BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ELAINE S. CUMMINGS, Petitioner, and OREGON NATURAL RESOURCES COUNCIL, Intervenor-Petitioner,	)	LUBA No. 93-088
vs. TILLAMOOK COUNTY, Respondent, and DAVID FARR, and DONALD NUSSMEIER, Intervenors-Respondent.	)	FINAL OPINION AND ORDER

Appeal from Tillamook County.

Neil Kagan, Portland, filed the petition for review and argued on behalf of petitioner and intervenor-petitioner.

No appearance by respondent.

Steven W. Abel and Mildred Carmack, Portland, filed the response brief on behalf of intervenors-respondent. With them on the brief was Schwabe, Williamson & Wyatt. Steven W. Abel argued on behalf of intervenors-respondent.

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

REMANDED 10/26/93

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

Petitioner appeals a county order approving the tentative plat for a 43-lot residential subdivision.

MOTIONS TO INTERVENE

Oregon Natural Resources Council moves to intervene in this appeal proceeding on the side of petitioner. David Farr and Donald Nussmeier, the applicants below, move to intervene in this proceeding on the side of respondent. There is no opposition to the motions, and they are allowed.

MOTION TO FILE REPLY BRIEF

Petitioner and intervenor-petitioner (petitioners) request permission to file a six-page reply brief responding to contentions in intervenors-respondents' (respondents') brief that petitioners are precluded from raising issues presented in their first and fourth assignments of error. There is no opposition to the motion, and it is granted.

MOTION TO TAKE OFFICIAL NOTICE

Petitioners request that the Board take official notice of Tillamook County Ordinance OA-92-05(33), an ordinance adopted October 28, 1992, amending Section 3.085 (Beach and Dune Overlay Zone) of the acknowledged Tillamook County Land Use Ordinance (TCLUO). There is no opposition to the motion, and it is granted.[1]

---

[1]Tillamook County Ordinance OA-92-05(33) is found at App-19 through App-97 of the petition for review. The amended Beach and Dune Overlay Zone

FACTS

The subject property is an approximately 11.71 acre ocean-front parcel in the Twin Rocks-Watseco area, between the cities of Rockaway Beach and Garibaldi. Respondents propose to develop the proposed subdivision in two phases. The first phase will be 32 lots on 7.8 acres, and the second phase will be 11 lots on 2.4 acres. The balance of the property will be designated as common open space.

The subject property is zoned Medium Density Urban Residential (R-2).[2] The R-2 zone has a minimum lot size of 5,000 square feet. The property is also subject to the county's Beach and Dune Overlay Zone (BD) and Flood Hazard Overlay Zone (FH).

On March 4, 1992, respondents filed separate applications with the county for approval of phases I and II of the proposed subdivision. The applications were accompanied by a tentative subdivision plat and a "Beach and Dune Hazard Report." Record 935, 940; Supp. Record 943, 951-58. On April 17, 1992, respondents asked that the county postpone any hearing on their applications and expressly waived the requirement of ORS 215.428(1) that the

---

found at App-81 through App-97 of the petition for review will be cited as TCLUO 3.085 (1992). The former Beach and Dune Overlay Zone is found at App-99 through App-114 and will be cited as TCLUO 3.085 (1989).

[2]The subject property is not within the urban growth boundary of an incorporated city. However, it is part of the unincorporated area within the "Barview Community Growth Boundary" adopted by respondent Tillamook County (county).

county take final action on their applications within 120 days. Record 930.

Respondents thereafter initiated an amendment to the text of TCLUO 3.085 (1989). Petition for Review App-19. The county adopted an ordinance amending TCLUO 3.085 (1989) on October 28, 1992. That amendment was acknowledged upon expiration of the 21-day appeal period established by ORS 197.830(8). ORS 197.625(1).

On November 18, 1992, respondents submitted additional documents to the county regarding their subdivision applications, including a "Dune Hazard Report" dated November 5, 1992. Record 799. On December 10, 1992, and January 14, 1993, the county planning commission held hearings on the subject applications. At its February 11, 1993 meeting, the planning commission approved the applications. Petitioner appealed the planning commission's decision to the board of commissioners. After an additional public hearing, the board of commissioners affirmed the planning commission's decision and approved the subject applications. This appeal followed.

PRELIMINARY ISSUE

Respondents contend that under ORS 197.763(1) and 197.835(2), petitioners are precluded from raising the issues addressed in their first and fourth assignments of error in this appeal, because they failed to raise them

during the proceedings below.[3] Respondents also contend that regardless of the effect of these statutory provisions, petitioners are precluded from raising these issues here because they did not raise them in an appeal to the board of county commissioners. Respondents point out petitioners do not assign error to the board of commissioners' decision to limit its scope of review in the local appeal to the two issues mentioned in petitioner Cumming's notice of local appeal.

LUBA's scope of review is determined by ORS 197.835 and 197.763(1). That local government regulations may allow or require the local governing body's scope of review to be narrowed during local appeals does not similarly narrow LUBA's scope of review. Davenport v. City of Tigard, ___ Or LUBA ___ (LUBA No. 92-104, March 15, 1993), slip op 4, aff'd 121 Or App 135 (1993); see Tice v. Josephine County,

---

[3]ORS 197.763(1) provides in relevant part:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. * * *"

ORS 197.835(2) provides, in relevant part:

> "Issues [raised before LUBA] shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763. A petitioner may raise new issues [before LUBA] if:
>
> "(a) The local government failed to follow the requirements of ORS 197.763[.]
>
> "* * * * *"

21 Or LUBA 371, 376 (1991).

Petitioners argue that under ORS 197.835(2)(a), they may raise new issues before LUBA because the county failed to follow the requirements of ORS 197.763 in several respects. One of petitioners' contentions in this regard is that the mailed notice of the planning commission hearing did not comply with ORS 197.763(3). According to petitioners, the county failed to include the list of county comprehensive plan and land use regulation criteria applicable to the subject applications, required by ORS 197.763(3)(b), or the "general explanation of the requirements for submission of testimony and the procedure for conduct of hearings," required by ORS 197.763(3)(j). Petitioners point out this Board has determined the statement required by ORS 197.763(3)(j) must provide notice of the rights under ORS 197.763(4)(b) and (6) to request a continuance or to keep the record open. Reed v. Clatsop County, 22 Or LUBA 548, 554 (1992); Wissusik v. Yamhill County, 20 Or LUBA 246, 252 (1990). Petitioners argue the county's notice failed to include such a statement.

The county's mailed notice of the planning commission's December 10, 1992 hearing is found at Record 912-14. As relevant to the issue raised by petitioners, that notice states:

> "Notice of public hearing, a map of the request area, and applicable criteria and a general explanation of the requirements for submission of

> testimony and the procedures for conduct of hearings are being mailed to all property owners within 250 feet of the exterior boundary of the subject property at least 20 days prior to the hearing.
>
> "Statements will be heard at the hearing. Written statements may be submitted to the [county planning department] prior to the date of the hearing. Please contact the Department as soon as possible if you wish to have your comments included in the staff report that will be presented to the Planning Commission." Record 912-13.

The record includes the "map of the request area" referred to in the notice above. Record 914. It does not include the list of "applicable criteria" or "general explanation" referred to in the notice.

Where applicable, a local government must comply with the procedural requirements of ORS 197.763. Where petitioners contend they may raise new issues before LUBA because the local government failed to comply with ORS 197.763, and allege specific respects in which the local government failed to follow the procedural requirements of ORS 197.763, the local government or other respondents must demonstrate that the local government complied with the relevant requirements of ORS 197.763. If they fail to do so, LUBA will conclude that under ORS 197.835(2)(a), petitioners may raise new issues.

In this case, the notice of hearing provided by the county did not include the list of applicable criteria or the explanation of the rights to request a continuance and

to keep the record open that are required by ORS 197.763(3)(b) and (j). Accordingly, petitioners may raise issues in this appeal irrespective of whether they were raised during the proceedings below.

FIRST ASSIGNMENT OF ERROR

Petitioners contend the county erred in applying TCLUO 3.085 (1992), rather than TCLUO 3.085 (1989), to the subject subdivision applications. According to petitioners, under TCLUO 3.085 (1989), more than half of the subject property, including the ten proposed beach front lots, would be undevelopable. Petitioners argue that under ORS 215.428(3), the county must base its decision on the standards and criteria that were applicable when the subject applications were originally submitted on March 4, 1992. Von Lubken v. Hood River County, 118 Or App 246, 249, 846 P2d 1178 (1993); Veatch v. Wasco County, 23 Or LUBA 515, 516 (1992).

ORS 215.428 provides, in relevant part:

"* * * * *

> "(2) If an application for a permit * * * is incomplete, the [county] governing body or its designate shall notify the applicant of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. * * *
>
> "(3) If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first

> submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.

"* * * * *" (Emphasis added.)

There is no dispute the county applied TCLUO 3.085 (1992) to the subject applications. There is also no dispute the county's plan and land use regulations were acknowledged when the subdivision applications were initially submitted on March 4, 1992. Therefore, under ORS 214.248(3), the county can properly apply TCLUO 3.085 (1992) only if (1) the subdivision applications filed on March 4, 1992 were incomplete, or (2) it is acting on subdivision application(s) filed after TCLUO 3.085 (1992) became acknowledged through operation of ORS 197.625(1).[4] Von Lubken v. Hood River County, supra.

With regard to this issue, the challenged decision provides as follows:

---

[4]Under ORS 197.625(1), the ordinance adopting TCLUO 3.085 (1992) became acknowledged when the 21-day appeal period provided by ORS 197.830(8) expired. ORS 197.830(8) provides that a notice of intent to appeal an amendment to an acknowledged comprehensive plan or land use regulation shall be filed not later than 21 days after the decision is mailed to parties entitled to notice under ORS 197.615. As far as we know, the record does not indicate when the county mailed the notice required by ORS 197.615. However, if we assume that notice was mailed on the earliest possible date, October 28, 1992, the date the ordinance in question was adopted, then the earliest point at which TCLUO 3.085 (1992) could have become acknowledged was when the 21-day appeal period expired at the end of November 18, 1992 without a notice of intent to appeal being filed. Thus, it is at best unclear whether TCLUO 3.085 (1992) would apply to a permit application filed on November 18, 1992.

> "Applicants initially submitted their Subdivision Application[s] on March [4], 1992. A Dune Hazard Report dated November [5], 1992 was submitted by Applicants [on November 18, 1992,] completing the application[s]. * * *" (Emphasis added.) Record 19.

The above statement indicates the county determined it was acting on the original subdivision applications filed March 4, 1992, not on new subdivision application(s) filed on or after November 18, 1992. Additionally, no party identifies subdivision application(s) in the record other than those filed on March 4, 1992. Therefore, we conclude no new subdivision applications were filed after March 4, 1992.

Respondents argue, however, that the county's failure to require a new application form to be filed when respondents submitted additional information in support of their applications on November 18, 1992, is merely a procedural error that did not prejudice petitioners' substantial rights. According to respondents, in Sunburst II Homeowners Assn. v. City of West Linn, 101 Or App 458, 460, 790 P2d 1213, rev den 310 Or 243 (1990), the court of appeals described subsequent application materials as "supplementing" the original filing, and held that failure to file a complete new application after amendment of the applicable ordinance was, at most, a procedural error.

We disagree with respondents' position that the court

in Sunburst II concluded the application of amended code standards where no new application is filed after the code is amended is merely a procedural error. In Sunburst II, a new permit application had been filed after the city's code was amended, and the city proceeded to apply the amended code to the new application. Petitioners in Sunburst II argued that the new application document did not satisfy certain code requirements for a permit application and, therefore, under ORS 227.178(3) (the analog to ORS 215.428(3) for cities) the city was required to apply the earlier version of its code in effect when the original permit application was filed. The court found that the alleged defects in the new application document amounted to at most a failure to follow applicable local procedural requirements for permit applications. The court concluded that unless the new application "fell short of being an 'application' for the purposes of ORS 227.178(3), the city construed the law correctly by applying the amended [code] provision * * *." Sunburst II, 101 Or App at 461.

This case is significantly different from Sunburst II in that there is no new application in the record and the county did not find a new subdivision application was filed. Therefore, the only basis on which the county could correctly construe ORS 215.428(3) to allow it to apply TCLUO 3.085 (1992) in making the challenged decision is if the March 4, 1992 subdivision applications were incomplete

when they were originally filed.

The county's finding that the November 5, 1992 Dune Hazard Report completed the applications may be intended to be such a determination.[5] However, if the county finds an application is incomplete, ORS 215.428(2) requires the county to notify the applicant of exactly what information is missing within 30 days after the application is submitted. Here, no such notification was given, and we are cited to nothing in the record indicating the county determined the original subdivision applications were incomplete any time prior to the amendment of TCLUO 3.085 (1989). We do not believe ORS 215.428(2) and (3) allow a county to determine, long after a permit application was originally filed, that the application was incomplete when filed. To allow the county to do so and, thereafter, to apply subsequently amended code standards would make ORS 215.428(3) a nullity. Unless a county notifies the applicant that its permit application is incomplete, as required by ORS 215.428(2), and the deficiency is not remedied within 180 days, the county must apply the standards and criteria that were in effect when that application was filed.

The first assignment of error is sustained.

---

[5]We note, however, that the original applications included a "Beach and Dune Hazard Report." Record 935, 940; Supp. Record 951-58.

SECOND ASSIGNMENT OF ERROR

Petitioners contend the county improperly approved the proposed subdivision tentative plat without benefit of a Dune Hazard Report including (1) a complete report on the results of a preliminary site investigation, or (2) the results of a detailed site investigation, as specified in detail in TCLUO 3.085(5)(B)(1) and (3).[6] Petitioners argue TCLUO 3.085(5)(B)(1) and (3) require that certain detailed information on beach and dunes hazards be present in the record at the time a subdivision tentative plat approval decision is made, and such information is not presently in the record.

Respondents do not contend the information in question is not required, or is already in the record.[7] Rather, respondents contend the county's regulations may properly be construed to allow this information to be submitted at the time of subdivision final plat approval. Meyer v. City of

---

[6]In the first assignment of error, we determine the county incorrectly applied TCLUO 3.085 (1992) in making the challenged decision. However, the provisions of TCLUO 3.085 (1989) and (1992) at issue under this assignment of error are identical. Therefore, we will address this assignment to the extent we can provide useful guidance to the parties on remand.

[7]We note one exception. Respondents do contend the record contains the information on "[b]ase flood elevation and areas subject to flooding" required by TCLUO 3.085(5)(B)(3)(e). Record 51. Nevertheless, the challenged decision itself determines that base flood elevation data for the subject property must be recalculated under current FEMA regulations, and imposes a condition of approval requiring that this be done. Record 27-28, 30. We therefore agree with petitioners that the base flood elevation data required by TCLUO 3.085(5)(B)(3)(e) is not currently in the record.

Portland, 67 Or App 274, 678 P2d 741, rev den 297 Or 82 (1984); Southwood Homeowners Assoc. v. City of Philomath, 21 Or LUBA 260, 272 (1991).

This Board is required to defer to a local government's interpretation of its own ordinances, unless that interpretation is contrary to the express words, policy or context of the local enactment. Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). This means we must defer to a local government's interpretation of its own enactments, unless that interpretation is "clearly wrong." Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d 1354 (1992). Additionally, in Weeks v. City of Tillamook, 117 Or App 449, 453, 844 P2d 914 (1992), the court of appeals said Clark requires that this Board not interpret a local government's ordinances in the first instance, but rather review the local government's interpretation of its ordinances.

TCLUO 3.085(5)(B)(1) provides that, with certain exceptions not relevant here, a "Dune Hazard Report shall be required prior to the approval of subdivisions and partitions governed by the Land Division Ordinance * * *." TCLUO 3.085(5)(B)(3) specifies the contents of such a report. However, the challenged decision does not interpret TCLUO 3.085(5)(B)(1) and (3) with regard to at what stage of the subdivision approval process the required information

must be submitted to the county.[8] This is an interpretation the county must make in the first instance. Weeks, supra.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners contend the county improperly approved the proposed subdivision tentative plat without determining the proposed subdivision will minimize and reduce exposure to flood damage, as required by certain provisions of the FH overlay zone. TCLUO 3.060(4)(i)-(k). Petitioners argue certain provisions of the FH zone and the Tillamook County Land Division Ordinance (TCLDO) are properly construed to require that these determinations be made at the time of subdivision tentative plat approval.

Respondents do not contend the challenged decision determines compliance with TCLUO 3.060(4)(i)-(k). Rather, respondents contend the challenged decision finds that compliance with TCLUO 3.060(4)(i)-(k) is feasible, and properly imposes a condition requiring that the technical determinations of compliance be made prior to final plat

---

[8]The challenged decision does include the following condition:

> "Prior to development requiring a building permit, each lot shall provide a project-specific and site-specific Detailed Site Investigation/Dune Hazard Report meeting the requirements of the Beach and Dune Overlay Zone." Record 31.

We note that contrary to the position taken by respondents, this condition does not appear to require compliance with TCLUO 3.085(5)(B)(1) and (3) prior to final subdivision plat approval, but rather prior to issuance of building permits for structures on the lots created by the proposed subdivision.

approval.[9]

TCLUO 3.060(4)(i)-(k) are listed in the TCLUO as standards applicable to "subdivision proposals." The challenged decision does not interpret TCLUO 3.060(4)(i)-(k) concerning at what stage of the subdivision approval process the required determinations of compliance must be made.[10] This is an interpretation the county must make in the first instance. Weeks, supra.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend the county failed to adopt findings of fact addressing Tillamook County Comprehensive Plan Goal 18 Policy 2.4a, TCLUO 3.085(4)(A)(1)(b)(2), TCLUO 3.085(5)(A)(2) and (3), and TCLDO 23.[11]

The provisions cited by petitioners appear to be relevant to a subdivision tentative plat approval decision.

---

[9]We note, however, that the challenged decision finds the proposed subdivision is feasible, under any result of future flood hazard studies, not that compliance of the proposed subdivision with TCLUO 3.060(4)(i)-(k) is feasible.

[10]Although Condition B requires the applicants to demonstrate "to the reasonable satisfaction of the Planning Director" that certain standards of TCLUO 3.060(4), (5), (8) and (9) are adequately satisfied, Condition B does not specifically state when such a demonstration must be made. Record 30. Respondents note the decision text states Condition B requires a recomputation of the base flood elevation data to be submitted "prior to Final Plat approval." Record 28. However, the text says nothing about when determinations of compliance with TCLUO 3.060(4) must be made.

[11]Petitioners' challenges to the adequacy of the county's findings concerning TCLUO 3.085(5)(B)(1) and (3) and 3.060(4)(i)-(k) are addressed under the second and third assignments of error.

The challenged decision includes only a conclusory statement that respondents have adequately demonstrated compliance with TCLUO 3.060, 3.085 and other TCLUO sections, "to the extent any of such Sections apply," and with TCLDO 20 through 25. Record 29. The decision also states the board of commissioners adopts the planning commission's findings of fact. Id. However, the record does not include any written findings of fact adopted by the planning commission.[12] We, therefore, agree with petitioners that the challenged decision is not supported by findings adequate to demonstrate compliance with plan Goal 18 Policy 2.4a, TCLUO 3.085(4)(A)(1)(b)(2), TCLUO 3.085(5)(A)(2) and (3), or TCLDO 23.

The fourth assignment of error is sustained.

The county's decision is remanded.

[12]Although both the planning commission minutes and the notice of the planning commission decision refer to the decision as being based on "findings of fact," they do not identify any such document and no such document is appended to either. Record 641, 643.