

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEAL **MAY 13 3 44 PM '88**

OF THE STATE OF OREGON

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2
3 RAY BARBEE and SUSIE BARBEE,)
4 Petitioners,)
5 vs.)
6 JOSEPHINE COUNTY,)
7 Respondent,)
8 and)
9 BILLY G. and ESTHER M. BLAKELY,)
10 Intervenors-)
11 Respondent.)

LUBA No. 88-004

FINAL OPINION
AND ORDER

11 Appeal from Josephine County.

12 Ray Barbee and Susie Barbee filed a petition for review and
13 argued on their own behalf.

14 No appearance by Josephine County.

15 Billy G. Blakely and Esther M. Blakely filed a response
16 brief and argued on their own behalf.

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

19 REMANDED

05/13/88

20 You are entitled to judicial review of this Order.
21 Judicial review is governed by the provisions of ORS 197.850.
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1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioners appeal the Josephine County Board of
4 Commissioners' (board of commissioners') December 20, 1987
5 decision approving a final plat for a land partition.

6 FACTS

7 In 1985, the county granted tentative plan approval for
8 intervenors'-respondent (respondents') proposed major
9 partition. The order granting tentative plan approval was
10 appealed to LUBA by the petitioners in this proceeding, but
11 that appeal was later dismissed at the request of petitioners.
12 Barbee v. Josephine County (LUBA No. 85-029, July 25, 1985).

13 The county's March 27, 1985 order granting tentative plan
14 approval imposed the following condition:

15 " * * * A dust free maintenance be implemented on
16 the road to control the dust problem." Record 65.

17 On June 28, 1987, respondents requested, by letter, that
18 the board of commissioners clarify the above-quoted condition.
19 In their request for clarification, respondents stated they
20 understood the above condition to impose a responsibility to
21 keep the road dust free only during construction.¹

22 On June 29, 1987, petitioners sent the county planning
23 department a letter concerning the disputed road.²

24 Petitioners received a response, dated July 1, 1987, from the
25 county planning department as follows:

26 "In response to your letter of June 29, 1987, the
Planning Commission approved a twelve month extension

1 to January 23, 1988 for the Blakely Major Partition.
2 At this time the Final Plat will be due and the road
3 will need to meet County and any conditions (i.e. dust
4 control). In lieu of construction a cash bond could
5 also be presented and if approved could extend the
6 construction past January 23, 1988.

7 "In summary, the conditions imposed by the Planning
8 Commission do not have to be addressed until the Final
9 Plat is submitted. That date has been extended to
10 January 23, 1988." Record 43. (Emphasis added.)

11 By a memorandum dated July 16, 1987, the board of
12 commissioners advised the county public works director:

13 "There has been some question regarding what the Board
14 of Commissioners meant by a 'dust free' road
15 concerning the Blakely Minor [sic Major] Land
16 Partition.

17 "It is this Board's decision that dust free meant
18 during construction. The road would be required to
19 meet the standards as discussed by the on-site
20 engineer; that is, this road would not require oil and
21 rock surface, but a rock surface." Record 19.

22 The county planning commission subsequently approved the
23 final plat, and on December 30, 1987, the board of
24 commissioners conducted a hearing on the requested final plat
25 approval. At that hearing, petitioners objected that the
26 county's interpretation of the condition requiring a dust free
road was incorrect and that the final plat could not be
approved until a "dust free maintenance [was] implemented" as
required by the condition. Record 9.

The board of commissioners reiterated its interpretation of
the "dust free" condition to apply only during construction and
approved the final plat.

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1 FIRST AND FOURTH ASSIGNMENTS OF ERROR

2 Under the first and fourth assignments of error,
3 petitioners note the county's March 27, 1985 tentative plan
4 approval, which imposed the disputed dust free maintenance
5 condition, is final and not before LUBA. Petitioners argue
6 that when the county failed to require respondents to construct
7 a dust free road prior to final plat approval, the county
8 either (1) interpreted the condition in a way that is neither
9 reasonable nor supported by substantial evidence in the record
10 or (2) amended the condition without following applicable
11 procedures.

12 The Josephine County Subdivision Ordinance (ordinance),
13 requires road improvements to be completed, or an agreement to
14 make required improvements to be submitted, before final plat
15 approval. Ordinance sections 2.20 and 5.06. In addition, we
16 understand the ordinance to provide a final plat may not be
17 approved until conditions of tentative plan approval are met.
18 Id. section 5.07.³

19 The ordinance apparently permits partitions such as the one
20 proposed by respondents to be served by a gravel surface
21 road.⁴ However, petitioners argue the disputed condition
22 requires a dust free road, rather than the gravel surface road
23 that would otherwise be permissible, and the county erred by
24 approving the final plat when the dust free condition was not
25 satisfied.

26 The question presented in these two assignments of error is

1 relatively straightforward. In reaching its decision the board
2 of commissioners embraced the interpretation it previously
3 stated in its July 16, 1987 memo, viz., the 1985 condition only
4 requires a dust free condition to be maintained during
5 construction. We must determine whether that interpretation is
6 correct. If the board of commissioners' interpretation is
7 correct, its decision to approve the final plat is not
8 defective as petitioners allege. However, if its
9 interpretation is incorrect, as petitioners allege, the board
10 of commissioners erred when they approved the plat without
11 requiring dust free maintenance to continue after road
12 construction.

13 The parties apparently believe the condition, "a dust free
14 maintenance be implemented on the road to control the dust
15 problem," is ambiguous. We agree. In such situations we
16 generally defer to the local government's interpretation, as
17 long as that interpretation is reasonable. Alluis v. Marion
18 County, 64 Or App 478, 481, 668 P2d 1242 (1983); Bienz v. City
19 of Dayton, 29 Or App 761, 777, 566 P2d 904, rev den 280 Or 171
20 (1977); Cook v. Yamhill County, 13 Or LUBA 137 (1985).

21 However, as the Court of Appeals recently made clear,
22 interpretation of ambiguous code provisions is a question of
23 law which LUBA reviews for correctness. McCoy v. Linn County,
24 90 Or App 271, ___ P2d ___ (1988); Gordon v. Clackamas County,
25 73 Or App 16, 21, 698 P2d 49 (1985). While McCoy and Gordon
26 both dealt with interpretations of land use regulations, the

1 same scope of review applies when the applicable standard being
2 interpreted is a condition previously imposed by county order
3 on a tentative plan approval, i.e., we review the county's
4 interpretation of the condition to see if it is correct. See
5 Meyer v. City of Portland, 7 Or LUBA 184, 206 (1983), aff'd 67
6 Or App 274, 678 P2d 741, rev den 297 Or 82 (1984). While we
7 accord the county's interpretation of the condition deference
8 where appropriate, we may not defer to an interpretation that
9 does violence to the terms of the condition. Fifth Avenue
10 Corporation v. Washington County, 282 Or 591, 599-600, 581 P2d
11 50 (1974).

12 The county's condition simply requires implementation of a
13 "dust free maintenance". The condition does not say how this
14 obligation is to be satisfied. Neither does it indicate for
15 how long the dust free maintenance is to be implemented.

16 As petitioners point out, the dictionary definition of
17 "maintenance"⁵ does not suggest an obligation that terminates
18 when construction is completed. In addition, when the county
19 uses the term "maintenance" in the section of the ordinance
20 establishing road standards, the maintenance obligation it
21 discusses clearly continues after initial construction. For
22 example, ordinance section 2.28 requires agreements for
23 maintenance of improvements to be enforceable by abutting
24 property owners and "their successors" for certain restricted
25 residential roads. Finally, our review of the board of
26 commissioners' 1985 decision discloses nothing to suggest the

1 dust free maintenance condition applied only during road
2 construction. Record 58-66.

3 We conclude the county's interpretation of the condition to
4 impose a requirement for dust free maintenance only during
5 construction is incorrect. It is possible that the board of
6 commissioners meant to say, in its 1985 decision, that dust
7 free maintenance was to be implemented during construction
8 only. However, the county's clarification in 1987 of what it
9 meant to say in 1985 is of no value. Defazio v. WPSS, 296 Or
10 550, 561, 679 P2d 1316 (1984); Fred Meyer v. Bureau of Labor,
11 39 Or App 253, 262, 592 P2d 564, rev den 287 Or 129 (1979).
12 1000 Friends v. Wasco County Court, (LUBA No. 81-132, September
13 30, 1983) slip op. at 25. The county is bound by what it said,
14 not by what it now says it meant to say.⁶

15 If respondents are to be permitted to construct and utilize
16 a road that will not receive dust free maintenance after the
17 initial construction is complete, the condition of tentative
18 plan approval must be amended, following any procedures
19 applicable to such amendments. We conclude the condition
20 imposes a continuing obligation to maintain a dust free road,
21 and under ordinance section 5.07 the county was required to
22 assure that obligation was, or would be, met prior to final
23 plat approval.

24 The first and fourth assignments of error are sustained.
25 Because we sustain these two assignments of error, the county's
26 decision must be remanded.

1 SECOND ASSIGNMENT OF ERROR

2 Petitioners argue the board of commissioners' July 16, 1987
3 memorandum improperly amended the condition requiring a dust
4 free maintenance without following required notice and hearing
5 procedures.

6 In our view, the July 16, 1987 memorandum is simply an
7 incorrect interpretation of the condition rather than an
8 attempt to amend the disputed condition. Even if the July 16,
9 1987 memo were a land use decision subject to our review, ORS
10 197.830(7) requires a notice of intent to appeal a land use
11 decision to be filed within 21 days after the decision becomes
12 final. The petitioners failed to file a notice of intent to
13 appeal the July 16, 1987 memorandum within the required 21 days.

14 The second assignment of error is denied.

15 THIRD ASSIGNMENT OF ERROR

16 Under this assignment of error, petitioners argue they
17 relied on the 1985 dust free road maintenance condition and say
18 they never would have dismissed their earlier LUBA appeal had
19 they known the board of commissioners later would interpret
20 that condition not to require ongoing maintenance of a dust
21 free road.

22 We have already concluded the county incorrectly
23 interpreted the disputed condition. Under
24 ORS 197.835(8)(a)(D), that is a sufficient basis for remanding
25 the final plat approval without a showing that petitioners were
26 prejudiced by the decision. We find nothing in this assignment

1 of error that provides an additional basis for remand.

2 The third assignment of error is denied.

3 FIFTH ASSIGNMENT OF ERROR

4 Under this assignment of error, petitioners argue that the
5 record does not contain substantial evidence that the road, as
6 constructed, will not be dusty.

7 We do not understand the county's decision to conclude that
8 the gravel road, as constructed, will not be dusty. While
9 respondents contend that dust was controlled during
10 construction by applying water to the road's surface, we do not
11 understand respondents to argue that gravel roads are not
12 dusty, absent measures to control dust. Rather, the county and
13 respondents take the position the 1985 condition does not apply
14 after construction of the road is complete.

15 Petitioners' fifth assignment of error provides no
16 additional basis for remand.

17 The fifth assignment of error is denied.

18 SIXTH ASSIGNMENT OF ERROR

19 Petitioners argue the county failed to set forth findings
20 of fact justifying its interpretation of the 1985 dust free
21 maintenance condition.

22 While we conclude under the first and fourth assignments of
23 error the county incorrectly interpreted the disputed
24 condition, we are unaware of any requirement that the county's
25 interpretation be supported by findings of fact. See Benjamin
26 Franklin Dev. v. Clackamas Co., 14 Or LUBA 758, 761 (1986);

1 Hightower v. Curry County, 15 Or LUBA 159, 162 (1986).

2 Petitioners do not explain what findings of fact allegedly are
3 required to support county interpretation of the meaning of the
4 disputed condition.

5 The sixth assignment of error is denied.

6 SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR

7 In these assignments of error petitioners argue the county
8 did not show it lacked authority to require respondents to
9 construct a road with a dust free surface. Petitioners further
10 argue the record in this proceeding is sufficient to determine
11 the types of surfaces that would be dust free.

12 The board of commissiioners did not base its decision on a
13 lack of authority to impose the requirement petitioners seek.
14 Rather, the county interpreted the condition it imposed in 1985
15 not to require a dust free surface. Therefore, the county's
16 failure to discuss its authority to impose a continuing
17 requirement for a dust free road is irrelevant. In this
18 circumstance, no purpose would be served by our reviewing the
19 record to determine whether there is sufficient evidence to
20 support a determination of what types of surfaces would be dust
21 free.

22 The seventh and eighth assignments of error are denied.

23 The county's decision is remanded.
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FOOTNOTES

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The relevant portion of respondents' request for clarification is as follows:

"I am requesting clarification concerning [sic] my responsibility to provide a dust free condition for Kira Lane a restricted residential road that I am in the process of constructing at this time.

"It was my belief during The Board of Commissioners hearing in March, 1985 that my responsibility was to keep the road dust free during construction which is being done.

"This road will be covered with shale and 3/4 minus gravel to county requirements. I feel this will be adequate to control the dust." Record 39.

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The letter stated in pertinent part:

"Please be advised that the proposed road 'Kira Lane', which will serve the Blakely Major Partition located in map 35-6-18, must meet additional construction requirements to meet the Commissioners condition as set forth in the attached copy of the Commissioners decision. The final approved Plat must also contain a road maintenance provision that will comply with the condition." Record 42.

3

Ordinance Section 5.07 provides in pertinent part:

"* * * the final plat or map shall not be approved by the Board of Commissioners until the Board is satisfied that all applicable state and local regulations and conditions have been satisfied. * * *"

4

The disputed road is classified as a "restricted residential" road under the ordinance. Ordinance section 1.06(43)(e). While "rural" and "urban" road standards in the ordinance require surface types that we assume are dust free, restricted residential roads may be constructed with a gravel surface. Ordinance section 2.28, Table III. The parties agree that gravel surface roads are not dust free.

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In relevant part, the term is defined in Webster's New International Dictionary, 1362 (3d ed 1968), as follows:

"* * * the labor of keeping something (as buildings or equipment) in a state of repair or efficiency * * *."

6
Petitioners call our attention to respondents' brief in the prior appeal of the county's 1985 decision, in which respondents appear to admit the condition imposes a requirement for a dust free maintenance after construction. The respondents' brief in that proceeding is not part of the record in this proceeding. Even if it were, post decision statements of respondents, like those of the planning department and county commissioners, are of no value in determining the meaning of the condition. See Murphy v. Nilsen, 19 Or App 292, 296, 527 P2d 736 (1974).