BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. CROOK COUNTY, Respondent, and OCHOCO CREEK RESORT, INC., and MARVIN HARRIS, Intervenors-Respondent.	LUBA No. 92-133 FINAL OPINION AND ORDER

Appeal from Crook County.

Jane Ard, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Charles S. Crookham, Attorney General; Jack Landau, Deputy Attorney General; Virginia L. Linder, Solicitor General; and Larry Knudsen, Assistant Attorney General.

No appearance by respondent.

Daniel H. Kearns, Portland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

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

REMANDED 01/11/93

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals an order approving a 75 unit planned unit development (PUD) on a 215 acre parcel zoned Exclusive Farm Use (EFU-2).

MOTION TO INTERVENE

Ochoco Creek Resort, Inc., and Marvin Harris move to intervene on the side of respondent in this appeal proceeding. There is no objection to the motion, and it is allowed.

FACTS

The subject parcel is zoned EFU-2, consists of 215 acres,[1] is bisected by a creek, and is located outside of the urban growth boundary of the City of Prineville. An abandoned gravel pit is located at the center of the parcel. The subject parcel is developed with a dwelling and outbuildings. A portion of the parcel has been used for the production of wheat and alfalfa and the entire parcel is, for taxation purposes, specially assessed at farm use value.

Property to the north of the subject parcel is in agricultural use; a golf course is located to the south and east; agricultural land and dwellings lie to the west; and the land to the south is "steeply sloped rim rock." Record 51.

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[1]The project site consists of 96 acres, 84 of which are to be utilized by the golf course. Record 74.

On June 13, 1991, the planning commission approved an "Outline Development Plan" for a 9 hole golf course and a 100 unit PUD on the subject parcel, to be served by a community water system and "separate community type septic systems." Supplemental Record 57.[2] On April 24, 1992, the planning commission gave "Preliminary Development Plan" approval for a 75 "lot" PUD and a nine hole golf course. Record 1. Petitioner appealed the planning commission's decision to the county court. On June 11, 1992, the county court affirmed the planning commission's approval of the "Preliminary Development Plan."[3] This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The county improperly construed the applicable law when it found DLCD's objections untimely and refused to address the issues raised concerning compliance with comprehensive plan provisions and land use regulations implementing [Statewide Planning] Goals 3, 11, and 14."

The issue under this assignment of error is whether the county properly refused to consider petitioner's local challenges to the preliminary development plan approval decision at issue in this appeal proceeding. Intervenors allege the county properly refused to consider petitioner's objections during the preliminary development plan

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[2]Other than the decision itself, the record of the Outline Development Plan proceedings, as well as the Outline Development Plan, is not part of the record submitted by the county for this appeal.

[3]The Preliminary Development Plan itself is not in the record submitted by the county.

proceedings, because petitioner's objections should have been raised and resolved in proceedings leading to unappealed 1991 planning commission decisions approving a conditional use permit and Outline Development Plan. Intervenors rely, in part, upon Crook County Land Development Ordinance (CCLDO) 6.110 (stating standards relevant to PUD outline development plan approval); 3.090(2) (stating that planning commission subdivision tentative plan approval is a final, binding and appealable decision);[4] and CCLDO 3.030(4) (stating that subdivision outline development plan approval is final, binding and appealable).[5] Intervenors argue that under these CCLDO provisions, the

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[4]The planning commission is required to review requests for outline development plan approval "in accordance with CCLDO 3.090." CCLDO 6.180(3). CCLDO Article 3 is entitled "Tentative Plans" and relates generally to the approval of subdivisions. CCLDO 3.090(2) provides:

> "Approval or disapproval of the Tentative Plan by the [planning commission] shall be final unless the decision is appealed to the County Court. The County Court review shall be conducted in accordance with Article 12 of [the CCLDO] and failure to do so within the required time limit shall be deemed to indicate acceptance of the [planning commission's] decision."

CCLDO Article 12 is entitled Administration and Appeals. CCLDO 12.020 provides that an appeal from a planning commission decision must be taken within 15 days of a decision other than a decision on a subdivision. A decision on a subdivision must be appealed to the county court within 30 days of the planning commission's decision."

[5]CCLDO 3.030(4) was amended in 1980, and as amended provides:

> "The approval or disapproval of an Outline Development Plan by the [planning commission] shall be final unless the decision is appealed to the County Court. The approval or disapproval shall be binding upon the County relative to compliance with the Comprehensive Plan and applicable zoning provisions."

1991 planning commission outline development plan approval decision was a final, binding and appealable decision.

Petitioner argues that under CCLDO 6.110 and 6.130,[6] it was not required to appeal the planning commission's 1991 outline development plan approval decision. Petitioner contends the 1991 planning commission decision was not final, but rather was only a preliminary step in the approval of the PUD. Petitioner points out that the proposal changed from 100 units to 75 units between outline and preliminary development plan approval. Further, petitioner contends there is no conditional use permit decision from which it could have appealed, contrary to intervenors' assertion and the statement in the challenged

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[6]CCLDO 6.110(3) provides the following with regard to the effect of PUD outline development plan approval:

> "Commission approval of the outline development plan shall constitute only a provisional approval of the planned unit development contingent upon approval of the preliminary development plan." (Emphasis supplied.)

CCLDO 6.130(1) provides in relevant part:

> "If an outline development plan has been submitted and the planned unit development has been provisionally approved based on the information in the outline development plan, the applicant shall file the preliminary development plan * * * within six (6) months following the provisional approval of the outline development plan. * * *
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> "* * * * *
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> "The [planning commission], having previously provisionally approved the proposed planned unit development, shall then either reapprove, disapprove or reapprove with modifications the planned unit development based on the preliminary development plan." (Emphasis supplied.)

decision. Petitioner states that it is unaware that any such decision has ever been rendered.

This Board is required to defer to a local government's interpretation of its own ordinances unless the challenged interpretation is contrary to the express words, policy or context of the local enactment. Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992). However, this Board may not interpret a local government's ordinances in the first instance, but rather must review the local government's interpretation of its ordinances. Weeks v. City of Tillamook, __ Or App _____, ___ P2d ___ (December 30, 1992). Further, a local government interpretation must be adequate for such review, and:

> "[a] conclusory statement does not suffice as an interpretation of the provisions. It says and explains nothing about the meaning of the [local ordinances]. * * * A bare recitation that the decision complies with the local provision does not constitute an interpretation of the provisions that is adequate for review." Larson v. Wallowa County, 116 Or App 96, 104, ___ P2d ____ (1992).

As a preliminary matter, we note that it is difficult to ascertain any interpretation by the county of the local ordinances concerning the issue disputed by the parties, conclusory or otherwise. It is unclear what findings the county court intended to adopt. The challenged county court decision states, in part:

> "[Petitioner and intervenors] both argued in favor of amending the record to include the following:
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> "(a) A signed copy of the official Crook County

> Planning Decision approving the Outline Development Plan and Conditional Use for Nonfarm dwellings, dated June 12, 1991.
>
> "(b) An updated copy of the Ochoco Creek Resort, Inc. Findings document dated February 15, 1992.
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> "* * * * *
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> "Now, Therefore, [the County Court] orders that the decision of the Crook County Planning Commission on the Preliminary Development Plan of Ochoco Creek Resort, Inc. is hereby upheld based upon the findings of fact contained in the record as amended." (Emphasis supplied.) Record 2.

It is difficult at best to identify the "findings of fact contained in the record as amended" upon which the county court bases its decision. The Outline Development Plan approval decision is dated June 13, 1991, not June 12, 1991. Thus, it is uncertain what "planning decision" is referred to under (a) quoted above. Further, there is no decision of which we are aware in the record dated June 12, 1991 giving conditional use permit approval.[7] While the county court "upheld" the planning commission's decision, it is not clear that the county court intended to adopt all of the planning commission's findings, as well as its decision. The planning commission decision incorporates at least two different documents, and "refers" to another. See Record

[7]The June 13, 1991 Outline Development Plan approval decision does contain some findings concerning the proposal's compliance with conditional use permit standards, but nothing in the decision discloses that those findings were intended to approve a conditional use permit for the proposed dwellings and golf course.

52.

In Gonzalez v. Lane County, ___ Or LUBA ___ (LUBA No. 92-108, November 20, 1992), slip op 10, this Board stated:

> "After all, the local government decision maker is in a unique position to know what it believes to be the facts and reasons supporting its decision. Therefore, we hold that if a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based upon the decision itself, would be able to identify and to request the opportunity to review the specific document thus incorporated." (Emphasis in original; footnote omitted.)

Here, a petitioner attempting to appeal the challenged county court decision would experience unreasonable difficulty in determining what findings the county court intended to adopt. Because the challenged decision must be remanded in any event for the reasons discussed below, on remand the county should clearly identify the findings it intends to adopt in support of the challenged decision.

The planning commission's findings provide the clearest statement concerning the county's refusal to consider petitioner's objections:

> "The [planning commission] takes official notice of the letter received from [petitioner] objecting to the proposed housing development in the

> County's EFU-2 zone. The County notes objections raised by [petitioner] relate to the Conditional Use Approval for non-farm dwellings in the EFU-2 zone. This decision was rendered on June 12, 1991 * * * and is not the subject of the matter before the [planning commission] at this time. The Conditional Use Permit decision was granted in June of 1991. * * * The issue before the Planning Commission is to render a decision on a proposed Preliminary Development Plan under the provisions of [CCLDO] Article 6. * * *"[8] Record 55.

The planning commission's decision also states:

> "The proposed Preliminary Development Plan approval is in accordance with the requirements of Section 3.020 of the Zoning Ordinance,[9] Sections 6.010-6.200 of the Land Development Ordinance, and pages 42-49 of the Comprehensive Plan." Record 52.

Other than these conclusory statements, there is nothing in the challenged decision to explain any basis for

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[8]The following statement is to the same effect as the statement in the planning commission's findings, and appears in the applicant's revised findings document dated February 15, 1992 referred to in the challenged county court decision:

> "After careful review of the County's land use documents and the County's written [June 12, 1991 outline development plan approval decision], the applicable requirements yet to be met are those relating to approval of the Preliminary Development Plan. The County's decision of June 12, 1991, contains written findings and conclusions of law necessary to approve the Conditional Use of the Planned Unit Development in the EFU-2 zone, as well as the Outline Development Plan including the golf course. The following material is submitted in accordance with Article 6 of [the CCLDO] dealing particularly with the approval requirements of the Preliminary Development Plan." Record 63.

[9]The county has two separate ordinances that relate to zoning and development. Ordinance 18 is the county's "Zoning Ordinance of 1978" and Ordinance 19 is the CCLDO, which governs land divisions and PUD's.

the county's refusal to consider petitioner's objections. To complicate matters, the county has not appeared in this appeal proceeding. Intervenors supply a rationale to support the county's conclusion, relying upon various provisions of CCLDO Articles 3 and 6, which is not expressed in the challenged decision. However, intervenors' argument is not the equivalent of a local government interpretation. Under the legal principles expressed in Weeks, supra, and Larson, supra, this Board has no choice but to remand the challenged decision for the county to interpret CCLDO Articles 3 and 6 n the first instance.

Two additional points should be addressed. Intervenors argue petitioner is precluded by the principles of res judicata and collateral estoppel from:

> "raising issues in a second proceeding [preliminary development plan approval] which were or could have been addressed in a prior related proceeding [outline development plan approval]." Intervenors' Brief 15.

The extent to which the principles of res judicata and collateral estoppel could apply here depends upon the county's interpretation of its ordinances. Therefore, we cannot determine this issue in the absence of such an interpretation.[10]

[10]We have some doubt about whether the principles of res judicata and collateral estoppel would apply to bar petitioner's "claim" against the preliminary development plan approval decision or the "issues" petitioner seeks to raise. The proposal at issue in the outline development plan approval proceedings is different that the proposal at issue during the

Intervenors also renew their motion to dismiss this appeal based on petitioner's failure to appeal the planning commission's June 1991 decision. Intervenors contend this failure to exhaust administrative remedies before appealing to this Board deprives us of jurisdiction. ORS 197.825(2)(a).

The challenged Preliminary Development Plan approval decision is a land use decision subject to our review authority. If intervenors are correct that petitioner was required to raise and resolve the issues it seeks to raise here during the outline development plan proceedings, then we would simply be obliged to affirm the county's decision. We would not, however, conclude that this Board lacks jurisdiction over the challenged Preliminary Development Plan approval decision.

The first assignment of error is sustained.

OTHER ASSIGNMENTS OF ERROR

The challenged decision does not address most of petitioner's arguments. Rather, the decision relies upon the assertion that petitioner's claims were finally resolved in the unappealed 1991 outline development plan approval decision, and a 1991 conditional use permit decision which petitioner disputes was ever made.

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preliminary development plan approval proceedings (100 units versus 75 units). Further, the outline development plan proposal was unspecific, whereas a greater level of specificity appears to be required for the submission of a preliminary development plan for approval.

As stated above, the challenged decision does not interpret the county's ordinances with regard to the basic question of whether petitioner's objections could be ignored at the preliminary development plan approval stage. Therefore, we may not determine in the first instance whether the county properly refused to consider petitioner's objections. One of petitioner's main objections to the challenged decision has to do with the county's approval of 75 nonfarm dwellings on the subject parcel. Because the challenged decision does not include a local government interpretation of the ordinances relative to that approval, we must remand the decision for the county to interpret those provisions in the first instance.[11]

The county's decision is remanded.

[11]In petitioner's fourth assignment of error, petitioner argues that the approval of 75 clustered nonfarm dwellings violates comprehensive plan provisions authorizing "rural" as opposed to "urban" level development outside of urban growth boundaries. Petitioner also asserts that the challenged decision violates Statewide Planning Goal 14 (Urbanization). However, we note that the requirements of Goal 14 do not directly apply to the challenged decision, as no amendment to the acknowledged county plan or land use regulations is adopted. Highway 213 Coalition v. Clackamas County, 17 Or LUBA 256, 263 (1988).