BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PATRICIA REINERT,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

RIVERSIDE AT FINLEY, LLC,
Intervenor-Respondent.

LUBA No. 2008-086

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Dorothy S. Cofield, Portland, filed the petition for review and argued on behalf of petitioner. With her on the brief was Cofield Law Office.

D. Daniel Chandler, Assistant County Counsel, Oregon City, filed a response brief on behalf of respondent.

Timothy V. Ramis, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was William A. Monahan and Jordan Schrader Ramis PC.

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

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

REMANDED 11/19/2008

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 appeals county approval of a 25-lot planned unit development (PUD) in two phases.

MOTION TO INTERVENE

Riverside at Finley, LLC (intervenor), the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

FACTS

The subject property is a 12.36-acre parcel zoned Urban Low Density Residential-10,000 square foot lot (R-10). The site is developed with the William Finley House, an 11,000 square foot mansion, and located on the east bank of the Willamette River. A narrow strip of river frontage is within the Willamette River Greenway. Between the mansion and the river the property slopes steeply down to the riverbank, with slopes up to 62 percent. An access road winds down the slope to the riverbank, where there is an existing boat ramp. Jewett Drive borders the property to the east, and Hull Avenue to the south.

Clackamas County Zoning and Development Ordinance (ZDO) 1012.08 requires that residential land within the urban growth boundary be developed at not less than 80 percent of its zoned density, which in the present case would require at least 25 lots. To satisfy ZDO 1012.08, intervenor proposed a PUD in two phases. Phase I plats the Finley House on a two-acre lot, several open space areas, and six large residential lots ranging from 32,198 square feet to 53,712 square feet in size. Phase I would be accessed from Hull Avenue via a new gated private street, Finley Drive. Phase II consists of 18 small lots in the northeast corner of the property, ranging in size from 3,465 to 4,914 square feet. Phase II would be accessed from Jewett Drive and a new dead end private street that would extend west from Jewett Drive. Appendix A to this opinion is a site plan that illustrates the proposed PUD.

The hearings officer conducted a public hearing and approved the PUD application, subject to conditions requiring that (1) Finley Drive be dedicated as a public street and provide a through connection from Hull Avenue to Jewett Drive, connecting Phase I and II, and (2) the applicant submit a geotechnical study demonstrating that proposed lots 5 and 6, closest to the river, are stable. This appeal followed.

FIRST ASSIGNMENT OF ERROR

ZDO Section 705 is the Willamette River Greenway District. ZDO 705.03(B) provides that "[a]ll intensification or change in use, or development shall require a Greenway Conditional Use permit." Petitioner argues that the PUD triggers the requirement to obtain a Greenway permit, because it intensifies uses within the greenway area.

The hearings officer found:

> "* * * A portion of the site is within the Willamette River Greenway. Development within the greenway is subject to the standards set out in ZDO 705. The applicant asserts that existing structures (the dock and boat ramp) will not become part of the common holdings of the development, and therefore no Greenway permit is needed at this time. Further, the applicant notes that the applicant proposes to retain approximately one-half of riverfront within a common open-space tract, and argues that the reservation of that open space is consistent with and furthers the purposes of the Greenway overlay of maintaining the existing natural conditions as much as possible. The hearings officer agrees." Record 11.

The hearings officer imposed a condition of approval prohibiting development within the Greenway without obtaining a permit.

Petitioner challenges the above finding, arguing that (1) nothing in the record indicates that access to the dock and boat ramp is limited to the Lot 5 owner, and (2) the act of creating lots 5 and 6 is itself an intensification or development of land within the Greenway boundary. Petitioner notes that the staff report found that under the ZDO definition of "develop," the act of subdividing land alone is considered "development" and therefore requires a Greenway permit. For that reason, petitioner argues, the staff report

recommended a condition requiring that the applicant obtain a Greenway permit prior to final plat approval.

Intervenor responds that the hearings officer correctly determined that no intensification or development will occur within the Greenway, and thus no Greenway permit is required. Intervenor notes, first, that although the above finding refers to a boat dock, in fact there is no boat dock on the subject property's river frontage, only a boat ramp. Second, intervenor argues that there is no "intensification" of uses within the Greenway because intervenor proposed and the hearings officer acknowledged that access rights to the boat ramp would be limited to the owner of Lot 5 and thus that the use of the boat ramp would be limited to residents of a single dwelling, as is the case today.

Intervenor does not respond to petitioner's argument that subdivision itself constitutes "development" as the ZDO defines that term. ZDO 705.02, part of the Greenway code provisions, states that the term "develop" includes "to divide land into parcels; to create or terminate rights of access." The term "development" is defined to mean "[t]he act, process or result of developing." As intervenor notes, county staff took the position that the act of subdividing the subject parcel to create lot lines within the Greenway itself constituted "development" and thus triggered the requirement for a Greenway permit.[1] The hearings officer did not address the staff position, and based on the text of the ZDO Greenway provisions the staff position appears to be correct. We agree with petitioner that remand is necessary to either address the Greenway permit requirements or condition approval on obtaining a Greenway permit prior to final plat approval.

The first assignment of error is sustained.

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[1] In addition, we note that the site plan shows a large area designated open space that appears to include part of the riverfront and Greenway. Intervenor proposed that open space areas would be common spaces accessible to all Phase I residents. If so, it is arguable that increasing the number of dwellings whose residents can access the Greenway constitutes an "intensification" of use as ZDO 705.02(B)(4) defines that term. *Id.* (defining intensification in part as an increase or expansion of "the level of activity").

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer erred in failing to require that the applicant satisfy the "Hillsides" standards at ZDO 1002.03 and the "Mass Movement Hazard Areas" standards at ZDO 1003.02 with respect to lots 5 and 6, prior to final subdivision plat approval, under a process that offers notice and the opportunity for public participation.

ZDO 1002.03 is entitled "Hillsides" and provides:

> "All development proposed on slopes of 20 percent or greater shall be limited to the extent that:
>
> "A. No partition or subdivision shall create any new lot or parcel which cannot be developed under the provisions of this section.
>
> "B. Development on land over 35 percent slope—and residential land over 25 percent slope in the RR, MRR and HR zoning districts—shall be subject to Planning Director review pursuant to [ZDO] 1305.02. * * *"

Intervenor argued to the hearings officer that only ZDO 1002.03(A) refers to and is applicable at the time of subdivision approval, and that in contrast ZDO 1002.03(B) does not require review at the time of tentative subdivision approval. According to intervenor, ZDO 1002.03(B) can be satisfied by requiring review under the Mass Movement Hazards Areas standards at ZDO 1003.02 prior to receiving a building permit or construction approval for a specific proposed structure.

The hearings officer apparently agreed with that view of ZDO 1002.03, and imposed Condition 17 and 18, which require a geotechnical assessment of lots 5 and 6 at two different stages.[2] Condition 17 requires a geotechnical report prior to final plat approval

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[2] The hearings officer's decision states, in relevant part:

> "* * * Portions of the site include steep slopes. [The ZDO] requires that development on steep slopes be limited or prohibited unless measures have been taken to minimize slope failure and erosion. Staff and the applicant argue that these standards apply to *development* of the site, and not directly to the creation of the lots themselves. Nevertheless the parties agreed that the subdivision standards prohibit the creation of a lot that cannot be developed, so preliminary findings must be made at the subdivision stage that the proposed lots can adequately accommodate development. Here, the lots at issue are large, and include areas that are not steeply sloped. There is no evidence that those shallow-sloped areas are unstable

demonstrating that lots 5 and 6 are stable, apparently to ensure compliance with ZDO 1002.03(A). Condition 18 requires that the applicant obtain county approval prior to building permit issuance for the "specific structure intended for that lot," to ensure compliance with ZDO 1002.03(B) and ZDO 1003.02. The permit process required under Condition 18, at ZDO 1305.02, requires notice and opportunity for public participation. However, the hearings officer did not require a similar public process under Condition 17.

Petitioner argues that both ZDO 1002.03(A) and (B) must be addressed prior to final subdivision plat approval, pursuant to procedures that provide notice and the opportunity for public participation. Intervenor responds that the hearings officer correctly determined that the review required by ZDO 1002.03(B) can be addressed at the time of actual development, prior to building permit approval, and that ZDO 1002.03(A) requires only "preliminary findings * * * at the subdivision stage that the proposed lots can adequately accommodate development." Record 12. According to intervenor, the hearings officer made a finding, supported by substantial evidence in the record, that lots 5 and 6 include areas that are not

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> or unsuitable for development. Further, staff has recommended that conditions of approval be imposed to require the applicant to submit a geotechnical study prior to the filing of the final subdivision plat. Staff argues that if for some reason one or more of the lots cannot be made suitable for development, the final subdivision approval can be withheld. The hearings officer agrees that, as conditioned, the evidence supports a finding that it is feasible to comply with this standard. * * *" Record 12 (emphasis in original).

Conditions 17 and 18 state:

> "17. Prior to final plat approval, the applicant shall submit an engineering geologic study or geotechnical report consistent with Section 1003.02(B)(2) of the ZDO demonstrating that Lots 5 and 6 are stable, or can be stabilized, for the development of single family dwellings and any associated cuts and fills necessary to develop the lots.
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> "18. Pursuant to Section 1002.03(B) of the ZDO, the applicant shall obtain County Planning Division approval of a Steep Slope Review permit for Lots 5 and 6 prior to the issuance of building permits on those lots. In conjunction with that application, the applicant shall submit an engineering geologic study or geotechnical report consistent with Section 1003.02(B)(2) of the ZDO demonstrating that Lots 5 and 6 are stable, or can be stabilized for the specific structure intended for each lot, and the report shall specify the measures necessary to ensure stability of the proposed structures. This language shall be included in the Codes, Covenants and Restrictions recorded with the final plat." Record 19.

steeply sloped, and that there is no evidence that the flatter areas on those lots are unstable or unsuitable for development. In other words, intervenor argues, the hearings officer did not defer a finding of compliance with ZDO 1002.03(A), but instead found that lots 5 and 6 comply with that standard, and simply imposed Condition 17 to confirm that lots 5 and 6 have developable areas, prior to final plat approval. Intervenor contends that that approach is consistent with *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992), where LUBA held that:

> "[Where] a local government finds compliance, or feasibility of compliance, with all approval criteria * * * it is entirely appropriate to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage. * * * In such circumstances neither notice to adjoining property owners nor additional public hearings are statutorily required during the second stage."

We agree with intervenor and the hearings officer that ZDO 1002.03(A) and (B) are focused on somewhat different concerns, and that ZDO 1002.03 need not be read to require that *both* provisions be addressed prior to subdivision approval. ZDO 1002.03(A) is explicitly focused on ensuring that lots and parcels are created with a developable area. ZDO 1002.03(B) and the related Mass Movement Hazard Areas criteria at ZDO 1003.02 are more narrowly focused on ensuring that the actual building site is geologically stable. ZDO 1002.03(A) obviously must be addressed at the time of subdivision approval, prior to the creation of proposed lots or parcels, but it is less obvious that ZDO 1002.03(B) must be. Where large lots with areas of shallow slopes are proposed, as in the present case, and the subdivision application does not propose particular building envelopes or sites, we see no error in concluding that ZDO 1002.03(B) can be addressed separately, prior to building permit approval, at a stage when the actual building site is known.

With respect to ZDO 1002.03(A), that provision does not specify what kind of evidence must be submitted to establish that proposed lots are developable, prior to lot creation. The hearings officer essentially found compliance with ZDO 1002.03(A) for the

reasons stated in her findings, and imposed Condition 17 to confirm that there are developable areas on those lots prior to final plat approval. Petitioner challenges the evidentiary support for that finding, but identifies no contrary evidence. Intervenor cites to testimony from its engineer that preliminary geotechnical studies have been conducted and those studies indicate that all lots are developable with standard foundations. Record 142. Petitioner argues that the applicant failed to place those preliminary studies into the record, and based on that failure a reasonable person could only infer that there is a problem with slope stability on the property. However, even if some negative inference might be drawn from the applicant's failure to place those preliminary studies in the record, that inference falls far short of undermining the positive testimony of the applicant's engineer. The hearings officer's finding of compliance with ZDO 1002.03(A), combined with a condition of approval to ensure compliance by submitting a geotechnical report for staff review, is supported by substantial evidence.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Intervenor proposed that Phase I would be accessed from Hull Avenue with a private road, Finley Drive, ending with a stub at the northern Phase I boundary. Phase II would be served by a T-shaped private road with a stub pointing south toward Phase I but separated from Phase I by an open space tract. The west end of the private road serving Phase II also terminates in an open space tract, pointing toward adjoining residentially-developed property.

Petitioner argued below that if the two phases were redesigned, the two proposed private roads could be connected, avoiding dead-end streets. Petitioner submitted an alternative subdivision layout showing the road through Phase II curving south to join Finley Drive in Phase I, with a different lot pattern. Record 288. As noted, the hearings officer required that intervenor connect Phase I and II by an internal public road that connects Jewett

Drive and Hull Avenue. However, the hearings officer did not require that intervenor modify the *west* end of the Phase II road, which terminates in a dead-end pointing to the west.

In this assignment of error, petitioner argues that allowing the west end of the Phase II road to terminate in what is essentially a dead-end or cul-de-sac is inconsistent with ZDO 1014.03(L), which provides:

> "New [roads] terminating in cul-de-sacs or other County-approved turnarounds are prohibited except where natural features (such as topography, streams or wetlands), parks, dedicated open space, or existing development precludes road connections to adjacent properties, existing street stubs, or existing roads. Cul-de-sacs off the primary street(s) within the development may be permitted when Subsection 1014.03(D) and 1014.03(E) have been satisfied and interior loop road connections or additional street stubs to adjacent properties are precluded by natural features, parks, dedicated open space, or existing development."

Petitioner also argues that the termination of the Phase II road is inconsistent with ZDO 1014.03(E), which provides that "[s]treet stubs shall be provided to allow for future access to adjacent undeveloped property as deemed necessary by the County Department of Transportation and Development." Petitioner contends that the hearings officer failed to adopt adequate findings explaining why the western termination of the Phase II road is consistent with ZDO 1014.03(E) and (L).

Intervenor responds, initially, that petitioner waived the issue of compliance with regard to ZDO 1014.03(L), because petitioner failed to raise any issue under that code provision during the proceedings below. According to intervenor, petitioner cited only to ZDO 1014.03(E) in arguing that the two proposed private roads should be connected. Record 285.

Petitioner responds that her letter at Record 285 is sufficient to raise the issue of whether the Phase II dead-end street complies with ZDO 1014.03(L). We agree. The letter at Record 285 cites ZDO 1014.03(E), but the letter actually discusses the operative terms of

ZDO 1014.03(L), not (E).[3] Further, the site plan that accompanied the letter depicts a single road connecting phases I and II and no dead-end at the west end of the Phase II road. Record 288. The letter together with the site plan make it reasonably clear that petitioner believed that the proposed Phase II private road, with two dead-ends, did not comply with the ZDO prohibition on dead-end roads. That petitioner mis-cited the applicable code provision is not a fatal flaw.

The hearings officer made no findings with respect to the western termination of the Phase II road. The hearings officer discusses ZDO 1014.03(E) and (L) in a footnote, but only in the context of the through connection between the Phase I and Phase II roads, and then only to reject the applicant's argument that the through road is infeasible. Record 13, n 7. While intervenor may be correct that the dead-end terminus of the Phase II road qualifies under one of the exceptions in ZDO 1014.03(L), and a stub street is not required under ZDO 1014.03(E) at the western boundary of the property, the hearings officer made no findings on those points, and remand is therefore necessary to address them.

The third assignment of error is sustained.

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[3] Petitioner's letter at Record 285 states, in relevant part:

> "**Dead-End Road off of SE Jennings Ave.:** The development of Phase II will require a dead-end private road extending west from SE Jennings Ave. ZDO 1014.03E states that dead-end streets are prohibited unless a roadway connection is precluded by adequate internal loop roads and connections to adjacent properties/roadways that have been otherwise provided. The dead-end extension from SE Jennings could be avoided if the Phase II development is placed on proposed lots 1, 2 and 3. Moving the 18 lots * * * to where Lots 1, 2 and 3 are presently located would allow the 18 lots to be served by the looped road (connecting SE Hull and Jewett), rather than a dead-end. There are other equivalent designs that could work as shown in the attached site plan." Record 285.

The above reference to SE Jennings Avenue is potentially confusing. SE Jennings Avenue is north of the subject property and connects to Jewett Drive, which dead-ends east of the subject property. The proposed Phase II private street connects directly to Jewett Drive, not Jennings Ave. However, it seems reasonably clear that the author of the letter either intended to refer to Jewett Drive or understood the two streets to be essentially the same street, for purposes of the code prohibition on dead-end streets.

FOURTH ASSIGNMENT OF ERROR

ZDO 1012.08 requires residential land within the urban growth boundary to be developed at 80 percent of its zoned density, which implements a requirement imposed by Metro, the Portland Metropolitan Area regional government. The hearings officer found "[t]he applicant clearly considers Phase II to be a throw-away—platted to satisfy county minimum density standards, but not intended for development like that planned for Phase I." Record 13. In her findings, the hearings officer considered whether the proposal complied with the minimum density standards, and concluded:

> "* * * [A]s staff notes, if this application is approved, and the applicant is permitted to develop roads and infrastructure to serve only Phase I, there is little incentive to construct Phase II, because Phase II will require significant improvements to serve 18 lots that are not likely to be attractive to develop or market. Again, while that might serve the applicant's and neighbors' interests, it does little to serve the broader community goals of developing infill housing within the Metro urban growth boundary. Further, as staff notes, the code does not permit the applicant to avoid compliance with the minimum density standards.
>
> "* * * [T]he hearings officer concludes that the best way to implement these competing interests and satisfy the code is to require that the applicant design a public through street connecting SE Hull Avenue with Jewett Drive, and require improvements on the SE Hull Avenue/Finley Drive intersection that meet public road intersection standards. In addition, Finley Drive shall be dedicated to the public and constructed to local roadway standards to the Phase II boundary. Construction of the through road segment from Phase I to Phase II shall not be required until development commences in Phase II." Record 14.

The hearings officer accordingly imposed Condition 28(h), which requires dedication and construction of the Phase I internal road up to a temporary barrier at the phase boundary, and dedication and construction of the Phase II through road to Jewett Drive when the Phase II plat records.

Petitioner argues that Condition 28(h) is ineffective to ensure compliance with the minimum density standard, as it does little or nothing to encourage the applicant or its successors to actually plat and develop Phase II. Instead, petitioner argues, the hearings

officer should have imposed a condition limiting full development of Phase I until the applicant plats and develops some percentage of the Phase II lots. *See West Hills Development Co. v. Washington County*, 37 Or LUBA 46 (1999) (affirming a legislative code amendment requiring that a certain percentage of high density lots be developed prior to low density lots, to ensure compliance with the Metro minimum density standard).

Intervenor responds, initially, that petitioner raised no issues below regarding the minimum density standard, and thus any issue under that standard has been waived. ORS 197.763(1). Petitioner replies that the hearings officer adopted findings on the question of whether non-development of Phase II would satisfy the minimum density standard, and attempted to craft conditions to encourage development of Phase II, which suggests that the issue was adequately raised below.

Petitioner has not cited to any testimony or document in the record that raises any issue regarding whether the applicant's current intent not to develop Phase II is inconsistent with the minimum density standard.[4] The staff report at Record 186 summarily finds that the proposal to develop 25 lots in two phases complies with the minimum density standard, and does not identify any "issue" regarding phasing or the minimum density standard. It is not clear why the hearings officer adopted findings on whether Phase II would be developed, or why she believed that Condition 28(h) would encourage development of Phase II.

In any case, even if the issue was raised below with the specificity required by ORS 197.763(1), we agree with intervenor's argument on the merits that petitioner has not established that the hearings officer is required to condition approval in a manner that ensures that Phase II is actually developed. While intervenor does not dispute that it has no current intent to develop Phase II, intervenor cites to testimony by its representative that if

[4] If no participant raised that issue below, it may be because, as the hearings officer noted, the neighbors generally opposed development of Phase II. Record 14 (The applicant's implied promise not to construct Phase II "best satisfies neighborhood wishes").

future market conditions warrant Phase II could be developed. Record 132. Further, while the ZDO 1012.08 minimum density standard certainly requires that the applicant propose and the county approve a minimum number of residential lots, it is less clear that it *compels* the county to ensure that all or any particular number of the approved lots are actually developed with dwellings within any particular time frame, or that development occurs in any particular sequence. The hearings officer clearly did not believe that ZDO 1012.08 compelled adoption of such measures, and petitioner has not established that ZDO 1012.08 must be interpreted to that effect. Therefore, petitioner's challenges to Condition 28(h) and her argument that a different condition should have been imposed to ensure actual development of Phase II do not provide a basis for reversal or remand.

The fourth assignment of error is denied.

The county's decision is remanded.

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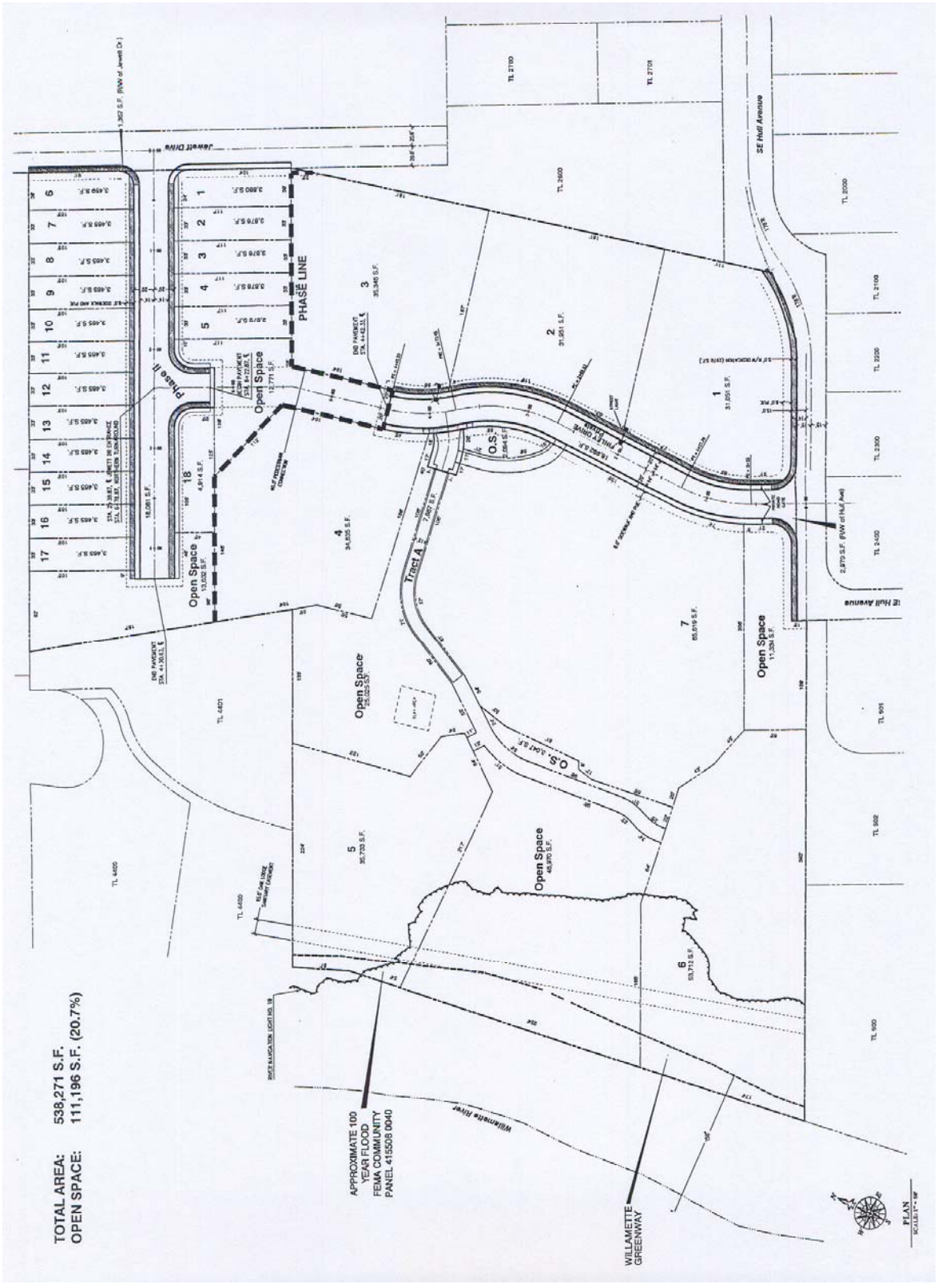
Appendix A


TOTAL AREA: 538,271 S.F.
OPEN SPACE: 111,196 S.F. (20.7%)
PHASE LINE
Phase II
Tract A
Open Space
O.S.
SE Hull Avenue
Jewett Drive
APPROXIMATE 100 YEAR FLOOD FEMA COMMUNITY PANEL 415508 0040
Willamette River
WILLAMETTE GREENWAY
PLAN