BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHRISTOPHER KYLE, MARTYNTJE KYLE,
JAMIE DULL, LAUREL DULL,
CINDY AUMAN, KAREN KEENE, ED KEENE,
DOUG MORSE, KIM MORSE,
GRANT ROBINSON and SUSAN ACKERMAN,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

ALGARVE CONSTRUCTION, INC.
and FRANK BANTON,
Intervenor-Respondents.

LUBA No. 2006-052

FINAL OPINION
AND ORDER

Appeal from Washington County.

Carrie A. Richter, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief were Edward J. Sullivan and Garvey Schubert Barer, PC.

No appearance by Washington County.

John M. Junkin, Portland, filed the response brief and argued on behalf of intervenor-respondents. With him on the brief were Krista N. Hardwick and Bullivant Houser Bailey, PC.

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

AFFIRMED 08/17/2006

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

Opinion by Holstun.

NATURE OF THE DECISION

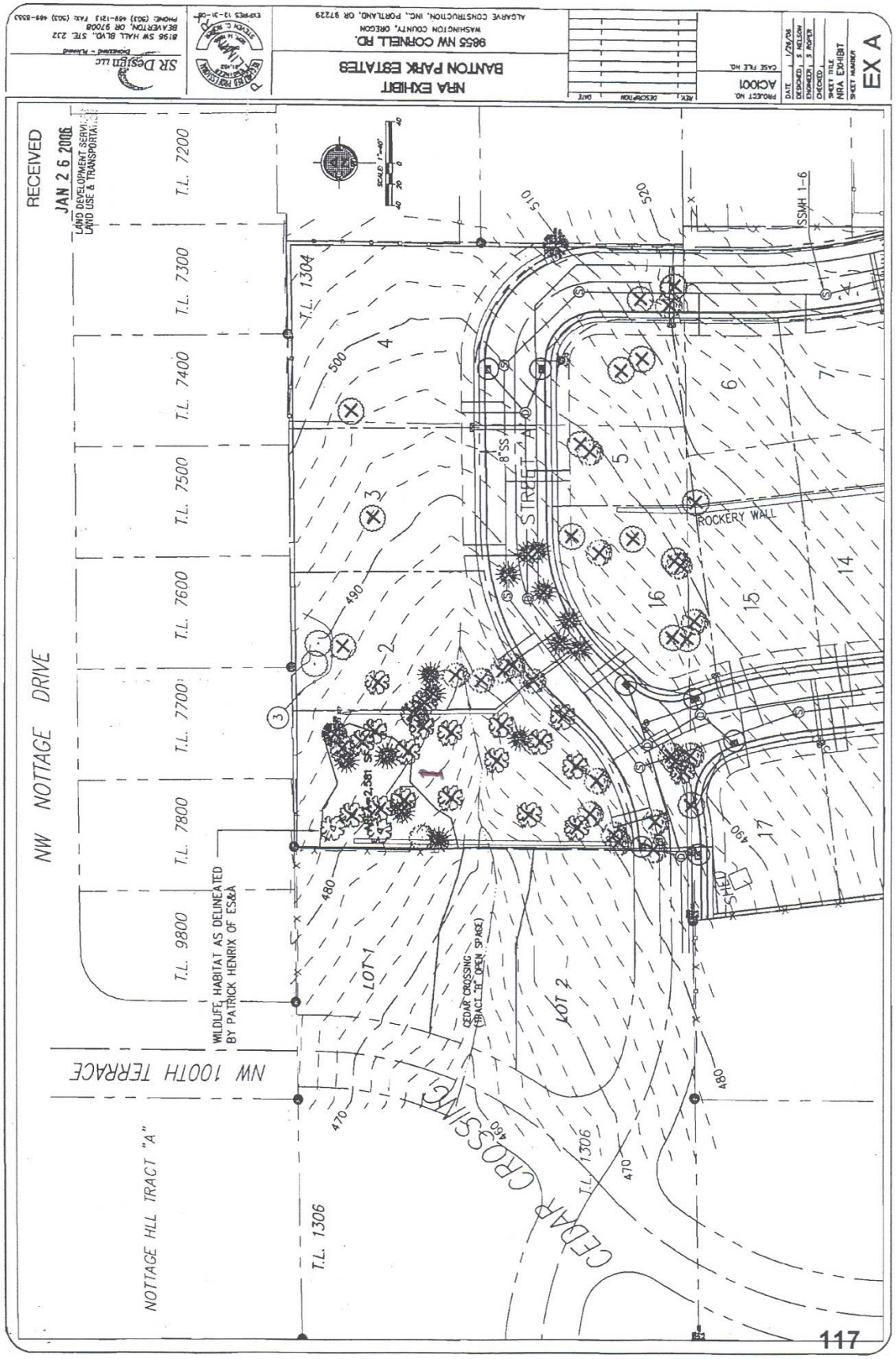
Petitioners appeal a county hearings officer decision that grants preliminary subdivision approval, with conditions.

FACTS

The subject 4.24 acre site is located north of NW Cornell Road in Washington County, just outside the City of Portland. The site is surrounded by NW Cornell on the south and platted residential lots to the west, north and east. Most of the lots to the north and east have already been developed with single family homes. The platted subdivision to the west, Cedar Crossing, is currently being developed. Intervenors, who were the applicants below, propose to divide the 4.24 acres into Banton Park Estates, a 26-lot residential subdivision.

A previously platted road in Cedar Crossing would be extended east into the northern part of the site and then turn south and west and continue back west to connect with another existing platted road in Cedar Crossing. Record 539. The northern part of the property (tax lot 1304) is the focus of the parties' dispute in this appeal.

As proposed, the extended street (Street A) would provide access to four lots along the northern part of the site (lots 1-4). Proposed Banton Park Estates Lot 1 is located at the extreme northwest corner of the 4.24-acre site. The westerly lot line of Lot 1 of Banton Park Estates would border the easterly lot line of lots 1 and 2 and Open Space Tract B of Cedar Crossing. Open Space Tract B is approximately 30 feet wide. A conceptual drawing showing the relationship of Banton Park Estates lots 1-4 and Cedar Crossing lots 1 and 2 and Open Space Tract B appears on the next page. A natural drainage way flows from east to west across Cedar Crossing Open Space Tract B, under NW 100th Terrace and across Cedar Crossing Open Space Tract A (not shown). The parties dispute how much of that natural drainage way extends east onto Banton Park Estates. The parties also dispute how far a Significant Natural Resource Area extends east from Cedar Crossing onto the site.


NRA EXHIBIT
BARTON PARK ESTATES
9855 NW CORNELL RD.
WASHINGTON COUNTY, OREGON
ALCHEMY CONSTRUCTION, INC., PORTLAND, OR 97229
SR Design LLC
8196 SW HALL BLVD., STE. 232
BEAVERTON, OR 97008
PHONE: (503) 469-1213 FAX: (503) 469-8353
EXPIRES: 12-31-08
PROJECT NO. AC1001
CASE FILE NO.
DATE 1/26/06
DESIGNED S. NELSON
DRAWN S. NELSON
CHECKED S. HOPER
SHEET TITLE NRA EXHIBIT
SHEET NUMBER EX A
RECEIVED
JAN 26 2006
LAND DEVELOPMENT SERVICES
LAND USE & TRANSPORTATION
NW NOTTAGE DRIVE
NW 100TH TERRACE
NOTTAGE HILL TRACT "A"
T.L. 7200
T.L. 7300
T.L. 7400
T.L. 7500
T.L. 7600
T.L. 7700
T.L. 7800
T.L. 9800
T.L. 1304
T.L. 1306
WILDLIFE HABITAT AS DELINEATED BY PATRICK HENRIX OF ES&A
CEDAR CROSSING (TRACT "E" OPEN SPACE)
LOT 1
LOT 2
STREET "A"
ROCKERY WALL
SHED
ISSWH 1-6
8"SS
CEDAR CROSSING
490
500
510
520
480
470
117

The application was first considered by the County Planning Manager. The Planning Manager approved the application with a condition that required that most of proposed lot No. 1 be designated as an open space area where development would be prohibited. Both the applicants and the petitioners appealed the Planning Manager's decision to the county hearings officer, who affirmed the Planning Manager's decision with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Among other things, Washington County Community Development Code (CDC) Section 605-2 provides that a subdivision in the county's urban area is subject to "the applicable development standards of [CDC] Article IV." For purposes of this assignment of error, the relevant development standards in CDC Article IV appear at CDC 410-3.6 and 410-3.7. CDC 410-3.6 and 410-3.7 require that the county preserve "existing natural drainage channels" and "the functioning of off-site drainage courses."[1] In their first assignment of error, petitioners allege the county hearings officer erroneously found the proposed subdivision, as conditioned, complies with CDC 410-3.6 and 410-3.7.

There is a swale or depression that drops from east to west across the northern part of the site, where lots 1 through 4 are located. That swale represents the upper reach of the drainage that extends to the west across Open Space Tracts A and B. The swale is deeper and more defined on the western part of the site where lot 1 is located than it is further east

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[1]As relevant, CDC 410-3 provides:

> "A grading permit, which shall apply only to the area of the site where construction, grading, cut or fill is proposed, may be issued only after the Review Authority finds:
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> "* * * * *
>
> "410-3.6 Except for permitted piping and culverting, the proposed grading protects and preserves existing natural drainage channels;
>
> "410-3.7 The proposed grading will preserve the functioning of off-site drainage courses or bodies of water[.]"

on the site. In the past that swale apparently drained a much larger area to the east and north. As the properties to the east and north have developed, much of the water that formerly drained into the swale is now collected in storm drainage systems and goes elsewhere. If the subject property is developed as proposed, water that now drains from much of the northern part of the 4.24-acre site will be collected and sent via drainage pipes in the street rights-of-way to a storm drainage detention facility in Cedar Crossing.

The hearings officer found that the swale on the northern part of the site could qualify as an "existing natural drainage channel" that is subject to the preservation requirement set out in CDC 410-3.6, if it carries "more than a *de minimis* amount of runoff."[2] Citing testimony and other evidence that was submitted by the applicants, the hearings officer ultimately found that the swale only qualified as an existing drainage channel for a length of approximately 60 feet before it crossed over into Cedar Crossing to the west:

> "* * * The applicant provided substantial evidence that is persuasive to the hearings officer, principally in the form of testimony and analysis from professional engineers, that the site does not contain a spring or perennial stream.[3] But the hearings officer finds that the applicant did not provide

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[2] The hearings officer explained:

> "The hearings officer relies on the definition in WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY (1983, p. 1839) to find that a 'swale' is a 'hollow or depression.' Based on the context of its use, in grading regulations intended to address the extent and nature of grading but to prohibit development, the hearings officer finds that such a hollow or depression must carry more than a *de minimis* amount of runoff and that it must do so regularly (e.g. during storm events) to be a drainage swale for purposes of CDC 410-3.6 or to affect the functioning of an off-site drainage course for purposes of CDC 410-3.7. To construe the term otherwise would strike a balance against grading of even the smallest depression, which the hearings officer finds is not consistent with the broad extent of uses and development allowed in the urban residential zones, which also are part of the context of the ambiguities in CDC 410. Even the Comprehensive Plan only requires use of reasonable means to protect Significant Natural Areas. See Policy 10, implementing strategy 'a.' It does not anticipate that drainage channels will be protected at all costs." Record 24 (footnote omitted).

[3] The applicants' stormwater expert Cunningham testified that he personally inspected the swale "and observed no groundwater seeping out of the ground or springs." Record 235. Cunningham also testified that he dug a hole 12 inches deep in the swale and "found no evidence of flowing water or saturation." *Id.* Although Cunningham's January 19, 2006 testimony does not identify precisely where the 12 inch hole was

> substantial evidence that the site does not contain a natural drainage channel, which is not the same as a stream.
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> "* * * The hearings officer finds that a natural drainage channel exists on tax lot 1304 based on the several topographic maps of tax lot 1304 in the record, which show that native grades in the west part of tax lot 1304 form a shallow V-shaped depression that tilts toward the west edge of the site.[4] The hearings officer cannot determine from the record precisely where the topographic change is significant enough to be construed as a channel for purposes of CDC 410. However, given the relatively small area that does and will drain in that direction without being intercepted by an engineered storm water system, the hearings officer finds that the swale will carry more than a *de minimis* amount of runoff not farther than 60 feet from the west edge of the site. While the swale may have carried more water a longer distance in the past, development changed that. It does not do so now." Record 24-25.[5]

We do not understand petitioners to challenge the hearings officer's interpretation that while all swales or depressions in the earth's surface may drain at least some surface water runoff, only those swales or depressions that drain more than a *de minimis* amount of runoff qualify as "existing natural drainage channels," within the meaning of CDC 410-3.6. Even if some parts of the petition for review can be read to question that interpretation, we agree with that interpretation.

While the applicants' experts apparently did not attempt to conduct their own empirical study to measure precisely how much water the swale drains, they did testify that they observed no spring or other source of groundwater on the site and observed no evidence that an amount of water that would exceed the *de minimis* threshold flows across the swale. Their explanation for why little water now flows across the swale is that development along the eastern and northern boundaries of the site has redirected surface water runoff, effectively

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dug, Cunningham's July 6, 2005 written testimony states he dug a hole in the westerly end of the swale and "found no water, or saturation to 14 [inches]." Record 611.

[4] The subject 4.24 acres are made up of three tax lots. The northernmost tax lot is tax lot 1304 and proposed lots 1 through 4 occupy most of tax lot 1304.

[5] The applicants' expert Cunningham estimated that 70-80 percent of the runoff that formerly drained east to west across the swale has been rerouted by the subdivision development to the north and east. Another of the applicants' experts, Roper, submitted written testimony and a drawing that shows the approximately 3.73 acre area that now drains into the swale. Record 77.

shrinking the size of the area the swale now drains to 3.73 acres. The applicants point out that when those 3.73 acres are developed with residences, as the county's zoning permits, the drainage area will become even smaller.

The hearings officer's findings are adequate to explain why the proposal complies with CDC 410-3.6 and 410-3.7 and those findings are supported by testimony from the applicants' experts, which we conclude a reasonable person could believe.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

CDC Section 422 regulates development in areas that have been identified in Community Plans as areas with "Significant Natural Resources." The Cedar Mill/Cedar Hills Community Plan includes a small scale map that identifies a "Banton NRA."[6] Record 641. Because the county's small scale Community Plan maps only identify the approximate location of Significant Natural Resource Areas (SNRAs), CDC 422-3.1 requires that development permit applicants must more precisely identify the boundaries of SNRAs.[7] Once an SNRA is located, CDC 422-3.6 requires that the county find that the proposed development "will not seriously interfere with" "wildlife areas and habitat."[8]

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[6] A small scale map shows less detail than a large scale map. The Community Plan Map at Record 641 appears to show that approximately the northern one-half of proposed lot 1 is a "Natural Resource Area," which the CDC defines as a "Significant Natural Resource Area." CDC 422-2.4.

[7] As relevant, CDC 422-3.1.A simply requires that the applicants "[i]dentify the location of the natural resource(s)." The record includes a written interpretation of CDC Section 422, which sets out the kind of information that the county requires applicants to submit regarding SNRAs and how the county applies CDC 422-3.6. Record 61-64.

[8] CDC 422-3.6 provides, in relevant part:

> "For any proposed use in a Significant Natural Resource Area, there shall be a finding that the proposed use will not seriously interfere with the preservation of fish and wildlife areas and habitat identified in the Washington County Comprehensive Plan, or how the interference can be mitigated."

The record includes a four-page "Community Development Code Interpretation," of CDC Section 422, which was signed by the County Planning Manager on February 17, 1998. Record 61-64. That 1998 interpretation sets out the kind of information that the county requires applicants to submit regarding SNRAs and how the county applies CDC 422-3.6.[9]

The applicants submitted wildlife habitat assessments prepared by its expert, Hendrix. Record 113-18, 604-10. The applicants took the position that the forested wildlife habitat on the site only occupies approximately 2,500 square feet and that it should not be protected as an SNRA because it is isolated from the larger SNRA located to the west in Cedar Crossing. Record 115.

The Planning Manager imposed a condition of approval that required the applicants to designate a 9,900 square foot "Open Space Tract." Record 404-05. The hearing officer characterized that area as "essentially the area of proposed Lot 1." Record 25. In addressing petitioners' arguments on appeal that the required open space tract is not large enough to comply with CDC 422-3.6, the hearings officer appears to have begun by finding that the SNRA occupies an approximately 3,000 square foot area in the general location of the approximately 2,500 square foot area in the northwest corner of the site, as identified by the applicants' expert Hendrix. Based on conflicting testimony from petitioners' experts, the hearings officer concluded the habitat area that CDC 422-3.6 requires the county to protect from serious interference is a little larger than the area identified by Hendrix and that this larger area has somewhat higher habitat value.[10] The hearings officer then concluded that

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[9] Among other things, the 1998 interpretation requires that the boundary of an SNRA "must be established by a professional or a team of professionals qualified to address different characteristics of the natural resource." Record 63. The 1998 interpretation further states "Wildlife habitat shall be assessed using professionally recognized methodology which numerically rates different habitat values, such as that developed for the City of Portland's Goal 5 inventory or the Wildlife Habitat Assessment originally developed for the City of Beaverton." *Id.*

[10] The hearings officer's findings are as follows:

the protected areas should also be enlarged to include additional habitat area to the south, extending east of the Cedar Crossing Open Space Tract A.[11] The hearings officer then determined that because the remaining portions of Lot 1 to the south, adjacent to Street A, and to the north next to the subdivision to the north would not be useable for development, those areas should also be included. Record 30 (findings 6(g)(ii) and 6(g)(iv)). As ultimately identified by the hearings officer, the open space tract includes approximately 8,750 square feet. Record 30. The hearings officer adopted the following findings to further

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> "* * * Regarding the quality of the existing habitat, the biologists agree that the habitat on the site has certain qualities. It is characterized by a mix of trees, including big leaf maple and western red cedar from 6 to 30 inches in diameter. Canopy cover varies, but is at least 26 percent over at least a roughly 3000-square foot area at the northwest corner of the site. The applicant's biologist gives the site a lower score on the [Wildlife Habitat Assessment] WHA than the [Petitioners'] biologist. But both acknowledge that the site contains wildlife habitat. The hearings officer agrees with and relies on their overall conclusion on this point.
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> "* * * The hearings officer finds that the habitat should score somewhat higher on the WHA form than scored by Mr. Hendrix, because the site contains seasonal water in the swale on the west 50 feet of the site, the site can be connected to the wildlife corridor to the west, the site contains considerable native herbaceous plants and there is cover (albeit less concentrated) beyond the perimeter of the high-ranked habitat. That is, the hearings officer finds that the habitat is somewhat better than the applicant's biologist estimates, and that the edge of the habitat is somewhat larger and considerably less rigid than the applicant's biologist suggests, based on at least equally probative substantial evidence in the record, including the testimony from [Petitioners] and their wildlife biologist and his associate and the photographs of the northwest part of the site. The hearings officer finds that the applicant's biologist did not clearly address the non-forested habitat areas of the site. There is nothing in CDC 422 or in the Community Plan that suggest the term 'habitat' is limited to only areas beneath trees. The hearings officer also is more persuaded by Mr. Brooks' discussion of the sources Mr. Hendrix cited for excluding areas from the habitat that some of those areas should be included. * * *" Record 27-28 (footnote omitted).

[11] The hearings officer found:

> "* * * The hearings officer observes that there is less dense forest cover on the site adjoining the 33-foot shared property line with the open space tract on Cedar Crossing than [is present further] north. However, based on the photographs of that area, it is heavily vegetated with herbaceous shrubs and non-native Himalayan blackberries, which provide food and cover for smaller creatures. Its proximity to the swale on the site and the stream immediately west means it has convenient and protected access to water at least seasonally. Although it is outside the mapped boundaries of the SNRA, the hearings officer finds that this area is functionally a part of that habitat and should be protected pursuant to CDC 422-3.6 so as to provide a link between the mapped habitat and the wildlife corridor to the west and thereby mitigate the impact of the development on the remaining habitat on the site." Record 28.

explain why he concluded the SNRA he identified was sufficient to comply with CDC 422-3.6:

> "The hearings officer finds that a subdivision plat could comply with CDC 422-3 if modified to preserve the wildlife habitat and drainage swale in the west 60 feet of the northwest corner of the site and if the applicant mitigates for the impact of the development beyond that area by enhancing the habitat values within that area (e.g., by removing invasive, non-native species and replanting native species plants within the protected habitat area). It is feasible to impose, enforce and implement such a condition, because the site contains enough area north of the north leg of A Street to create four lots after excluding a reasonably-sized habitat tract.
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> "* * * The hearings officer concedes that the selection of 60 feet as the east edge of the protected habitat is somewhat arbitrary. It is intended to include a line of trees that are depicted along the east edge of what is shown as proposed Lot 1, whose crowns appear to the hearings officer to mark the approximate east edge of an area of habitat with somewhat similar characteristics, the chief one of which is tree cover. The hearings officer is persuaded that this width contains the highest value habitat on the site, because it contains the most dense forest canopy and herbaceous understory on the site. The hearings officer understands that this width is needed to maintain a mix of tree types and conditions. This is roughly the width Mr. Hendrix delineated in his January 25, 2006 memo, expanded to include the crown of the trees on the east." Record 29.

Finally, having explained why he believed the required 60-foot wide open space tract and mitigation will result in a subdivision that complies with CDC 422-3, the hearings officer specifically rejected petitioners' contention that areas further east, outside of the SNRA, must also be protected.[12]

In their second assignment of error, petitioners argue the hearings officer erred by making his own determination regarding the area that is properly subject to protection under

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[12] The hearings officer's finding explains:

> "* * * Maple and cedar trees extend southeast of that line of trees, as do a few cherry trees, and a clump of deciduous trees is situated northeast of that line, reflecting that some habitat characteristics extend further east. However the hearings officer concludes that CDC 422-3.6 does not require the applicant to preserve those trees or their surrounding habitat, because they extend well beyond the mapped SNRA and have lower habitat value. Also, enhancement of the habitat in the open space tract will mitigate for impacts of development of habitat areas outside the tract." Record 29-30.

CDC 422-3.6 rather than deferring to the experts' recommendations in this matter. Petitioners contend that the hearings officer is not an expert in habitat identification and that his determination "ignored water, food, cover, disturbance, interspersion or other unique features." Petition for Review 9.

Intervenors respond, and we agree, that petitioners confuse the application submittal requirements set out in the 1998 Interpretation, with the applicable approval standards, which require that an applicant more precisely delineate the SNRA (CDC 422-3.1(A)) and avoid or mitigate serious interference with any identified wildlife areas and habitat (CDC 422-3.6). *See* ns 7 and 8. The hearings officer considered the conflicting evidence offered by the opposing experts, and agreed in part with each expert and disagreed in part with each expert. The habitat area that the hearings officer ultimately decided qualifies as an SNRA is considerably larger than the approximately 2,500-square foot habitat area the applicants' expert argued was too small and too isolated to merit protection. The hearings officer explained why he disagreed with the applicants' expert regarding the area and value of the habitat that should be included. The hearings officer also explained why he disagreed with petitioners' expert that areas further east should be included in the SNRA and protected. *See* Record 29-30 (sparsely treed areas further east "extend well beyond the mapped SNRA and have lower habitat value"). We agree with intervenors that the hearings officer, as decision maker in this matter, was not bound to accept either petitioners' or the applicants' expert's recommendation as a whole and without change. His choice of the recommendations he chose to rely on was adequately explained. The hearings officer's findings that we have set out above, which explain why he concluded the approximately 8,750-square foot open space tract is adequate to include the SNRA on the site and protect it, are adequate and supported by substantial evidence.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Although petitioners' third assignment of error is not entirely clear, we understand petitioners to allege that the hearings officer (1) failed to find that the proposal will comply with CDC 422-3.6 and (2) improperly deferred that required finding to a future planning staff review that under the CDC need not include an opportunity for a public hearing. As we explain below, petitioners' third assignment of error is based on a misreading of the hearings officer's decision.

A. The Requirement for Mitigation

As the findings quoted above in the text demonstrate, the hearings officer found that the proposed development will comply with CDC 422-3.6 if it is modified in two ways. First, "the wildlife habitat and drainage swale in the west 60 feet of the northwest corner of the site" must be preserved. Record 29. Second, the applicants must mitigate "for the impact of the development beyond that area [presumably the referenced area is the 8,825 square foot open space tract] by enhancing the habitat values within that area (e.g., by removing invasive, non-native species and replanting native species plants within the protected habitat area)." *Id.*

As we have already explained, it appears that the hearings officer found that the SNRA is made up of an approximately 3,000-square foot area in the northwest corner of the parcel plus an additional area east of the Cedar Crossing Open Space Tract A. The hearing officer appears to have thrown in additional areas to the north and south for good measure, because they would be too narrow to develop. Whether the hearings officer considered the ultimate 8,725-square foot open space tract to be the more accurately identified SNRA that CDC 422-3.1 requires or whether he considered the 8,725-square foot open space tract to be part SNRA and part undevelopable lands outside the SNRA is not important. What is important is that it is reasonably clear that the hearings officer found that the additional less valuable habitat further east is *outside* the SNRA. *See* n 12.

For reasons that are not obvious to us, the hearing officer nevertheless found that the applicants should be required to enhance the habitat *inside* the SNRA to mitigate for impacts to less valuable habitat farther east that is located *outside* the SNRA, and imposed a condition of approval to that effect.[13] If the hearings officer based that requirement for habitat enhancement mitigation on CDC 422-3.6, we question whether that section imposes *any* obligation to avoid interference with habitat that is outside the identified SNRA and therefore presumably not wildlife habitat that is "identified in the Washington County Comprehensive Plan." *See* n 8. For whatever reason, the hearings officer imposed the condition, and for purposes of this opinion we assume there was a valid basis for that requirement.

B. Petitioners' Arguments

Petitioners contend the condition requiring that the applicants submit a plan for enhancing the habitat on the open space tract shows that the hearings officer has improperly deferred his required finding that the proposed development is consistent with CDC 422-3.6 and instead has relied on staff approval of the referenced mitigation plan in the future to supply the missing finding. Under the CDC, that staff review and approval will be a ministerial review process that does not include notice and an opportunity for a public hearing at which petitioners will have a right to participate. Citing our decisions *Rhyne v. Multnomah County*, 23 Or LUBA 422 (1992) and *J.P. Finley & Son v. Washington County*, 19 Or LUBA 263 (1990), petitioners contend that these actions by the county improperly

[13] That condition is as follows:

> "6. The applicant shall submit a plan for review and approval that provides for enhancing the value of the habitat in the open space tract, such as by removing invasive, non-native vegetation and/or plating native species plants in a given area or areas of the open space tract, consistent with the recommendations of a habitat biologist, landscape architect, urban forester or naturalist or other qualified professional. The applicant and/or homeowners association shall implement the approved plan as provided therein." Record 32.

deny petitioners an opportunity to ensure that the county determines the proposal will comply with CDC 422-3.6 before the conclusion of the public hearing phase of the approval process. Petitioners misread the hearings officer's decision and misread our decisions in *Rhyne* and *J.P. Finley & Son*.

In *Rhyne* we explained the options that are open to local governments in multi-stage approval processes where findings of compliance with all relevant mandatory approval criteria must be adopted prior to the conclusion of the stage where there is a right of public participation, but where some of the final details of how a development will be constructed have yet to be determined:

> "Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. *First*, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. *Second*, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. *Third*, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances. *Holland v. Lane County*, 16 Or LUBA 583, 596-97 (1988)." *Rhyne v. Multnomah County*, 23 Or LUBA at 447-48 (1992) (footnotes omitted; emphases added).

We understand petitioners to argue the hearings officer adopted the third option described in *Rhyne*, and deferred the required finding of compliance with CDC 422-3.6 to the planning staff decision that will consider the applicants' habitat enhancement plan. However, it is relatively clear that the hearings officer adopted the first of the *Rhyne* options,

not the third.[14] We believe it is sufficiently clear from the hearings officer's findings that he found that the proposal, as modified by the hearings officer, will comply with CDC 422-3.6. *See Salo v. City of Oregon City*, 36 Or LUBA 415, 425 (1999) (Where a local government finds that a proposal complies with applicable approval criteria, "the appropriate inquiry is whether that finding is adequate and supported by substantial evidence, not whether the city impermissibly deferred a finding of compliance to a second stage of review.").

There is argument on page 12 of the petition for review that suggests petitioners' confusion about what the hearings officer found regarding CDC 422-3.6 may be based on a further misreading of the CDC 422-3.6 requirement that the county find that development will "not seriously interfere" with wildlife habitat or, if there will be interference, "how interference can be mitigated." The hearings officer found that interference with habitat outside the SNRA will be mitigated if the applicants enhance habitat located inside the open space tract. The hearings officer went further and specified the kinds of enhancement the plan must include and that the plan must be consistent with the recommendations of qualified professionals. *See* n 13. Petitioners seem to read CDC 422-3.6 necessarily to require precise quantification of the interference, precise quantification of the mitigation and a finding that the quantum of mitigation equals or exceeds the quantum of interference. We see no such requirement in CDC 422-3.6.

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[14] As we previously noted, the hearings officer found "that a subdivision plat could comply with CDC 422-3 if modified to preserve the wildlife habitat and drainage swale in the west 60 feet of the northwest corner of the site and if the applicant mitigates for the impact of the development beyond that area by enhancing the habitat values within that area * * *." Record 29.

The hearings officer ultimately concluded:

> "Based on the above findings and discussion, and the public record in this case, the hearings officer concludes the application in * * * (Banton Park Estates) should be approved, because the applicant sustained the burden of proof that the application does or can comply with applicable approval standards of the CDC * * provided that the applicant complies with feasible conditions of approval necessary to ensure that the proposed development complies in fact with those standards, consistent with the discussion above." Record 31.

We recognize that the county's deferral of final answers for *any* development details to later ministerial review without any right of public participation can present the appearance, or the reality, that a final decision *regarding whether the development complies with one or more development criteria* has been improperly deferred to a stage where there is no right of public participation. However, there is a difference between (1) finding that a proposal, with any appropriate modifications and conditions, complies with relevant approval criteria, and (2) deferring a required finding that the proposal complies with applicable criteria to subsequent decision maker. The Court of Appeals in *Meyer v. City of Portland*, 67 Or App 274, 282 n 6, 678 P2d 741 (1984) made it clear that precise final technical solutions for every potential problem posed by the development need not be developed in a public hearing, provided the decision maker finds such solutions are feasible. The hearings officer adequately found that mitigation is feasible here. There has been no improper deferral of the required finding of compliance with CDC 422-3.6, and the county's decision to defer final resolution of the habitat enhancement plan to a later date where the CDC does not require notice and a right of public participation is not error.

Petitioners argue at some length that the planning staff review that will be required when the applicants submit a plan to enhance the habitat on the open space tract will result in either a "land use decision," or a "limited land use decision," as those terms are defined at ORS 197.015(11) and (13). Further, petitioners argue the planning staff decision will constitute a "permit" decision, as that term is defined by ORS 215.402(4). As a quasi-judicial permit decision, petitioners argue, the planning staff decision must include notice and an opportunity for a prior public hearing or a right of local appeal with a de novo hearing. ORS 215.416(3). Citing *J.P. Finley & Son*, petitioners argue that the nature of the planning department's future decision must be decided now and that the county erred by not requiring that the decision concerning the habitat enhancement requirement include notice and a public right to participate.

J.P. Finley & Son is simply inapposite. In that case, the land use decision rendered at the end of the public process stage included a condition of approval that *expressly* required that a subsequent grading plan be submitted and reviewed via a Type I procedure, which did not include a right of public participation. That land use decision was not appealed to LUBA. Because the decision to proceed via a Type I procedure was made in that unappealed land use decision, LUBA concluded that the issue of whether some different procedure should have been followed when the grading permit was later issued could not be raised in a subsequent LUBA appeal challenging the grading permit itself. 19 Or LUBA at 269-70.

While it seems likely that the county may not provide a public hearing when it reviews the habitat enhancement plan that is required by the challenged decision, *the challenged decision does not decide how that review will be conducted*. In that important regard, the challenged decision is unlike the decision in *J.P. Finley & Son*. If petitioners believe that state law requires that the county's future decision concerning the habitat enhancement plan must include a public process, they may file an appeal of the county's decision regarding the habitat enhancement plan and take that position, if the decision is rendered in the future without such a public process. Nothing in the decision that is before us in this appeal says anything about what kind of procedure the county might follow in the future to comply with any applicable local and state procedural requirements.

Finally, although we need not and do not decide in this case whether state law dictates that the county must follow the public process that petitioners argue will be required when the habitat enhancement plan is submitted for approval, we note that those arguments are based in large part on petitioners' erroneous understanding that the hearings officer decision that is before us in this appeal did not find that the modified proposal will comply with CDC 422-3.6. We conclude, to the contrary, that the hearings officer found that the proposal, as it will be modified to comply with his conditions of approval, will comply with CDC 422-3.6. Given that understanding of the hearings officer's decision, we seriously

question whether the county's future decision to approve the required habitat enhancement plan will be a "land use decision," a "limited land use decision" or a "permit," as the relevant statutes define those terms, as opposed to the kind of technical review that the Court of Appeals in *Meyer* found may properly be deferred to a ministerial technical review.

The third assignment of error is denied.

The county's decision is affirmed.