BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

VIRGINIA G. MITCHELL, JACK OSWALD, STEVEN MAUER, MARION ENSLEY, NINA DENHAM, CARLA BARONE, PAUL NEWMAN, and WILLIAM H. MURPHY,
Petitioners,

and

DAVID A. RICHARDSON, ARTHUR M. FURBER, JOHN S. BIGGI, and SHARRON C. BIGGI,
Intervenors-Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

RIVERSIDE HOMES,
Intervenors-Respondent.

LUBA No. 99-054

FINAL OPINION
AND ORDER

Appeal from Washington County.

Virginia G. Mitchell, Aloha, filed the petition for review and argued on her own behalf. Petitioner Jack Oswald appeared at oral argument and argued on his own behalf.

No appearance by respondent.

Gary Firestone, Portland, and Timothy V. Ramis, Portland, filed the response brief. With them on the brief was Ramis, Crew, Corrigan and Bachrach. D. Daniel Chandler argued on behalf of intervenors-respondent.

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

REMANDED 01/05/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners[1] appeal the county's preliminary plat approval for a 20-lot subdivision.

MOTION TO INTERVENE

David A. Richardson, Arthur M. Furber, Sharron C. Biggi, and John S. Biggi move to intervene on the side of petitioners. The applicant below, Riverside Homes (intervenor), moves to intervene on the side of respondent. There is no opposition to these motions, and they are allowed.

FACTS

The subject property is a 4.87-acre parcel zoned Residential, 6,000 square foot minimum lot size (R-6). The property abuts Miller Hill Road on the east, which runs north-south between Gassner Road and Wagner Road. Miller Hill Road is designated a major collector street, but it is not currently improved to collector standards. In some segments of the road the paved width is only 16 feet. The western one-quarter of the property is designated a Significant Natural Resource Area (SNRA), and includes a small wetland area and drainage channel.

Intervenor applied for preliminary plat approval for a 20-lot subdivision, a drainage hazard area alteration permit and tree removal permit. The preliminary plat proposes constructing a new public street, Monte Vista Court, that will extend 470 feet west from SW Miller Hill Road and then turn north and become a second new street, 198th Place, that extends to the northern boundary of the property. Intervenor proposed retaining the area designated as SNRA as an open space tract that will be left unimproved except for a drainage

[1]Although the petition for review states that it is filed on behalf of all petitioners and intervenor-petitioners, only petitioner Virginia G. Mitchell (Mitchell) signed it. Only Mitchell and petitioner Jack Oswald participated in oral argument. Our rules do not allow persons who are not attorneys to represent others before LUBA. OAR 661-010-0040(1); 661-010-0075(7). Therefore, reference to "petitioners" in this opinion is limited to petitioners Mitchell and Oswald.

line and outfall.

A county hearings officer conducted a hearing on the application on December 23, 1998. On March 2, 1999, the hearings officer issued his decision approving the application with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county's findings regarding the adequacy of Miller Hill Road are not supported by substantial evidence.

County Development Code (CDC) 501-8.2(A)(1) provides that the "applicant shall provide documentation from the appropriate * * * highway department that adequate levels of service are available or will be available to the proposed development within the time-frames requires by the service provider." Pursuant to CDC 501-8.2(B), an applicant must "ensure that an adequate level of Arterial and Major Collector roads will be available to the proposed development." CDC 501-8.2(B) goes on to specify how an applicant can satisfy that requirement.[2]

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[2]CDC 501-8.2(B) provides:

> "An applicant shall ensure that an adequate level of Arterial and Major Collector roads will be available to the proposed development. This requirement is satisfied by payment of the Traffic Impact Fee unless the provisions of [CDC] 501-10 and 501-11 are applicable. Payment of the Traffic Impact Fee is not an assurance for improvements required by [CDC] 501-8.2(E) [Future Alignments], 501-8.2(F) [Half-Street Improvements] or 501-8.2(G) [Pedestrian/Utility Easement]. In addition to payment of the Traffic Impact Fee an applicant shall assure that all identified safety improvements within the impact and analysis area pursuant to Resolution and Order No. 86-95 (Determining Traffic Safety Improvements under the Traffic Impact Fee Ordinance – Process Documentation) shall be constructed prior to occupancy of a development with the assurance provided prior to issuance of a building permit and the following:
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> "(1) On-site road drainage is adequate to protect the facility. On-site * * * [includes] the right-of-way of existing roads lying adjacent to such lands;
>
> "(2) Entering sight distance meets standards as specified in 'A Policy on Geometric Design of Highways and Streets,' American Association of State Highway and Transportation Officials (AASHTO), 1990;
>
> "(3) Right-of-way on or adjacent to the frontage property meets Washington County Functional Classification Standards;

Petitioners contend, first, that intervenor failed to comply with CDC 501-8.2(A)(1) because the Transportation Report (Report) it submitted was from the Washington County Department of Land Use and Transportation, which petitioners argue is not the "appropriate * * * highway department." However, as intervenor points out, the hearings officer found that the Department of Land Use and Transportation is the "relevant service provider for roads under County jurisdiction such as Miller Hill Road." Petitioners do not challenge that finding, or otherwise state a basis to conclude that intervenor failed to comply with CDC 501-8.2(A)(1).

Petitioners argue next that intervenor has failed to establish compliance with CDC 501-8.2(B), because the Report analyzes the subdivision's traffic impacts on Miller Hill Road only in the area immediately adjacent to the proposed subdivision. For that reason, petitioners argue that the Report fails to establish either that Miller Hill Road currently provides adequate level of service or that it will be improved to provide adequate service. We understand petitioners to argue that in order to meet CDC 501-8.2(B)'s requirement that the applicant "assure that all identified safety improvements within the impact and analysis area pursuant to Resolution and Order No. 86-95 * * * shall be constructed * * *," intervenor must improve Miller Hill Road to collector standards for its entire length up to and including its intersection with Wagner Road to the north.

However, petitioners do not explain why either CDC 501-8.2(B) or Resolution and Order No. 86-95 impose that requirement. As intervenor points out, CDC 501-8.2(B) specifies precisely what an applicant must do to satisfy that standard: pay the traffic impact fee, and provide the improvements identified pursuant to Resolution and Order No. 86-95. Resolution and Order No. 86-95 sets forth the methodology for determining what off-site "identified safety improvements" may be imposed on an applicant. The county followed that

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"* * * * *"

methodology, and imposed as a condition of approval that intervenor provide or construct various safety improvements to Miller Hill Road in the vicinity of the subdivision. Petitioners do not identify any error in the county's application of that methodology, or explain why Resolution and Order No. 86-95 or CDC 501-8.2(B) requires that intervenor improve Miller Hill Road to its intersection with Wagner Road.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county's finding that sight distance easements on Miller Hill Road are not required is not supported by substantial evidence.

CDC 501-8.2(B)(2) requires adequate sight distance for approaching traffic from the road leading out of the proposed subdivision. CDC 501-8.5(F)(3)(b) requires that sight distance shall be measured "10 feet from the near edge of the pavement * * *." The parties apparently agreed, below, that CDC 501-8.5(F)(3)(b) requires that sight lines be measured from 10 feet from the near edge of the future pavement, when and if Miller Hill Road is widened to collector standards, rather than its existing pavement edge. Based on recorded speeds at the site, intervenor's study determined that approximately 400 feet of sight distance was necessary to the north of the subdivision. Intervenor's engineer, Stein, measured sight distance to the north at 408 feet, at which point Miller Hill Road bends to the west. The engineer submitted a diagram showing the sight line and photographs taken from the observation spot. Record 147-48. As the hearings officer noted, Stein testified that his initial report erroneously stated that he measured 10 feet from the existing pavement; however, in fact he measured 10 feet from the ultimate pavement line, assuming Miller Hill Road is improved to collector standards. It is from that point, Stein testified, that he observed a 408-foot line of sight.

The opponents' engineer, Bernstein, also measured sight distance from a point 10 feet from the edge of the future pavement, and submitted a diagram showing a sight line that

crosses intervening property lines. Because the sight line as depicted in Bernstein's diagram crosses intervening property lines, petitioners argue, the hearings officer cannot find compliance with CDC 501-8.2(B)(2) unless intervenor obtains sight easements from those landowners to ensure a 400-foot sight distance.

Petitioners argue, first, that the differences between the two engineers' diagrams is due to uncertainty as to the precise location of the future pavement, and that the hearings officer erred in failing to require intervenor to conduct a survey to determine that precise location.[3] Second, petitioners argue that even if the sight line as depicted on intervenor's engineer's diagram is measured from the correct point, it appears to overlay and run parallel to the property line of adjoining private property. Record 147. If so, petitioners argue, sight distance to the north could be obstructed in the future if the landowner plants a tree on the property line, and thus the hearings officer erred in failing to require that intervenor obtain a sight easement from the landowner of that property. Petitioners point to statements by the adjoining landowners that they will refuse to grant intervenor a sight easement over their property.

The hearings officer concluded that:

> "Given the disparate opinions of and evidence offered by the parties, the hearings officer must choose who to believe. The opponents' opinions are not supported by substantial evidence. The hearings officer finds Mr. Stein's testimony has greater probative value, and chooses to accept it over contrary testimony by the opponents. Based on the sight distance measured by Mr. Stein and confirmed by the County, sight distance at the proposed intersection on Miller Hill Road will exceed County minimum standards. * * *." Record 24.

[3]Petitioners also appear to argue that intervenor's engineer incorrectly measured sight distance from 10 feet from the near edge of the *existing* pavement, rather than from the near edge of the future pavement, when and if Miller Hill Road is ultimately widened. However, petitioners do not challenge the hearings officer's finding that intervenor's engineer measured sight distance from the near edge of the future pavement, and we do not consider that argument further.

Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Even if there is some supporting evidence, that evidence may not be substantial when viewed together with the countervailing evidence in the whole record. *Canfield v. Yamhill County*, 142 Or App 12, 17-18, 920 P2d 558 (1996).

A reasonable person could conclude, based on the record as a whole, that intervenor's engineer measured sight distance from the point required by CDC 501-8.5(F)(3)(b), and that a sight distance exceeding 400 feet currently exists from that point without crossing intervening property lines, notwithstanding the countervailing evidence from the opponents' engineer. That countervailing evidence does not so undermine the evidence relied upon as to render the latter insubstantial. With respect to the possibility that the landowner of adjoining property might plant vegetation on the property line that would obscure the line of sight running parallel to that property line, the hearings officer required intervenor to confirm prior to final plat approval that an adequate line of sight exists, and imposed conditions of approval requiring that, if future circumstances warrant, intervenor remove vegetation in the right of way, and obtain any easements across private property necessary to preserve the line of sight.[4] As intervenor points out, the current reluctance of the adjoining landowners to provide any necessary easements does not mean they cannot be persuaded by an adequate financial offer, or that they will own the property at such time in the future as easements may be required. Petitioners do not explain why the imposed conditions are insufficient to ensure that the proposed access continues to comply with CDC 501-8.2(B)(2).

Accordingly, we conclude that the hearings officer's finding of compliance with CDC 501-8.2(B)(2) is supported by substantial evidence.

The second assignment of error is denied.

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[4]No party questions whether CDC 501-8.2(B)(2) requires that an applicant ensure that a presently adequate line of sight will be maintained in the future and we therefore do not consider that issue.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that the proposed subdivision violates Policies 1, 3, 4 and 7 of the county's Transportation Plan.[5] According to petitioners, the county's Transportation Plan, including the cited policies, must be applied pursuant to CDC 601-2.3(C).

CDC 601-2.3(C) lists Transportation Plan policies that are applicable to land divisions, and Policies 1, 3, 4 and 7 are not included. The hearings officer adopted findings that Policies 1, 3, 4 and 7 are not mandatory approval criteria, because those policies are not among the Transportation Plan provisions made applicable to land divisions by CDC 601-2.3(C). Further, the hearings officer found that the terms of Policies 1, 3, 4 and 7 do not contain mandatory approval criteria. Petitioners do not challenge the hearings officer's findings on either point. Even if the third assignment of error is read to challenge those findings, we agree with intervenor that the hearings officer correctly interpreted CDC 601-2.3(C) and the relevant Transportation Policies.

The third assignment of error is denied.

FOURTH, FIFTH, AND SIXTH ASSIGNMENTS OF ERROR

Petitioners argue that the county's findings regarding school capacity and the availability of fire and police protection are not supported by substantial evidence.

CDC 501-8.1(A) and 501-8.2(A) require that an applicant submit documentation from service providers, including fire, police and schools, that adequate levels of service can be provided to the proposed development.

A. Fire Protection

With respect to fire protection, the applicant submitted a form from the local fire marshal that the service level is adequate to serve the proposed development. However, the

[5]Policy 1 is "to provide a transportation system that maximizes the mobility of Washington County Residents and Businesses. Policy 3 is to "maintain and improve transportation system safety." Policy 4 is to "ensure the cost of transportation facilities and services are borne by those who benefit by them." Policy 7 is to "provide a roadway system that is safe for motorists, pedestrians, and bicyclists."

fire marshal also submitted a letter that reviewed the applicant's preliminary site plan and stated:

> "Until such time [as 198th Place is completed to connect with Miller Hill Road north of the subject property] the Fire District would require that the [90-foot] radius turnaround drawn on the site plan remain complete. The location of the turnaround [a]ffects Lot 12. An alternative to the radius could be to provide a Hammerhead Turnaround which would still [a]ffect one of the lots * * *." Record 144.

Intervenor ultimately chose to provide the hammerhead turnaround suggested in the fire marshal's letter. The hearings officer found compliance or feasibility of compliance with CDC 501-8.1(A) as it applies to the turnaround, stating:

> "based on the November pre-application letter and post-hearing discussions by the applicant and the fire marshal, it appears that [the hammerhead] approach may be acceptable to the fire marshal. * * * If the fire marshal finds such access is adequate, the hearings officer finds that it can be accommodated with minor revisions to the preliminary plat, such as creation of an easement over the frontage of one or two lots, without violating other applicable approval standards * * * [.]
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> "If the fire marshal requires the applicant to provide a more land-extensive turn-around feature, the hearings officer finds it can be provided by granting an [temporary] easement for that purpose over one or more lots. If lot(s) is/are not buildable as a result, the applicant can defer platting the lot(s) until 198th Avenue is extended north to create a loop street system with Mill Hill Road provided the hearings officer amends condition of approval VI.A accordingly. In the alternative, the applicant could eliminate those lots from the plat (which would be permitted as a minor amendment under CDC 602-5). * * *
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> "* * * The hearings officer finds that a condition of approval is warranted to require that, before the County approves the final plat, the applicant shall submit written certification from the fire marshal that the plat provides adequate access for emergency vehicles used for fire protection. The condition should allow the applicant to modify the preliminary plat to achieve that result, including granting of an easement over lots in a manner that does not cause those lots or development thereon to violate applicable dimensional standards, relocating lot lines and/or right of way limits and/or phasing of lots to provide for fire protection access." Record 27-28.

Petitioners argue that the hearings officer improperly deferred a determination of compliance with CDC 501-8.1(A) as it applies to the turnaround, contrary to *Tenly*

Properties, Inc. v. Washington County, 34 Or LUBA 352 (1998), and *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992). *Tenly Properties Inc.* involved a criterion requiring an adequate emergency turnaround for private streets. The county made no finding of compliance or finding of feasibility of compliance with the criterion, but merely deferred the issue to later stages of the review process that provided no notice or opportunity for a hearing. In *Rhyne*, we stated that:

> "Assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage [that does not provide notice or additional public hearings]." 23 Or LUBA at 447.

Intervenor argues, and we agree, that the hearings officer's finding of compliance or feasibility of compliance with CDC 501-8.1(A) is supported by substantial evidence and does not impermissibly defer such findings to a second stage of review that fails to provide statutory notice and opportunity for public hearing. The hearings officer found that the proposed hammerhead turnaround was acceptable to the fire marshal and feasible under the existing site plan with imposition of an easement, and imposed conditions of approval to ensure that the relevant criteria are met. That the hearings officer required intervenor to submit a written certification of adequate emergency vehicle access, and crafted the conditions to handle contingencies in which the fire marshal ultimately requires a more land-extensive turnaround, does not violate the principles articulated in either *Tenly* or *Rhyne*.

B. Police Protection

Intervenor submitted a form letter from the county sheriff's office stating that the "[s]ervice level is adequate for emergency calls only." Record 354. Petitioners argue that a service level adequate only for emergency calls is not sufficiently "adequate" for purposes of CDC 501-8.2(A). The hearings officer found compliance with CDC 501-8.2(A) as it pertains to police protection, for three reasons:

> "First, the statement [from the sheriff] does state that sheriff services are adequate for emergency response. It does not say that the services are inadequate. Second, the sheriff has made a similar response in other cases. * * * In those cases, the statement that services are available only for emergency calls has been construed to mean that services are adequate. There is no relevant reason to adopt a different construction of the sheriff's statement in this case. Third, the hearings officer infers from the evidence that the [sheriff] only responds to emergencies except in Enhanced Sheriff's Patrol Districts ("ESPD"). Given its pervasive practice, the Sheriff has concluded that emergency service response is adequate." Record 28.

Petitioners do not challenge the above-quoted finding, or otherwise explain why the sheriff's statement is not sufficient to demonstrate compliance with CDC 501-8.2(A).

C. School Capacity

Intervenor submitted a statement from the local school district that "there is a significant negative impact on the elementary level capacity with the approval of this request." Record 347. Notwithstanding the school's statement, the hearings officer found compliance with CDC 501-8.2(A) as it pertains to school capacity, as follows:

> "* * * At some point, the accumulation of many significant adverse impacts could make the school services inadequate, but that is not what the school districts statements says will or is likely to happen in this case. The school district letter acknowledges that 'capacity and anticipated/projected student enrollment must be accounted for, as it is the expectation of every parent or guardian with children in the School District that space will be available for their children upon entry into the District.' From this, the hearings officer infers the school district will accommodate all students from the subdivision, although such accommodations may contribute to the need for changes in school attendance boundaries, for use of portable and other temporary facilities, and for schedule changes needed to make better use of available facilities. The hearings officer finds that the [school's statement] fulfills CDC 501-8.2(A) and that school services are or may be adequate at build-out of the subdivision depending on the actions the district takes in response to the changing school-age population. Even if school services are not adequate at build-out of the subdivision, this factor, by itself, cannot be the basis for denial of the application [pursuant to ORS 195.110(10)]. Because the hearings officer finds that other services are or will be adequate, the school district's equivocal response to the application is not a basis for denial of the application." Record 28-29.

Again, petitioners do not challenge the hearings officer's findings, or demonstrate why those findings are erroneous or not supported by substantial evidence. In any case, as the hearings officer noted and petitioners concede, ORS 195.110(10) does not permit inadequate school capacity to be the sole reason for denial of a development application. Thus, even if petitioners are correct regarding what CDC 501-8.2(A) requires in terms of school adequacy, unless the county denies the application for another reason, or LUBA reverses the county's approval on the grounds that it is prohibited as a matter of law, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The fourth, fifth and sixth assignments of error are denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioners contends that the county failed to adopt findings of feasibility regarding the grading plan for the proposed subdivision, and thus impermissibly deferred findings of compliance regarding that plan.

CDC 410-1.1 requires that a grading plan be submitted with an application for development, and permits grading applications to be processed "through a two-step procedure consisting of a preliminary review (grading plan) and a final review (grading permit)." According to CDC 410-1.1, the purpose of the preliminary grading plan is to

> "determine whether or not it is feasible to comply with the grading permit review standards of [CDC] 410-3. * * * [G]rading plans shall be accurate enough to provide a basis for determining whether or not the grading plan, as designed and to be implemented, will meet the applicable Code requirements."

Pursuant to CDC 410-1.2, grading plans must contain specified information, including a

> "[w]ritten statement demonstrating the feasibility of complying with [CDC] 410-3. Demonstrating feasibility does not require detailed solutions, but there must be enough information for the review authority to find that solutions to problems are possible and likely." CDC 410-1.2(G)(8).

The hearings officer made the following findings with respect to CDC 410-1.2:

> "Regarding grading, CDC 410-1.2 requires the applicant to submit a grading plan. The applicant did so, although it does not contain all of the details required by that section. * * * CDC 410-3 contains the standards for a grading permit. The opponents argue CDC 410-3 applies at this time, and that the application does not contain substantial evidence that shows the grading plan complies with the criteria for approval of a grading permit. The applicant responds that a grading permit is not part of the application; such a permit will be applied for and approved before development occurs. The hearings officer agrees with the applicant. A grading permit, per se, is not part of the application before the County, and it is not required to comply with applicable standards for the subdivision * * *" Record 34.

We understand petitioners to argue that CDC 410-1.2 explicitly requires a finding, based on the preliminary grading plan, that it is feasible for that plan to comply with the grading permit standards at CDC 410-3, and that the hearings officer failed to make such a finding.[6] We agree. Although intervenor argues that no finding of feasibility is required, intervenor does not address the language of CDC 410-1.1 and 1.2, quoted above, and does not identify any place in the record where the hearings officer determined whether or not it is feasible for the preliminary grading plan to comply with the standards at CDC 410-3.

The seventh assignment of error is sustained.

EIGHTH ASSIGNMENT OF ERROR

CDC 412-1 requires that all applications for development include a drainage plans that conform to standards set forth at CDC 412-3. The hearings officer adopted findings that the preliminary drainage plan submitted by intervenor complies with the requirements of CDC 412-3. Record 34-35. However, petitioners argue that "no evidence was presented

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[6]CDC 410-3 sets forth numerous criteria for approval of a grading permit, including requirements that the proposed grading "will not cause erosion to any greater extent than would occur in the absence of development or result in erosion, stream sedimentation, or other adverse off-site effects or hazards to life or property." CDC 410-3.2. Other provisions of CDC 410-3 require design safeguards to ensure structural stability of development in certain defined conditions; revegetation; final contours that are blended with adjacent terrain; protection of existing drainage channels; preservation of off-site drainage courses or bodies of water; and compliance with storm water quality control facility standards adopted by the Oregon Department of Environmental Quality.

regarding the feasibility of any drainage plan," and that the hearings officer impermissibly deferred a finding of compliance with CDC 412-3 to a second stage of review that does not provide notice or an opportunity for a public hearing.

Petitioners do not identify any provision in CDC 412 that requires a finding of feasibility regarding the drainage plan, nor do petitioners challenge the hearings officer's finding that the preliminary drainage plan complies with the requirements of CDC 412-3. Petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

Petitioners argue that the county's finding of compliance with standards at CDC 421 governing development in flood plain and drainage hazard areas are not supported by substantial evidence.

Petitioners do not explain why the hearings officer's findings regarding CDC 421 are deficient, but merely refer us to arguments presented below at Record 55-57. Incorporation of previously iterated arguments in a brief may be permissible, where doing so presents a developed argument for our review. However, Record 55-57 is part of a document that predates and hence does not address the hearings officer's findings of compliance with CDC 421, and the cited portions of that document bear no obvious relationship to petitioners' arguments in this assignment of error. Absent additional explanation from petitioners, we cannot discern any basis under this assignment of error to reverse or remand the challenged decision. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

The ninth assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

CDC 421-7.5 requires a finding that "[t]he proposal will not increase the existing velocity of flood flows so as to exceed the erosive velocity limits of soils in the flood area.

Energy dissipation devices or other measures to control the mean velocity so as not to cause erosion of the flood area may be used to meet this standard." The hearings officer addressed conflicting evidence regarding compliance with CDC 421-7.5, and found that "[g]iven the evidence in the whole record, the hearings officer finds that the applicant failed to bear the burden of proof that the proposed development does or will comply with CDC 421-7.5 as proposed." Record 32. However, the hearings officer then found that "the applicant can detain stormwater on the site to reduce the erosive effect of the additional stormwater resulting from the development. If the applicant detains stormwater on the site so that the post-development rate of discharge from the outfall is no greater than the pre-development rate of discharge from the site, stormwater discharge will not be erosive to the creek." Record 32-33. The hearings officer then described, and found feasible, several methods to detain, slow or reduce the erosive capability of stormwater on the property, and imposed conditions of approval to ensure that the resulting discharge is consistent with CDC 421-7.5.[7]

Petitioners argue that the hearings officer exceeded his authority by imposing on intervenor an erosion control facility devised by the hearings officer. Petitioners also argue that there is no substantial evidence in the record that the self-devised erosion control facility complies with CDC 421-7.5.

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[7]The hearings officer added the following conditions of approval related to the drainage plan:

> "a. The drainage plan shall provide for detention of stormwater on the site such that the rate of stormwater runoff from the site during a peak storm event after development is no greater than the rate of stormwater runoff from the site during a peak storm event before development. * * *
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> "b. The drainage plan also shall show that the velocity of stormwater in the route between the detention facility and the outfall will not erode the adjoining soil by reducing the grade of the channel consistent with USA [Unified Sewerage Agency] standards, by improving the sides of the channel with vegetation that protects the adjoining soil from direct contact with the stormwater in the channel, and/or by enclosing the water in a solid or perforated pipeline, as approved by USA." Record 40.

Intervenor responds that the hearings officer has authority to impose conditions to ensure compliance with applicable criteria, and that petitioners' own engineer testified that compliance with CDC 421-7.5 could not be met "without employing some type of detention facilities." Record 136. By necessary implication, intervenor argues, the standard can be met *with* detention facilities. Thus, intervenor argues, the hearings officer's finding of compliance or feasibility of compliance with CDC 421-7.5 is supported by petitioners' own evidence.

We agree with intervenor that the hearings officer did not exceed his authority in imposing the conditions related to erosion to ensure compliance with CDC 421-7.5. The more difficult issue is whether the hearings officer's findings with respect to the erosion control facility required by those conditions are supported by substantial evidence. The challenged findings state:

> "The hearings officer finds that the applicant can reduce the erosive effects of stormwater on the proposed stormwater ditch by reducing the grade of the ditch to comply with USA standards cited by [intervenor's engineer, or] by reinforcing the walls of the ditch with appropriate vegetation or other materials. The hearings officer also finds that any potential erosive effects between the pond and the outfall can be eliminated by enclosing the stormwater in a pipeline. Enclosing the water in a pipeline would eliminate any potential water quality enhancement achieved by routing the water through a suitably improved ditch, but the hearings officer understands that the applicant did not propose to use the ditch for water quality purposes; all water quality enhancement was proposed to be achieved in the pond. If the applicant wants to use the ditch for water quality purposes, erosion will not be a problem if the ditch is improved with vegetation typical of biofiltration swales. Suitable vegetative cover effectively changes the erosive characteristics of the ditch; it would protect surrounding soils from direct exposure to stormwater.
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> "* * * The hearings officer finds it feasible for the applicant to detain stormwater by enlarging the proposed pond as needed to achieve no net change in discharge rates. * * * These changes also are feasible, in that CDC 602-5 would allow them. The opponents' arguments that detention will require wholesale redesign of the site is not sustained by substantial evidence in the record." Record 33.

Other than the testimony regarding the necessity of a detention pond, intervenor does not cite to any evidence in the record supporting the hearings officer's findings regarding the methods of reducing erosive capacity described in those findings. The hearings officer is undoubtedly correct that the identified methods would reduce and perhaps eliminate the erosive capacity of stormwater; however, there is apparently no evidence in the record supporting that conclusion. In addition, although the hearings officer found that the identified methods are "feasible" in the sense they can be implemented, there are no findings that those methods, if implemented, can achieve compliance with CDC 421-7.5, *i.e.* ensure that "flood flows [do not] exceed the erosive velocity limits of soils in the flood area." Consequently, we agree with petitioners that the hearings officer's findings of compliance with CDC 421-7.5 are not supported by substantial evidence.

The tenth assignment of error is sustained.

ELEVENTH ASSIGNMENT OF ERROR

In the eleventh assignment of error, petitioners argue that the county improperly deferred a finding of compliance with CDC 421-7.5 with respect to the erosion control measures suggested by the hearings officer. However, as we explained in *Salo v. City of Oregon City*, ___ Or LUBA ___ (LUBA No. 98-173, July 14, 1999) slip op 9, if the local government adopts findings of compliance or feasibility of compliance with applicable criteria, then the issue is whether those findings are adequate and supported by substantial evidence, not whether the local government improperly deferred those findings to a second stage of review. Accordingly, because we concluded in the tenth assignment of error that the hearings officer's findings of compliance or feasibility of compliance with CDC 421-7.5 are not supported by substantial evidence, we need not address petitioners' arguments regarding improper deferral.

The eleventh assignment of error is denied.

TWELTH ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer erred in approving the proposed subdivision even though there exists unabated land use violations regarding trees improperly removed on the property. Further, petitioners contend that the hearings officer exceeded his authority by imposing a mitigation scheme that, if accepted by the applicant, will result in dismissal of the pending enforcement casefile.

The hearings officer found that there was no express relationship between the preexisting violation and approval of the proposed subdivision. However, because the parties appeared willing to remedy the violation, and in the interests of efficiency, the hearings officer proposed a mitigation scheme that would require intervenor to replant a certain number and type of trees in the flood hazard area. If intervenor complied, the hearings officer stated that he will direct the county to dismiss the violation casefile. However, the hearings officer noted, because the tree violation is not relevant to approval of the subdivision, intervenor's rejection of the mitigation scheme would not preclude final subdivision approval; it would simply mean that the violation remained unabated, and the county could take appropriate enforcement measures.

Petitioners cite to CDC 104-1 for the proposition that the existence of the unabated violation means that the subdivision application must be denied. CDC 104-1 provides that all use or development of land shall comply with the county's comprehensive plan, its charter, as well as any applicable regional, state, federal and local laws. However, CDC 104-1 also provides that "[a] determination of compliance with such laws shall not be a standard or condition of approval * * *." We agree with intervenor that petitioners have not demonstrated that the hearings officer erred in approving the preliminary subdivision plat notwithstanding the unabated violation regarding trees. With respect to the hearings officer's authority to draft a mitigation plan and order the county to dismiss the violation casefile if intervenor accepts that plan, intervenor notes that county's land use staff, the body

responsible for enforcing the ordinances violated by the tree removal, asked the hearings officer to address the issue and provide for closure on the matter. Petitioners do not explain why the hearings officer erred in responding to the staff request; we see no error in doing so.

The twelfth assignment of error is denied.

The county's decision is remanded.