remand we believe the county
2 should explain how it believes these provisions are to be
3 interpreted so as to exclude private roads from the calculation.

4 This subassignment of error is sustained.

5 ASSIGNMENT OF ERROR NO. 3

6 "THE COUNTY BASED ITS DECISION ON EVIDENCE NOT IN THE
7 RECORD

8 "A.

9 "The Commisioners Failure to Include in the Record the
10 Results of an On-Site Investigation Resulted in a
11 Denial of the Opportunity to Rebut Evidence and
12 Violated Due Process"

13 Petitioner claims that on March 4, 1982, two members of the
14 commission with staff and the applicants' attorney and the
15 petitioner's attorney made an on-site investigation of the
16 parcel. There was no announcement of the facts gained from
17 this view, and the failure to make such an announcement denied
18 petitioner the opportunity to meet and rebut those facts.

19 We find no error. Petitioner was represented at the
20 inspection and had ample opportunity at the time of the hearing
21 before the commissioners to inquire as to the facts learned.
22 In Friends of Benton County v Benton County, 3 Or LUBA 165
23 (1981), we held that an undisclosed on-site view of the
24 property made after the record was closed was violative of
25 petitioner's due process rights. In that case, and in
26 Concerned Property Owners of Rocky Point v Klamath County, 3 Or
LUBA ____ (1981), the visits were unannounced, and petitioners

1 were not represented at the time of the visit. Here,
2 petitioner was represented at the time of the visit, and there
3 existed opportunity to meet and rebut the evidence available to
4 the commission members. Under these circumstances, we find no
5 harm to petitioner. Pierron v City of Eugene, ___ Or LUBA ___
6 (LUBA No. 82-104, Slip Opinion, 6/07/83).

7 This subassignment of error is denied.

8 "B.

9 "The Findings Adopted by the County are Based on
10 Evidence not in the Record"

11 Under subassignment of error III(B) petitioner argues
12 certain findings are not supported by evidence in the record.
13 At the outset, we wish to note that whether particular findings
14 are objectionable in form, content or support in the record
15 does not always control the outcome of the case. Even if we
16 were to find that the county made findings that were deficient
17 or were unsupported, remand or reversal would not be warranted
18 unless the findings were critical to the outcome of the case.
19 By critical to the outcome of the case, we mean findings or
20 conclusions that are required by applicable land use standards
21 before any approval can be given.

22 Here, for example, petitioner objects to finding 8 about
23 the sizes of surrounding properties. We do not believe the
24 finding is critical to the outcome of the case. Petitioner
25 does not explain how it is that this information controls
26 compliance or non-compliance with a county ordinance standard.

1 Petitioner complains about conclusion 5 which says the
2 prices of this development will be "broader than that generally
3 available for new housing in the Mt. Hood Corridor."

4 Petitioner says there is no evidence about price ranges of the
5 kind of housing in the record. We do not agree. The record
6 contains evidence as part of the application as to the cost of
7 this housing. See record, p. 117-119. What is missing,
8 however, is any comparison to existing housing costs necessary
9 to make conclusion 5 meaningful. One has no comparison if only
10 cost of the proposed housing is considered.

11 Petitioner also complains that conclusion 8 about wetlands
12 is not sufficient "because no on-site survey was made."
13 Petitioner concludes that finding 12 about the facilities of
14 the Hoodland Service District (for utilities) is similarly
15 without support.

16 We agree that conclusion 8 is defective, but not for the
17 lack of a survey as alleged by petitioners. The conclusion
18 references an on-site investigation and survey and concludes
19 that only 1.67 acres of wetland exists on the subject
20 property. The reason the finding is defective, is because the
21 county has not sufficiently dealt with evidence presented by
22 petitioner and the county's own staff suggesting that there is
23 an area of "wetland" in the center of the site. The conclusion
24 that only 1.67 acres of wetland exists on the property is, in
25 light of all the evidence in the record, not supported by
26 substantial evidence notwithstanding the existence or

1 non-existence of a survey. See our discussion under assignment
2 of error no. 1(A).⁷

3 This subassignment of error is sustained in part.

4 ASSIGNMENT OF ERROR NO. 4

5 "THE COUNTY'S GRANTING OF APPROVAL CONDITIONED UPON
6 RECEIPT AND STAFF APPROVAL OF A STORM DRAINAGE PLAN,
7 AN EROSION CONTROL PLAN AND A GRADING PLAN IS AN
8 IMPROPER DELEGATION OF AUTHORITY AND DEPRIVES THE
9 PETITIONER DUE PROCESS OF LAW"

10 Petitioner complains the commissioners have improperly
11 delegated their authority under ZDO 1304 as finders of fact.
12 Allowing the staff to decide whether or not certain critical
13 matters are up to standard is improper under ZDO 1303.06C,
14 according to petitioners. These decisions must be based on
15 evidence offered at the time of hearing, and evidence about the
16 feasibility of the project with regard to storm drainage,
17 erosion and grading would of necessity have to come in after
18 the hearing to be reviewed and past upon by staff. Petitioner
19 asserts it is the applicant that bears the burden of
20 demonstrating compliance with all applicable criteria, and the
21 county commissioners must determine if the application meets
22 that burden.

23 Respondents argue that ZDO 1303.05 permits this
24 delegation. Section 1303.05 allows approval subject to
25 conditions. We understand respondents to say that a condition
26 allowing staff review is permissible under ZDO 1307.05.
Respondents cite Gustafson v Grants Pass, 3 Or LUBA 189 (1981),

1 for the proposition that even a sketchy plan may exist where
2 the zoning ordinance requires public participation at all
3 phases.

4 The county has made no statement that a storm drainage
5 system is feasible, but leaves the entire matter up to later
6 staff review. We believe there must be sufficient evidence in
7 the record from which the county may make a conclusion that
8 adequate storm drainage plans may be drawn, before the county
9 may order that such plans be drawn or condition the approval on
10 the drawing of such plans.⁸ We do not suggest that the
11 county must have detailed plans in front of them, simply that
12 the county make a finding that such plans are possible based
13 upon substantial evidence in the record that plans may indeed
14 be made. See Margolis v City of Portland, 4 Or LUBA 89 (1981),
15 Mt. Area Corridor, et al v Clackamas County, et al, ___ Or
16 LUBA ___ (LUBA No. 83-002, 1983).

17 This assignment of error is sustained.

18 ASSIGNMENT OF ERROR NO. 5

19 "THE ORDER ADOPTED BY THE COMMISSIONERS DOES NOT
20 ACCURATELY REFLECT THE MOTION PASSED BY THE
COMMISSIONERS"

21 In this last complaint against the county order, petitioner
22 says the January 13, 1983 meeting included a motion to approve
23 the plot project subject to the original staff report of June
24 30, 1981. Record, p. 19-20. In that original staff report,
25 two conditions were made. See record, p. 360. The order
26

1 signed by the commissioners omits the two conditions.

2 Respondents simply say that the county would stipulate to
3 an interlineation of the two conditions. We find no error
4 here, as the county has agreed to correct what appears to be a
5 simple clerical error.

6 This assignment of error is denied.

7 ASSIGNMENT OF ERROR OF INTERVENOR

8 Intervenor Carolyn Smith and Mountain Area Corridor
9 Citizens/Environmental Committee on Suitability (MACC/ECOS)
10 complain that the county has made inadequate findings on
11 wetlands impact and wetlands recharge areas. Intervenors point
12 to ZDO 1002.06 which provides:

13 "B. All developments proposed in or near (within 100
14 feet) of natural wetlands shall be designed to:

15 "1. Preserve functions of groundwater recharge,
16 water storage, turbidity reduction, nutrient
17 filtration, biologic or botanical production and
18 protective habitat cover.

19 "2. Provide compatibility with the continued
20 performance of wetlands functions....

21 "4. Maintain the runoff coefficient and erosion
22 equilibrium for lands bordering the wetland
23 substantially the same as if such lands were
24 undeveloped."

25 Intervenors argue that this section requires a careful analysis
26 of the characteristics of the wetland to insure this project
will meet the above quoted requirements. The county has not
made this analysis, according to intervenors. Further, ZDO
1011.03C requires preservation "to the maximum extent possible"

1 of all wetlands recharge areas. ZDO 1011.02(B)(2)(d). Here,
2 there are no findings on the location or extent of wetlands
3 recharge areas on site.

4 The county order says there will be no development within
5 100 feet of natural wetlands. It may be, therefore, that ZDO
6 1002.06 does not apply in this case. However, should the
7 county on remand find that the "log pond" mentioned under
8 assignment of error no. 1 is indeed a wetland, ZDO 1002.06 does
9 come into play in which case the county must make a finding
10 showing compliance with this section.

11 We also agree that the county has an obligation to address
12 ZDO 1011.03(C) requiring preservation of wetland recharge
13 areas. It may be that there are no recharge areas, but that is
14 not clear from the findings before us.

15 This matter is remanded to Clackamas County for further
16 proceedings not inconsistent with this opinion.

FOOTNOTES

1
2
3 1
4 ZDO 1002.06(B), 1 through 4, requires all developments
5 proposed in or near (near meaning 100 feet) natural wetlands
6 shall be designed to:

- 7 "1. Preserve functions of groundwater recharge, water
8 storage, turbidity reduction, nutrient filtration,
9 biologic or botanical production, and protective
10 habitat cover.
- 11 "2. Provide compatibility with the continued performance
12 of wetland functions, such as:
- 13 "a. Conservation of soil, vegetation, water, fish and
14 wildlife.
- 15 "b. Low intensity, 'dispersed' outdoor recreation
16 (hiking, nature study).
- 17 "c. Utility easements, but only on peripheral areas
18 and where alternative alignments are impractical.
- 19 "3. Eliminate the need for filling, dumping and/or
20 excavating in the wetland proper, unless approved
21 pursuant to subsection 1001.04.
- 22 "4. Maintain the runoff coefficient and erosion
23 equilibrium for lands bordering the wetland
24 substantially the same as if such lands were
25 undeveloped. Pier construction, elevated pedestrian
26 boardwalks, semi-impervious surfacing, bridging of
natural drainageways, and retention of vegetation in
areas not intended for buildings or roads are
recommended design methods."

27 2
28 We note the design criteria in ZDO 1002.06(B) apply only
29 when development is to occur within 100 feet of a "natural
30 wetland." Perhaps the presence of this pond, whether natural
31 or not is of no real consequence because development may not
32 take place within the 100 foot boundary. If true, the county
33 needs to so find, however.

1
3

2 Section 1000 includes development standards for
3 "development of property and associated facilities within the
unincorporated area of Clackamas County." ZDO 1001.01.

4
4

5 This statement is part of testimony before the county
6 hearings officer.

7
5

8 The "commitment" is relayed in testimony before the county
9 hearings officer. We are not cited to any direct evidence of
such a commitment.

10
6

11 We note ZDO 1204.06(B) allows for the planning director to
12 condition an approval on "county approval of a subsurface
13 sewage disposal system." We believe this provision is usable
only when the feasibility of such a subsurface sewage disposal
unit developments.

14
7

15 We believe we have discussed the adequacy of the county's
16 findings regarding utilities in assignment of error no. I(C).
We will not discuss petitioner's remaining claims of error in
individual findings and conclusions.

17
8

18 ZDO 1013.02(A) provides that a planned unit development may
19 be established on land which is "suitable for and of sufficient
20 size to be planned and developed in a manner consistent with
the purposes and objectives of this section." Under ZDO
21 1013.01, the purpose of a planned unit development includes,
among other things, the purpose of allowing flexibility of
22 design considering geography and topography. We fail to see
how an application can be made which allows the county to
23 determine compliance with these provisions without knowing,
generally, that a storm system is indeed feasible. We note, in
24 this regard, ZDO 1013.07(N) which requires a drainage statement
be included in the application showing water courses on it and
abutting the property and

25 "approximate location of areas subject to inundation
26 of storm water overflow, or all areas covered by

1 water, and the approximate location, width, and
2 direction of flow of all water courses. Direction of
3 drainage on proposed streets shall be indicated."

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26