

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CLELAN DUDEK and LOIS DUDEK,
5 *Petitioners,*

6
7 vs.

8
9 UMATILLA COUNTY,
10 *Respondent.*

11
12 LUBA No. 2001-102

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Umatilla County.

18
19 Douglas E. Hojem, Pendleton, filed the petition for review and argued on behalf of
20 petitioners. With him on the brief was Corey, Byler, Rew, Lorenzen and Hojem.

21
22 Douglas R. Olsen, County Counsel, Pendleton, and D. Rahn Hostetter, Enterprise,
23 filed the response brief.

24
25 BRIGGS, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
26 participated in the decision.

27
28 REMANDED

10/04/2001

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.
32

NATURE OF THE DECISION

Petitioners challenge county approval of a partition.

MOTION TO RESET ORAL ARGUMENT

The petition for review in this appeal was filed on July 31, 2001. On August 7, 2001, we mailed a letter to petitioners and the county setting September 20, 2001, as the date for oral argument. On August 13, 2001, D. Rahn Hostetter (Hostetter) filed a motion to intervene on behalf of the applicant.¹ Petitioners objected to the motion as being untimely filed. We denied the motion to intervene on September 17, 2001.

On August 27, 2001, 20 days after oral argument had been scheduled, Hostetter filed a response brief on the county's behalf. Douglas R. Olsen (Olsen), the county counsel, was listed on the brief with Hostetter as attorneys for the county. Oral argument was held as scheduled on September 20, 2001, and no one appeared to represent the county. The Board allowed petitioners to present their oral argument pursuant to OAR 661-010-0040(2). On September 24, 2001, an employee in Hostetter's office informed LUBA staff that Hostetter had intended to appear on behalf of the county, but had not been informed of the date of oral argument.

Pursuant to ORS 197.830(14), the final opinion in this appeal was due October 1, 2001. At oral argument, petitioners agreed to extend that deadline for one week. Hostetter and Olsen have agreed to extend that deadline to October 8, 2001, to allow Hostetter additional time to file a motion objecting to our decision to proceed with oral argument on September 20, 2001. Hostetter now moves for a new oral argument or, in the alternative, an opportunity to submit written argument in response to the points made in petitioners' oral argument. Hostetter explains that he was unable to attend the September 20, 2001 oral

¹Until that time, we had no notice that Hostetter was involved in the appeal in any capacity.

1 argument because he was scheduled for a trial in the Wallowa County Circuit Court, and if
2 he had known about the September 20, 2001 oral argument date, he would have requested
3 that oral argument be rescheduled to accommodate his previously scheduled trial.

4 Our August 7, 2001 letter advising the parties of the place, time and date for oral
5 argument was sent to all parties of record on August 7, 2001. Although Hostetter later filed a
6 motion to intervene, and apparently prepared and submitted the county's brief that was filed
7 with LUBA on August 27, 2001, neither of those actions occurred until after oral argument
8 had already been scheduled. Hostetter's failure to learn of the September 20, 2001 oral
9 argument is attributable to his failure to make appropriate inquiries with LUBA or Olsen.
10 That failure provided no reasonable basis for canceling oral argument on September 20,
11 2001, and provides no basis for delaying this appeal to allow additional time for the county
12 to submit additional written argument now. Hostetter's motion is denied.

13 **FACTS**

14 On November 13, 2000, Danny R. Smith (Smith) submitted an application to divide
15 the subject 20-acre property into three parcels. As proposed, two five-acre parcels would be
16 created from the western half of the property, and a third 10-acre parcel would be created
17 from the eastern half of the property. The application anticipated the use of Jerico Lane, an
18 existing private road easement, as the access to the property from the west. The Jerico Lane
19 easement is 50 feet wide, with an improved gravel surface that varies in width from 14 to 20
20 feet. Jerico Lane provides access to several properties before it reaches the subject property,
21 including petitioners' property. After reaching the subject property, Jerico Lane crosses the
22 subject property along its western boundary and provides access to the property to the north.
23 Smith also proposed to create a new easement along the southern boundary of the property to
24 provide access to the third parcel.

25 Petitioners appeared before the county to oppose the application, and testified that
26 Jerico Lane is not currently built to county standards. Petitioners argued that the application

1 could be approved only if Smith were required to bring the entire 3,500-foot length of Jerico
2 Lane leading to the subject property up to county road standards. Petitioners contended that
3 county standards require that the right-of-way width be expanded to 60 feet, and that the road
4 be improved to county B-1 standards.²

5 The planning commission asked county counsel whether petitioners were correct that
6 county standards required Smith to widen and improve the entire length of Jerico Lane prior
7 to reaching the subject property. County counsel responded in a memorandum, in which he
8 concluded that the county did not have authority to require the applicant to make off-site
9 improvements to bring the entire length of Jerico Lane up to county standards. According to
10 the memorandum, only the portion of Jerico Lane on the subject property and any new access
11 easements off Jerico Lane are subject to the county's road standards. Record 110.

12 The planning commission subsequently approved the partition. Among other
13 conditions, the planning commission's decision requires that the final plat show (1) an
14 increased width of the proposed new easement along the south property line from 30 feet to
15 60 feet, and (2) an "increased width of the existing easement (Jerico Lane)" from 50 feet to
16 60 feet. Record 86. Further, the planning commission decision requires that both easements
17 be dedicated on the final plat as public roads, and that Smith sign and record an irrevocable
18 consent agreement to participate in future improvements to Jerico Lane and the new
19 unnamed easement established by the partition. *Id.* Petitioners appealed the planning
20 commission decision to the board of commissioners, which affirmed the planning
21 commission's decision. This appeal followed.

22 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

23 In their first assignment of error, petitioners argue that the county erred by failing to
24 require the improvement of the entire length of Jerico Lane to B-1 standards prior to final

²The county's B-1 road standard for residential development requires a six-inch crushed rock base, a two-inch crushed rock level course and a one and one-quarter inch 0-11 oil mat. Record 152.

1 plat approval. According to petitioners, Umatilla County Development Ordinance (UCDO)
2 152.684(G)(3) imposes two development requirements on an application for partition plat
3 approval in these circumstances: (1) dedication of a 60 foot right-of-way; and (2)
4 improvement of the right-of-way to a B-1 standard.³ Petitioners argue that the planning
5 commission and board of commissioners interpreted UCDO 152.684(G)(3) to apply to the
6 entire length of Jerico Lane, and properly imposed a condition requiring Smith to widen the
7 entire length of Jerico Lane from 50 to 60 feet. However, petitioners argue that the county
8 erred in also failing to require Smith to improve the entire length of Jerico Lane to B-1

³UCDO 152.684 provides, in relevant part:

“In granting approval of a Type II Land Division [partition], the Planning Director shall find that the Type II Tentative Plan and required supplementary material [demonstrate compliance with the following requirements]:

“* * * * *

“(F) Roads and recorded easements for access purposes are laid out so as to conform, within the limits of the development standards, to the plats of subdivisions and maps of partitions already approved for adjoining property unless the Planning Director determines it is in the public interest to modify the road pattern;

“(G) Dedicated road or public recorded easement[(s)] shall be provided to each parcel and conform to right-of-way and improvement standards as follows:

“(1) If a recorded easement for access purposes in a Type II Land Division will serve three or fewer lots and will not likely serve other parcels or lots due to existing conditions, such as topography or the size or shape of land, or the parcels are not buildable lots, a minimum of a 30-foot right-of-way shall be required and be improved to a ‘D’ standard.

“* * * * *

“(3) If a public road or recorded easement for access purposes in a Type II Land Division will serve four or more lots and will likely serve additional parcels due to development pressures in the area, or likely be an extension of a future road as specified in a future road plan, a minimum of a 60-foot right-of-way shall be required and be improved to a ‘B-1’ standard.

“* * * * *

“(5) Existing county or public roads shall be improved pursuant to the requirements of this chapter.”

1 standards. In their second assignment of error, petitioners contend that the county’s findings
2 are inadequate to demonstrate that UCDO 152.684(G)(3) is satisfied with regard to Jerico
3 Lane.

4 The county responds that UCDO 152.684(G)(3) only imposes road improvement
5 requirements when the county finds that the access road (1) will serve four or more lots, and
6 (2) will likely serve additional properties due to development pressures in the area. Here,
7 respondent argues, the county found that Jerico Lane currently serves four or more lots;
8 however, the county did not find that road improvements were necessary because it is
9 unlikely that Jerico Lane will serve additional parcels due to development pressure in the
10 area.

11 The county’s findings state, in relevant part:

12 “6. Roads and easements conform to existing plats: There is an existing
13 partition plat (No. 1999-49) adjacent to the south side of the subject
14 property. This plat increased the width of Jerico Lane to 60 feet in
15 order to meet county standards for easement roads serving more than 4
16 parcels. In order to conform to that existing plat and meet county
17 standards for easement widths, the applicants will be required to
18 increase the width of the existing 50-foot easement for Jerico Lane to
19 60 feet. This is discussed further below.

20 “7. Provides dedicated roads or easements to each parcel, and complies
21 with county road and easement improvement standards.

22 “7a. Recorded road easement will serve now and in the future 3 or fewer
23 parcels. Not applicable. The 50-foot easement road (Jerico Lane)
24 serves more than 3 parcels. The proposed 30-foot easement has the
25 potential of serving more than 3 parcels.

26 “7b. The road will now or in the future serve 4 or more parcels. Yes.
27 [UCDO] 152.684(G)(3) requires that [i]f a public road or recorded
28 easement will likely serve 4 or more lots, a minimum 60-foot right-of-
29 way shall be required and be improved to a ‘B-1’ standard.

30 “The 50-foot easement (Jerico Lane) is already an established
31 easement that would need to be increased to 60 feet due to the number
32 of properties it serves and to conform with the adjacent partition plat.

1 “The applicant has proposed a 30-foot easement along the southern
2 property line of proposed parcel 1 to serve proposed parcel 3 to the
3 east. Due to the minimum lot size of the RR-2 zoning, proposed parcel
4 3 could be subdivided into 5 two-acre lots. The tax lot to the south of
5 the subject property also has the potential for additional partitioning
6 which will need future access. Since the new easement would provide
7 access to more than 4 parcels, the applicant will be required to
8 increase the proposed easement width for the new easement to 60 feet
9 from the 30 feet proposed.

10 “[UCDO] requires easements serving, or having the potential to serve,
11 4 parcels or more to be developed to a ‘B-1’ standard. Since there is
12 no subdivision proposed at this time and the new easement is expected
13 to now serve only one parcel, the roadway improvements to the new
14 easement will not be required to meet full standard until additional
15 development occurs. A subsequent condition to improve the proposed
16 new easement to a [one-half] D standard (currently that [one-half]
17 standard calls for a roadbed of 6 inches of compacted gravel to a 16-
18 foot width) will be required prior to permits being issued for
19 development on proposed parcel 3.” Record 6-7 (emphasis in original).

20 The above-quoted findings are unclear and they do not include interpretations of
21 UCDO 152.684(G)(1) and (3) that are sufficient for review. *Larson v. Wallowa County*, 25
22 Or LUBA 537 (1993). That lack of clarity and absence of interpretations of the relevant
23 UCDO provisions lead the parties to take different views on what the county actually decided
24 in this case and why it did so.⁴

25 Rather than engage in a detailed discussion of the parties’ arguments, we return to the
26 language of UCDO 152.684(G)(3), which was set out at n 3, and note some obvious
27 ambiguities that the county must resolve to apply UCDO 152.684(G)(3) in the factual
28 context that is presented in this case. As an initial point, we assume the county’s
29 interchangeable use of the terms “lot” and “parcel” in UCDO 152.684(G)(1) and (3) was
30 unintentional and that UCDO 152.684(G)(1) and (3) require consideration of units of land,

⁴For example, petitioners read the decision to require that the applicant provide a 60-foot wide easement for the entirety of Jerico Lane. In addition, the county imposed the easement-widening requirement of UCDO 152.684(G)(3) for Jerico Lane but not the roadway improvement requirement of UCDO 152.684(G)(3). The reasoning that led the county to that apparently inconsistent application of UCDO 152.684(G)(3) is not explained in the decision.

1 whether they be lots or parcels. Assuming we have resolved that ambiguity correctly, UCDO
2 152.684(G)(3) appears to require that two questions be answered in this case:

- 3 1. Will a public road or recorded easement for access to the proposed
4 division serve four or more lots or parcels? If the answer is no, UCDO
5 152.684(G)(3) does not apply and no easement widening or roadway
6 improvements can be required under UCDO 152.684(G)(3).
- 7 2. If the answer to question 1 is yes, is the public road or recorded
8 easement for access to the proposed division also “likely [to] serve
9 additional [lots or] parcels [in the future] due to development pressures
10 in the area, or likely [to] be an extension of a future road as specified
11 in a future road plan * * *”? If the answer is yes, UCDO
12 152.684(G)(3) applies and requires a 60-foot right-of-way or easement
13 and roadway improvements to a B-1 standard.

14 In answering these questions, there are a number of ambiguities in UCDO
15 152.684(G)(3) that the county must resolve. In answering the first question, it is necessary to
16 determine whether only the two new parcels that will be provided access by Jerico Lane and
17 one new parcel that will be provided access by the new proposed easement must be
18 considered. In applying this part of UCDO 152.684(G)(3), the county apparently does not
19 interpret UCDO 152.684(G)(3) so narrowly, because it apparently looked at other existing
20 properties that use Jerico Lane for access and at other properties that adjoin the proposed
21 new easement in determining that four or more lots or parcels were served by both Jerico
22 Lane and the proposed new easement.

23 In answering the second question, the county must determine whether only potential
24 future development *on the subject property* must be considered or whether the possibility
25 that Jerico Lane or the proposed new easement might serve new lots or parcels created in the
26 future out of *other properties* must also be considered. While it is not entirely clear, the
27 county appears to have embraced the latter, broader interpretation to conclude that UCDO
28 152.684(G)(3) applies to both Jerico Lane and the proposed new easement.

29 Finally, if those two questions are answered in the affirmative, the county must
30 determine whether any easement widening and roadway improvements that are required by

1 UCDO 152.684(G)(3) apply to the entire length of Jerico Lane or only to the part of Jerico
2 Lane that crosses the subject property.⁵ While it is not entirely clear, the county appears to
3 have adopted the more narrow interpretation and only required that the applicant provide a
4 60-foot wide access easement for the part of Jerico Lane that crosses the subject property and
5 the proposed new access easement on the subject property. However, it would also appear
6 that if the county found that UCDO 152.684(G)(3) applies here, and relies on it to require
7 that the access easements on the subject property be 60 feet wide, UCDO 152.684(G)(3) also
8 requires that the applicant improve the access easements on the subject property to the B-1
9 standard. The challenged decision clearly does not do so, either for the portion of Jerico Lane
10 on the subject property or for the new proposed easement. Nothing in the decision explains
11 or justifies this apparent inconsistent application of UCDO 152.684(G)(3). Accordingly, the
12 challenged decision must be remanded to allow the county to interpret UCDO
13 152.684(G)(3).

14 The first assignment of error is sustained in part. The second assignment of error is
15 sustained. The county's decision is remanded.

⁵It may be that in some cases, perhaps including the present case, interpreting UCDO 152.684(G)(3) to require that the applicant widen all of Jerico Lane to 60 feet in width and improve all of Jerico Lane to the B-1 standard would run afoul of the constitutional limitation on exactions that is imposed under the Fifth Amendment to the United States Constitution under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). Such concerns might lead the county to adopt the more narrow interpretation of UCDO 152.684(G)(3). If the county adopts the broader interpretation, it will need to recognize that the broader interpretation may require that it consider the constitutionality of applying that interpretation of UCDO 152.684(G)(3) on a case by case basis. These concerns may have been behind the county counsel's conclusion that the county lacked authority to require the applicant to make off-site improvements, but we cannot know for sure.