

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 CITY OF DAMASCUS,  
5 *Petitioner,*

6  
7 vs.

8  
9 CLACKAMAS COUNTY,  
10 *Respondent,*

11  
12 and

13  
14 D.R. HORTON, INC.  
15 and CITY OF HAPPY VALLEY,  
16 *Intervenors-Respondent.*

17  
18 LUBA No. 2005-102

19  
20 FINAL OPINION  
21 AND ORDER

22  
23 Appeal from Clackamas County.

24  
25 Peggy Hennessy, Portland, filed the petition for review and argued on behalf of petitioner.  
26 With her on the brief was Reeves, Kahn and Hennessy.

27  
28 No appearance by Clackamas County.

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30 Michael C. Robinson, Portland, filed a response brief and argued on behalf of intervenor-  
31 respondent D.R. Horton, Inc. With him on the brief were Roger A. Alfred and Perkins Coie, LLP.

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33 Pamela J. Beery, Portland, filed a response brief on behalf of intervenor-respondent City of  
34 Happy Valley. With her on the brief were Spencer Q. Parsons and Beery, Elsner and Hammond,  
35 LLP.

36  
37 BASSHAM, Board Member; DAVIES, Board Chair; HOLSTUN, Board Member,  
38 participated in the decision.

39  
40 AFFIRMED

11/03/2005

41  
42 You are entitled to judicial review of this Order. Judicial review is governed by the  
43 provisions of ORS 197.850.

**NATURE OF THE DECISION**

The City of Damascus (petitioner or the city) appeals a county approval of a 249-unit planned unit development (PUD) on a portion of an 81.82-acre parcel that is partially within the city limits.

**MOTION TO INTERVENE**

The City of Happy Valley and D.R. Horton, Inc. move to intervene on the side of the county. There is no opposition to the motions, and they are allowed.

**FACTS**

The subject property is a former quarry located between the Clackamas River and Highway 224, zoned Future Urbanizable (FU-10). Approximately 13 acres of the 82-acre parent parcel is within the city limits, and the remainder is in unincorporated Clackamas County.

Pursuant to an intergovernmental agreement, the city has adopted the county comprehensive plan and zoning ordinance, and the county provides staff review for land use applications. Intervenor-respondent D.R. Horton, Inc. (intervenor) applied to the county for a 249-unit PUD and zone changes from UR-10 to Low Density Residential (R-7) for 52 acres of the 82-acre parent parcel, Medium Density Residential (MR-1) for 17.64 acres, and Open Space Management (OSM) for 5.2 acres. A 6.84-acre portion of the parent parcel will remain zoned UR-10. The proposed PUD encompasses the 52-acre portion to be zoned R-7. Intervenor contemplates filing a separate application to develop the MR-1 zoned portion.

The county hearings officer conducted a public hearing on the applications, at which the City of Damascus mayor and other public officials testified, raising a variety of issues regarding coordination, future annexation, school capacity, and the adequacy of transportation facilities. The hearings officer approved the PUD and zone changes, subject to a number of conditions. To address impacts on the nearby intersection of Highway 224 and Springwater Road, the hearings officer imposed a condition requiring that intervenor provide a surety in the amount of \$342,000

1 prior to final plat approval, the funds to be used to pay for signalization improvements when the  
2 county reconstructs the intersection, as contemplated in the county capital improvement plan (CIP).  
3 The hearings officer declined to impose conditions requiring that intervenor dedicate land or provide  
4 funds to address school capacity issues, or requiring that intervenor consent to annexation. This  
5 appeal followed.

6 **FIRST ASSIGNMENT OF ERROR**

7 Clackamas County Zoning and Development Ordinance (ZDO) 1022.07(A) provides that  
8 development may be approved “only if the capacity of transportation facilities is adequate or will be  
9 made adequate in a timely manner.” ZDO 1022.07(D)(1) defines “timely” to mean, in part, that for  
10 facilities under county jurisdiction, necessary improvements are included in the five-year CIP, fully  
11 funded, and scheduled for construction within three years of the date land use approval is issued.<sup>1</sup>

12 Just south of the subject property is the Highway 224/Springwater Road intersection, which  
13 is currently not meeting Oregon Department of Transportation (ODOT) mobility standards. The

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<sup>1</sup> ZDO 1022.07(D) provides, in relevant part:

“As used in Subsection 1022.07(A), ‘timely’ means:

“1. For facilities under the jurisdiction of Clackamas County, necessary improvements are included in the Five-Year Capital Improvement Program, fully funded, and scheduled to be under construction within three years of the date land use approval is issued;

“\* \* \* \* \*

“4. Alternatively, ‘timely’ means that necessary improvements will be constructed by the applicant or through another mechanism, such as a local improvement district. Under this alternative:

“a. Prior to issuance of a certificate of occupancy for a conditional use or a development subject to design review and prior to recording of the final plat for a subdivision or partition, the applicant shall do one of the following:

“1. Complete the necessary improvements; or

“2. For transportation facilities under the jurisdiction of Clackamas County, the applicant shall provide the county with a deposit, letter of credit, performance bond, or other surety satisfactory to county staff pursuant to Section 1104. \* \* \*”

1 county's 20-year CIP includes project 134, which calls for reconstructing the Highway  
2 224/Springwater Road intersection. To address impacts on this intersection, the hearings officer  
3 imposed condition 68, which requires:

4 "Before the county planning director approves the final plat for phase 1A, the  
5 applicant shall provide a surety, satisfactory to the county, in the amount of  
6 \$342,000. These funds will be incorporated into CIP Project 134: Springwater  
7 Road and will provide for signalization improvements to the intersection of Oregon  
8 Highway 224/Springwater Road to be constructed by Clackamas County."  
9 Record 28.

10 The city argues that condition 68 is inadequate to ensure compliance with the  
11 ZDO 1022.07(A) concurrency requirement. According to the city, project 134 remains on the 20-  
12 year CIP, and there is no evidence that the project is fully funded or that it is scheduled for  
13 construction within three years of the approval date, as required by ZDO 1022.07(D)(1).

14 Intervenor responds that no issue regarding ZDO 1022.07(A) or condition 68 was raised  
15 below, and thus the issues presented in this assignment of error are waived. ORS 197.763(1),  
16 197.835(3). In the event the Board concludes that these issues were not waived, intervenor argues  
17 that condition 68 is authorized by and consistent with ZDO 1022.07(D)(4), which provides that  
18 "timely" also means that necessary improvements will be constructed by the applicant "or through  
19 another mechanism." According to intervenor, the bonding mechanism imposed by condition 68 is  
20 an appropriate "mechanism" under ZDO 1022.07(D)(4). Intervenor also cites portions of the staff  
21 report explaining why the county proposed condition 68.<sup>2</sup>

22 At oral argument, the city contended that the issue of compliance with the ZDO 1022.07(A)  
23 concurrency requirements was raised by ODOT, at Record 116-17. However, we do not agree.  
24 The ODOT letter at Record 116-17 notes that the Highway 224/Springwater Road intersection

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<sup>2</sup> The staff report and staff testimony cited to explains that the county has recently received additional funding that will fast track project 134 to begin construction in the year 2007, but that a complicating factor is that the bridge adjacent to the intersection may be re-aligned, which will require relocation of the intersection. Under these circumstances, staff explained, the county deemed it sufficient to require intervenor to provide a surety for a portion of the necessary improvements, rather than have intervenor construct improvements that may have to be torn out shortly after being built. Record 40-41, 162-63.

1 currently does not meet mobility standards, and noted several problems with improving the  
2 intersection at its current location. With respect to ZDO 1022.07, the ODOT letter agrees with  
3 county staff that it is not appropriate to require the applicant to construct improvements at this time  
4 and supports the county’s approach in requiring a fee in lieu of improvements.<sup>3</sup> Nothing in the  
5 ODOT letter raises the issue presented in the first assignment of error, which is whether the county  
6 erred in failing to require that the intersection be made “adequate in a timely manner” as the term  
7 “timely” is defined under ZDO 1022.07(D)(1). In any case, we agree with intervenor that the  
8 county proceeded under the alternative provisions of ZDO 1022.07(D)(4), not  
9 ZDO 1022.07(D)(1).

10 The first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 During the proceedings below, a school district representative testified that school capacity  
13 is limited, and requested that the hearings officer either require the applicant to dedicate land for  
14 school purposes or provide funding in lieu. The school district later withdrew that request, but  
15 based on the district’s initial testimony the city requested that the hearings officer impose a condition  
16 requiring land dedication or funds in lieu to mitigate the impacts on the school system, citing to  
17 Policy 6 of the comprehensive plan Residential element.<sup>4</sup> The hearings officer declined to do so,

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<sup>3</sup> The ODOT letter states, in relevant part:

“In order to address ZDO 1022, Concurrency, the applicant will need to mitigate for the existing capacity issue at OR 224-Springwater Road. The County has been awarded OTIA III funding to re-build the Springwater Bridge, and several alignments are being considered in project development. Given the difficulties regarding lack of right of way to construct a signal and turn lanes, and the possibility that the intersection may be relocated at the time of the bridge construction, ODOT does not recommend the county condition the applicant to construct the signal/turn lanes at this time. We support the County’s approach to negotiate with the applicant a reasonable ‘fee-in-lieu’ for the signalization project, so that it may be constructed with the County’s bridge project.” Record 117.

<sup>4</sup> Policy 6 states that it is county policy to:

“Insure adequate provisions for the schools, churches and recreation facilities which are an integral part of all residential neighborhoods. The siting of these facilities is subject to

1 noting that the county’s PUD criteria require dedication of land for school purposes only if the PUD  
2 includes 250 units or more, and that ORS 195.110(11) provides that school capacity “shall not be  
3 the sole basis for approval or denial of any residential development application.” The hearings  
4 officer also rejected the city’s argument that Policy 6 is an approval criterion that requires intervenor  
5 to either dedicate land for schools or funding in lieu.<sup>5</sup>

6 In this assignment of error, the city argues that the hearings officer misconstrued Policy 6  
7 and erred in failing to require intervenor to mitigate impacts on the school district, as a condition of  
8 PUD approval. According to the city, Policy 6 is an approval criterion applicable to PUD  
9 proposals.

10 Intervenor argues that the hearings officer correctly interpreted Policy 6 in context to be a  
11 planning mandate to the county, not an approval criterion governing applications for residential  
12 development. We agree. As written, Policy 6 does not suggest that it is an approval criterion for

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conditions insuring adequate design and safety particularly with regard to vehicular and pedestrian access.”

<sup>5</sup> The hearings officer’s findings state, in relevant part:

- “b. County staff argue that ‘Policy 6 is intended to insure facilities of this nature [i.e. a school] can be provided for within the Low Density Residential plan designation. They argue that the policy is implemented by ZDO 301.06, which allows schools in low density residential areas as a conditional use. \* \* \*
- “c. The applicant argues that Policy 6 under the ‘Residential’ element in Chapter 4 must be read in context with policies in Chapter 7, which are specifically addressed to public facilities and services. Nothing in Chapter 7 requires the county to consider school capacity when deciding whether to approve a zone change or PUD application. \* \* \* Policy 16 requires a percentage of the PUD area to be devoted to open space. No similar language exists to implement Policy. It would be inconsistent with the context of Policy 6 to construe it to require a dedication of land for a school. \* \* \*
- “d. The hearings officer is persuaded that Policy 6 under the ‘Residential’ element in Chapter 4 does not require the applicant to dedicate land for a school for the reasons provided by county staff and the applicant. The plain meaning of the words in Policy 6 does not indicate that the policy is intended to be an approval criterion for a zone change or PUD, unlike policy 16. Policy 6 is not directed to applicants, it is directed to the county. This assures that schools can be included in residential areas. Also Chapter 4 needs to be read in conjunction with Chapter 7, which is the public facilities policy. If the county had intended to require schools as a condition of land use approval, it would have said so in Chapter 7.” Record 9-10.

1 quasi-judicial development applications. The context the hearings officer cites makes it even clearer  
2 that Policy 6 is, at best, a planning mandate to the county.

3 The second assignment of error is denied.

#### 4 **THIRD ASSIGNMENT OF ERROR**

5 ZDO 1013.06(C) provides that “[a]ll lots within the development shall have reasonable  
6 access to open space or recreation areas.” The hearings officer criticized the initial application for  
7 failure to provide sufficient usable recreational open space. In response, intervenor modified the  
8 application to propose improving a large open space on the subject parcel with a basketball court  
9 and other amenities. The hearings officer accepted the modification and imposed a condition of  
10 approval to ensure that the open space area would be improved as proposed in conjunction with  
11 the PUD development.

12 The city points out that the open space at issue is not actually part of the PUD subdivision  
13 area, but is apparently intended as an open space for the MR-1 zoned area of the subject parcel.  
14 According to the city, intervenor contemplates construction of up to 235 multi-family dwelling units  
15 on the MR-1 zoned area, in a separate application that has not yet been filed. The city argues that  
16 the hearings officer erred in relying on open space that is associated with the MR-1 zoned area of  
17 the parent parcel to satisfy ZDO 1013.06(C), while ignoring the additional dwelling units that will be  
18 built on the MR-1 zoned area for purposes of ZDO 1013.06(G)(2), which requires a dedication of  
19 land for schools for residential development that exceeds 250 units. The applicant cannot have it  
20 both ways, the city argues. Either the portions of the parent parcel outside the PUD should be  
21 considered for all purposes under ZDO 1013.06, in which case the applicant must provide a  
22 dedication of land for schools under ZDO 1013.06(G)(2), or no portion of the parcel outside the  
23 PUD should be considered for any purpose under ZDO 1013.06, in which case intervenor has  
24 failed to address the hearings officer’s concerns regarding usable open space.

25 Intervenor responds that no objection or issue was raised below regarding intervenor’s  
26 proposal to improve the open space, to address the hearings officer’s concerns under

1 ZDO 1013.06(C). In fact, intervenor argues, the city submitted a letter supporting that proposal.  
2 Record 171. Because the issue presented in this assignment of error was not raised below,  
3 intervenor argues, it is waived. In the alternative, intervenor argues that ZDO 1013.06(D) does not  
4 require that open space be improved with recreational amenities, and the intervenor's offer to do so  
5 was voluntary. However, even if such improvements were necessary to comply with  
6 ZDO 1013.06(D), intervenor argues, proposing such improvements on open space outside the  
7 PUD for purposes of ZDO 1013.06(D) does not obligate the applicant to count development of  
8 other property outside the PUD, for purposes of ZDO 1013.06(G)(2).

9 The city cites no place in the record where the issue presented in this assignment of error  
10 was raised below. Therefore, the issue is waived. ORS 197.763(1).

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 The city argues that the hearings officer failed to adequately coordinate with the city, as  
14 required by Statewide Planning Goal 2 (Land Use Planning), ORS 197.015(5) and local  
15 ordinances. According to the city, the county failed to provide the city with the staff report until two  
16 days prior to the hearing. Further, the city complains that, while the hearings officer adopted  
17 findings addressing the concerns raised by the city, he made no reasonable effort to accommodate  
18 those concerns.

19 Turning first to the staff report, intervenor and intervenor-respondent City of Happy Valley  
20 respond that the staff report was made available to the city seven days prior to the hearing, as  
21 required by ORS 197.763(4)(b). County staff apparently submitted a three-page addendum two  
22 days prior to the hearing. However, the hearings officer left the record open after the hearing to  
23 allow any party to submit additional evidence and testimony. The respondents argue, and we agree,  
24 that the city has not demonstrated the county committed any error with respect to the staff report or  
25 that any error prejudiced the city's substantial rights.



1 Turning to the coordination issue, we have described the coordination obligation under Goal  
2 and ORS 197.015(5) as follows:

3 “[T]he coordination obligation does not mean that local governments must ‘accede  
4 to every request’ made by an affected governmental agency. *Brown v. Coos  
5 County*, 31 Or LUBA 142, 146 (1996); *Waugh v. Coos County*, 26 Or LUBA  
6 300, 314 (1993). However, the obligation imposed by Goal 2 and ORS  
7 197.015(5) goes beyond the county’s obligation to address and demonstrate  
8 compliance with other applicable approval criteria. The coordination obligation  
9 requires an exchange of information and an attempt to accommodate the legitimate  
10 interests of all affected governmental agencies. *Rajneesh v. Wasco County*, 13 Or  
11 LUBA 202, 210 (1985). Goal 2 and ORS 197.015(5) do not mandate success in  
12 accommodating the needs or legitimate interests of all affected governmental  
13 agencies, but they do mandate a reasonable effort to accommodate those needs and  
14 legitimate interests ‘as much as possible.’ For LUBA to be able to determine that  
15 this coordination obligation has been satisfied, a local government must respond in  
16 its findings to ‘legitimate concerns’ that are expressed by affected governmental  
17 agencies. *Waugh*, 26 Or LUBA at 314-15 (1993).” *Turner Community  
18 Association v. Marion County*, 37 OR LUBA 324, 353-54 (1999) (footnote  
19 omitted).

20 The city expressed the following concerns during the proceedings below. First, the city  
21 requested that the hearings officer impose a condition requiring that the applicant consent to city  
22 annexation of the entire parcel, arguing that the city may eventually be the service provider for the  
23 property. Second, the city requested that the hearings officer require mitigation for impacts on  
24 school capacity. Finally, the city raised concerns regarding transportation facilities, specifically, (1)  
25 the possibility that ODOT may close access to a portion of the subject parcel, which might shift  
26 traffic to Eckert Lane, which runs through the city, and (2) the capacity of the Highway  
27 224/Springwater Road intersection.

28 The hearings office adopted lengthy findings addressing the city’s concerns, and explaining  
29 why the hearings officer believed he could not or should not accommodate those concerns. The city  
30 does not challenge those findings, or explain why they are insufficient to satisfy the Goal 2  
31 coordination requirement, except to argue that the hearings officer did not accede to the city’s  
32 requests. However, as explained, the coordination obligation does not require that the county  
33 accede to the city’s requests, only that the county make a “reasonable effort to accommodate” the

1 city's needs and legitimate interests "as much as possible." *Id.* Without some challenge to the  
2 findings explaining why the hearings officer believed he could not accommodate the city's requests,  
3 the city's arguments under this assignment of error do not provide a basis for reversal or remand.

4 The fourth assignment of error is denied.

5 The county's decision is affirmed.