BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID P. MILLER and THE BONNIE SLOPE NEIGHBOR'S GROUP, Petitioners, vs. WASHINGTON COUNTY, Respondent, and JIM McGEHEE, Intervenor-Respondent.	LUBA No. 92-237 FINAL OPINION AND ORDER

Appeal from Washington County.

David P. Miller, Portland, filed the petition for review and argued on behalf of petitioners.

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

Timothy V. Ramis, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was O'Donnell, Ramis, Crew & Corrigan.

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

AFFIRMED 04/12/93

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners' decision affirming, with modified conditions, a county hearings officer's decision approving a preliminary plat for a 50 lot subdivision.

MOTION TO INTERVENE

Jim McGehee, the applicant below, moves 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 property is composed of two parcels totaling 9.57 acres. Intervenor-respondent's (intervenor's) original proposal requested approval of a 55 lot subdivision, but that proposal was revised to 50 lots during the course of the local proceedings. The subdivision was given preliminary approval by the county planning and economic development director on March 17, 1992.

The director's decision was appealed to the county hearings officer. Intervenor submitted a revised application excluding a portion of the subject property from the subdivision request and indicating the excluded area would be transferred to owners of the property adjoining the excluded portion of the subject property to the west.[1] The

[1]The excluded area is an approximately 55 foot wide strip (hereafter 55 foot strip), which includes a total of 14,326 square feet.

55 foot strip is included in the area shown on the subdivision preliminary plat approved by the hearings officer, but the hearings officer required, as a condition of final plat approval, that the 55 foot strip be transferred to the owners of the adjoining property through a lot line adjustment.

The hearings officer's decision was appealed to the board of county commissioners and was affirmed with modified conditions. This appeal followed.

STANDING/JURISDICTION

Intervenor challenges petitioners' standing to bring this appeal. Although intervenor's challenge is captioned a "standing" challenge, the argument intervenor presents in support of the standing challenge is actually a challenge to this Board's jurisdiction. We reject the challenge.

Petitioners clearly have standing to bring this appeal. ORS 197.830(2) establishes two requirements for standing to bring a LUBA appeal. Petitioners must have (1) filed a timely notice of intent to appeal, and (2) appeared during the local proceedings. Petitioners satisfy both of these requirements and, for that reason, have standing to bring this appeal.

The question raised by intervenor regarding this Board's jurisdiction concerns whether petitioners exhausted available administrative remedies. ORS 197.825(2)(a) provides that this Board does not have jurisdiction to

review a land use decision where the petitioner fails to "exhaust all remedies available by right before petitioning [LUBA] for review."

Intervenor argues petitioners' local petition for review appealing the county planning and economic development director's decision to the hearings officer did not include the original signatures required by Washington County Community Development Code (CDC) 209-3.7.[2] According to intervenor, this defect is jurisdictional; and the county should have granted its motion to dismiss petitioners' appeal. Had the county done so, intervenor argues, petitioners would have failed to exhaust an available local remedy; and an appeal to LUBA would have been foreclosed by ORS 197.825(2)(a). In other words, intervenor argues that even though the county proceeded with petitioners' appeal, petitioners' alleged failure to comply with the jurisdictional requirement that the local petition for review be signed constitutes a failure to exhaust administrative remedies. We do not agree.

The county entertained petitioners' local appeal, albeit over intervenor's objections. Petitioners obtained a decision from the highest level local decision maker and, therefore, exhausted available administrative remedies, as ORS 197.825(2)(a) requires. Lyke v. Lane County, 70 Or App

[2]Petitioners dispute intervenor's contention.

82, 86-87, 688 P2d 839 (1984). Therefore, we have jurisdiction to consider this appeal.

The county's error, if there was one, was in failing to dismiss petitioners' local appeal. However, even if intervenor is correct that the county committed error in proceeding with the local appeal over intervenor's objections, that error would provide a basis for intervenor filing his own appeal of the county's ultimate decision to this Board or filing a cross-petition for review in this proceeding.[3] Intervenor did neither. Therefore, the question is not properly presented, and we do not consider it.

FIRST ASSIGNMENT OF ERROR

Under the first assignment of error, petitioners make two arguments. First, petitioners contend the intervenor's revision of the application to exclude the 55 foot strip from the proposed subdivision necessitates submittal of a new application for subdivision approval. Second, petitioners argue the county erred by failing to require that the 55 foot strip be approved as a separate lot, as part of the subdivision approval, pursuant to ORS chapter 92.

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[3]We are authorized to reverse a challenged decision if the local government exceeds its jurisdiction. ORS 197.828(2)(c)(A), 197.835(7)(a)(A); OAR 661-10-071(1)(a), 661-10-073(1)(a).

A. Modified Application

In response to petitioners' first argument, respondent points out that ORS 92.044(1) specifically provides that the county is to "adopt standards and procedures * * * governing * * * submission and approval of tentative plans and plats of subdivisions * * *." The CDC specifically provides that a subdivision preliminary plat application may be approved with "modifications or conditions of approval * * *."[4] CDC 207-1.2. Petitioners cite no statutory provision precluding the county from accepting a modified subdivision application, after the subdivision application is initially submitted, and making a decision regarding that modified application without requiring that the entire approval process be restarted. We agree with respondent and intervenor that the county committed no error in considering the modified subdivision application.

B. Lot Line Adjustment Condition

ORS 92.012 provides "[n]o land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.190. Petitioners appear to argue that because the 55 foot strip will be divided from the rest of the subject property through a lot line adjustment, rather than through the subdivision process, ORS 92.012 is violated.

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[4]As respondent notes, the CDC also permits minor revisions in lot dimensions, street locations and lot patterns after preliminary plat approval has been given. CDC 602-6.1.

Although the relevant statutes do not appear to specifically envision an approval process that combines a lot line adjustment and a subdivision approval, neither do they prohibit such a combined process. Under the relevant statutory definitions, a lot line adjustment, such as the one required by the disputed condition, does not create a lot or parcel subject to the provisions of ORS chapter 92.[5] A lot line adjustment does not create new lots or parcels, it simply relocates common boundary lines between adjoining lots or parcels to make one or more lots or parcels larger and one or more lots or parcels smaller. CDC 605-1 allows the property line between adjoining lots or parcels to be relocated, so long as an additional lot or parcel is not created, and the parcel that is reduced in size is not made smaller than the minimum lot size imposed in the relevant land use district.

Petitioners offer no reason why a lot line adjustment between the subject property and property in the adjoining

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[5]The term "lot" is defined as a "unit of land that is created by a subdivision of land." A lot line adjustment is not a "subdivision of land," as the statutes define that concept. Similarly, the term "partition land" is specifically defined to exclude

> "[a]n adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created and where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance[.]"

Therefore the lot line adjustment to deed the 55 foot strip to the adjoining property owners does not create a new lot or constitute the partition of a new parcel.

subdivision could not be granted, pursuant to CDC 605-1, to allow conveyance of the 55 foot strip to the adjoining property owners. Petitioners appear to argue the lot line adjustment is improper because the disputed condition is imposed as a condition of preliminary subdivision plat approval. According to petitioners, the creation and transfer of the 55 foot strip, therefore, must be accomplished through the subdivision approval process rather than by way of a lot line adjustment.

We see no reason why the county could not have elected to proceed in the way petitioners argue it was required to proceed. However, neither do we see any basis in either ORS chapter 92 or the CDC provisions cited by petitioners for concluding the county could not proceed in the manner it did. The decision requires that the 55 foot strip be transferred from the subject property to the adjoining property by way of a lot line adjustment prior to final subdivision plat approval for the remainder of the subject property. As far as we can tell, the choice between whether to accomplish that transfer by way of a lot line adjustment (before the subdivision final plat is approved) or as part of the approved subdivision itself is for the county to make. We see no error in the county's election to accomplish the transfer by requiring a lot line adjustment prior to final subdivision plat approval.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The roadways within the proposed subdivision must comply with Washington County Urban Road Standards. CDC 501-5.1.B(1). Washington County Uniform Road Improvement Design Standards (URIDS) 210.6 provides, in part, as follows:

> "* * * * *
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> "Cul-de-sacs shall not be more than six hundred (600) feet in length. The length of a cul-de-sac shall be measured along the centerline of the roadway from the near side right-of-way from the nearest through traffic intersecting street to the farthest point of the cul-de-sac right-of-way.
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> "* * * * *"

The proposed subdivision includes a cul-de-sac that is more than 600 feet from N.W. McDaniel Road, the nearest existing through traffic intersecting street. For that reason, petitioners contend URIDS 210.6 is violated. However, the proposed cul-de-sac is less than 600 feet from proposed stub streets within the subdivision which will become through traffic intersecting streets if extended in the future when adjoining properties are developed, as is planned.[6] For that reason, respondents contend URIDS 210.6 is not violated.

The challenged decision adopts the interpretation of

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[6]URIDS 210.17 provides that "[s]tub streets provide for future extensions * * *" and requires that reserve strips be provided at the end of a stub street until it is extended in the future.

the CDC advocated by respondents. Both petitioners and respondents contend there are policy reasons why their interpretation is correct.[7]

URIDS 210.6 does not specify whether it refers to existing or proposed through traffic intersecting streets. We conclude that either construction is reasonable. The interpretation adopted by the county is not clearly wrong, and we defer to it. Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, ___ P2d ___ (1992); West v. Clackamas County, 116 Or App 89, ___ P2d ___ (1992); Cope v. Cannon Beach, 115 Or App 11, 836 P2d 775 (1992).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

CDC 501.5.2.A(1) imposes the following requirement:

> "An applicant shall provide documentation from the appropriate school district * * * that adequate levels of service are available or will be available to the proposed development within the time-frames required by the service provider."

On October 17, 1991, the Beaverton School District submitted a residential impact statement for the disputed

[7]Petitioners point out the cul-de-sac limitation is at least partially based on access safety considerations, and that approving a cul-de-sac that extends more than 600 feet from an existing through traffic intersecting street conflicts with that policy until an intervening stub street is extended. Respondents counter that petitioners' argument imposes an unintended and significant restraint on the use of cul-de-sacs, effectively precluding the approval of cul-de-sacs based on the planned-for traffic circulation system.

subdivision. The impact statement form provides for three possible responses concerning the "Status of School Impact." Those responses range from "A" (school capacity not exceeded) to "B" (school capacity exceeded, but core school facilities sufficient to accommodate projected enrollment with portable classrooms) to "C" (school capacity exceeded, and core school facilities insufficient to allow adding portables).

The October 17, 1991 school impact statement shows intermediate and high schools have excess core facility capacity, but that potential school enrollment, with the disputed subdivision included, will exceed core capacity at Cedar Mill Elementary School. However, the impact statement includes a table showing that, with portable classrooms, Cedar Mill Elementary will be able to accommodate the projected enrollment.[8] Record 253. The impact statement assigns a "B" rating for the "Status of School Impact." The county relied in part on this impact statement in concluding that the proposed subdivision satisfies the requirement of CDC 501.5.2.A(1). Petitioners do not dispute that a "B" rating is sufficient to comply with CDC 501.5.2.A(1). Petitioners do dispute the continuing effectiveness and

[8]The proposed subdivision is located in the Cedar Mill Elementary School service area. Intervenor points out an additional potential option for providing adequate elementary school services to the proposed subdivision is revision of the elementary school service areas to shift elementary school students to other elementary schools with available capacity.

validity of the October 17, 1991 "B" rating. Petitioners point out the October 17, 1991 impact statement was, by its own terms, only good for 120 days and, therefore, expired before the decision challenged in this appeal became final. Moreover, petitioners contend that after the October 17, 1991 impact statement was submitted, but before the challenged decision became final, the school district changed the methodology it uses to assess the impact of residential subdivisions on schools. Using the new methodology, petitioners contend a June 17, 1992 letter from the executive director of facilities and construction for the school district to petitioners' attorney confirms the school district would no longer assign a "B" rating to the proposed subdivision.

We agree with respondents that while the June 17, 1992 letter raises some questions about the earlier "B" rating, it does not reject the October 17, 1991 impact statement. More importantly, in response to a June 30, 1992 inquiry from intervenor's attorney, the same executive director of facilities and construction for the school district expressly reaffirmed the earlier October 17, 1991 impact statement signed by him.[9]

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[9]Petitioners also contend that only the school district may submit school capacity related information. This argument apparently is directed at information concerning school capacity submitted by intervenor. We agree with respondents that CDC 501.5.2.A(1) does not impose such a limitation. Even if it did, the October 17, 1991 impact statement and the June 30, 1992 written response from the executive director of facilities

The October 17, 1991 impact statement, as reaffirmed on June 30, 1992, constitutes substantial evidence in support of the county's determination that the requirement of CDC 501.5.2.A(1) is satisfied. See Southwood Homeowners Assoc. v. City of Philomath, 22 LUBA 742, 757-58) (1992); Wentland v. City of Portland, 22 Or LUBA 15, 20-21 (1991) (and cases cited therein); compare Dickas v. City of Beaverton, 17 Or LUBA 578 (1989).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

CDC 501-5.3.D(2)(a) and (b) impose sight distance requirements for the intersection of the proposed subdivision access road with N.W. McDaniel Road. Petitioners argue the required sight distance is obstructed by two existing trees, and that the decision approving the subdivision should be conditioned on removal of the trees.

Intervenor contends the condition petitioners seek is included in the decision. Record 313 (condition 10(d)). Although the condition does not clearly require that the sight-obscuring trees be removed, the challenged decision explains that "[t]he applicant has agreed to remove the trees" and that the decision is conditioned on removal of the trees. Record 12. We conclude removal of the trees is a condition of approval.

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and construction for the school district constitute the school district's official position and the justification for that position.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue the subdivision access roadway's intersection with N.W. McDaniel Road is prohibited by applicable CDC provisions limiting direct access onto major collectors and imposing spacing requirements between intersections.

N.W. McDaniel Road is a major collector. Direct access to a major collector is governed by CDC 501-5.3.B(3), which provides, in pertinent part, as follows:

> "All commercial, industrial and institutional uses with one-hundred-fifty (150) feet or more of frontage will be permitted direct access to minor or major collectors. Uses with less than one-hundred-fifty (150) feet of frontage shall not be permitted direct access to major collectors. * * *"

CDC 501-5.3.B(3) does not specifically address direct access to major collectors by residential uses with 150 feet or more frontage.[10]

Respondents first argue provisions of CDC 501-5.3.B(2) and (3) regulate direct access onto minor and major collectors, not access by public rights of way (including internal subdivision roadways that are to become local streets). In our view, that interpretation is a defensible one, to which this Board would be required to defer.

[10]Unlike CDC 501-5.3.B(3), CDC 501-5.3.B(2) specifically allows residential uses with 70 feet or more of frontage to have direct access onto minor collectors.

However, because the county did not adopt that interpretation in its decision, we do not consider it further. See Weeks v. City of Tillamook, 117 Or App 449, ___, P2d ___ (1992); Larson v. Wallowa County, 116 Or App 96, 104, ___ P2d ___ (1992). We turn to the interpretation the county did adopt.

The challenged decision determines that although CDC 501-5.3.B(3) does not expressly allow access to major collectors by residential uses with over 150 feet of frontage, neither does it prohibit such access. The decision goes on to explain the prohibition of CDC 501-5.3.B(3) is limited to uses with less than 150 feet of frontage. Because the proposed subdivision has more than 150 feet of frontage, the county concluded the proposed intersection is not prohibited.

We cannot say the county's interpretation of CDC 501-5.3.B(3) is clearly wrong, and we therefore defer to it. Clark v. Jackson County, supra; Goose Hollow Foothills League v. City of Portland, supra; West v. Clackamas County, supra; Cope v. Cannon Beach, supra.

With regard to the minimum access spacing requirements of CDC 501-5.3.B(3), petitioners' entire argument is as follows:

> "Petitioners also contend that the minimum access spacing standards for major collector roads set forth at Development Code Section 501-5.3.B(3) is [sic] not met in the Subdivision application." Petition for Review 19.

Intervenor points out the county adopted findings explaining its reasons for concluding that the spacing requirements of CDC 501-5.3.B(3) are met. Record 27. Intervenor also identifies evidence in the record supporting these findings. Record 75. Because petitioners neither develop their argument nor challenge the findings addressing the applicable criterion, we reject petitioners' argument concerning the spacing requirements of CDC 501-5.3.B(3).

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners contend the Cedar Hills/Cedar Mill Community Plan identifies a water area on the subject property. By definition, a "Riparian Zone" extends at least 25 feet on either side of a water area. CDC 106.185. CDC 422-3.3 and 422-3.1 impose requirements concerning water areas and riparian zones. Petitioners argue as follows:

> "* * * Based on the Record, it is not clear that the water area and riparian zone on the Subdivision site are properly identified or protected under the proposed Subdivision. No master plan or site analysis of the type and thoroughness required by the Development Code exists on the Record. Thus, the county cannot conclude that no water area or riparian zone exists on the Subdivision site. * * *" Petition for Review 21.

The county adopted the following findings in response to petitioners' concerns about the water area and riparian zone:

"The appellant contends that the Applicant has not

> complied with the code sections requiring a riparian zone adjacent to a water area. The Appellant points only to the broad mapping of the community plan map. These map indications are not site specific. They indicate further on-site investigation is required to determine whether resources are present which require analysis under the CDC.
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> "The applicant has presented substantial evidence from the [Oregon Division of State Lands (Record 225)], A.G. Crook [(Record 535-571)] and John Godsey that the property contains no floodplains, ponds or drainage hazard areas, and thus does not contain a water area sufficient to require an adjacent riparian zone. The [board of county commissioners] agrees with this evidence and finds that a riparian zone is not required on this site by CDC Sections 422-3.1 and 422-3.3."

Without a more focused challenge from petitioners, we agree with respondents that the county's findings, that the subject property does not include water areas or a riparian zone, are adequate and supported by substantial evidence.

The sixth assignment of error is denied.

The county's decision is affirmed.