BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

COLIN CARVER,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

WESTWOOD HOMES LLC,
Intervenor-Respondent.

LUBA No. 2014-028

FINAL OPINION
AND ORDER

Appeal from Washington County.

Gregory S. Hathaway, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hathaway Koback Connors LLP.

Alan A. Rappelyea, County Counsel, and Jacquilyn Saito-Moore, Assistant County Counsel, Hillsboro, filed a joint response brief. Jacquilyn Saito-Moore argued on behalf of respondent.

Michael C. Robinson and Seth J. King, Portland, filed a joint response brief. Seth J. King argued on behalf of intervenor-respondent. With them on the brief was Perkins Coie LLP.

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

AFFIRMED 07/16/2014

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 a hearings officer's approval of a 56-lot subdivision.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to address waiver and other issues raised in the response brief. There is no opposition to the motion and it is allowed.

MOTION FOR DETERMINATION OF MOOTNESS

Intervenor-respondent (intervenor) filed a motion requesting that LUBA determine that the first assignment of error is now moot. Petitioner opposes the motion. As explained below, we deny the first assignment of error on other grounds, and therefore do not consider further the motion for determination of mootness.

FACTS

The proposed Cedar Park subdivision is a two-phase residential subdivision of 56 lots, on a 11.25-acre property zoned R-6. The R-6 zone requires a minimum density of five units per acre, or approximately 56 units on the subject property. Phase 1 consists of 22 lots for single-family dwellings, while Phase 2 consists of 34 lots, for a total of 56 units.

Cedar Mill Creek flows from north to south through the middle of the property. Phase 1 is proposed for the west side of Cedar Mill Creek, while Phase 2 is proposed for the east side. There is no road or other connection between the two phases, which have separate access points.

The Cedar Mill Creek corridor is mapped as a Significant Natural Resource (SNR). An isolated wetland, known as Wetland A, is located on the property to the east of Cedar Mill Creek, within Phase 2. Wetland A originates

from a seep discharge point on the southeast end of the property, resulting in a mix of ponding and saturated soils, but the wetland has no surface or hydrologic connection with Cedar Mill Creek. Wetland A is approximately 6,816 square feet in size, which together with a 25-foot wide vegetative corridor surrounding it totals approximately 17,524 square feet. All of the natural resource areas on the property, including the Cedar Mill Creek SNR and Wetland A, total approximately 181,638 square feet, or 4.16 acres.

To accommodate the minimum density of 56 residential lots, the applicant, intervenor, proposed to impact approximately half of the natural resource areas on the property, or 96,243 square feet, including the entirety of Wetland A and its surrounding vegetative buffer. Intervenor proposed to mitigate the loss by preserving 79,554 square feet of the Cedar Mill Creek SNR, creating 11,425 square feet of new habitat, enhancing 5,577 square feet of degraded habitat, and purchasing off-site mitigation credits. The hearings officer approved the proposed mitigation.

Access to Phase 2 is via Melody Lane, which intervenor proposed to reduce from the code standard width of 22 feet to 18 feet, due to difficulty acquiring a larger right-of-way. The hearings officer determined that the proposed reduction requires a special type of variance, called a Critical Services Exception. The hearings officer conditioned approval of Phase 2 on obtaining a Critical Services Exception for the reduced road width.

Proposed access to Lots 12 through 18 of Phase 1 is via a dead end east/west private street located on what is labeled Tract A,[1] which includes a bicycle/pedestrian path that continues on to connect with NW 119th Avenue, a

[1] Tract A should not be confused with Wetland A.

north/south arterial that abuts Phase I on its west side. The hearings officer approved the private street, after concluding that a public street was not required under the county's code.

Petitioner's first assignment of error concerns the condition requiring a Critical Services Exception for the reduced width of Melody Lane. The second through sixth assignments of error challenge the proposed elimination of Wetland A. The seventh assignment of error concerns approval of the private street on Tract A.

FIRST ASSIGNMENT OF ERROR

As noted, Condition VI.A requires that, prior to final subdivision plat approval for Phase 2, intervenor obtain a Critical Services Exception to reduce the width of Melody Lane. Since Phase 1 could be developed before Phase 2 and the Critical Services Exception necessary to develop Phase 2 as proposed might not be approved, petitioner contends that the hearings officer erred in failing to impose the same condition regarding Melody Lane on Phase 1 or, alternatively, to adopt findings that Phase 1 independently satisfies all applicable approval criteria.

According to petitioner, much of the hearings officer's decision considered the entire subdivision, both Phases 1 and 2, in the course of determining whether the subdivision complies with applicable approval criteria, including criteria and mitigation regarding impacts to the SNR Area. However, petitioner argues that because Condition VI.A applies only to Phase 2, intervenor could potentially construct Phase 1 even if intervenor does not succeed in obtaining a Critical Services Exception for Phase 2, with possibility that Condition VI.A will never be satisfied, and Phase 2 will never be constructed. Petitioner contends that remand is necessary to either (1) apply

Condition VI.A to Phase 1 as well, or (2) adopt findings supported by substantial evidence that Phase 1 in isolation complies with all applicable approval criteria.

Respondents argue first that the issue raised under the first assignment of error was waived because no party raised it below, pursuant to ORS 197.763(1).[2] According to respondents, there is always a risk in multi-phase subdivisions that a later phase may not be developed for failure to comply with conditions of approval or other reasons, and that only the initial phases will be completed. If petitioner believed that Phase 1 should have been conditioned such that it can gain final approval only after Phase 2 satisfies all conditions, respondents argue that petitioner should have raised that issue below.

In addition, intervenor argues that the first assignment of error is now moot. Intervenor notes that on June 20, 2014, the county hearings officer approved a Critical Services Exception for the reduced road width. Given that the county has now approved the exception required by Condition VI.A, intervenor contends that petitioner's speculative concern that (1) the exception might be denied, (2) no other solution will be found, and (3) ultimately Phase 2 never constructed, is without foundation. Accordingly, intervenor filed a

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[2] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

motion requesting that LUBA determine that the first assignment of error is moot.

On the merits, respondents argue that petitioner identifies no approval criterion that requires that each phase of the subdivision independently satisfy all development standards. Absent identifying such a criterion, respondents argue, petitioner cannot establish that the hearings officer erred in failing to either apply Condition VI.A to Phase 1, or consider whether Phase 1 in isolation complies with all applicable approval criteria.

In the reply brief, petitioner disputes that issues regarding Condition VI.A could have been raised below, because the condition did not appear until the final decision. According to petitioner, during the proceedings below the applicant chose to address many applicable code standards by evaluating the entire property as a whole, and there was no reason to believe that the hearings officer would impose separate sets of conditions on Phase 1 and 2 in a manner that creates the possibility that Phase 1 would be developed but Phase 2 might never be developed.

The hearings officer imposed 13 pages of conditions. Some conditions apply to both phases, some apply only to Phase 1, and others only to Phase 2, which is not uncommon with multi-phased tentative subdivision approvals where conditions are pertinent only to particular phases. Respondents are correct that, with any multi-phase development, there is a risk that subsequent phases will never receive final plat approval due to noncompliance with conditions or for other reasons. While petitioner's concern is focused on Condition VI.A—the requirement to obtain a Critical Services Exception—the same risk exists with respect to any of the conditions imposed on Phase 2, or more generally any conditions imposed on subsequent phases of any multi-

phase subdivision. In this context, we conclude that if petitioner believed that some code provision or other legal principle required the hearings officer to either (1) independently approve each phase, or (2) condition construction of Phase 1 on completion of all conditions applicable to Phase 2, it was incumbent on petitioner to raise that issue during the proceedings below. Petitioner did not raise the issue, and therefore it is waived.

Even if this issue was not waived, we agree with respondents on the merits that petitioner has not identified any code requirement or other legal standard that requires the hearings officer to independently approve Phase 1 in isolation from Phase 2, or, in the absence of independent approval of Phase 1 would require the hearings officer to condition construction of Phase 1 on the completion of all conditions applicable to Phase 2.[3]

The closest petitioner comes to identifying any kind of code-based dependence between Phase 1 and Phase 2 is with respect to the SNR mitigation plan. Petitioner argues that a single mitigation plan was jointly developed for both phases, and therefore the approval of Phase 1 is necessarily contingent on development of Phase 2. However, petitioner does not explain why. We note that the Cedar Mill Creek SNR appears to be located entirely or almost entirely within Phase 1, within what is marked as Tract C, while Wetland A and its

[3] We might conclude otherwise if petitioner identified some code requirement applicable to Phase 1 that is satisfied only if Phase 2 is constructed as approved. For example, if Phase 1 is required to have emergency access, and is dependent on Phase 2 for emergency access, it might well be error to adopt conditions that allow Phase 1 to be fully constructed without ensuring the provision of the required emergency access. In the present case, however, access to Phase 1 does not depend on compliance with Condition VI.A, or any other condition imposed on Phase 2.

vegetative buffer are located entirely within Phase 2. *See* Petition for Review App 66 (plat showing the phase boundary). Development of Phase 1 will impact certain resource areas, for which mitigation will be required. Development of Phase 2 will impact different resource areas, for which mitigation will be required. Both phases are subject to Condition I.B.i, which requires compliance with conditions imposed in a Clean Water Services (CWS) service provider letter regarding disturbances in sensitive areas, including required mitigation. Petitioner does not argue, much less attempt to establish, that mitigation for development of Phase 1 is dependent on completion of Phase 2, or offer any reason to believe that CWS will not require full mitigation for any disturbances caused by construction of Phase 1, even if Phase 2 is never developed.

Finally, although we need not rule on the motion to determine mootness, we tend to agree with intervenor that the June 20, 2014 decision approving the Critical Services Exception, and thus satisfying Condition VI.A, goes a long way toward rendering the remand petitioner requests under the first assignment of error a pointless exercise.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted, the portion of Cedar Mill Creek on the property is mapped as a "Significant Natural Resource" or SNR. Petitioner argues that the hearings officer erred in failing to find the proposed subdivision complies with Community Development Code (CDC) 422-3.5, which applies to "Significant Natural Areas," and which requires in relevant part that development within such areas "reduce its impact, to the maximum extent feasible" by various

means, including relocation of proposed development.[4] Relatedly, petitioner argues that the applicant and hearings officer failed to consider whether development impacts could be minimized by taking advantage of density transfers, an option that is allowed in SNR areas under CDC 422-4 and CDC 300-3.

Respondents argue that CDC 422-3.5 applies only to "Significant Natural Areas," and the Cedar Creek SNR is not a "Significant Natural Area." Respondents appear to be correct. CDC 422-2 describes four categories of SNR areas.[5] The fourth category is "Significant Natural Area," which includes

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[4] CDC 422-3.5 provides, in relevant part:

> "Any development requiring a permit from Washington County which is proposed in a Significant Natural Area, as identified by the applicable Community Plan or the Rural/Natural Resource Area Plan Element, shall reduce its impact, to the maximum extent feasible, on the unique or fragile character or features of the Significant Natural Area. Appropriate impact reducing measures shall include:
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> "A. Provision of additional landscaping or open space; and
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> "B. Relocation of the proposed site of a building, structure or use on the lot."

[5] CDC 422-2 provides, in relevant part:

> "Significant Natural Resources have been classified in the Community Plans or the Rural/Natural Resource Plan Element by the following categories:
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> "422-2.1 Water Areas and Wetlands - 100-year flood plain, drainage hazard areas and ponds, except those already developed.

"[s]ites of special importance, in their natural condition, for their ecological, scientific, and educational value." Respondents request that we take official notice of a comprehensive plan map of SNR areas, which appears to show that no Significant Natural Areas exist near the subject property. The hearings officer found that the Cedar Mill Creek SNR falls into the categories described in CDC 422-2.2 and 2.3, *i.e.*, water areas and wetlands, and fish and wildlife habitat. App 23-24. Petitioner makes no effort to demonstrate that the Cedar Mill Creek SNR is also a Significant Natural Area as described in CDC 422-2.4. Because CDC 422-3.5 applies only to Significant Natural Areas, petitioner's arguments under the second assignment of error provide no basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

CDC 422-3.6 requires a finding that a proposed use in a SNR will not "seriously interfere" with the preservation of fish and wildlife areas and habitat identified in the county comprehensive plan, or that any serious interference be

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"422-2.2 Water Areas and Wetlands and Fish and Wildlife Habitat - Water areas and wetlands that are also fish and wildlife habitat.

"422-2.3 Wildlife Habitat - Sensitive habitats identified by the Oregon Department of Fish and Wildlife, the Audubon Society Urban Wildlife Habitat Map, and forested areas coincidental with water areas and wetlands.

"422-2.4 Significant Natural Areas - Sites of special importance, in their natural condition, for their ecological, scientific, and educational value."

mitigated.[6] The hearings officer found that the proposed development would seriously interfere with the Cedar Mill Creek SNR, but concluded that the interference had been adequately mitigated.

Petitioner challenges the finding that the serious interference with the Cedar Mill Creek SNR has been adequately mitigated, arguing that adequate mitigation requires compliance with CDC 422-3.5, and a finding supported by substantial evidence that the project impacts have been avoided or minimized by relocation and/or density transfers. However, as explained above, CDC 422-3.5 does not apply to the Cedar Mill Creek SNR. Petitioner's arguments under this assignment of error do not provide a basis for reversal or remand.

The third assignment of error is denied.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

CDC 422-3.3.A generally prohibits most development, including residential development, within a "Riparian Corridor" or a "significant water area or wetland" that is identified in the applicable community plan.[7] The

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[6] CDC 422-3.6 provides, as relevant:

> "For any proposed use in a Significant Natural Resource Area * * * there shall be a finding that the proposed use will not seriously interfere with the preservation of fish and wildlife areas and habitat identified in the Washington County Comprehensive Plan, or how the interference can be mitigated. * * *"

[7] CDC 422-3.3.A provides, in relevant part:

> "No new or expanded alteration of the vegetation or terrain of the Riparian Corridor (as defined in Section 106) or a significant water area or wetland (as identified in the applicable Community Plan or the Rural/Natural Resource Plan Element) shall be allowed except for the following [listing exceptions, but not including residential development]."

hearings officer approved removal of Wetland A in order to allow development of five residential lots in that area. The hearings officer concluded that Wetland A is not a Riparian Corridor or a significant water area or wetland identified in the applicable community plan, and therefore the prohibition in CDC 422-3.3.A does not apply to Wetland A. Under the fourth and fifth assignments of error, petitioner argues that Wetland A qualifies as a "Riparian Corridor" and is therefore subject to CDC 422-3.3.A.

CDC 106-185(1) defines "Riparian Corridor" in relevant part as "the area, adjacent to a water area, which is characterized by moisture-dependent vegetation * * *."[8] The hearings officer concluded that, in context, the

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[8] CDC 106-185 provides:

> "(1) For areas that have not been the subject of a Goal 5 analysis completed and a program decision adopted pursuant to OAR 660-023 (effective September 1, 1996), *riparian corridor shall mean the area, adjacent to a water area, which is characterized by moisture-dependent vegetation*, compared with vegetation on the surrounding upland, as determined by a qualified botanist or plant ecologist, or in no case less than a ground distance of twenty-five (25) feet on either side of the channel. Where, in its existing condition, a wetland or watercourse has no discernible channel which conveys surface water runoff, the riparian zone shall be measured from the center of the topographic trough, depression or canyon in which it is located.
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> "(2) For areas that have been the subject of a Goal 5 analysis completed and a program decision adopted pursuant to OAR 660-023 (effective September 1, 1996), riparian corridor shall mean a Goal 5 resource that includes the water areas, fish habitat, adjacent riparian areas, and wetlands within the riparian area boundary, or the definition of the term used in OAR 660, Division 23. * * *" (Emphasis added.)

reference to "water area" is to areas designated in the community plan as "Water Areas and Wetlands," such as the Cedar Mill Creek SNR.[9] Under that interpretation, the hearings officer concluded, an isolated wetland such as Wetland A is not a "Riparian Corridor" because it is not adjacent to a designated water area. Accordingly, the hearings officer concluded that CDC 422-3.3.A does not apply to prohibit residential development of Wetland A.

Petitioner interprets CDC 106-185(1) differently, arguing that CDC 106-185(1) defines Riparian Corridor as a "water area" that is "characterized by moisture dependent vegetation." Petition for Review 23. According to petitioner, Wetland A is a "water area" that is characterized by moisture dependent vegetation, and therefore qualifies as a Riparian Corridor.

Petitioner misreads CDC 106-185(1). The phrase "which is characterized by moisture-dependent vegetation" modifies "area," not "water area." *See* n 8. In other words, a Riparian Corridor is an "area" that has two

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

> "The hearings officer finds, based on the plain meaning of the words in the Code, that the 'Riparian Corridor' is limited to areas adjacent to 'Water Areas and Wetlands." CDC 106-185 describes 'Riparian Corridor' in relation to 'Water Areas and Wetlands.' The text of CDC 106-185(1) limits this term to areas '[a]djacent to a water area…' The term 'water area is not defined by the Code. The hearings officer finds, based on the text and context of the Code, that the term 'water area' refers to areas designated by community plans as 'Water Areas and Wetlands.' This interpretation is consistent with CDC 106-185(2), which defines 'riparian corridor' as '[a] Goal 5 resource that includes the water areas, fish habitat, adjacent riparian areas, and wetlands within the riparian area boundary…' Isolated wetlands, which are not associated with a stream, do not meet the definition of 'Riparian Corridor.'" (Emphasis omitted.)

attributes: it is (1) adjacent to a water area, and (2) characterized by moisture-dependent vegetation. Petitioner's reading of CDC 106-185(1) essentially eliminates the requirement that a Riparian Corridor be "adjacent to a water area," and is therefore inconsistent with the text of CDC 106-185(1).

Petitioner also disputes the hearings officer's conclusion that a "water area" must be an area designated in the community plan. However, as respondents note, the Court of Appeals rejected a similar argument under an earlier version of CDC 422-3.3.A and CDC 106.185. *Plotkin v. Washington County*, 165 Or App 246, 997 P2d 226 (2000).[10] Petitioner offers no basis to reach a different conclusion in the present appeal.

The hearings officer's interpretation is essentially the same as that adopted by the Court of Appeals in *Plotkin*. Under that interpretation, a Riparian Corridor is an undesignated area, with moisture-dependent vegetation, that is adjacent to a designated water area or wetland. That interpretation is consistent with the text and context of CDC 422-3.3.A and CDC 106.185, if not compelled by *Plotkin*, and we affirm it. Under that interpretation, the

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[10] The operative code language has not substantially changed since *Plotkin* was decided, although the CDC then used the term "riparian zone" rather than "Riparian Corridor." In *Plotkin*, the Court of Appeals interpreted CDC 422-3.3.A and the CDC 106 definition of "riparian zone" together, to the effect that CDC 422-3.3.A applies

> "only to wetlands identified in a community plan and adjacent riparian zones; that is, the reference to riparian zones in CDC 422-3.3.A does not extend protection to all riparian zones regardless of whether they are listed in a community plan. Rather, the reference makes clear that if a wetland or water area is listed in a community plan, then the adjacent moisture dependent vegetation, as defined in section 106, will also be protected from development." 165 Or App at 251.

hearings officer did not err in concluding that Wetland A does not qualify as a Riparian Corridor.

The fourth and fifth assignments of error are denied.

SIXTH AND SEVENTH ASSIGNMENTS OF ERROR

These assignments of error challenge the hearings officer's approval of a private street instead of a public street on Tract A of Phase 1. The proposed street provides vehicular access to seven lots in Phase 1, is 25 feet in width, with a sidewalk along one side, and is stubbed at its western end, where a pedestrian/bicycle path is proposed to continue to NW 119th Avenue. The pedestrian/bicycle connection to NW 119th Avenue is required under CDC 408-6.3.C, which requires that on-site pedestrian/bicycle facilities connect to abutting pedestrian and transit facilities.

In relevant part, CDC 409-3.1.A authorizes a private street if:

> "The street is not needed to provide access to other properties in the area in order to facilitate provisions of the applicable Community Plan(s), the Transportation Plan, or [CDC] 431, access spacing, sight distance, and circulation standards and requirements, or emergency access standards or concerns[.]"

The hearings officer approved the private street under CDC 409-3.1.A, concluding that the street was "not needed to provide access to other properties in the area or to address the vehicular access requirements of the community plan, transportation plan or the Code." Record 37-38.

Petitioner argues that the hearings officer misconstrued CDC 409-3.1.A by considering only whether the street is needed to provide "vehicular" access to other properties. According to petitioner, because CDC 408-6.3.C requires a pedestrian/bicycle connection between the street and NW 119th Avenue, the street is needed to provide *non-vehicular* access to NW 119th Avenue, and

therefore the street does not meet the qualifications for a private street under CDC 409-3.1.A.

Respondents argue, and we agree, that the pedestrian/bicycle connection to NW 119th Avenue required by CDC 408-6.3.C is not "needed to provide access to other properties in the area" within the meaning of CDC 409-3.1(A). The apparent purpose of CDC 408-6.3.C is to ensure that on-site pedestrian/bicycle facilities connect to abutting off-site pedestrian/bicycle facilities and transit facilities, such as the sidewalk and bus stop on NW 119th Avenue. Such connected facilities, although required, are not needed to provide, and do not provide, "access" to "other properties in the area," as those terms are used in CDC 409-3.1.A. The phrase "other properties in the area" presumably refers to other developed or developable properties in the area that require access. The pedestrian/bicycle facilities on an abutting collector street such as NW 119th Avenue are not "other properties in the area." The CDC may require connections to transit and pedestrian/bicycle facilities located on adjoining streets such as NW 119th Avenue, but petitioner has not established that such connections provide "access" to other properties in the area within the meaning of CDC 409-3.1.A. Accordingly, petitioner has not demonstrated that the hearings officer erred in concluding that the proposed street qualifies as a private street under CDC 409-3.1.A.

The hearings officer also adopted two alternative bases for approving the proposed street as a private street. The first is under CDC 409-3.2, which allows a private street where "topographic constraints make construction of a public street impractical[.]" Intervenor submitted expert testimony, in the form of a topographic map annotated with elevations and calculations, to demonstrate that a public street in Tract A connecting to NW 119th Avenue

would result in a 20 percent street grade for a distance of 150 feet, which would violate county road standards. In the seventh assignment of error, petitioner challenges those calculations, arguing that depending on what annotations and elevations are considered the actual grade over 150 feet may be only 11.5 percent. We understand petitioner to argue that intervenor's topographic map is not substantial evidence that "topographic constraints make construction of a public street impractical." Although petitioner does not explain how he believes grade should be calculated, we surmise that petitioner believes that intervenor's expert used the incorrect elevations. On the annotated grading plan, the expert marked the start and end elevations in red ink, "485.05 GB/TP" and "455.20 GB," resulting in a grade of a little over 20 percent over 150 feet.[11] Record 77. Petitioner appears to argue that different elevations, marked in black print, should be used to calculate grade. However, petitioner does not explain what the black print elevations represent. Absent a more developed argument, petitioner has not demonstrated that the hearings officer's finding that the grade exceeds 20 percent, based on the annotated grading plan, is not supported by substantial evidence.

The second alternative basis is that constructing a public street to connect with 119th NW Avenue would violate the CDC collector street intersection spacing requirements, at CDC 501-8.5. Petitioner does not dispute the accuracy of that finding, but observes only—in footnote 16 on page 29 of the Petition for Review—that the hearings officer failed to find that violation of intersection spacing requirements would be due to environmental or

[11] No party explains what "GB/TP" and "GB" signify.

topographic constraints, which are the bases for authorizing a private street under CDC 409-3.2.

LUBA generally does not consider arguments in footnotes that set out a different legal theory than that presented in the assignment of error itself. *Frewing v. City of Tigard*, 59 Or LUBA 23, 45 (2009); *David v. City of Hillsboro*, 57 Or LUBA 112, 142 n 19 (2008). The seventh assignment of error challenges only the findings under CDC 409-3.2. The second alternative basis for approving the proposed private street is based not on CDC 409-3.2 but on CDC 501-8.5. Whatever the merits of the hearings officer's reliance on CDC 501-8.5 to approve the private street, if petitioner wishes to challenge that alternative basis for approving the street petitioner needs to do so in an assignment of error, not in a footnote to an assignment of error challenging a different basis for approval.

For the foregoing reasons, petitioner's arguments under the sixth and seventh assignments of error do not provide a basis for reversal or remand.

The sixth and seventh assignments of error are denied.

The county's decision is affirmed.