BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

COLUMBIA HILLS DEVELOPMENT COMPANY, RICHARD RECHT, ARTHUR C. NELSON and SHERRY JAY, Petitioners, vs. COLUMBIA COUNTY, Respondent, and CITY OF SCAPPOOSE, SUE RUSSELL and MICHAEL F. SHEEHAN, Intervenors-Respondent.	)	LUBA No. 97-160
_____	)	FINAL OPINION AND ORDER
COLUMBIA HILLS DEVELOPMENT COMPANY, RICHARD RECHT and ARTHUR C. NELSON, Petitioners, vs. COLUMBIA COUNTY, Respondent, and CITY OF SCAPPOOSE, SUE RUSSELL and MICHAEL F. SHEEHAN, Intervenors-Respondent.	)	LUBA No. 97-161

Appeal from Columbia County.

D. Daniel Chandler, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was O'Donnell Ramis Crew Corrigan & Bachrach.

Anne Corcoran Briggs, Assistant County Counsel, St. Helens, filed a response brief and argued on behalf of respondent.

Jeffrey J. Bennett, Portland, filed a response brief and argued on behalf of intervenor-respondent City of Scappoose. With him on the brief was Tarlow, Jordan & Schrader.

Michael F. Sheehan, Scappoose, filed a response brief and argued on behalf of intervenors-respondent Sheehan and Russell.

HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED (97-160)
DISMISSED (97-161) 09/24/99

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal two county decisions. The first decision is a board of county commissioners' decision that interprets the Columbia County Zoning Ordinance (CCZO) and Comprehensive Plan as they apply to petitioners' application for a building permit. That decision is appealed in LUBA No. 97-160. The second decision is a letter from the county land development director that denies the petitioners' application for a building permit, based on the board of commissioners' interpretation. The second decision is appealed in LUBA No. 97-161.

MOTION TO INTERVENE

Motions to intervene on behalf of respondent were filed by (1) the City of Scappoose and (2) Michael F. Sheehan and Sue Russell. There is no opposition to the motions, and they are allowed.[1]

MOTION TO ALLOW REPLY BRIEF

Petitioners move to allow a reply brief to respond to new issues raised in the respondent's brief. OAR 661-010-0039. The new issues identified by petitioners include the county's argument that petitioners waived an argument by not raising the argument below and respondent's reliance on Statewide Planning Goal 14 (Urbanization) in responding to the fourth assignment of error. We agree both of these are new issues. The motion is allowed.

MOTION TO DISMISS

The county moves to dismiss LUBA No. 97-161. The county argues that once the discretionary interpretive land use decision challenged in LUBA No. 97-160 was rendered, it was that decision that required denial of petitioners' building permit application, and the

[1]We previously issued an order denying Nancy Heinzel Dale's motion to intervene as a petitioner in this matter.

decision challenged in LUBA No. 97-161 did not independently apply any land use planning criteria.

We agree with the county. The board of county commissioners' decision challenged in LUBA No. 97-160 constitutes a land use decision because it "concerns the * * * application of" the county's land use regulations and comprehensive plan.[2] The subsequent letter challenged in LUBA No. 97-161 is not a land use decision; it simply relies on the land use decision challenged in LUBA No. 97-160 and does not itself apply the statewide planning goals, the county's comprehensive plan or land use regulations. See Fechtig v. City of Albany, 31 Or LUBA 441, 444 (1996) (decision that applies clear and objective building code standards to deny a fill permit is not a land use decision where a separate decision addressed compliance of the fill permit with discretionary land use criteria).

The motion to dismiss LUBA No. 97-161 is granted.

FACTS

Hillcrest Subdivision (Hillcrest) is a 1,143-lot subdivision that was platted in the late 1950s, before the statewide planning goals were adopted and before the county adopted land use regulations. The subdivision includes approximately 380 acres and the average lot size is approximately one-third acre.

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[2]As relevant, LUBA's jurisdiction is limited to "land use decisions." ORS 197.825(1). As defined by ORS 197.015(10)(a)(A), land use decisions include:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> "(i) The [statewide planning] goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

ORS 197.015(10)(b) specifies several exceptions to the above statutory definition of land use decision, but no party argues any of those exceptions apply to the decision challenged in LUBA No. 97-160.

In 1979, the Land Conservation and Development Commission (LCDC) entered an enforcement order directing that the county take steps to comply with Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Land), after the county issued several building permits for lots of less than one acre in Hillcrest. When the enforcement order was entered, the county did not have a comprehensive plan and land use regulations that had been acknowledged under ORS 197.251 for compliance with the statewide planning goals.

In 1985, LCDC acknowledged the county's comprehensive plan. The acknowledged comprehensive plan includes an exception to Goal 4 which designates 240 acres of the 380 acres in Hillcrest as Forest-Conservation in the county comprehensive plan and zones that area Forest-Agriculture 40 with a Buffer Woodlot Overlay.[3] The exception states that these zoning designations allow forest uses and also allow dwelling in conjunction with forest uses on these 240 acres, at a maximum density of one dwelling per 12 acres. The remaining portion of Hillcrest, comprised of 140 acres and 378 lots, was designated "Rural Residential" in the comprehensive plan and zoned RR-5.[4]

Petitioners submitted an application for a building permit to construct a single family dwelling on four lots in Hillcrest that are zoned RR-5. Together, the four lots comprise 28,000 square feet, or approximately .64 acre. Because the RR-5 zone imposes a minimum lot size of 5 acres or 2 acres, depending on the availability of certain public facilities, the planning director relied on the lot of record provisions at CCZO 605 to approve petitioners' request.[5] The planning director's decision was appealed to the county planning commission

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[3]Petitioners supply a copy of the Hillcrest Exception and all its exhibits and request that we take official notice of those documents that are part of the county's comprehensive plan. We grant petitioners' request. OEC 202; Sunburst II Homeowners v. City of West Linn, 18 Or LUBA 695, 698, aff'd 101 Or App 458, 790 P2d 1213 (1990).

[4]As explained later in this opinion, petitioners and the county dispute how development is regulated under the RR-5 zone and whether the acknowledged exception imposed an overall density limit on residential development in RR-5 zoned portion of Hillcrest beyond the requirements of the RR-5 zone.

[5]CCZO 605 provides:

by the City of Scappoose and a citizens committee.

The city and the citizens committee questioned whether CCZO 605, applied where lots of record were aggregated for building purposes. The city and citizens committee took the position that CCZO 605 could not be relied on in that context and that the aggregated lots must satisfy the minimum lot size, width and depth requirements of the RR-5 zone. The planning commission denied the appeals, and the planning commission's decision was appealed to the board of county commissioners.

Written notice of the board of county commissioners May 28, 1997 public hearing was mailed to property owners within 250 feet of the subject property.[6] Among the "applicable criteria" listed in that notice are ORS 197.763 (statutory requirements for quasi-judicial land use hearing), CCZO 605 and other CCZO provisions and the "Exception to the Forest Lands Goal (Goal 4) relating to the Hillcrest Subdivision." Record 211.[7] During the course of the May 28, 1997 hearing there was discussion concerning the adequacy of services for residential development at Hillcrest and how many dwelling units were to be developed on the RR-5 zoned portion of Hillcrest. Record 98-103; Petition for Review Appendix 47-48. At the conclusion of the hearing, one of the commissioners

> "requested that staff research the history of the Hillcrest subdivision and exception to help the Board clarify the issues. He also asked staff to document previous ordinances and their treatment of lot of record." Record 103.

The board of commissioners then closed the May 28, 1997 evidentiary hearing and

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> "Lots of Record. Lots lawfully created by a subdivision plat, or by a deed or sales contract, and of record in the County Clerk's office, shall be eligible to receive a building permit for any use permitted by [CCZO] 602, if such permit would have been issued otherwise but for the lot width, depth, or area, but subject to all other regulations of this zone."

[6]Many lots in Hillcrest are located more than 250 feet from the subject property, and the owners of those lots were not provided notice of the board of commissioners' hearing.

[7]This notice was the first time the county had listed the Hillcrest Exception as an applicable criterion in this matter.

voted to "hold the record open for seven days to allow for any additional written testimony and [stated] the Board would take action on June 11, 1997 * * *." Id. At its June 11, 1997 meeting, the board of commissioners voted to uphold the planning director's conclusion concerning the application of CCZO 605 to aggregated lots of record. However, the board of commissioners also voted to "uphold the appeal regarding the service requirements for 'lots of record'" and required that "lots in Hillcrest will be an average of 2.3 acres, based on the exception statement included in the 1984 Comprehensive Plan." Record 97.

On July 3, 1997, a document entitled "Supplemental Finding" stamped "draft" was mailed to the parties. In a cover letter, the parties were advised as follows:

> "Attached please find a draft order and supplemental findings regarding the above named action which is currently before the Board of County Commissioners. At the request of [one of the commissioners], staff supplied information regarding the history of the Hillcrest Subdivision and the prior versions of Section 605 into the record. However, not all parties may have had an opportunity to comment on the information staff supplied.
>
> "Therefore, the Board requested that the draft order be circulated to the persons who testified at the public hearing, and [the Board] will receive comments regarding it from any interested party until Tuesday July 15, 1997. The Board will then consider the order at its regular meeting on July 16, 1997." Record 62-69.[8]

In an eleven page letter dated July 15, 1997, petitioner Nelson presented a detailed critique of the draft Supplemental Findings. That letter states that it is sent on behalf of "Columbia Hills Development Company [and] many other property owners that would be affected by the Order and Findings." Record 48. The letter includes the following statement:

> "The conclusions of law and the supplemental findings * * * address issues that, as far as I am aware, are not part of the notice given. The conclusions and findings take me and others by surprise. We are therefore unprepared to

[8]The draft Supplemental Findings are composed of five single-spaced pages of discussion of the Hillcrest Exception followed by six single-spaced pages of findings along with eleven pages of exhibits. The exhibits include prior county lot of record provisions and written testimony given by petitioner Recht concerning the Hillcrest Exception in 1984 as well as a 1984 letter concerning the Hillcrest Exception signed by petitioner Nelson.

> provide necessary input; our right to do so is severely curtailed. Moreover, some of the subjects addressed in the proposed order are not properly before the Board at this time." Record 49.

The letter concludes:

> "The appropriate remedy is to affirm the conclusions and findings of the County Planning Director and the County Planning Commission." Record 58.

At its July 16, 1997 meeting, the board of commissioners considered petitioner Nelson's letter and other comments submitted in accordance with the county's July 3, 1997 letter. On July 30, 1997, the board of commissioners adopted the disputed decision. As relevant in this appeal, the decision adopts two positions—one based on an interpretation of CCZO 605 and 604 and one based on an interpretation of the Hillcrest Exception. First, the board of county commissioners determined that the exception provided by CCZO 605 only applies to the "area, lot width and lot depth" requirements of CCZO 604.1 to 604.4 and that CCZO 605 does not obviate the requirement that lots of record must comply with the service requirements of 604.2.[9] Record 14. Second, the board of commissioners interpreted the Hillcrest Exception as imposing a 2.3-acre per building site average density limitation.[10]

THIRD ASSIGNMENT OF ERROR

In this assignment of error, petitioners argue the board of commissioners erroneously interpreted CCZO 604 and 605. CCZO 604 starts with a requirement that lots and parcels in the RR-5 zone must include 5 acres and meet certain width, depth and right-of way frontage requirements.[11] CCZO 604 allows lots of between 2 and 5 acres, but only if certain

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[9]CCZO 605 is set out at n 5. We set out and discuss relevant provisions of CCZO 604 and 605 below, in our discussion of the third assignment of error.

[10]We set out and discuss this part of the county's decision in more detail under the fourth assignment of error.

[11]The relevant provisions of CCZO 604 are set out below:

> "Standards:
>
> ".1 The minimum lot or parcel size * * * shall be 5 acres.

minimum service requirements are met. CCZO 604 does not allow lots of less than 2 acres.

CCZO 605 provides an exception to the width, depth and area requirements of CCZO 604.[12] The board of commissioners interpreted CCZO 605 as follows:

"CCZO 605 requires that development on lots of record conform to certain development standards. The CCZO 605 exception to 'area, lot width and lot

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".2 The minimum lot or parcel size * * * shall be 2 acres when it can be shown that:

"A. The use will be served by a public or community water system.

"B. Adequate area exists on the property to facilitate an individual subsurface sewage system; or, the property is served by a public or community sewer system.

"C. The property has direct access onto a public right-of-way.

"D. The property is within, and is capable of being served by, a rural fire district.

".3 The minimum average lot or parcel width shall be 100 feet.

".4 The minimum average lot or parcel depth shall be 100 feet.

".5 Lots or parcels shall conform to the following requirements before a building permit may be issued for construction on the property:

"* * * * *

"B. All lots or parcels legally recorded before June 4, 1991 shall have a minimum of 50 feet of usable frontage on a public right-of-way or private non-exclusive easement. One-half of the public right-of-way or private non-exclusive easement adjacent to the lot or parcel shall be improved in accordance with the requirements of the Columbia County Uniform Road Improvement Design Standards [subject to certain exceptions].

".6 No residential structures shall be constructed closer than 30 feet to a property line. * * *

".7 Unless otherwise prohibited, the maximum building height for all non-farm, non-forest structures shall be 35 feet or 2-1/2 stories, whichever is less."

[12]As previously noted, CCZO 605 provides:

"Lots of Record. Lots lawfully created by a subdivision plat, or by a deed or sales contract, and of record in the County Clerk's office, shall be eligible to receive a building permit for any use permitted by [CCZO] 602, if such permit would have been issued otherwise but for the lot width, depth, or area, but subject to all other regulations of this zone." (Emphasis added.)

depth' only apply to the minimum lot sizes found in CCZO 604.1 and 604.2 and to the lot width and depth requirements of CCZO 604.3 and 604.4. The service requirements remain.

"Therefore, for lots of record containing more than two acres, the requirements to site a dwelling include compliance with subsurface sewage regulations, lot frontage, setback and height requirements. For lots of record containing two or [fewer] acres, the requirements to site a dwelling include: a public or community water supply as those terms are defined by Oregon Administrative Rule 333-061-0020(16) and (68), compliance with subsurface sewage regulations, direct access to * * * a public right of way (subject to the exception in 604.5), location within, and service by, a rural fire district, setback and building height requirements. This interpretation is limited to developments on lots and parcels pursuant to CCZO Section 605." Record 14-15.

Petitioners argue that the "but for the lot width, depth, or area" language in CCZO 605 is absolute and "[t]he 'other regulations' of the zone are [limited to] those which are not based upon lot width depth or area." Petition for Review 23. The county responds:

"Petitioners provide one interpretation—that the subjunctive clause 'but for lot width, depth, or area' means that any criterion in the [RR-5] zone which is dependent on lot width, depth or area does not apply to lots of record. Columbia County determined that the 'but subject to all other regulations of this zone' modifies the exception in the phrase 'but for lot width, depth or area', so as to limit the exception to only those criteria which establish a minimum lot width, depth or area standard. CCZO 604 requires a minimum parcel size of 5 acres for a dwelling; two acres if the applicant can show that the parcel: 1) is served by public or community water, 2) has adequate subsurface sewage disposal, 3) has access to a public right-of-way, 4) is served by a rural fire district, and in certain circumstances, 5) road improvements are made. If the Board chose the interpretation petitioners suggest, 'but subject to all other regulations of this zone 'would be meaningless. * * *" Respondent's Brief 19-20.

We agree with the county. We have some question whether CCZO 605 is even ambiguous on the point or that petitioners' interpretation is a possible interpretation. All that CCZO 605 provides is that lots of record shall not be denied a building permit because they lack the width, depth or area required by CCZO 604. CCZO 605 provides nothing about the additional service considerations that the county imposes on lots of less than five acres in the RR-5 zone. Under the county's interpretation, it did not deny petitioners' building permit

request because the aggregated lots are smaller than 5 acres or smaller than 2 acres. Rather the board of commissioners determined that the building permit must be denied because the lots are not served by a "public or community water system," as required by CCZO 604.2(A) for lots of less than 5 acres.[13] In any event, even if CCZO 605 is ambiguous, the county's interpretation is clearly within its discretion under ORS 197.829(1) and Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), and we defer to it.

The third assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners' fifth assignment of error is based on CCZO 1619.1, which provides:

> "It shall be the responsibility of the Director, or his designate, to administer and enforce [the CCZO] and to decide all questions of interpretation or applicability to specific properties for any provisions of [the CCZO]. The Director's decision may be appealed to the Planning Commission."

Petitioners argue that the board of commissioners erred by considering the Hillcrest Exception when neither the director's nor the planning commission's decisions did so.

Decisions of the planning commission may be appealed to the board of county commissioners and are considered in a "de novo hearing." CCZO 1703. As an initial point, we note that the delegation expressed in CCZO 1619 delegates responsibility to interpret the CCZO, it does not mention the comprehensive plan. As has already been noted, the Hillcrest Exception is part of the comprehensive plan. Therefore, nothing in CCZO 1619 would preclude the board of commissioners from interpreting the Hillcrest Exception. In any event, petitioners' argument essentially requires that CCZO 1619 be interpreted as a complete delegation of all authority to interpret the CCZO in the first instance. Under that interpretation, any additional or unanticipated interpretive questions that arise in an appeal of

[13]If anything, we question the county's apparent conclusion that the service requirements of CCZO 604.2(B) to 604.2(D) would not apply to lots of record that are larger than 2 acres but smaller than 5 acres. No party addresses that part of the county's decision and we do not consider it.

the director's decision could not be decided by the planning commission or board of commissioners and would require that the interpretation be sent back to the planning director consider any such interpretive issues first. While it is possible the county intended such an awkward procedure, we think it is sufficiently unlikely that we reject the argument. ORS 197.829(2).

The fifth assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue the county erred by interpreting the Hillcrest Exception as imposing a 2.3-acre density requirement on the RR-5 zoned portion of Hillcrest. The challenged decision states:

> "Development within the Rural Residential portion of the Hillcrest Subdivision must conform to the provisions of the Comprehensive Plan's Exception Statement. The Board concludes that the rural residential designation permits development on sites averaging 2.3 acres. * * *" Record 15.

The Supplemental Findings express concern that without a maximum density limitation, the development of Hillcrest might violate Goal 14 (Urbanization) by allowing an urban level of development on rural lands without an exception to Goal 14. The Supplemental Findings go on to explain:

> "The Board of County Commissioners finds that development of the Hillcrest Subdivision must conform to the provisions of the Comprehensive Plan, including the exception statement. <u>The exception statement is ambiguous as to the permitted level of development in the Rural Residential zone</u>. Therefore, it is necessary to look to the legislative history of the exception to determine its meaning. The Board of County Commissioners has reviewed the testimony supplied by Mr. Recht and Mr. Nelson during the 1984 proceedings, and has determined that the compromise reached by the developers and [Land Conservation and Development Commission] staff was intended to ensure a five acre average parcel size over the entire subdivision. This is consistent with the rural residential designation and the purpose of the 'built and committed' exception.
>
> "* * * * *

> "The Board of County Commissioners therefore finds and concludes that residential development within the Rural Residential portion of the Hillcrest Subdivision must occur on aggregations of lots averaging 2.3 acres." Record 31.[14] (Emphasis added.)

As petitioners correctly note, the problem with the county's purported interpretation is that it does not interpret any provision of the Hillcrest Exception, much less identify any portion of the exception that is ambiguous. Rather, the county relies entirely on the absence of any density limitation in the RR-5 zoned portion of the Hillcrest Exception for its finding that the Hillcrest Exception is ambiguous.

The Hillcrest Exception imposes a specific density limitation of one dwelling per 12 acres in the portion of the exception that is covered by the Buffer Woodlot Overlay. That shows the county knew how to impose a specific density limit when it intended to.

The text of the Hillcrest Exception does not impose or even suggest a density limitation for the portion of the exception that is zoned RR-5. The only discussion of density affecting the RR-5 zoned portion is a finding that the soils can support a density of one unit per acre with individual subsurface septic systems.[15] Otherwise, the Hillcrest Exception

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[14]An earlier portion of the Supplemental Findings makes it reasonably clear that the 2.3-acre figure was computed by the county based on a 1984 letter from petitioner Nelson to the board of commissioners in which he was attempting to address concerns about the potential impact of residential development in the Rural Residential portion of the exception are on public services:

> "Our impact on other specific public services will be minimal. In particular, I would now like to discuss our impact on schools, roads, and other services. Our original plans called for 300 homes; however, because of restrictions imposed on us by compromise with LCDC, we're limited to about 75 homes (60 homes in an exception area and another 15 woodlots) – which is an average of 5 acres per homesite (the zoning density throughout the adjacent and nearby exception areas). * * *" Record 35.

Dividing the 140 acres in the RR-5 zoned portion of Hillcrest by 60 dwelling units produces a density of 2.33 acres per dwelling unit.

[15]The Hillcrest Exception includes the following discussion concerning septic systems:

> "We also find that Hillcrest has been extensively studied for its septic suitability * * * and that, based on these soils analyses, and a preliminary determination by Oregon DEQ and County officials, that densities in Hillcrest can achieve one unit per one acre for septic system purposes. * * *

contains no hint that the county intended the exception to include a 60-unit or 2.3-acre density limitation in the RR-5 zoned portion.

In Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 218, 843 P2d 992 (1992), the Court of Appeals agreed with LUBA that a local government's interpretation of its legislation can depart so profoundly from its text as to constitute an amendment of that legislation. The court emphasized that "to amend legislation de facto, or to subvert its meaning in the guise of interpreting it, is not a permissible exercise." Id. In the present case the county's interpretation not only departs profoundly from the text of the Hillcrest Exception, it has no basis in the text of the exception at all. While the county may be able to amend the Hillcrest Exception to include a density limitation for development within the RR-5 portion of Hillcrest, it must do so by amending its comprehensive plan, and not "in the guise of interpreting it."

The citation to Goal 14 concerns in the Supplemental Findings is equally unavailing. The Hillcrest Exception was acknowledged in 1985. Any concerns that the density that might be allowed on the 140 acres zoned RR-5 would violate Goal 14 were required to be raised at that time. Acknowledgment of the Hillcrest Exception in 1985 resolved any such concerns about Goal 14 as a matter of law. Byrd v. Stringer, 295 Or 311, 316-17; 666 P2d 1332 (1983); Friends of Neabeack Hill v. City of Philomath, 139 Or App 39, 46, 911 P2d 350 (1996); Urquhart v. Lane Council of Governments, 80 Or App 176, 181, 721 P2d 870 (1986).

The fourth assignment of error is sustained.

"Because lot of record rights are extensive throughout Hillcrest * * *, and based upon the septic suitability of soils throughout Hillcrest, we find that many (if not most) of these rights can be developed * * *." Record 264-65.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioners argue the county violated statutory requirements at ORS 197.763 for quasi-judicial land use hearings and decision making. Petitioners argue that Supplemental Findings adopted by the board of commissioners make it clear that the board of commissioners relied on evidence concerning the Hillcrest Exception that was not included in the record when the county purported to close the evidentiary record on May 28, 1997. The "Background" section of the Supplemental Findings cite representations made by petitioners Recht and Nelson concerning Hillcrest and numerous other discussions that occurred outside the context of this proceeding. These representations and discussions were not part of the local record, when it closed on May 28, 1997. Petitioners also speculate that the Supplemental Findings effectively rely on a "shadow" staff report that was prepared and provided to the board of commissioners after the hearing and record was closed on May 28, 1997, rather than seven days in advance of the May 28, 1997 hearing, as required by ORS 197.763(4)(b).

In their first assignment of error, petitioners argue that the manner in which the county proceeded in adopting its Supplemental Findings concerning the Hillcrest Exception violates ORS 197.763 and the decision must be remanded for additional proceedings for that reason. In their second assignment of error, petitioners argue the county's decision concerning the Hillcrest Exception is not supported by substantial evidence in the record, because it is based in part on evidence that was developed by the county after the evidentiary record was closed.

We have already rejected the county's purported interpretation of the Hillcrest Exception as imposing a 2.3-acre density limitation in the RR-5 zoned portion of Hillcrest, as a matter of law. Therefore, even if we agreed with petitioners that the county erred by proceeding in the manner that it did, and thereby prejudiced petitioners substantial rights, a remand for the county to conduct additional proceedings to provide petitioners an

opportunity to rebut the evidence that the county relied upon in interpreting the Hillcrest Exception would serve no purpose. Similarly our consideration here of whether a legally incorrect interpretation is supported by substantial evidence would serve no purpose.

For the reasons explained above, further consideration of petitioners' first and second assignments of error would serve no purpose.

CONCLUSION

Because we conclude the board of county commissioners incorrectly interpreted the Hillcrest Exception as imposing a 2.3-acre maximum density limitation in the RR-5 zoned portion of Hillcrest, the decision must be remanded to correct that part of the decision. The board of commissioners' decision is otherwise affirmed.

The county's decision is remanded.