BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LES HILDERBRAND and ARTHUR COLLIER, Petitioners, vs. MARION COUNTY, Respondent, and RICK SMART and KELLY SMART, Intervenors-Respondent.	LUBA No. 94-221 FINAL OPINION AND ORDER

Appeal from Marion County.

John W. Shonkwiler, Tigard, filed the petition for review and represented petitioners.

Jane Ellen Stonecipher, Assistant County Counsel, Salem; and M. Chapin Milbank, Salem, filed the response brief. Jane Ellen Stonecipher argued on behalf of respondent. M. Chapin Milbank argued on behalf of intervenors-respondent.

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

HOLSTUN, Chief Referee, concurring.

REMANDED 02/27/95

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

Petitioners appeal a county decision approving a partition.

MOTION TO INTERVENE

Rick Smart and Kelly Smart, the applicants below, move to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

The subject 3.6 acre parcel is designated Rural Residential in the Marion County Comprehensive Plan and zoned Acreage Residential. The proposal is to partition the subject parcel into two parcels consisting of 1.5 and 2.18 acres respectively. The subject parcel is developed with a dwelling. The proposal is for the 2.18 acre parcel to include the dwelling and for an additional dwelling to be placed on the 1.5 acre parcel. 84th Place S.E. provides access to the subject parcel and to the parcels created by the proposed partition. Eleven homes are currently served by 84th Place S.E.

The planning director approved the partition application, and that decision was appealed to the hearings officer. The hearings officer reversed the planning director and denied the partition on the basis that the hearings officer could not determine whether 84th Place S.E. is a public road or private drive. This is important

because if 84th Place S.E. is a private drive, MCZO 110.800[1] prohibits it from serving more than four parcels.

Intervenors appealed the hearings officer's decision to the Marion County Board of Commissioners. The board of commissioners reviewed the matter and remanded the decision to the hearings officer for further consideration of the public or private nature of 84th Place S.E. The hearings officer reconsidered the matter and again denied the application, and the applicants again appealed to the board of commissioners. The board of commissioners again remanded the application to the hearings officer on the sole issue of whether 84th Place S.E. is a public road or a private drive. Rather than make that decision, the hearings officer approved the application subject to several conditions, one of which defers the determination regarding the nature of 84th Place S.E. and is relevant here. The board of commissioners affirmed the hearings officer's decision, and this appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

This appeal involves Condition 8 and Finding 11, which

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[1]MCZO 110.800 provides:

> "* * * A private drive shall not serve more than 4 dwelling units unless the parcels, on which those units are proposed to be placed, were established with the approval of the Marion County Planning Commission or Hearings Officer in accordance with State law or Marion County Zoning Subdivision * * *, prior to May 1, 1977, or were approved under Chapter 121, Planned Development."

provide:

> "8. Applicants shall submit proof of a final order of a court of competent jurisdiction or Marion County Board of Commissioners showing that 84th Place SE is a public way."[2] Record 14.
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> "11. Determining the legal status of 84th Place SE as a private or public road is not a land use decision and is not within the scope of the Hearings Officer's authority. Such a determination must be shown by Marion County Board of Commissioners [sic] order or by order of a court of competent jurisdiction. Without such a determination the applicants have not carried the burden of proving that the proposed new parcel will have adequate access as required under the [county plan] and MCZO.
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> "* * * * *" Record 10.

Petitioners claim Condition 8 and Finding 11 violate both Marion County Comprehensive Plan (plan) Rural Residential Policy 9 (Policy 9)[3] and Marion County Zoning Ordinance (MCZO) 110.800. Petitioners argue Policy 9 and MCZO 110.800 contain legal prerequisites to approval of a partition application. Petitioners contend that under Policy 9 and MCZO 110.800, to approve an application for a

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[2]We note the challenged decision does not make approval of the final partition map subject to any county determination that condition 8 is satisfied.

[3]As relevant here, Policy 9 provides:

> "When approving rural subdivisions and partitions each parcel shall be approved as a dwelling site only if it is determined that * * * there is adequate access to the parcel."

partition, the county must determine the road serving the property to be partitioned is either a public road or a private drive serving less than four parcels.

We agree with petitioners. At a minimum, Policy 9 and MCZO 110.800 require the county to determine that the parcels created by a partition will be accessed by a private drive serving four or fewer parcels or a public road. Therefore, MCZO 110.800 clearly requires the county to make a determination concerning the status of 84th Place S.E. as either a public road or a private drive. The county is free to make a determination concerning whether 84th Place S.E. is a public road or private drive. The county is incorrect that it lacks the authority to make a specific determination on this issue. Where the county's own code requires that it make such a determination, it can hardly be held to lack authority to make such a required determination.

It is well established that where a local government wishes to defer a determination of compliance with an applicable approval standard, its decision or regulations must ensure that the later approval process to which the decision making is deferred provides any statutorily or locally required notice and hearing. Eppich v. Clackamas County, 26 Or LUBA 498, 507-08 n4 (1994). The decision requires intervenors at some point in the future to submit to the county a certain order regarding the status of 84th Place S.E. However, neither the decision nor the county's

regulations require that approval of the subject partition be deferred until the county determines compliance with Policy 9 and MCZO 110.800, in a proceeding providing petitioners the opportunity for notice and input to which they are entitled.

Petitioners' first and second assignments of error are sustained.[4]

The county's decision is remanded.

Holstun, Chief Referee, concurring.

The majority is correct that the challenged decision does not require compliance with Condition 8 prior to approval of the final plat. As I read Policy 9 and MCZO 110.800, the county may not approve the disputed partition unless 84th Place S.E. is a public street.[5] Because it appears the final plat could be approved and recorded under the challenged decision before a determination is made that 84th Place S.E. is a public street, the decision must be

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[4]Petitioners' third and fourth assignments of error concern evidentiary support for the challenged decision as it relates to 84th Place S.E. Because we remand the challenged decision to the county for a determination concerning the status of 84th Place S.E., we need not address petitioners' evidentiary arguments.

[5]Actually MCZO 110.800 requires that lots abut "a public street" or in certain circumstances a "pre-existing private driveway." MCZO 110.800 includes the prohibition quoted in the majority opinion at n 1 on private drives serving more than 4 dwelling units. In the circumstances presented in this appeal, the proposed partition cannot be approved unless 84th Place S.E. is a public street. Condition 8 uses the term "public way," but petitioners do not contend a "public way" is something different than a "public street." Petitioners' challenge is limited to the county's deferral of a determination concerning the "public" or "private" status of 84th Place S.E.

remanded.

However, we have held on many occasions that a local government may ensure compliance with approval standards by imposing conditions. See e.g. Sigurdson v. Marion County, 9 Or LUBA 163, 176 (1983). Had the county properly conditioned final plat approval on prior compliance with Condition 8, as it did for at least two other conditions of approval, I do not believe the county would be required to determine as part of the challenged decision that 84th Place S.E. is a public street, as the majority concludes it must.

Both the board of county commissioners and the circuit court have jurisdiction to determine whether 84th Place S.E. is a public street in a proceeding specifically for, and limited to, that question. If the county elects to have that determination made outside the land use decision making arena, I see no reason why it may not do so. The public will have whatever rights of participation are provided under law in the conduct of such proceedings. In the somewhat unique situation presented in this case, there is an available alternative to this land use proceeding to make the determination whether 84th Place S.E. is a public street. Therefore, this is not a case where the county has improperly imposed a condition deferring a decision concerning compliance with a discretionary criterion until after the close of the public hearing in this matter. See Foland v. Jackson County, 18 Or LUBA 731, 779 (1990) (and

cases cited therein).

If the board of commissioners or the circuit court issues an order determining that 84th Place S.E. is a public street, that would establish as a matter of law that 84th Place S.E. is a public street. The order could then be submitted with the final plat and the final plat could then be recorded. If the board of county commissioners or the circuit court determines 84th Place S.E. is not a public street, Condition 8 would preclude approval and recording the final plat. In that event, the county would not have improperly "approved" the disputed partition in contravention of Policy 9 and MCZO 110.800.

To the extent the majority suggests the county may not allow the decision concerning compliance with Condition 8 to be made as a ministerial decision at the time the final plat is submitted for approval and recording, without a public hearing or notice and an opportunity to request a public hearing, I respectfully disagree.