

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 MEADOW NEIGHBORHOOD ASSOCIATION,
5 CAROL SCHEANS, RUSSELL ROLLINS,
6 CAROL ROLLINS, DAVID O'GUINN, LORNA O'GUINN,
7 LINDA BERTWELL, CHRISTA FOX, CINDY GRANT,
8 CATALIN IRIMIA, RODICA IRIMIA, JOE CONRAD,
9 GEORGIA HOGAN, JIM HOGAN, RUSS FLUNO, SUZIE FLUNO,
10 ROBERTA MILLER, GIL ROCHA and JAN PETERSON,
11 *Petitioners,*

12
13 vs.

14
15 WASHINGTON COUNTY,
16 *Respondent,*

17
18 and

19
20 J&G HOLDINGS,
21 *Intervenor-Respondent.*

22
23 LUBA No. 2007-160

24
25 FINAL OPINION
26 AND ORDER
27

28 Appeal from Washington County.
29

30 Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of
31 petitioners. With him on the brief was Josselson & Potter.
32

33 No appearance by Washington County.
34

35 Corinne S. Celko and Roger A. Alfred, Portland, filed the response brief and argued
36 on behalf of intervenor-respondent. With them on the brief were Michael C. Robinson and
37 Perkins Coie LLP.
38

39 HOLSTUN, Board Chair; BASSHAM, Board Member; participated in the decision.
40

41 RYAN, Board Member, did not participate in the decision.
42

43 AFFIRMED

12/27/2007

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45 You are entitled to judicial review of this Order. Judicial review is governed by the

1 provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioners appeal a county decision that approves a car wash on the site of an existing service station.

MOTION TO INTERVENE

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

FACTS

The disputed carwash was administratively approved by the Washington County Land Development Manager. That decision was appealed to a county hearings officer, who also approved the application. The hearings officer’s decision was appealed to LUBA. We remanded the hearings officer’s decision. *Meadow Neighborhood Assoc. v. Washington County*, 54 Or LUBA 124 (2007) (*Meadow Neighborhood Assoc. I*). Most of the relevant facts were set out in our decision in *Meadow Neighborhood Assoc. I* and are reproduced below:

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

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

“* * * * *

1 “The proposed car wash will have access onto both SW 91st Avenue and SW
2 Beaverton Hillsdale Highway. Washington County Community Development
3 Code (CDC) 501-8.5 requires that all development must have access to a
4 county or other public road and imposes criteria to regulate that access.

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

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

28 Under CDC 501-8.5(C), exceptions to the access criteria in CDC 501-8.5(B)
29 can be allowed through approval of an access management plan that explains
30 ‘the need for the modification and demonstrate[s] that the modification
31 maintains the classification function and integrity of the [applicable
32 transportation] facility.’ CDC 501-8.5(C)(2). The hearings officer did not
33 require that the proposed accesses comply with the access standards in CDC
34 501-8.5(B) and did not require that the applicant justify its failure to comply
35 with the CDC 501-8.5(B) access standards by preparing an access
36 management plan under CDC 501-8.5(C). * * *.” *Meadow Neighborhood*
37 *Assoc. I*, 54 Or LUBA at 126-27 (record citations omitted).

38 In the hearings officer’s decision that was before us in *Meadow Neighborhood Assoc.*
39 *I*, the hearings officer approved the proposal under a CDC provision that governs
40 nonconforming uses. Following our remand in *Meadow Neighborhood Assoc. I*, the hearings

1 officer did not rely on those nonconforming use provisions and instead approved the
2 proposal based on a condition of approval that requires the applicant to prepare and obtain
3 approval of an access management plan.

4 **ASSIGNMENT OF ERROR**

5 As explained in our discussion of the facts above, the two driveways that the
6 applicant proposes for SW 91st Avenue violate the CDC 501-8.5(B)(2) requirement that the
7 accesses be located beyond the influence of the southbound standing queue on SW 91st
8 Avenue as it approaches SW Beaverton Hillsdale Highway. In addition, the single access
9 that is proposed for Beaverton Hillsdale Highway violates CDC 501-8.5(B)(4)(a), which
10 requires that such access be not less than 600 feet from the Beaverton Hillsdale Highway/SW
11 91st Avenue intersection. The hearings officer found that all three of these accesses violate
12 applicable CDC 501-8.5(B) access spacing standards.¹

13 CDC 501-8.5(C) authorizes the county to approve proposed development,
14 notwithstanding that the access that is proposed for that development violates applicable
15 CDC 501-8.5(B) access spacing standards, provided the applicant prepares and the county
16 approves an access management plan. An access management plan must explain why the
17 CDC 501-8.5(B) access spacing standard should be modified and “demonstrate that the
18 modification maintains the classified function and integrity of the facility.” CDC 501-
19 8.5(C)(2). An access management plan must be prepared by a certified traffic or civil
20 engineer. CDC 501-8.5(C)(3). An access management plan must (1) identify a minimum
21 study area, (2) address “potential safety and operational problems” with the proposed
22 modified access, (3) compare all alternatives examined, (4) include a list of improvements
23 and (5) “include a list of improvements and recommendations necessary to [address] all

¹ In his decision on remand, the hearings officer only explicitly found that the accesses onto SW 91st Avenue violated the relevant CDC spacing standard, but it is undisputed that the proposed access onto SW Beaverton Hillsdale Highway also violates CDC spacing standards.

1 safety and operational concerns identified.” The complete text of CDC 501-8.5(C) is set out
2 in the margin.²

3 The application at issue in this appeal does not include an application for approval of
4 an access management plan. In approving the disputed car wash, following our remand in

² CDC 501-8.5(C) provides:

“Exception to Access Criteria

- “(1) Alternate points of access may be allowed if an access management plan which maintains the classified function and integrity of the applicable facility is reviewed and approved by the Review Authority after considering the applicant’s compliance with this Article.
- “(2) An application for an Access Management Plan shall explain the need for the modification and demonstrate that the modification maintains the classified function and integrity of the facility. References to standards or publications used to prepare the Access Management Application shall be included with the application.
- “(3) An access management plan shall address the safety and operational problems which would be encountered should a modification to the access spacing standards be granted. An access management plan shall be prepared and certified by a traffic or civil engineer registered in the State of Oregon. An access management plan shall at minimum contain the following:
- “(a) The minimum study area shall include the length of the site’s frontage plus the distance of the applicable access spacing standard, as set forth in Section 501-8.5 B., measured from the property lines or access point(s), whichever is greater. * * *
- “(b) The access management plan shall address the potential safety and operational problems associated with the proposed access point. The access management plan shall review both existing and future access for all properties within the study area as defined above.
- “(c) The access management plan shall include a comparison of all alternatives examined. At a minimum, the access management plan shall evaluate the proposed modification to the access spacing standard and the impacts of a plan utilizing the County standard for access spacing. Specifically, the access management plan shall identify any impacts on the operations and/or safety of the various alternatives.
- “(d) The access management plan shall include a list of improvements and recommendations necessary to implement the proposed access modification, specifically addressing all safety and operational concerns identified.
- “(4) Notice for a proposed access management plan shall include all property owners within the study area defined in 501-8.5 C. (3)(a).”

1 *Meadow Neighborhood Assoc. I*, the hearings officer imposed the following condition of
2 approval:

3 “E. Obtain County approval of an access management plan for the site
4 pursuant to CDC 501-8.5(C), subject to at least a Type II review.”
5 Record 16.

6 The above condition of approval must be satisfied “prior to commencing any on-site
7 improvements[.]” Record 15.

8 A recurring question in discretionary land use decision making is determining
9 whether, and under what circumstances and conditions, a decision maker may approve a
10 development application and defer required findings regarding applicable approval criteria to
11 a later stage of development review. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48
12 (1992). Provided local law does not dictate a different result, local governments generally
13 may approve a proposed development of land after providing any required notice and
14 hearings—without finding that the proposal complies with all relevant approval criteria—so
15 long as the local government defers the required findings to a later stage and ensures that a
16 second opportunity for any required notice and public hearing is provided before the required
17 findings are adopted at that later stage. *Gould v. Deschutes County*, 216 Or App 150, 162,
18 171 P3d 1017 (2007); *Rhyne*, 23 Or LUBA at 448.

19 Petitioners recognize the general principle described above, but argue that such
20 deferral is not appropriate in this case, even though the hearings officer’s condition requires a
21 second opportunity for public participation before the county could approve the access
22 management plan that will be required for the car wash proposal to go forward. Citing
23 *Sunningdale-Case Heights Assoc. v. Washington County*, 34 Or LUBA 549 (1998)
24 (*Sunningdale*), petitioners argue:

25 “[The hearings officer] failed to consider the obvious problem that the
26 essential elements of an access management plan, namely the location and
27 configuration of accesses and the nature and intensity of the traffic using the
28 accesses, have already been determined by his approval of development
29 review. Among the requirements of an access management plan is a

1 comparison of all alternatives examined. *The hearings officer precluded any*
2 *alternatives other than the one he approved.*

3 “In any event, the decision making options discussed in *Rhyne* are not
4 available where, as here, the criteria for the present and the future approvals
5 are necessarily dependent on one another. *Because of the matters established*
6 *by the development review approval, the issues to be examined in an access*
7 *management plan review will be moot.”* Petition for Review 8-9 (citations
8 omitted; emphases added).

9 Petitioners read the holding in *Sunningdale* too broadly, and have an erroneous
10 understanding of the legal effect of the hearings officer’s decision in this case on the analysis
11 that will be required for the county to approve an access management plan for the accesses
12 that the hearings officer approved for the disputed car wash. While we tend to agree with
13 petitioners that it would make more sense to secure access management plan approval before
14 securing approval for the car wash and its accesses, we do not agree that the county and
15 intervenor are legally required to proceed in that order.

16 We reject petitioners’ argument that the hearings officer’s decision in this appeal
17 precludes consideration of alternatives “other than the one he approved” or renders “moot”
18 any issues that might arise in preparing, reviewing and making a decision on the access
19 management plan that is required by the hearings officer’s decision. In fact, we do not see
20 that the hearings officer’s decision in this case has any bearing on the county’s review of the
21 required access management plan, other than to make it likely that intervenor will seek
22 approval for an access management plan that includes the accesses that have now been
23 conditionally approved. If the accesses that have been conditionally approved by the
24 hearings officer do not satisfy the criteria set out in CDC 501-8.5(C), the county presumably
25 will deny any application for approval of an access management plan that includes those
26 accesses. Similarly, we see no reason why the county could not determine in reviewing an
27 access management plan that proposed modifications to access requirements need to be
28 further changed or that the development anticipated in the access management plan must be
29 modified to allow the access management plan to be approved. If the county has such

1 authority under CDC 501-8.5(C), we do not believe that authority is affected by the fact that
2 the disputed car wash and its accesses have received conditional approval *before* the access
3 management plan that will be needed to authorize construction of those accesses has been
4 approved. If accesses other than the ones approved by the hearings officer are required under
5 CDC 501-8.5(C), that simply means that the car wash and accesses that have been
6 conditionally approved will have to modified and receive county approval as modified.

7 *Sunningdale* concerned a county decision that conditionally approved a partition. As
8 a condition of partition approval, the county required that the applicant later seek review to
9 determine whether the parcels that were created by the partition complied with applicable
10 criteria that governed infill development. Petitioners in that appeal argued the partition
11 approval effectively dictated the result in the subsequent infill development review. As we
12 explained in *Sunningdale*:

13 “Petitioners argue that the terms and tenor of [the infill standards] prohibit the
14 county from approving a partition without contemporaneously considering
15 and finding compliance with the requirements of [the infill standards]. We
16 understand petitioners to contend that deferral under these circumstances
17 effectively nullifies the [infill] standards * * *, because the partition approval
18 necessarily determines crucial elements of the development review required
19 by [the infill standards], *i.e.* the size and configuration of the three new lots
20 and the access and circulation patterns for those lots, thus preventing
21 meaningful consideration of those factors during subsequent proceedings. In
22 short, petitioners contend that the [infill standards] are inextricably entwined
23 with partition approval, and thus [the CDC] requires contemporaneous
24 consideration of all aspects of the development proposal affecting the [infill
25 standards].

26 “* * * * *

27 “* * * We agree with petitioners that the [infill standards] and partition
28 approval are necessarily dependent upon one another. The partition approval
29 predetermines much of the inquiry required by the [infill standards]. At the
30 subsequent proceeding, *the partition itself and hence the size, configuration,*
31 *access and circulation of the lots will be moot issues, preventing any*
32 *meaningful review of those factors in determining whether the proposed*
33 *partition and infill are ‘compatible with existing development.’” *Id.* at 557-*
34 *58.*

1 Based on a concern that the partition approval would render the subsequent review moot, we
2 concluded in *Sunningdale* that the county erred in deferring its review under the infill
3 standards to a date after it granted partition approval. We did not appear to consider the
4 possibility that subsequent review against the infill standards might ultimately require that
5 the approved partition be modified.

6 Regardless of whether the above-quoted view of the legal effect of the partition
7 approval in *Sunningdale* was correct, it is clear that our ruling in *Sunningdale* was based on a
8 concern that the conditional partition approval would have the legal effect of rendering issues
9 in the subsequent review “moot” and have the effect of “preventing any meaningful review”
10 of the infill criteria. For the reasons we have already explained, we do not see that the
11 hearings officer’s conditional approval of the car wash and proposed access has any legal or
12 preclusive effect on the review that will be required under CDC 501-8.5(C) to approve the
13 access management plan that is required by the hearings officer’s condition. Given that
14 different view of the legal effect of the hearings officer’s decision in this case, *Sunningdale*
15 does not provide authority for concluding that the conditional approval in this case is
16 improper.

17 Petitioners’ assignment of error is denied.

18 The county’s decision is affirmed.