

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

AUG 24 2 39 PM '88

CORNELL PARK ASSOCIATES,

Petitioner,

vs.

WASHINGTON COUNTY,

Respondent,

and

C. M. GENERAL CONTRACTING, INC.,

Intervenor-Respondent.

LUBA No. 88-032

FINAL OPINION
AND ORDER

Appeal from Washington County.

Jack L. Orchard, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Ball, Janik & Novack.

Cheyenne Chapman, Hillsboro, filed a response brief and argued on behalf of respondent.

Paul R. Hribernick and Steven R. Schell, Portland, filed a response brief on behalf of intervenor-respondent. With them on the brief was Rappleyea, Beck, Helterline, Spencer & Roskie. Paul R. Hribernick argued on behalf of intervenor-respondent.

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

AFFIRMED

08/24/88

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals Washington County Resolution and Order
4 No. 88-73 granting development review approval for a
5 contractor's service and storage yard with related offices on a
6 6.18 acre site zoned Industrial (IND).

7 MOTION TO INTERVENE

8 C. M. General Contracting, Inc. moves to intervene on the
9 side of respondent in this proceeding. There is no opposition,
10 and we allow the motion.

11 FACTS

12 The 6.18 acre parcel that is the subject of this appeal
13 adjoins N.W. Cornell Road. Washington County's Transportation
14 Plan, an element of its comprehensive plan, designates the
15 portion of Cornell Road adjoining the subject property as a
16 "corridor study area." Transportation Plan, Figure 10. The
17 county has approved, but has not yet implemented, a realignment
18 of this section of Cornell Road 500 feet to the north.

19 The property contains two single family residences
20 adjoining N.W. Cornell Road. These existing dwellings are
21 proposed to be remodelled into offices.

22 In June 1987, intervenor-respondent C. M. General
23 Contracting, Inc. (respondent) submitted a development review
24 application to the Washington County Department of Land Use and
25 Transportation (DLUT) for a concrete batch plant, contractor's
26 storage and service yard and related offices. This application

1 was handled by the county as a Type III action.¹

2 In the fall of 1987, respondent obtained a temporary permit
3 from the county for a contractor's service and storage yard on
4 the subject property. On October 2, 1987, respondent informed
5 the county that it wished to modify its original application by
6 removing the contractor's yard and related offices. On October
7 5, 1987, respondent filed a separate application for
8 development review approval of a contractor's yard and related
9 offices on the subject property. This application was handled
10 by the county as a Type II action.²

11 Petitioner appealed the approval of the Type II application
12 by the DLUT director to the Hearings Officer. Petitioner then
13 appealed the Hearings Officer's approval to the board of
14 commissioners, which upheld the Hearings Officer's decision.
15 This appeal followed.

16 FIRST ASSIGNMENT OF ERROR

17 "Washington County failed to follow the appropriate
18 procedure in allowing the applicant to withdraw its
19 original application and sever the Contractor's
20 Establishment from consideration with the concrete
batch plant, thereby avoiding consideration of the
entire project under a Type III process."

21 A. Use of Type II Process

22 Petitioner argues that respondent's proposal is a single,
23 integrated project, composed of a concrete batch plant and the
24 transportation, storage and office facilities necessary for its
25 efficient functioning. Petitioner claims the county should not
26 have allowed respondent to separate its proposed project into

1 two land use applications. Petitioner contends the county
2 violated CDC 202-5.1 by allowing the contractor's yard and
3 related offices to be approved through a separate, Type II
4 action.³ According to petitioner, under CDC 202-5.1

5 "any doubts about whether the Contractor's
6 Establishment was an independent use constituting a
7 separate land use function, or whether it is to be
8 part of the batch plant operation, are to be resolved
by having the matter processed as a Type III action."
Petition for Review 10.

9 Petitioner claims that permitting the contractor's yard and
10 related offices to be reviewed and approved separately, as a
11 Type II action, prejudiced petitioner's right to have a full
12 review made of the contractor's yard, lessened the opportunity
13 for effective comment and consideration of the application, and
14 allowed respondent to add to the record an "enormous amount" of
15 information not submitted prior to the DLUT director's approval
16 of the contractor's yard. Petitioner contends Type II
17 standards are "less rigorous" than Type III standards.
18 Petition for Review 9, 11.

19 The county and respondent reply that the acknowledged CDC
20 clearly specifies that a contractor's establishment is a Type
21 II use in the IND zone and a batch plant is a Type III use in
22 the IND zone.⁴ Respondent points out that CDC 202 (Procedure
23 Types and Determination of Proper Procedure) specifically
24 provides that uses identified in the CDC as Type II are to be
25 classified and processed as Type II uses (CDC 202-2.2.A), and
26 uses identified in the CDC as Type III are to be classified and

1 processed as Type III uses (CDC 202-3.2.A). The county and
2 respondent contend that CDC 202-5.1 applies only when uses are
3 not specifically identified in the CDC as to type and,
4 therefore, does not apply in this case. They assert the
5 county's interpretation of its code is correct and should be
6 upheld.

7 The county and respondent argue further that neither ORS
8 215.416(2) nor the CDC require that applications concerning
9 separate uses of the same property be consolidated, or that
10 every portion of an application be subjected to the highest
11 level of review required for some portion of the
12 application.⁵ The county and respondent also contend that
13 the contractor's yard and related office buildings are clearly
14 not inextricably intertwined with the proposed concrete batch
15 plant, as the contractor's yard currently is operating
16 independently on the subject property, under a temporary permit.

17 The county's interpretation of the relevant provisions of
18 CDC 202 (Procedure Types and Determination of Proper Procedure)
19 is reasonable and correct. See McCoy v. Linn County, 90 Or App
20 271, 275, ___ P2d ___ (1988). Uses identified in the CDC as
21 being allowable in a particular district through a specific
22 procedure type are required to be processed as that procedure
23 type. CDC 202-1.2.A, 202-2.2.A, 202-3.2.A. It is only when
24 the CDC does not identify a proposed use as being allowable in
25 a particular district through a specific procedure type that
26 CDC 202-5.1 comes into play and allows the DLUT director

1 discretion to make a determination as to which procedure type
2 is to be followed. In such instances, CDC 202-5.1 provides
3 that doubt as to the correct procedure type shall be resolved
4 in favor of the type providing the greatest notice and
5 opportunity to participate.

6 In this case, the CDC clearly identifies the procedure type
7 to be applied for the proposed uses in the IND zone. It states
8 that contractor's equipment and accessory offices may be
9 allowed in the IND zone through a Type II procedure. CDC
10 320-3.1.A and 320-3.9.C. We are cited no statute or ordinance
11 provisions which would require the county to consolidate this
12 Type II application with the Type III application for a
13 concrete batch plant on the same property or, if it did so, to
14 apply other than Type II standards and procedures to approval
15 of the contractor's yard and related offices. The county did
16 not commit error in handling respondent's application for a
17 contractor's yard and related offices in the IND zone through
18 the Type II procedure.⁶

19 This subassignment of error is denied.

20 B. Withdrawal/Modification of Type III Application

21 Petitioner also argues that allowing the contractor's yard
22 and related offices to be deleted from the original application
23 did not comply with the process of CDC 203-1.3 for withdrawals
24 of applications.⁷ According to petitioner, there is no
25 evidence that a request for withdrawal of the original
26 application was ever made, and plan and CDC violations "are

1 present in this instance because of the project's direct access
2 onto a local street." Petition for Review 11.

3 Respondent argues, in the alternative, (1) the original
4 application was not withdrawn, but rather was modified; and (2)
5 if it was withdrawn, the requirements of CDC 203-1.3 for
6 withdrawals of applications were met.

7 On October 2, 1987, the applicant advised the county it
8 wished "to modify the [original June, 1987] application by
9 removal of the contractor's storage yard and related offices
10 from the concrete batch plant portion of the application."
11 Record 352. Following the applicant's request, the county
12 proceeded with the batch plant portion of the June, 1987
13 application and made a decision, which became final in
14 February, 1988, approving the application as modified. As
15 noted in footnote 2, supra, that decision was not appealed to
16 LUBA.

17 The subject of this appeal is the county's decision on the
18 application for a contractor's yard and related offices which
19 was filed on October 5, 1987. This appeal is not concerned
20 with whatever action or actions the county took on the
21 application for a concrete batch plant, contractor's yard and
22 related offices which was filed in June, 1987 and modified in
23 October, 1987. The notice of intent to appeal in this case did
24 not identify that earlier application as a subject of this
25 appeal and was not filed within 21 days of when the county's
26 decision on that application became final. City of Corvallis

1 v. Benton County, ___ Or LUBA ___ (LUBA No. 87-115, March 21,
2 1988).

3 This subassignment of error is denied.

4 The first assignment of error is denied.

5 SECOND ASSIGNMENT OF ERROR

6 "Washington County approved the applicant's
7 Contractor's Establishment in violation of the
8 County's Comprehensive Plan policy and Transportation
Plan policy which limit development along local
streets to residential uses."

9 Petitioner argues that the county transportation report in
10 the record recognizes the portion of N.W. Cornell Road
11 adjoining the subject property as a local street. Record 78.
12 According to petitioner, Comprehensive Framework Plan (plan)
13 Policy 32⁸ and unspecified performance criteria of Article IV
14 (Development Standards) of the CDC allow access onto a local
15 street only from residential uses. As the only access to the
16 proposed contractor's yard and offices will be from a "local
17 street," petitioner concludes that the proposed industrial
18 development is prohibited by this plan policy.

19 Respondent replies that petitioner is precluded from
20 raising this issue in its appeal by ORS 197.762,⁹ CDC 209-3.4
21 and CDC 209-5.2¹⁰ because petitioner did not specifically
22 raise the local street issue in either of the petitions for
23 review it filed before the county. However, respondent does
24 admit that petitioner referred to the "local street issue" in
25 its presentation before the board of commissioners.
26 Intervenor-Respondent's Brief 14.

1 Respondent also argues that the plan implementation
2 strategy definition of "local streets" on which petitioner
3 relies merely encourages the pursuit of certain objectives, but
4 is not a regulatory standard for the appealed decision.
5 Respondent points to the use of the words "intended" and
6 "should" in the definition, and cites McCoy v. Tillamook
7 County, 14 Or LUBA 108, 118 (1985); Semler v. City of
8 Portland, ___ Or LUBA ___ (LUBA No. 87-081, December 21, 1987)
9 slip op. at 4-6; and Downtown Community Association v. City of
10 Portland, 14 Or LUBA 382, rev'd 80 Or App 336, 722 P2d 1259
11 (1986). Respondent argues that petitioner's interpretation is
12 unreasonable. Since residential development is not permitted
13 in the IND zone, under petitioner's interpretation no
14 development could ever be permitted on a "local street" in the
15 IND zone.

16 CDC 209-3.4 and 209-5.2 might have provided a basis for
17 refusing to allow petitioner to raise the "local street issue"
18 before the local governing body if petitioner had not
19 identified this issue as grounds for appeal in its petitions
20 for review below. However, respondent admits that the "local
21 street issue" was raised before the governing body, and does
22 not argue that the governing body rejected this testimony
23 because the issue was not raised in the petitions for review.
24 Respondent does not identify any statutory or code provisions
25 which have the effect of limiting our review to issues raised
26 in a petition for review to a local governing body under these

1 circumstances. Cf. McNulty v. City of Lake Oswego, 14 Or LUBA
2 366, 369-370, aff'd without opinion, 83 Or App 275 (1986).

3 ORS 197.762 can have the effect of precluding a petitioner
4 from raising a particular issue in an appeal to this Board only
5 if the issue was not raised before the local governing body, or
6 at least was not raised with sufficient specificity to allow
7 the governing body an adequate opportunity to respond.
8 Therefore, ORS 197.762 does not apply in this case, and
9 petitioner is not precluded from raising the "local street
10 issue" in this appeal.

11 We cannot determine from the county's plan documents and
12 the decision appealed in this case whether the county has
13 designated the subject portion of NW Cornell Road as a "local
14 street." The county's description of its functional
15 classification system states the accompanying maps present the
16 functional classifications for major collectors and arterials,
17 and "lesser roadways will be defined through the community plan
18 and land development processes." Transportation Plan, p.23.
19 Thus, the Functional Classification System Map in the
20 Transportation Plan simply shows that NW Cornell Road from
21 186th Avenue to Cornelius Pass Road is not designated as a
22 major arterial, minor arterial or major collector. It does not
23 determine whether it is designated as a minor collector, local
24 street, commercial/industrial street or transit street.¹¹

25 However, it is not necessary for us to determine the
26 functional classification of this portion of NW Cornell Road in

1 order to dispose of this assignment of error. Even if NW
2 Cornell Road were designated as a "local street," the plan
3 provisions cited by petitioner would not have the effect of
4 prohibiting the county from allowing access onto the road from
5 respondent's industrially zoned property.

6 The implementing strategies cited by petitioner state that
7 a local street "is intended to" provide direct property access
8 in residential areas, and that development along local streets
9 "should" be restricted to residential uses. Provisions worded
10 in this manner encourage the pursuit of certain objectives and
11 discourage certain actions by the county, but are not mandatory
12 limitations on the county's ability to approve access onto
13 local streets. See Foster v. City of Astoria, ___ Or LUBA ___
14 (LUBA No. 88-030/88-031, August 15, 1988), slip op. at 16-17;
15 McCoy v. Tillamook County, 14 Or LUBA 108, 118 (1985); Downtown
16 Community Association v. City of Portland, 80 Or App 336, 722
17 P2d 1259, rev den 302 Or 86 (1986).

18 The second assignment of error is denied.

19 THIRD ASSIGNMENT OF ERROR

20 "Cornell Road in its present location functions as a
21 minor arterial. The County's conditions and the scope
22 and intensity of the applicant's development disregard
23 the actual functioning of Cornell Road and violate the
standards relating to access to minor arterials, as
well as the minor arterial standards set by the
County's Development Code."

24 Petitioner argues that since (1) the county transportation
25 report recognizes that NW Cornell road currently functions as a
26 minor arterial, and (2) there is no plan for the implementation

1 of the proposed realignment, the county must either condition
2 the appealed development approval on bringing NW Cornell Road
3 into compliance with minor arterial standards (which was not
4 done), or require respondent to find other access to its site.
5 Petitioner further argues that because NW Cornell Road
6 functions as a minor arterial, CDC 501-5.3.B(4)(a)¹²
7 prohibits direct access onto it from the subject property.

8 Respondent once again argues that petitioner is precluded
9 from raising this issue by ORS 197.762, CDC 209-3.4 and CDC
10 209-5.2. Respondent also argues that the Transportation Plan
11 Map clearly shows that the relevant portion of N.W. Cornell
12 Road is designated as a local street, and there is no provision
13 in the plan or CDC which imposes different standards because a
14 road is "functioning" at a different level than its actual
15 designation. Respondent also challenges petitioner's assertion
16 that the record shows that Cornell Road is functioning as a
17 minor arterial, contending that the county's traffic analyst
18 later retracted that statement.

19 As was dicussed under the second assignment of error,
20 supra, the subject portion of NW Cornell Road is not designated
21 by the county as a minor arterial. Petitioner has presented no
22 other legal basis, and we are aware of none, for concluding
23 that county plan or CDC standards for minor arterials apply to
24 this section of NW Cornell Road.

25 The third assignment of error is denied.

26 The county's decision is affirmed.

FOOTNOTES

1
2
3 1
4 The Washington County Community Development Code (CDC)
5 classifies all land use actions as either Type I, II, III or
6 IV. CDC 202. The CDC sets out procedures and criteria for
7 processing each type of action. CDC 203-209.

8
9 2
10 The county's separate decision approving the modified
11 application for a concrete batch plant as a Type III action was
12 not appealed to LUBA.

13
14 3
15 CDC 202-5.1 provides:
16
17 "The Director shall determine whether an application
18 or decision is a Type I, II or III action in
19 accordance with the standards set forth above.
20 Questions as to the appropriate procedure shall be
21 resolved in favor of the Type providing the greatest
22 notice and opportunity to participate. The decision
23 of the Director is not subject to appeal on its own,
24 but may be alleged as an error in an appeal of the
25 decision on the proposed development. Upon appeal of
26 the decision on the merits of a development action not
27 specifically classified in this Code, the appeals
28 authority may determine, based on the standards set
29 forth in Section 202 that a different procedure type
30 should have been used and direct that the proposed
31 development action be processed accordingly."

32
33 4
34 CDC 320-3 identifies uses permitted through a Type II
35 procedure as including:

36 "320-3.1 Accessory uses to a principal use.

37 "The following are allowed as accessory to uses
38 permitted:

39 "A. Administrative, office, recreation,
40 educational or other related activities

41 " * * * * *

42 "320-3.9 Processing and Storage

1 " * * * * *

2 "C. Contractors equipment, house mover, delivery
3 vehicles, transit storage, trucking terminal
4 and used equipment in operable condition

5 " * * * * *

6 CDC 320-4 identifies uses permitted through a Type III
7 procedure as including:

8 "320-4.4(A) Aggregate products:

9 "(1) Concrete mixing plant; manufacture of
10 concrete products; crusher, stone or rock;
11 manufacture of cement

12 " * * * * *

13 -----
14 5 ORS 215.416(2) provides:

15 "The governing body shall establish a consolidated
16 procedure by which an applicant may apply at one time
17 for all permits or zone changes needed for a
18 development project. * * * The consolidated
19 procedure shall be available for use at the option of
20 the applicant * * *

21 -----
22 6 Since we conclude that the county did not commit error
23 in this regard, we need not consider petitioner's
24 arguments that its substantial rights were prejudiced by
25 the alleged error.

26 -----
27 7 CDC 203-1.3 provides:

28 "The Director may withdraw any application or petition
29 for review at the request of the applicant or
30 petitioner. Once accepted as complete, however, the
31 applicant or petitioners shall be entitled to withdraw
32 by right only if the Director determines that:

33 "A. Written consent to withdraw an application has
34 been obtained from a majority of the owners or
35 contract purchasers or the majority interest
36 holders in the property, or all signers of the

1 petition for review;

2 "B. No existing violation of this Code or the
3 Comprehensive Plan, which might best be cured by
4 further processing the application, have been
5 identified on the subject property."

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

8

Plan Policy 32 states:

"It is the policy of Washington County to provide a balanced transportation system which combines land uses with the appropriate levels and types of transportation services necessary to accommodate the full implementation of the comprehensive plan."

The implementing strategies accompanying plan Policy 32 state that the county will adopt transportation functional classification definitions, including the following definition for "local streets":

"Local Streets: (Example: Sugar Plum Lane)

"Functional Purpose: A Local Street is intended to provide direct property access in residential areas. A Local Street is not intended to serve through traffic.

"Design Considerations: A Local Street will be two lanes wide with or without parking. It will be designed to carry traffic at speeds of 25 miles per hour. Street trees will be provided in the design of a Local Street as well as sidewalks.

"Land Use Considerations: Development along Local Streets should be restricted to residential uses. The combined traffic of such uses should clearly be within acceptable Local Street levels, otherwise Collector standards should apply."

9

ORS 197.762 provides in relevant part:

"The following shall apply to land use hearings on applications for development of property entirely within an urban growth boundary to be conducted by a local governing body:

"(1) An appeal procedure shall:

1 "(a) Require an applicant or appellant to raise any
2 issue before the local governing body with sufficient
3 specificity so as to have afforded the governing body,
4 and applicant, if appropriate, an adequate opportunity
5 to respond to and resolve each issue.

6 " * * * * *

7 -----
8 10

9 These CDC provisions provide in relevant part:

10 "209-3 Petition for Review

11 "A petition for review shall contain the
12 following:

13 " * * * * *

14 209-3.4 The nature of the decision and the
15 specific grounds for appeal. Unless
16 otherwise directed by the appellate
17 authority, the appeal shall be limited
18 to the issue(s) raised in the petition;

19 " * * * * *

20 "209-5 Nature of Hearing

21 " * * * * *

22 209-5.2 B. Review of the final decision of the
23 Director in Type I and Type II actions
24 shall be de novo, except that the
25 issues raised * * * are limited by
26 Section 209-3.4 * * *

 " * * * * *

11 -----
12 11

13 The Sunset West Community Plan Map depicts this portion of
14 NW Cornell Road as a major arterial. However, the text of the
15 community plan states that it "includes functional roadway
16 classifications from the county-wide Transportation Plan."
17 (emphasis added) Thus, both the Transportation Plan and the
18 community plan clearly indicate that it is the county-wide
19 Transportation Plan which controls the designation of arterials
20 and major collectors. We therefore disregard the apparently
21 erroneous depiction of this portion of NW Cornell Road as a
22 major arterial on the community plan map.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

12

CDC 501-5.3.B(4)(a) provides:

"(4) Arterials:

"Only collector and other arterial streets shall be permitted direct access to arterials pursuant to the following:

"(a) Minor Arterials

"A collector or other arterial street will be permitted direct access to a minor arterial, provided that Point 'A' of such access is more than six hundred (600) feet from any intersection Point 'A' or other access to that minor arterial (Point 'C')."