BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MEADOW NEIGHBORHOOD ASSOCIATION,
CAROL SCHEAN, RUSSELL ROLLINS, CAROL ROLLINS,
DAVID O'GUINN, LORNA O'GUINN, LINDA BERTWELL,
CHRISTA FOX, CINDY GRANT, CATALIN IRIMIA, RODICA IRIMIA,
JOE CONRAD, GEORGIA HOGAN, JIM HOGAN,
RUSS FLUNO, SUZIE FLUNO and ROBERTA MILLER,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

J & G HOLDINGS,
Intervenor-Respondent.

LUBA No. 2006-222

FINAL OPINION
AND ORDER

Appeal from Washington County.

Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Josselson and Potter.

Christopher A. Gilmore, Sr. Assistant County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

Michael C. Robinson, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Roger A. Alfred, Corinne Sam and Perkins Coie, LLP.

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

REMANDED 04/23/2007

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 decision that grants approval for a car wash at the site of an existing service station.

MOTION TO INTERVENE

J & G Holdings moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

The subject .8-acre property occupies the northeast corner of the intersection of SW 91st Avenue and SW Beaverton Hillsdale Highway. SW 91st Avenue runs north and south along the property's western property line and SW Beaverton Hillsdale Highway runs east and west along the property's southern property line. Jesuit High School is located directly across SW Beaverton Hillsdale Highway from the subject property. SW 91st Avenue is a Neighborhood Route, which connects SW Beaverton Hillsdale Highway with Canyon Road to the north. SW Beaverton Hillsdale Highway is a four-lane arterial highway with a center turn lane. SW 91st Avenue is a two-lane roadway.

The subject property is improved with a service station and a smaller vehicle service building. The vehicle service building was used for a car wash in the past, but the car wash operation was discontinued approximately ten years ago. The approved proposal would retain the existing fuel pumps, and would continue to sell fuel, but would remove the existing service station and vehicle service buildings. A 4,193-square foot car wash would be constructed in their place. The proposed car wash would also include 12 new vacuum stations.

INTRODUCTION

The proposed car wash will have access onto both SW 91st Avenue and SW Beaverton Hillsdale Highway. Washington County Community Development Code (CDC)

501-8.5 requires that all development must have access to a county or other public road and imposes criteria to regulate that access.

CDC 501-8.5(B)(2) regulates access onto Neighborhood Routes like SW 91st Avenue. Under CDC 501-8.5(B)(2), access is not allowed onto SW 91st Avenue within 50 feet of the intersection of SW 91st Avenue and SW Beaverton Hillsdale Highway and any access onto SW 91st Avenue must be located beyond the influence of any standing queue on SW 91st Avenue. The challenged decision allows the existing service station access from SW 91st Avenue to remain as a right-in/right-out driveway and allows a second multi-directional access further north on SW 91st Avenue. During the morning and evening peak traffic hours, southbound traffic on SW 91st Avenue backs up at the SW Beaverton Hillsdale Highway/SW 91st Avenue intersection and forms a lengthy queue. It is not clear to us whether the right-in/right-out driveway violates the 50-foot setback requirement, but there is no dispute that both driveways violate the CDC 501-8.5(B)(2) requirement that they be located beyond the influence of the southbound standing queue on SW 91st Avenue as it approaches SW Beaverton Hillsdale Highway. Record 32.

CDC 501-8.5(B)(4)(a) generally requires that direct access onto an arterial must be located at least 600 feet from arterial intersections. The existing service station has two accesses onto SW Beaverton Hillsdale Highway that are less than 600 feet east of the SW 91st Avenue/SW Beaverton Hillsdale Highway intersection. Under the challenged decision, the closest existing access to the intersection is to be closed, but the other existing access onto SW Beaverton Hillsdale Highway will remain in use. That access violates the CDC 501-8.5(B)(4)(a) 600-foot spacing standard.

Under CDC 501-8.5(C), exceptions to the access criteria in CDC 501-8.5(B) can be allowed through approval of an access management plan that explains "the need for the modification and demonstrate[s] that the modification maintains the classification function and integrity of the [applicable transportation] facility." CDC 501-8.5(C)(2). The hearings

officer did not require that the proposed accesses comply with the access standards in CDC 501-8.5(B) and did not require that the applicant justify its failure to comply with the CDC 501-8.5(B) access standards by preparing an access management plan under Under CDC 501-8.5(C). Instead, the hearings officer relied on another CDC provision that governs nonconforming development, CDC 440-10.

Under the CDC, the existing service station is a "Type II" use. Under CDC 440-10, where an existing Type II use is already served by accesses that do not comply with the CDC 501-8.5 access standards, "alteration, expansion or change in occupancy of [such] a Type II use" need not comply with the CDC 501-8.5 access standards if the "alteration, expansion or change in occupancy" will not increase average daily trips by 25 percent or more.[1] The exception provided by CDC 440-10 is limited to proposals that (1) will alter, expand or change the occupancy of a Type II use, and (2) will not increase average daily trips (ADTs) by 25 percent or more. The county hearings officer found that CDC 440-10 applies in this case and that the car wash therefore is not subject to the above-described CDC 501-8.5(B) access standards.

Petitioners first argue that the car wash is an entirely new use, rather than a proposal to alter, expand or change the occupancy of an existing Type II use, rendering CDC 440-10 inapplicable. In their first assignment of error, petitioners allege the hearing officer erred by finding that petitioners waived that argument by failing to assert that argument below in a timely manner. In their second assignment of error, petitioners allege that regardless of the argument presented in their first assignment of error, the proposal will increase average daily

[1] CDC 440-10 provides:

> "Approval of an alteration, expansion or change in occupancy of a Type II use which currently does not conform with the requirements of Section 501-8.5 (Access to County and Public Roads) shall require that the use be brought into compliance with these standards when such changes create a twenty-five (25) percent increase in the existing Average Daily Trips (ADT). * * *."

trips by 25 percent or more, rendering CDC 440-10 inapplicable for that separate reason as well.

FIRST ASSIGNMENT OF ERROR

The challenged decision was rendered initially by the county planning director. The planning director's decision was appealed to the county land use hearings officer. A public hearing was held before the hearings officer in this matter on August 31, 2006. At the conclusion of the August 31, 2006 public hearing, the hearings officer held the evidentiary record open for two weeks, until September 14, 2006, for county staff to submit a response to the applicant's revised access plan and issues that were raised at the August 31, 2006 hearing. The hearings officer held the evidentiary record open for one additional week, until September 21, 2006, for all parties to submit new evidence and argument. ORS 197.763(6)(a).[2] During that open record period, petitioners submitted a letter dated September 12, 2006. Record 190-93.

The record was held open for two more weeks, until October 5, 2006, for all parties to respond to the new evidence submitted during the August 31, 2006 to September 21, 2006 open record period. After the evidentiary record closed on October 5, 2006, petitioners requested that the hearings officer reopen the record to allow them to respond to an October 4, 2006 memorandum, which was submitted on behalf of the applicant to address traffic conditions. Petitioners argued that October 4, 2006 memorandum included new evidence and that petitioners had a right to respond to that new evidence under ORS 197.763(6)(c).[3]

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[2] ORS 197.763(6)(a) provides:

> "Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection."

[3] ORS 197.763(6)(c) provides:

Based on petitioners' request, the hearings officer reopened the record on October 11, 2006 and allowed petitioners until October 18, 2006 to respond to the October 4, 2006 memorandum. Record 62. Petitioners submitted a letter on October 18, 2006. Record 50-53.

In finding that petitioners did not timely raise any issue concerning whether the proposed car wash should be viewed as an entirely new use rather than an alteration or expansion of an existing use, the hearings officer explained:

> "[Petitioners] argued that CDC 440-10 is inapplicable, because the applicant is not proposing to alter or expand the existing gas station use on the site. [Petitioners argue t]he applicant is proposing an entirely new use. See the October 18, 2006 letter from [petitioners]. [Petitioners] raised this issue for the first time in response to the hearings officer's October 11, 2006 Order Opening the Record. That Order expressly limited the open record period to allow the [petitioners] to respond to the new transportation evidence submitted by the applicant during the prior open record period ending October 5, 2006. The applicant's prior submittals * * * did not address the issue of whether the proposed carwash constitutes alteration or expansion of a use. The hearings officer finds that this portion of [petitioners'] letter did not respond to transportation issues raised in the applicant's prior submittals. The [petitioners] exceeded the limited scope of the open record period by raising an entirely new issue, outside the limited scope of the open record period. Therefore the hearings officer will exclude that portion of [petitioners' October 18, 2006] letter from the record and will not address the issue in this Final Order." Record 30.

While the question of whether the new car wash is properly viewed as an entirely new use is raised in petitioners' October 18, 2006 letter, petitioners contend the hearings officer is simply wrong in finding that the issue was *first* raised in that October 18, 2006 letter. Petitioners' note that their October 18, 2006 letter points out that that issues regarding the access standards were raised earlier in petitioners' September 12, 2006 letter, at a time when

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> "If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section."

petitioners were permitted to present new evidence and arguments. Petitioners argue that the three paragraphs set out below, which appear in that September 12, 2006 letter, are sufficient to raise the issue that the hearings officer concluded had not been raised until petitioners submitted their October 18, 2006 letter:

> "Although the County decision did not ultimately enforce the access spacing requirements, the initial conclusion that those requirements are applicable to this application is correct. *This application has two components, one of which is approval of a new car wash use. A new use on a parcel must comply with the requirements of the CDC.*
>
> "Potentially confusing the issue is a determination by the County staff prior to issuance of the administrative decision that the proposed use will not increase the average daily trips on the property by 25% and therefore an access management plan is not required.
>
> "The 25% increase provision is found in CDC 440-10, which is a part of the nonconforming use requirements of the CDC. The second component of this application noted above is the fact that it involves alteration of the nonconforming gasoline station use on the property. That use is nonconforming, among other things, because its street accesses do not meet the access spacing requirements. CDC 440-10 insulates an alteration, expansion or change of occupancy of an existing nonconforming use from compliance with the access spacing requirements until the proposed changes generate 25% or more additional ADTs to and from the property. *Because the combined alteration of the gasoline station and the new car wash will increase ADTs substantially more than 25%, this is an additional reason why the access spacing standards apply* and why any variation from those standards requires at a minimum an approved access management plan." Record 191. (Emphasis added.)

Although petitioners could have raised the issue more clearly and precisely, we agree with petitioners that the above paragraphs in the September 12, 2006 letter raise the issue that the hearings officer erroneously determined was first raised in the October 18, 2006 letter. The emphasized language in the first paragraph, viewed in context with the other two paragraphs, takes the position that the proposal has two components: (1) an entirely new car wash use, and (2) an alteration of the existing gasoline station. The above paragraphs take the position that because the proposal includes an entirely new use, and is not limited to alteration of an existing use, CDC 440-10 does not apply for that reason alone. The above

paragraphs also take a second position—that the combined additional traffic that will be generated by the new car wash and the altered gasoline station will increase ADTs by more than 25%. That second position is characterized in the September 12, 2006 letter as an "additional reason why" CDC 440-10 does not apply and the CDC 501-8.5 access standards must be met or an access management plan must be prepared under CDC 501-8.5(C).

Because the hearings officer erroneously concluded that he need not consider whether the proposed car wash must be viewed as a new use and, if so, whether that renders CDC 440-10 inapplicable, remand is required so that the hearings officer may consider that question.[4]

The first assignment of error is sustained.

SECOND, THIRD AND FIFTH ASSIGNMENTS OF ERROR

Unless and until the hearings officer considers and rejects petitioners' argument that the proposed car wash must be viewed as an entirely new use that renders CDC 440-10 inapplicable, we cannot know whether CDC 440-10 is potentially available to allow intervenor to avoid having to provide accesses that comply with the criteria set out in CDC 501-8.5(B). Therefore, we conclude, it is premature for LUBA to consider petitioners' second assignment of error, in which they allege the hearings officer erroneously found that the proposal will not increase ADTs by more than 25 percent. In addition, our resolution of the third and fifth assignments of error will be affected by the hearings officer's ultimate decision concerning the applicability of CDC 440-10. The hearings officer's decision proceeds on the assumption that CDC 440-10 applies and that the access standards set out at

[4] Intervenor-respondent argues the hearings officer "implicitly addresse[d] the issue of the applicability of CDC 440-10." Intervenor-Respondent's Brief 9. We do not agree. The hearings officer expressly found that he did not need to address the interpretive issue raised in the October 18, 2006 letter because the issue was raised too late. While we express no position on the merits of the interpretive issue that petitioners raise, the hearings officer erred in concluding that he need not address that interpretive issue, and we decline to address that issue in the first instance without the benefit of the hearings officer's consideration of that interpretive issue.

CDC 501-8.5(B) therefore do not apply. Petitioners' third and fifth assignments of error assume that CDC 440-10 does not apply and that the access standards set out at CDC 501-8.5(B) therefore do apply. We therefore do not consider the third and fifth assignments of error.

FOURTH ASSIGNMENT OF ERROR

The hearings officer found that the proposed accesses, although not optimal, "will function safely based on past history and the expert testimony of the County engineer." Record 32. Petitioners argue under the fourth assignment of error that the hearings officer's safety finding is not supported by substantial evidence.

However, petitioners identify no applicable CDC approval standard or any other legal standard that requires the county to find that the proposed accesses will function safely. Unless the county is legally required to adopt the disputed finding, a lack of evidentiary support for that finding provides no basis for reversal or remand. *City of Barlow v. Clackamas County*, 26 Or LUBA 375, 380 (1994); *Day v. City of Portland*, 25 Or LUBA 468, 472 (1993). Therefore, we need not and do not consider whether the finding is supported by substantial evidence.

The fourth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners allege that the decision at issue in this appeal is a "permit," as that term is defined at ORS 215.402(4).[5] Under ORS 215.416, the county is given two options regarding public hearings on permit applications. The county may first hold a public hearing and then

[5] As potentially relevant here, ORS 215.402(4) provides:

> "'Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto. 'Permit' does not include:
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> "(a) A limited land use decision as defined in ORS 197.015[.]"

make its decision on the permit application. ORS 215.416(3).[6] Or, alternatively, the county may make a decision on the permit application first, without providing a hearing. ORS 215.416(11)(a)(A).[7] Under this alternative, the county is obligated to provide a right of local appeal to challenge such a permit decision. If such a permit decision is appealed, a public hearing is required. Petitioners allege the county selected the second option in this case. We do not understand the county to dispute that the challenged decision is a permit or that the county proceeded under the option provided by ORS 215.416(11)(a)(A) to render the permit decision without a prior hearing, subject to a local right of appeal. The initial decision was rendered by the planning director, without a public hearing. The county provided petitioners a right to appeal that decision to the hearings officer to comply with ORS 215.416(11)(a)(A).

Where a county selects the option provided by ORS 215.416(11)(a), ORS 215.416(11)(b) limits the fee that the county may charge for an appeal. ORS 215.416(11)(b).[8] That fee may not exceed $250 or the cost of preparing for and conducting the appeal, "whichever is less." *Id*. The county charged petitioners an appeal fee of $1,800 to appeal the planning director's decision. Petitioners argued to the hearings officer that the $1,800 appeal fee is inconsistent with ORS 215.416(11)(b) and that they are owed a refund

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[6] ORS 215.416(3) provides:

> "Except as provided in subsection (11) of this section, the hearings officer shall hold at least one public hearing on the application."

[7] ORS 215.416(11)(a)(A) provides:

> "The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal."

[8] As relevant, ORS 215.416(11)(b) provides:

> "If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or $250, whichever is less."

of $1550. The hearings officer ruled that his scope of review did not include authority to consider the validity of the county's appeal fee.

Whether the hearings officer has authority to consider the validity of the appeal fee or not, we believe our scope of review includes review of any interlocutory county decisions that are a necessary part of the county's final land use decision to approve the disputed car wash. The county's decision to charge petitioners a $1,800 appeal fee to appeal the planning director's decision is such an interlocutory decision.

As the county correctly points out, ORS 215.422(1)(c) generally grants the county authority to set reasonable appeal fees "to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person."[9] ORS 215.422(1)(c) requires that appeal fees be reasonable, but does not impose a $250 limit. However, the county fails to recognize that ORS 215.416(11)(b) represents a *specific* limitation on the *general* grant of authority to establish permit appeal fees in ORS 215.422(1)(c). That specific limitation applies where a permit decision is rendered without first providing a hearing, as authorized by ORS 215.416(11)(a). That specific limitation applies here, and the county erred by charging a $1,800 appeal fee.

The county makes two arguments in defense of its action. We reject both arguments. The county first cites *Friends of Linn County, v. City of Lebanon*, 45 Or LUBA 408 (2003), and argues that *Friends of Linn County* has some bearing on this case. *Friends of Linn County* concerned ORS 227.175(10)(b) and ORS 227.180(1)(c), which apply to cities and are the statutory analogues to ORS 215.416(11)(b) and ORS 215.422(1)(c), which apply to

[9] ORS 215.422(1)(c) provides:

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. * * *."

counties. *See* ns 8 and 9. In *Friends of Linn County* the petitioners attempted to rely on the specific $250 limit imposed by ORS 227.175(10)(b) to argue that a $500 appeal fee set by the city under ORS 227.180(1)(c) to appeal a planning commission permit decision to the county governing body after a public hearing was not reasonable. We rejected the argument. *Friends of Linn County* stands for the proposition that an appeal fee that is set under the *general* authority in ORS 227.180(1)(c) to set reasonable appeal fees to appeal planning commission permit decisions following a hearing is not inconsistent with the specific $250 fee limit on appeals of permit decisions that are rendered without a prior hearing. Since the county concedes that the decision at issue in this appeal is a permit decision that was rendered without a prior hearing, we fail to see how *Friends of Linn County* lends any support to the county's appeal fee in this matter.

We are not sure we understand the county's second argument. The county appears to contend that the challenged decision is the kind of permit decision that is described in ORS 215.416(11)(a)(A), but is not the kind of permit decision that is described in ORS 215.416(11)(b). See ns 7 and 8. As we have already explained, ORS 215.416(11) authorizes, and sets out certain requirements for rendering, a permit decision that is not preceded by a public hearing. ORS 215.416(11)(a)(A) and 215.416(11)(b) both concern that kind of permit decision. The permit decisions that are the subject of ORS 215.416(11)(a)(A) and 215.416(11)(b) are not different kinds of permit decisions.

The county provided notice and an opportunity to comment on the planning director's decision before it was rendered. That procedure is similar to that authorized for a "limited land use decision," as that term is defined at ORS 197.015(13).[10] If the challenged decision

[10] 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:

is a limited land use decision, then by definition the county's decision would not be a "permit" decision. ORS 215.402(4)(a). *See* n 5. If the challenged decision is not a permit decision, then the limit imposed by ORS 215.416(11)(b) would not apply. However, as we have already noted, the county does not argue that the challenged decision is a limited land use decision.

The sixth assignment of error is sustained.

The county's decision is remanded.

> "(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."

Under ORS 197.195 a local government must provide notice and an opportunity to comment on a limited land use decision, but is not required to provide a public hearing.