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

RANDY ELLISON, TOM HOLEMAN, )  
CAROL MASTRONARDE, PETE SCHNELL, )  
GLENN LAUBAUGH and ROBERT )  
DELEGATO, )  
 ) LUBA No. 94-138  
Petitioners, )  
 ) FINAL OPINION  
vs. ) AND ORDER  
 )  
CLACKAMAS COUNTY, )  
 )  
Respondent. )

Appeal from Clackamas County.

Stuart A. Sugarman, Portland, filed the petition for review and argued on behalf of petitioners.

Stacy L. Fowler, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON, Referee, participated in the decision.

REMANDED 01/13/95

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county hearings officer's order  
4 approving a flexible lot size subdivision.<sup>1</sup>

5 **FACTS**

6 The subject property is zoned Urban Low Density  
7 Residential (R-10) and consists of 1.65 acres. The proposal  
8 is to create a seven-lot subdivision and a dead-end street  
9 to serve the subdivision. The proposed dead-end street will  
10 require approximately 11,230 square feet of the subject  
11 property. After a public hearing, the hearings officer  
12 approved the proposal, and this appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 The issue under this assignment of error centers on the  
15 meaning of the term "dedicated" in Clackamas County Zoning  
16 and Development Ordinance (ZDO) 1012.03(C)(1). This  
17 interpretative issue is important because if the road to be  
18 created to serve the proposed subdivision is "dedicated"  
19 within the meaning of ZDO 1012.03(C)(1), then the proposed  
20 subdivision may have more than the permissible number of  
21 lots.

22 ZDO 1012.03(C)(1) provides the following requirement  
23 for calculating density:

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<sup>1</sup>The challenged decision is a limited land use decision as defined by ORS 197.010(12). However, no party argues that this affects our scope of review in this appeal proceeding, and we do not see that it does.

1 "Subtract area to be dedicated for new roads  
2 serving the development \* \* \*."

3 The challenged decision includes the following  
4 interpretation of ZDO 1012.03(C)(1):

5 "A principal issue in this proceeding is the lot  
6 sizes and density permitted by the applicant's  
7 proposed access as a private roadway rather than a  
8 public road. [ZDO] 1012.03(C) would require that  
9 the area to be dedicated for new roads serving the  
10 development be subtracted \* \* \* from the total  
11 unrestricted area in calculating the permitted  
12 density. It has been the County's view of [ZDO  
13 1012.03(C)] that the area[s] included within  
14 private access easements are not to be subtracted,  
15 but can be wholly included within the density  
16 calculations. \* \* \* In this case, even though  
17 the applicant will be required to construct an  
18 access to County local road standards, with curbs  
19 and sidewalks, that access will be designated as a  
20 reciprocal and perpetual non-exclusive common  
21 access and utility easement. It will be under the  
22 ownership of those lots which it serves, and it  
23 will not be dedicated as a public road. \* \* \*

24 " \* \* \* \* \*

25 "The land which lies under the private road which  
26 will serve this development will not be designated  
27 for any general or public use. That land will be  
28 encumbered only by limited common access and  
29 utility easements. The land under the private  
30 road is, therefore, not dedicated. The land is  
31 also not dedicated as a public road, as the  
32 general public will have no specific right to  
33 utilize it as a roadway.

34 " \* \* \* \* \*

35 "While there may not appear to be any legislative  
36 or public policy served by authorizing greater  
37 density when development is served by a private  
38 road or access easement, as opposed to development  
39 served by a public road, the legislative standards  
40 for determining density are not vague, and must be

1 followed." Record 3.

2 The challenged decision also interprets the meaning of the  
3 term "dedicated" in ZDO 1012.03(C)(1) by referring to ZDO  
4 202, which defines the term "dedication" as follows:

5 "DEDICATION: The designation of land by its owner  
6 for any general or public use."

7 Petitioners allege, and respondent concedes, the  
8 disputed road is the only road that will directly serve the  
9 proposed subdivision lots. Petitioners argue the disputed  
10 road will generally be used by the public, as well as by  
11 individuals living within the proposed subdivision.  
12 Petitioners contend there is nothing in the challenged  
13 decision or elsewhere to indicate public access to or along  
14 the disputed roadway, or public access to or along the  
15 sidewalks to be constructed within the roadway, will in any  
16 way be restricted. In addition, petitioners rely on  
17 condition 19 in the challenged decision, which provides:

18 "The street construction, storm sewer and  
19 utilities work must be designed and built to be  
20 compatible with adjoining existing approved plats  
21 and accommodate future needs of the adjoining  
22 property." Record 137.

23 At the outset, we note we are not required to defer to  
24 the hearing's officer's interpretation of the county code  
25 under ORS 197.829 or Clark v. Jackson County, 313 Or 508,  
26 515, 836 P2d 710 (1992). Gage v. City of Portland, 319 Or  
27 308, 877 P2d 1187 (1994); Watson v. Clackamas County 129 Or  
28 App 428, 879 P2d 1309, rev den 320 Or 407 (1994). Our

1 review of a hearings officer's interpretation is to  
2 determine whether the interpretation is reasonable and  
3 correct. McCoy v. Linn County, 90 Or App 271, 752 P2d 323  
4 (1988).

5 We agree with petitioners that the hearings officer's  
6 interpretation is incorrect. Here, a private easement is  
7 required by the challenged decision to serve ZDO road  
8 requirements and act as a road for the subdivision. The  
9 disputed road will serve as emergency access to the proposed  
10 development. Further, there is no limitation in the  
11 challenged decision or elsewhere on who may use the disputed  
12 road and sidewalks and a condition of approval requires the  
13 disputed road be "built to be compatible with adjoining  
14 existing approved plats and accommodate future needs of the  
15 adjoining property." Record 137. Under these  
16 circumstances, the reasonable and correct interpretation and  
17 application of ZDO 202 and 1012.03(C)(1) is that the road  
18 will be "generally" used, or that it will be used by the  
19 public and, therefore, the land underlying that road is  
20 "area to be dedicated for new roads serving the  
21 development." ZDO 1012.03(C)(1). The hearings officer's  
22 contrary interpretation is erroneous.

23 The first assignment of error is sustained.

24 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

25 Petitioners argue the challenged decision fails to  
26 establish compliance with the purpose statement for the ZDO

1 Urban Low Density Residential zones, which states:

2 "This section implements the policies of the  
3 Comprehensive Plan for existing and future Low  
4 Density Residential areas, which include:

5 "A. Provide and protect residential land for  
6 families who desire to live in a low density  
7 environment.

8 "B. Protect the character of existing low density  
9 neighborhoods.

10 "\* \* \* \* \*" ZDO 301.01.

11 Petitioners also argue the challenged decision is  
12 inconsistent with ZDO 301.02 (Areas of Application), which  
13 provides:

14 "One or more of the following factors shall guide  
15 the determination of the most appropriate [zoning]  
16 district to apply to a specific piece of property  
17 or area:

18 "\* \* \* \* \*"

19 "(E) Neighborhood Preservation and Variety: Areas  
20 which have historically developed on large  
21 lots where little vacant land exists shall  
22 remain zoned consistent with the existing  
23 development pattern.

24 "\* \* \* \* \*"

25 Petitioners contend the proposal's compliance with  
26 ZDO 301.01 and 301.02(E) is a relevant issue raised below to  
27 which county was obliged, but failed, to respond.

28 We note as an initial matter that we may determine in  
29 the first instance whether ZDO 301.01 and 302.02(E) are  
30 mandatory approval standards applicable to the proposal.  
31 This is because even if the hearings officer adopted an

1 interpretation of these provisions, we would not be required  
2 to defer to that interpretation under Gage, supra and  
3 Watson, supra. Further, interpreting the cited ZDO 301  
4 provisions does not present a situation posing any  
5 particularly complex interpretative issue regarding the  
6 interrelationship between these and other ZDO provisions.

7 We agree with the county's position stated in its brief  
8 that the ZDO 301.01 purpose statement is aspirational only  
9 and, therefore, is not a mandatory approval standard which  
10 must be satisfied for the county to approve the proposed  
11 subdivision. Neuharth v. City of Salem, 25 Or LUBA 267, 278  
12 (1993); Bennett v. City of Dallas, 17 Or LUBA 450, aff'd 96  
13 Or App 645 (1989). Consequently, that the challenged  
14 decision does not include findings of compliance with  
15 ZDO 301.01 provides no basis for reversal or remand of the  
16 challenged decision. Bonner v. City of Portland, 11 Or LUBA  
17 40, 52 (1984).

18 Further, we also agree with the county's position in  
19 its brief that ZDO 301.02(E) was adopted to guide the county  
20 in applying zoning districts to particular properties, and  
21 does not purport to be a mandatory approval standard  
22 applicable to individual development applications.  
23 Therefore, that the proposal may not establish compliance  
24 with ZDO 301.02(E) provides no basis for reversal or remand  
25 of the challenged decision.

26 The second and third assignments of error are denied.

1           The county's decision is remanded.