BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. TILLAMOOK COUNTY, Respondent, and ED MYERS and WILMA MYERS, Intervenors-Respondent.	LUBA No. 96-181 FINAL OPINION AND ORDER

Appeal from Tillamook County.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Theodore R. Kulongoski, Attorney General, Thomas A. Balmer, Deputy Attorney General, and Virginia L. Linder, Solicitor General.

William K. Sargent, County Counsel, Tillamook, and Jeffrey L. Kleinman, Portland, filed the response brief. William K. Sargent argued on behalf of respondent. Jeffrey L. Kleinman argued on behalf of intervenors-respondent.

LIVINGSTON, Referee; HANNA, Chief Referee, participated in the decision.

REMANDED 04/21/97

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners (county board) approving a six-lot subdivision with one-acre lots in a Rural Residential Zone.

MOTION TO INTERVENE

Ed Myers and Wilma Myers (intervenors) move to intervene on the side of the respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

This is the second time this matter has been before us for review. In DLCD v. Tillamook County, 30 Or LUBA 221, 222 (1995) (Myers I), we stated the facts as follows:

> "In August, 1994, intervenors filed applications for subdivision approval and conditional use approval of their proposed development on six acres of a 90-acre tract. Intervenors proposed to divide the six acres into six, one-acre lots.[1] The proposed subdivision is part of a 90-acre tract owned by intervenors, which is included within a larger area of approximately 171 contiguous acres, all zoned Rural Residential and included in a "noncommunity rural area."[1] The proposed subdivision would be reached by traveling 1.1 miles down Hughey Lane and then one-quarter mile down Marvin Road, which abuts the subdivision. The subdivision lots are grouped around a cul-de-sac off Marvin Road.
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> "After the planning commission denied the applications, intervenors appealed to the board of

[1]The six lots would be the result of dividing each of three, two-acre lots into two, one-acre lots.

commissioners, which reviewed the applications de novo. The board of commissioners held three hearings at which it accepted testimony, argument and evidence. On February 22, 1995, the board of commissioners voted to reverse the planning commission and approve the applications. The board of commissioners' decision was signed on March 20, 1995. This appeal followed.

"[1]Although the present proposal is for a six-lot subdivision, the applicant made clear at the outset that the proposal is for the first phase of a larger development. Record 195, 241."

We remanded the county's decision in Myers I on the ground that the county board's interpretation of Tillamook County Land Use Ordinance (LUO) 3.010(4)(k)(5) was inconsistent with the express language, purpose and policy of Tillamook County Comprehensive Plan (TCCP) Policy 3.17.[2]

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[2]LUO 3.010(4)(k) states, in relevant part:

"The minimum lot size may be as small as 20,000 square feet if the following conditions are met:

"* * * * *

"5. Public or private roads providing access to the lots shall meet the standards as contained in the County Land Division Ordinance [LDO].

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

TCCP Policy 3.17 provides:

"Tillamook County recognizes that development densities in rural areas have significant impacts on roadways, sewage disposal, water quality and quantity and nearby resource lands. Tillamook County will set its minimum lot size requirement in rural noncommunity areas at two acres in order to prevent adverse impacts. Higher densities will be allowed on a

Based on the explanation of Policy 3.17 contained in the plan findings, which showed the plan's drafters believed that uncoordinated development would have substantial negative impacts on county roads, we explained:

> "Policy 3.17 does not allow the county to apply the criteria of LUO 3.010(4)(k) in isolation each time a proposal for a subdivision of less than two-acre lots is made. Allowing small pockets of greater density on the basis that when viewed in isolation, they have negligible effects will result in uncoordinated development." Id. at 226.

We explained that it was not disputed that Hughey Lane does not presently meet the standards contained in the LDO and is potentially hazardous. Id. at 227. We then noted:

> "On remand, the county may consider requiring petitioner to make improvements to Hughey Road as a condition to approval of the proposed subdivision. However, the county is not required to impose conditions to enable intervenors to create a subdivision at a density greater than normally allowed by the LUO. * * * If the expense of upgrading Hughey Road to the standards contained in the LDO and its distance from the proposed subdivision make it impracticable or impossible, for constitutional or other reasons, to require the improvements as conditions to approval, the county may deny the application." (Emphasis in original.) Id. at 227 n4.

On remand, the county held a public hearing on July 10, 1996, and, on August 21, 1996, made its final written decision adopting findings and conclusions addressing our order and again approving the application. This appeal

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conditional basis where the cumulative impact of greater densities is not significant." (Emphasis added.)

followed.

FIRST ASSIGNMENT OF ERROR

We decided in Myers I that Hughey Lane is one of the roads to which LUO 3.010(4)(k)(5) applies.[3] The challenged decision finds:

> "1. The Board finds that the specific question before it on remand from LUBA is whether, under LUO 3.010(4)(k)(5), Hughey Lane will 'meet standards as contained in the County Land Division Ordinance', in light of the impact and 'cumulative impact' of the proposed subdivision upon Hughey Lane. * * *
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> "2. On remand from LUBA, the Board of Commissioners reviewed the existing record and also reopened the record with respect to the specific issue of impacts upon and improvements to Hughey Lane. * * *
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> "3. Upon review of said evidence and arguments, the Board of Commissioners is persuaded by the testimony of Jon A. Oshel, Director of Public Works for Tillamook County, at the Board's hearing of July 10, 1996. Mr. Oshel stated that, since the time of the prior proceedings in this case, the Board of County Commissioners has made the improvement of all of Hughey Lane a priority of the county. Some improvements have already been completed. (The Board expressly finds that Hughey Lane has already been widened between Fairview Road and Hodgdon Road, and the Hughey Creek culvert at approximately MP 0.85 has already been replaced with a larger one.) The balance of the improvements is scheduled to be completed in four phases starting in

[3]Intervenors made clear in the petition for review and at oral argument that they strongly disagree with the reasoning and the result in Myer I. However, intervenors did not appeal that decision, and it is now the law of the case. Beck v. Tillamook County, 313 Or 148, 831 P2d 678 (1992).

1997, and ending not later than 2000. Based upon the above statements and further comments by Mr. Oshel, we find that these improvements would make Hughey Lane satisfactory and up to the standards required to handle the cumulative impact of not only the three additional lots in question herein, but also the full buildout of the applicants' property at the density of this proposal, and all other conceivable growth in the area served by Hughey Lane. (We note that the latter item was not addressed by LUBA in its decision. We are hence not required to address it, but do so out of an abundance of caution because DLCD has raised it in this remand proceeding.) In response to DLCD's concerns, we expressly find that based upon the above evidence, the 'cumulative impact of a greater density' upon Hughey Lane will not be significant.

"4. We also find, based upon the testimony of applicant Ed Myers, that buildout of this six-lot development is likely to occur in late 1998 or early 1999, a point in time we expressly find to be reasonably close to the time that the above Hughey Lane improvements will be completed.

"LUO 3.010(4)(k)(5) provides that:

"'The minimum lot size may be as small as 20,000 square feet if the following conditions are met:

"'* * * * *

"'5. Public or private roads providing access to the lots shall meet the standards as contained in the County Land Division Ordinance.'

"In interpreting the above provision, we note that it contains no language requiring fulfillment of the above condition prior to

issuance of building or occupancy permits. Hence, we interpret this provision to require a finding that fulfillment of the condition is feasible and reasonably certain to occur, within a reasonable time of the occupancy of the development and resulting generation of traffic. Based upon the findings contained in paragraph 3, above, and in this paragraph, we expressly make said finding herein. In so doing, we are making a finding of actual compliance with LUO 3.010(4)(k)(5). We are not deferring such finding to a later date or proceeding, or waiving any of our approval standards.

"* * * * *

"6. Finally, [an opponent] has raised the issues of who has paid for the improvements to date on Hughey Lane, and whether political changes on this Board will affect the future work on Hughey Lane. * * * With respect to the latter, we expressly find that this Board and this county have a history of keeping their commitments regardless of changes in the political winds, and can reasonably be expected to continue to do so.

"7. We hence conclude that compliance with LUBA's mandate on remand, i.e., compliance with the requirements of LUO 3.010(4)(k)(5) as interpreted by LUBA, is feasible, and solutions to the identified problems with respect to Hughey Lane posed by the proposal and possible future development of the applicants' contiguous property and other property in the area are possible, likely, and reasonably certain to succeed in achieving compliance. We further conclude that, in light of the above program of improvements to Hughey Lane and the conditions pertaining to street improvements set out in our prior Findings, Conclusions and Order, the public or private roads providing access to the lots will meet the standards contained in the Land Division Ordinance.

> "* * * * *" (Original emphasis omitted; emphasis added.) Record 3-5.

Petitioner contends the county erred in construing LUO 3.010(4)(k)(5) to allow approval of the proposed conditional use without assuring compliance with a requirement whose mandatory nature is indicated by the word "shall." Petitioner argues that the county's

> "interpretation, that it need find only that 'fulfillment of the condition is feasible and reasonably certain to occur' is inconsistent with the plain meaning of the word 'shall,' and therefore inconsistent with the express language of the code provision, and is 'clearly wrong.' Consequently, [the county's] interpretation is not entitled to deference * * *." Petition for Review 5.

The county and intervenors (respondents) answer that "reduced to its bare essentials," the issue upon which we remanded is whether "in light of the prospective development of all the Myers' property, Hughey Lane will meet the standards identified in LUO 3.010(4)(k)(5)."[4] (Emphasis added.) Response Brief 8. We disagree with that description of our remand. We remanded to give the county an opportunity to apply LUO 3.010(4)(k)(5) to Hughey Lane, which it had not done prior to Myers I. LUO 3.010(4)(k)(5) does not say "will meet," it says "shall meet." The question we must now answer is whether the county's

[4]The first paragraph of the county's findings, quoted above, also state this to be the issue.

interpretation of "shall meet" to mean "will meet" or "feasible and reasonably certain to occur, within a reasonable time of the occupancy of the development" or "possible, likely, and reasonably certain to succeed in achieving compliance" is within its interpretive discretion under ORS 197.829(1).[5]

In answering this question, we may not interpret the county's provision ourselves, even as a means to determine how far the county's interpretation may have strayed from being correct. Huntzicker v. Washington County, 141 Or App 257, 261, 917 P2d 1051 (1996). Instead we must begin with the county's interpretation and examine it to determine if it is "clearly wrong" or "beyond a colorable defense" or "indefensible." deBardelaben v. Tillamook County, 142 Or App 319, 922 P2d 683 (1996) (deBardelaben); Zippel v.

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[5]ORS 197.829(1) provides:

> "(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

Josephine County, 128 Or App 458, 461, 876 Pd 854, rev den 320 Or 272 (1994); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 843 P2d 992 (1992).[6]

As we have explained before, this Board has difficulty determining how wrong a local government interpretation must be before it becomes reversible. Davenport v. City of Tigard, 27 Or LUBA 243, 255 (1994). However, the present case is not one where "the ordinance contains a grab bag of provisions that, arguably, are equally relevant and that equally support the various meanings for which the parties contend and that the decision-maker found." West v. Clackamas County, 116 Or App 89, 93, 840 P2d 1354 (1992). See also deBardelaben, 142 Or App 319; Langford v. City of Eugene, 126 Or App 52, 867 P2d 535 (1994); Reusser v. Clackamas County, 122 Or App 33, 857 P2d 182 (1993). The interpretation challenged by petitioner does not balance one or more code provisions against others arguably equally relevant. Instead, it addresses only one word: "shall."

Websters Third New International Dictionary 2086 (1981) defines "shall" as follows:

"**1** archaic **a:** will have to **:** MUST * * * **b.** will

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[6]We note that none of these terms is found in ORS 197.829(1)(a)-(c) which essentially codify the Oregon Supreme Court's decision in Clark v. Jackson County (Clark), 313 Or 508, 836 P2d 710 (1992). See Watson v. Clackamas County, 129 Or App 428, 432, 879 P2d 1309 (1994). They are also neither found in Clark itself nor in the one Oregon Supreme Court case that discusses the approach taken in Clark. See Gage v. City of Portland, 319 Or 308, 877 P2d 1187 (1994).

> be able to **:** CAN * * * **2a** -- used to express a command or exhortation * * * **b** -- used in laws, regulations, or directives to express what is mandatory * * * **3a** -- used to express what is inevitable or what seems to be fated or decreed or likely to happen in the future * * * **b** used to express simple futurity * * * **4** -- used to express determination."

Notwithstanding definitions 1a and b (which are archaic) and 3a, there can be no reasonable doubt that as used in the LUO, "shall" has the meaning stated in definition 2b: "used in laws, regulations, or directives to express what is mandatory." One has only to substitute the county's interpretation for the word "shall" in LUO 3.010(4)(k)(5) itself to see the interpretation is indefensible:

> "5. Public or private roads providing access to the lots [**will be feasible and reasonably certain to**] meet the standards as contained in the County Land Division Ordinance."

or

> "5. Public or private roads providing access to the lots [**will be able to**] meet the standards as contained in the County Land Division Ordinance."

or

> "5. Public or private roads providing access to the lots [**will be possible and likely, and reasonably certain to succeed in complying with**] the standards as contained in the County Land Division Ordinance."

The county's interpretation would amend the county's own legislation by transforming the mandatory present requirements of the LUO into predictions. To amend

legislation de facto or to subvert its meaning in the guise of interpreting it is not permissible. Goose Hollow Foothills League v. City of Portland, 117 Or App at 218. The county's interpretation is clearly wrong.[7]

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

A local government may properly grant permit approval based on either (1) a finding that an applicable approval standard is satisfied, or (2) a finding that it is feasible to satisfy an applicable approval standard and the imposition of conditions necessary to ensure that the standard will be satisfied. Burghardt v. City of Molalla, 29 Or LUBA 223, 236 (1996). See also Rhyne v. Multnomah County, 23 Or LUBA 442, 447 (1992). After arguing that LUO 3.010(4)(k)(5) states a mandatory standard, petitioner contends the county did not adequately condition its approval to assure compliance with the standard.

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[7]Respondents cite deBardelaben, 142 Or App 319, in support of their contention that the county's interpretation is neither "clearly wrong" nor "so wrong as to be beyond colorable defense." Response Brief 10-11. In deBardelaben v. Tillamook County, 31 Or LUBA 131, rev'd 142 Or App 319 (1996), this Board reasoned that in view of the importance placed by ORS 197.829(1)(b) on the purpose for a land use regulation, the county's interpretation of a labeled "purpose statement" as being "aspirational" was clearly wrong. But see Sullivan v. City of Ashland, 130 Or App 480, 882 P2d 633 (1994) (court deferred to local government interpretation of purpose statement as being merely precatory). Although the Court of Appeals reversed, at least in part on the basis that a local governing body can interpret "purpose" to mean "aspiration," we do not believe the court took the position that, as a rule, clear language in a local ordinance can be interpreted to mean something quite different. See Marquam Farms Corp. v. Multnomah County, ___ Or App ___, ___ P2d ___ (April 16, 1997).

Respondents maintain the county did not defer compliance, but instead found actual compliance. We agree the county board found actual compliance, but in doing so, it misinterpreted "shall."

Respondents also argue there is substantial evidence in the record to support the county's conclusion the completion of improvements to Hughey Lane in the future is feasible and likely to occur. Even if there were substantial evidence that supported this conclusion, the conclusion itself is not enough to assure compliance with LUO 3.010(4)(k)(5). Approval must still be conditioned upon actual compliance with the standard.

We understand respondents to argue that a condition requiring compliance is not necessary because it is the county's task, rather than the applicant's, to comply with the standard. We do not agree with respondents. If approval is not conditioned on compliance, the possibility exists that the proposed development will occur and compliance with the standard will not be achieved. Although the county may have good reason to believe compliance is feasible and likely to occur, it cannot be certain that it will, in the future, have the necessary funds and political determination to make the required improvements to Hughey Lane.

The second assignment of error is sustained.

The county's decision is remanded.