BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES H. L. PAPST,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

NICK STEARNS,
Intervenor-Respondent.

LUBA No. 2006-170

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Mary W. Johnson, Oregon City, filed the petition for review and a response brief and argued on behalf of petitioner. With her on the brief was Mary Ebel Johnson, PC.

Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief on behalf of respondent.

Phillip E. Grillo, Portland, filed the cross petition for review and a response brief and argued on behalf of intervenor-respondent. With him on the brief were William L. Rasmussen and Miller Nash, LLP.

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

AFFIRMED 02/08/2007

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by a hearings officer for Clackamas County (county) approving, with conditions, a design review application for a 36-unit condominium development.

MOTION TO INTERVENE

Nick Stearns (intervenor or applicant) moves to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

FACTS

The subject property is a three-acre site zoned Medium Density Residential District (MR-1), located on S.E. Johnson Road. Intervenor applied for approval to construct a 36-unit condominium project on the property. Intervenor's application and tentative plan provided that access to the condominium units in the project would be obtained by extending a driveway from S.E. Johnson Road west through the property. That driveway would turn north and terminate at the property's north property line, which separates the subject property from the undeveloped property to the north. The point of access for the driveway onto S.E. Johnson Road is approximately 265 feet from the intersection of S.E. Johnson Road and S.E. Lake Road.

The application was deemed complete on May 12, 2006. Sometime after the application was submitted, the planning department requested comments from various agencies and a neighborhood association, the North Clackamas Citizens Association, with all comments to be submitted by June 5, 2006. Record 161-162. The planning department approved the application on June 28, 2006, and petitioner appealed that decision to the hearings officer.[1] A *de novo* appeal hearing was held on August 10, 2006. The hearings

[1] The county processed the application according to Clackamas County Zoning Ordinance (CCZO) procedures which implement ORS 215.416(11), allowing a decision on a permit without a hearing. *See* CCZO

officer denied the appeal and approved intervenor's application, subject to conditions. This appeal followed.

MOTION TO DISMISS/CROSS PETITION FOR REVIEW

A. Motion to Dismiss

Intervenor moves this board to dismiss the appeal. Intervenor asserts that the appealed decision is a limited land use decision (LLUD) as that term is defined in ORS 197.015(13)(b).[2] Intervenor contends that because none of the issues raised in the petition for review were raised during the initial comment period described in ORS 197.195(3)(c)(A), this Board lacks jurisdiction to hear the appeal.[3]

1305.02. The county provided notice of the permit approval to neighboring property owners under those procedures, which require a *de novo* hearing on the permit approval, if a local appeal is filed. *See generally* CCZO Sections 1300 through 1303.

[2] ORS 197.015(13) provides:

> "'Limited land use decision' is a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:
>
> "(a) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).
>
> "(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

[3] ORS 197.195(3) provides in relevant part:

> "A limited land use decision is subject to the requirements of paragraphs (a) to (c) of this subsection.
>
> "(a) In making a limited land use decision, the local government shall follow the applicable procedures contained within its acknowledged comprehensive plan and land use regulations and other applicable legal requirements.
>
> "(b) For limited land use decisions, the local government shall provide written notice to owners of property within 100 feet of the entire contiguous site for which the application is made. The list shall be compiled from the most recent property tax assessment roll. For purposes of review, this requirement shall be deemed met when the local government can provide an affidavit or other certification that such notice was given. Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

We disagree that this Board lacks jurisdiction to hear the appeal. Under ORS 197.825(1), LUBA has jurisdiction to review "any land use decision or limited land use decision." Whether the appealed decision is a limited land use decision (LLUD) under ORS 197.015(13), or a land use decision under ORS 197.015(11), ORS 197.825(1) gives this Board jurisdiction to review either type of decision. Even assuming that intervenor is correct that there are no reviewable issues in this appeal because none of petitioner's issues were raised during the initial comment period specified in ORS 197.195(3)(c)(A), that fact would merely limit our scope of review; it would not eliminate our jurisdiction over the appeal.

Intervenor's motion to dismiss is denied.

"(c) The notice and procedures used by local government shall:

"(A) Provide a 14-day period for submission of written comments prior to the decision;

"(B) State that issues which may provide the basis for an appeal to the Land Use Board of Appeals shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue;

"(C) List, by commonly used citation, the applicable criteria for the decision;

"(D) Set forth the street address or other easily understood geographical reference to the subject property;

"(E) State the place, date and time that comments are due;

"(F) State that copies of all evidence relied upon by the applicant are available for review, and that copies can be obtained at cost;

"(G) Include the name and phone number of a local government contact person;

"(H) Provide notice of the decision to the applicant and any person who submits comments under subparagraph (A) of this paragraph. The notice of decision must include an explanation of appeal rights; and

"(I) Briefly summarize the local decision making process for the limited land use decision being made."

B. Cross Petition for Review

In his cross petition for review, intervenor argues that the hearings officer erred by failing to treat the application as an application for a limited land use decision. In doing so, intervenor argues, the hearings officer exceeded his authority by considering issues raised by petitioner that were not raised during the initial comment period specified in ORS 197.195(3)(c)(A), and thereby prejudiced intervenor's substantial rights.[4]

The county maintains that the hearings officer's decision was not a limited land use decision because under the relevant provisions of the Clackamas County Zoning Ordinance (CCZO), applications for "design review" are not limited to review of only the physical characteristics of a development. *See* n 1. While the application is entitled "Application for Design Review," the county's design review process analyzed the proposal for compliance with all of the development standards set forth in CCZO Section 1000 and required information to be submitted regarding issues such as access, availability of sewer and water, and the adequacy of the surrounding transportation infrastructure, all of which go beyond consideration of the "physical characteristics of a use that is permitted outright" in the zone as that phrase is used in ORS 197.015(13)(b).

More importantly, the county notes that it has not adopted a separate procedure to make "limited land use decisions" that is different from the procedure for processing other applications for development review. The county's procedure for processing design review applications makes clear that discretionary approval standards applied to that use may be used to deny approval of the use altogether, rather than merely be applied to regulate that

[4] We note that the county's request for comments found at Record 161-162 was not a "notice" that met the requirements of ORS 197.195(3)(b) and (c), *see* n 3, but was simply an inter-agency request for comments sent to affected agencies and one neighborhood group. The county did not send notice of the application and a request for comments to adjacent property owners as required by ORS 197.195(3)(b), who would have been entitled to notice if the application was treated as a LLUD, and the notice did not contain the information required in ORS 197.195(3)(c).

use's physical characteristics.[5] As we explained in *Fechtig v. City of Albany*, 27 Or LUBA 480, 485, *aff'd* 130 Or App 433, 882 P2d 138 (1994), local governments wishing to utilize the statutory procedures for limited land use decisions must make some initial effort to identify in their plan or land use regulations which kinds of uses they view as qualifying for approval as a limited land use decision, and in doing so, must make clear that the approval standards applied to that use may not be used to deny the approval altogether.

We agree with the county that the hearings officer's decision was not a limited land use decision as that term is used in ORS 197.015(13). Accordingly, the cross petition for review does not provide a basis for reversal or remand.

PETITIONER'S FIRST, THIRD, AND FOURTH ASSIGNMENTS OF ERROR

Petitioner's first, third and fourth assignments of error generally challenge the hearings officer's conclusion that the applicant's proposal meets the requirements of the CCZO regarding access control, and we address them together here. In his first assignment of error, petitioner contends that (1) the hearings officer applied an incorrect standard in determining that the proposed development meets CCZO standards for access control, and (2) that the hearings officer's approval of intervenor's request for a modification to the access standard was error.[6] Petitioner's third assignment of error challenges the adequacy of the hearings officer's findings regarding the applicable access spacing standard. Petitioner's fourth assignment of error alleges that the hearings officer's decision allowing a modification

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[5] The county processed the application under CCZO 1102.02(A), which provides in relevant part:

> "A design review application *may be approved* pursuant to Subsection 1305.02 if the applicant provides evidence substantiating that the proposed development complies with Section 1000 [Development Standards], the standards of the zoning district in which the subject property is located, and all other applicable provisions of this Ordinance." (Emphasis added.)

[6] Petitioner also includes a third argument under the first assignment of error, namely that the hearings officer erred in approving the development with conditions of approval because, petitioner argues, one of the conditions is entirely dependent on petitioner's future execution of an easement for the benefit of intervenor. We address that argument below under the second assignment of error.

to the applicable access spacing standard set forth in Table V-5 of the Clackamas County Comprehensive Plan (CCCP) is not supported by substantial evidence in the record.

The county and intervenor (together, respondents) answer that the hearings officer applied the correct standard to the proposed access spacing for the driveway and correctly approved a modification to the applicable standard. Respondents also argue that the hearings officer's findings regarding the applicable access spacing standard are adequate and that the hearings officer's finding regarding the absence of alternative access is supported by substantial evidence in the record.

A. Access Standards

CCZO Section 1007.04(B), entitled "Vehicle Access," provides: "Access control shall be based on the guidelines found in Table V-5 of the [CCCP]." Table V-5 of the CCCP provides the following regarding access onto minor arterials from driveways:

> "Driveway access guidelines: * * **Driveway accesses* shall not be located within * * * *300 feet of an intersection along minor arterials except when it is demonstrated that no other alternative is feasible.*" (Emphases added).[7]

However, another section of the county's zoning ordinance, CCZO 1007.03(A), entitled "Roadways," provides in relevant part:

> "* * *All *roadways* shall be developed according to classifications and guidelines listed in Tables V-2 and V-3 of the [CCCP] and *the Clackamas County Roadway Standards*. These standards may be deviated from when the County finds that alternate designs would better accommodate: [certain specified considerations] * * *." (Emphasis added).[8]

The Clackamas County Roadway Standards (CRS) is a separate handbook of requirements and drawings that is apparently used by the Clackamas County Department of

[7] The hearings officer found, and no party disputes, that S.E. Johnson Road is a "minor arterial" as that term is used in Table V-5 of CCCP. Record 12.

[8] Tables V-2 and V-3 of the CCCP are entitled "Roadway Classifications and Guidelines" and describe various functional classifications for different types of roadways, as well as guidelines for access, roadside parking, number of lanes, and minimum right-of-way and paved width.

Transportation and Development. Section 110 of the CRS adopts and incorporates by reference the CCZO and the CCCP.

CRS Section 230, entitled "Access, Entries, and Driveways" provides that driveway entrances to existing roads must conform to the CCZO.[9] CRS 230.2 describes access requirement guidelines for local roadways, collector roadways, and arterials. CRS 230.2 provides in relevant part:

> "Arterials: Only collector roadways shall be permitted access onto arterial roadways. The separation distance shall be a minimum of 600 feet from the nearest intersection when the collector intersects a minor arterial * * * Alternate access types and spacing intervals may be allowed if an access management plan, which maintains the function and service of the arterial, can be ensured."

The hearings officer resolved what he determined to be a conflict between the access spacing standards set forth in Table V-5 of the CCCP and the access spacing standards set forth in CRS 230.2, finding that that to the extent CRS 230.2 was inconsistent with Table V-5 of the CCCP, the CCCP controlled. Record 13-14. After finding that Table V-5 controlled, the hearings officer approved a modification to the 300-foot access spacing standard set forth in CCCP Table V-5, approving an approximately 265-foot spacing, finding that no feasible alternative access was available to the site.

Petitioner argues that the hearings officer erred because both the 300-foot and the 600-foot access spacing standards apply to the application and, according to the provisions of CCZO 102.05, the standard set forth in the CRS controls. CCZO 102.05 provides:

> "The provisions [in the CCZO] shall be held to be minimum requirements. Where [the CCZO] imposes a greater restriction than is imposed or required by other provisions of law or by other rules or regulations or resolutions or

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[9] CRS Section 230 provides:

> "Access and driveway entrances to existing and proposed roadways shall conform to *the* [*CCZO*] * * *" (Emphasis added.)

> easements, covenants, or other agreements between the parties, the provisions of [the CCZO] shall control."

We disagree that CCZO 102.05 is applicable to the present situation. We do not think the CRS access spacing standards apply to the proposed access. The proposed access from intervenor's property onto S.E. Johnson Road is a driveway.[10] CRS Section 230.2, quoted above, regulates collector roadways accessing minor arterials. CRS Section 230 provides that "driveway entrances to existing * * * roadways" shall conform to the CCZO. Thus, even the CRS provides that driveway entrances are governed by the CCZO, which in turn provides that access spacing is governed by Table V-5 of the CCCP.

The hearings officer resolved what he determined to be a conflict between Table V-5 of the CCCP and CRS Section 230.2 by finding that the CCCP controlled. Although not for the same reasons adopted by the hearings officer, we agree that Table V-5 of the CCCP is the relevant approval criterion.

The hearings officer also adopted an alternative finding that the proposal met the standards of CRS 230.2, and allowed a deviation from the 600-foot access spacing standard under CRS 160.1.4, finding that the proposed modification was "minor" because it represented a 12 percent reduction in the relevant access spacing standard.[11] Record 15. Although we tend to disagree with the hearings officer's finding that the proposed

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[10] Petitioner apparently agrees that the proposed access way is a driveway when he agrees that the applicable standards of CCCP Table V-5 are those regulating driveway entrances onto minor arterials. Petition for Review 9.

[11] CRS 160.4 provides in relevant part:

> "The County may grant a modification to the adopted standards or specifications when any one of the following conditions are met:
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> " * * * * *
>
> "3. A minor change to a standard or specification is required to address a specific design or construction problem which, if not enacted, will result in an undue hardship." (Emphasis in original).

modification to the CRS 600-foot access standard would be "minor" where the access is reduced from 600 feet to 265 feet, that error is at most harmless error, because we affirm the hearings officer's alternative finding that the proposal complied with the CCCP Table V-5 access spacing standard. In addition, because we find that the CRS are not applicable to the proposed development, we do not address petitioner's arguments challenging the modification process under CRS 160.1.

B. Evidence Regarding Alternative Access

After finding that CCCP Table V-5 controlled, the hearings officer approved a modification to the 300-foot access spacing standard set forth in the table and allowed a reduction in spacing to 265 feet. In a portion of his first assignment of error, and in his fourth assignment of error, petitioner asserts that the hearings officer erred in approving a modification to the 300-foot access spacing standard set forth in CCCP Table V-5 because he found that no alternative access to intervenor's property was feasible.[12] Petitioner argues there is not substantial evidence in the record to support that finding. Specifically, petitioner argues that there is no evidence in the record regarding whether access across the neighboring private property to the south, the Sabin Skills Center, may be available.

We agree with respondent that there is substantial evidence in the record upon which a reasonable person could rely to determine that no feasible alternative access to intervenor's site exists. Evidence in the record indicates that the property is bordered on three sides by private property and the only public street abutting the property is S.E. Johnson Road. Record 15, 170, 221, 222-24. Conversely, there is no evidence in the record indicating that other feasible alternative access is available. We do not think the applicant was required to

[12] The hearings officer found:

> "In this case, there is no feasible alternative access available to the site based on substantial evidence in the record, including aerial photos showing only Johnson Road adjoins the site and [petitioner's mother's] refusal to grant access across [Tax Lot 701] where it will comply with intersection spacing standards." Record 12.

submit evidence that an adjacent owner of private property would not grant access to the applicant's property through its property. The hearings officer did not err in concluding that because the property is bordered on three sides by private property, no other feasible access existed. Record 12.

The first assignment of error is denied in part, and the third and fourth assignments of error are denied.

SECOND ASSIGNMENT OF ERROR

In a portion of his first assignment of error, and in his second assignment of error, petitioner challenges certain conditions of approval. In a portion of his first assignment of error, petitioner argues that condition 37 violates applicable law because it does not ensure that access complying with CCZO 302.02(A) will be provided concurrently with development. *See* n 13, *infra*. CCZO 302.02(A) provides in relevant part:

> "Property may be zoned MR-1 when the site has a Comprehensive Plan designation of Medium Density Residential, the criteria under Section 1202 are satisfied, and the following criterion is satisfied:
>
> "A. The property and affected area are presently provided with adequate public facilities, services, and transportation networks to support the use, or such public facilities, services, and transportation networks are planned to be provided concurrently with the development of the property."

We do not see how CCZO 302.02(A) applies to the application that is the subject of this appeal. CCZO 302.02(A) addresses the circumstances under which a property may be zoned MR-1. That provision does not apply in the present case where the property is already zoned MR-1 and the applicant is not seeking a zone change.

In his second assignment of error, petitioner argues that the hearings officer erred in imposing two conditions of approval (conditions 37 and 41) that, petitioner argues, limit the use and development of the property adjacent to the applicant's property (Tax Lot 701) and

restrict the future development of Tax Lot 701.[13] Intervenor responds that conditions 37 and 41 do not impose conditions on the future development of Tax Lot 701 or restrict its development in any way.

We agree with intervenor. We do not read conditions 37 and 41 as restricting the owner of Tax Lot 701's use of her property or as requiring that property to be developed in any particular way. Condition 37 merely requires the applicant to provide a master plan illustrating how its development *could* tie into development of Tax Lot 701 if that property was developed. This is consistent with the requirement of CCZO 1007.04(B), which ensures future street connectivity. Merely because intervenor's driveway ends at the adjacent property line and will be developed as a stub street to allow future connectivity does not mean that the adjacent owner's use of its property is limited in any way. Condition 41 gives the owner of the adjacent property an easement over intervenor's property if and when that owner grants intervenor a reciprocal easement over intervenor's property. If the adjacent property owner never desires to use intervenor's property for access, then no reciprocal easement will be required.

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[13] Condition 37 provides in relevant part:

> "The applicant shall provide a master plan illustrating proposed development of the site and potential development of the adjoining lot to the north assuming future access is provided opposite Lake Road * * *." Record 26.

Condition 41 provides in relevant part:

> "The applicant shall grant and record a 24-foot wide easement granting access over the private road on the site to the owner of Tax Lot 701 to the north, at a location determined by the applicant and approved by [the Clackamas County Department of Transportation and Development], provided, before the owner of Tax Lot 701 may use the easement over the site, that owner shall grant to the owner of the subject site a reciprocal easement for access purposes to and over a private road on Tax Lot 701 and/or to a public road created thereon so as to provide access from the site to Johnson Road at Lake Road. * * * The applicant may use the land subject to the easement as desired until the owner of Tax Lot 701 grants and files the reciprocal easement with the deeds to the properties and requests access to the easement.* * *" Record 27.

The first assignment of error is denied in part, and the second assignment of error is denied.

The county's decision is affirmed.