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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. 97-250  
  
FINAL OPINION  
AND ORDER

Appeal from Tillamook County.

Richard M. Whitman, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hardy Myers, Attorney General, David Schuman, Deputy Attorney General and Michael D. Reynolds, Solicitor General.

William K. Sargent, Tillamook County Counsel, Tillamook, filed a combined response brief and argued on behalf of respondent.

Jeffrey L. Kleinman, Portland, filed a combined response brief and argued on behalf of intervenors-respondent.

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

REMANDED 06/25/98

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's subdivision and  
4 conditional use approval for a six-lot residential subdivision  
5 in the county's rural residential (RR) zone.

6 **MOTION TO INTERVENE**

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

10 **FACTS**

11 This is the third time the challenged decision has been  
12 before this Board. The facts are set forth fully in DLCD v.  
13 Tillamook County, 30 Or LUBA 221 (1995) (Myers I), and in DLCD  
14 v. Tillamook County, \_\_ Or LUBA \_\_ (LUBA No. 96-181, April 21,  
15 1997) (Myers II), and are not repeated here.

16 Briefly, intervenors requested approval of a six-lot  
17 subdivision in the county's RR zone. Minimum lot size in the  
18 RR zone is two acres, unless certain conditions are met. As  
19 relevant here, Tillamook County Land Use Ordinance (LUO)  
20 3.010(4)(k)(5) allows lots to be as small as 20,000 square  
21 feet in the RR zone where

22 "[p]ublic or private roads providing access to the  
23 lots shall meet standards as contained in the County  
24 Land Division Ordinance."

25 As we explained in Myers I, the proposed subdivision is  
26 accessed "by traveling 1.1 miles down Hughey Lane and then  
27 one-quarter mile down Marvin Road, which abuts the

1 subdivision. The subdivision lots are grouped around a cul-  
2 de-sac off Marvin Road." Myers I at 222. It is undisputed  
3 that Hughey Lane does not currently meet those standards.

4 The county's initial decision applied LUO 3.010(4)(k)(5)  
5 only to Marvin Road and the proposed cul-de-sac. In Myers I,  
6 we determined that LUO 3.010(4)(k)(5), when read in  
7 conjunction with Tillamook County Comprehensive Plan (TCCP)  
8 Policy 3.17, requires the county to consider the traffic  
9 impacts of the proposed subdivision not only on the streets  
10 immediately abutting the proposed subdivision, but on Hughey  
11 Lane, as well.

12 On remand, the county adopted new findings, interpreting  
13 the "shall meet" language in LUO 3.010(4)(k)(5) to require a  
14 finding of actual compliance with applicable road standards,  
15 but also interpreting actual compliance to require only a  
16 finding that the condition imposed to ensure compliance "is  
17 feasible and reasonably certain to occur within a reasonable  
18 time of the occupancy of the development and resulting  
19 generation of traffic." Myers II, slip op 6. Based on that  
20 interpretation, the county again approved the proposed  
21 subdivision, finding, in relevant part:

22 "We hence conclude that compliance with LUBA's  
23 mandate on remand, i.e., compliance with the  
24 requirements of LUO 3.010(4)(k)(5) as interpreted by  
25 LUBA, is feasible, and solutions to the identified  
26 problems with respect to Hughey Lane posed by the  
27 proposal and possible future development of the  
28 applicants' contiguous property and other property  
29 in the area are possible, likely, and reasonably  
30 certain to succeed in achieving compliance. We  
31 further conclude that, in light of the above program

1 of improvements to Hughey Lane and the conditions  
2 pertaining to street improvements set out in our  
3 prior Findings, Conclusions and Order, the public or  
4 private roads providing access to the lots will meet  
5 the standards contained in the Land Division  
6 Ordinance." Myers II, slip op 7.

7 We again remanded the county's approval, finding that the  
8 county's interpretation was "clearly wrong" in that it  
9 transformed "the mandatory present requirements of the LUO  
10 into predictions." Myers II, slip op 11.

11 During the second remand proceeding, prior to an on-the-  
12 record hearing, the county issued a proposed order, to which  
13 petitioner responded:

14 "The proposed order to be considered at your October  
15 29, 1997 meeting provides for the development of  
16 three of the six lots in the subdivision based on  
17 new language in condition 26 which states:

18 "No building permits shall be issued for any  
19 more than three of the proposed lots herein,  
20 until that portion of Hughey Lane west of and  
21 including its intersection with Marvin Road  
22 meets the standards contained in the County  
23 Land Division Ordinance as of the date the  
24 Myers' application in this case was deemed  
25 complete.'

26 "The problem with the language in condition 26 is  
27 that it addresses the issuance of building permits  
28 rather than the creation of parcels that are two  
29 acres. Parcels less than two acres cannot be  
30 allowed until the road (Hughey Lane) is brought up  
31 to the required standards." Record 31.

32 Following the remand hearing, the county issued revised  
33 findings, which state, in relevant part:

34 "The Board interprets the specific provision above  
35 [LUO 3.010(4)(k)(5)] as being intended to address  
36 the additional traffic impacts resulting from lots  
37 of less than two acres. For example, in this case,  
38 allowing six lots rather than three on the same six  
39 acres could result in doubling the number of

1 residences and, hence, doubling the traffic impacts  
2 upon the 'public or private roads providing access  
3 to the lots.' The Board expressly interprets this  
4 provision to state, and expressly finds herein, that  
5 compliance can be assured by limiting the number of  
6 residences to the three allowed as a matter of  
7 right, until such time as the 'public or private  
8 roads providing access to the lots shall meet  
9 standards as contained in the County Land Division  
10 Ordinance.'

11 \* \* \* \* \*

12 \* \* \* We hence conclude that compliance with LUBA's  
13 mandate on remand, i.e., not approving the within  
14 application unless compliance with the requirements  
15 of LUO 3.010(4)(k)(5) is assured, is achieved by  
16 means of the adoption of the additional condition of  
17 approval [26] set out below." Record 5.

18 The county then approved the application, with the  
19 addition of condition of approval 26, quoted above.

20 Petitioner appeals that approval.

21 **FIRST ASSIGNMENT OF ERROR**

22 Petitioner again challenges the county's interpretation  
23 of LUO 3.010(4)(k)(5) and the condition premised on that  
24 interpretation. As petitioner argues:

25 "The problem with the county's 'interpretation' is  
26 that it misconstrues the nature of the conditional  
27 use allowed by LUO Section 3.010(4)(k)(5). The  
28 conditional use is not the construction of  
29 residences, or residential occupancy, as reflected  
30 in the county's new condition tying issuance of  
31 building permits to the completion of road  
32 improvements. Residential use is permitted outright  
33 in the rural residential zone. LUO 3.010(2)(a).  
34 The conditional use in this case is the creation of  
35 lots of less than 2 acres." Petition for Review 7  
36 (emphasis in original).

37 Petitioner argues that the county's interpretation of LUO  
38 3.010(4)(k)(5) to regulate the number of residences, rather  
39 than the creation of lots, is contrary to its express language

1 and, therefore, clearly wrong. On that basis, petitioner  
2 argues that, by tying only the issuance of building permits to  
3 the required road improvements, condition 26 does not  
4 assurance compliance with LUO 3.010(4)(k)(5).

5 Intervenor respond first that "[p]etitioner failed to  
6 raise the arguments in its First Assignment of Error during  
7 the local proceedings on the application." Response Brief 3.  
8 Intervenor then clarify that "[p]etitioner did not raise the  
9 issue of the county's code interpretation challenged in this  
10 appeal." Response Brief 5. Intervenor argue, therefore,  
11 that petitioner is precluded under ORS 197.835(3) from raising  
12 here "the arguments contained in its first assignment of  
13 error." Id.

14 We find no merit to intervenor's claims. First, nothing  
15 in ORS 197.835(3) or ORS 197.763 requires petitioner to raise  
16 particular "arguments" during the local proceedings in order  
17 to address those arguments on appeal. ORS 197.835(3)  
18 specifies that "issues [on appeal before LUBA] shall be  
19 limited to those raised by any participant before the local  
20 hearings body as provided by \* \* \* ORS 197.763[.]" (Emphasis  
21 added.)<sup>1</sup> The statutory restrictions to raising issues on

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<sup>1</sup>ORS 197.763(3)(e) specifies that written notice of a local proceeding must

"[s]tate that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statement or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes an appeal to the board based on that issue[.]"

1 appeal do not apply to new arguments on appeal regarding  
2 issues that were raised below.

3 To the extent intervenors argue petitioner did not  
4 sufficiently raise the issue of the county's interpretation of  
5 LUO 3.010(4)(k)(5), that argument is equally without merit.  
6 ORS 197.835(3) limits issues to those raised by "any  
7 participant before the local hearings body." The purpose of  
8 that restriction is to ensure the local government an adequate  
9 opportunity to address the relevant issues prior to an appeal.  
10 In this case, the issue of the interpretation of LUO  
11 3.010(4)(k)(5) was clearly the fundamental issue before the  
12 county on remand, whether it was most clearly raised by  
13 petitioner, intervenors, or the county itself. It is  
14 inconceivable that the county was not preeminently aware that  
15 this interpretative question was the issue during the remand  
16 proceedings, particularly since the interpretation was the  
17 focal point of the county's final decision.

18 In addition, as intervenors state, the county's hearing  
19 on remand was "held on the preexisting record, and no new  
20 evidence was taken or considered." Response Brief 3. Hence,  
21 petitioner could not have raised a new issue at that stage of  
22 the proceeding. Finally, even if petitioner had been able to  
23 raise new issues on remand, it is not required to raise issues

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ORS 197.763(5)(c) requires that same statement be made at the commencement of the public hearing.

1 regarding interpretive findings made in the final decision,  
2 prior to the issuance of those findings.

3 As far as we can tell, intervenors' sole basis for  
4 claiming that petitioner did not "raise" the interpretive  
5 question below is that petitioner did not use the word  
6 "interpretation" in its written challenge to the county's  
7 implementation of its code interpretation through condition  
8 26. As explained above, however, for numerous reasons it is  
9 abundantly clear that all parties to this proceeding were  
10 fully aware that the issue on remand was the county's  
11 interpretation of LUO 3.010(4)(k)(5), and the county's  
12 decision clearly reflects that it was fully aware of the  
13 issue. Petitioner's emphasis in its written statement on the  
14 effect of condition 26 in no way precludes petitioner from  
15 continuing to challenge the interpretation as it has done  
16 throughout these proceedings.

17 As to the merits of the county's interpretation,  
18 intervenors respond:

19 "The county's interpretation complies with the  
20 purpose of and the underlying basis for this  
21 provision by assuring that none of the additional  
22 development allowed to the applicants under LUO  
23 3.010(4)(k) (*i.e.*, more than one residence per two  
24 acres) can occur until the roads providing access to  
25 the lots do in fact 'meet standards as contained in  
26 the County Land Division Ordinance.' The discussion  
27 of traffic impacts which forms the basis for the  
28 Commissioners' interpretation is reasonable and  
29 rational." Response Brief 7 (emphasis in original).

30 Intervenors' explanation of the purpose of LUO  
31 3.010(4)(k) exemplifies the county's error in its



1 interpretation of it. As clearly set forth in the plain  
2 language of that provision, LUO 3.010(4)(k) addresses and  
3 restricts lot size, not the number of residences or the number  
4 of building permits issued. Any interpretation of that  
5 provision that allows the creation of lots smaller than two  
6 acres without first establishing that access roads currently  
7 meet required standards is contrary to the express language of  
8 LUO 3.010(4)(k)(5), and is, therefore, clearly wrong.

9 While the county's reasoning behind its "interpretation"  
10 may be "reasonable and rational" in the context of a  
11 legislative inquiry, this is not such an inquiry. The effect  
12 of the county's interpretation in this quasi-judicial  
13 evaluation is again, that the county has impermissibly amended  
14 its ordinance under the guise of interpretation. Goose Hollow  
15 Foothills League v. City of Portland, 117 Or App 211, 218  
16 (1992).

17 Because the county's interpretation of LUO 3.010(4)(k) is  
18 clearly wrong, condition 26, which is premised on that  
19 interpretation, does not ensure compliance with that  
20 provision. Condition 26 does not restrict the creation of  
21 lots pending road improvements. It limits only the number of  
22 building permits issued pending those improvements. Limiting  
23 the number of building permits issued for already created lots  
24 is not the legal equivalent of limiting the number of lots  
25 created. Thus, it does not in any way ensure that lot sizes  
26 remain a minimum of two acres until and unless access roads

1 meet the required road standards and, consequently, does not  
2 ensure compliance with LUO 3.010(4)(k)(5).

3         Simply put, LUO 3.010(4)(k)(5) requires lot sizes in the  
4 RR zone to be at least two acres unless the roads providing  
5 access to those lots meet the required road standards.  
6 Therefore, the county may not approve the creation of any lot  
7 less than two acres in the proposed subdivision until Hughey  
8 Lane meets the required county road standards.

9         Petitioner's assignment of error is sustained.

10         The county's decision is remanded.