

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

3  
4 RICHARD NIEDERHOF, LORI NIEDERHOF,  
5 STEPHEN GREER, MICHAEL BAYARD  
6 and ROGER-HARRIS-HUNNELL NEIGHBORS ,  
7 *Petitioners,*

8  
9 vs.

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11 DESCHUTES COUNTY,  
12 *Respondent,*

13  
14 and

15  
16 J BAR J YOUTH SERVICES,  
17 *Intervenor-Respondent.*

18  
19 LUBA No. 2004-156

20  
21 ORDER

22 **MOTION TO INTERVENE**

23 J Bar J Youth Services, the applicant in a related land use proceeding, moves to  
24 intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

25 **MOTION TO DISMISS**

26 On September 1, 1970, W.D. Bowers and Baba Lee Bowers (hereafter the Bowers)  
27 executed a “Road Dedication Deed,” which granted “the PUBLIC an easement for road  
28 purposes” over certain real property in unincorporated Deschutes County. Record 4. That  
29 deed was recorded on September 10, 1970. In 1970 the statutory requirements for dedicating  
30 a public way by deed appeared at ORS 368.546. As relevant, the 1970 version of ORS  
31 368.546 provided:

32 “Whenever any person owning lands in any county, and not within the limits  
33 of an incorporated city or town, has dedicated or, after August 9, 1961, shall  
34 forever dedicate, to the use of the public for road purposes all or any portion  
35 of said land, by:

1           “(1) Presenting to the county court a good and sufficient deed properly  
2           executed forever dedicating the land and granting such public road  
3           easement, and the deed has been or is accepted by the county court and  
4           placed of record;

5           “\* \* \* \* \*

6           “each public road easement so dedicated shall be a public highway and road  
7           and shall be open to public use and travel.”

8           Under the 1970 version of ORS 368.546(1), three actions were required to complete a  
9           dedication of land for a county road outside city limits: (1) a deed that dedicated land for a  
10          public road, (2) acceptance of that deed by the county court, and (3) recording of the deed.  
11          Although a deed for the disputed easement was executed and recorded, and a road apparently  
12          has been constructed across the above-noted easement, the county only recently accepted the  
13          dedication. On June 21, 2004, the board of county commissioners voted to accept the  
14          dedication. On June 30, 2004, the board of county commissioners executed an “Acceptance  
15          of Deed” (acceptance) in which it accepted the 1970 dedication, but excepted from that  
16          acceptance a parcel that the Bowers had previously deeded to others in 1967. That June 30,  
17          2004 acceptance is the subject of this appeal.

18          As relevant here, LUBA’s jurisdiction is limited to land use decisions.  
19          ORS 197.825(1). The county’s decision is a land use decision, if the county was required to  
20          apply the statewide planning goals, a comprehensive plan provision or a land use regulation  
21          when it accepted the 1970 deed.<sup>1</sup> The county moves to dismiss this appeal, arguing that the

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<sup>1</sup> Under ORS 197.015(10)(a)(A), a land use decision includes:

“A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

- “(i) The [statewide planning] goals;
- “(ii) A comprehensive plan provision;
- “(iii) A land use regulation; or
- “(iv) A new land use regulation[.]”

1 2004 acceptance is not a land use decision. The county argues that it had no land use  
2 regulations that applied to road dedications in 1970. We understand the county to argue that  
3 it views the 1970 dedication as an application for a “permit,” within the meaning of ORS  
4 215.402(4), and its 2004 acceptance as the county’s approval of that 1970 application for a  
5 “permit.”<sup>2</sup> The county argues that ORS 215.427(3)(a) requires that it apply the standards that  
6 were in effect in 1970 to that application.<sup>3</sup> Because the only applicable standards in effect in  
7 1970 were set out in the 1970 version of ORS 368.546, and no land use standards applied in  
8 1970, the county contends the challenged deed is not a land use decision.

9 We do not agree that the 1970 deed is correctly characterized as an application for a  
10 permit, *i.e.*, “discretionary approval of a proposed development of land.” *See* n 2. It is not an  
11 application for anything; it is an offer to convey an interest in real property to the public.  
12 Even if the 1970 deed could be viewed as a permit application, the fixed goal post rule in  
13 ORS 215.427(3)(a) was first adopted in 1983. Or Laws 1983, ch 827, § 23(3). There is  
14 nothing in that 1983 legislation that suggests it was intended to apply retroactively to a deed  
15 that was executed and recorded 13 years earlier under a statute that was repealed in 1981  
16 without the county having accepting the deed, as was required by the repealed statute to  
17 create a public road.<sup>4</sup> Even if all these problems with the county’s position could be  
18 overcome, from the time it was first enacted in 1983, the fixed goal post rule for counties  
19 only applies to counties with acknowledged comprehensive plans and land use regulations.

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<sup>2</sup> As relevant, ORS 215.402(4) provides: “[p]ermit’ means discretionary approval of a proposed development of land[.]”

<sup>3</sup> ORS 215.427(3)(a) provides:

“If the application [for a permit] was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.”

<sup>4</sup> ORS 368.546 was repealed by Oregon Laws 1981 chapter 153, section 79.

1 See n 3. We read ORS 215.427(3)(a) to require that the county’s comprehensive plan and  
2 land use regulation must be acknowledged at the time the permit application is submitted for  
3 the fixed goal post rule to apply. Deschutes County did not have an acknowledged  
4 comprehensive plan and land use regulations in 1970.

5 There was no fixed goal post rule in 1970. It is undisputed that the county did not  
6 accept the 1970 deed until 2004. The county was bound to apply the law in effect in 2004,  
7 when it accepted the easement dedication. We next consider whether, under the law in effect  
8 in 2004, the county was required to apply land use standards that make its decision to accept  
9 the easement dedication a land use decision.

10 The statutes governing county roads are now codified at ORS 368.001 to 368.990.  
11 Under ORS 368.011, the county is authorized to adopt its own procedure for road  
12 dedications. Deschutes County Code (DCC) Title 17 is the county’s land division ordinance.  
13 DCC Title 17 is a “land use regulation,” within the meaning of ORS 197.015(11).<sup>5</sup> In 1995,  
14 the county adopted DCC 17.52 as part of DCC Title 17. DCC 17.52.050 identifies the  
15 criteria in DCC Title 17 and the county’s zoning ordinance criteria that apply to road  
16 dedications. DCC 17.52.090 requires that the board of county commissioners accept road  
17 dedications. We do not understand the county to dispute that dedications of land for roads  
18 pursuant to DCC chapter 17.52 require the county to apply land use regulations and therefore  
19 result in land use decisions. Neither do we understand the county to dispute that the  
20 challenged road dedication and acceptance must be processed under DCC chapter 17.52, if  
21 ORS 215.427(3)(a) does not prohibit it from doing so. We have already concluded above  
22 that ORS 215.427(3)(a) does not impose such a prohibition.

23 The county’s motion to dismiss is denied.

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<sup>5</sup> ORS 197.015(11) provides the following definition of land use regulation:

“‘Land use regulation’ means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.”

1           Because the county apparently did not follow the procedures or apply the criteria that  
2 must be applied under DCC chapter 17.52 when it accepted the 1970 deed in 2004, it would  
3 appear that remand of the county’s decision based on that failure is inevitable. Nevertheless,  
4 because the petition for review has not yet been filed and petitioners have not yet assigned  
5 error to the county’s decision, we have no basis for remanding the county’s decision at this  
6 point. We therefore establish a briefing schedule and leave it to the county to determine  
7 whether it wishes to move for a voluntary remand or attempt to defend its acceptance on the  
8 merits.

9           The petition for review is due 21 days from the date of this order. The response brief  
10 is due 42 days from the date of this order. The Board’s final opinion and order is due 77 days  
11 from the date of this order.

12           Dated this 22<sup>nd</sup> day of November, 2004.

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Michael A. Holstun  
Board Chair