BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PETES MOUNTAIN HOMEOWNERS ASSOCIATION,
JERRY L. SCHLESSER, and JUDITH LEE MESSNER,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

DONALD BOWERMAN,
W. LEIGH CAMPBELL and CEILLE CAMPBELL,
Intervenor-Respondents.

LUBA No. 2007-124

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Jeffrey L. Kleinman and Peter D. Mohr, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Clackamas County.

Daniel Kearns, Portland, filed the response brief and argued on behalf of intervenor-respondents. With him on the brief was Reeve Kearns, PC.

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

REMANDED 11/15/2007

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 hearings officer's decision that approved an application for tentative subdivision approval for a 41-lot subdivision.

MOTION TO INTERVENE

Donald Bowerman, W. Leigh Campbell and Ceille Campbell move to intervene on the side of respondent in this appeal. There no opposition to the motion, and it is allowed.

FACTS

The subject property is made up of three separate properties that together include approximately 69 acres. The property is zoned Agriculture/Forest (AG/F). The AG/F zoning district imposes an 80-acre minimum lot size and prohibits residential subdivisions. However, the property owners acquired the subject property in 1969 when the property was zoned General Use (GU). The GU zone allowed residential subdivisions and permitted lots as small as one acre. The owners of the subject property sought and received state and county waivers of certain state and county land use laws pursuant to Ballot Measure 37. Ballot Measure 37 was approved by the voters in 2004 and is codified at ORS 197.352. After securing those state and local waivers, the disputed application for tentative subdivision approval was submitted to the county and approved by a county land use hearings officer.

As explained more fully below, although the Ballot Measure 37 waivers render the 80-acre minimum lot size and the prohibition against residential subdivisions inapplicable, some county land use regulations continue to apply to the disputed subdivision application. Petitioners contend that the subdivision does not comply with several of those land use regulations. Intervenors dispute those contentions and argue that one of the land use standards that petitioners identify as applying was waived by the board of county commissioners in response to their Ballot Measure 37 claim.

A recurring issue in petitioners' assignments of error is their contention that the county should have denied the disputed subdivision application because the evidentiary record does not establish that there is an adequate domestic water supply for the residences that would be constructed in the proposed subdivision. As proposed by the applicants, water for the subdivision will be provided in one of two ways. First, the Oregon Water Resources Department (OWRD) has concluded that each lot would be eligible for an individual exempt well under ORS 537.545(1)(d).[1] Second, Pete's Mountain Water Company (PMWC) operates a community water system that currently serves a number of residences in the vicinity of the proposed subdivision. PMWC represented that it was prepared to provide water to the proposed subdivision lots. However, at the time the hearings officer rendered her decision, the subject property and a number of PMWC's existing customers were located outside the designated place of use under PMWC's water right permit. PMWC filed an application with OWRD some time ago to expand its place of use under its water right permit. PMWC's application to amend its water right permit to include those existing customers and the subject property was approved by the OWRD *after* the hearings officer rendered her decision in this matter and *while* this appeal was pending before LUBA.

REPLY BRIEF/MOTION TO STRIKE

Intervenors attach to their response brief a copy of OWRD's August 28, 2007 Order, which grants PMWC's application for a change in place of use to allow it to provide domestic water to a larger geographic area. It is undisputed that the enlarged authorized

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[1] ORS 537.545(1) provides, in part:

> "No registration, certificate of registration, application for a permit, permit, certificate of completion or ground water right certificate under ORS 537.505 to 537.795 and 537.992 is required for the use of ground water for:
>
> "* * * * *
>
> "(d) Single or group domestic purposes in an amount not exceeding 15,000 gallons a day[.]"

place of use under the August 28, 2007 Order includes the subject property. However it is also undisputed that the August 28, 2007 Order post-dates the challenged decision and was issued long after the county's evidentiary record closed and the record was filed in this appeal.

Petitioners move for permission to file a reply brief. In that reply brief, petitioners move to strike the August 28, 2007 Order because it post-dates the decision on appeal and is not included in the record that the county filed in this appeal. At oral argument, petitioners also informed LUBA that they intended to file a petition for judicial review to challenge the August 28, 2007 Order.

Intervenors do not oppose the motion to file the reply brief, but do oppose the motion to strike. Citing *Douglas Electric v. Central Lincoln PUD*, 164 Or App 251, 255, 991 P2d 1060 (1999) and *Crown Mills v. Oregon Electric Ry. Co*, 144 Or 25, 30, 21 P2d 214 (1933), intevenors contend that under Oregon Evidence Code (OEC) 202(2) LUBA may take official notice of the August 28, 2007 OWRD order and that the order establishes that petitioners' contentions that PMWC cannot lawfully provide water service to the disputed subdivision under its water right permit from OWRD are without merit.[2]

Neither of the cases cited by intervenors holds that an appellate tribunal like LUBA may take official notice of extra-record facts, and rely on those noticed facts in conducting a review of a decision on appeal, where that appellate review is expressly limited by statute to the record before the decision making body. Under ORS 197.835(2)(a), except in the circumstances specified in ORS 197.835(2)(b), LUBA's review of the hearings officer's

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[2] OEC 202 authorizes judicial notice of different "[k]inds of law." OEC 202(2) authorizes judicial notice of:

> "Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory, or other jurisdiction of the United States."

The OWRD is an executive department agency.

decision is limited to the evidentiary record that the county filed in this appeal, and that record does not include the August 28, 2007 Order.[3] In performing its limited scope of review, LUBA routinely takes official notice of applicable laws under OEC 202; but LUBA does not take official notice of any facts that may have been adjudicated in the laws that are subject to official notice under OEC 202. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103 (2005); *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995).

We are not certain how to characterize intervenors' request that we take official notice of the August 28, 2007 Order. Intervenors' request could be characterized as an improper request that we take official notice of facts adjudicated in that order and that we rely on those facts to resolve factual disputes in this appeal. However, we believe it is more accurate to characterize their request as a request to take official notice of the August 28, 2007 Order as the official act of an executive agency that establishes the law that governs PMWC's access to and distribution of groundwater. Viewed in that way, the August 28, 2007 Order is a proper subject for official notice under OEC 202(2). Petitioners' motion to strike is denied.

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[3] ORS 197.835(2) sets out the following limitation on LUBA's scope of review:

> "(a) Review of a decision under ORS 197.830 to 197.845 shall be confined to the record.
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> "(b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record."

FIRST ASSIGNMENT OF ERROR

A. The Hearings Officer's Decision Concerning ZDO 407.09(E)

Clackamas County Zoning and Development Ordinance (ZDO) 407.09 sets out siting standards for residential structures in the AG/F zoning district. ZDO 407.09(E) sets out the following water supply standard:

> "The applicant shall provide evidence to the Planning Division that the domestic water supply is from a source authorized in accordance with the Water Resource Department's [OWRD] rules for the appropriation of ground water or surface water and not from a Class II stream as defined in the Forest Practices Rules.
>
> "1. For purposes of this subsection, evidence of a domestic water supply means:
>
> "a. Verification from a water purveyor that the use described in the application will be served by the purveyor; or
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> "b. A water use permit issued by the [OWRD] for the use described in the application; or
>
> "c. Verification from the [OWRD] that a water use permit is not required for the use described in the application.
>
> "2. If the proposed water supply is from a well and is exempt from permitting requirements, the applicant shall submit the well constructor's report to the county upon completion of the well."

In addressing the above criterion the hearings officer adopted findings that include the following:

> "The hearings officer concludes that *ZDO 407.09(E)(1) does not require a demonstration that a particular volume of water is necessary to accommodate development, only that the source of the domestic water is not from a Class II stream.* The evidence shows that the source of domestic water will be from individual wells that are exempt from regulation pursuant to ORS 537.545(1) and OAR 690-502-0190, or from PMWC, which holds quasi-municipal water rights, for the property. The availability of individual wells as a source of domestic [water] has been verified Michael L. McCord, District 16 Watermaster. * * * Accordingly, the hearings officer concludes that ZDO 407.09(E)(1)(c) is satisfied." Record 12 (emphasis added).

Petitioners challenge the above findings. Petitioners interpret ZDO 407.09(E) to require that the hearings officer must find that the proposed domestic water supply is both legally and practically a feasible water supply for the subdivision lots. Petitioners argue that the hearings officer and OWRD misread ORS 537.545 in concluding that separate individual wells may be approved for each of the proposed 41 lots. Petitioners also argue that when the hearings officer rendered her decision, the subject property lay outside PMWC's place of use under its water right permit. In addition, petitioners argue that PMWC and the individual wells would both rely on a basalt aquifer that underlies the property. Petitioners contend that aquifer is both declining and subject to overdraft and is not a feasible source of water for the proposed subdivision. Because OWRD could be required in the future to interrupt the subdivision's use of water from that aquifer to preserve the rights of other water users with senior water rights, petitioners contend the hearings officer erred in finding that the proposal complies with ZDO 407.09(E).

Intervenors argue that ZDO 407.09(E) does not apply to their application for tentative subdivision approval, because the board of commissioners determined in response to their Ballot Measure 37 claim that the siting standards at ZDO 407.09 do not apply to a decision to approve or deny intervenors' application for tentative subdivision approval. Therefore, intervenors argue, the above-quoted hearings officer findings are unnecessary to approve their application and are properly viewed as mere surplusage that provides no basis for reversal or remand. *SEPA v. Washington Cty.*, 4 Or LUBA 236, 239 (1981), *aff'd* 61 Or App 471, 658 P2d 1168 (1983) (unnecessary findings are surplusage and provide no basis for remand). Alternatively, intervenors contend the above-quoted findings adequately and correctly apply ZDO 407.09(E) and that the hearings officer's findings are supported by substantial evidence in the record. We turn first to intervenors' argument that ZDO 407.09(E) does not apply to the challenged decision.

B. The County's Ballot Measure 37 Decision Removed the ZDO 407.09 Siting Standards

In response to intervenors' Ballot Measure 37 claim, the board of county commissioners adopted an order on May 18, 2005. In that order, the board of county commissioners ruled that intervenors had a valid Ballot Measure 37 claim and that the county, in lieu of paying compensation, would remove certain land use regulations to allow intervenors to divide their property into parcels as small as one acre:

> "ZDO sections 407.10 (minimum lot size), 407.05.B-G and I-K (establishment of residences) and 407.09 (siting standards) are removed; the property may be developed under the 1969 GU [zoning] provisions." Record 1414.[4]

Notwithstanding the above board of county commissioners decision to remove the ZDO 407.09 siting standards from intervenors' property for purposes of securing county subdivision approval to divide the property into one-acre lots, during the proceedings below, planning staff took the position that those siting standards would nevertheless apply to individual building permit applications.[5] Apparently, based on the planning staff's view that individual building permits would be subject to the ZDO 407.09 siting standards, the hearings officer applied ZDO 409.09(E) in granting tentative subdivision approval and found that intervenors' proposal complies with ZDO 409.09(E), for the reasons set out in the above-quoted findings.

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[4] We briefly describe the Ballot Measure 37 claim process later in this opinion.

[5] In a March 8, 2007 staff report, planning staff explained:

> "With respect to the siting standards for dwellings in the AG/F zoning district found in Subsection 407.09 of the ZDO, the Planning Division is of the opinion that these standards are applied when individual building or manufactured home placement permits are applied for on individual lots and are not applied during the subdivision application review." Record 1284.

During the proceedings below, intervenors argued that the hearings officer should not apply the ZDO 407.09 siting standards in ruling on their application for tentative subdivision approval:

> "* * * [Pete's Mountain Homeowners Association] PMHA assumes that [ZDO 407.09(E)] applies in this subdivision proceeding and maintains that Applicant has not complied with the standard. However, the County Planning Division determined that the standards for dwellings in the AG/F zoning district found in ZDO 407.09, including the standard requiring evidence of a water supply, 'are applied when individual building or manufactured home placement permits are applied for on individual lots and are not applied during the subdivision application review.' *See* Planning Staff Report and recommendation to the Hearings Officer at 3-4, 25 (March 8, 2007) ('Staff Report'). Although PMHA did not directly challenge the Planning Division's conclusion that the standards in ZDO 407.09 are applicable at the building permit stage, or the condition of approval recommended by county staff to ensure compliance with these standards, PMHA argues the standard does apply and has not been satisfied.
>
> "The Planning Division is correct in its conclusion that ZDO 407.09 must be satisfied at the building permit stage and not in this subdivision proceeding. For this reason alone, [Pete's Mountain Homeowners Association's] comments concerning ZDO 407.09, which assume that ZDO 407.09 is applicable in this proceeding are irrelevant. * * *" Record 1216.

Without acknowledging intervenors' and planning staff's position that the ZDO 407.09 siting standards do not apply as approval criteria in granting tentative subdivision approval, the hearings officer applied those siting standards.

We agree with intervenors that the board of commissioners' decision on intervenors' Ballot Measure 37 claim expressly "removed" the ZDO 407.09 siting standards from intervenors' subdivision proposal, and, therefore, those standards were not mandatory approval standards that the hearings officer was required to consider in approving the requested tentative subdivision plan approval. It follows that the hearings officer's findings concerning ZDO 407.09(E) provide no basis for reversal or remand, even if those findings erroneously construe the applicable law and are unsupported by substantial evidence, as petitioners argue.

At oral argument, petitioners offered four reasons that they argue should lead to a different conclusion regarding the applicability of ZDO 407.09 siting standards. We address those four reasons in turn.

1. ZDO 407.09(E) is a Public Health and Safety Regulation

ORS 197.352(1) requires that local governments pay property owners just compensation if certain land use regulations reduce the fair market of their property. ORS 197.352(8) provides that in lieu of just compensation that may be owed under ORS 197.352(1), a local government "may modify, remove, or not * * * apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property." ORS 197.352(3) limits the application of ORS 197.352(1) and provides that ORS 197.352(1) does not apply to regulations that restrict or prohibit "activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations[.]"

Intervenors argue that ZDO 407.09(E) is a "public health and safety * * * regulation," and under ORS 197.352(3)(B) such regulations are not subject to Ballot Measure 37 claims or waivers. Petitioners' argument might have provided a basis to challenge the board of county commissioners' decision in its May 18, 2005 Order to remove the ZDO 407.09 siting standards from intervenors' proposed subdivision. But as far as we are informed, that order has not been challenged. Petitioners' contention now that ZDO 407.09(E) is a health and safety regulation that may not be waived under Ballot Measure 37 comes too late. This appeal is available to petitioners to challenge the hearings officer's decision concerning any land use regulations that remained applicable to intervenors' proposed subdivision after the May 18, 2005 Order; this appeal is not available to challenge the May 18, 2005 Order that removed ZDO 407.09(E) from the land use standards intervenors' must satisfy to receive tentative subdivision plan approval for their property.

2. The Hearings Officer Never Found That ZDO 407.09(E) Does Not Apply

Petitioners next argue, correctly, that the hearings officer never found that ZDO 407.09(E) does not apply. However, that failure on the hearings officer's part does not support a conclusion that ZDO 407.09(E) does apply. The hearings officer simply failed to acknowledge intervenors' argument that ZDO 407.09(E) should not be applied in ruling on their request for tentative subdivision plan approval. That failure on the hearings officer's part does not preclude intervenors from arguing that the hearings officer need not have applied ZDO 407.09(E) in ruling on intervenors' request for tentative subdivision approval.

3. Intervenors Failed to Cross Petition for Review or Include Cross Assignments of Error in their Response Brief

After failing to acknowledge intervenors' argument, the hearings officer simply proceeded to apply ZDO 407.09(E). Certainly that action by the hearings officer could have provided a basis for intervenors to (1) file their own appeal of the hearings officer's decision, (2) file a cross petition for review as allowed by OAR 661-010-0030(7); or (3) include a cross-assignment of error in their respondents' brief. We understand petitioners to contend that interveners' failure to pursue any of those three options bars intervenors from arguing that ZDO 407.09(E) does not apply to the hearings officer's decision or that petitioners' first assignment of error can be denied because ZDO 407.09(E) does not apply.

The hearings officer's decision was favorable to intervenors. Therefore, intervenors' decision not to file their own appeal of the hearings officer's decision is certainly understandable. It is true that after petitioners filed their appeal of the hearing officer's decision at LUBA, and intervenors intervened in this appeal, intervenors could have filed a cross petition for review or included cross-assignments of error in their respondent's brief. In such a cross petition for review or cross-assignment of error, intervenors could have argued that ZDO 407.09(E) does not apply and that the hearings officer committed harmless error to the extent she assumed otherwise. OAR 661-010-0030(7) expressly authorizes cross

petitions for review.[6] Despite the lack of any express provisions in our rules for cross-assignments of error, we have recognized and addressed cross assignments of error. *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653, 661-667, *aff'd* 193 Or App 822, 94 P3d 913 (2004). The question we must answer is whether intervenors' failures to (1) file a cross petition for review or (2) include cross-assignments of error that are denominated as such in their response brief precludes their argument in their response brief that ZDO 407.09(E) does not apply.

While the better practice is to file a cross petition for review or expressly allege cross-assignments of error in the respondents' brief, where the response brief includes arguments that are *de facto* cross-assignments of error that are reasonably recognized as such by all parties, we believe it is appropriate to treat such arguments as a cross-assignments of error. *See Linstromberg v. City of Veneta*, 47 Or LUBA 99, 108 (2004) (treating argument that defective findings provide no basis for reversal or remand because the findings address an inapplicable criterion as a cross assignment of error). We believe it is appropriate to do so here.

4. Intervenors Conceded that ZDO 407.09(E) Applies

Petitioners' fourth and final reason that LUBA should not consider intervenors' argument that ZDO 407.09(E) does not apply to the disputed tentative subdivision approval is that intervenors conceded that ZDO 407.09(E) applies. However, as noted above, intervenors conceded that the ZDO 407.09(E) applied to applications for building permits. Intervenors did not concede that ZDO 407.09(E) applies to the disputed application for

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[6] OAR 661-010-0030(7) provides:

> "Cross Petition: Any respondent or intervenor-respondent who desires to file a petition for review may do so by filing a cross petition for review. The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party."

tentative subdivision approval. To the contrary, as noted above, they argued that ZDO 407.09(E) does not apply to their application for tentative subdivision approval.

A related argument that petitioners may have suggested at oral argument but did not develop is probably closer to the mark. Intervenors' arguments, which were quoted above, like the planning staff report those arguments rely on, are somewhat ambiguous about *why* planning staff and intervenors took the position that the ZDO 407.09 siting standards should apply only at the time of building permit approval. One possibility is that intervenors and planning staff believed that the language of ZDO 407.09 itself requires that it be applied only at the building permit stage; another possibility is that they believed such a result is required because the May 18, 2005 Order removed the ZDO 407.09 siting standards for purposes of subdivision approval. The paragraph of the March 8, 2007 planning staff report that specifically mentions the ZDO provisions that were removed by the May 18, 2005 Order begins at the bottom of Record 1283 and continues at the top of Record 1284. That paragraph does not mention ZDO 407.09. The next paragraph on Record 1284 continues discussion of laws that apply and do not apply under the state and local Ballot Measure 37 waivers, and takes the position that the ZDO 407.09 siting standards do not apply to the application for subdivision approval but do apply to building permits. It is not clear from that paragraph whether planning staff took that position due to the May 18, 2005 order or took that position for other unspecified reasons. While it is a close question, to the extent petitioners took the position at oral argument that intervenors never sufficiently raised any issue concerning whether ZDO 407.09(E) was rendered inapplicable by the board of commissioners May 18, 2005 order, we do not agree. The issue was not waived.

C. Conclusion

The hearings officer's decision assumes that ZDO 407.09(E) applies and finds that intervenors' application for tentative subdivision approval complies with that standard. For the reasons explained above, we agree with intervenors that the hearing officer's apparent

assumption that ZDO 407.09(E) applies here is erroneous. It follows that even if the hearings officer's findings concerning ZDO 407.09(E) are erroneous for one or more of the reasons petitioners allege and even if the hearings officer's findings are not supported by substantial evidence, those errors would not provide a basis for reversal or remand of the hearings officer's decision. We therefore do not consider petitioners' first assignment of error further.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

ZDO Chapter 1006 concerns "Utility Lines and Facilities." ZDO 1006.02 sets out utility "[s]tandards." ZDO 1006.02(B) sets out utility standards for water facilities.[7] In their second assignment of error, petitioners allege the hearings officer erroneously found that the subdivision's impact on groundwater supplies need not be addressed under ZDO 1006.02(B)(1), because the subdivision is not located in an area that has been designated a critical groundwater area. In their third assignment of error, petitioners argue the hearings

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[7] ZDO 1006.02(B) provides:

> "All development which has a need for water service shall install water facilities and grant necessary easements pursuant to the requirements of the district serving the development.
>
> "1. The impact on groundwater supplies shall be addressed in each application for a subdivision or major partition in those rural areas identified by the Water Resources Department, in coordination with the County, as having declining groundwater levels.
>
> "2. Written certification is required from a public water system serving a development identifying they have the authority to provide service and there is adequate potable water available in quantities sufficient for year-round use.
>
> "3. Outside Metro urban growth boundaries and the Mount Hood urban area
>
> "a. Water service for partitions and subdivisions shall be provided according to the provisions of ORS 92.090. When no water is to be provided by a water district or community water system, there shall be a note on the final plat indicating that no water is being provided, in addition to the filing and disclosure requirements of ORS 92.090.
>
> "* * * * *."

officer erroneously found the proposal complies with ZDO 1006.02(B)(2) and (3). Petitioners contend the certification provided by PMWC is inadequate to comply with ZDO 1006.02(B)(2) and that the proposed subdivision cannot rely on individual exempt wells under ZDO 1006.02(B)(3).

A. Impact on Groundwater (ZDO 1006.02(B)(1))

In applying ZDO 1006.02(B)(1), the first question the hearings officer had to consider is whether the subdivision is located in a "rural [area] identified by [OWRD], in coordination with the County, as having declining groundwater levels." If not, ZDO 1006.02(B)(1) does not apply. If so, ZDO 1006.02(B)(1) applies. If ZDO 1006.02(B)(1) applies, ZDO 1006.02(B)(1) is silent about how the impact on ground water must be "addressed." ZDO 1006.02(B)(1) is also silent about what the county is authorized to do or required to do, after "the impact on ground water supplies" has been "addressed" under ZDO 1006.02(B)(1). As explained below, the hearings officer concluded that intervenors' subdivision is not located in the kind of area that triggers the ZDO 1006.02(B)(1) requirement to address groundwater impacts. Therefore, the hearings officer did not have to consider what, if anything, the hearings officer could or must require of intervenors under ZDO 1006.02(B)(1), if it does apply. The hearings officer's findings concerning the applicability of ZDO 1006.02(B)(1) are set out below:

> "With respect to ZDO 1006.02(B)(1), the standard requires a showing the impact of a development on groundwater supplies only when [OWRD] has concluded that the area is subject to declining groundwater levels, i.e., the area is designated as a critical groundwater area. Here, there is no dispute that the amount and location of area groundwater supplies is not known. See Exhibit 12, letter from Carl Wozniak. However, that uncertainty does not trigger the quantification requirement set out in ZDO 1006.02(B)(1). Only a critical groundwater designation triggers the standard. Consequently, evidence that the proposed individual wells may reduce groundwater supplies does not provide a basis for denying the application." Record 12.

Petitioners contend that the hearings officer erred by substituting a trigger that is not included in ZDO 1006.02(B)(1)—location within a designated critical groundwater area—for

the trigger that is actually set out in ZDO 1006.02(B)(1)—location within a "rural [area] identified by [OWRD], in coordination with the County, as having declining groundwater levels."

Under ORS 537.730(1), the Water Resources Commission is authorized to adopt rules to "designate an area of the state a critical groundwater area."[8] Although there are a number of statutory criteria for designating critical groundwater areas, one of the statutory criteria for such a designation is that "[g]round water levels in the area in question are declining or have declined excessively[.]" *See* n 8. ORS 537.730(1) does not expressly

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[8] ORS 537.730(1) provides:

> "The Water Resources Commission by rule may designate an area of the state a critical ground water area if:
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> "(a) Ground water levels in the area in question are declining or have declined excessively;
>
> "(b) The Water Resources Department finds a pattern of substantial interference between wells within the area in question;
>
> "(c) The department finds a pattern of interference or potential interference between wells of ground water claimants or appropriators within the area in question with the production of geothermal resources from an area regulated under ORS chapter 522;
>
> "(d) The department finds a pattern of substantial interference between wells within the area in question and:
>
> "(A) An appropriator of surface water whose water right has an earlier priority date; or
>
> "(B) A restriction imposed on surface water appropriation or a minimum perennial stream flow that has an effective date earlier than the priority date of the ground water appropriation;
>
> "(e) The available ground water supply in the area in question is being or is about to be overdrawn;
>
> "(f) The purity of the ground water in the area in question has been or reasonably may be expected to become polluted to an extent contrary to the public welfare, health and safety; or
>
> "(g) Ground water temperatures in the area in question are expected to be, are being or have been substantially altered except as specified in ORS 537.796."

require "coordination" with the county in designating critical groundwater areas. However, assuming that requirement is not essential or there in fact is coordination with a county when a critical groundwater area is designated, it would appear that a critical groundwater designation by the Water Resources Commission would likely suffice to make a designated critical groundwater area in rural Clackamas County a "rural [area] identified by [OWRD], in coordination with the County, as having declining groundwater levels," within the meaning of ZDO 1006.02(B)(1). However, we agree with petitioners that the hearings officer interpreted ZDO 1006.02(B)(1) too narrowly when she interpreted ZDO 1006.02(B)(1) *only* to apply in areas where the Water Resources Commission has designated the area as a critical groundwater area. If the drafters of ZDO 1006.02(B)(1) had intended to limit its applicability to only those areas where there has been a critical groundwater designation by the Water Resources Commission, they would have worded ZDO 1006.02(B)(1) to say that. As ZDO 1006.02(B)(1) is worded, we fail to see why more informal identifications of declining groundwater areas could not suffice to trigger application of ZDO 1006.02(B)(1), even without a critical groundwater designation.

Before the hearings officer, petitioners pointed out that the subject property lies within the Sherwood-Dammasch-Wilsonville Groundwater Limited Area in OWRD's Willamette Basin Program. OAR 690-502-0190. Pursuant to that designation, groundwater use is "classified for exempt uses only." *Id.* The additional legal significance of that designation, if any, is not clear to us. Whether the Sherwood-Dammasch-Wilsonville Groundwater Limited Area designation, by itself, is sufficient to constitute a coordinated OWRD identification of Sherwood-Dammasch-Wilsonville Groundwater Limited Area as an area with "declining groundwater levels" seem doubtful.[9] However, petitioners also

[9] Petitioners invite us to visit OWRD's website to confirm that ground water limited classifications are "made for areas which suffer from declining groundwater levels." Petitioners offer no theory by which LUBA could take official notice of information on that website to confirm the purpose of groundwater limited area classifications, and we decline petitioners' invitation.

provided the hearings officer with copies of OWRD correspondence in which concern is expressed that groundwater levels in that groundwater limited area are declining. Record 202-03; 460. In one of those letters the OWRD director states that the Sherwood-Dammasch-Wilsonville Groundwater Limited Area was included in the Willamette Basin Program in 1992 because "[g]roundwater levels in the Columbia River Basalt Group * * * have declined so seriously* * *." Record 202. Again, it is certainly possible that this correspondence might fall short of a coordinated identification of the relevant area as an area with "declining groundwater levels," within the meaning of ZDO 1006.02(B)(1). However, we do not know how the hearings officer would answer that question, because the hearings officer erroneously interpreted ZDO 1006.02(B)(1) only to apply where there has been a critical groundwater designation. We agree with petitioners that the hearings officer's interpretation of ZDO 1006.02(B)(1) only to apply within a Water Resource Commission designated critical groundwater area misconstrued the applicable law.

On remand, the question the hearings officer must ask and answer is whether OWRD has identified the relevant area as an area with "declining groundwater levels," and whether any such identification was "coordinated" with the county, within the meaning of ZDO 1006.02(B)(1). If so, the hearings officer must then determine whether the information that intervenors have already provided is sufficient to satisfy their obligation under ZDO 1006.02(B)(1) to address the subdivision's impact on groundwater supplies.[10]

In their remaining arguments under the second assignment of error, petitioners argue the hearings officer misread one of their arguments when she adopted the following findings:

> "*In response to opponents' second legal argument, that the county may, in some circumstances, make an independent determination that an area has declining groundwater levels, the case law on this is fairly clear*. In *Ashland*

[10] Intervenors argue that LUBA should find that intervenors have already adequately "addressed" the subdivision's impact on ground water, within the meaning of ZDO 1006.02(B)(1). We do not agree. That question is for the hearings officer to answer in the first instance, provided the hearings officer concludes on remand that ZDO 1006.02(B)(1) applies in this case.

> *Drilling Inc. v. Jackson County*, 168 Or App 624, 7 P3d 748 (2000), the Oregon Court of Appeals concluded that the state legislature intended that statutes implementing the development of water resources, such as well drilling standards, preempt local regulations that are intended to identify and protect water sources. In that decision, the Court of Appeals held that while local governments may adopt standards pertaining to water quality, it could not adopt local regulations regarding the quantity of water produced by a water source, or how that water is extracted. Opponents have not explained why the county in this instance, may regulate the extraction of water from groundwater sources, when the Court of Appeals has stated that OWRD is the only entity with the regulatory authority to do so. This understanding of the law is consistent with the plain wording of ZDO 100[6.02(B)(1)], which places the county in a secondary role to ORWD. *The hearings officer concludes that the county may not independently designate a critical groundwater area, which would trigger the impact analysis set out in ZDO 100[6.02(B)(1)]. * * *"* Record 12-13 (emphases and underline emphasis added).

Petitioners first dispute the emphasized portion of the above-quoted findings, contending that they never argued that the county could designate a critical groundwater area or, in the words of ZDO 1006.02(B)(1), identify an area that has declining groundwater levels. Although it does not provide an additional basis for remand, we agree that the emphasized findings appear to attribute an argument to petitioners that they never made.

Petitioners next dispute the underlined findings. Petitioners contend there is a difference between direct county regulation of wells, water quality and water quantity, which the Court of Appeals in *Ashland Drilling* found to be preempted by ORS 537.769 and land use regulations that simply limit land uses based on the impacts that those uses could have on water resources.[11] According to petitioners, in *Ashland Drilling* the Court of Appeals explained that the latter type of regulations is not preempted by ORS 537.769:

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[11] ORS 537.769 provides:

> "The Legislative Assembly finds that ground water protection is a matter of statewide concern. No ordinance, order or regulation shall be adopted by a local government to regulate the inspection of wells, construction of wells or water well constructors subject to regulation by the Water Resources Commission or the Water Resources Department under ORS 537.747 to 537.795 and 537.992."

> "[T]he county's ordinance is not directed at limiting the use of ground water, itself. Rather, it is included solely in the [Land Development Ordinance], and it directly restricts only the use of land: again, only '[a]pplications for *land use permits or divisions* shall be denied where minimum quantity and quality standards * * * are not satisfied.' (Emphasis added.) The fact that the restriction on the use of land is predicated on ground water quality or quantity concerns and that the land use decision may affect the actual use of ground water is not consequential because the only regulatory action the ordinance permits the county to undertake is to approve or deny a land use permit or land use division proposal. * * *" *Ashland Drilling*, 168 Or App at 647 (emphasis in original).

We agree with petitioners. As we have already noted, it is not clear whether ZDO 1006.02(B)(1) applies in this case to require that the subdivision's impact on groundwater supplies must be considered. Neither is it clear that ZDO 1006.02(B)(1) requires that the county limit or prohibit the subdivision to avoid harm to those groundwater supplies. However, to the extent that ZDO 1006.02(B)(1) applies and by itself or in conjunction with other applicable law requires that the proposed subdivision be regulated to protect groundwater supplies, we agree with petitioners that nothing in the Court of Appeal's decision in *Ashland Drilling* supports a conclusion that application of ZDO 1006.02(B)(1) is preempted. The findings underlined above can be read to conclude to the contrary, and the hearings officer therefore erred.

The second assignment of error is sustained.

B. ZDO 1006.02(B)(2) and (3) Certification and Final Plat Note

ZDO 1006.02(B)(2) provides "[w]ritten certification is required from a public water system serving a development identifying they have the authority to provide service and there is adequate potable water available in quantities sufficient for year-round use." *See* n 7. If the subdivision is not to be served by a water district or community water system, ZDO 1006.02(B)(3) and ORS 92.090(4)(c) require that a note be included on the final plat that no

water will be provided to the lots.[12] The hearings officer adopted the following findings to address ZDO 1006.02(B)(2) and (3):

> "With respect to ZDO 100[6.02(B)(2) and (3)], the applicant has submitted certification from PMWC that it has the authority and capacity to provide water service to the subdivision. If that certification is not borne out by the law or the facts, a subdivision may still be approved if the applicant includes a note on the final subdivision plat that complies with ORS 92.020(4)." Record 13.

The certifications the hearings officer references in the above-quoted findings appear at Record 1047 and 1049-51. In those certifications, PMWC points out that the water right permit that it held at the time the certifications were issued did not include the disputed subdivision in PMWC's designated place of use, but that PMWC's application to amend the permit to expand that place of use was pending before the OWRD. Even without the permit amendment, the certification takes the position that ORS 540.510(3) provides PMWC legal authority to provide water outside its place of use.[13] As noted earlier, the amendment to PMWC's water right permit has now been approved by the OWRD.

Petitioners argue that ZDO 1006.02(B)(2) requires that intervenors demonstrate that it is feasible for PMWC to provide a water supply for the disputed subdivision. Petitioners challenge PMWC's representation that it has legal authority to provide water to the subdivision and its financial and technical capability of doing so. In addition, petitioners rely on evidence that was submitted by their experts that the aquifers that will provide the water for the subdivision are being overused and that if users with senior water rights are harmed

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[12] ZDO 1006.02(B)(3) is set out at n 7. ORS 92.090(4)(a) and (b) provide that a subdivision plat cannot be approved without certification and financial assurances that a water system will be extended to serve all the subdivision lots. ORS 92.090(4)(c) provides an exception to those requirements in ORS 92.090(4)(a) and (b) and provides that the approving body may instead accept "a statement that no domestic water supply facility will be provided to the purchaser of any lot depicted in the proposed subdivision plat, even though a domestic water supply source may exist." A copy of that statement must be provided to "each prospective purchaser of a lot in the subdivision."

[13] The ORS 540.510(3) authority to apply water to lands that are not appurtenant to a water right does not apply where such application would "interfere with or impair prior vested water rights[.]" ORS 540.510(3)(a)(B).

by PMWC's withdrawal of additional water to serve the subdivision, OWRD may be required to interrupt that withdrawal. All of this, petitioners argue, demonstrates that there is not a feasible water supply and that the hearings officer erred in applying ZDO 1006.02(B)(2).[14]

Intervenors respond:

> "* * * ZDO 1006.02(B)(2) requires only 'written certification' from PMWC and nothing more. PMWC provided this certification of its capacity and willingness to serve this land and its legal authority to serve was confirmed by OWRD on August 28, 2007. This code section does not authorize the Hearings Officer to second-guess PMWC's certification or independently evaluate PMWC's authority to serve or its water system capacity. *Angius v. Washington County*, 52 Or LUBA 222, 246-247 (2006) and *Bouman v. Jackson County*, 23 Or LUBA 628, 646-47 (1992). The Hearings Officer accepted PMWC's written certification that it could and would serve this territory and concluded this was relevant credible evidence that ZDO 1006.01(B)(2) was met. PMWC's written certifications constitute substantial evidence – evidence a reasonable person would rely on in reaching a decision. * * * Ultimately, the proof * * * is reflected in the Final Order Approving a Change of Place of Use issued by OWRD allowing an expansion of PMWC service territory to include this land. LUBA should affirm the County and deny the third assignment of error." Intervenors' Response Brief 21-22.

The certification that is required by ZDO 1006.01(B)(2) is substantially similar to the standard in *Angius* that required a letter from Clean Water Services (CWS), a sanitary sewer and surface water management agency. In *Angius*, the required letter had been produced and petitioners attempted to challenge certain representations in the letter. We rejected the attempted challenge:

> "As the hearings officer explained, CDC 410-3.8 requires only that CWS provide the required service provider letter, not that the letter be accurate or free from error. CDC 410-3.8 does not require or allow the hearings officer to second-guess the CWS assessment, however faulty that assessment may turn out to be. Petitioners do not challenge that interpretation of CDC 410-3.8, or explain why it is erroneous. * * *" 52 Or LUBA at 247.

[14] We agree with intervenors that although the third assignment of error lists ZDO 1006.02(B)(3), petitioners do not make a cognizable challenge under ZDO 1006.02(B)(3).

The legal principle we draw from *Angius* is that in applying a legal standard that simply requires a certification or letter, a decision maker is not obligated to ensure the validity of all legal conclusions that are included in the certification or letter or to ensure that there is substantial evidence to support every included finding. We leave open the possibility that under a standard like ZDO 1006.01(B)(2) a legal error could be so obvious or the evidence undercutting or contradicting a certification might be so overwhelming that a reasonable decision maker would not accept or rely on a facially adequate certification to comply with ZDO 1006.01(B)(2). However, that is not the case here. There is conflicting evidence in the record regarding the capacity of the aquifer. PMWC answered legal questions that were raised about its authority to provide water to the disputed subdivision. OWRD has now approved a modification of PMWC's water right permit place of use. We agree with intervenors that the certifications were sufficient to support the hearings officer finding

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

ZDO 1003.05 is entitled "STANDARDS FOR FIRE HAZARD AREAS." ZDO 1003.05(A) provides:

> "Development in areas with the potential for forest or brush fires shall be designed:
>
> "1. To provide adequate water storage and pressure for purposes of maintaining minimum flows for fire protection.
>
> "2. To provide, in cooperation with local fire districts, fire hydrants appropriate to the intensity and type of development.
>
> "3. So that dwellings are not sited in areas subject to extreme fire hazard, such as areas of heavy fuel concentration, draws, etc. (3/24/05)
>
> "4. To provide for other methods of fire protection and prevention appropriate to the location and type of development, utilizing techniques recommended by the Oregon State Forestry Department."

The hearings officer addressed ZDO 1003.05(A) with the following findings:

> "Turning to ZDO 1003.05, staff concludes that this criterion does not apply because the subject property is not located within a fire hazard area. There is no evidence to undermine this assertion. Even if this criterion does apply, the applicant has demonstrated that it is feasible to site and design dwellings to minimize wildfire risks. This criterion is satisfied." Record 13.

Petitioners first complain that the planning staff and hearings officer improperly equated "areas with potential for forest or brush fires" with "fire hazard area[s]." With regard to the hearings officer's observation that there was no evidence to undermine the staff's assertion that the subject property is not in a fire hazard area, petitioners contend that is because both intervenors and petitioners assumed that ZDO 1003.05(A) did apply.

Taking petitioners' last point first, a planning staff report can itself constitute substantial evidence, even if it is not supported by other evidence.[15] *McGowan v. City of Eugene*, 18 Or LUBA 299, 306-07 (1989), *aff'd* 102 Or App 512, 795 P2d 563 (1990); *Scott v. City of Portland*, 17 Or LUBA 197, 202 (1988). Here the planning staff report was available on March 8, 2007. At no point after the planning staff took the position that the subdivision is not located in a fire hazard area did anyone dispute that contention. Planning staff's unchallenged representation that the subdivision is not located in a fire hazard area is evidence a reasonable person could rely on to find that the disputed subdivision is not located in a fire hazard area.

Turning next to petitioners' complaint that the both the hearings officer and planning staff improperly equated "areas with potential for forest or brush fires" with fire hazard areas, we do not believe that difference in wording is significant. As we earlier noted, ZDO 1003.05 is entitled "STANDARDS FOR FIRE HAZARD AREAS." It seems likely to us that the planning staff's and hearings officer's word choice could simply reflect the title of

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[15] The March 8, 2007 staff report addresses ZDO 1003.05 as follows:

> "Section 1003.05, Standards for Fire Hazard Areas: The subject property is not located in an identified wildfire hazard area. The area is provided with fire protection services by Tualatin Valley Fire and Rescue. **This criterion is not applicable**." Record 1289 (bold lettering in original).

the section. In any event, petitioners offer no reason to suspect that the hearings officer assigned different meanings to the phrases "fire hazard area" and "areas with potential for forest or brush fires." Indeed, petitioners make no attempt to explain why *they* believe the meanings of those two phrases are materially different.

For the reasons explained above, we conclude that the hearings officer's findings that ZDO 1003.05 does not apply in this case are adequate and supported by substantial evidence.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

ZDO chapter 1022 is entitled "CONCURRENCY." ZDO 1022.01 sets out the purpose of the chapter:

> "The purpose of this section is to ensure that sanitary sewer, surface water management, water, and transportation infrastructure is provided concurrent with the new development it is required to serve or, in the case of transportation infrastructure, within a reasonable period of time following the approval of new development."

ZDO 1022.05 addresses water service and provides as follows:

> "Approval of a development that requires public water service shall be granted only if the applicant provides a preliminary statement of feasibility from the water system service provider. The statement shall verify that water service, including fire flows, is available in levels appropriate for the development and that adequate water system capacity is available in source, supply, treatment, transmission, storage and distribution. Alternatively, the statement shall verify that such levels and capacity can be made available through improvements completed by the developer or the system owner. If the statement indicates that water service is adequate with the exception of fire flows, the applicant shall provide a statement from the fire district serving the subject property that states that an alternate method of fire protection, such as an on-site water source or a sprinkler system, is acceptable. The statement shall be dated no more than one year prior to the date a complete land use application is filed and need not reserve water system capacity for the development."

In addressing ZDO 1022.05, the hearings officer relied on the March 8, 2007 staff report, which found:

> "This site is not located within a public or community water service area and the applicant proposes that each lot be provided with water service by individual private wells. **This criterion is not applicable**." Record 1304 (bold lettering in original).

Intervenors anticipate that the proposed lots either will be served by individual wells or by PMWC, which constitutes a community water service. Because individual wells are possible, if PMWC ultimately does not provide water service, we understand the above findings to conclude that ZDO 1022.05 does not apply because the subdivision is not "a development that *requires* public water service." (Emphasis added.) However, the above-findings also seem to rely in part on the fact that the proposed subdivision is "not located within a public or community water service area." Following the August 28, 2007 OWRD Order, that is no longer the case.

On remand, the hearings officer must consider whether the legal consequence of the proposed subdivision being located within a community water service area is that the subdivision "requires public water service," and, if so, whether ZDO 1022.05 must be applied. If so, the hearings officer can decide whether the evidence intervenors have already submitted is sufficient to constitute "a preliminary statement of feasibility from the water system service provider." We decline intervenors' invitation that LUBA make that determination in this appeal.

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

Petitioners argue that the county failed to adopt findings addressing Section 23.0 of the Water Resources Section of Chapter 3 of the Clackamas County Comprehensive Plan. Section 23.0 provides: "[p]rotect groundwater supplies in rural, agricultural, and forest areas through large lot zoning * * *." Petitioners contend the hearings officer erred by failing to adopt findings addressing plan policy 23.0.

Intervenors first contend in their response brief that petitioners waived this issue by failing to raise it below. Petitioners did not respond to intervenors' waiver argument in their reply brief. Neither did petitioners respond to intervenors' waiver argument in their opening argument at oral argument. Petitioners responded to intervenors' waiver argument for the first time at the very end of their rebuttal argument at oral argument. The pages that petitioners cite do mention plan policy 23.0 and are minimally sufficient to preserve the argument that petitioners make under their sixth assignment of error. Record 199, 461. Before turning to the merits of petitioners' argument under the sixth assignment of error, we note that delaying response to waiver arguments until the very end of the rebuttal phase of oral argument is risky. The far better practice is for a petitioner to either respond in a reply brief or respond in petitioner's opening argument at oral argument.

Intervenors contend that plan policy 23.0 simply requires that the county "adopt large lot zoning to protect rural, agricultural and forest areas," and the county has done so. Intervenors contend that there is nothing in plan policy 23.0 that suggests it is to be applied as an approval standard or consideration in approving subdivisions. We agree with intervenors.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Clackamas County Roadway Standard (CCRS) 240.6 regulates cul-de-sacs. CCRS 240.6 provides as follows:

> "Cul-de-sacs shall be discouraged and shall be allowed only where topography or pre-existing development precludes roadway connections. A cul-de-sac shall be as short as possible, having a maximum length of 400 feet, serving not more than 18 dwelling units. The length of the cul-de-sac shall be measured along the centerline of the roadway from the near side right-of-way of the nearest cross street to the farthest point of the cul-de-sac right-of-way. A cul-de-sac shall terminate with a circular turnaround having a 50-foot improved radius and 57-foot right of way radius. Cul-de-sacs shall conform to Standard Drawing C300.

> "Dead end streets longer than 400 feet may be approved if no other means is available for development of the property and special provisions are made for public facilities, pedestrian/bicycle circulation and emergency service accesses."

Petitioners argued below that the applicants propose cul-de-sacs that are longer than 400 feet long but "failed to show that no other means are available for development." Record 361.

The challenged decision relies on the following explanation from the March 8, 2007 staff report to address cul-de-sac length:

> "Clackamas County Roadway Standards, Section 240.6 limits cul-de-sacs to a maximum length of 400 feet. Dead end streets longer than 400 feet may be approved if no other means is available for development and special provisions are made for public facilities, pedestrian/bicycle circulation and emergency service access. The proposed private road includes two cul-de-sacs (Ceille Court and Leigh Court) with a length of approximately 700 to 750 feet serving 8 homes each. To mitigate the length of the cul-de-sac, additional shoulder width is recommended. The recommended improvement for this portion of roadway is a 22-foot wide paved surface with 6-foot wide gravel shoulder on each side of the roadway." Record 1301.

Petitioners argue that the county erred by failing to address the CCRS 160.1.4 criteria for modifying CCRS standards.[16]

It is reasonably clear that the county did not rely on the CCRS 160.1.4 criteria for modifying CCRS standards to approve the cul-de-sacs in excess of 400 feet in length. Instead, the county relied on the second paragraph of CCRS 240.6, which expressly authorizes cul-de-sacs in excess of 400 feet in length if "no other means is available for

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[16] CCRS 160.1.4 provides:

> "The County may grant a modification to the adopted standards or specifications when any one of the following conditions are met:
>
> "1. The standard or specification is deemed not applicable in the particular application.
>
> "2. Topography, right-of-way or other geographic conditions impose an environmental concern and an equivalent alternative, which can accomplish the same design intent, is available.
>
> "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."

development of the property." We agree with intervenors that resort to CCRS 160.1.4 is not necessary if that part of CCRS 240.6 is properly invoked. But the above-quoted findings make no attempt to explain why "no other means is available for development of the property" without cul-de-sacs in excess of 400 feet in length. In their brief, intervenors offer a number of reasons that they believe demonstrate that the longer cul-de-sacs are appropriate in the circumstances presented in this appeal. We do not consider the merits of those arguments, because the hearings officer's findings neither cite nor rely on those arguments in approving the disputed subdivision with the longer cul-de-sacs. The hearings officer will be free to consider those arguments on remand.

On remand, the hearings officer must adopt findings to establish that cul-de-sacs that exceed 400 feet in length are required because "no other means is available for development of the property." If such findings are not possible, resort to CCRS 160.1.4 may also provide a basis for allowing the longer cul-de-sacs. We also do not mean to preclude application of any other variance authorities that are properly invoked. However, absent such findings or variance authority, the challenged subdivision must be revised to comply with the 400-foot length limit on cul-de-sacs.

The seventh assignment of error is sustained.

EIGHTH ASSIGNMENT OF ERROR

ZDO Chapter 1002 is entitled "PROTECTION OF NATURAL FEATURES." One of the purposes of ZDO Chapter 1002 is to "[e]ncourage site planning and development practices which protect and enhance significant natural features such as * * * large trees[.]" ZDO 1002.01(B). ZDO 1002.04 is entitled "TREES AND WOODED AREAS," and ZDO 1002.04(A) provides in part:

> "Existing wooded areas, significant clumps or groves of trees and vegetation, consisting of conifers, oaks and large deciduous trees, shall be incorporated in the development plan wherever feasible. Site planning and design techniques which address this standard include, but are not limited to, the following:

> "* * * * *
>
> "2. Preservation of existing trees within rights-of-way and easements when such trees are suitably located, healthy, and when approved grading allows[.]"

The hearings officer's decision identifies ZDO 1002.04(A)(2) as an applicable approval standard and finds that an issue was raised concerning application of ZDO 1002.04(A) to a 46 inch diameter oak tree located approximately two miles from the disputed subdivision at the intersection of Schaeffer and SW Mountain Roads. Record 8. In response to concerns about safety at that intersection, intervenors proposed to remove the tree to improve sight distance. The hearings officer's decision includes the following findings:

> The [Transportation Impact Study] noted that the Schaeffer/SW Mountain intersection is skewed, and has limited sight distance for vehicles turning north or south from Schaeffer Road to SW Mountain Road. The applicant has proposed to make improvements within the intersection right-of-way, including the removal of a 46" dbh oak, to improve sight distance. County staff has evaluated the alternative improvements proposed for the intersection, and agrees that the alternatives show that sight distance and traffic safety can be improved at that intersection without the acquisition of additional right of way. * * *" Record 10.

The hearings officer included a condition of approval that requires that intervenors "remove the oak tree." Record 24.

Petitioners argue the hearings officer erred by not adopting findings to explain how the tree can be removed consistently with ZDO 1002.04(A)(2).

Intervenors offer a number of responses. Intervenors first argue no issue was raised concerning compliance with ZDO 1002.04(A)(2) and the issue was therefore waived under ORS 197.835(3). As already noted, the hearings officer specifically found that an issue had been raised concerning the oak tree and ZDO 1002.04(A)(2). We reject intervenors' waiver argument.

Intervenors next argue that ZDO 1002.04(A)(2) does not apply to a single oak tree located two miles from the subdivision. The first part of ZDO 1002.04(A) states that

"existing wooded areas, significant clumps or groves of trees and vegetation" are to "be incorporated in the development plan wherever feasible." We tend to agree with intervenors that it is hard to see how any obligation under that language could encompass a single tree located two miles from the subdivision. But ZDO 1002.04(A)(2) requires "preservation of existing trees within rights-of-way and easements when such trees are suitably located, healthy, and when approved grading allows[.]" Presumably the additional traffic that the subdivision will generate is the impetus for requiring removal of the tree, and the text of ZDO 1002.04(A)(2) is not expressly limited to on-site trees. Even if intervenors' limited interpretation of ZDO 1002.04(A)(2) is possible, we are unwilling to adopt that interpretation in the first instance. The hearings officer may consider that interpretation on remand.

Intervenors finally argue that ZDO 1002.04(A)(2) only requires preservation of trees that are "suitably located." Intervenors contend that a tree that "obstructs sight distance and causes a traffic safety hazard" is not suitably located. That strikes us as a pretty good argument. On remand, the hearings officer can consider whether she agrees with that argument.

The eighth assignment of error is sustained.

The county's decision is remanded.