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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

KB TREES, LLC and JOE KARAS,
*Petitioners*,

vs.

WASHINGTON COUNTY,
*Respondent*,

and

POLYGON WLH, LLC,
*Intervenor-Respondent*.

LUBA No. 2019-139

FINAL OPINION
AND ORDER

Appeal from Washington County.

Gregory S. Hathaway, Portland, filed the petition for review and a reply brief, and argued on behalf of petitioners. With him on the brief were Sara Brennan and Hathaway Larson LLP.

Jacquilyn E. Saito, Senior Assistant County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

Jack L. Orchard, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Sara A.H. Sayles and Ball Janik LLP.

RUDD, Board Chair; RYAN, Board Member, participated in the decision.

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

AFFIRMED 05/05/2020

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

Opinion by Rudd.

## NATURE OF DECISION

The challenged decision is a county hearings officer decision approving preliminary review of intervenor's proposed planned subdivision, including a re-plat to revise the subdivision's previously platted street network.

## FACTS

On March 20, 2020, we denied petitioners' motion for stay in this matter. *KB Trees v. Washington County*, ___ Or LUBA ___ (LUBA No 2019-139, Order, Mar 20, 2020) (slip op at 1-3). We take our statement of facts from that order:

> "The subject property contains two wetlands and is located within the North Bethany Subarea Plan (NBSP), a subarea identified in the county's comprehensive plan. * * * When the NBSP was adopted in 2009, it included the specific location of future roadways. * * * In 2018, the county adopted an ordinance amending the NBSP to realign one of those future roadways in order to minimize impacts to the wetlands on the subject property.* * * Under that realignment, the smaller of the two wetlands would be completely filled so that the roadway would avoid the larger wetland entirely. * * *
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> "* * * * *
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> "On April 19, 2019, after the county amended the NBSP to realign the roadway, intervenor submitted its land use application for preliminary review of a subdivision, and re-plat. Record 231. During the local proceedings on intervenor's land use application, planning staff recommended that the hearings officer impose the following condition of approval:
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> > "'If there is any activity within the [wetlands], the applicant shall gain authorization for the project from the Oregon Department of State Lands (DSL) * * *. The applicant shall provide Clean Water Services [(CWS)] or its designee

> (appropriate city) with copies of all DSL * * * project authorization permits.'" *KB Trees*, ___ Or LUBA ___ (LUBA No 2019-139, Order, Mar 20, 2020) (slip op at 1-3) (quoting Record 77-78).

Under this condition, intervenor is required to obtain approval from CWS prior to conducting any on-site or off-site grading work or construction impacting the wetlands.

During the proceedings before the hearings officer, petitioners requested that the hearings officer revise the condition. The italicized portion reflects the additional language proposed by petitioners:

> "'If there is any activity within the [wetlands], the applicant shall gain *final* authorization (*'Final Authorization'*) for the project from the Oregon Department of State Lands (DSL) * * *. The applicant shall provide [CWS] or its designee (appropriate city) with copies of all DSL * * * *Final* Project Authorization permits *prior to commencing any on-site improvements including grading.' Final Authorization means the exhaustion of all appeals regarding any contested case filed by [petitioners] challenging DSL's issuance of a wetland fill and removal permit for the proposed development.*" Record 937 (emphases added).

The hearings officer declined to impose the condition petitioners requested. On December 6, 2019, the hearings officer approved the preliminary review and re-plat with the condition proposed by county planning staff. This appeal followed.

**MOTION TO DISMISS**

On March 10, 2010, intervenor filed a motion to dismiss, asserting that the relief sought by petitioners is outside our jurisdiction, that petitioners have failed

to exhaust local administrative remedies, and that the appeal is moot.[1] The county joined in intervenor's jurisdictional arguments in its response to the petition for review. The county and intervenor are referred to jointly as respondents. For the reasons set forth below, we deny the motion.

**A. Jurisdiction**

Respondents argue we lack jurisdiction to provide the relief sought by petitioners because the requested relief requires that the hearings officer interfere with the authority of CWS and DSL to issue permits effective upon their issuance, decisions that are not appealable to LUBA. Petitioners respond that respondents mischaracterize the nature of their appeal. We agree with petitioners and conclude that we have jurisdiction.

Petitioners' challenge is that the county hearings officer improperly construed Washington County Development Code (CDC) 207-5.1, which provides:

> "The Review Authority may impose conditions on any Type II or III development approval. Such conditions shall be designed to protect the public from potential adverse impacts of the proposed use or development or to fulfill an identified need for public services within the impact area of the proposed development. Conditions shall not restrict densities to less than that authorized by the development standards of this Code."

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[1] Petitioners also argue that that petitioners' appeal is not well-founded in law or supported by fact. This assertion is not relevant to the motion to dismiss.

ORS 197.835(9)(a)(D) provides that LUBA shall reverse or remand a land use decision if the local government "improperly construed the applicable law." CDC 207-5.1 is an adopted and acknowledged land use regulation and qualifies as "the applicable law." *Beaumont-Wilshire Neighbors v. City of Portland*, 69 Or LUBA 381, 383 (2014) (LUBA's scope of review once it has jurisdiction includes compliance with "applicable law"). Accordingly, we have jurisdiction to consider petitioners' challenges to the hearings officer's application of a county land use regulation that grants the hearings officer the authority to impose conditions on a permit.

The condition of approval imposed by the hearings officer recognized the regulatory role of DSL in project development, providing in relevant part that "[i]f there is any activity within the [wetlands], the applicant shall gain authorization for the project from [DSL]."[2] Record 77. As we explained in our order denying petitioners' motion for stay:

> "A person who plans to remove or fill 'any waters of this state' must first obtain a permit from the Department of State Lands (DSL). ORS 196.810(1)(a). In order to fill the smaller wetland, intervenor

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[2] DSL is a state agency and LUBA does not have jurisdiction to review state agency contested case orders. ORS 197.825(2)(d); *Stewart v. Division of State Lands*, 25 Or LUBA 565 (1993). ORS 196.825(6) explicitly provides that DSL removal-fill permit decisions are contested case orders and that appeals of such orders are to the Court of Appeals, pursuant to ORS 183.482. On December 23, 2019, petitioners appealed DSL's decision to the Court of Appeals, where the matter is now pending. *KB Trees v. Department of State Lands*, *appeal pending* (A173008).

> applied for and, on October 8, 2018, DSL approved a removal/fill permit. * * * On October 26, 2018, petitioners requested a hearing on the DSL approval. * * * On August 14, 2019, an Administrative Law Judge (ALJ) issued a proposed order recommending that DSL affirm the issuance of the permit. * * * On November 27, 2019, the Director of DSL adopted the ALJ's recommendation as DSL's final order." *KB Trees*, ___ Or LUBA ___ (LUBA No 2019-139, Order, Mar 20, 2020) (slip op at 2).

The condition of approval also recognized the regulatory role of CWS in project development. CWS is a county service district created pursuant to ORS chapter 451. *Angius v. Clean Water Services District*, 50 Or LUBA 154, 158 (2005). CWS has jurisdiction over sewer, water quality and water quantity in the county.[3] Respondents are correct that we do not have jurisdiction over an appeal of a DSL

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[3] CDC 410 requires grading and drainage plans as part of intervenor's application. The hearings officer found that:

> "Pursuant to Resolution and Order No. 19-5 [(2019)], [CWS] has the responsibility for review and approval of storm drainage plans as well as erosion control plans. [CWS] has provided service provider letters affirming that storm sewer service is available to the site. The applicant will be required to obtain approval from [CWS] for the proposed drainage plan prior to any on-site work." Record 63-64.

As we have previously explained, there is no "clear connection" between CWS's design and construction standards and the county's comprehensive plan, and the standards are therefore not "land use regulation[s]." ORS 197.015(10)(a); *Angius*, 50 Or LUBA at 161-65. Therefore, decisions issued pursuant to those standards, such as a sensitive area pre-screening site assessment and the issuance of an erosion control permit, do not concern the adoption, amendment or application of a land use regulation, and are not "[l]and use decision[s]" pursuant to ORS 197.015(10)(a). *Id.*

removal-fill permit contested case order, or an appeal of a CWS approval of sewer services or proposed drainage plans.

However, as explained above, we have jurisdiction over this appeal and petitioners' challenge to the hearings officer's decision regarding an application for a permit.

**B. Collateral Attack**

Respondents also argue that petitioners' appeal amounts to an improper, collateral attack on the county's 2018 decision realigning the road. *Wingate v. City of Astoria*, 39 Or 603, 606, 65 P 982 (1901); *City of Astoria v. Douglas Land Co.*, 140 Or 7, 8, 12 P2d 307 (1932) (proceedings cannot be collaterally attacked after the improvement is made, on the grounds that some prior proceeding was irregular or invalid when the petitioner had knowledge of the improvement and made no objection). Again, we agree with petitioners. Petitioners' appeal is not a collateral attack on the county's previous decision realigning the road. The appeal before us is an appeal of the hearings officer's decision approving the preliminary review and replat.

**C. Exhaustion of Remedies**

Respondents also contend that the appeal is premature because CWS has not yet issued a permit to intervenor, and petitioners have therefore not exhausted CWS's process for internal appeals. ORS 197.825(2)(a); *Jacobsen v. City of Winston*, 63 Or LUBA 405 (2011) (it is the decision rendered at the end of the local appeal process that must be appealed to LUBA, not the intermediate

decision that led to the local appeal). Again, we agree with petitioners that this appeal concerns the county hearings officer's decision approving a permit. Appeal of the county's land use decision to LUBA requires that petitioners exhaust local appeal opportunities before the county. Respondents do not assert that petitioners failed to do so.

**D. Mootness**

LUBA will dismiss an appeal as moot where LUBA's review of the appealed decision would have "no practical effect." *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 420 (2014); *Jacobsen v. City of Winston*, 61 Or LUBA 465, 466 (2010); *Friends of Clean Living v. Polk County*, 36 Or LUBA 544, 549-50 (1999); *Davis v. City of Bandon*, 19 Or LUBA 526, 527 (1990). Respondents next maintain that the appeal is moot. According to respondents, petitioners' argument in the petition for review is that the hearings officer should have imposed a condition that required intervenor to present a DSL permit that is "final" to CWS, and because intervenor has presented a DSL permit to CWS, petitioners have received the remedy they sought and their appeal to LUBA would have no practical effect. Record 937.

We agree with petitioners that the fact that DSL has issued a permit does not, in itself, render moot petitioners' appeal of the hearings officer's decision

approving the preliminary review and replat.[4] Petitioners' assignment of error alleges that the hearings officer misconstrued the law when he declined to impose petitioners' requested condition. Petitioners seek remand of the hearings officer's decision in order for him to impose the condition they requested. Accordingly, the remedy petitioners seek at LUBA would still have a practical effect concerning the rights of the parties. Therefore, the issue is not moot.

The motion to dismiss is denied.

**ASSIGNMENT OF ERROR**

In their single assignment of error, petitioners argue that the hearings officer improperly construed CDC 207-5.1 in declining to impose *petitioners'* requested condition. ORS 197.835(9)(a)(D). Petitioners argue that the hearings officer has both the authority and duty to impose their requested condition on the development approval under CDC 207-5.1. We also understand petitioners to argue that the DSL related condition that the hearings officer imposed is inadequate because it does not "protect the public from potential adverse impacts of the proposed use" within the meaning of CDC 207-5.1, quoted below. Finally, petitioners also argue that the hearings officer's findings are inadequate. We address each argument in turn.

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[4] Although intervenor has procured the DSL permit, as noted above, the ALJ's decision affirming DSL's issuance of the permit has been appealed to, and is pending before, the Court of Appeals. *KB Trees v. Department of State Lands*, *appeal pending* (A173008).

### A. CDC 207-5.1

CDC 207-5.1 provides in part that:

> "The Review Authority *may* impose conditions on any Type II or III development approval. Such conditions shall be designed to protect the public from potential adverse impacts of the proposed use or development or to fulfill an identified need for public services within the impact area of the proposed development." (Emphasis added.)

As explained above, the staff report included a recommendation that the hearings officer adopt a condition of approval providing:

> "If there is any activity within the [wetlands], the applicant shall gain authorization for the project from the Oregon Department of State Lands (DSL) * * * . The applicant shall provide [CWS] or its designee (appropriate city) with copies of all DSL * * * authorization permits." Record 103.

During the proceedings below, petitioners requested that the hearing officer instead impose a condition that would require that intervenor obtain "final authorization" from DSL, meaning intervenor was required to provide CWS with a DSL permit prior to initiation of grading and any other construction activity for which "exhaustion of all appeals regarding any contested case filed by [petitioners]" had concluded. Record 937. The hearings officer declined to do so. He found:

> "Opponents have contested the issuance of a wetland fill and removal permit from DSL, and have indicated their willingness to continue to challenge it until all of their legal remedies are exhausted. The Hearings Officer acknowledges that while the various appeals may result in an outcome different from the one envisioned by the current application, that potential is not within the

scope of consideration for this decision." Record 73.

The hearings officer declined to impose the condition that petitioners requested. Petitioners argue that the hearings officer improperly construed CDC 207-5.1 and that the hearings officer has the "express authority *and duty* to impose conditions on a development approval."[5] Petition for Review 7 (emphasis added).

In support of their proposition that the hearings officer had *a duty* to impose the requested condition, petitioners cite *SkyDive Oregon, Inc. v. Clackamas County*, 122 Or App 342, 857 P2d 879 (1993) and *Von Clemm v. City of Portland*, 66 Or LUBA 379, 383-84 (2012). In *SkyDive Oregon*, the Court of Appeals agreed with our determination that the county possessed the authority to impose certain conditions of approval on a recreational skydiving facility in a rural residential and resource zone, a use subject to a conditional use permit. 122 Or App 342. In *Von Clemm*, we agreed with the city that the hearings officer appropriately imposed conditions of approval that led him to conclude that the

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[5] Petitioners also argue that the decision should be remanded for the hearings officer to "clarify" that "final" for purpose of petitioners' proposed conditions "means the exhaustion of all appeals regarding any contested case filed by Petitioners challenging DSL's issuance of a wetland fill and removal permit for Polygon's development." Petition for Review 1-2. In response, intervenors argue, and we agree that the condition that the hearings officer imposed does not, in fact, use the word "final." Petitioners' argument is based upon a misstatement of the hearing officer's decision. Only petitioners' proposed condition that the hearings officer rejected included the word "final." Accordingly, the hearings officer declined to adopt a proposed condition, he did not fail to interpret anything.

proposal complied with the city's general development standards and properly approved an environmental review application and side setback modification of a single-family dwelling application. 66 Or LUBA at 383-84. Further, we agreed that the city's code "expressly authorizes the city to impose conditions of approval for the purpose of ensuring 'that the proposal will conform to the applicable approval criteria for the review.'" *Id.* at 384. Neither of those cases establish that the hearings officer was required to impose the condition that petitioners requested. Both of those cases stand for the unremarkable proposition that when a local code provision provides a decision maker with the discretion to impose a condition of approval on a development proposal, the decision maker has the authority to impose conditions.

We review the hearings officer's decision to determine whether it was correct.[6] *McCoy v. Linn County*, 90 Or App 271, 752 P2d 323 (1998). For the reasons set forth below, we agree with respondents that the hearings officer correctly declined to impose the condition requested by petitioners.

As indicated above, CDC 207-5.1 provides that the hearings officer *may* impose a condition that is "*designed to protect the public from potential adverse impacts of the proposed use or development*[.]" (Emphasis added.) Petitioners argue that the condition imposed by the hearings officer will not protect

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[6] The hearings officer did not adopt a reviewable interpretation of CDC 207-5.1.

petitioners or the public. Petition for Review 3, 7. Although their argument is barely developed, we understand it to be a variation of their argument that the hearings officer had a duty to impose petitioners' requested condition because only their condition was "designed to protect the public from potential adverse impacts of the proposed use or development." If that is the argument, we disagree. The condition that the hearings officer did impose is both within his authority to impose, and requires that, in order to satisfy applicable erosion control measure criteria, the applicant must obtain a permit from DSL and provide that permit to CWS.

The first subassignment of error is denied.

**B. Hearings Officer's Findings are Adequate**

Under the second subassignment of error, petitioners challenge parts of the findings adopted by the hearings officer as inadequate to explain why he concluded that he would not impose petitioners' requested condition.

Adequate findings set out the applicable approval criteria and explain the facts relied upon to reach the conclusion whether the applicable criteria are satisfied. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992); *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92 (2015) (findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below). That a petitioner may disagree with the local government's conclusions provides no basis for reversal or remand. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993).

For the reasons we explain below, the findings are adequate to explain why the hearing officer declined to impose petitioners' requested condition. The hearings officer concluded that the condition of approval recommended by county planning staff was sufficient. The hearings officer ultimately concluded that with condition I.B.1.m Resolution and Order 19-5 (2019) was satisfied. Further musings by the hearings officer are dicta and not relevant.[7]

Petitioners argue that the findings are inadequate to explain why petitioners' condition did not better protect the public interest than the condition proposed by planning staff. Petition for Review 11. The hearings officer identified Resolution and Order 19-5 as an applicable approval criterion, and

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[7] The hearings officer also found that:

> "[T]he condition of approval in question is part of two prior un-appealed county approvals for the same properties * * *.
>
> "Pursuant to CDC Section 207-5.7 (Modification or Removal of Conditions), modification of a condition of approval may be sought only on appeal, or as a new development action. This application is technically a new development action, but the applicant is not requesting modification of the condition through this action. Additionally, even if the Hearings Officer did believe the condition could be modified through this application, it still would not meet the requirements set forth in 207-5.7 A.-D. for granting a modification on conditions." Record 73.

This finding does not undermine the hearing officer's finding that the condition imposed ensured that the criterion in Resolution and Order 19-5 would be met.

imposed condition I.B.1.m to ensure compliance with that criterion. Condition I.B.1.m requires intervenor to submit a DSL permit to CWS for approval prior to initiating the grading activity allowed under the permit. Record 77-78.

Petitioners also challenge the hearing officer's findings that:

> "The Hearings Officer acknowledges that while the various appeals may result in an outcome different from the one envisioned by the current application, that potential is not within the scope of consideration for this decision.
>
> "* * * * *
>
> "The Hearings Officer * * * notes that amending the condition in the manner suggested by [petitioners] would effectively act to stay the permit DSL issued on October 8, 2018. Whether or not to stay the effect of DSL's permit is not a decision for Washington County to make. That authority lies with either DSL itself or an Oregon court." Record 73.

Petitioners argue it is irrelevant whether the impact of petitioners' proposed condition would effectively act to stay the DSL permit, because it would "ultimately be in the best interest of the public" for the hearings officer's to impose petitioners' proposed condition, and because whether the effect of the condition would be to stay the DSL permit does not address whether the hearings officer has the authority to impose a condition that would do so. Petition for Review 14.

We disagree. As we have explained above, the hearings officer has the authority to impose conditions of approval to protect the public. The hearings officer's musings regarding one potential effect of imposing the condition as

requested by petitioners do not undercut his ultimate authority to impose the condition he deems necessary to protect the public interest, or establish that but for any belief he had concerning the propriety of imposing a condition which might delay the effectiveness of the DSL permit, he would have imposed petitioners' requested condition. Petitioners have not established that the condition imposed by the hearings officer fails to protect the public or otherwise fails to ensure satisfaction of Resolution and Order 19-5. The findings identify the relevant criteria, the facts relied upon and how the facts led to the ultimate conclusion. The findings are adequate.

As discussed above, the code provides that the hearings officer *may* impose conditions, not that he must do so. Nothing cited to us by petitioners suggests that the hearings officer was required to impose petitioners' proposed condition, simply because they proposed it.[8]

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[8] Petitioners also challenge the hearings officer's finding that:

> "The existing condition of approval requires the applicant to 'gain authorization for the project' and 'provide [CWS] [* * *] with copies of all [* * *] permits.' These requirements are already clear that the applicant cannot be active within the sensitive area without the permits." Record 73.

Petitioners argue that the hearings officer's finding is ambiguous, suggests that the hearings officer in fact believed he could require that all appeals of the DSL permit be exhausted, as petitioners had requested, and should be remanded for clarification. Read in context of the hearings officer's other findings, it is clear that the hearings officer rejected the language requested by petitioners.

The second subassignment of error is denied.

The county's decision is affirmed.

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Petitioners disagree with the hearings officer's findings; petitioners have not provided a basis for remand. *McGowan*, 24 Or LUBA 540 (1993).