BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF YAMHILL COUNTY,
Petitioner,

vs.

YAMHILL COUNTY,
Respondent,

and

LOUIS WEST and JUDY WEST,
Intervenors-Respondent.

LUBA No. 2000-112

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by Yamhill County.

Michael C. Robinson, Portland, and David E. Filippi, Portland, filed the response brief. With them on the brief was Stoel Rives, LLP. Michelle Rudd, Portland, argued on behalf of intervenors-respondent.

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

REMANDED 02/22/2001

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

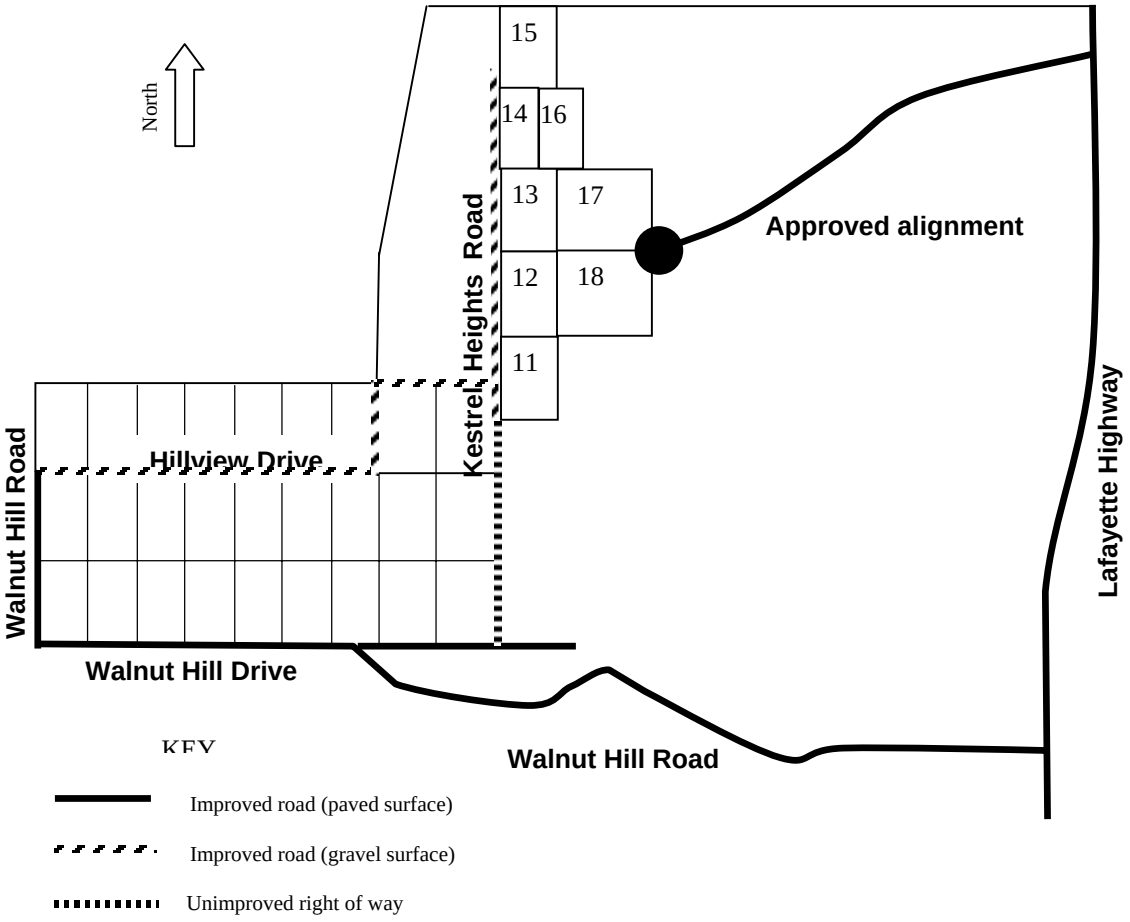
Petitioner appeals a county decision granting conditional use approval for a public road across land zoned for exclusive farm use (EFU).

MOTION TO INTERVENE

Louis and Judy West, the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Walnut Hill No. 2 subdivision was platted in 1911. Eight lots along the eastern edge of that subdivision extend along a ridge and are located next to the west side of the subject 198-acre, EFU-zoned parcel. Lots 11, 12, 13, 14, and 15 front on Kestrel Heights Road, an improved, north/south road in the subdivision.



Pursuant to ORS 215.700 to 215.710, lot of record dwellings were recently approved for EFU-zoned lots 11, 12, 14 and 15. Dwellings were also recently approved for three other EFU-zoned lots—lots 16, 17 and 18. The access that was required for approval of dwellings for those three lots is provided by easements across the intervening lots to Kestrel Heights Road.

Access from these seven lots to Lafayette Highway, which is located approximately one-half mile to the east, is possible over existing subdivision roads (hereafter the subdivision alignment). However, the subdivision alignment is circuitous, and some of the existing subdivision roads that must be crossed do not currently meet county standards.

A much shorter and more direct way to provide access from these seven lots to Lafayette Highway would utilize an existing roadway across the subject property. Such a roadway extends westward from Lafayette Highway to a cul-de-sac adjoining lots 17 and 18. An east/west driveway previously provided access from two existing dwellings on the subject property to Lafayette Highway. That driveway was recently improved, extended to lots 17 and 18 and terminates in a cul-de-sac.[1] Private easements connect the cul-de-sac to the five remaining lots. The existing roadway that connects the seven lots to Lafayette Highway to the east was built without county land use approval. The challenged decision authorizes dedication of that existing roadway as a public right of way to provide access for residential use of the seven lots (hereafter the approved alignment).[2]

ASSIGNMENT OF ERROR

In a single assignment of error, petitioner alleges that the county misinterpreted and

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[1]The existing gravel road is 22 feet wide, and applicants propose to dedicate a 50-foot right-of-way. The road is constructed to county standards, and applicants propose to further improve the road with an 18-foot wide paved surface. Record 310.

[2]The challenged decision takes the position that the existing roadway was legally constructed, since it can be characterized as an accessory use to farm uses on the subject property and lots 11, 15 and 16, and requires no county land use approval for such use.

failed to demonstrate that the disputed road complies with transportation planning rule requirements, applicable statewide planning goals and related Yamhill County Zoning Ordinance (YCZO) provisions. Petitioner makes several discrete arguments under its single assignment of error, and we address those arguments separately below.

A. OAR 660-012-0065(3)(o)

As relevant in this appeal, ORS 215.283(3) allows transportation facilities on EFU-zoned land, if those facilities (1) comply with ORS 215.296 and (2) are authorized by Land Conservation and Development Commission (LCDC) rules.[3] The relevant rule is OAR 660-012-0065. OAR 660-012-0065(3)(o) provides that the following transportation facilities may be approved on EFU-zoned land, without first adopting an exception to Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands), 11 (Public Facilities and Services), or 14 (Urbanization):

> "Transportation facilities, services and improvements * * * that serve local travel needs. The travel capacity and level of service of facilities and improvements serving local travel needs shall be limited to that necessary to support rural land uses identified in the acknowledged comprehensive plan or to provide adequate emergency access."

The challenged decision adopts alternative findings that the approved alignment is limited in both of the ways specified by OAR 660-012-0065(3)(o) ("limited to that necessary to support rural land uses" or limited to that necessary "to provide adequate emergency access"). Petitioner first challenges the county finding that the travel capacity and level of service of the approved alignment is "limited to that necessary to support rural land uses identified in the acknowledged comprehensive plan." Petitioner argues that the lot of record dwellings that have been approved for the seven lots are not "rural land uses identified in the acknowledged comprehensive plan" because they are not specifically authorized in the

[3]The county found that the disputed road complies with ORS 215.296, and petitioner does not assign error to those findings.

comprehensive plan as such. Petitioner also suggests the dwellings that have been approved for the seven lots are properly viewed as "urban," rather than "rural" land uses.

We agree with intervenors that the rule requires that the rural land uses that the approved alignment will serve be "identified" in the county's comprehensive plan, and does not require that the rural uses be specifically authorized. The county's acknowledged comprehensive plan contemplates rural residential development.[4] Goal 3 requires that rural agricultural lands be planned for agricultural use and zoned EFU. The YCCP does so. Lot of record dwellings are a species of rural residential development that is authorized by ORS 215.700 though 215.710 in rural EFU zones. The approved alignment would serve seven lot of record dwellings. We agree with intervenors that no more is required for the lot of record dwellings that the approved alignment would serve to be "identified in the acknowledged comprehensive plan," within the meaning of OAR 660-012-0065(3)(o).

The seven lot of record dwellings undeniably constitute "rural" land uses, in the sense that they are not located inside an urban growth boundary. We question whether OAR 660-012-0065(3)(o) requires a further inquiry about whether the seven lot of record dwellings, which are specifically authorized on rural EFU-zoned land, constitute "urban" land uses because they may have some of the characteristics of urban land uses. *See Jackson County Citizens League v. Jackson County*, 171 Or App 149, 158, ___ P3d ___ (2000) ("compliance with or an exception to Goal 14 is unnecessary to allow those urban-level uses in EFU zones that are specifically authorized or permissible under ORS 215.213 or ORS 215.283"). However, even if the rule does require such an inquiry, we agree with the

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[4]The challenged decision cites the following Yamhill County Comprehensive Plan (YCCP) policy language:

> "Yamhill County will continue to recognize that the appropriate location of very low density residential development is in designated large areas where commitments to such uses have already been made through existing subdivision, partitioning, or development * * *." Record 22.

county's conclusion that the lot of record dwellings are properly viewed as rural land uses. Two of the lots include eight acres, one of the lots includes four acres and the remaining lots appear to include between two and four acres. Record 433. In view of these circumstances, we reject petitioner's argument that the disputed dwellings should be viewed as urban land uses, for purposes of OAR 660-012-0065(3)(o).

We reject petitioner's argument that the challenged decision violates OAR 660-012-0065(3)(o).[5]

B. OAR 660-012-0065(5)

In addition to the requirements imposed by OAR 660-012-0065(3)(o) that transportation facilities in EFU zones serve local needs and be designed to perform that local service function, OAR 660-012-0065(5) requires that (1) alternative alignments be considered, (2) the impacts of each alignment on farm and forest uses be considered, and (3) the alternative with the least impacts on such farm and forest uses be selected. OAR 660-012-0065(5) provides:

> "For transportation uses or improvements listed in [OAR 660-012-0065(3)(o)] within an exclusive farm use (EFU) * * * zone, a jurisdiction shall, in addition to demonstrating compliance with the requirements of ORS 215.296:
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> "(a) Identify reasonable build design alternatives, such as alternative alignments, that are safe and can be constructed at a reasonable cost, not considering raw land costs, with available technology. * * * The jurisdiction need not consider alternatives that are inconsistent with applicable standards or [are] not approved by a registered professional engineer;
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> "(b) Assess the effects of the identified alternatives on farm and forest practices, considering impacts to farm and forest lands, structures and facilities, considering the effects of traffic on the movement of farm

[5]Because we agree with intervenors that the challenged decision adequately demonstrates that the approved alignment will "be limited to that necessary to support rural land uses identified in the acknowledged comprehensive plan," we need not consider petitioner's separate challenge to the county's alternative finding that the approved alignment also complies with OAR 660-012-0065(3)(o) because it is "limited to that necessary to * * * provide adequate emergency access."

and forest vehicles and equipment and considering the effects of access to parcels created on farm and forest lands; and

"(c) Select from the identified alternatives, the one, or combination of identified alternatives that has the least impact on lands in the immediate vicinity devoted to farm or forest use."

1. OAR 660-012-0065(5)(a)

As intervenors correctly note, under OAR 660-012-0065(5)(a), the subdivision alignment need not be considered as an alternative under OAR 660-012-0065(5)(b) and (c) if that alignment is "inconsistent with applicable standards or not approved by a registered professional engineer." However, this case is somewhat unusual in that both of the alignments that the county identified as potential alternatives are existing, improved alignments. Although the way OAR 660-012-0065(5)(a) is written makes it somewhat awkward to apply, we agree with petitioner that the existing subdivision alignment may not be rejected under OAR 660-012-0065(5)(a) simply because the existing roadway that is constructed in that alignment is (1) unsafe, (2) does not meet "applicable standards," or (3) has not previously been "approved by a registered professional engineer." If that were all that were required under OAR 660-012-0065(5)(a), an existing roadway with trivial and easily correctable safety and construction standards problems would not have to be considered as an alternative to constructing a new alignment across EFU-zoned land.[6] Even if the subdivision alignment has all three of these problems, as the county found, the county must establish that the roadway located in the subdivision alignment could not be improved to be "safe," meet "applicable standards" and be "approved by a registered professional engineer" "at a reasonable cost, not considering raw land costs, with available technology."

[6]Similarly an existing roadway that met all standards and was safe would not need to be considered as an alternative if it had never been approved by a registered professional engineer, even though such approval might be easily obtained.

Unless and until the county does so, it may not dismiss the subdivision alignment as an alternative under OAR 660-012-0065(5)(a).

There are three problems with the county's justification for concluding that under OAR 660-012-0065(5)(a) it need not consider the subdivision alignment as an alternative.

a. Unreasonable Cost to Provide Access to Lots 17 and 18

Intervenors cite the following findings:

> "The applicant also retained Kittelson & Associates, Inc., a transportation planning and traffic engineering firm, to review the proposed access. After conducting a field review of the site, Kittelson & Associates determined that the most feasible connection to the subject lots is via the proposed public road. *See* Letter from * * * Kittelson & Associates, to [intervenors' attorney] dated March 28, 2000, a copy of which was included in the record and is incorporated herein. * * * *Kittelson & Associates also state that access from the west could not be constructed to meet County road standards. Id. Based on these findings, the Board finds that it need not consider access from the west as it is inconsistent with applicable standards, and is not approved by a registered professional engineer*." Record 27 (emphasis added).

Although the above finding can be read to suggest that the applicants' engineer stated that the subdivision alignment could not be improved to be safe, meet county standards and be approved by a registered professional engineer, the engineer's statement that the findings rely on is much more limited.

The traffic engineer's March 30, 2000 letter simply concludes that the proposed alignment is the most feasible way to provide access to lots 16-18.[7] In support of that conclusion, the letter states:

> "There is in excess of 120 feet of elevation difference between Lots 17 and 18 and Kestrel Heights Road. This steep topography would require road grades in excess of * * * 13 percent. A new road between Lots 17 and 18 and Kestrel Heights Road could not be constructed to meet County standards." Record 314.

[7]There is no letter in the record dated March 28, 2000, that matches the description in the findings. There is a March 30, 2000 letter at Record 314-15 that matches the description in the findings, and we assume that is the letter the decision intended to refer to.

As noted earlier, the lot of record dwellings for these easterly lots were approved on the basis that they would be provided access west to Kestrel Heights Road via easements. The March 30, 2000 letter takes no position on whether driveways across those easements could be constructed to county standards to serve lots 16-18.[8] Neither does the letter take any position concerning whether the roadway that is constructed in the subdivision alignment currently fails to meet county standards or could not be improved to meet those standards for a reasonable cost.

The March 30, 2000 letter and the findings that rely on that letter are inadequate to support a conclusion that the subdivision alignment need not be considered as an alternative under OAR 660-012-0065(5)(a).

b. Unimproved Kestrel Heights Road Right-of-Way

The challenged decision quotes the following statement by a land surveyor hired by the applicants:

> "[I]t would be very difficult to construct a road to county specifications within the platted right of way of 30'. One would need to construct a large fill across the draw besides having large cuts through the orchard in order to meet a 15% maximum slope of 200'. It is very likely that the base of the fill would fall outside of the 30' right-of-way due to the required fill slopes and height of the fill. Massive amounts of soil would need to be moved, and on steep slopes such as here, erosion and possible soil movement will be factors that could pose problems. Basically, it comes down to the road location as platted does not seem feasible to build. There are better locations with less impact available than trying to force the road into the 30' right-of-way as platted." Record 313.

The difficulties described in the above-quoted statement by the land surveyor and relied on by the county in its findings do not have anything to do with the existing constructed subdivision alignment. Rather, they describe the difficulty that would have to be overcome if

[8]We also note that easements would be required to connect lots 11, 12, 14, 15 and 16 with the approved alignment. Therefore, easements will be required for access no matter which alternative is selected. The parties do not tell us whether the county has standards that govern such easements or the driveways that may be constructed on such easements.

the currently unimproved portion of the Kestrel Heights Road right-of-way were to be improved to provide a more direct connection with Walnut Hill Road to the south and Lafayette Highway to the east.

Petitioner contends that even if improvement of this currently unimproved portion of Kestrel Heights Road would be unfeasible, that does not mean the currently developed subdivision alignment could not be improved to be safe, meet county standards and be approved by a registered professional engineer. We agree.

c. Feasibility of Improvements to the Subdivision Alignment

There is an unexplained statement in a one-page letter from the Oregon Department of Transportation District Manager to petitioner's vice president that Kestrel Heights Road would need "a significant amount of work" to meet county standards. Record 236. The findings also identify two other letters signed by the same land surveyor noted above. Record 310-12. Those letters note that one part of the subdivision alignment, Hillview Road, is not maintained by the county and has grades of up to 17 percent.[9] The letters also note other problems with the subdivision alignment, including evidence of slope instability, narrow gravel roadways, and shady curves at higher elevations that could "make negotiating the route during snow and ice conditions more treacherous, especially during an emergency." Record 311. One of those letters concludes:

> "It is my opinion that the location of the [approved alignment] is a better alternative to access the property. It is a shorter distance to a major highway with favorable grades and causes less disturbance and impact to the environment." *Id.*

One might infer from the decision and the above-noted letters that the county, the applicants' traffic engineer and land surveyor and the ODOT representative may believe that the subdivision alignment cannot be improved to be safe, meet "applicable standards," or be

[9]Apparently, county road standards call for road grades of 15 percent or less. Record 313.

"approved by a registered professional engineer" "at a reasonable cost, not considering raw land costs, with available technology." However, there is no attempt to explain how seriously the subdivision alignment falls short of county standards.[10] Neither is there any attempt to provide even a rough estimate of how much it might cost to improve the subdivision alignment to county standards so that it would be "safe" and could be "approved by a registered professional engineer." Without some sort of estimate of those costs, it is not possible to know whether the costs are reasonable.

Before turning to the county's alternative findings, which address OAR 660-012-0065(5)(b) and (c), we note one other error in the county's decision. The challenged decision rejects as unreasonable what we understand to be alternative alignments "from the south or north" that are different from the subdivision alignment. Record 29. These alternatives are rejected, in part, on the basis that expensive easements might be required to address water feature, drainage and sight distance problems. The challenged decision concludes that such easement costs are not "raw land costs" and can be considered under OAR 660-012-0065(5)(a) to eliminate an alternative as unreasonably costly. Petitioner does not challenge the county's rejection of these other alternatives, but does dispute the county's finding that the cost of such easements may be considered to reject an alternative under OAR 660-012-0065(5)(a).

We agree with petitioner's interpretation of OAR 660-012-0065(5)(a). As we have already explained, OAR 660-012-0065(5)(a) requires that in considering the reasonableness of the costs of alternatives, "raw land costs" are not to be considered. Whether the legal right to use land for a transportation facility is acquired by purchase of the fee or by purchase of an

[10]One of our difficulties in this appeal is a lack of clarity about what the county road standards require. There are suggestions at various places in the record that those standards impose 13 percent or 15 percent grade limits and that the subdivision alignment violates those standards. Similarly, there are suggestions that various portions of the roadway constructed in the subdivision alignment fail to meet minimum width requirements, without specifying what those minimum width requirements are.

easement is irrelevant. Both are "land costs," within the meaning of OAR 660-012-0065(5)(a), and they may not be considered to eliminate an alternative from further consideration under the rule.[11]

For the reasons explained above, we conclude the county failed to adequately justify its conclusion that under OAR 660-012-0065(5)(a) it need not consider the subdivision alignment under OAR 660-012-0065(5)(b) and (c).

2. OAR 660-012-0065(5)(b) and (c)

As noted earlier in this opinion, OAR 660-012-0065(5)(b) and (c) require that the county consider the impacts that identified alternatives will have on farm and forest practices and select the alternative "that has the least impact on lands in the immediate vicinity devoted to farm or forest use." Petitioner argues:

> "The applicants' new road is 22 feet wide on a [50] foot right-of-way. It bisects a 198 acre EFU parcel currently in farm use and subjects that parcel to at least 70 daily vehicle trips by seven nonfarm households. The applicants' new EFU road has at least some impact on farmland; the [subdivision alignment] has none. The challenged decision is therefore required under OAR 660-012-0065(5)(b) and (c) to choose the [subdivision alignment]." Petition for Review 13.

Although we do not agree that the difference between the impacts on farm and forest uses is necessarily as absolute as petitioner argues, we agree that the county's findings fail to demonstrate that it selected the alignment "that has the least impact on lands in the immediate vicinity devoted to farm or forest use." The record includes a videotape of problems that the applicants encountered in moving a piece of farm equipment along the subdivision alignment. However, we do not understand the applicants to argue that they

[11]Although we agree with petitioner that the county incorrectly interpreted OAR 660-012-0065(5)(a) as allowing it to consider the cost of such easements in rejecting the alternative alignments, that error does not provide an independent basis for remand. We address this argument so that the county will not repeat the error in any proceedings the county may conduct on remand with regard to the subdivision alignment and any easements that might be required to improve that alignment so that it meets county standards.

actually operate farm equipment on the subdivision alignment.[12] Beyond an unexplained and undeveloped reference to "impacts of the other alternatives on farm uses," the county findings do not even attempt to explain why the approved alignment will have fewer such impacts than the subdivision alignment. Record 31.

3. Conclusion Regarding OAR 660-012-0065(5)

For the reasons explained above, we agree with petitioner that the county's decision fails to justify its selection of the approved alignment over the subdivision alignment and fails to justify its conclusion that it need not consider the subdivision alignment. Therefore, the county's decision is remanded.

[12]Presumably the road that has already been constructed on the subject property is used to provide any needed farm equipment access to the western portion of the subject property.