BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MEK PROPERTIES, LLC and TANYA KRAHN,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

STEVEN REHER and ANNETTE REHER,
Intervenors-Respondents.

LUBA No. 2010-021

FINAL OPINION
AND ORDER

Appeal from Coos County.

Dorothy R. Ryan, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Alan Sorem and Saalfeld Griggs PC.

No appearance by Coos County

No appearance by Steven and Annette Reher.

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

REMANDED 06/17/2010

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the county denying an application for a three parcel partition.

MOTION TO INTERVENE

Steven Reher and Annette Reher move to intervene on the side of the respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject property is an approximately 54.35 acre parcel zoned Rural Residential – 2 acre minimum (RR-2) located approximately two miles south of the City of Coos Bay. The subject property is generally located in an area west of Highway 101 and east of Red Dike Road, a county road. Access to the subject property is taken from Ashley Road, a private road that is a twenty foot wide gravel road that connects to Red Dike Road. Red Dike Road contains an approximately 20 foot wide gravel surface. Portions of Red Dike Road have experienced wash outs in recent years.

Several previous land divisions that began in 1984 are relevant to the present appeal. Those land divisions began with the 1984 recording of a final plat that created the "Red Dike Subdivision #1," which created four lots, the largest of which totaled 201 acres and is referred to as "Lot 4 of Red Dike Subdivision." OR 34-35.[1] Subsequently, in 1998, Lot 4 of Red Dike Subdivision was the subject of an application to create the Cedar Crest Subdivision by dividing it into 48 lots, in two phases. In September, 1998, the county approved a tentative subdivision plan to create 23 lots in phase I and 22 lots in phase II.[2]

[1] The record in the present appeal, LUBA No. 2010-021 includes the record from LUBA No. 2009-087. In this opinion, we refer to pages from the record in LUBA No. 2009-087 as "OR" and the pages from the record in LUBA No. 2010-021 as "RR."

[2] Subsequent to its approval of the tentative plan for Cedar Crest Subdivision, the county approved a variance to reduce the required right of way for Red Dike Road from 60 feet to 40 feet because the road is

That tentative plan approval for phases I and II of the Cedar Crest Subdivision included the following condition of approval to be satisfied prior to finalizing the subdivision final plat, which we and petitioners refer to as "Condition 9":

> "Documentation must be brought into the Planning Department that the access road *through* the Boise Addition is constructed and approved by the County Road Department prior to signing of final plat."[3] OR 91 (emphasis added).

The final plat for phase I of Cedar Crest Subdivision, creating 22 lots, was recorded in August, 1999. The final plat contained the following Declaration:

> "* * * Access *to* Boise Addition which lies to the north and east of the initial point of this subdivision will be provided during Phase 2 of this development." OR 38 (emphasis added).

The subject property lies in the portion of Lot 4 of Red Dike Subdivision that was slated in the approved Cedar Crest Subdivision tentative plan to be developed as Phase II. However, no final plat for Phase II of the approved Cedar Crest Subdivision was ever approved or recorded. In 2007, the remaining approximately 130 acres of Lot 4 of Red Dike Subdivision (the same property that comprised Phase II of Cedar Crest Subdivision) was partitioned into three parcels, one of which is the subject property.[4]

---

bordered by tidelands, and to reduce the paved surface to no less than 20 feet in width at a power pole and tide gates along the road. OR 34.

[3] The Boise Addition Subdivision is north and east of and partially adjacent to the subject property. A map in the record shows the Boise Addition Subdivision and platted streets located within it that is referred to in Condition 9. OR 39. According to petitioners and the county, at least some of those platted streets were vacated after the 1998 tentative plan approval, and it is not clear from the record whether or which of the platted streets remain available for future improvement or what the condition of those platted streets is. OR 9, 39.

[4] The final plat for Cedar Crest Subdivision Phase I created two private roads in the northern most part of the property, Juniper Drive and View Crest Lane. View Crest Lane appears from the recorded plat to be a stub street to connect to Phase II of Cedar Crest Subdivision when it was developed, and is a twenty foot wide gravel road. According to petitioners, in 2006 or 2007, View Crest Lane was extended and improved with gravel from its end point in Phase I of Cedar Crest Subdivision to the property line of the Boise Addition Subdivision directly to the north. OR 23. The tentative partition plat that was submitted in connection with the 2007 partition shows a sixty foot wide right of way and an extension of View Crest Lane from its current end point through the subject property to the property's northern property line. OR 233.

In 2008, petitioners applied to partition the subject 54.35-acre property into three parcels, one totaling 2.09 acres, a second totaling 2.10 acres and the third totaling 50.16 acres. The planning department approved the application with conditions, and intervenors appealed the decision to the planning commission. Prior to the planning commission hearing that was scheduled for intervenors' appeal, the board of county commissioners (BCC) elected to review the decision under Coos County Zoning and Land Development Ordinance (CCZLDO) 1.3.980.[5] The BCC subsequently denied the application, concluding that the application failed to satisfy Condition 9.[6]

Petitioners appealed the denial to LUBA. After petitioners filed their petition for review, the county filed a motion for a voluntary remand of the decision, and LUBA issued a final opinion and order remanding the decision on November 18, 2009. Thereafter, the county provided notice of the hearing on remand and the BCC held a hearing on remand. The remand hearing did not include an opportunity for public testimony. At the hearing, the

---

[5] CCZLDO 1.3.980 provides in relevant part:

> "The Board of Commissioners reserve the right to pre-empt any permit review process or appeal process and thereby hearing any permit application or appeal directly. * * *"

[6] The BCC's first decision denying the application found:

> "Phase 2 [of the Cedar Crest Subdivision] was the 2007 partition submitted by Dwight Edmon. However, Condition 9 was not complied with in either the Cedar Crest Subdivision approval nor in Phase 2 the 2007 partition approval. Therefore, the Board of Commissioners finds that staff erred in accepting the application.
>
> "* * * The applicant argued that requiring an alternative access is not roughly proportional to impacts directly related to the proposed creation of 3-parcels. The Board of Commissioners finds that Condition 9 of the Cedar Crest Subdivision approval controls. The Board further finds that the applicant is series partitioning which results in the incremental impact on the transportation facilities serving this area.
>
> "The Board of Commissioners concludes that staff erred in accepting the series partitions because Condition 9 of the 1998 tentative plat approval of Cedar Crest Subdivision was not enforced. * * *" OR 5.

BCC voted to deny the application, and later issued its written decision denying the application for a second time. Petitioners appealed that second denial decision to LUBA.

FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR

The BCC denied the application because it found that the application failed to comply with various provisions of the CCZLDO and the Coos County Comprehensive Plan (CCCP). Although it is less clear, the decision also can be read to deny the application based on the applicants' failure to comply with Condition 9.

A. Procedural Error

In the third assignment of error, petitioners argue that the county committed a procedural error that prejudiced petitioners' substantial rights when it denied the application based on CCZLDO and CCCP standards and criteria that were not identified in the notices of either hearing and were not discussed in any staff report or in the only public hearing that was held on the application. Petitioners further argue that the county committed a procedural error when it did not notify petitioners that the cited CCZLDO and CCCP provisions were applicable standards and criteria or allow petitioners an opportunity during the hearing on remand to explain how the application satisfied those provisions. We address that assignment of error before turning to petitioners' first and second assignments of error.

Prior to both the initial BCC hearing and the BCC hearing on remand, the county provided notice of the hearings and listed the applicable approval criteria, as follows:

> "* * * The original application must meet criteria set forth in the Oregon Revised Statutes (ORS) Chapter 215.427 – Final actions on permits or zone change application; Coos County Zoning and Land Development Ordinance (CCZLDO) Chapter 4, Section 4.2.400 (Table 4.2c) Rural Residential Use Tables, Section 4.2.900(6) Review Standards; Chapter VI, Land Divisions; and Chapter VII, Street and Road Standards." OR 114, RR 25.

At the conclusion of the remand hearing, the BCC voted to deny the application based on the county's determination that the application failed to comply with CCZLDO 6.1.300 and

6.5.300(4), CCCP 5.19(1) and (5), CCZLDO 6.1.100, 6.2.250, 7.1.200, and CCZLDO Table 7.2. RR 13.

ORS 197.763(3)(b) requires a notice of hearing to "[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue * * *." The county's notice of hearing for the remand hearing did not list any CCCP provisions as applicable approval criteria. Although the notice of hearing generally identified CCZLDO "Chapter VI, Land Divisions; and Chapter VII, Streets and Road Standards," it did not specify which criteria in those chapters applied to the application.

Petitioners have a substantial right to "prepare and submit their case and [to] a full and fair hearing." *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). Those rights include the right to notice of the standards by which the application will be judged and to address those standards before the county's final decision on the application is issued. In denying the application based on provisions of the CCZLDO and the CCCP that were not identified either in the notices of hearing that were sent out prior to the hearings, in any staff report, or in any public hearing on the application that petitioners were entitled to participate in, the county erred. *Latta v. City of Joseph*, 36 Or LUBA 708, 712 (1999). Simply listing "Chapter VI, Land Divisions; and Chapter VII, Road Standards" does not satisfy the requirement of ORS 197.763(3)(b) to list the criteria applicable to the subject application. *ONRC v. City of Oregon City*, 29 Or LUBA 90, 98 (1995). We agree with petitioners that the county committed a procedural error that prejudiced petitioners' substantial rights in failing to notify petitioners of the standards by which their application would be judged. We further agree with petitioners that the county erred in failing to allow petitioners an opportunity during the hearing on remand to explain how the application met those provisions, or to argue to the county that those provisions are not standards and criteria that are applicable to the application. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440, 455-56 (2000), *aff'd* 172 Or App 361, 19 P3d 918 (2001).

Where, as in the present case, LUBA agrees with petitioners that the county committed a procedural error that prejudiced the petitioners' substantial rights by failing to notify petitioners that certain provisions of the CCZLDO and the CCCP applied to the partition application and to allow petitioners to present evidence regarding those provisions, our usual course is to remand the decision to give petitioners the opportunity to participate in the remand proceeding and present evidence regarding the application's compliance with those provisions or the inapplicability of those provisions to the application. However, as noted above, in their first assignment of error, petitioners argue that the county erred in concluding that the cited provisions apply at all to the partition application, and in their second assignment of error petitioners argue that the county's findings are inadequate to explain its bases for denial. In the interest of efficiency, we address those assignments of error below.

B. CCZLDO and CCCP Provisions

Turning to the BCC's bases for denying the application, the county denied the application based on the county's determination that the application failed to comply with CCZLDO 6.1.300 and 6.5.300(4), CCCP 5.19(1) and (5), CCZLDO 6.1.100, 6.2.250, 7.1.200, and CCZLDO Table 7.2. In the first assignment of error, petitioners argue that the cited CCZLDO and CCCP provisions are not "standards and criteria" that apply to the application, and thus that the county erred in denying the application based on those provisions.[7] In the second assignment of error, petitioners argue that the county's findings are inadequate to explain the county's basis for denying the application based on those standards and criteria.

[7] ORS 215.416(8)(a) requires that "[a]pproval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

CCZLDO 6.1.300 and CCZLDO 6.5.300(4) require that applications for a partition are "in conformity with" and "compl[y] with the objectives of" the CCCP.[8] The county found that based on those sections of the CCZLDO, the applicant was required to demonstrate that the partition plan complies with CCCP 5.19. CCCP 5.19 is a part of the CCCP's transportation chapter and provides in relevant part that:

> "1. Coos County shall *strive to provide and encourage* a transportation system that promotes safety and convenience for citizens and travelers and that strengthens the local and regional economy by facilitating the flow of goods and services.
>
> " * * * * *
>
> "5. Coos County shall incorporate cost-effective road and street design standards into its zoning and land development ordinances, consistent with public safety considerations, recognizing that these economic considerations can result in efficient land use, while lowering site development costs."

The county also relied on CCZLDO 6.1.100(1), (4), and (8). CCZLDO 6.1.100 sets out the general purpose and intent of the land division chapter, including in relevant part:

> "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.
>
> " * * * * *

[8] CCZLDO 6.1.300 provides in relevant part that "[a]ll land divisions shall be in conformity with the Coos County Comprehensive Plan."

CCZLDO 6.5.300(4) specifies that when the planning director reviews a tentative partition plan, that review must ensure that the plan "complies with the objectives of the [CCCP]," and allows the planning director to impose conditions on approval of a tentative plan in certain circumstances.

> "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."

Finally, the county relied on CCZLDO 6.2.250(2), which contains design and development standards for land divisions. CCZLDO 6.2.250(2) provides in relevant part:

> "Any access approval request under this section shall be reviewed to assure that no development occurs in known natural hazard areas without appropriate safeguards. * * *"

The BCC found :

> "Taking all of the requirements of the CCZLDO together, the County finds that it is a principal criterion that the proposed development meets public safety standards. *See Falcon Ridge LLC v. City of Klamath Falls*, 57 Or LUBA 651, 658 (2008). The Applicant bears the burden of proof to demonstrate that the proposed development is safe.
>
> "* * * * *
>
> "As a result, the County cannot approve the application because the Applicant did not meet CCZLDO Sections 6.1.300 and 6.5.300(4) or meet its burden of proof to demonstrate that the proposed development can be implemented in a safe manner. The County finds that the proposal would be in violation of CCCP 5.19(1) and (5), and CCZLDO Section 6.1.100, 6.2.250, 7.1.200, and Table 7.2.
>
> " * * * * *
>
> "Based on the record herein and the findings contained herein, the [BCC] denies the application [and] concludes that the Applicant has not met CCZLDO Sections 6.1.300 and 6.5.300(4), and fails to meet its burden of proof to demonstrate that the proposed development is safe, which is in violation of CCCP 5.19(1) and (5), and CCZLDO Sections 6.1.100, 6.2.250, 7.1.200, and Table 7.2. * * *" RR 12-13.

We understand the county to have reviewed all of the CCZLDO and CCCP provisions quoted and described above and concluded that, when read with Condition 9, discussed below, those provisions collectively impose a requirement that petitioners provide "safe" access to the subject property in the form of additional access to the partitioned parcels through some property adjacent to the subject property or, in the alternative, that Red Dike Road be upgraded to eliminate safety concerns. The county denied the application because

Red Dike Road does not meet the standards set forth in CCZLDO Table 7.2 and because petitioners did not propose to construct improvements to Red Dike Road to bring the road into compliance with those standards or propose alternative access through the Boise Addition.[9]

Petitioners argue that the county erred in treating the cited CCZLDO and CCCP provisions as approval criteria. According to petitioners, CCZLDO 6.1.300 and 6.5.300(4) are not approval criteria in and of themselves and the fact that those provisions generally require land divisions to conform to or comply with the objectives of the CCCP does not mean that every part of the CCCP becomes an approval criterion. Further, petitioners argue, CCCP 5.19(1) merely recites a county aspiration for a safe transportation system, and CCCP 5.19(5) directs the county to adopt and incorporate street design standards. According to petitioners, neither of those subsections of CCCP 5.19 is a mandatory approval standard for a land partition. Finally, petitioners argue that the county's attempt to rely on the purpose statement for CCZLDO Chapter 6 as a mandatory approval criterion applicable to all land divisions is error, where the purpose statement contains general objectives rather than independent approval standards.

We agree with petitioners. CCCP Policy 5.19(1), which provides that the city should "strive to promote and encourage" a safe transportation network is not a mandatory approval criterion, either read alone or in conjunction with CCCP Policy 5.19(5). CCCP Policy 5.19(5) directs the county to incorporate cost-effective road design standards into the CCZLDO, and we do not see how that provision itself could possibly be viewed as an approval criterion for land divisions.[10]

---

[9] Table 7.2 sets forth the design standards applicable to *new* roads proposed to be created in conjunction with a land division.

[10] It may be that the road design standards that the county has incorporated into the CCZLDO pursuant to CCCP Policy 5.19(5) are applicable criteria, but CCCP Policy 5.19(5)'s direction to incorporate such standards is not itself an applicable land division standard.

We also agree with petitioners that the purpose statement found at CCZLDO 6.1.100 does not provide mandatory approval criteria. Where a purpose statement is a general expression of the goals and objectives of the local government in adopting a land use regulation, it does not play a role in reviewing applications for permits. *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387, 392 (2008); *Renaissance Development Corp. v. City of Lake Oswego*, 45 Or LUBA 312, 322-23 (2003).

Similarly, the county's attempt to rely on CCZLDO 6.2.250(2), which provides that "[a]ny access approval request under this section shall be reviewed to assure that no development occurs in known natural hazard areas without appropriate safeguards * * *" to create a requirement that the partition satisfy a "public safety" requirement fails. First, it is questionable whether that provision applies at all where, as here, the proposal does not contain any request for approval of new access and the new parcels will take access from an existing road, albeit one that arguably has safety problems. Further, the county has not explained why the proposed partition is "development" as used in CCZLDO 6.2.250(2) or whether that partition is proposed in a "known natural hazard area." The evidence in the record tends to indicate that travel on Red Dike Road may be hazardous at times. However, that does not explain why the subject property is in a "known natural hazard area."

Petitioners also fault the county's reliance on CCZLDO 7.1.200 and Table 7.2. CCZLDO Chapter 7 is entitled "Streets and Roads" and contains development standards for rural and urban roads. CCZLDO Table 7.2 provides the road standards for new rural roads created as part of a land division. We agree with petitioners that Table 7.2 does not apply in circumstances where no new road is proposed or required as part of a land division.

CCZLDO 7.1.200, on the other hand, appears to authorize the county to require a partition applicant to design and dedicate public roads. CCZLDO 7.1.200 provides:

> "When a land division is reviewed by the County, the Board of Commissioners, Hearings Body or TRC may require design and public

> dedication of streets or roads to ensure the development and continuance of a convenient roadway network."

Petitioners argue that CCZLDO 7.1.200 only authorizes the county to require design and dedication of new on-site roads, and does not authorize the county to require improvements to off-site roads such as Red Dike Road, or to deny a proposed partition because off-site roads are inadequate. Petitioners contend, therefore, that CCZLDO 7.1.200 is not an "approval standard" that the county could apply to deny the partition.

We disagree with petitioners that CCZLDO 7.1.200 is not a potentially applicable approval criterion to the subject partition. CCZLDO 7.1.200 clearly authorizes the county to require design and dedication of new streets and roads "to ensure the development and continuance of a convenient roadway network." We tend to agree with petitioners that the "design and dedication" language in CCZLDO 7.1.200 is not sufficient to allow the county to require that petitioners make extensive *off-site* improvements to existing, off-site roads such as Red Dike Road or roads located within Boise Addition, or secure off-site right of way to provide a second access road to the proposed parcels through Boise Addition. But CCZLDO 7.1.200 seems to at least authorize the county to require design and dedication of an internal road, such as a new road or extension of an existing road, to connect the subject property to adjoining roads, if that would help to "ensure the development and continuance of a convenient roadway network." If such a new or extended road is required, failure to provide it could potentially provide a basis for denial.[11] However, the meaning of CCZLDO 7.1.200 is obscure, because although the county's findings twice cite CCZLDO 7.1.200, there is no discussion or interpretation of that code provision.

---

[11] We understand petitioners to take the position that the extension of View Crest Lane that was constructed in 2006 or 2007 satisfies any obligation they might have had under Condition 9 or any other applicable CCZLDO provisions to construct a new road. *See* n 4. However, evidence in the record suggests that that extension of View Crest Lane did not connect View Crest Lane to an actual road or even a platted road, but rather to a lot in Boise Addition Subdivision. If that is the case, then we would have a hard time seeing how that road satisfies any requirement to "ensure the development and continuance of a convenient roadway network" as provided in CCZLDO 7.1.200.

Findings supporting denial must provide a coherent explanation for why the local government does not believe the application complies with the applicable criteria, and must be sufficient to inform the applicant what steps are necessary to obtain approval or explain the reasons that it is unlikely that the application will be approved. *Bridge Street Partners*, 56 Or LUBA at 394. Accordingly, we sustain petitioners' second assignment of error to the extent it argues that the county's findings are inadequate to explain how the application fails to satisfy CCZLDO 7.1.200.

In sum, with the exception of CCZLDO 7.1.200, we agree with petitioners that the CCZLDO and CCCP provisions cited and relied on by the county to deny the application are not applicable approval criteria, and under ORS 215.416(8)(a), it is not permissible for the county to review the partition application against those criteria or to deny the application based on a failure to satisfy those criteria.

C. Condition 9

The decision also discusses Condition 9, quoted and described above.[12] Although that part of the decision is less clear regarding the effect of Condition 9 on the application or

[12] The BCC found:

> "To the north of the subject property is the platted subdivision Boise Addition. Applicant agreed that a second access was needed. Applicant argued that, the Applicant has no legal access to Boise Addition and; therefore, cannot provide a route through Boise Addition without an unreasonable amount of cost. The Applicant claimed that all streets in Boise Addition were vacated and were no longer dedicated roads to the public and; therefore, to obtain a second access to Boise Addition would require the applicant to acquire access through several property owners to reach Alabama Street, which is located in the Boise Addition. The Applicant claimed that it would cost hundreds of thousands of dollars to acquire legal access, however, the Applicant provided no evidence to support its claim of actual cost other than the bare allegations. Further the Applicant provided no evidence demonstrating that the applicant had no legal access to Boise Addition. According to the County Surveyor, not all of the roads in the Boise Addition were vacated. Evidence in the record demonstrates that another property owned by Applicant (Parcel 1 of partition 2007-9) abuts other dedicated streets in the Boise Addition such as Railroad Street, Council Street and Payette Street. * * * Further, the application identifies an easement that appears to connect the subject property to Boise Addition for the purpose of '60 ft. roadway and utility easement reserved for future development' but provided no evidence that a second access would be constructed as an alternative to the hazardous Red Dike Road. Therefore, Applicant's argument that the property could not obtain a second legal access without significant cost is

the county's conclusion, we understand the county at a minimum to have expressed doubt about whether petitioners could comply with Condition 9, and to suggest that noncompliance with Condition 9 is a potential basis for denial. We address Condition 9 in order to give the parties some direction on remand.

As explained above, Condition 9 was imposed as part of the 1998 tentative plan approval of Cedar Crest Subdivision phases I and II. In 1999, the final plat for phase I was recorded, and phase I was subsequently developed. A final plat for phase II, as approved in 1998, was never approved or recorded. As explained above, Condition 9 contained different language from the language that appeared on the recorded plat for phase I. Condition 9 required access "through" the Boise Addition Subdivision to the north of the subject property, while the phase I final plat declaration states that the developer will provide access "to" the Boise Addition Subdivision "during phase [II]."

Petitioners argue that when the tentative plan approval for Cedar Crest Subdivision phase II expired without phase II being developed, Condition 9 expired and it does not encumber the subject property.[13] We agree with petitioners that in the circumstances presented this appeal, Condition 9 does not require petitioners to provide alternative access to the property. Although the county may be trying to continue to try to breathe life into Condition 9, the problem the county has with that approach can be traced to 2007, when it approved a three-parcel partition, in place of phase II of Cedar Crest, without requiring the documentation of construction of a road "through" Boise Addition as required by condition

---

> not credible. Further, the applicant has failed to propose any alternative route in lieu of Red Dike Road; therefore, the county could not evaluate the feasibility of the alternative access." RR 9-10.

[13] That tentative plan approval is not in the record and we are not sure if the current version of the CCZLDO applied at the time of tentative plan approval. However, CCZLDO 6.5.450 provides:

> "An application for a final partition plat or subdivision plat complete with all submittal requirements and the appropriate fee shall be submitted to the Planning Department for approval not later than five 5 years after the date of approval of the tentative plan."

9. We tend to agree with the BCC's first decision in this matter that the county erred in approving that 2007 partition without requiring that petitioners comply with Condition 9. *See* n 6. If the 1998 tentative plan approval had not expired by 2007, the county clearly could have required that the proposed 2007 partition comply with Condition 9. And even if the tentative plan approval had expired by 2007, the final plat for phase I of Cedar Crest Subdivision that created the remainder parcel that was the subject of the 2007 partition was subject to Condition 9. The declaration on the final plat for phase I, viewed in context with Condition 9, might well have been sufficient to require that petitioners provide the access road *through* Boise Addition that was required by Condition 9, notwithstanding the different wording in the declaration on the phase I final plat.

However, that issue is not before us here, because the county did approve the 2007 partition without requiring compliance with Condition 9. That 2007 partition created the parcel that is the subject of this partition, and Condition 9 was not carried forward as a condition of that 2007 partition approval. Condition 9 is no longer available as a source of authority for the county to require petitioners to construct an access road through Boise Addition.

In sum, we sustain petitioners' third assignment of error that argues that the county committed a procedural error that prejudiced petitioners' substantial rights in failing to allow petitioners to present evidence regarding the application's compliance with the cited CCZLDO and CCCP provisions. We also sustain petitioners' first assignment of error in part because we agree with petitioners that, with the exception of CCZLDO 7.1.200, the CCZLDO and CCCP provisions relied on by the county are not "standards and criteria" under ORS 215.416(8)(a) that apply to the proposed partition. We sustain petitioners' second assignment of error in part because we agree with petitioners that the county's findings regarding CCZLDO 7.1.200 are inadequate.

FOURTH ASSIGNMENT OF ERROR

In their fourth assignment of error, petitioners argue that the county's denial of its partition application amounts to a "de facto" moratorium contrary to the requirements of ORS 197.505 to ORS 197.540. Because we remand under the first, second and third assignments of error, it is unnecessary for us to address petitioners' arguments under the fourth assignment of error. Accordingly, we do not address the fourth assignment of error.

REMEDY

Petitioners argue that LUBA should reverse the city's denial of the proposed partition and order the city to approve it under ORS 197.835(10)(a)(A). ORS 197.835(10)(a)(A) requires LUBA to reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:

> "Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

The Court of Appeals has interpreted this language to mean that LUBA must reverse a denial of a permit if the record establishes, as a matter of law, that the application must be approved. *Smith v. Douglas County*, 93 Or App 503, 508, 763 P2d 169 (1988), *aff'd* 308 Or 191, 777 P2d 1377 (1989). Although we have relied on ORS 197.835(10)(a)(A) in one instance to reverse a local government decision and order the local government to approve an application for a partition, in that one instance the local government did not dispute that all of the applicable criteria had been satisfied, but denied the application for other reasons. *Stewart v. City of Salem*, 58 Or LUBA 605, *aff'd* 231 Or App 356, 219 P3d 46 (2009).

It does not appear that those circumstances are present in this case. We sustained the first assignment of error because we agreed with petitioners that the county misconstrued the CCZLDO and CCCP in determining that most of the cited provisions contained approval criteria that allowed it to deny the application if alternative access was not provided or if Red

Dike Road was not improved to address safety concerns. It may be that on remand, the county will conclude, as planning staff did, that the application satisfies all of the applicable approval criteria from the CCZLDO. However, petitioners have not established, based on the evidence in the record, that as a matter of law the application meets all of the requirements of the CCZLDO. Thus, remand is the appropriate remedy.

The county's decision is remanded.