BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SCOTT DAHLEN,
Petitioner,

vs.

CITY OF BEND,
Respondent,

and

BROKEN TOP COMMUNITY ASSOCIATION,
Intervenor-Respondent.

LUBA No. 2007-251

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Reeve Kearns, PC.

Peter M. Schannauer, Bend, filed the response brief and argued on behalf of respondent. With him on the brief was Forbes & Schannauer, LLP.

Edward P. Fitch and Lisa D.T. Klemp, Redmond, represented intevenor-respondent.

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

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

REVERSED 11/21/2008

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

Petitioner challenges a declaratory ruling initiated by the city determining that a residential-zoned lot owned by petitioner is a dedicated buffer area and thus unbuildable.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to respond to waiver arguments in the city's brief. There is no opposition to the motion, and the reply brief is allowed.

MOTION TO STRIKE

Petitioner moves to strike from the response brief references to and quotations from three letters from petitioner that are not in the record. The city does not argue that the letters are in the record, or offer any basis to consider extra-record documents. The motion is granted, and the Board will not consider the three letters or the portions of the response brief that refer to or quote from the three letters.

FACTS

In 2003, petitioner purchased tax lot 100, a narrow 1.92-acre lot along the east side of Mt. Washington Drive in the City of Bend. Tax lot 100 is part of the Broken Top Planned Unit Development (PUD), and is zoned Urban Standard Density Residential (RS). The property includes a small earthen berm and some landscaping but otherwise is undeveloped.

After petitioner attempted to remove trees on tax lot 100, the city issued a cease and desist letter, under the belief that tax lot 100 (1) is not a legal lot, and (2) is not a buildable lot, because it is a dedicated as an open space buffer. In response, petitioner initiated a legal lot determination process, and the city hearings officer ultimately determined that tax lot 100 is a legal lot of record.

City planning staff subsequently initiated its own declaratory ruling process on the question of "whether and to what extent the subject property may be developed with uses other than a landscaped open space buffer[.]" Record 30. City staff took the position that the

1991 or 1992 PUD approvals that created the Broken Top PUD reserved tax lot 100 as a dedicated open space or buffer.

After conducting two evidentiary hearings in which petitioner participated, the city hearings officer agreed with the city that the 1991 PUD decision had implicitly reserved tax lot 100 as a landscaped open space buffer, and therefore tax lot 100 is not a buildable lot. Petitioner appealed the declaratory ruling decision to the city council, which declined to hear the appeal. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner challenges the hearings officer's conclusion that the 1991 PUD approval effectively restricted the use of tax lot 100 to a landscaped buffer area. For the following reasons, we agree with petitioner that the hearings officer erred in that respect.

Some review of the history of the Broken Top development is necessary to understand the parties' contentions. Most of the following is undisputed; we attempt to note where the parties disagree.

A. The 1991 PUD Approval and Plan Map Amendment

In June 1991, the county hearings officer granted a set of applications for the Broken Top PUD, including (1) a master plan for a seven-phase PUD, and (2) a comprehensive plan map amendment to the Bend Area General Plan to relocate Mt. Washington Drive from the location depicted on that map to the northeast corner of the PUD area. As part of those applications, the developer proposed that a strip of land on the east side of the relocated Mt. Washington Drive be a landscaped buffer area, to buffer the residents of an adjoining residential subdivision from the impacts of moving Mt. Washington Drive.[1] The Broken Top

[1] The developer's Burden of Proof narrative stated in relevant part that "[a] 90-foot easement for visual buffering will be provided to protect the existing homes from Mt. Washington Drive." Record 438. A different portion of the Burden of Proof states that the 80-foot wide Mt. Washington Drive right of way "will be bordered on both sides by easements to provide a visual and noise buffer. These easements will have a combined width of 120 feet, with 90 feet between the right-of-way and the Overturf Butte Subdivision and 30

PUD developer submitted Exhibit 20A, a drawing or set of drawings of the proposed landscape buffer along Mt. Washington Drive. The county hearings officer cited Exhibit 20A in his findings, under the heading of "Roads."

> "The Hearings Officer finds that the landscape buffer and construction methodology proposed by the Applicant for Mount Washington Drive will mitigate any adverse impacts of the relocation of Mount Washington Drive, *vis a vis* the Overturf Subdivision (see Exhibit 20A, Mount Washington landscape buffer drawings). Since there will not be any direct access into the Overturf Butte Subdivision, the Hearings Officer believes that Mount Washington Drive will not have any adverse impact in terms of circulation or noise, in light of the buffer and the methodology of construction." Record 120.

Unfortunately, Exhibit 20A cited by the county hearings officer has been lost, and it is not known precisely what the drawings in Exhibit 20A depicted. However, there is little real disagreement that it consisted of a drawing or drawings of a proposed landscaped buffer area along the east side of the relocated Mt. Washington Drive right of way. Whether that proposed area included what is now tax lot 100 is less clear, but we assume for purposes of this opinion that the Exhibit 20A landscape drawings depicted the area that is now tax lot 100, among others, as a landscaped buffer area.

The county hearings officer again referenced the proposed landscape buffer in discussing the applicable PUD criteria, which require a finding that the project will be compatible with adjacent development and will not adversely affect the character of the area. The county hearings officer noted that "[t]he project will be separated from the only subdivision adjacent to it (Overturf Subdivision) by Mount Washington Drive and a considerable landscape buffer." Record 125.

The county hearings officer recommended approval of the proposed plan amendment to relocate Mt. Washington Drive, and approved the PUD application and related applications, subject to conditions of approval. Notably, none of the conditions of approval

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feet between the right of way and Broken Top." Record 448. The developer proposed a berm and landscaping along the entire length of Mt. Washington Drive adjacent to the Overturf Butte neighborhood.

that were imposed on the PUD approval require a landscaped buffer area or easements along the east side of Mt. Washington Drive. On September 4, 1991, the board of county commissioners adopted an ordinance amending the Bend Area General Plan map to reflect the realignment of Mt. Washington Drive.

There were apparently two Broken Top Master Plans, one dated January 18, 1990, and another dated October 10, 1990, that were before the county hearings officer during the 1991 proceedings. It is not clear which one the county hearings officer approved. The January 18, 1990 master plan shows the Mt. Washington Drive right-of-way in the northeast corner of the property. Beside it is the label "Buffer Easements" with arrows pointing to two strips of land on the east and west sides of the Mt. Washington Drive right-of-way. Record 348, Oversize Exhibit 3 (excerpt at Record 140). The eastern strip of land appears to include the area that is now tax lot 100. The October 10, 1990 master plan shows less detail, but depicts the Mt. Washington Drive right-of-way and labels it "200' Mt. Washington Blvd. Easement and Buffer." Record 349, Oversize Exhibit 4 (excerpt at Record 141).

B. 1992 PUD Master Plan

In early 1992, the Broken Top PUD developer submitted applications for (1) a new six-phase Broken Top PUD master plan and (2) tentative subdivision plat approval for phase I under that master plan. The 1992 PUD master plan differed in a number of ways from the earlier approved 1991 PUD master plan, providing for six phases instead of seven, for example. Unlike the 1991 PUD master plan, the 1992 PUD master plan included no references to "buffer easements" along the east side of Mt. Washington Drive, although the strip along the west side is labeled "bicycle/pedestrian path." Oversize Exhibit 2, Record 299.

On February 20, 1992, the county planning director approved the 1992 PUD master plan and the phase I tentative subdivision plat. The planning director's findings do not discuss any kind of landscape buffer along the east side of Mt. Washington Drive, and the

conditions of approval imposed on the 1992 PUD include no requirements regarding a landscape buffer in that location. The parties disagree about whether the 1992 PUD master plan approval superseded the 1991 PUD master plan approval.

C. 1992 Variance Approval

The Broken Top PUD developer initially appealed several conditions of the planning director's February 20, 1992 PUD master plan and tentative plat approval, including a requirement to construct sidewalks on both sides of Mt. Washington Drive north of Simpson Avenue. At some point, the developer chose to file an application seeking a variance to the county subdivision standards that required a sidewalk on both sides of Mt. Washington Drive, and that variance application was apparently combined with the appeal of the February 20, 1992 PUD master plan and tentative plat conditions. The same county hearings officer who approved the 1991 PUD master plan presided over the combined appeal/variance proceeding. The county hearings officer approved the variance with respect to the sidewalks and denied the appeal with respect to other challenged conditions.

In approving the variance, the hearings officer cited "the fact that there is a 200 foot wide corridor through which Mt. Washington Drive is situated, as shown on the original Master Plan approval for the Broken Top Planned Unit Development. In addition to the 80 foot right of way, there are significant buffers on both sides of the right of way for protection of both the Broken Top Development itself, and the Overturf Butte Subdivision to the east." Record 249. Further, the hearings officer cited "the fact that Mt. Washington Drive is being situated within a 200 foot wide corridor with significant buffering on both sides of the 80 foot right of way." Record 250.

D. Subsequent Tentative and Final Subdivision Plats

In the years following the 1992 PUD approval, the developer submitted and the county approved tentative and final subdivision plats through phase VI. Each of the approved subdivision plats states that it is "Per Master Plan (MP 92-1)," the 1992 Master Plan. The

subdivision plat for Phase III, which covers the PUD area north of Simpson Avenue that appears to include what is now tax lot 100, depicts a 90-foot wide strip east of Mt. Washington Drive, but does not identify it as a tract, common area, buffer area or anything similar. Record 198. The Phase III subdivision plat does identify a 30-foot wide strip along the *west* side of Mt. Washington Drive as "Tract S", where the 1992 PUD identified a "bicycle/pedestrian path." *Id.* Notably, the subdivision plat for Phase I *south* of Simpson Avenue identifies a 90-foot wide strip along the east side of Mt. Washington Drive as "Tract D" and "common area", and a 30-foot wide strip along the west side of Mt. Washington Drive as "Tract C." Record 170. None of the tentative or final subdivision plats approved for the Broken Top PUD include any language or restriction regarding the 90-foot wide strip on the east side of Mt. Washington Drive north of Simpson Avenue, where tax lot 100 is located. Indeed, tax lot 100 is not included in any of the Broken Top PUD subdivision plats.[2]

The Broken Top PUD was annexed into the city in 1996. The 1992 PUD master plan has been revised and extended in the intervening years. Like the 1992 PUD master plan, the most recent master plan in the record does not identify or limit tax lot 100 as a buffer of any kind, or indeed identify tax lot 100 in any way. Record 613, Oversize Exhibit 5.

E. The City Hearings Officer's Findings

In the challenged decision, the city hearings officer reviewed the 1991 and 1992 PUD master plans and the county hearings officer's findings quoted above, which support approval of the 1991 PUD master plan and recommend approval of the comprehensive plan map amendment. The hearings officer concluded that in approving the 1991 PUD master plan the county hearings officer relied upon Exhibit 20A and the proposed buffer to satisfy

[2] The city hearings officer concluded in her lot of record determination that what is now known as tax lot 100 is a legal remainder lot created as a result of several city actions approving the platting, dedication, or lot of record status for all the surrounding lots and parcels. Record 663. The stretch of Mt. Washington Drive adjacent to tax lot 100 was actually platted and dedicated as part of Golden Butte Phase I subdivision, which adjoins tax lot 100 to the northeast. Record 351.

the applicable PUD and comprehensive plan amendment criteria. Citing several LUBA cases, the hearings officer concluded therefore that no explicit condition of approval is necessary to limit the use of tax lot 100 to a landscaped buffer area.[3]

Apparently in acknowledgment of petitioner's argument that the 1992 PUD master plan approval had superseded the 1991 PUD master plan approval, the hearings officer concluded that the 1991 comprehensive plan map amendment that was necessary to relocate Mt. Washington Drive had no "expiration date," and "therefore any change to the alignment

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[3] The city hearings officer's findings state, in relevant part:

> "* * * The record indicates the subject property was specifically identified as a landscape buffer in exhibits submitted as part of Broken Top's development proposals, in particular in Exhibit 20A to Broken Top's proposed plan amendment to move the alignment of Mt. Washington Drive. I find this exhibit clearly constituted more than a mere statement of intent by Broken Top. In addition, the above-quoted findings from former Hearings Officer Ed Fitch's 1991 and 1992 Broken Top decisions make clear that he relied on the buffer in approving both the plan amendment to move the alignment of Mt. Washington Drive adjacent to the Broken Top PUD and the variance to the improvement standards for that segment of Mt. Washington Drive. Moreover, I find from Mr. Fitch's 1991 and 1992 decisions that the landscape buffer submitted in support of the proposed plan amendment and variance was required to demonstrate compliance with the approval criteria for these applications.
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> "The Hearings Officer finds the circumstances presented in this case are like those in [*Wilson Park Neighborhood Association v. City of Portland*, 27 Or LUBA 106, 123-24, *rev'd on other grounds*, 129 Or App 33, 877 P2d 1205 (1994); *Perry v. Yamhill County*, 26 Or LUBA 73, 87, *aff'd* 125 Or App 588, 865 P2d 1344 (1993); and *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411, 421, *aff'd* 123 Or App 256, 860 P2d 278, *on recon* 125 Or App 122, 866 P2d 463 (1993)] in which LUBA held no condition of approval was required to make binding those restrictions submitted by the applicant as part of its proposal. The creation of a 90-foot-wide landscape buffer along the east side of the realigned Mt. Washington drive was an integral part of Broken Top's plan amendment and variance proposals, was proposed by Broken Top specifically to gain those approvals, and was relied on by Mr. Fitch in granting those approvals. Of equal importance, Broken Top put the restriction on the subject property into effect when it constructed Mt. Washington Drive and the 90-foot-wide landscape buffer within the alignments proposed by Broken Top and approved by Mr. Fitch through his 1991 and 1992 decisions. Broken Top never has disavowed this restriction. To the contrary, the record indicates that during the years between Mr. Fitch's 1991 and 1992 decisions and Mr. Dahlen's 2003 purchase of the subject property, Broken Top has continuously treated and maintained the subject property as a landscape buffer. Finally, the staff report states, and I agree, that there was no expiration date on the Mt. Washington Drive plan amendment approved in 1991, Broken Top initiated the approval when it constructed Mt. Washington Drive and the landscape buffer in the approved alignments, and therefore any change to the alignment of the road and/or the adjacent landscape buffer on the subject property would require another plan amendment." Record 41.

of the road and/or the adjacent landscape buffer on the subject property would require another plan amendment." Record 41.

Petitioner challenges those conclusions, arguing that the hearings officer erred in concluding that the 1991 PUD master plan approval effectively limited the use of tax lot 100 to a landscaped buffer area. To the extent the 1991 PUD master plan decision imposed such a limitation, petitioner argues, it was superseded by the 1992 PUD master plan approval, which clearly did not impose any such limitation. Further, petitioner disputes the hearings officer's conclusions that the 1991 comprehensive plan map amendment limited the use of tax lot 100 to a landscaped buffer area and that removing that limitation would require a comprehensive plan amendment.

F. Limits Imposed by the 1991 PUD Approval.

We generally agree with the hearings officer that 1991 PUD master plan approval had the effect of limiting the use of the 90 foot wide strip of land east of Mt. Washington Drive to a landscape buffer. The landscape buffer was proposed to satisfy applicable PUD criteria, a specific plan was submitted showing the proposed buffer area, the county hearings officer relied on that plan and that proposal to conclude that the PUD criteria were satisfied and, most importantly, the approved PUD master plan identified that strip of land as a "buffer."

We say "most importantly," in the preceding paragraph because in our view the clearest circumstance in which a condition of approval is unnecessary is when the applicant applies for and obtains local government approval of a proposed plan (such as a preliminary subdivision plan) that is intended to govern the development of the site, and that plan clearly depicts a particular feature that future necessary approvals (such as the final plat and building permits) must be consistent with. *See NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277, 288-89 (2007) (where city approves preliminary PUD plan that specifically describes proposed housing as senior housing, a condition of approval requiring senior housing is not necessary, because the final PUD plan must be consistent with the

preliminary PUD plan). Conversely, where the applicant makes proposals orally at the hearing or in a document that is auxiliary to the application, such as the application narrative or a supporting study, if the local government wishes to ensure that those proposals are implemented and become enforceable the safest course is to impose an explicit condition of approval to that effect. *See Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290, 306 (2007) (recommendations in a forest plan discussed and relied upon by the hearings officer are insufficient to ensure that those recommendations are implemented in support of a large tract dwelling permit application, absent an explicit condition of approval); *Culligan v. Washington County*, __ Or LUBA __ (LUBA No. 2008-038, September 5, 2008) slip op 8 (the applicant's promise in the subdivision application narrative to provide senior housing is not sufficient to make a condition of approval to that effect unnecessary).

In the present case, the approved 1991 PUD master plan explicitly identified the strip east of Mt. Washington Drive as a "buffer." Had the developer submitted tentative subdivision plans for approval based on the 1991 PUD master plan, there is little doubt that the county would have required that the applicable tentative subdivision plans and final subdivision plats identify that strip of land as a buffer, consistent with the 1991 master plan requirement for a "buffer," the hearings officer's PUD approval and Exhibit 20A. *See* ORS 92.010(18) (defining "subdivision plat" as a final map and other writing containing all the descriptions, locations, specifications, dedications, provisions and other information concerning a subdivision). While an explicit condition of approval might have helped ensure that result, it likely would have been unnecessary in that circumstance. In other words, had the 1991 master plan decision been appealed to LUBA, we would likely have concluded, as we did in *NE Medford Neighborhood Coalition*, that the 1991 master plan effectively required that the strip of land east of Mt. Washington Drive be used as a landscape buffer, and an explicit condition of approval to that effect was not necessary.

The difficulty in the present case is that, as far we can tell from the record, the 1992 master plan approval superseded the 1991 master plan approval, and nothing in the 1992 master plan map or the 1992 approval required that the strip of land east of Mt. Washington Drive be used as a landscape buffer. Assuming that the approval standards that led to the requirement for the landscape buffer in the 1991 PUD master plan approval remained in effect in 1992, the failure to include the landscape buffer strip in the 1992 PUD master plan was likely error. But even if the failure was error, the 1992 PUD master plan approval was not appealed and the error was not corrected. Each of the tentative subdivision plans and final subdivision plats that were subsequently approved were based on the 1992 master plan, not the 1991 master plan, and none of the subdivision plats require a landscaped buffer area east of Mt. Washington Drive and north of Simpson Avenue.

The city argues in its response brief that the 1992 PUD master plan approval was simply a revision of the 1991 PUD master plan, submitted only to show that the PUD satisfied minimum density requirements. The city notes that Condition 20 of the 1991 decision required such a revised PUD master plan.[4] The city also argues from the earlier quoted findings from the hearings officer's variance decision that the county understood that the 1991 PUD master plan approval remained in effect and was not superseded by the 1992 PUD. According to the city, both of the 1991 and 1992 PUD master plans continued in effect, and therefore the limitations associated with the 1991 PUD master plan approval with respect to the buffer area were not superseded by the 1992 master plan approval.

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[4] Condition 20 of the 1991 county hearings officer's decision required the developer to:

> "Provide a minimum density in the Broken Top planned unit development to comply with the minimum density requirements of the Bend Urban Area Plan as set forth in the Findings above. The provision of such density is to be reflected in a revised master plan wherein the provision of public facilities, roads and the golf course shall not be materially altered." Record 132.

It is not clear from the record whether the 1992 master plan is simply a revision of the 1991 PUD master plan, or an entirely new master plan based on a new application. The planning director's decision approving the 1992 PUD master plan appears to apply all applicable PUD master plan approval criteria, and does not suggest that the submitted master plan was simply a limited purpose revision of the 1991 master plan to address density requirements. The planning director imposed a full set of conditions on the 1992 PUD master plan approval that are more extensive and detailed than those imposed by the county hearings officer on the 1991 PUD master plan. Further, the 1992 master plan appears to differ significantly from the 1991 PUD master plan, most obviously with respect to phasing but also with respect to the location of roads. The 1992 PUD master plan appears to be more than the simple revised plan required by Condition 20.

However, even if the 1992 master plan was intended to be a revision of the 1991 PUD master plan, once approved it became the controlling document for purposes of future land use approvals, such as tentative subdivision plans filed for each phase. For whatever reason, the approved 1992 PUD master plan eliminated the narrative labels that describe the 90-foot wide area east of Mt. Washington Drive as a "buffer," that were found on the 1991 master plan. That 1991 master plan was effectively superseded. Based on the 1992 PUD master plan, the county approved tentative subdivision plans and final subdivision plats for each of the six phases, none of which depict any kind of limitation on the area including the subject property. Many of those final subdivision plats do depict various open space and common area tracts, including Tract D, which is the 90 foot wide strip of land east of Mt. Washington Drive *south* of Simpson Avenue, and Tract S, which is the 30 foot wide strip of land west of Mt. Washington Drive and north of Simpson Avenue. The fact that some final subdivision plats include such tracts no final subdivision plat depicts tax lot 100 in that way suggests that the county understood that the controlling master plan imposed no similar limitations on tax lot 100. Again, the approval of the 1992 PUD master plan without any limitation on the use

of the land that is now included in tax lot 100 may have simply been an oversight, but even if so we do not see how that oversight can be corrected now. We note that, as conditioned, the 1992 PUD master plan was effective for five years, in which time the Broken Top PUD developer was required to complete platting all six phases. Record 165. Although subsequently extended and revised through the year 2002, we understand that the most recent master plan (Oversize Exhibit 5) is now expired.

For the reasons explained above, we agree with petitioner that the hearings officer erred in concluding that the 1991 PUD master plan approval continues to restrict the use of tax lot 100 to a buffer area.

G. Amendment to the Bend Area General Plan Map

In the challenged declaratory ruling, the city hearings officer also found, apparently in the alternative, that

> "* * * there was no expiration date on the Mt. Washington Drive plan amendment approved in 1991, Broken Top initiated the approval when it constructed Mt. Washington Drive and the landscape buffer in the approved alignments, and therefore any change to the alignment of the road and/or the adjacent landscape buffer on the subject property would require another plan amendment." Record 41.

Accordingly, the hearings officer concluded:

> "Because the restriction on the use of the subject property * * * was created [by] Deschutes County's approval of a plan amendment in 1991 to relocate the alignment of Mt. Washington Drive near the Broken Top PUD, any change to the permitted use of the subject property as declared in this decision will require a plan amendment." Record 42.

Petitioner challenges that conclusion, arguing that nothing in the Bend Area General Plan or any city or county comprehensive plan element requires that tax lot 100 or any other land adjoining the Mt. Washington Drive right-of-way be restricted to a buffer area. According to petitioner, the board of county commissioner's decision approving the plan map amendment to reflect the relocation of Mt. Washington Drive did not condition the map amendment on restricting the subject property to a buffer area. We agree with petitioner.

The county hearings officer's 1991 decision recommended approval of a map amendment to the Bend Area General Plan to relocate Mt. Washington Drive, along with an unrelated zoning amendment. The county board of commissioners subsequently adopted an ordinance approving that map amendment, based on that recommendation. The map attached to the ordinance shows the realigned right of way, but that map does not depict any buffer areas. Petitioner is correct that nothing in the text of the ordinance or the map amendment itself mentions buffers or requires a buffer. Petitioner argues, and it is undisputed, that nothing in the Bend Area General Plan depicts or refers to a buffer along the east side of Mt. Washington Drive. It is not clear, petitioner argues, why use of the property for a residential use consistent with its zoning and plan designation would require a new plan amendment, or what exact plan map or text would need amendment.

In the challenged decision, the city hearings officer does not explain why she concluded that the 1991 board of commissioners' decision adopting the plan map amendment had the effect of restricting the strip of land east of Mt. Washington Drive to a buffer area. The hearings officer identifies nothing in the 1991 ordinance that is the source of any such restriction.

In its response brief, the city notes that Section 3 of the ordinance adopting the plan map amendment adopts as findings the hearings officer June 21, 1991 decision as it related to the plan amendment.[5] The city argues that the buffer was an "integral part" of the proposed plan map amendment, and that when the board of commissioners adopted the county hearings officer's findings in support of that map amendment it necessarily imposed the

[5] Section 3 of Ordinance 91-031 provides:

> "The Board of County Commissioners adopts as its findings and decision in support of the plan amendments described herein, the Findings and Decision of the Hearings Officer, dated June 21, 1991, relating to Plan Amendment Application No. PA-90-10, marked Exhibit 'E,' attached hereto and by this reference incorporated herein. The Board's adoption of these Plan Amendments is subject to all conditions of approval set forth in the afore-mentioned Hearings Officer's decision." Record 311.

requirement that the strip of land east of Mt. Washington Drive be used as a buffer area. Therefore, the city argues, the hearings officer correctly concluded that the buffer restriction cannot be deleted without the adoption of another ordinance amending the Bend Area General Plan.

We disagree with the city that the board of commissioner's 1991 adoption of the ordinance amending the Bend Area General Plan map to depict the relocated Mt. Washington Drive had the effect of limiting use of the subject property as a buffer, such that a plan amendment is necessary to use the property for any use other than a buffer.

The board of commissioners was the decision maker for the comprehensive plan map amendment. The hearings officer merely recommended approval of the plan map amendment. The hearings officer did not (and could not) impose conditions on the plan map amendment and did not even recommend any conditions. Section 3 provides that the plan map amendment is "subject to all conditions of approval set forth in the afore-mentioned Hearings Officer's decision." However, that obviously refers to the explicit conditions of approval imposed at the end of the hearings officer's decision. As noted, the hearings officer's conditions of approval said nothing about a buffer.

The purpose of the plan map amendment was to amend the county transportation map to reflect the realignment of the Mt. Washington Drive right-of-way. We see no reason based on the 1991 ordinance to assume that the board of commissioners believed or intended that the plan map amendment also have the effect of requiring a buffer along the east side of Mt. Washington Drive. In our view, the fact that the board of commissioners adopted the hearings officer's findings recommending approval of the map amendment, and those incorporated findings discuss the proposed buffer, is an insufficient basis to conclude that the ordinance implicitly restricted the use of land adjacent to the realigned right-of-way to a buffer. To the extent the commissioners considered the matter, they may have reasonably

assumed that the buffer would be required as part of the 1991 PUD master plan approval, and any subsequent tentative and final subdivision plats based on that 1991 PUD master plan.

Accordingly, we conclude that comprehensive plan map amendment to realign Mt. Washington Drive did not include an implicit condition of approval requiring a buffer area east of the alignment. For that reason, the city hearings officer erred in concluding that the 1991 plan map amendment includes a condition limiting the subject property to a buffer area, and that developing the subject property for a residential use would require a new comprehensive plan amendment.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer exceeded her authority in conducting a declaratory ruling proceeding under the city's development code to construe *county* decisions. According to petitioner, Bend Development Code (BDC) 4.1.1410(a)(2) limits the hearings officer's authority under the declaratory ruling process to interpretations of *city* decisions.[6] The city responds that petitioner's challenge under BDC 4.1.1410(a) was not raised below and is therefore waived. In addition, the city disputes that BDC 4.1.1410(a) limits the hearings officer's authority to issue declaratory rulings regarding the meaning of permits within city limits.

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[6] BDC 4.1.1410(a) provides, in relevant part:

"Subject to the other provisions of this section, there shall be available for the City's comprehensive plans, zoning ordinances, the subdivision and partition ordinance and this ordinance a process for:

"*****

"2. Interpreting a provision or limitation in a land use permit issued by the City or quasi-judicial plan amendment or zone change in which there is doubt or a dispute as to its meaning or application[.]"

As explained below, our resolution of the first assignment of error requires that we reverse the hearing officer's decision. Accordingly, there is no purpose in resolving the second assignment of error.

We do not reach the second assignment of error.

THIRD ASSIGNMENT OF ERROR

Petitioner argues the city hearings officer's decision results in an uncompensated "taking" of petitioner's property, in violation of Article I, Section 18 of the Oregon Constitution and the Fifth Amendment to the United States Constitution, by declaring that the only permitted use of tax lot 100 is a buffer area.

We do not address this argument, because we concluded in the first assignment of error that nothing in the 1991 or 1992 hearings officer's decisions or the 1991 board of commissioners' plan map amendment had the effect of restricting the use of the subject property to a buffer area. Accordingly, we do not reach the third assignment of error.

CONCLUSION

OAR 661-010-0071 provides in relevant part that LUBA shall reverse a land use decision when the decision "violates a provision of applicable law and is prohibited as a matter of law," but LUBA shall remand a land use decision for further proceedings when the decision "improperly construes the applicable law, but is not prohibited as a matter of law." OAR 661-010-0071(1)(b), 661-010-0071(2)(d). Petitioner requests that we reverse rather than remand the hearings officer's decision.

Under our resolution of the first assignment of error, the hearings officer's conclusion that the 1991 county decisions limited the use of the subject property to a buffer area appears to be prohibited as a matter of law. As we understand the present circumstances, the only possible outcome of any proceeding on remand would be to declare that the use of the property is not so limited. Accordingly, we agree with petitioner that reversal rather than remand is the appropriate disposition.

The city's decision is reversed.