BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENNETH L. REUSSER, GERTRUDE REUSSER, LEON CLUTTERHAM, DOROTHY CLUTTERHAM, DEREK FICK, LUZAN FICK, JOHN L. KLOR, JUDY F. KLOR, JACK E. YOUNG, MEREDITH C. YOUNG, MICHAEL G. DeNOUX-MAGNUS, and DANIELLE DeNOUX-MAGNUS, Petitioners-Cross-Respondents,	)
vs.	) LUBA No. 92-212
WASHINGTON COUNTY, Respondent-Cross-Respondent,	) FINAL OPINION AND ORDER
and	)
STUART HONEYMAN, Intervenor-Respondent-Cross-Petitioner.	)

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

David C. Noren, Assistant County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent-cross-respondent.

Steven W. Abel and Steve C. Morasch, Portland, filed the cross-petition for review and a response brief. With them on the briefs was Schwabe, Williamson & Wyatt. Steven W. Abel argued on behalf of intervenor-respondent-cross-petitioner.

SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON,

Referee, participated in the decision.

REVERSED 04/29/93

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a decision of the board of county commissioners approving a lot line adjustment involving two lots in adjacent rural planned developments (RPDs). Intervenor-respondent (intervenor) cross-appeals the board of commissioners' decision, challenging the board of commissioners' determination that it had jurisdiction to hear petitioners' local appeal.

MOTION TO INTERVENE

Stuart Honeyman, the applicant below, moves to intervene in this proceeding on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

In 1985, the county approved the creation of a seven lot RPD (Honeyman RPD) from a 19.66 acre parcel adjacent to S.W. Reusser Road, outside the Portland metropolitan area urban growth boundary (UGB). The Honeyman RPD is comprised of six lots ranging in size from 0.8 to 1.0 acres, and a seventh lot 13.62 acres in size. Access to these lots is provided by a private road. The lots in the Honeyman RPD are subject to a set of restrictive covenants that include development and design controls. Record 271-78. Petitioners are the owners of the six small lots in the Honeyman RPD. Petitioners purchased their property from intervenor or his successor in interest.

In 1990, the county approved the creation of a 17 lot RPD (Timberline RPD) from a 49.4 acre parent parcel. The Timberline PUD is comprised of 16 lots ranging in size from 1.0 to 1.5 acres, and a seventeenth lot approximately 30 acres in size. Record 333. The Timberline RPD adjoins the 13.62 acre parcel in the Honeyman RPD. The lots in the Timberline RPD are not subject to the restrictive covenants imposed on the Honeyman RPD.

Both the Honeyman and Timberline RPDs are zoned Agriculture and Forest (AF-5). The AF-5 zone has a minimum lot area of five acres "except as may be varied by the requirements of Article IV for specific uses * * *." Washington County Community Development Code (CDC) 348-6.1. CDC Article IV (Development Standards) includes CDC 404-5 (Rural Planned Development), which establishes requirements for RPDs on AF-5 or AF-10 zoned land outside a UGB. CDC 404-5.3 provides that the minimum lot area in a RPD is two acres for lots with an individual water supply and one acre for lots with public or community water service. CDC 404-5.4 provides that the maximum number of lots allowed in an AF-5 zoned RPD is determined by dividing the total number of acres by four (where lots have individual water service) or by three (where lots have public or community water service).[1]

[1]Apparently, the number of lots created in the Honeyman RPD and the Timberline RPD is the maximum number allowed under these RPD provisions.

On November 30, 1990, intervenor filed an application to modify the Honeyman and Timberline RPDs by changing the lot lines of one Honeyman RPD lot and one Timberline RPD lot. The proposed lot line adjustment would reduce the 13.62 acre lot in the Honeyman RPD to 1.5 acres, and would enlarge a 1.03 acre lot in the Timberline RPD to 13.15 acres. Intervenor owns both lots.

The county treated intervenor's application as a request for a "Type II" land use action.[2] Record 72. Petitioners appealed the planning director's decision approving intervenor's application to the county hearings officer. After holding public hearings, the hearings officer issued a decision affirming the planning director's decision. On December 4, 1991, the county mailed notice of the hearings officer's decision to petitioners. Record 48-52.

The notice of the hearings officer's decision identifies the "Procedure Type" as "II -- Appeal." Record 48. The notice also includes a sheet entitled "APPEAL INFORMATION." This sheet states that "a signed petition for review (appeal) [must be filed] within fourteen (14) calendar days of [the] date written notice is provided

---

[2]Under county procedures for Type II actions, the planning director makes an initial decision, after notice to neighboring property owners and the expiration of a period of time for filing written comments. The planning director's decision may be appealed to the county hearings officer. CDC 202-2.3.

(date mailed)." Record 52. The appeal information sheet specifically states that the "Appeal Period" for the subject decision runs from December 4, 1991 to 5:00 PM on December 18, 1991. The appeal information sheet also includes a list setting out the items a petition for review must contain, including the following:

> "The fee of $280.00 for Type I and Type II Actions or the fee of $330.00 for Type III Actions, plus the cost of the completed transcript." Record 52.

On December 18, 1991, petitioners filed a petition for review appealing the hearings officer's decision to the board of commissioners, including a check for $280. Record 221. On April 30, 1992, the county appeals secretary sent petitioners a letter returning their check for $280 and informing them that their appeal to the board of commissioners is a Type III action and, therefore, requires a filing fee of $330. The letter states petitioners may amend their petition for review by submitting a new check in the amount of $330 within seven days, and that failure to remit this amount within seven days will result in a jurisdictional defect in the appeal. Record 218. Petitioners paid the requested $330 on May 4, 1992.

The board of commissioners conducted an on the record review of the hearings officer's decision. Intervenor moved to dismiss the local appeal, on the ground that under CDC 209-3.7 petitioners' failure to pay the full $330 appeal fee by December 18, 1991 is a jurisdictional defect. On

October 20, 1992, the board of commissioners adopted the challenged decision, denying intervenor's motion to dismiss and affirming the hearings officer's decision. This appeal followed.

ASSIGNMENT OF ERROR (CROSS-PETITION)/MOTION TO DISMISS

The assignment of error in the cross-petition for review and intervenor's motion to dismiss are essentially identical. Intervenor asks that we either reverse the board of commissioners' decision to deny intervenor's motion to dismiss the local appeal, or dismiss this appeal because the board of commissioners lacked jurisdiction to hear petitioners' local appeal and, therefore, petitioners failed to exhaust their administrative remedies, as required by ORS 197.825(2)(a).

Intervenor argues that petitioners' appeal to the board of commissioners was jurisdictionally defective, and should have been dismissed, because the CDC unequivocally provides that failure to pay the proper appeal fee by 5:00 p.m. on the date the appeal is due is a jurisdictional defect. Intervenor relies on provisions of CDC section 209 (Appeals). Intervenor argues that under CDC 209-1, a hearings officer's decision may be appealed if a party "files a complete petition for review" "within fourteen (14) calendar days after written notice of the decision is provided to the parties." Intervenor points out CDC 209-3.5 provides that a petition for review must contain "[t]he

appeal fee set by Resolution and Order of the Board [of Commissioners]." In addition, CDC 209-3.7 provides:

> "Failure to file a signed original petition with the [planning department] by 5:00 p.m. on the due date, with the proper fee, shall be a jurisdictional defect. * * *" (Emphasis added.)

Intervenor argues that in Breivogel v. Washington County, 114 Or App 55, 57, 834 P2d 473 (1992) (Breivogel I), the court of appeals interpreted CDC 209-3.7 "to impose certain procedural requirements that are mandatory prerequisites to an appeal to the [county] governing body." Intervenor also points out that in an appeal of LUBA's decision on remand from the Breivogel I decision, the court of appeals upheld the county's dismissal of a local appeal because the local petition for review was not signed "and therefore did not meet the requirements of [CDC] 209-3.7." Breivogel v. Washington County, 117 Or App 195, 197, ___ P2d ___ (1992) (Breivogel II).

Intervenor contends that under county Resolution and Order No. 87-120, the proper fee for an appeal from a decision of the hearings officer to the board of commissioners is $330.[3] Intervenor further contends that

[3]In their response to the motion to dismiss, petitioners argue that Resolution and Order No. 87-120 does not establish a fee for an appeal to the board of commissioners from a hearings officer's decision on a Type II action. Petitioners may also argue in their response to the motion to dismiss that the $280 they paid when filing their appeal to the board of commissioners on December 18, 1991, was the correct appeal fee. However, petitioners do not challenge the county's decision to require a $330 appeal

because written notice of the decision was mailed to the parties on December 4, 1991, petitioners' appeal, including the $330 appeal fee, was due on December 18, 1991. According to intervenor, because petitioners did not pay that fee by 5:00 p.m. on December 18, 1991, there is a jurisdictional defect in petitioners' local appeal, and the board of commissioners improperly refused to dismiss it.

With regard to this issue, the challenged decision states:

> "[T]he notice of decision that was mailed [to the parties] with the hearings officer decision did not adequately comply with the requirement of CDC 204-3.4 that the notice of decision contain a statement in which the appeal fee shall be listed, and * * * the notice of the hearings officer decision was therefore not proper[.]
>
> "[B]ased on the memoranda from the Office of County Counsel and the materials in the appeal file, the appellants received proper notice of [the hearings officer] decision when they were informed of the correct appeal fee [on April 30, 1992. T]he appellants submitted the proper fee within 14 days of mailing of proper notice, and * * * the appeal is therefore not jurisdictionally defective[.]" Record 5-6.

The county states that after it made the decision at issue in Breivogel I and II, it amended CDC 204-3 (Type II Actions) and 204-4 (Type III Actions) to require that a notice of decision list both the elements of a petition for review, as required by CDC 209-3, and the appeal fee. The

---

fee in their petition for review and, therefore, in this opinion we assume that the county properly required payment of an appeal fee of $330.

county argues that CDC 204-3.4.D, cited in the above quoted portion of the challenged decision, now provides that the notice of a decision on a Type II action made by either the planning director or the hearings officer (on appeal from a decision by the planning director) must contain:

> "A statement that the decision may be appealed and a public hearing held by filing a petition for review within fourteen (14) calendar days of the date the decision was provided. The statement shall note that the petition shall be filed with the [planning department] by 5:00 p.m. of the closing date. The elements of a petition for review set forth in [CDC] 209-3, and the fee, shall be listed. * * *" (Emphasis added.)

The county further argues it may reasonably interpret the provisions of CDC 204-3.4.D and 209-1 together to provide that the 14 day period established by CDC 209-1 for filing an appeal does not begin to run until a party is provided with the notice required by CDC 204-3.4.D, including a correct statement of the required appeal fee. According to the county, the notice mailed to petitioners on December 4, 1991 was defective because it identified the hearings officer's decision as "Type II" and incorrectly stated that the fee for appealing this Type II action was $280. Record 48, 52. The county maintains petitioners' 14 day period for filing an appeal did not begin to run until April 30, 1992, when petitioners were first informed that the correct appeal fee was $330.

Intervenor responds that CDC 204-3.4.D is not applicable here, because it applies only to notice of the

planning director's initial decision on a Type II action, not to notice of a hearings officer's decision on appeal from the planning director's decision. Intervenor contends under CDC 202-2.3, the only CDC provision applicable to an appeal to the hearings officer from a planning director's decision on a Type II action is CDC section 209. According to intervenor, the only requirement imposed regarding notice of such a decision of the hearings officer is that it be in writing. CDC 209-1.

We are required to defer to a local government's interpretation of its code, so long as the interpretation is not "clearly contrary to the enacted language," or "inconsistent with express language of the ordinance or its apparent purpose or policy." Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). The court of appeals has stated that under Clark, the question for this Board to resolve is not whether a local government interpretation of its own code is "right," but rather whether it is "clearly wrong." Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, ___ P2d ___ (1992); West v. Clackamas County, 116 Or App 89, 92-93, ___ P2d ___ (1992).

We first consider the county's interpretation of CDC 204-3.4.D as applying to notice of the hearings officer decision in this case. CDC 202 provides that "[a]ll land use actions shall be classified as" either Type I, II, III or IV. CDC 204-3 establishes requirements for notice of

Type II actions. There is no dispute that the planning director's initial consideration of and decision on the proposed RPD modification is a Type II action. The city maintains the hearings officer's consideration of and decision on appeal from the planning director decision remains a Type II action, subject to the notice requirements of CDC 204-3. Intervenor identifies nothing in the CDC establishing that an appeal from the planning director's decision on a Type II action is itself a different type of action. Further, CDC 204-3.4 does not expressly provide that it applies only to decisions of the planning director. Therefore, the county's interpretation that the provisions of CDC 204-3.4 apply to notice of the hearings officer's decision on the proposed RPD modification is not clearly wrong, and we defer to it.

We next consider the county's interpretation of CDC 204-3.4.D and 209-1, when read together, as providing that the 14 day period for filing an appeal does not begin to run until a party is given the notice required by CDC-3.4.D. The CDC provisions at issue in this case are significantly different from those at issue in Breivogel I and II, supra. The amended version of CDC 204-3.4.D imposes a duty on the county to specify, in the notice of a decision on a Type II action that is mailed to parties, the elements of a petition for review and the appeal fee required by CDC 209-3. Because CDC 209-3.7 makes particular elements of

a petition for review, including the proper appeal fee, a jurisdictional requirement, where the county gives a party the wrong information in the notice of decision, as occurred here, that party's right to appeal could be negated.[4]

We conclude it is not inconsistent with the words, context or policy of the CDC to interpret CDC 204-3.4.D and 209-1 together to provide that an appeal must be filed within 14 days after the written notice of decision required by CDC 204-3.4.D is provided to the appealing party. Accordingly, we agree with the county that petitioners' $330 appeal fee was timely filed, and there was no "jurisdictional" defect in petitioners' appeal to the board of commissioners.

The assignment of error (cross-petition) and motion to dismiss are denied.

ASSIGNMENTS OF ERROR (PETITION FOR REVIEW)

Petitioners challenge the county's approval of the proposed RPD lot line adjustment because (1) it does not comply with the requirements for a lot line adjustment in an

---

[4]We note that in interpreting the requirement of ORS 215.416(10) that counties give notice of certain decisions to parties to the county proceedings and the "jurisdictional" requirement of ORS 197.830(8) that appeals to this Board be filed "not later than 21 days after the date the decision sought to be reviewed becomes final," the court reasoned that the legislature did not intend county nonperformance of the duty to give notice to defeat the possibility of a timely appeal from a county decision, and held that the 21 day period for appealing to this Board begins to run only when "the prescribed written notice of the decision is mailed or delivered personally to the party seeking to appeal." League of Women Voters v. Coos County, 82 Or App 673, 680-81, 729 P2d 588 (1992).

RPD set out in CDC 404-5.6, (2) the county failed to apply substantive requirements of CDC section 404-5 applicable to modification of an RPD, and (3) not all owners of property in the Honeyman RPD have consented to modification of the RPD. Petitioners argue the challenged decision impermissibly results in the Honeyman RPD being comprised of seven lots on only 7.54 acres, a result that is prohibited under provisions of CDC 404-5 establishing standards for RPDs. In other words, petitioners contend the challenged lot line adjustment allows the county to create an RPD that could not be approved under applicable RPD regulations.

We first consider the context and policy of the CDC provisions governing RPDs. An RPD must be "planned as an integral unit." CDC 404-5.5. An RPD application must be submitted "in conjunction with" an application for a partition or subdivision.[5] CDC 404-5.1. As explained above, the maximum number of lots authorized in an AF-5 zoned RPD may result in a residential density as great as one dwelling per three acres, rather than the one dwelling per five acre density that would otherwise be allowed in the AF-5 zone. CDC 404-5.4. However, if an RPD would result in an increase in density, the applicant must "demonstrate how the RPD complies with the purpose of the underlying District

[5]For subdivisions in conjunction with an RPD, "all of the requirements of [CDC] Section 610 [(Land Divisions and Lot Line Adjustments Outside the UGB)] shall apply." CDC 404-5.12.

by varying lot sizes to preserve the farm or forest uses on the site."[6] CDC 404-5.8.

CDC 404-5.10.B provides that a deed or sales contract creating parcels in an RPD must include a restrictive covenant that "there will be no further partitioning of the land beyond that approved through the RPD process." The only provision in CDC 404-5 relating to modification of an approved RPD states:

> "In an RPD, lot lines may be adjusted through a Type I procedure when:
>
> "A. A subsurface [sewage] disposal system cannot be approved due to soil conditions; and
>
> "B. No additional lots will be created, or
>
> "C. The lot line adjustment does not change the area of any of the lots." CDC 404-5.6.

There is no dispute that the lot line adjustment at issue in this case does not satisfy the requirements of CDC 404-5.6.

The challenged decision addresses the county's authority to allow lot line adjustments in an approved RPD as follows:

> "[L]ot line adjustments between adjacent RPDs are allowed by the [CDC]. [CDC] 404-5.6 allows lot

---

[6]The purpose of the AF-5 zone is:

> "* * * to promote agricultural and forest uses on small parcels in the rural area, while recognizing the need to retain the character and economic viability of agricultural and forest lands, as well as recognizing that existing parcelization and diverse ownerships and uses exist within the farm and forest area. * * *" CDC 348-1.

> lines to be adjusted through a Type I procedure under two circumstances * * *. However, the [CDC] does not preclude a Type II lot line adjustment pursued in accordance with the provisions of [CDC] 602-7 as a revision to a partition or subdivision which has received final approval."[7] Record 12.

CDC 602-7 is referred to in the above quote as the source of the county's authority to allow the proposed lot line adjustment. It provides:

> "Revisions to Land Divisions with Final Approval
>
> "Revisions to a partition or subdivision which has received final approval * * * shall be through the same procedure as the preliminary approval."

As we understand it, because each of the RPDs involved in the proposed lot line adjustment was originally approved in conjunction with a subdivision, and through a Type II procedure, the county interprets CDC 602-7 to grant it authority to approve a modification to those subdivisions through a Type II procedure.[8]

---

[7]The county then proceeded to apply the standards of CDC 610-1 for lot line adjustments in the AF-5 zone to the challenged decision. Even if CDC 602-7 did give the county authority to approve a lot line adjustment pursuant to the standards of CDC 610-1, we do not see that the subject lot line adjustment complies with CDC 610-1. CDC 610-1.1.B provides that no lot in the AF-5 zone shall be reduced below three acres "except as provided through the RPD process." The approved lot line adjustment allows an AF-5 zoned lot in the Honeyman RPD to be reduced to 1.5 acres, but does not follow the RPD process.

[8]The county also argues that its interpretation of the authority granted by CDC 602-7 to modify lot lines in an RPD is limited to situations where there is a lot line adjustment between lots in two RPDs, as opposed to between one lot in an RPD and another subdivision lot that is not part of an RPD. However, under the county's interpretation, we see nothing in CDC 602-7 so limiting the county's authority.

By its express terms, CDC 602-7 applies to revisions to a partition or subdivision. Although an RPD is approved "in conjunction with" a partition or subdivision, it is clearly more than just a partition or subdivision. It must be "planned as an integral unit" and must satisfy a comprehensive set of standards governing its design and configuration, including standards requiring preservation of farm or forest uses on the RPD site. The provisions in CDC 404-5.6 authorize lot line adjustments to an approved RPD only in certain circumstances which do not exist here. In addition, the county's interpretation of these provisions would allow it to approve a lot line adjustment resulting in an RPD that would be prohibited under the density limitations of CDC 404-5.4, as has occurred in this case.

We believe the county's interpretation of CDC 602-7 as giving it authority to approve lot line adjustments in an RPD beyond what could be approved under CDC 404-5.6, is contrary to the language of CDC 602-7 and to the context and policy of the RPD provisions of the CDC and, therefore, is clearly wrong.

The assignments of error are sustained.

The county's decision is reversed.