

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 RICHARD L. HARCOURT and  
5 CAROLYN HARCOURT,

6 *Petitioners,*

7  
8 vs.

9  
10 MARION COUNTY,

11 *Respondent,*

12  
13 and

14  
15 MERRILL DEVELOPMENT, INC.,  
16 ALLAN MERRILL and LYNN MERRILL,

17 *Intervenors-Respondent.*

18  
19 LUBA No. 2001-116

20  
21 FINAL OPINION  
22 AND ORDER

23  
24 Appeal from Marion County.

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26 Corinne C. Sherton, Salem, represented petitioners.

27  
28 Jane Ellen Stonecipher, Salem, represented respondent.

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30 Wallace W. Lien, Salem, represented intervenors-respondent.

31  
32 BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member,  
33 participated in the decision.

34  
35 DISMISSED

09/18/2001

36  
37 You are entitled to judicial review of this Order. Judicial review is governed by the  
38 provisions of ORS 197.850.

39

**NATURE OF THE DECISION**

Petitioners appeal a May 15, 2001 letter from county staff concluding that a hydrogeologic review satisfies county code requirements.

**MOTION TO INTERVENE**

Merrill Development, Inc., Allan Merrill and Lynn Merrill (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

We take the following facts from the parties' pleadings. Intervenors own 10 acres zoned Acreage Residential that are within a sensitive groundwater overlay zone. Intervenors desire to subdivide the property into two-acre lots. Intervenors and county staff conducted a pre-application conference on the subdivision. County staff advised intervenors that pursuant to Marion County Rural Zoning Ordinance (RZO) chapter 181 they must prepare and submit a hydrogeologic review as a prerequisite to filing their subdivision application, to establish there is sufficient evidence of water supply to serve the proposed new lots.

RZO 181.100 requires that a hydrogeologic review shall contain specified information and analyses, and shall demonstrate that available information is sufficient to accurately estimate the "groundwater budget." RZO 181.150 requires that the hydrogeologic review be reviewed by a qualified expert of the county's choice, prior to acceptance of the land use application:

"All studies and reviews required by this chapter shall be reviewed by a qualified [geologist, engineering geologist or professional engineer], pursuant to [RZO] 181.130, of the county's choice prior to acceptance of the land-use application. Such review shall include examination to ensure required elements have been completed, study procedures and assumptions are generally accepted, and all conclusions and recommendations are supported and reasonable."

Further, RZO 181.160(B) provides that:

1            “All conclusions regarding the adequacy of evidence, findings derived from  
2            the evidence, and decisions concerning conditions on or limitations to  
3            development permits for requested land uses based on the provisions of this  
4            chapter shall be made by the approving authority that would ordinarily act on  
5            the specific type of application, as required by the [RZO]. \* \* \*”

6            Intervenors engaged a local engineering firm to conduct the required hydrogeologic  
7            review, which underwent the peer review process mandated by RZO 181.150. The county’s  
8            expert approved the hydrogeologic review on May 11, 2001. On May 15, 2001, county staff  
9            sent intervenors a letter stating that the county had received the results of peer review. The  
10           letter went on to say:

11           “As you will find, the results are positive. Consequently, the requirements of  
12           chapter 181 of the [RZO] (the ‘Sensitive Groundwater Overlay’ zone) for  
13           evidence of a sustainable long-term water supply for an additional well are  
14           satisfied. Please include a copy of the enclosed [peer review] letter with any  
15           land division applications submitted for this property. \* \* \*” Notice of Intent  
16           to Appeal, attachment 1.

17           Intervenors subsequently filed their subdivision application, which is currently  
18           pending before a county hearings officer. Petitioners apparently learned of the May 15, 2001  
19           letter during the course of the proceedings before the hearings officer and, on July 23, 2001,  
20           filed this appeal.

21           **MOTION TO DISMISS**

22           The county and intervenors jointly move to dismiss this appeal, arguing that LUBA  
23           lacks jurisdiction because the challenged letter is not a final land use decision or, in the  
24           alternative, if it is a final land use decision, petitioners failed to exhaust administrative  
25           remedies. The county and intervenors also argue, although they do not explain why it is a  
26           jurisdictional defect, that petitioners’ challenge to the May 15, 2001 letter is an  
27           impermissible collateral attack on RZO 181.

28           With respect to finality, the county and intervenors argue that county acceptance of  
29           the peer approval of the hydrogeologic review under RZO 181.150 is part of the pre-  
30           application process, does not lead to any final decision concerning compliance with approval

1 criteria or otherwise have preclusive legal effect, and is therefore not a final decision subject  
2 to LUBA's jurisdiction. *See Neighbors For Sensible Dev. v. City of Sweet Home*, \_\_\_ Or  
3 LUBA \_\_\_ (LUBA No. 2000-154, May 10, 2001) (tentative planning commission approval  
4 as the first step of a three-step approval process is similar to a pre-application conference and  
5 is not a final decision). The county and intervenor argue that RZO chapter 181 simply sets  
6 forth a process and requirements for a pre-application evidentiary submission, but does not  
7 itself contain any approval standards or criteria regarding the adequacy of groundwater  
8 supplies. Such standards are located elsewhere in the county's code, the county and  
9 intervenors argue, and are addressed during the application process, in the present case,  
10 during the proceedings before the hearings officer.

11 Petitioners agree with the county and intervenors that the challenged letter is not a  
12 *final* land use decision under the pertinent county code provisions, although petitioners  
13 dispute the remaining contentions in the motion to dismiss. Petitioners explain that they filed  
14 this appeal as a precaution, concerned that statements in the county's May 15, 2001 letter  
15 indicated that the county believed that the hydrogeologic review does more than satisfy the  
16 evidentiary submittal requirements of RZO chapter 181. Petitioners accept the county's  
17 explanation that final resolution of issues regarding groundwater adequacy will be made  
18 during the subsequent proceedings on intervenors' subdivision application.

19 We agree with the parties that under the county's code, the May 15, 2001 letter is not  
20 a final decision. It is clear under RZO 181.150 and 181.160(B) that the county's acceptance  
21 of the hydrogeologic review is not a final determination regarding the adequacy of that  
22 review to provide substantial evidence of compliance with any approval criteria, and that any  
23 such determinations will be made during the proceedings on the subsequent application. The  
24 May 15, 2001 letter determines that the hydrogeologic review satisfies the requirements of  
25 RZO chapter 181, but those requirements are simply for an evidentiary submittal. The May

1 15, 2001 letter does not purport to make a determination that the evidence submitted is also  
2 sufficient to provide substantial evidence of compliance with approval criteria.

3 Accordingly, this appeal is dismissed.