BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TIMOTHY P. SPERBER,
Petitioner,

vs.

COOS COUNTY,
Respondent.

LUBA No. 2009-084

FINAL OPINION
AND ORDER

Appeal from Coos County.

Timothy P. Sperber, Coquille, filed the petition for review and argued on his own behalf.

Joana Lyons-Antley, Coquille, filed the respondent's brief and argued on behalf of Coos County.

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

BASSHAM, Board Chair, did not participate in the decision.

REMANDED 10/26/2009

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals conditions of approval imposed by the county in a decision that grants petitioner's application for partition approval.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in respondent's brief. The motion is granted.

FACTS

Petitioner owns approximately 63 acres of property that is located outside of the City of Coquille's city limits but within the city's urban growth boundary (UGB). Petitioner envisions a series of partitions to create a number of parcels for residential development. The first partition created 5.75, 6.06 and 51.67 acre parcels. Petitioner proposes to provide access to the parcels by extending Gary Sipe Road, a county road, into his property across an access easement as parcels are developed.

This appeal concerns petitioner's second partition application. The second partition would divide the 51.67 acre parcel into three parcels of 6.65, 19.54 and 25.48 acres. The second partition also proposes to extend the Gary Sipe Road access easement to provide access to those parcels. The challenged decision grants tentative partition approval for the second partition, and is before us for a second time. In his appeal of the first county decision concerning the second partition application, petitioner challenged a number of conditions of approval. One of those conditions of approval required that petitioner enter into an agreement to improve Gary Sipe Road, and provide a bond or other guarantee to ensure completion of the road improvements. Under the disputed condition of approval, the agreement and bond were required before petitioner could request final plat approval for the second partition. We sustained petitioner's assignment of error regarding that condition and a subassignment of error concerning a related condition concerning the required bond or

guarantee to ensure completion of the road improvements. *Sperber v. Coos County*, ___ Or LUBA ___ (LUBA No. 2008-227, April 10, 2009), slip op 7-9, 12 (*Sperber I*). We also sustained two other subassignments of error concerning two other conditions of approval. In sustaining those two subassignments of error, we remanded for the county to clarify what those conditions required. *Sperber I*, slip op 13-14. On remand, the county purported to clarify the conditions of approval, including the condition of approval that required an agreement and financial assurances to improve Gary Sipe Road, and the county again approved the second partition with conditions. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

In these assignments of error petitioner contends the county erred by imposing essentially the same condition that he execute an agreement and bond to assure construction of Gary Sipe Road that LUBA found was not authorized by the Coos County Zoning and Land Development Ordinance (CCZLDO). Petitioner contends the county cannot revisit an issue that was decided against the county in *Sperber I* and that the county continues to misinterpret the CCZLDO. For the reasons that follow, we agree with petitioner.

A. Introduction

In *Sperber I*, petitioner challenged Condition 9, which provided as follows:

> "The applicants must execute an agreement complying with the required improvements identified in Table 7.3 prior to submittal of the final plats." *Sperber I*, slip op 7.

The reference to Table 7.3 can be put aside. That table sets out the standards to which Gary Sipe Road must be constructed, when the Gary Sipe Road extensions are constructed. The dispute in *Sperber I* and the dispute in this appeal is whether the county has the authority under the CCZLDO to require that petitioner execute an agreement, prior to final plat approval, in which petitioner agrees to construct the extension of Gary Sipe Road and provide a bond to guarantee that construction. Petitioner took the position in *Sperber I* that construction of Gary Sipe Road is not required under the CCZLDO until the parcels that will

rely on the extension of Gary Sipe Road are developed. Petitioner's position in *Sperber I* and in this appeal is that the county has no authority under the CCZLDO to require that he execute an agreement to improve Gary Sipe Road, and provide a bond to guarantee that improvement, as a condition of final partition plat approval.

The starting point in analyzing the parties' dispute is CCZLDO 6.5.400, which is entitled "Agreement for Improvements," and is set out in the margin.[1] Petitioner argued in

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[1] As relevant, CCZLDO 6.5.400 provides:

"Before [a] final plat may be approved, the partitioner or subdivider shall either:

"1. install *required* monumentation, improvements and repair existing streets and other public facilities damaged in the construction of the subdivision or partition; or

"2. execute and file with the County Surveyor or Roadmaster, pursuant to directions below, an agreement between himself and the County.

"A. Interior Monuments: * * *

"B. Improvements. If the road, street, utility, or other improvements for a partition or subdivision are to be completed *on or before a specified date after recording of the plat*, the estimated cost (See figure 6.5) of performing the work shall be prepared by the surveyor or engineer performing the work on the described plat and shall be approved by the County Roadmaster.

"C. Bond, Surety, Cash or Other Security Deposit Requirements. The bond, surety, cash or other security deposit agreement shall:

"i. specify the time within which the *required* monumentation, improvements or repairs shall be completed;

"ii. be filed in the amount of 120% of the approved estimated cost, as per the sample Bond Request, Figure 6.5;

"iii. be conditioned upon the final approval and acceptance of the development;

"iv. be forfeited to the County if the applicant does not complete the requirements within the agreed-upon time limit, not to exceed two years from date of final plat approval, or if the applicant has created a hazard causing imminent danger to the public health and safety within or adjacent to the development which the developer is financially unable to correct.

"* * * * *

"* * * * *." (Emphases added.)

Sperber I, and we agreed, that CCZLDO 6.5.400 applies to improvements that are "required" of subdividers and partitioners. For "required" improvements, a partitioner has the option of installing those improvements before final plat approval under CCZLDO 6.5.400(1) or executing an agreement to complete those "required" improvements and submitting a bond to ensure that those "required" improvements are completed within two years after final plat approval. CCZLDO 6.5.400(2)(C)(iv). The critical question becomes whether construction of the anticipated extension of Gary Sipe Road is a "required" improvement. If so, petitioner must either (1) install the Gary Sipe Road improvement or (2) agree to install the Gary Sipe Road improvements and provide a bond or other security to ensure construction. For the answer to that question, we turn to CCZLDO 7.1.900 and CCZLDO Table 7.1.

CCZLDO 7.1.900 is entitled "Circumstances Requiring Road Improvements; Extent of Required Road Improvements." As relevant CCZLDO 7.1.900 provides: "Public and private road and street improvements are *required* by this ordinance when the circumstances set forth in Table 7.1 exist." (Emphasis added.) As explained in CCZLDO 7.1.100, "[p]olicy matters regarding required road improvements are set forth and summarized in Table 7.1." Table 7.1 is a matrix that asks and answers several questions. One question asked by Table 7.1 is "Must a road be improved in conjunction with a subdivision at the time of final plat?" Table 7.1 answers that question "yes." Another question asked by Table 7.1 is "Must a road be improved in conjunction with a partition?" Table 7.1 answers that question "no." Under Table 7.1, the roads that will serve parcels within a partition approved after 1996 must be improved "before a dwelling may be authorized." Simply stated, improvement of roads within a subdivision is "required" before final subdivision plat approval. But improvement of roads within a partition is not "required" for final partition plat approval; improvement of roads within a partition is "required" before a dwelling may be authorized on a parcel within the partition. It follows that CCZLDO 6.5.400, CCZLDO 7.1.900 and Table 7.1 do not authorize the county to impose a condition of final partition plat

approval that requires that petitioner install the anticipated improvements to Gary Sipe Road. That is the conclusion we reached in *Sperber I*:

> "As far as we can tell, petitioner is correct that the matrix set out in Table 7.1 makes it clear that road improvements need not be constructed or bonded prior to final partition plat approval." Slip op at 9.

On remand, despite our conclusion in *Sperber I*, the county adopted the following findings and imposed a modified Condition 9:

> "Section 6.5.400 requires that a partitioner **shall** either install the road improvements or execute a road improvement agreement prior to approval of the final plat. LUBA's decision did not take into account that Table 7.1 only addresses whether road improvements are required prior to final plat approval. Table 7.1 does not address 6.5.400(2) which requires the execution of an agreement should a partitioner choose not to install road improvements pursuant to Table 7.1
>
> "FINDING: The Board finds that Table 7.1 does not invalidate Section 6.5.400, but merely provides an exception to option (1) for partitions. Section 6.5.400 goes a step beyond the Policy Matrix of Table 7.1 by requiring that when road improvements are not installed, a partitioner must execute an agreement under option (2) prior to filing the final plat.
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> "Condition 9 is amended as follows:
>
> "'The applicants must execute a road improvement agreement pursuant to Section 6.5.400(2) in accordance with the road standards required under Table 7.3, prior to final plat approval.'" Record 4 (bold type and underlining in original).

The effect of the county's purported clarification of Condition 9 on remand is that while petitioner need not construct the extension of Gary Sipe Road that will be needed to provide access to the parcels that will be created by the second partition, he must execute an agreement and provide a bond or other financial guarantee to assure construction of the road extension.

B. Law of the Case

The first problem with the county's decision is that the question of whether CCZLDO 6.5.400(2), 7.1.900 and Table 7.1 authorize the county to condition final plat approval on

petitioner's execution of an agreement under CCZLDO 6.5.400(2) to make petitioner responsible for construction of the required road improvements was resolved in petitioner's favor and against the county in *Sperber I*. Under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), the county is bound in its proceedings on remand by all issues that were resolved against the county in our unappealed decision in *Sperber I*. While the county may be able to expand the scope of a remand to consider issues that go beyond LUBA's bases for remand, the county may not revisit issues that were resolved against the county in *Sperber I*. *Schatz v. City of Jacksonville*, 113 Or App 675, 681, 835 P2d 923 (1992); *Curtin v. Jackson County*, 56 Or LUBA 649, 653 (2008).

The county cites language in *Sperber I* where LUBA endeavored to clarify and resolve some of petitioner's arguments concerning Condition 9 and noted that the county did not appear and defend its decision in *Sperber I*. LUBA also noted that the minutes of the November 25, 2008 board of county commissioners' hearing on remand suggested the county intended to modify Condition 9 in response to petitioner's objection, but we ultimately concluded that the board of county commissioners' final decision did not include any modification of Condition 9:

> "It appears that the county intended to clarify that under Condition 9 petitioner would neither be required to construct improvements to Gary Sipe Road, nor provide an agreement and bond to do so at the time of final plat approval. But the challenged decision simply does not include that clarification." *Sperber I*, slip op at 9 (footnote omitted).

While it was difficult to resolve some of petitioner's arguments, nothing in our decision in *Sperber I* was intended to be an invitation to the county to belatedly attempt to respond to issues that petitioner presented in *Sperber I* and were resolved against the county. In *Sperber I*, petitioner argued that CCZLDO 6.5.400(2), 7.1.900 and Table 7.1 did not authorize the county to require that he enter into an agreement to extend Gary Sipe Road at a future date and provide a bond or other financial guarantee to assure that such future construction is completed. We agreed with petitioner in *Sperber I*, and the county may not

on remand offer a belated interpretation of CCZLDO 6.5.400(2), 7.1.900 and Table 7.1 to support its position that the county can require that petitioner execute such an agreement.

The county also argues that LUBA must have intended to allow the county to attempt further clarification of Condition 9 because it remanded the county's initial decision to clarify other aspects of the improvements to Gary Sipe Road. Those conditions have to do with how Gary Sipe Road is to be improved; they have nothing to do with whether the CCZLDO authorizes the county to require petitioner to enter into the agreement required by Condition 9.

The county's purported clarification of Condition 9 on remand is barred by law of the case.

C. CCZLDO 6.5.400 Only Applies to Improvements That are Required of Petitioner

Even if the county were not barred from offering a belated interpretation of CCZLDO 6.5.400 in its decision on remand, we would reject the county's interpretation set out above. The first sentence of the county's findings fails to appreciate why we concluded that CCZLDO 6.5.400 does not authorize the disputed condition. That sentence is repeated below:

> "Section 6.5.400 requires that a partitioner **shall** either install the road improvements or execute a road improvement agreement prior to approval of the final plat." Record 4.

As we explained in *Sperber I*, CCZLDO 6.5.400 is simply not as broad as the above quoted finding suggests. CCZLDO 6.5.400 does not require "that a partitioner **shall** either install the road improvements or execute a road improvement agreement prior to approval of the final plat." Subdividers' and partitioners' obligations under CCZLDO 6.5.400 apply only to "monuments and improvements" that are "required" of subdividers and partitioners. *See* n 1. As we explained in *Sperber I* and have explained again in this opinion, the persons who seek dwellings approvals for the parcels in the disputed partition will be "required" to improve

Gary Sipe Road. Petitioner may be "required" to make those improvements if he ultimately seeks approval of permits to build houses on those parcels, but petitioner (as the partitioner in this matter) is not "required" by CCZLDO 6.5.400(2), 7.1.900 and Table 7.1 to make those road improvements.

It is crystal clear that the obligation in subsection 1 of CCZLDO 6.5.400 to "install required * * * improvements" extends only to improvements a subdivider or partitioner is "required" to install. It is not quite as clear that the agreement and bonding provisions of CCZLDO 6.5.400(2) are limited to improvements that are "required" of subdividers and partitioners. But the text of CCZLDO 6.5.400(2) does not support the county's conclusion that petitioner must agree to construct, and provide a bond or other financial guarantee to complete, road improvements that 6.5.400(1), CCZLDO 7.1.900 and Table 7.1 do not require petitioner to construct.

The obligation to specify the time when improvements will be completed is specifically limited to "required" improvements. CCZLDO 6.5.400(2)(C)(i). *See* n 1. That text suggests the subject of the CCZLDO 6.5.400(2) agreement and financial assurances is "required" improvements, not improvements that a partitioner is not "required" to complete. The suggestion that the CCZLDO 6.5.400(2) is limited to the improvements that are required of a partitioner under CCZLDO 6.5.400(1) is reinforced by CCZLDO 6.5.400(2)(B), which expressly provides that the improvements that are subject to CCZLDO 6.5.400(2) are those improvements that must "be completed on or before a specified date after recording of the plat * * *." Under Table 7.1, the extension of Gary Sipe Road need not be completed until the time the parcels are developed, rather than "a specified date after recording of the plat."

A related textual problem with the county's interpretation of CCZLDO 6.5.400 and Table 7.1 is that under CCZLDO 6.5.400(2)(C)(iv) a partitioner would forfeit his or her bond if improvements are not completed in two years. But as we have already noted, under Table 7.1, road improvements are not required until parcels are developed. As far as we can tell

there is no requirement that those parcels be developed within any particular period of time. Under the county's interpretation of CCZLDO 6.5.400(2) and Table 7.1, although a partitioner is not required to construct the roads necessary to serve the parcels created by a partition, if the parcels are not developed within two years, a partitioner would nevertheless have to construct those roads or forfeit his or her bond. It seems highly unlikely to us that the drafters of CCZLDO 6.5.400(2) could have intended to require that partitioners agree to complete road improvements that partitioners are not required to complete and to bond to ensure that such improvements are completed with two years. If they did, the words they chose, viewed in context, are not consistent with that intent.

As CCZLDO 6.5.400(2) is currently drafted, a partitioner could be obligated to bond to complete interior monuments under CCZLDO 6.5.400(2)(A). *See* n 1. As CCZLDO 6.5.400(2) is currently drafted, a partitioner could be obligated to bond to complete any "utility or other improvements" that might be "required" of a partitioner as a partitioner. CCZLDO 6.5.400(2)(B). But as CCZLDO 6.5.400(2) is currently drafted, the county simply lacks authority to require a partitioner to bond for completion of roads that a partitioner is not "required" to complete as part of the partition approval process. Finally, as we noted in *Sperber I*,

> "It is clear that the county is somewhat concerned that petitioner proposes to divide his property into a significant number of parcels and if petitioner's series of partitions are not planned carefully the owners of those lots could encounter problems when the time comes to develop those parcels and the roadway that will be needed to serve the parcels." Slip op at 18.

However, we also explained in *Sperber I*, "[t]hat does not mean the county can apply county land use laws to petitioner in a way that is inconsistent with the language of those county land use laws." *Id*. If the county wishes to treat serial partitions differently than a single partition that will create only three or fewer parcels, we are aware of no statutory obstacle to the county doing so. But the county needs to rewrite CCZLDO 6.5.400(2), 7.1.900 and Table 7.1 to allow it to require that applicants for serial partitions, like applicants for

subdivisions, either construct the roads that will serve the parcels that will be created via serial partitions or provide contractual and financial assurances to guarantee that those roads will be constructed. As CCZLDO 6.5.400(2), 7.1.900 and Table 7.1 are now written, they simply do not authorize the county to impose Condition 9.

D. Additional Arguments in the Respondent's Brief

In its brief, the county cites CCZLDO 6.1.100, 6.2.100 and suggests those sections of the CCZLDO authorize the disputed condition. CCZLDO 6.1.100 is the general purpose section of the Land Division Chapter. CCZLDO 6.2.100 is the purpose section of the design and development standards.

The short answer to the county's argument is that the challenged decision does not rely on those sections of the CCZLDO to impose the disputed condition. The county relies on CCZLDO 6.5.400(2), 7.1.900 and Table 7.1. But even if the county's decision had cited those sections of the CCZLDO as additional authority for it to impose the disputed condition, we agree with petitioner that CCZLDO 6.1.100 simply states the purposes and intent of the county's land division regulations and does not provide authority for the county to impose Condition 9.[2] CCZLDO 6.1.200 states that design and development standards are minimum

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[2] CCZLDO 6.1.100 provides in part:

> **"SECTION 6.1.100. General Purpose.** The general purpose of this Chapter is to prescribe the form and content of subdivision plats and partition plats (minor and majors) and the procedures to be followed in their development and approval and to designate those authorized to give such approval; to establish the minimum requirements and standards necessary for efficient, safe, and attractive subdivisions and partitions consistent with the natural resources of the County; and to provide penalties for violations. It is intended that this Chapter be consistent with ORS Chapters 92 and 215.
>
> "It is further the intent of this Chapter:
>
> "1. To ensure that land be subdivided or partitioned in a manner which will promote the public health, safety, convenience, and general welfare.
>
> "* * * * *
>
> "4. To minimize through proper design and layout, the danger to life and property by the hazards of fire, flood, water pollution, soil erosion and land slippage.

standards and provides that those regulations "are not intended to limit the developer from using higher standards * * *."[3] While CCZLDO 6.1.200 makes it clear developers can voluntarily exceed the standards set out in the CCZLDO, it does not authorize the county to require petitioner to exceed the county's adopted regulatory minimum standards for partitions.

For the reasons discussed above, petitioner's first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

In his third assignment of error, petitioner alleges the county's treatment of his partition proposals amounts to a violation of Article I, section 20 of the Oregon Constitution, which provides:

> "no law shall be passed granting to any citizen or class of citizens privileges or immunities, which upon the same terms, shall not equally belong to all citizens."

In support of that argument, petitioner requests that LUBA consider extra-record evidence of partition approval decisions where the county did not require that the applicant enter into an agreement under CCZLDO 6.5.400(2) to ensure construction of roads to serve the parcels that were created by those partitions.

"* * * * *

"8. To provide adequate provisions for transportation designed to handle the anticipated usage and to ensure that they minimize safety hazards and adverse impact on the neighboring area.

"9. To ensure that the costs of providing rights-of-way and improvements for vehicular and pedestrian traffic, utilities, and public areas serving new developments be borne by the benefited persons rather than by the people of the County at large."

[3] CCZLDO 6.2.100 provides:

"**Purpose.** All land divisions shall conform to the design and development standards specified in the following sections. The standards so specified shall be considered as the minimum appropriate for land division, partition, PUD or subdivision development and are not intended to limit the developer from using higher standards of design and development."

As we explain below, because we sustain petitioner's first and second assignments of error, the county's decision must be remanded so that petitioner's application for partition approval can be approved without the disputed conditions. Petitioner's third assignment of error would only provide an additional basis for our remand. We therefore do not consider the third assignment of error, and petitioner's motion requesting that we consider extra-record evidence is denied.

CONCLUSION

The decision that petitioner appealed to LUBA in *Sperber I* approved his partition proposal with conditions that petitioner objected to. We sustained petitioner's challenges to some conditions and rejected other challenges. The decision before us in this appeal was the county's attempt to respond to the bases for remand in *Sperber I*. Some of the clarifications that the city adopted to respond to our decision in *Sperber I* are not challenged by petitioner, and those aspects of the county's decision are unaffected by this decision. The only conditions that remain at issue in this appeal are conditions 9 and part of condition 10. Condition 9 has been discussed at length above. The challenged part of Condition 10 is closely related to Condition 9 and requires that petitioner comply with a county road department recommendation that petitioner should be required to construct the proposed extension of Gary Sipe Road or submit an agreement and bond to do so. Condition 9 and that part of Condition 10 are not authorized by the CCZLDO for the reasons explained in this opinion.

Petitioner contends that LUBA should *reverse* the challenged decision and order the county to eliminate the disputed conditions. However, none of the bases for reversal in OAR 661-010-0071(1) apply here.[4] The county did not exceed its jurisdiction. We have not

[4] OAR 661-010-0071(1) provides:

"The Board shall reverse a land use decision when:

considered petitioner's constitutional challenge. Petitioner does not contend the county's approval of his partition is "prohibited as a matter of law." Where a petitioner challenges a local government's favorable decision on a request for land use approval in order to challenge conditions of approval, and LUBA concludes that the local government erred by imposing the conditions of approval, the appropriate remedy is remand so that the application can be reapproved without the erroneous conditions. *7th Street Station LLC v. City of Corvallis*, 55 Or LUBA 321, 328 (2007). The challenged decision is remanded so that the county can reapprove petitioner's partition application without Condition 9 and the related part of Condition 10.

The county's decision is remanded.

"(a) The governing body exceeded its jurisdiction;

"(b) The decision is unconstitutional; or

"(c) The decision violates a provision of applicable law and is prohibited as a matter of law."