

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS Jul 21 4 17 PM '89

OF THE STATE OF OREGON

ROBERT RANDALL, KATHRYN)
RANDALL, NATHALIE DARCY, DEBBI)
ESTES,)
)
Petitioners,)
)
vs.)
)
WASHINGTON COUNTY,)
)
Respondent,)
)
and)
)
ERIC RYSTADT,)
)
Intervenor-Respondent.)

LUBA No. 89-019

FINAL OPINION
AND ORDER

Appeal from Washington County.

Robert Randall, Kathryn Randall, Nathalie Darcy and Debbie Estes, Portland, filed the petition for review. Nathalie Darcy argued on her own behalf.

No appearance by respondent Washington County.

Eric Rystadt, Portland, filed a response brief and argued on his own behalf.

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

REMANDED

07/21/89

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

1 Opinion by Kellington.

2 NATURE OF THE DECISION

3 Petitioners appeal a decision of the Washington County
4 Board of Commissioners approving a major partition creating
5 three parcels.

6 FACTS

7 Intervenor-respondent (intervenor) applied for a major land
8 partition¹ of a 0.62 acre² parcel on property zoned
9 Residential 5 Units Per Acre (R-5). The partition creates
10 three parcels and a private road.

11 County staff approved the application. Petitioners
12 appealed the staff decision, and a public hearing was held
13 before the Washington County hearings officer. The hearings
14 officer issued a decision denying the application. Intervenor
15 filed an appeal to the Washington County Board of
16 Commissioners. Record 92. The board of commissioners reversed
17 the hearings officer and approved the application. This appeal
18 followed.

19 FIRST ASSIGNMENT OF ERROR

20 "The county acted inconsistently with its acknowledged
21 land use ordinance in failing to apply or comply with
Section 430-72, Infill Policy."

22 SECOND ASSIGNMENT OF ERROR

23 "The county's findings and conclusion with regard to
24 WCCDC Section 430-72 (Infill Policy) are not supported
by substantial evidence in this proceeding."

25 A. Washington County Community Development Code (CDC) 430-72

26 CDC 430-72 is ambiguous. We first address the meaning of,

1 and obligation imposed by, CDC 430-72.³

2 The Washington County Comprehensive Framework Plan (plan)
3 includes the following policy:

4 "INFILL"

5 "It is the policy of Washington County to provide
6 regulations for developing vacant bypassed lands of
7 two acres or less in areas designated R5 and R6. The
8 intent of such regulations shall be to ensure that new
9 development is compatible with the character of
existing developments by establishing a review process
and criteria which emphasize building orientation,
privacy, lot size, buffering, access, and circulation.

10 "Implementation Strategies

11 "The County will:

12 "a. Prepare development regulations with respect to
13 the Infill Policy which addresses the following
14 considerations:

- 15 "1) Notification of surrounding properties,
16 "2) Full parcelization of the subject property,
17 "3) Access, including private access drives
18 built to standards appropriate to the needs
19 of the infill development,
20 "4) Creation of flag lots,
21 "5) Lot area, and
22 "6) Development design, particularly with regard
23 to privacy, buffering, and building
24 orientation." Comprehensive Framework Plan
25 Policy 19.

26 The above infill policy is implemented by CDC 430-72
("Infill"), which provides:

"430-72.1 Intent and Purpose

"The intent of this Section is to provide a
means of developing vacant, by-passed lands
of two (2) acres or less in areas designated

1 R-5 and R-6 by the applicable Community
2 Plans of the Washington County Comprehensive
3 Plan. This Section is intended to insure
4 that new development is compatible with
5 existing developed areas through Development
6 Review that emphasizes building orientation,
7 privacy, lot size, buffering, access and
8 circulation and provides for notification to
9 adjacent property owners.

6 "430-72.2 Applicability

7 "The Infill Section shall apply to all
8 properties designated by the applicable
9 Community Plan as R-5 or R-6 which contain
10 two (2) acres or less (excluding existing
11 rights-of-way).

10 "430-72.3 Development of land required to be processed
11 through the infill provisions shall:

12 "A. Be developed through the requirements
13 of Section 430-45 - Flag Lot and shall
14 consider the intent and purpose of the
15 Infill Section; or

16 "B. Be developed through a subdivision
17 which considers the orientation,
18 landscaping and buffering of uses to
19 provide maximum privacy to surrounding
20 existing and future residential
21 structures." (Emphasis supplied.)

18 The parties agree the above infill provisions apply to the
19 major partition challenged in this appeal.⁴

20 Petitioners assert that the intent and purpose statement
21 for infill development contained in CDC 430-72.1 is a mandatory
22 approval criterion. Petitioners contend that if it is not
23 established that compatibility between the existing and the
24 proposed development is "ensured," the county must deny
25 intervenor's application.

26 Intervenor's position is that the infill provision of

1 CDC 430-72.1 provides factors to be considered in connection
2 with the imposition of conditions, not approval criteria.

3 Accordingly, we first consider whether the infill
4 provisions of CDC 430-72.1 establish mandatory approval
5 criteria or are factors to be considered in connection with the
6 imposition of conditions.

7 We have interpreted sections of the CDC similar to
8 CDC 430-72.1 not to state mandatory approval standards. See,
9 Standard Insurance Company v. Washington County, ___ Or
10 LUBA ___ (LUBA No. 87-020, September 1, 1987), slip op at 4-5
11 (descriptions of characteristics of a zoning district are not
12 approval standards). Of course, the wording of the specific
13 intent and purpose provision and its context, not our decisions
14 concerning other similar CDC sections, determine whether the
15 provision should be interpreted to impose mandatory approval
16 standards.

17 CDC 430-72.2 and 430-72.3 provide that the requirements
18 related to flag lots in CDC 430-45 apply to infill development
19 such as that proposed here, and that the county must consider
20 the statement of intent and purpose in CDC 430-72.1 in
21 processing such infill development requests. Accordingly, the
22 county must consider whether the proposal is compatible with

23 " * * * existing developed areas through Development
24 Review that emphasizes building orientation, privacy,
25 lot size, buffering, access and circulation provides
for notification to adjacent property owners."
CDC 430-72.1.

26 The factors of CDC 430-72.1 are applied primarily⁵

1 through the "flag lot" provisions as required by
2 CDC 430.72.3.⁶ These "flag lot" provisions require the
3 following:

4 "430-45.1 Buildings located on flag lots shall be
5 oriented to provide the maximum privacy to
6 surrounding existing and future residential
7 structures;

8 "430-45.2 Access to all proposed flag lots (including
9 future lots) shall:

10 "A. Be by means of an interior road, either
11 public, or private with a joint
12 maintenance agreement for all parcels
13 receiving the benefit of the access and
14 an access easement extending to the
15 deepest lot for the full width of the
16 frontage requirement;

17 "B. Provide for drainage as set forth in
18 Section 412;

19 "C. Consolidate access onto public streets
20 wherever possible including
21 consolidation of the access of the
22 parent lot.

23 "430-45.3 Landscaping and fencing (buffering) as
24 required through Development Review to
25 ensure that privacy of existing residential
26 structures is maintained." (Emphasis
supplied.)

The above-quoted "flag lot" provisions incorporate most of the
factors specified in the intent and purpose section for infill
development.⁷

We believe that the most reasonable and correct
interpretation of CDC 430-72.3 is that the county must apply
the "flag lot" provisions to proposed infill developments for
the purpose of minimizing the impact of the infill development
on existing dwellings, and so to achieve the purpose of the

1 infill section CDC 430-72.1. We do not interpret the intent
2 and purpose statement of CDC 430-72.1 to create independent
3 approval standards, but rather to be a list of factors which
4 the county must consider in applying CDC 430-45 and which may
5 be applied in connection with its authority to impose
6 conditions pursuant to CDC 202-2.1 and CDC 207-6.1.

7 B. Adequacy of Findings

8 Petitioners attack the following findings adopted by the
9 county addressing CDC 430-72:

10 "9. The board of County Commissioners, finds that the
11 infill policy 430-72 of the C.D.C. is met. The
12 lot sizes are somewhat smaller than some others
13 in the area, however, 7000 square feet [sic] lots
14 are appropriate in this area. To ensure
15 compatibility the applicant shall provide
16 screening in the form of landscaping and/or
17 fencing similar to what is shown on the attached
18 site plat. This will ensure privacy for the
19 existing dwellings in the neighborhood as well as
20 the proposed dwellings.

21 "10. Privacy for the dwelling to the south will be
22 maintained by the existing hedge and additional
23 fencing in the gaps of the hedge." Record 9.

24 According to petitioners, the above findings are inadequate
25 to demonstrate that intervenor's development will be compatible
26 with the surrounding area. Petitioners complain that the
27 county failed to address the impact of the proposed access road
28 on the property to the south. Regarding the site plat referred
29 to in finding 9, quoted supra, petitioners complain

30 "the only fencing indicated [on the plat] is the
31 notation 'fencing to be installed where gaps are in
32 laurel hedge' and the notation on the frontage of the
33 site 'fence to be installed.' No other fencing is
34 evident. No landscaping is indicated whatsoever."

1 Petition for Review 7. (Emphasis in original.)

2 Petitioners also argue the county's conclusion that 7,000
3 square foot lots are appropriate is simply that -- a
4 conclusion. Petitioners argue:

5 "the county has not shown how 7,000 square foot lots
6 are appropriate." Petition for Review 7.

7 Intervenor identifies no additional findings addressing the
8 requirements of CDC 430-72. Intervenor does point to evidence
9 that infill development is occurring in the area. Intervenor
10 also states few trees would be removed and the proposed road
11 would replace an existing circle driveway on the property.
12 Finally, intervenor contends that

13 "it is appropriate for the county to apply conditions
14 of approval to redevelopment proposals such as this
15 one which preserves compatibility through orientation
16 of proposed structures, access, screening and other
17 means, in addition to possible, but not inevitable
18 reductions in density." Intervenor's Brief 4.

19 We note that the county's decision includes a number of
20 conditions from earlier staff reports.⁸ Record 9. The
21 decision also conditions approval on the following:

22 "On the final site plat the applicant shall indicate
23 the location and orientation of the new structures as
24 well any existing or additional landscaping which will
25 keep or maintain privacy for the site and adjacent
26 parcels." Record 10.

 It is apparent to us that the county considered the infill
policy of CDC 430-72.1. It applied conditions in order to
maximize "compatibility" according to CDC 430-72.1. This is
all it was required to do. See Hummel v. City of

1 Brookings, ___ Or LUBA ___ (87-026, August 25, 1987, slip op at
2 17).

3 The first assignment of error is denied.

4 C. Evidentiary Support

5 Petitioners argue that the county's findings that the sizes
6 of the parcels to be created are compatible with the sizes of
7 the parcels in the existing developed area, and that the
8 conditions imposed will ensure privacy, are not supported by
9 substantial evidence.

10 We have concluded in the first assignment of error that the
11 statement of intent and purpose statement in CDC 430-72.1 does
12 not establish mandatory approval criteria. Although the county
13 is required to address those findings, it is not required to
14 prepare findings of fact supported by substantial evidence to
15 show each factor is satisfied or met. Hummell v. City of
16 Brookings, supra, slip op at 18. We will not reverse or remand
17 a decision for failure to adopt or support a finding with
18 substantial evidence, unless the finding is critical to the
19 decision. Bonner v. City of Portland, 11 Or LUBA 40, 52
20 (1984). The county's finding of the outcome of its
21 consideration of the factors in CDC 430-72.1 is not critical to
22 its decision. What is important is that the county did
23 consider the factors of CDC 430-72.1, as it applied CDC 430-45,
24 and the county did so.

25 The second assignment of error is denied.

26 / / /

1 THIRD ASSIGNMENT OF ERROR

2 "The county acted inconsistently with its acknowledged
3 land use ordinance in failing to apply or comply with
4 Section 501-Public Facilities and Services relative to
5 non-county service providers of: critical services
6 (Section 501-5.1.A), essential services (Section
7 501-5.2) and desirable services (Section 501-5.5)"

6 FOURTH ASSIGNMENT OF ERROR

7 "The county's findings and conclusion with regard to
8 the adequacy of services of non-county service
9 providers is [sic] not supported by substantial
10 evidence in the whole record of this proceeding."

11 CDC 501-5 sets out "standards for development," and there
12 is no dispute that CDC 501 applies to the county's approval of
13 the major partition. The relevant standards for development
14 are contained in CDC 501-5.1 (critical services); 501-5.2
15 (essential services) and 501-5.5 (desirable services).⁹

16 In addition, CDC 501-4.3 establishes the following
17 requirement for demonstrating compliance with required levels
18 of public facilities and services, and for rebutting such
19 demonstrations:

20 "The service provider's information shall be treated
21 as a rebuttable assumption as to the ability to provide
22 an acceptable level of service. However, the evidence
23 that can rebut it must be compelling evidence based on
24 objective data in order to controvert the
25 determination of the service provider."

26 CDC chapter 501 "identify[s] those public facilities and
27 services that are necessary at a minimum level to accommodate
28 development." CDC 501-1. Further, CDC 501-2.1.A states

29 "* * * the public facilities standards (Section 501-1
30 through 501-6) shall apply to the Urban Unincorporated
31 Area as follows:

1 "A. To all land divisions * * *." (Emphasis
2 supplied.)

3 Although CDC 501-2.3 permits the county to defer application of
4 public facilities standards to a subsequent stage of the
5 development process if "there is uncertainty as to the
6 ultimate use and the resulting public facilities demands," such
7 is not the case here, and the county did not purport to defer
8 application of the public facilities standards.

9 Petitioners argue that the county did not demonstrate that
10 "each non-county service provider can or will provide an
11 adequate level of service." Petition for Review 12.

12 Petitioners acknowledge in their brief that the March 17, 1988
13 staff report states "[t]he applicant has submitted written
14 statements from the West Slope Water District, Washington
15 County Fire District #1, the Unified Sewerage Agency and the
16 Washington County Sheriff which state that the proposed lots
17 can be adequately served." Petition for Review 13. However,
18 petitioners argue that the statements in the staff report
19 concerning services are inadequate because they do not explain
20 what the county believes "adequate" services to be:

21 "The county has merely found that 'The applicant has
22 submitted written statements from the West Slope Water
23 District, Washington County Fire District #1, the
24 Unified Sewerage Agency and the Washington County
25 Sheriff which state that the proposed lots can be
26 adequately served.'" Petition for Review 12-13.

27 Intervenor argues that CDC 501-4.3, quoted supra, requires
28 petitioners to submit evidence which "controverts" the
29 determinations of the service providers that service levels

1 either are or can be made adequate. Intervenor contends that
2 petitioners have not submitted any evidence to "controvert" the
3 service providers' determinations of adequacy of service.
4 Accordingly, intervenor concludes that petitioners cannot
5 attack the determinations of the service providers that service
6 levels are adequate for the proposed development.

7 The county made no findings regarding adequacy of services
8 in its order. We will, however, review the evidence cited by
9 the parties to ascertain whether there is evidence in the
10 record that clearly demonstrates that the requirements of
11 CDC 501 have been met. ORS 197.835(10)(b).

12 A. Sewer Services

13 Petitioners contend that the statement of sewer service
14 adequacy from the Unified Sewer District regarding service
15 availability (dated April 9, 1987) is more than 90 days old.
16 Petitioners point out that sewer service is a "critical
17 service" under CDC 501 and that documentation of "critical
18 service" availability cannot be more than 90 days old.
19 CDC 501-5.1.A. Accordingly, petitioners conclude that the
20 documentation of sewer service availability cannot be
21 considered as substantial evidence to support the county's
22 decision.

23 Intervenor agrees that the documentation from the sewer
24 agency is more than 90 days old. However, intervenor contends
25 that the age of the document is excused because "* * * there is
26 no evidence to support a different conclusion" than the

1 conclusion reached by the sewer agency. Intervenor's Brief 6.
2 Intervenor also contends that the age of the sewerage agency
3 document should be excused because

4 "* * * Washington County does require more current
5 documentation when plans and partition[s] are
6 finalized." Intervenor's Brief 6.

7 CDC 501-5.1.A requires that "documentation of" sewerage
8 service availability "shall be no more than ninety (90) days
9 old." The sewer service report is dated April 9, 1987. The
10 intervenor's application was received by the county on
11 November 5, 1987 and accepted by the county on November 15,
12 1987. Neither party provides any insight about when the ninety
13 day period referred to in CDC 501-5.1.A begins to run.
14 However, even if the ninety day period is calculated from the
15 date of the application, the report was more than 90 days old
16 on that date.

17 We may not disregard the provision of CDC 501-5.1.A which
18 explicitly requires that critical non-county service providers'
19 documentation "shall be no more than ninety (90) days old." We
20 assume the county imposes the 90 day limit because these
21 services are viewed as "critical" and the county does not view
22 documentation in excess of 90 days old to be reliable.

23 Accordingly, the report of the Unified Sewer District neither
24 satisfies CDC 501-5.1.A nor is sufficient under CDC 501-4.3 to
25 establish "a rebuttable assumption as to the ability [of the
26 sewer district] to provide an acceptable level of service."

CDC 501-4.3.

1 B. Water Services

2 Petitioners also contend that the documentation from the
3 Westslope Water District is not substantial evidence to
4 constitute a "rebuttable assumption" of service availability.
5 Petitioners argue that this documentation cannot be relied upon
6 to show there is an adequate level of service available to the
7 proposed development. Petitioners point out that the agency's
8 statement of service availability does not specify the kind of
9 use proposed, the number of dwellings proposed or the nature of
10 the proposal. According to petitioners, the Westslope Water
11 District simply said that it has the ability to service an
12 unidentified proposal.

13 Intervenor answers that under CDC 501-4.3 it is
14 petitioners' responsibility to provide objective evidence that
15 the conclusion of the water district, that it can adequately
16 provide service, is unreliable.

17 The certificate of the water district that it can provide
18 adequate service to the proposed development is on a form which
19 apparently is provided by the county. The form is entitled
20 "REQUEST FOR STATEMENT OF SERVICE AVAILABILITY." The form
21 requires an applicant to describe the development action
22 proposed, existing uses on the property, number of dwelling
23 units and whether the dwelling units are single or
24 multifamily. None of these areas on the county's form are
25 completed. The only areas completed on the form are those
26 areas regarding the name of the land owner, description of the

1 property by map, tax lot, site size and address and a brief
2 comment from the water district that it can adequately serve
3 the proposed project. Intervenor points to no evidence in the
4 record to suggest that the water district had any information
5 about the size, kind or scope of the development proposal.

6 If it were not for CDC 501-4.3, we might agree with
7 petitioners that the water district's certificate is not
8 evidence a reasonable person would rely upon to conclude that
9 the water district can provide service to the proposed
10 development. It is not possible to ascertain from the water
11 district's certificate the size or intended use of the
12 property. Accordingly, it is not possible to determine with
13 certainty the premises upon which the water district relied to
14 make its conclusion that the service level is adequate to serve
15 the proposed project.

16 However, the CDC requires only that the applicant furnish
17 "* * * documentation * * * that adequate water * * * can be
18 provided." CDC 501-5.1.A. Once documentation from the water
19 district is provided, the CDC explicitly shifts the burden to
20 petitioners to rebut the service provider's documentation.
21 CDC 501-4.3. Accordingly, it is petitioners' responsibility to
22 provide evidence which undermines the service provider's
23 determination that it can provide service. Petitioners did not
24 provide any evidence to undermine the service provider's
25 determination that it can provide service. Compare Dickas v.
26 City of Beaverton, ___ Or LUBA ___ (LUBA No. 87-086, April 11,

1 1988), aff'd 92 Or App 168 (1988). Accordingly, we deny this
2 subassignment of error.

3 C. School, Transit and Park Services and Facilities

4 Petitioners state, and intervenor does not dispute, that
5 there is no documentation from the school district or transit
6 agency regarding whether these "essential" services are
7 "adequate" to accommodate the proposed use.

8 Thus, we are cited to no evidence in the record to show
9 that the applicant provided documentation that the school
10 district or transit agency can provide adequate levels of
11 service as required by CDC 501-5.2.A(1). We conclude that CDC
12 501-5.2.A(1), regarding provision of school and transit
13 services has not been complied with.

14 Further, we are cited to no evidence that the applicant
15 provided documentation from the transit or park district
16 regarding adequacy of desirable facilities as required by
17 CDC 501-5.5(A). Accordingly, we conclude that CDC 501-5.5.A
18 has not been met.¹⁰

19 The third and fourth assignments of error are sustained in
20 part.

21 FIFTH ASSIGNMENT OF ERROR

22 "The county misconstrued the applicable law and acted
23 inconsistently with its acknowledged land use
24 ordinance by failing to apply or comply with CDC
Section 501 relative to road access as a critical
service."

25 SIXTH ASSIGNMENT OF ERROR

26 "The county's findings and conclusion with regard to
the availability and adequacy of access, a critical

1 public service, are not supported by substantial
2 evidence in the whole record of this proceeding."

3 Petitioners point to CDC 501-5.1.B, which states the
4 following:

5 "No development shall be approved without an adequate
6 level of access to the proposed development in place
7 or assured at the time of occupancy, with 'adequate'
8 defined for critical road services as:

9 "* * * * *

10 "(2) For those access roads lying adjacent to and
11 between the property owner's proposed development
12 and the nearest adequate Collector or Arterial
13 road, as defined in Essential Services, the road
14 must meet the following minimum standards:

15 "(a) Have a wearing surface and structural life
16 expectancy period of no less than five (5)
17 years; (paved)

18 "(b) Paved surfaces for existing roadways shall
19 be twenty-two feet or greater in width. New
20 roads shall meet the adopted County Road
21 Standards.

22 "(c) On-site means all lands in the land use
23 application and one half (1/2) the
24 right-of-way of existing roads lying
25 adjacent to such lands;

26 "(d) On-site entering sight distance, as well as
horizontal and vertical stopping sight
distances meet Washington County standards;
and

"(e) Right-of-way meets Washington County
functional classification standards."
(Emphasis supplied.)

Petitioners contend that the county did not make any findings
that requirements of CDC 501.5.1.B are met.¹¹ Petitioners
also contend that additional CDC standards governing access
from the approved private roadway onto S.W. 96th Avenue are not

1 addressed in the county's findings.¹² Intervenor does not
2 contend that the cited CDC provisions concerning roadway access
3 do not apply. Neither does intervenor argue the county
4 deferred its determination of compliance with these code
5 requirements to a later stage of development approval, as
6 permitted in CDC 501-2.3. Intervenor cites no findings in the
7 county's decision addressing the disputed CDC provisions, and
8 we find none.¹³

9 Intervenor's arguments under the fifth and sixth
10 assignments of error are not responsive to petitioners'
11 arguments that the city was required to adopt findings
12 addressing the cited CDC roadway and access requirements.
13 Intervenor does claim that detailed roadway plans will be
14 submitted at the time of final plat approval. However, he does
15 not argue that the requirement for determination of compliance
16 with these CDC provisions does not apply at this stage of
17 approval, or that the required determination was deferred as
18 allowed by CDC 501-2.3. Intervenor simply asserts the proposed
19 private road will be built to required county standards (a
20 point petitioners do not dispute, except to challenge the
21 adequacy of sight distance where the road intersects with S.W.
22 96th Avenue) and relies on a December 9, 1987 staff memo.

23 The county is required, under CDC provisions which appear
24 to apply to the appealed decision, to adopt findings explaining
25 why access and roadway requirements are satisfied.

26 Accordingly, intervenor must (1) provide some explanation for

1 why those provisions do not apply to the disputed decision, (2)
2 identify findings that address the CDC provisions, or
3 (3) identify evidence that clearly shows the standards are
4 met. Intervenor offers no explanation for why the cited
5 standards do not apply and identifies no relevant findings.
6 The staff memo cited by respondent is clearly insufficient by
7 itself to show the CDC access and roadway requirements are
8 met. In fact, the memo seems to suggest S.W. 96th Avenue does
9 not meet the requirements set forth in CDC 501-5.1.B(2).¹⁴

10 The fifth and sixth assignments of error are sustained.

11 SEVENTH ASSIGNMENT OF ERROR

12 "The county misconstrued the applicable law and acted
13 inconsistently with its acknowledged land use
14 ordinance by failing to apply or comply with WCCDC
15 Section 501-5.1.C (drainage as a critical public
16 facility), WCCDC Section 412 (development standards
17 for drainage) and WCCDC Section 404 (master planning)."

18 EIGHTH ASSIGNMENT OF ERROR

19 "The county's findings and conclusions regarding
20 WCCDC Section 501-5.1.C (drainage as a critical public
21 facility), WCCDC Section 412 (development standards
22 for drainage, and WCCDC Section 404-1 (drainage impact
23 analysis) are not supported by substantial evidence in
24 the whole record of this proceeding."

25 A. Adequacy of Findings

26 The county's decision incorporates by reference the listing
of applicable standards in the March 17, 1988 staff report.
That staff report identifies CDC 501-5.1 as an applicable
standard. CDC 501-5.1.C provides:

"No development shall be approved without adequate
drainage as prescribed by the County Drainage Master
Plan or the adopted Drainage Ordinance or Resolution

1 and Order." CDC 501-5.1.C.

2 Petitioners point to the following finding as the county's
3 effort to satisfy the standard set forth in CDC 501-5.1.C:

4 "Roadway drainage along South West 96th Avenue is
5 unacceptable. The ditch needs to be cleaned, graded
6 and shaped for the proper roadway drainage."
7 Record 119.

8 Petitioners claim that this finding is conclusional.

9 Petitioners also contend that the county must specify with
10 particularity the specific improvements which must be made to

11 "bring the ditch to an adequate level." Petition for

12 Review 20. Further, petitioners assert that the county was
13 required to but did not apply CDC 412¹⁵ and CDC 404¹⁶ to
14 intervenor's application.

15 Intervenor asserts only that "petitioners have the burden
16 of proof the county lacks judgment in stating: No off-site
17 impact on adjacent land since roof-water will be carried off to
18 96th from this property." Intervenor's Brief 9.

19 Petitioners do not explain why and to what extent CDC 404
20 or CDC 412 apply to this application. We will not make
21 petitioners' argument for them and, therefore, we reject
22 petitioners' contentions concerning CDC 404 and CDC 412.

23 Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220
(1982).

24 CDC 501-5.1.C forbids development approvals without
25 provision for adequate drainage. The county imposed as a
26 condition of approval regarding drainage that the applicant

1 must:

2 "[s]ubmit plans, obtain Engineering Division approval,
3 provide financial assurance, and obtain a facility
4 permit for the following public improvements:

5 "(b) * * * adequate roadway drainage on SW 96th
6 Avenue frontage (clean, ditch, grade and shape
7 ditch)." Record 370.

8 We understand the county to have concluded that the only
9 problem with the ditch is that it needs cleaning, grading and
10 shaping. The county apparently concluded that adequate
11 drainage, pursuant to CDC 501-5.1.C, would be assured if the
12 ditch was cleaned, graded and shaped. Petitioners do not
13 explain why "clean, ditch, grade and shape ditch" does not
14 adequately describe the improvements which must be made to the
15 ditch.

16 This subassignment of error is denied.

17 B. Evidentiary Support

18 Petitioners contend that the county's conclusion that
19 cleaning, grading and shaping the ditch will constitute
20 "adequate drainage" within the meaning of CDC 501-5.1.C,
21 CDC 412 and CDC 404-1 is not supported by substantial
22 evidence. Petitioners argue that the county has not identified
23 who made the determination of adequacy of drainage or whether
24 the person who made the determination was qualified to do so.

25 The county apparently relied upon the judgment of its staff
26 regarding the condition of the 96th Street ditch and the
measures necessary to make the ditch adequate for the proposed
development. The county is entitled to rely on its staff's

1 judgment in such matters. Scott v. City of Portland, ___ Or
2 LUBA ___ (LUBA No. 88-063, Dec. 2, 1988) slip op 7.

3 Petitioners point to evidence from a neighboring landowner
4 that "the ditch is grossly inadequate and current runoff often
5 washes out portions of my driveway." Petition for Review 23.

6 Petitioners also claim that:

7 "* * * If all the drainage from all the impervious
8 surfaces proposed on the site will be drained to the
9 drainage ditch on SW 96th Avenue, then there obviously
10 will be impact to that ditch. And if only the portion
11 of the ditch fronting the site is to be improved with
12 the remainder of the ditch left in its "grossly
13 inadequate" condition, and the site drainage will
14 enter the ditch at the southern (lowest) point, the
15 impact to the remaining, unimproved ditch and the
16 properties adjacent to this ditch will not only
17 continue but will be increased as a direct result of
18 the new development proposed." Id. (Emphasis in
19 original.)

20 Although the question is a close one, we do not believe the
21 evidence petitioners point to is sufficient to undermine the
22 position taken in the staff report that with the conditions
23 imposed, the ditch would be adequate to satisfy the standard in
24 CDC 501-5.1.C. While the county did not adopt findings
25 expressly addressing CDC 501-5.1.C, we believe the evidence
26 clearly demonstrates that the standard in that subsection is
met.

27 This subassignment of error is denied.

28 The seventh and eighth assignments of error are denied.

29 The county's decision is remanded.

FOOTNOTES

1
2
3 1
4 The Washington County Community Development Code (CDC)
5 defines a major partition as "[a] partition which includes the
6 creation of a road or street." CDC 106-125.

7 2
8 The precise size of the parcel at issue is unclear. The
9 portions of the record to which we have been referred state the
10 parcel size as 0.68 acres. Record 8. However, petitioners
11 claim the subject parcel size is 0.62 acres. Petition for
12 Review 3. Whether the parcel is 0.62 or 0.68 acres is
13 irrelevant for purposes of this appeal.

14 3
15 As the county has not appeared in this proceeding, we do
16 not have the benefit of its view of the correct interpretation
17 of its code. An ambiguous code provision is by definition
18 susceptible of more than one reasonable interpretation.
19 Although there may be only one correct interpretation, see
20 e.g., McCoy v. Linn County, 90 Or App 271, 275, 752 P2d 323
21 (1988), we see no reason why there cannot be more than one
22 correct interpretation of a zoning code. Accordingly, we do
23 not adopt a definitive and unassailable interpretation of
24 CDC 430-72 in this opinion.

25 4
26 CDC 430-72.1 states that the intent of the infill
27 provisions is "* * * to provide a means of developing vacant,
28 by-passed lands of two (2) acres or less in areas designated
29 R-5 and R-6 * * *." The land at issue, although designated
30 R-5, is not vacant. There is a dwelling on it. However, the
31 county apparently interprets its infill provisions to apply
32 regardless, and explicitly identified CDC 430-72 as an
33 "applicable standard" in its decision. Record 8, 361. The
34 correctness of this interpretation is not disputed by the
35 parties.

36 5
37 There are other specific provisions of the CDC which
38 implement certain factors listed in CDC 430-72.1. For example,
39 notification of adjacent property owners is required by
40 CDC 204-3.1.B.

1
6

2 Flag lots are defined as:

3 "A lot behind a frontage lot, plus a strip out to the
4 street (pole) for an access drive." CDC 430-45.

5 The strip or easement included in the major partition at issue
6 in this proceeding is to be improved as a private road, not an
7 access drive. Thus, the proposed development will not create a
8 "flag lot." However, we interpret CDC 530-72.3.A to make the
9 requirements of CDC 430-45 ("Flag Lots") applicable to any
10 infill development described in CDC 430-72.2 which is not
11 developed through a subdivision process, under CDC 430-72.3.B.

7

12 We note that "lot size," which is listed as a factor in CDC
13 430-72.1, is not specifically mentioned in the flag lot
14 provisions. This omission further supports our interpretation
15 of CDC 430-72.1 not to require that lot size in a proposed
16 infill development be the same as or comparable to that of
17 surrounding existing development in order to ensure
18 "compatibility," as long as the county considers all of the
19 factors of CDC 430-72.1.

20 In addition, as intervenor correctly notes, our
21 interpretation that the factors to be considered under
22 CDC 430-72 are considerations, rather than independent approval
23 criteria, is specifically required in the case of lot size
24 limitations affecting density, in view of CDC 207-6.1. The
25 proposed development at issue in this proceeding is subject to
26 what is referred to in the CDC as "Type II Development
Approval." CDC 207-6.1 provides:

27 "The Review Authority may impose conditions on any
28 Type II or III Development Approval. Such conditions
29 shall be designed to protect the public from potential
30 adverse impacts of the proposed use or development or
31 to fulfill an identified need for public services
32 within the impact area of the proposed development.
33 Conditions shall not restrict densities to less than
34 that authorized by the development standards of this
35 code." (Emphasis supplied.)

36 While the county might take into consideration proposed lot
37 sizes producing densities lower than that otherwise allowable
38 under the CDC, in its consideration of the intent and purpose
39 of the infill provision, the county may not require density to
40 be lower than that allowable under the CDC. Thus, we do not
41 agree with petitioners that in this case CDC 430-72.1

1 authorizes the county to require larger lots, more reflective
2 of those existing in the neighborhood, which would result in a
lower density than authorized by the R-5 zone.

3
4 8
The resolution and order adopted by the board of county
5 commissioners includes findings in support of its decision, but
6 does not adopt or incorporate findings included in earlier
staff reports.

7 9
8 CDC 501-5.1 requires in part:
"Critical Services:

9 "A. An applicant for development shall provide
10 documentation from the appropriate non-County
11 service provider that adequate water, sewer and
12 fire protection can be provided to the proposed
development prior to occupancy. The
documentation shall be no more than ninety (90)
days old.

13 "** * * * * ." (Emphasis supplied.)

14 CDC 501-5.2 requires in part:

15 "Essential Services:

16 "A. Service Provider Documentation

17 "(1) An applicant shall provide adequate
18 documentation from the appropriate school
19 district, police or sheriff department and
20 transit agency that adequate levels of
service are available or will be available
to the proposed development within the
timeframes required by the service provider.

21 "** * * * * ." (Emphasis supplied.)

22 CDC 501-5.5 provides:

23 "Desirable Services:

24 "A. An applicant shall provide documentation from the
25 appropriate Transit and Park District identifying
existing or proposed transit or park facilities
26 within one (1) mile of the proposed development.

1 "B. Applications may be conditioned to provide on and
2 off-site transit and park improvements and
3 pedestrian walkways and bicycle facilities when
4 identified by the appropriate agency and a direct
5 impact or benefit to the proposed use is
6 identified.

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We emphasize that we express no view about whether dividing the existing parcel into three lots so that two additional houses may be constructed necessarily violates the services requirements in CDC 501-5.2.A and 501-5.5.A. Our remand is required under this portion of the third and fourth assignments of error because the county adopted no findings concerning these standards and intervenor points to no evidence showing the standards were considered and satisfied in granting the approval.

11

We understand CDC 501-5.1.B to apply to S.W. 96th Avenue, the "access" road to the nearest adequate collectors or arterials, which apparently are S.W. Canyon Road and Beaverton Hillsdale Highway.

12

Those code provisions include CDC 501-5.3.A and CDC 501-5.3.B(2). In view of our disposition of this assignment of error, no purpose would be served by setting these provisions out verbatim in this opinion.

13

The March 17, 1988 staff report included in the record does reference and incorporate a December 9, 1987 staff memorandum which proposes findings and recommendations concerning S.W. 96th Avenue. Record 368, 374-375. However, the county's decision does not adopt either the March 17, 1988 staff report or the December 9, 1987 memorandum as findings in support of its decision.

14

The staff memo states, in part:

"1. SW 96th Avenue is a County minor collector street. Existing right-of-way is 25 feet from

1 centerline; required right-of-way is 30 feet from
2 centerline.

3 * * * * *

4 "3. The frontage road for this site, SW 96th Avenue,
5 is not presently constructed to ultimate County
6 minor collector standard.

7 "4. Roadway drainage along SW 96th Avenue is
8 unacceptable. The ditch needs to be cleaned,
9 graded and shaped for proper roadway drainage."

10 * * * * *." Record 374.

11

15

12 CDC 412-1 provides that it applies as follows:

13 "Applicability

14 "Drainage plans are to be submitted with or be made
15 part of a Site Plan or grading permit for a project
16 that:

17 "412-1.1 Involves a land disturbance (grading, or
18 removal of vegetation down to duff or bare
19 soil, by any method) of a site which is more
20 than twenty-thousand (20,000) square feet;

21 "412-1.2 Will result in an impervious surface of more
22 than one thousand (1,000) square feet;

23 "412-1.3 Is subject to local ponding due to soil
24 conditions and lack of identified drainage
25 channels;

26 "412-1.4 Is located wholly or partially within a
Flood Plain or Drainage Hazard Area; or,

"412-1.5 Involves hillside development on slopes
steeper than ten (10) percent."

27

16

CDC 404 provides in part:

* * * Master Planning through the Site Analysis or
Planned Development is provided to encourage
development which best utilizes the existing on and
off-site characteristics, to encourage flexibility and

1 a creative approach in land development with a more
2 efficient, aesthetic and desirable use of open space,
3 and to establish desirable physical links within a
4 community. It is not the intent of this Section to
5 require full engineering or landscape drawings prior
6 to receiving approval of a requested use. Preliminary
7 (conceptual) plans shall be submitted with the Master
8 Plan application. Prior to issuance of permits final
9 drawings will be required." (Emphasis supplied.)
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