BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MERILYN REEVES and
FRIENDS OF YAMHILL COUNTY,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent,

and

SAMUEL EASTMAN, MILDRED EASTMAN
and COYOTE HOMES, INC.,
Intervenor-Respondents.

LUBA No. 2007-122

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Kenneth D. Helm, Beaverton, filed the petition for review and argued on behalf of petitioners.

No appearance by Yamhill County.

Charles E. Harrell, Newberg, filed the response brief and argued on behalf of intervenor-respondents. With him on the brief was Gunn Cain & Kinney LLP.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 12/26/2007

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal county approval of a 16-lot subdivision and conditional use permit, pursuant to a waiver issued by the state and county under ORS 197.352.

FACTS

Intervenor-respondents Eastman acquired the subject property, a 41.9-acre parcel, on December 4, 1971. At the time, the property was zoned Agriculture-A (Ag-A), pursuant to county Ordinance 29, adopted in 1968. Ordinance 29 created sixteen zoning districts, including the Ag-A zone and the Exclusive Farming Zone (E-F), and applied those zones to certain portions of the county.

In 1975, Statewide Planning Goal 3 (Agricultural Lands) was adopted, which required counties to place all agricultural lands into an exclusive farm use zone. The county subsequently rezoned the subject property to Exclusive Farm Use (EF-20).

In 2005, the Eastmans applied to the state and county for compensation under ORS 197.352 (2005). In lieu of compensation, the county chose not to apply the EF-20 zone regulations and other ordinances and comprehensive plan provisions, in order to allow intervenors to divide the subject property into 20 lots, and place dwellings on those lots, subject to regulations in effect on December 4, 1971. On April 6, 2006, the Department of Land Conservation and Development (DLCD) issued an order choosing not to apply "applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, Division 33," to allow the Eastmans to subdivide the property into 20 lots and place dwellings on each lot. The DLCD order stated that those regulations will not apply "only to the extent necessary to allow the Eastmans to use the property for the use described in [the staff] report, to the extent the use was permitted at the time they acquired the property in 1971."

On September 21, 2005, the Eastmans entered into a land sale contract with intervenor-respondent Coyote Homes, Inc., under which the Eastmans agreed to sell the

1 subject property to Coyote Homes on completion of three conditions, including final
2 approval of a 16-lot subdivision of the property and the vesting of the Eastmans' ability to
3 transfer the 16-lot subdivision to third parties. Following the issuance of the DLCD order,
4 Coyote Homes filed applications with the county for a 16-lot subdivision and a conditional
5 use permit. Samuel Eastman signed the applications as owner of the subject property.

6 The board of county commissioners approved the applications on June 20, 2007.
7 This appeal followed.

8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioners contend that the county erred in concluding that the Ag-A zone was not a
10 "farm use" zone as provided in ORS 215.203(1) (1971).[1]

11 As noted above, Ordinance 29, adopted in 1968, created 16 zoning districts, including
12 the Ag-A zone and the E-F zone. The E-F zone lists two permitted uses: (1) "[f]arm use as
13 defined by ORS 215.203" and (2) dwellings "customarily provided in conjunction with farm
14 use." The E-F zone lists five uses as conditional uses. Record 150-51. The list of permitted
15 and conditional uses allowed in the E-F zone are substantively identical to the uses allowed
16 in farm zones under the version of ORS 215.213 in effect between 1968 and 1971, including
17 "dwellings and other buildings customarily provided in conjunction with farm use[.]"
18 ORS 215.213(6) (1971). Record 150.

19 The purpose of the Ag-A zone is to "preserve land for agriculture and related uses."
20 Section 3.055 of Ordinance 29 sets out the permitted uses in the zone, including "farming."
21 Record 136.[2] Section 3.065 lists 24 conditional uses allowed in the Ag-A zone, including
22 single-family dwellings, golf courses, hospital, sanitarium, nursing home, school or college,

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[1] Unless stated otherwise, all future references to ORS chapter 215 in this opinion are to the 1971 statute. Accordingly, unless there is risk of confusion, we sometimes omit citations to 1971.

[2] Ordinance 29 defined "farming" very differently than the "farm use" described in the E-F zone, which is identical to the statutory definition at ORS 215.203(2) (1971). Compare Record 131 and Record 150.

theater, landfill, and automobile wrecking yard. Section 3.085 provided that in the Ag-A zone "a lot shall not be less than 2 ½ acres in area for any conditional use permitted."

Petitioners contend that the Ag-A zone was a "farm use" zone under the statute, and therefore the "single-family dwellings" that may be conditionally permitted on the property are limited by ORS 215.213(6) (1971) to dwellings "customarily provided in conjunction with farm use." According to petitioners, the DLCD order did not and could not waive the requirements of ORS 215.203(1) (1971), and therefore the county may approve the proposed dwellings only if they qualify as dwellings customarily provided in conjunction with farm use.

Intervenors dispute that the Ag-A zone was a "farm use" zone as provided in ORS 215.203(1) (1971). According to intervenors, when the county adopted Ordinance 29 in 1968 it clearly intended the E-F zone to be a "farm use" zone within the meaning of ORS 215.203(1) (1971), as evidenced by the fact that the permitted and conditional uses allowed in the E-F zone are word for word the same uses listed in ORS 215.203 and 215.213 (1971). However, intervenors argue, the county did not similarly intend that the Ag-A zone be a farm use zone within the meaning of that statute. To resolve that dispute, it is necessary to discuss the origin, text and context of ORS 215.203(1)(1971) and Ordinance 29.

The relevant provisions of ORS Chapter 215 were initially enacted in 1963, and for present purposes remained unchanged through 1971. Under ORS 215.020 (1971), the governing body of a county may (but is not required to) create a planning commission. If a planning commission is created, the commission must adopt a comprehensive plan for the use of some or all of the land in the county. ORS 215.050 (1971). The planning commission may recommend to the governing body ordinances intended to carry out part or all of the comprehensive plan, including zoning ordinances. ORS 215.110(1)(a).

ORS 215.203 (1971) was entitled "Adoption of zoning ordinances establishing farm use zones; 'farm use' defined." ORS 215.203(1) (1971) provided:

1 "Zoning ordinances may be adopted under ORS 215.010 to 215.190 to zone
2 designated areas of land within the county as farm use zones. Land within
3 such zones shall be used exclusively for farm use except as otherwise
4 provided in ORS 215.213. Farm use zones shall be established only when
5 such zoning is consistent with the over-all plan of development within the
6 county."

7 ORS 215.203(2) (1971) defines "farm use" much like the current statute as the "current
8 employment of land for the purpose of obtaining a profit in money" by engaging in various
9 listed activities. ORS 215.203(2)(a) (1971) excludes from the definition of farm use the
10 "construction and use of dwellings and other buildings customarily provided in conjunction
11 with the farm use."

12 ORS 215.213 (1971) was entitled "Nonfarm uses permitted within farm use zones,"
13 and provided:

14 "The following nonfarm uses may be established in any area zoned under
15 ORS 215.010 to 215.190 for farm use:

16 "(1) Public or private schools.

17 "(2) Churches.

18 "(3) Golf courses.

19 "(4) Parks, playgrounds or community centers owned and operated by a
20 governmental agency or a nonprofit community organization.

21 "(5) Utility facilities necessary for public service.

22 "(6) The dwellings and other buildings customarily provided in conjunction
23 with farm use, referred to in [ORS 215.203(2)(a)]."

24 Under ORS 215.203(1) (1971), a county could, but was not required to, adopt a "farm
25 use" zone that required that land within such zones shall be used exclusively for farm use,
26 with the exception of the nonfarm uses specified in ORS 215.213. At that time, the county
27 was free to adopt other zones, even other zones that allowed farm use, that are not exclusive
28 farm use zones. Such other zones would not be subject to the limits on nonfarm uses set out
29 in ORS 215.213. The question in the present case is whether the county intended the Ag-A

zone to be an "exclusive" farm use zone under ORS 215.203, or an "other" zone that happens to allow farming or farm uses, as well as other uses that exclusive farm use zones did not allow.

As discussed under the second assignment of error, the county and the parties attempt to answer to that question in part by considering the practices of the county tax assessor in 1971 in granting preferential assessments for properties within the Ag-A zone, under ORS 308.770 (1971). We do not believe that whether and the extent to which the county tax assessor in 1971 applied the preferential assessment to properties within the Ag-A zone, or to particular properties within the Ag-A zone, has much if any bearing on whether the Ag-A zone is correctly viewed as an ORS 215.203 (1971) "farm use" zone.

The best evidence of the county's intent in adopting the Ag-A zone, in our view, is the text and context of Ordinance 29. As intervenors point out, the county clearly knew how to adopt an exclusive farm use zone subject to ORS 215.203 and 215.213 (1971), because it explicitly did so in adopting the E-F zone under Ordinance 29. The county also clearly knew that, in order to comply with the statute, it could allow only those nonfarm uses in a "farm use" zone that are listed in ORS 215.213 (1971). At the same time, the county adopted 15 other zoning districts under Ordinance 29, including the Ag-A zone. While the Ag-A zone allows "farming" as a permitted use, unlike the E-F zone it does not refer to either ORS 215.203 or 215.213 (1971). Neither does the Ag-A zone refer to "exclusive" farm use or the statutory term "farm use." Perhaps most importantly, the Ag-A allows a large number of non-farm uses as conditional uses that bear no relationship to the nonfarm uses listed in ORS 215.213 (1971). The obvious inference is that the county did not intend the Ag-A zone to implement ORS 215.203 (1971) or to be a "farm use" zone under that statute.

Petitioners argue that because the county chose to allow "farming" in the Ag-A zone, it was as a matter of law a "farm use" zone for purposes of ORS 215.203 (1971). We disagree. As noted above, the county was not required to adopt "farm use" zones under

ORS 215.203 (1971) at all. Nothing in the statutes in effect at the time prohibited the county from adopting one or more zones that allow farming as a permitted use that are not "farm use" zones under the statute, in addition to or in instead of "farm use" zones.[3]

In sum, we agree with intervenors that the Ag-A zone was not an exclusive "farm use" zone within the meaning of ORS 215.203(1) (1971), and thus the county did not err in failing to address whether the proposed dwellings comply with the standards for dwellings customarily provided in conjunction with farm use.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county erred in failing to follow precedent established by the Yamhill County Circuit Court in *Robison v. DLCD*, CV05-305. According to petitioners, the material facts in the *Robison* case are similar to those in the present case, and therefore the circuit court's ruling in that case applies equally to the present case.

Before the Court in *Robison* was a DLCD order under ORS 197.352, in which DLCD took the position that Robison's property, which was zoned Ag-A and acquired in 1972, is subject to ORS 215.203 (1971) because the property had qualified for preferential farm tax assessment. The parties in *Robison* stipulated that in 1972 the county tax assessor automatically applied preferential farm tax assessment to all rural property, including land zoned Ag-A. The Court concluded, based on that stipulation, that because Robison's property was granted preferential farm tax assessment it was subject to the limitations of ORS 215.213, and thus the only dwellings permitted on Robison's property under the DLCD order were dwellings customarily provided in conjunction with farm use. The Court

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[3] The incentive for counties to adopt "farm use" zones under ORS 215.203 was that property within such zones automatically qualified for preferential farm tax assessment under ORS 308.770 (1971). Properties in farm use in other zones could also qualify for farm tax assessments, but not automatically; property owners had to apply for and demonstrate that the use of land qualified for preferential farm tax assessment.

therefore affirmed DLCD's order. The parties advise us that the Court's decision was appealed to the Court of Appeals, but the appeal was later withdrawn.

The county commissioners in the present case attempted to distinguish *Robison*, citing to an affidavit from the county tax assessor averring that, contrary to the parties' stipulation in *Robison*, the assessor did not automatically extend preferential farm tax assessments to all rural property, including property zoned Ag-A. Instead, the affidavit stated, the owners of property not zoned E-F had to apply farm tax assessment. Record 563. In addition, the county commissioners simply disagreed with the Circuit Court judge that the tax status of the subject property is determinative of whether the Ag-A zone is a "farm use" zone subject to ORS 215.203 and 215.213.

Petitioners argue that the county's attempts to distinguish or ignore *Robison* are unsuccessful, and that the ruling in that case governs the present case. Because land within the Ag-A zone qualified for preferential farm tax assessment in 1971, petitioners argue, it is a "farm use" zone within the meaning of ORS 215.203.

Intervenors argue, and we agree, that the *Robison* decision is not binding on the county commissioners in rendering the present decision. The Court's decision in *Robison* was based on the parties' stipulation as to facts deemed critical by the Court, specifically that the tax assessor automatically applied preferential farm tax assessments to properties zoned Ag-A. In the present case, those critical "facts" are in dispute, and the county found to the contrary, based on substantial evidence. Petitioners offer no basis to conclude that stipulated facts in a circuit court proceeding are binding on different parties in a different land use proceeding.

In addition, we question the correctness of the Court's apparent conclusion, echoed by petitioners in this appeal, that whether the Ag-A zone is a "farm use" zone for purposes of ORS 215.203 and 215.213 may be determined by whether the county tax assessor automatically applied preferential tax assessments to lands zoned Ag-A in 1971, or whether

farming uses on lands zoned Ag-A could qualify such lands for preferential tax assessments. In our view, because the applicable statutes at the time left the choice up to the county governing body, whether the Ag-A zone is a "farm use" zone under ORS 215.203 is determined based on the county governing body's intent in adopting that zone in 1968, as evidenced by the text and context of the relevant legislation. How the county tax assessor applied the preferential farm tax assessment scheme in 1971 might be some indication of what the county tax assessor believed at the time, but we do not understand why the beliefs or practices of the county tax assessor have any bearing on the question of what the county governing body intended when it adopted the Ag-A zone.

Accordingly, the county did not err in declining to apply the holding in the *Robison* decision.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that a right to develop property under an ORS 197.352 waiver of applicable land use regulations is personal to the claimant, and therefore lost if that claimant transfers the property to a third party before the right to development is fully vested. According to petitioners, ORS 197.352 imposes a burden on the local government to verify, at all stages of necessary development approval, that the subject property is still owned by the ORS 197.352 claimant, and not a third party.

No party in this appeal disputes that ORS 197.352 waivers are personal. Therefore, for purposes of resolving this assignment of error, we assume that the Eastmans' ORS 197.352 waiver was personal. In the present case, petitioners raised concerns below that the land sale contract between the Eastmans and Coyote Homes transferred all of the Eastmans' interest in the subject property to Coyote Homes. Petitioners contend that the county is obligated to address those concerns, by requiring the Eastmans to verify that they continue to own the subject property.

Petitioners filed a motion to take evidence not in the record under OAR 661-010-0045, seeking to place into the record before LUBA the land sales contract between the intervenors. LUBA denied that motion, concluding that petitioners had failed to demonstrate that considering evidence outside the record was warranted under our rules. *Reeves v. Yamhill County*, __ Or LUBA __ (LUBA No. 2007-122, Order on Motion to Take Evidence Not in the Record, October 9, 2007). In responding to petitioners' motion, intervenors submitted the affidavit of Samuel Eastman, which related the significant terms of the land sale contract, and offered to submit the contract to LUBA's *in camera* review if necessary. According to that affidavit, one of the terms of the contract is that the Eastmans will sell the property to Coyote Homes on fulfillment of three conditions, including "vesting" of the Eastmans' ability to transfer the 16-lot subdivision to third parties.

We understand petitioners argue that the condition to sell the property following "vesting" of the right to transfer the 16-lot subdivision to third parties may be inconsistent with ORS 197.352, because it fails to recognize the possibility that creation of the 16-lot subdivision may not suffice to also "vest" the right to construct dwellings on the newly created lots. Therefore, petitioners request remand to the county with instructions to inquire into the terms of the sales agreement, and to determine whether, under the agreement, the Eastmans will continue to qualify for the protections of ORS 197.352.

Intervenors respond the Eastmans have signed all applications as the owner and that there is nothing in the record or in the materials submitted in support of or in opposition to the motion to take evidence not in the record that suggests that the Eastmans have transferred their interest in the property to a third party. According to intervenors, Mr. Eastmans' affidavit makes it clear that the Eastmans have a contractual obligation to sell the property to Coyote Homes once the right to complete development of the property has "vested" under ORS 197.352. While it may be unclear at what point a right to complete development under the statute has vested or under the recently passed Ballot Measure 49 (2007), intervenors

argue that such a transfer would be consistent with the statute and there is no basis or reason to require the county to inquire into the details of the agreement between intervenors, in the context of issuing development approvals.

We agree with intervenors that petitioners have not demonstrated a basis to remand the decision under this assignment of error. There is no dispute that at all relevant times the Eastmans have continued to own the subject property. Petitioners' speculation that in the future the Eastmans may prematurely transfer the property prior to vesting the right to complete the proposed development does not demonstrate any error on the part of the county.

Further, we question petitioners' view that the county has an affirmative obligation under ORS 197.352 to inquire into the terms of private contracts between the ORS 197.352 claimant and third-party developers. In our view, where the ORS 197.352 claimant signs the development application as owner or otherwise certifies to the local government that he or she is the owner of the property that is the subject of the claim, if an issue regarding continued ownership arises at later stages of the development review the county is entitled to rely on the representations of the claimant or the claimant's representatives that the claimant continues to own the subject property, without conducting any further evidentiary inquiry. Even if the local government concludes that some inquiry or verification is necessary, we see no reason why the local government may not confine the inquiry to publicly available documents, such as deeds and other documents of record.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Yamhill County Land Division Ordinance (LDO) 6.090 requires that "[a]ll lots within a partition or subdivision shall have an adequate quantity and quality of water to support the proposed use."[4] LDO 6.090 goes on to provide that "[n]o final plat of a subdivision or

[4] LDO 6.090 is entitled "Water Supply" and provides:

1 partition shall be approved unless the Director and engineer have received and accepted" one
2 of three specified certificates or evidence of water supply. In lieu of such certificates, when
3 no public or private water supply is available, the final plat must state that "[n]o municipal,
4 public utility, community water supply or private well system will be provided to the
5 purchasers of the lots noted hereon."

6 Intervenors proposed that each lot will be served by an individual well. Intervenors'
7 consultant submitted a report concluding that "an adequate water supply may be available
8 from wells drilled at the development." Record 637. However, opposing parties testified
9 that the consultant failed to consider evidence regarding the output of the existing well on the
10 property and that neighboring wells in the area are declining.

"All lots within a partition or subdivision shall have an adequate quantity and quality of water to support the proposed use of the land. No final plat of a subdivision or partition shall be approved unless the Director and engineer have received and accepted:

"A. A certification by a municipal, public utility or community water supply system, subject to the regulation by the Public Utility Commission of Oregon, that water will be provided to the parcel line of each and every parcel depicted in the final plat; or

"B. A bond, contract or other assurance by the subdivider or partitioner to the county that a domestic water supply system will be installed on behalf of the subdivider or partitioner to the parcel line of each and every parcel depicted on the final plat. * * *; or

"C. A water well report filed with the State of Oregon Water Resources Department for each well provided within a subdivision or partition. The location of such wells and an appropriate disclosure shall be placed on the face of the final plat. If the subdivider or partitioner intends that domestic water will be provided to the proposed lot or lots by well(s) and no test wells have been drilled, the Director may require that test wells be drilled prior to final approval. The number and location of such wells shall be determined by the director and watermaster having jurisdiction; or

"D. In lieu of Subsections (1), (2), and (3) of this Section, when a municipal, public utility, community water supply or private well system is not available, then a statement must be placed on the final plat or map which states:

"'No municipal, public utility, community water supply or private well system will be provided to the purchaser of those lots noted hereon.'"

1 The county commissioners adopted no findings addressing LDO 6.090, apparently
2 based on the position expressed in the May 1, 2007 staff report that compliance with one of
3 the four options set out in LDO 6.090 will be determined at the time of final plat approval.
4 Record 365. Instead, the county imposed condition 8, which requires that "[t]he subdivision
5 shall be shown to have adequate quality and quantity of water to support the proposed use."
6 Record 6.[5] Petitioners argue that the county erred in failing to address the conflicting
7 evidence and determine whether the proposed subdivision complies with the LDO 6.090
8 requirement that all lots within the subdivision "have an adequate quantity and quality of
9 water to support the proposed use."

10 Intervenors respond that the county did not err in concluding that compliance with
11 LDO 6.090 is established at the time of final subdivision plat approval, not at the time of
12 preliminary subdivision plat approval. Further, intervenors argue that whether there is "an
13 adequate quantity and quality of water to support the proposed use" is a matter that is within
14 the sole jurisdiction of the Oregon Water Resources Department.

15 We disagree with intervenors' second argument, that the county has no role in
16 determining whether there is "an adequate quantity and quality of water to support the
17 proposed use" for purposes of LDO 6.090. That regulation is a county land use regulation
18 that the county has the obligation of addressing. *See Pete's Mountain Homeowners' Assoc.*
19 *v. Clackamas County*, __ Or LUBA __ (LUBA No. 2007-124, November 15, 2007) slip op

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[5] Condition 8 states:

> "The subdivision shall be shown to have adequate quality and quantity of water to support the proposed use. Prior to final plat approval, the applicant shall demonstrate conformance with the standard 1, 2, 3 or 4 of Subsection 6.090 of the [LDO]. Either domestic wells shall be provided to each lot by a community water system or an on-site well or wells, with the location of the well(s) indicated on the face of the plat, or the following disclosure shall be placed on the plat:
>
> "No municipal, public utility, community water supply or private system will be provided to the purchaser of those lots noted herein." Record 6.

20 (county regulation requiring finding that subdivision is not in an area identified as having declining groundwater levels is not preempted by state regulations).

With respect to the first argument, that compliance with the first sentence of LDO 6.090 can be demonstrated at the time of final subdivision plat approval, the answer to that question is less clear. The first sentence of LDO 6.090 requires that "[a]ll lots within a partition or subdivision shall have an adequate quantity and quality of water to support the proposed use of the land." That determination appears to require a discretionary judgment, but nothing in the text or context of LDO 6.090 explicitly states whether that determination is made during preliminary plat or final plat review. The rest of LDO 6.090 plainly addresses final plat requirements, and gives the applicant four options to satisfy those final plat requirements. At least two of those options do not appear to require exercise of any discretion.

The relationship between the first sentence and the remaining provisions of LDO 6.090 is not clear. The fact that the first sentence is combined within the same criterion as other standards that plainly apply at the time of final plat approval suggests that the county intended that compliance with the first sentence will be addressed when reviewing the final plat review. On the other hand, the context of LDO 6.090 suggests that at least the discretionary aspects of that regulation apply during preliminary plat review.

LDO Section 5.010 sets forth the information that must be included on the preliminary subdivision plat, including "[p]roposed means of * * * water supply." LDO 5.010(R). LDO 6 provides "general design standards" for partitions and subdivisions. At least some (if not most) of the general design standards in LDO Section 6 are discretionary standards that would appear to apply and be reviewed at the time of preliminary plat approval, including review of proposed street layout, access, lot size and shape, block size, proposed easements, etc. In contrast, LDO section 11 sets forth the requirements for

final subdivision plat approval. Under LDO 11.010, the planning director will approve the final plat under the LDO "if the application conforms to the preliminary plat, conditions of approval and the requirements of this ordinance." Under LDO 4.080, the county cannot require changes to the final plat unless "necessary for compliance with the terms of its approval of the preliminary plat."[6] In other words, the county's subdivision review scheme appears to be front-loaded toward the preliminary plat approval stage, where most if not all of the discretionary decision-making occurs. Notably, nothing in LDO 11.010 explicitly requires any review or approval of water supply, quality or quantity. That obligation occurs only under LDO 6.090.

We understand petitioners to argue that at least the first sentence of LDO 6.090 is a discretionary standard that must be reviewed during preliminary plat review. Intervenors argue to the contrary that LDO 6.090 in its entirety applies only during final plat review. The county's findings do not address this issue, although condition 8 quoted above in note 5 is consistent with intervenors' position. One difficulty with that position is that it is not clear whether the county's final plat review proceedings require a public hearing or process whereby the public can submit testimony regarding compliance with the first sentence of LDO 6.090. *See, generally*, *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992) (discussing statutory obligations to address discretionary approval standards during proceedings open to public input). If not, then there is no guarantee that the county will ever

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[6] LDO 4.080 is entitled "Effect of Approval," and provides:

> "Following approval of a preliminary plat, the owner may proceed with final preparation of the partition or subdivision plat and the necessary improvements pursuant to the provisions of this ordinance. Approval of the preliminary plat shall not constitute final acceptance of the final plat for recording. However, approval by the county of a preliminary plat shall be binding upon the owner and the county for the purpose of preparation of the final plat, and the county may only require changes in the final plat that are necessary for compliance with the terms of its approval of the preliminary plat."

1 address the issues raised in the current proceeding regarding water quality and quantity.
2 From our review of the county's land division ordinance, it is not clear whether final plat
3 review is subject to procedures requiring notice or a hearing or other opportunity for public
4 input.

5 In our view, remand is necessary for the county to adopt findings determining
6 whether LDO 6.090, particularly its first sentence, applies during preliminary or final plat
7 review. If the county concludes that compliance with LDO 6.090 in its entirety is
8 determined during final plat review, the county should consider whether the proceedings that
9 will govern review of intervenors' final plat application are consistent with the county's
10 statutory obligations to address discretionary land use standards as part of a public process
11 that affords notice and the opportunity for public input and, if not, impose any necessary
12 conditions of approval to ensure consistency with those statutory obligations.

13 The fourth assignment of error is sustained.

14 **FIFTH ASSIGNMENT OF ERROR**

15 The county's ORS 197.352 order waived certain provisions of the current county land
16 division ordinance, but required that other provisions relating to health and safety be
17 complied with, specifically LDO 6.010(1), 6.010(2), 6.010(7), 6.015, 6.030, and 6.090.[7]
18 Intervenors' subdivision application addressed those unwaived LDO land division
19 requirements.

20 Petitioners argue, however, that the county's ORS 197.352 order did not exempt the
21 Eastmans from compliance with the county's 1959 subdivision ordinance. Petitioners cite to

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[7] The county's decision states in relevant part that:

> "The Planning Director and the Board of Commissioners determined that the [applications] satisfy the health and safety standards of the [LDO]. Certain provisions of LDO Chapter 6, such as Section 6.000, are not applicable to the [subdivision application] because of the Measure 37 waivers. The subdivision will have to comply with the health and safety requirements of Section 6.010(1), 6.010(2), 6.010(7), 6.015, 6.030, and 6.090." Record 4.

comments below raising issues regarding compliance with the 1959 subdivision ordinance. Record 35, 107.[8] Petitioners contend that the county failed to address these issues, and failed to address the 1959 subdivision ordinance or find that the proposed subdivision complied with it.

Intervenors respond that the subdivision application complied with the applicable provisions of the current LDO, *i.e.*, those that relate to health and safety, and that the county did not err in failing to address the 1959 subdivision ordinance.

Intervenors do not dispute that the 1959 subdivision ordinance applied at the time the Eastmans acquired the subject property, and was not waived under the county's ORS 197.352 order. Both the county and DLCD order stated that the proposed development is subject to standards in effect on December 4, 1971, including, presumably, the county's 1959 subdivision ordinance. Under ORS 197.352, it is not clear how such pre-acquisition standards apply, or how local governments resolve any conflicts or inconsistencies between applicable pre-acquisition standards and any post-acquisition "health and safety" standards that continue to apply under ORS 197.352(3)(B). While the presumption underlying ORS 197.352 may be that current land use standards are more restrictive than older land use standards, that is not always the case. Arguably, if a pre-acquisition land use regulation imposes a more restrictive standard than current regulations, the ORS 197.352 claimant must demonstrate compliance with the pre-acquisition standard, and does not have the option of demonstrating compliance only with the less restrictive current standard.

The parties provide no argument or analysis on these points, and we decline to speculate further in the absence of briefing. In our view, remand is necessary for the county

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[8] An opponent noted that the 1959 subdivision ordinance required 60-foot wide interior streets, measured from "property line to property line," and argued that the proposed subdivision instead placed property lines to the middle of the proposed streets, with the result that the proposed subdivision violates that provision of the 1959 ordinance. If the "property line to property line" street provision were applied, the opponent argued, many of the proposed 16 lots would be smaller than the 2.5-acre minimum parcel size then applicable, and thus violate the 1968 zoning ordinance. Record 35.

1 to address the issues raised below regarding application of and compliance with the 1959
2 subdivision ordinance. If the county believes that the 1959 subdivision ordinance no longer
3 applies to the proposed subdivision, the county must adopt findings explaining why. If the
4 county believes that the 1959 subdivision ordinance applies, the county must adopt any
5 necessary findings addressing compliance with the ordinance. If the county finds that there
6 is a conflict between one or more standards in the 1959 ordinance and standards that were
7 not waived in the current land division ordinance, such that only one standard can apply, it is
8 incumbent on the county to adopt findings resolving that conflict.

9 The fifth assignment of error is sustained.

10 The county's decision is remanded.