1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 CHRISTOPHER W. ANGIUS,
5 *Petitioner,*
6
7 vs.
8
9 WASHINGTON COUNTY,
10 *Respondent,*
11
12 and
13
14 D. SHANE KOLLENBORN
15 and STEPHANIE N. KOLLENBORN,
16 *Intervenors-Respondent.*
17
18 LUBA No. 2005-019
19
20 FINAL OPINION
21 AND ORDER
22
23 Appeal from Washington County.
24
25 Carrie A. Richter, Portland, filed the petition for review on behalf of petitioner. With her on
26 the brief were Edward J. Sullivan and Garvey Schubert Barer, PC.
27
28 No appearance by Washington County.
29
30 Robert A. Browning, Forest Grove, represented intervenors-respondent.
31
32 DAVIES, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
33 participated in the decision.
34
35 REMANDED 08/05/2005
36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.

1 Opinion by Davies.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a tentative plan for a 10-lot subdivision.

4 **FACTS**

5 The subject property is a 1.99-acre site within the Tualatin and Lake Oswego Sub-Basins.
6 On June 24, 2004, intervenors filed an application for approval of a 10-lot subdivision. At the
7 public hearing conducted November 18, 2004, before the hearings officer, petitioner testified
8 regarding his concerns with the impacts on nearby significant natural resources as a result of tree
9 removal and development activities on the site. On December 21, 2004, the county hearings officer
10 issued his final order approving the proposed subdivision with conditions. This appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 The challenged decision includes a condition of approval requiring submittal of a final plat
13 that responds to Clean Water Services (CWS) and county staff "red line" comments.[1] Petitioner
14 asserts that because it is unclear what red-line revisions might be made, the county committed

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[1] Condition II provides:

> "**PRIOR TO SUBMITTAL OF THE PROPOSED FINAL SUBDIVISION PLAT TO THE COUNTY SURVEY DIVISION**:
>
> **"Submit two (2) copies of the proposed final plat to Clean Water Services * * *, the Engineering Division * * *, and Land Development Services * * *. Each agency or division will 'red-line' the plat and return it to the applicant's surveyor for corrections."** Record 8.

Condition III(A) provides:

> **"PRIOR TO FINAL APPROVAL AND SUBDIVISION PLAT RECORDATION:**
>
> **"A. Submit to the County Survey Division * * *:**
>
> "Seventeen copies of the proposed final plat including correction responding to the 'red-lined' plats previously returned by Clean Water Services, Land Development Services, and the Engineering Division. Proposed final plat shall comply with Oregon Revised Statutes, Chapter 92 and Section 605 of the Washington County Community Development Code." *Id*.

1 procedural error that prejudiced petitioner's substantial rights, misconstrued applicable law and
2 rendered a decision not supported by substantial evidence.

3 Washington County Community Development Code (CDC) 605-2.1 provides a two-step
4 process for subdivision applications that consists of a preliminary review and a final review. The
5 challenged decision, approval of a preliminary subdivision review, directs county staff to propose
6 revisions, which could be substantial, and requires intervenors to incorporate those revisions into
7 their final plat proposal. Pursuant to CDC 204-2, final subdivision plat approval requires a Type I
8 procedure, which provides for no "public notice of review." Petitioner argues that the county
9 committed procedural error because the Type I review procedures do not provide for notice and
10 comment after those revisions are proposed by staff and then incorporated into the final plat by
11 intervenors. Petitioner relies on the Court of Appeals' decisions in *Hammer v. Clackamas*
12 *County*, 190 Or App 473, 79 P3d 394 (2003) (final plat approval is a "limited land use decision"
13 and requires the opportunity for notice and comment) and *Meyer v. City of Portland*, 67 Or App
14 274, 678 P2d 741 (1984).

15 In *Meyer*, the Court of Appeals recognized a two-step permit approval process, like the
16 two-step subdivision approval in this case, as a permissible way to process certain land use actions,
17 "so long as interested parties receive a full opportunity to a hearing before the decision becomes
18 final." *Id*. at 280. The Court cautioned, however:

19 "Obviously, such an approval process could be used to deny interested parties the
20 full opportunity to be heard if matters on which the public has a right to be heard are
21 not decided until the second stage of the process – that is, the stage of the process
22 in which final approval of the plan takes place and which occurs after public
23 participation has come to an end." *Id*.

24 We subsequently explained in *Rhyne v. Multnomah County*, 23 Or LUBA 422 (1992),
25 that a local government must provide procedural safeguards if it defers findings that are required at
26 the first step to the second step of a two-step process. We held that a local government may adopt
27 findings that demonstrate it is feasible to comply with an approval criterion and impose conditions of
28 approval to assure compliance with that criterion. If that course is followed, there is no deferral.

1 Where there is not sufficient evidence to establish that it is feasible to comply with an approval
2 criterion, a local government may defer consideration of that criterion to a later stage. If it does so,
3 however, it must assure that the later stage proceeding provides the same notice and participatory
4 rights that are required for the initial stage. *Id.* at 447-48.

5 We understand petitioner to argue that the red-line revisions by staff could be substantial,
6 and that the county's failure to provide the public an opportunity to review those changes and
7 comment on them is procedural error that prejudices his substantial rights, because the challenged
8 decision does not provide any of the necessary procedural safeguards outlined in *Rhyne*. Petitioner
9 also argues that notice and comment are required in any event during the final stage under the Court
10 of Appeals' holding in *Hammer*, and that the county erred in failing to require that those procedures
11 be followed during the final stage. Petition for Review 8-9 (citing *J.P. Finley and Son v.*
12 *Washington County*, 19 Or LUBA 263, 269 (1990) ("time to challenge the county's decision to
13 proceed without additional notice or public hearings [at a second stage] was when the decision to
14 proceed in that manner was made")).

15 The hearings officer addressed petitioner's argument on this point, concluding as follows:

16 "Based on the recent court of appeals decision in Hammer v. Clackamas County
17 (190 Or. App. ___, ___ P.3d ___ (2003-163)), an application for approval of a
18 final plat is a limited land use action, and is subject to public notice, comment and
19 appeal rights as such. A condition of approval requiring such notice would be
20 redundant and potentially inconsistent with the law at the time the applicants submit
21 a final plat application." Record 27.

22 As we understand the above quote from the challenged decision, the county's position is that under
23 the Court of Appeals' holding in *Hammer*, final subdivision plat approvals are limited land use
24 decisions, which by statute require notice and opportunity for comment. Accordingly, an
25 application for approval of a final plat is subject to public notice, comment and appeal rights,
26 notwithstanding the procedures outlined in the local code. The hearings officer appears to believe
27 that he need not also impose a condition that requires that the final review include procedures
28 providing for notice and an opportunity to comment. According to petitioner, a condition requiring

1 notice and comment is required because the local code clearly requires only a Type I administrative
2 action for final review, and Type I procedures do not require notice and comment.
3 As discussed above, petitioner's main concern appears to be with the red-line revisions and
4 the public's inability to review and comment on them. First, at least until the legislature adopts
5 legislation exempting final subdivision plat approvals from the definition of "limited land use
6 decision," the public will have an opportunity to review the red-line revisions in the final plat. Even if
7 legislative changes are made before final plat review in this case, and the final plat review is not
8 subject to notice and opportunity to comment, technical revisions need not be decided with public
9 participation. *Meyer*, 67 Or App at 282 n 6. Further, ORS 92.090(3)(d) requires that a final plat
10 be in substantial conformity with the tentative plan. *See also* CDC 610-2.2 (final plat approval
11 reviewed for consistency with preliminary approval). We see no reason why that requirement is not
12 sufficient to preclude any significant deviation from the tentative plan that would compromise the
13 public participation guaranteed under *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d
14 23 (1973). *See, e.g., Pfahl v. City of Depoe Bay*, 16 Or LUBA 796 (1988) (significant change in
15 road grade from that proposed and approved in tentative plan not "substantial conformity" and
16 justifies denial of final plat approval).
17 Petitioner's first assignment of error is denied.
18 **SECOND ASSIGNMENT OF ERROR**
19 Petitioner argues that the county erred in deferring compliance with CDC 410-3, which sets
20 forth criteria for approval of a grading permit, to the final plat review. In response to petitioner's
21 arguments below, the challenged decision provides:

22 "The hearings officer finds that the County is not required to provide notice and an
23 opportunity to comment on the final grading, drainage and erosion control plans.
24 CDC 410-1.1 expressly allows for 'a two-step procedure consisting of a
25 preliminary review (grading plan) and a final review (grading permit) * * *

26 "The purpose of a preliminary grading plan (conceptual) is to determine
27 whether or not it is feasible to comply with the grading permit review
28 standards of Section 410-3. Full engineering drawings are not required

> prior to receiving approval of a requested use. However, grading 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. *Id*.

> "Detailed technical matters involved in selecting a particular solution to each problem are left to be worked out between the applicant and county's experts during the second stage approval process for the final plan. This is consistent with *Meyer v. City of Portland*, 67 Or App. 274 (1984).
>
> "a. The hearings officer finds that it [is] feasible to comply with the applicable final engineer permit review standards, based on the expert testimony of County planning and building services staff and the applicants' preliminary grading plans.
>
> "b. Mr. Angius and Winterbrook Planning argued that the applicants' preliminary plans are inadequate to demonstrate feasibility, because they do not include a number of specific details (fencing, energy dissipaters, swale slopes, access, etc.). The hearings officer finds that the issues they identify can be addressed during the final engineering process. The preliminary plan is a conceptual design. The applicants are not required to provide detailed engineering plans at this stage. The opponents point out a number of items that the applicants need to address during final engineering. The hearings officer finds that it is feasible to do so, based on the expert testimony of County planning and building services staff. For instance, nothing precludes the installation of adequate temporary fencing, the design and installation of energy dissipaters if needed as a matter of engineering, and the design and construction of swales with suitable characteristics." Record 24-25.

Petitioner does not argue that the county failed to make a finding that compliance with CDC 410-3 is feasible. The hearing officer clearly made that finding. Petitioner argues, however, that that finding is unsupported by substantial evidence. He asserts that "nothing in the Final Order of the Findings suggest any consideration of the specific requirements of CDC 410-3." Petition for Review 14. The staff report, adopted by the hearings officer, states:

> "Final storm drainage, grading and erosion control plans shall be submitted to the Building Division Engineer and to Clean Water Services for review and approval prior to commencing any on-site improvements for the proposed development, including grading, excavation and fill activities. *Staff and both agencies will review the grading permit for compliance with Section 410-3 at that time*." Record 156 (emphasis added).

Generally, respondents would respond by pointing to the evidence in the record that supports the conclusion in the challenged decision—in this case, the expert testimony the hearings officer purports to be relying upon. In this case, however, neither respondent nor intervenors filed a response brief. The evidence petitioner points us to suggests that the planning staff, upon which the hearings officer relies, indicates that compliance with CDC 410-3 has yet to be addressed. We will not scour the record to determine whether that finding is supported by substantial evidence. *Fjarli v. City of Medford,* 33 Or LUBA 451 (1997) (where petitioners assert that a local government decision is not supported by substantial evidence, and no party cites evidence in the record to support the local government's decision, LUBA will not search the record to find supporting evidence).

Petitioner's second assignment of error is sustained.[2]

THIRD ASSIGNMENT OF ERROR

CDC Section 410-1.2.D(1) requires the submittal of an erosion control plan "as required by Section 426" for areas within the Tualatin River and Oswego Lake sub-basins.[3] There appears to be no dispute that the subject property is located within at least one of these sub-basins. Petitioner argues that the hearings officer erred in failing to "acknowledge that compliance with Section 426 was applicable to this decision or that compliance is 'feasible.'" Petition for Review 22. Petitioner asserts, we believe correctly, that the challenged decision directly addresses section 426 in only one place – the hearings officer's summary of the evidence presented on appeal:

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[2] Petitioner also argues that notice and an opportunity for comment are required for the subsequent review of the grading and erosion plans because they are either limited land use decisions or permits. Because we sustain petitioner's second assignment of error on the substantial evidence challenge, we need not resolve those issues.

[3] CDC 410-1.2.D(1) provides:

> "For areas inside the Tualatin River and Oswego Lake sub-basins, an erosion control plan as required by Section 426 shall be submitted."

CDC 410-1.2.D(2) provides the circumstances in which an erosion control plan is required for areas outside the Tualatin River and Oswego Lake sub-basins.

1 "[Petitioner] argued that the site is located inside the Tualatin River Basin. However
2 the applicants' plans address the erosion control standards for properties located
3 outside of the basin." Record 18.

4 The confusion regarding this provision appears to have begun when intervenors submitted
5 an application that erroneously addressed the provisions applicable to areas outside the Tualatin
6 River Basin, CDC 410-1.2.D(2), instead of the provision relating to erosion control plans for areas
7 inside the sub-basins, CDC 410-1.2.D(1). Petitioner makes much of the fact that intervenors' final
8 written submittal acknowledges that the original application addressed the wrong provisions. That
9 final written submittal indicates that intervenors revised the submittal accordingly, but no revised
10 submittal demonstrating compliance with the correct provisions appears in the record. Petition for
11 Review 23; Record 33.

12 We do not see that such an omission from the record is fatal. First, the correct provision,
13 CDC 410-1.2.D(1), only requires that "an erosion control plan as required by Section 426 shall be
14 submitted." CDC 426 merely requires that the conditions of a preliminary plat include an erosion
15 control plan. It does not require that an erosion control plan be prepared prior to preliminary plat
16 approval or even that certain erosion control criteria be complied with as part of preliminary plat
17 approval. CDC 426-4.[4]

18 The conditions of approval do include a requirement that an erosion control plan be
19 prepared. Record 8. The staff report, incorporated into the hearings officer's decision,
20 acknowledges the relevance of CDC 426 in this case and indicates that the submittal of a more
21 detailed erosion control plan is deferred until "on-site improvements, including grading, excavation

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[4] CDC 426-4 provides:

"No preliminary plat, site plan, development permit, building permit or public works project shall be approved unless the conditions of the plat, permit or plan approval include an erosion control plan containing methods and/or interim facilities to be constructed or used concurrently with land development and to be operated during construction to control the discharge of sediment in the stormwater runoff. The erosion control plan shall be prepared in conformance with the Washington County Erosion Control Plans Technical Guidance Book, January 1991, or its successor."

1 and/or fill activities are proposed."[5] CDC 426-5.2, authorizing deferral of the final erosion control
2 plan, applies whether the area is inside or outside the sub-basins.[6]
3 The justification for the provision allowing for deferral is clear from the context of the
4 provision. The purpose of CDC 426 is to implement Department of Environmental Quality
5 administrative rules requiring erosion control measures in the relevant sub-basins only "*during*
6 *construction* to control and limit soil erosion." CDC 426-1 (emphasis added). CDC 426-3.1
7 requires an erosion control plan to include a list of best management practices "to be applied *during*
8 *construction* to control and limit soil erosion." CDC 426 does not, as petitioner seems to assert,
9 provide mandatory approval criteria for the challenged decision, tentative subdivision plan approval.
10 It merely states that an erosion control plan is required prior to construction and sets forth the
11 information that must be included in that plan. *See* n 4. Finally, CDC 426 clearly is aimed at
12 controlling erosion during construction. Deferral of preparation of the erosion control plan is
13 authorized where "no construction or physical change to the land is to be commenced." CDC 426-
14 5.2; *see* n 6.

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[5] The staff report states:

> "Section 426 requires erosion control measures in the Tualatin River and Oswego Lake sub-basins during construction to control and limit soil erosion. Sheet C3 of the submitted plan set illustrates erosion control measures in conjunction with the site grading, but as indicated previously the plans do not illustrate all final grading. Pursuant to CDC 426-5.2, the applicant has opted to defer submittal of a more detailed erosion control plan until on-site improvements, including grading, excavation and/or fill activities are proposed. * * *
>
> "* * * The applicant will be required to submit a final erosion control plan to Clean Water Services for their approval prior to any on-site or off-site work (including work within the right-of-way) or construction." Record 158.

[6] CDC 426-5.2 provides:

> "The Department may defer submittal of an erosion control plan for a land division if no construction or physical change to the land is to be commenced and the land division would not otherwise interfere with future compliance with this section. Approval shall be conditioned to require an approved erosion control plan prior to any physical change or construction."

1 Because petitioner does not demonstrate that CDC 426 establishes mandatory approval
2 criteria applicable to the decision on appeal, we conclude that the hearings officer was not required
3 to include a finding that CDC 426 is complied with or that compliance with CDC 426 is feasible.
4 There may have been mandatory approval criteria for which the hearings officer failed to include
5 findings of compliance or feasibility of compliance, but petitioner does not identify any.
6 Accordingly, petitioner's third assignment of error does not provide a basis for reversal or remand.
7 Petitioner's third assignment of error is denied.
8 The county's decision is remanded.