BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SUNNINGDALE-CASE HEIGHTS ASSOCIATION and WALTER GORMAN, Petitioners, vs. WASHINGTON COUNTY, Respondent, and ALFRED BREWER and SHELLEY BREWER, Intervenors-Respondent.	LUBA No. 97-217 FINAL OPINION AND ORDER

Appeal from Washington County.

Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of petitioners.

Dan Olsen, County Counsel, Hillsboro, represented respondent.

Christopher C. Brand, Portland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Davis Wright Tremaine.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

REMANDED 06/09/98

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal the county's decision approving a partition and denying the applicants' request for hardship relief.

MOTION TO INTERVENE

Alfred and Shelley Brewer (intervenors), the applicants below, move to intervene in this proceeding on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

On July 12, 1996, intervenors applied to partition a .83-acre lot into three residential parcels for single family dwellings. One single-family dwelling exists on the parent lot, which has double frontage on Sunningdale Drive and Old Quarry Road. After partition, each of the three parcels would front Sunningdale Drive, while one parcel would also front Old Quarry Road.

Intervenors' application was complete July 22, 1996. During the evaluation process, the county informed intervenors that the partition would require widening Sunningdale Drive from 16 feet to 22 feet. As a result, intervenors amended their application to request hardship relief to widen Sunningdale Drive to 18 feet rather than 22 feet. The county determined that the amended application was subject to a recently enacted provision of the Community Development Code

(CDC) 203-3.3, which requires a neighborhood meeting prior to application for certain types of actions, including partitions. Accordingly, intervenors obtained mailing lists from the county and provided notice as required by CDC 203-3. The neighborhood meeting was held January 2, 1997, and attended by 57 community members.

On April 10, 1997, the planning director issued an administrative decision approving the partition and denying the hardship relief. Petitioners appealed that decision to a hearings officer, arguing in part that the county failed to apply the infill requirements of CDC 430-72. The hearings officer upheld the decision, but imposed a condition that no further development occur until the application is reviewed for compliance with CDC 430-72 in an additional administrative proceeding. The hearings officer's decision was appealed to the county board of commissioners, which upheld the hearings officer's decision, adopting the staff report's findings and the hearings officer's findings and interpretations of the county's code as its own.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county is required to deny intervenors' application because, according to petitioners, the notice intervenors provided of a required neighborhood

meeting lacked certain information and was posted for a shorter time than required by CDC 203-3.3.[1]

CDC 203-3.3 does not itself state what information is required on mailed and posted notices and how long notice must be posted. Petitioners refer to criteria adopted by a separate resolution, which requires, inter alia, that (1) the applicant post public notice at least 20 days prior to the meeting, to remain posted until the meeting, and (2) that the notice state that the site may be subject to a proposed development (e.g. subdivision, variance). Resolution and Order 96-177 (October 9, 1996). Petitioners argue that the posted notice described only the partition, not the hardship relief, and the affidavit submitted by intervenors fails to state that the notice remained posted during the 20 days prior to the neighborhood meeting.

Petitioners appear to argue that there is not substantial evidence in the record establishing that the two criteria

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[1]CDC 203-3.3 provides:

> "Neighborhood meetings shall be held at a location within the boundaries of the applicable [Citizens Participation Organization] CPO. * * * Mailed notice of the meeting shall be provided by the applicant to the surrounding neighborhood and the applicable CPO. The applicant shall also post notice of the neighborhood meeting by posting a sign on the subject site in advance of the meeting. * * * The [county] shall establish by Resolution and Order specific requirements for notice of posting and conducting of neighborhood meetings * * *.
>
> "If the applicant fails to hold a neighborhood meeting and the application is deemed complete, failure to hold a neighborhood meeting in accordance with these provisions and the Resolution and Order prior to submittal of a complete application shall result in denial of the application."

identified were met, and thus the county's conclusion to that effect is not supported by the record. Accordingly, petitioners conclude that the county is required by CDC 203-3.3 to deny intervenors' application.

Intervenors cite to evidence in the record that, they contend, demonstrates that intervenors complied with all of the neighborhood meeting criteria, including the two disputed criteria. However, we need not address the parties' substantial evidence dispute because we agree with intervenors' further argument that, even if the defects identified by petitioners exist, those defects provide no basis under CDC 203-3.3 or Resolution and Order 96-177 to deny the application.

Resolution and Order 96-177 specifies that an applicant demonstrates compliance with its requirements by including with the application four documents: a copy of the notice, a copy of the mailing list, a signed affidavit attesting to mailing and posting of the notice, and a copy of the meeting notes. Resolution and Order 96-177(III)(E).[2] Intervenors

[2]Resolution and Order 96-177(III)(E) states, in relevant part:

> "An application shall not be deemed complete until the applicant demonstrates compliance with this section by including the results of the meeting with the application. This includes:
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> "(a) A copy of the notice to surrounding property owners;
>
> "(b) A copy of the official mailing list * * * of surrounding property owners;
>
> "(c) A signed affidavit of the mailing and posting of the required notice;

argue that they submitted each of the four required documents, and thus have demonstrated compliance with Resolution and Order 96-177(III). Further, intervenors note that CDC 203-3.3 requires the county to deny an application under that provision only when the applicant fails to hold a neighborhood meeting. Intervenors point out that the applicant held a neighborhood meeting, attended by 57 persons. Thus, intervenors conclude, neither CDC 203-3.3 nor Resolution and Order 96-177 provides that the alleged defects in the notice and posting require the county to deny the application. We agree.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners challenge the county's failure to process the hardship relief request as a quasi-judicial Type III proceeding rather than an administrative Type II proceeding. Petitioners contend that intervenors requested a "variance" from the width requirements for Sunningdale Drive and that the county is required by CDC 435-3 to process a "variance" request as a Type III quasi-judicial proceeding.

The county responds that intervenors did not request a "variance" but rather "hardship relief," which is a distinct type of variance governed by CDC 435-5. CDC 435-5.2 provides that hardship relief applications shall be conducted under

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"(d) A copy of the meeting notes * * *[.]"

Type II administrative proceedings. At oral argument, petitioners conceded that intervenors might have filed for hardship relief rather than a variance. We agree with the county that intervenors requested "hardship relief" rather than a variance, and thus that the county properly processed the application under Type II proceedings.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the partition creates a flag lot, parcel 3, that has frontage on two roads, Sunningdale Drive and Old Quarry Road, in violation of CDC 605-3.6(A). That provision states:

> "Double-frontage lots or parcels shall be prohibited unless the Review Authority finds:
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> "(1) They are essential to provide separation of existing or proposed residential uses from major collectors or arterials or adjacent nonresidential activities; and/or
>
> "(2) They are needed to overcome specific disadvantages of topographical orientation."

The hearings officer found that the partition did not violate CDC 605-3.6(A), stating:

> "[Petitioners] contend that proposed parcel 3 will have double frontage in violation of CDC 605-3.6. The hearings officer does not agree because the lot that will have the double frontage already exist[s] with a house on it. The existing house will share access with proposed parcel 2 to NW Sunningdale Drive." Record 20.

The county explains on appeal to us that the quoted passage contains an implicit interpretation of CDC 605-3.6 reading that provision as prohibiting only the <u>creation</u> of

double-frontage lots.[3] The hearings officer appears to have reasoned that the parent parcel is a double-frontage lot and "proposed parcel 3" contains the house existing on the parent parcel, therefore "proposed parcel 3" is not a new parcel but somehow the same parent parcel. Based on that conclusion, the hearings officer determined that CDC 605-3.6 does not apply. The county argues that we must defer to the hearings officer's "interpretation" of CDC 605-3.6, because the county board of commissioners adopted the interpretations of the hearings officer. See Gage v. City of Portland, 319 Or 308, 317, 877 P2d 1187 (1994).

We need not determine whether the hearings officer interpreted CDC 605-3.6, what that interpretation is, and whether it is adequate for our review. The predicate to the hearings officer's determination that CDC 605-3.6 does not apply is his conclusion that "proposed parcel 3" is not a new parcel but somehow the same parcel as the parent parcel. However, "proposed parcel 3" and the parent parcel are not the same parcel, notwithstanding that they share the existing house. ORS 92.017.[4] It follows that what the application proposes and the decision approves are three new parcels,

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[3]Neither CDC 605-3.6 nor the hearings officer's decision mentions the words "create" or "creation" or expressly limits CDC 605-3.6 to the creation of double-frontage lots.

[4]ORS 92.017 states:

> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law."

including parcel 3. Thus, even if the hearings officer articulated the interpretation of CDC 605-3.6 that the county urges on appeal, the legal and factual basis for application of that interpretation is absent. Remand is necessary for the county to determine, under a correct understanding of the circumstances, whether and how CDC 605-3.6 applies to this case.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the county erred in approving a partition while deferring compliance with the infill requirements of CDC 430-72.

CDC 430-72 is intended to ensure that "new development is compatible with existing developed areas through Development Review that emphasizes building orientation, privacy, lot size, buffering, access and circulation and [that] provides for notification to adjacent property owners." To that end, CDC 430.72.3(B) requires that an applicant for a partition provide a sketch of the complete development of the subject property to the density allowed by the zoning district, and consideration of building orientation, privacy, setbacks, landscaping, access and circulation.[5]

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[5]CDC 430-72.3 states:

"Development of land required to be processed through the infill provisions shall meet the following:

"* * * * *

The hearings officer found that applicants had not submitted the plan or sketch required by CDC 430-72.3(B)(4) and that the record did not contain sufficient evidence for the county to make the findings required by CDC 430-72.3(B). The hearings officer concluded:

> "In the absence of a plan or drawing addressing the criteria of CDC 430-72, it is impossible for the hearings officer to make a finding of compliance with this criteria, or determine whether specific conditions of approval are needed to minimize the impacts. The Director's decision in approving the Application for the Preliminary Plat Approval for the three lot partition can only be approved if the following additional condition is added.
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> "Prior to commencement of on-site improvements the Applicants shall, through a Type II action,

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"(B) For all other development (i.e. partitions, development review for attached units), consider the intent and purpose of this Section and comply with the following:

"(1) Buildings shall be oriented to provide maximum privacy to surrounding existing and future residential structures;

"(2) Maintain the setback requirements of the primary district * * *;

"(3) Landscaping and fencing may be required to maintain the privacy of existing dwellings on adjacent properties;

"(4) The applicant shall provide a sketch of complete development of the subject property and potential development of adjacent vacant parcels to the density allowed by the district; and

"(5) Parcelization or placement of dwellings shall not preclude reasonable development of the subject site and surrounding properties to the density allowed by the district. Consideration shall include but not be limited to:

"(a) Access;

"(b) Circulation; and

"(c) Building location."

> demonstrate compliance with CDC 430-72." Record 24.

The hearings officer then approved the partition subject to the above condition.

Petitioners argue that the terms and tenor of CDC 430-72 prohibit the county from approving a partition without contemporaneously considering and finding compliance with the requirements of that section. We understand petitioners to contend that deferral under these circumstances effectively nullifies the standards at CDC 430-72, because the partition approval necessarily determines crucial elements of the development review required by CDC 430-72 criteria, i.e. the size and configuration of the three new lots and the access and circulation patterns for those lots, thus preventing meaningful consideration of those factors during subsequent proceedings. In short, petitioners contend that the CDC 430-72 criteria are inextricably entwined with partition approval, and thus CDC 430-72 requires contemporaneous consideration of all aspects of the development proposal affecting the criteria at CDC 430-72.

The county responds that it may defer a determination of compliance with an applicable approval standard if the decision ensures that the subsequent approval process provides the same notice and opportunity for public input as the original proceeding. Rhyne v. Multnomah County, 23 Or LUBA 442, 447-8 (1992).

However, Rhyne and similar cases involve discrete sets of criteria that operate independently. We agree with petitioners that the CDC 430-72 criteria and partition approval are necessarily dependent upon one another. The partition approval predetermines much of the inquiry required by the CDC 430-72 criteria. At the subsequent proceeding, the partition itself and hence the size, configuration, access and circulation of the lots will be moot issues, preventing any meaningful review of those factors in determining whether the proposed partition and infill are "compatible with existing development."

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the county erred in deferring a determination of compliance with storm drainage requirements until a subsequent administrative proceeding. Petitioners argue that intervenors failed to submit storm drainage plans as required by CDC 605-2.3(C) and CDC 412-1, and that the county deferred review and approval to a further administrative proceeding without finding compliance with applicable county provisions or that compliance with those provisions is feasible.[6]

[6]CDC 605-2.3(C) requires that the preliminary partition plat contain or be accompanied by storm drainage plans. CDC 412-1 requires that all applications for a development permit involving land disturbance include a drainage plan that meets certain substantive criteria, particularly that waters drained from the development not cause erosion to any greater extent than would occur in the absence of development, as required by CDC 412-3.

Intervenors respond that the county can defer a determination of compliance with required technical code standards such as storm drainage plans as long as the county determines that compliance is "feasible" and appropriate conditions are imposed to ensure compliance. Rhyne, 23 Or LUBA at 447; Meyer v. City of Portland, 7 Or LUBA 184, 196 (1983), aff'd 67 Or App 274 (1984). Intervenors concede that CDC 605-2.3(C) and CDC 412-1 require the applicant to submit storm drainage plans, and that the county failed to find that compliance with the storm drainage requirements is "feasible." Nonetheless, intervenors argue that there is "substantial evidence" in the record supporting a finding that compliance with the storm drainage requirements is "feasible," and thus, pursuant to ORS 197.835(11)(b), we may affirm the county's decision in this respect, notwithstanding the lack of findings.[7]

Intervenors misstate our authority under ORS 197.835(11)(b). That statute permits us to affirm the county's decision where an inadequate or absent finding is "clearly supported" by the record, not where there is

[7]ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

"substantial evidence" supporting the decision. See Sanders v. Yamhill County, ___ Or LUBA ___ (LUBA No. 96-273, February 2, 1998), slip op. 36 (the "clearly supports" standard in ORS 197.835(11)(b) is considerably more demanding than the substantial evidence standard).

In this case, it is not clear that the evidence intervenors direct us to even meets the substantial evidence threshold. That evidence consists of a "Request for Statement of Service Availability for Surface Water" signed by the local sewerage agency that sets out what documents and plans the agency requires to evaluate whether intervenors' storm drainage facilities meet the agency's standards. Intervenors argue that the document permits the inference that the agency reviewed intervenors' storm drainage plans and found them technically feasible. We disagree. Nothing in the document suggests the agency actually reviewed intervenors' storm drainage plans and found them technically feasible.

In addition, intervenors' argument is misdirected. The issue here is whether compliance with the applicable requirements of CDC 412 is feasible, not whether storm drainage plans not in the record are feasible as a matter of technical engineering. A finding that compliance with local requirements is feasible is something that the county cannot delegate to the sewerage agency. See Tenley v. Washington County, ___ Or LUBA ___ (LUBA No. 97-110, April 15, 1998), slip op. 15-17 (county cannot delegate finding of compliance

with emergency turnaround requirements to the fire department). In Tenley, we also held that the applicant must supply the technical plan at issue before the county can make a finding of feasibility of compliance with applicable county requirements. Id. at 10. Here, as in Tenley, intervenors did not submit any storm drainage plans for the county's review, and hence the county has no basis on which it could make a finding of compliance.

We agree with petitioners that the county erred in failing to require storm drainage plans from intervenors, and in failing to either find compliance with applicable requirements or find that compliance was feasible. Nothing in the record directed to our attention "clearly supports" a finding that compliance with the applicable storm drainage requirements is feasible.

The fifth assignment of error is sustained.

The county's decision is remanded.