

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OTTO GEORGE NEUMAN and)
BETTY NEUMAN,)
Petitioners,) LUBA No. 94-219
vs.) FINAL OPINION
BENTON COUNTY,) AND ORDER
Respondent.)

Appeal from Benton County.

Edward F. Schultz, Albany, filed the petition for review and argued on behalf of petitioners. With him on the brief was Weatherford, Thompson, Quick & Ashenfelter.

David Doyle, Assistant County Counsel, Corvallis, filed the response brief and argued on behalf of respondent.

SHERTON, Chief Referee, participated in the decision.

REMANDED 04/12/95

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision by the board of county
4 commissioners granting preliminary approval for a partition
5 of their property, with conditions.

6 **FACTS**

7 Prior to 1993, the subject property was part of a
8 30.5-acre parent parcel. The parent parcel was bordered on
9 the south and west by Mary's River and on the northeast by
10 Highway 20.¹ At all relevant times, the parent parcel and
11 the abutting property to the southeast were zoned Rural
12 Residential, two-acre minimum, Flood Plain Management
13 Overlay (RR2/FP). A dwelling is located near the eastern
14 boundary of the parent parcel, some 300 to 400 ft. south of
15 Highway 20. Access to this dwelling is from Highway 20 via
16 a gravel drive running east-west across the abutting
17 property to the east. Whether this gravel drive is a public
18 or private road is a matter of dispute.²

19 In 1993, the county approved a partition creating a

¹At this location, Highway 20 has a northwest-southeast orientation.

²As explained in more detail below, petitioners contend this east-west drive is part of a county road created in 1925 (hereafter "1925 county road"), which road also includes a north-south leg extending north at or near the eastern boundary of the parent parcel and intersecting with Highway 20. In other words, according to petitioners, the 1925 county road is L-shaped, with the north-south leg paralleling the eastern boundary of the parent parcel, and the north and east ends of the L-shaped road intersecting Highway 20 at two different access points.

1 2.14-acre parcel in the southeast corner of the parent
2 parcel (Parcel 2), a 2.35-acre parcel in the northeast
3 corner of the parent parcel (Parcel 3), and the subject
4 26-acre parcel (Parcel 1), which contains the existing
5 dwelling. Record 58. According to the approved final plat,
6 an "easement for ingress and egress in favor of parcels 1,
7 2, and 3" was created along the eastern boundary of the
8 parcels (hereafter "access easement"). *Id.* The access
9 easement is 40 ft. wide where it begins at the southwest
10 boundary of the Highway 20 right-of-way, but decreases to
11 25 ft. in width approximately halfway down the eastern
12 boundary of the parent parcel, and ends at the northeast
13 corner of Parcel 2.

14 On March 7, 1994, petitioners submitted an application
15 to divide the 26-acre Parcel 1 into two 2-acre parcels
16 (Parcels 5 and 6) and a 22-acre parcel (Parcel 4). Parcel 4
17 would contain the existing dwelling. Parcels 5 and 6 are
18 located along the eastern boundary of the subject property.
19 According to petitioners' application, access to Parcels 5
20 and 6 would be via the access easement created as part of
21 the 1993 partition.³ Record 61.

22 After a public hearing, the county planning commission
23 approved petitioners' application, with conditions.

³Petitioners contend proposed Parcel 4 would have access from the adjoining 1925 county road. However, petitioners do not contend the 1925 county road adjoins or provides direct access to proposed Parcels 5 and 6.

1 Petitioners appealed the planning commission decision to the
2 board of commissioners, challenging conditions requiring
3 that petitioners dedicate right-of-way and construct a
4 public road to county standards, give up one of the two
5 existing access points onto Highway 20 and obtain Oregon
6 State Highway Division approval for a public road access.
7 After an additional public hearing, the board of
8 commissioners denied petitioners' appeal and affirmed the
9 decision of the planning commission. This appeal followed.

10 **DECISION**

11 **A. Failure to Reopen Record**

12 On September 21, 1994, the board of commissioners held
13 a hearing on petitioners' appeal. The minutes indicate that
14 prior to the hearing being closed, petitioners' attorney
15 "declined a continuance." Record 29. However, on
16 September 28, 1994, petitioners' attorney submitted a letter
17 accompanied by a draft Reciprocal Easement and Maintenance
18 Agreement for Access and Utility Purposes. Supp. Record 9.
19 At the October 5, 1994 board of commissioners meeting,
20 during deliberation on petitioners' appeal, county counsel
21 placed the letter and draft agreement before the board of
22 commissioners, took the position that the draft agreement
23 would not bring the proposed partition into compliance with
24 the BCC, and recommended affirming the planning commission
25 decision. Record 18.

26 Petitioners argue:

1 "At the hearing [sic] on October 5, 1994, Benton
2 County Staff reported the [September 28, 1994]
3 proposal was not acceptable. The Commissioners
4 were upset that Petitioners did not provide the
5 proposal they thought [was] going to be produced.
6 This immediately led to a motion to deny the
7 appeal filed by Petitioners. [T]he Record should
8 have been reopened for the limited specific
9 purpose of receiving the proposals of Petitioners
10 which the Commissioners obviously were expecting.
11 The process used allowed the staff to maintain
12 [its] position that anything less than a paved
13 road is unacceptable and created the erroneous
14 image that the Petitioners were non-responsive to
15 the concerns of the Board of Commissioners."
16 Petition for Review 6.

17 Petitioners specifically declined a continuance of the
18 September 21, 1994 hearing. Petitioners identify nothing in
19 the record indicating the board of commissioners invited
20 petitioners to submit additional proposals after the close
21 of the September 21, 1994 hearing. Nevertheless,
22 petitioners did submit such a proposal. Contrary to
23 petitioners' contentions, the record was reopened, in that
24 county staff placed petitioners' proposal before the board
25 of commissioners and responded to that proposal during the
26 board of commissioners' October 5, 1994 deliberations.
27 Petitioners do not agree with the staff's response.
28 However, we do not see that accepting a staff response to
29 newly submitted evidence constitutes error by the decision
30 maker.

31 **B. Effect of 1993 Partition Approval**

32 Petitioners argue that in 1993 they applied for, and
33 the county granted, preliminary series partition plat

1 approval.⁴ Granting preliminary series partition plat
2 approval requires compliance with BCC 95.120.
3 BCC 95.110(3). BCC 95.120(4) requires "compli[ance] with
4 the access or frontage standards of BCC 99.405 to 99.420."
5 Therefore, petitioners argue that when the county approved a
6 preliminary series partition plat in 1993, relying on the
7 access easement shown on the approved final plat, the county
8 determined the access easement complies with the access and
9 frontage standards of BCC 99.405 to 99.420, and petitioners
10 were entitled to rely on that determination to guide future
11 partitions. Petitioners maintain their proposed partition
12 properly relies on the access easement approved by the
13 county in the 1993 preliminary series partition plat.

14 We are cited to no evidence in the record that the
15 county approved a preliminary series partition plat in 1993.
16 As far as we can tell, with regard to the 1993 partition
17 proceedings, the only item in the record is the final
18 partition plat itself. Record 58. The 1993 final plat does
19 not exhibit what is required of a partition plan for a

⁴Benton County Code (BCC) 95.110(1) provides:

"A landowner may partition a parent parcel into three parcels through the provisions of this chapter. A landowner proposing to further partition the parent parcel into a fourth or subsequent parcel shall first obtain approval of a preliminary series partition plat if the remaining acreage in the parent parcel exceeds three times the minimum parcel size."

1 preliminary series partition plat by BCC 95.110(2).⁵
2 Therefore, we agree with the county that the fact it
3 approved the 1993 partition does not establish whether the
4 partition proposed in 1994 complies with the BCC.

5 **C. BCC Frontage/Access Requirements**

6 As explained above, BCC 95.120(4) requires proposed
7 partitions to comply with the frontage and access standards
8 of BCC 99.405 to 99.420.

9 **1. BCC 99.405(2)**

10 BCC 99.405(2) provides:

11 "Every proposed parcel in a land division shall
12 have a minimum of twenty-five (25) feet of
13 frontage along an improved public road."
14 (Emphasis added.)

15 Even if the "1925 county road" is an improved public
16 road, as petitioners contend but the county disputes,
17 proposed Parcels 5 and 6 have no frontage on it. Therefore,
18 there can be no dispute that the proposed partition does not
19 satisfy BCC 99.405(2).⁶ This means the county is entitled

⁵BCC 95.110(2) requires an application for preliminary series partition plat approval to include a partition plan "showing the boundaries, acreage and frontage of any future parcels, the location and width of future road rights-of-way, and existing structures, driveways, wells, septic systems and drainageways on the subject parcel."

⁶Petitioners claim their proposed partition could be reconfigured to give all three proposed parcels at least 25 feet of frontage on the 1925 county road. However, petitioners never submitted such a proposal. Additionally, absent local code provisions requiring the county to allow petitioners to modify their application, the county has the discretion to approve or deny the partition based on the original application. Schatz v. City of Jacksonville, 25 Or LUBA 327, 339, aff'd 122 Or App 299 (1993); see Simonson v. Marion County, 21 Or LUBA 313, 325 (1991).

1 to deny petitioners' application, unless the provisions of
2 BCC 99.415(1) for an exception to the frontage requirements
3 of BCC 99.405 are satisfied.

4 **2. BCC 99.415(1)**

5 BCC 99.415(1) states a partition creating a parcel that
6 does not comply with the frontage requirements of BCC 99.405
7 may be approved if all of the following criteria are met:

8 "(a) Not more than six (6) parcels including the
9 proposed parcel obtain access via an existing
10 private road or street. * * *

11 "(b) The easement is a minimum of fifty (50) feet
12 in width and no more than 1,250 feet in
13 length measured from the point of
14 intersection with a public road or street to
15 the proposed access point on the proposed
16 parcel. The minimum easement width may be
17 reduced below fifty feet if not more than
18 three parcels could potentially be served by
19 the easement.

20 "(c) The existing private road or street
21 intersects a public road or street which
22 meets County Secondary Road Standards * * *;
23 and

24 "(d) The existing private road or street is
25 improved to County Secondary Road Standards
26 contained in BCC 99.515(4) for the total
27 number of non-resource parcels served by the
28 easement."

29 The challenged decision finds it is "unclear whether
30 the '[1925] county road' referred to [by petitioners] is a
31 public road within the meaning of the [BCC]."
32 Record 11.

33 The decision goes on to state:

34 "Further, if the '[1925 county] road' is a 'public
 road,' the exceptions to the required road

1 improvements possible under BCC 99.415 would not
2 apply. BCC 99.415 applies only to existing
3 private roads or streets." (Emphasis in
4 original.) Id.

5 As far as we can tell, this is the only explanation given in
6 the challenged decision of why the proposed partition is not
7 eligible for an exception to the frontage requirement of
8 BCC 99.405(2) pursuant to BCC 99.415(1).

9 While it is petitioners' burden to demonstrate
10 compliance with the exception criteria of BCC 99.415(1), the
11 county must adopt findings explaining why it believes
12 petitioners failed to meet this burden. The county's
13 findings do not do this. The county's findings simply say
14 that if the 1925 county road is a public road, BCC 99.415
15 does not apply. However, the decision does not determine
16 whether the 1925 county road is a public road or a private
17 road. Additionally, even if the 1925 county road is a
18 public road, and if it is improved to county standards, it
19 appears that BCC 99.415(1) could apply to allow the creation
20 of Parcels 5 and 6 based on access to these parcels from an
21 existing private road created as a result of the access
22 easement approved in the 1993 partition.

23 The challenged decision must be remanded for the county
24 to address whether the requirements of BCC 99.415(1) for an
25 exception to the frontage requirement of BCC 99.405(2) are

1 satisfied.⁷

2 **D. Conditions of Approval**

3 As explained above, there is no dispute that
4 petitioners' proposal does not satisfy BCC 99.405(2). On
5 remand, the county may adopt findings explaining why an
6 exception to BCC 99.405(2), under BCC 99.415(1), is not
7 warranted. If so, the county may either deny the
8 application or approve it with conditions that ensure
9 compliance with these BCC provisions.

10 In this appeal, petitioners challenge the following
11 three conditions of final plat approval:

12 *****

13 "(2) One highway approach is permitted at the
14 existing driveway location for access to
15 Parcels 2, 3, 4, 5 and 6. No additional
16 highway approach permits will be authorized
17 by the County except as provided for on a
18 revised preliminary series partition plat
19 approved by the Planning Commission.

20 *****

21 "(6) Provide for dedication of right-of-way and

⁷At oral argument, the county took the position that granting an exception pursuant to BCC 99.415(1) is completely discretionary, in the sense that even if petitioners' proposal satisfies the criteria of BCC 99.415(1), the county would not be required to approve an exception. Although we are required, under ORS 197.829 and Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992), to give considerable deference to the interpretation of local ordinances by the local governing body, that interpretation must be expressed in the challenged decision or supporting findings, not in the local government's argument. Eskandarian v. City of Portland, 26 Or LUBA 98, 109 (1993); Miller v. Washington County, 25 Or LUBA 169, 179 (1993). Therefore, we do not consider this interpretation further.

1 construction of a road to the County RL-2
2 standard^[8] per BCC 99.405(2) including a
3 turnaround acceptable to the County Engineer.
4 * * *

5 "(7) Obtain approval from the Oregon State Highway
6 Division to upgrade the current private road
7 access to a public road access.

8 "** * * * *" Record 12.

9 Petitioners challenge the above quoted conditions as
10 being unconstitutional exactions and as not being supported
11 by necessary county determinations. According to
12 petitioners, such determinations include (1) the public or
13 private status of the 1925 county road, (2) whether any
14 portion of the 1925 county road is in public ownership,
15 (3) whether the 1925 county road includes any part of the
16 easement created by the 1993 partition, (4) the relationship
17 between the dedication required by the challenged conditions
18 and the easement created by the 1993 partition, and
19 (5) which of the existing access points onto Highway 20
20 petitioners must give up.

21 We agree with petitioners that the challenged decision
22 does not include any of the determinations described above.
23 This is a matter of some significance, because we cannot
24 tell what land condition 6 requires petitioners to dedicate

⁸The "RL-2 standard" is one of the design and construction standards for rural local roads established by BCC 99.515. The RL-2 standard calls for, among other things, a 50 ft. right-of-way, an 18 ft. surface width. "AC, PCC [or] APM" paving material, 4 ft. gravel shoulders and a maximum grade of 15%. BCC 99.515, Table I.

1 to the public, and whether that dedication satisfies
2 constitutional standards, without determinations by the
3 county concerning whether the 1925 county road is a public
4 road, whether any portion of it is already in public
5 ownership, and the interrelationship between the location of
6 the 1925 county road, the easement required by the 1993
7 partition and the dedication required by the challenged
8 decision. In addition, we cannot determine from the
9 challenged decision which access point onto Highway 20
10 condition 2 requires petitioners to give up. Finally,
11 although the decision itself expressly states that whether
12 the 1925 county road is a public or private road is
13 "unclear," condition 7 appears to imply that the current
14 access onto Highway 20 is from a private road. Thus, it is
15 not clear what condition 7 would require of petitioners if
16 the current access onto Highway 20 is by a public road.

17 If, on remand, the county again decides to approve the
18 proposed partition with conditions, the county must clarify
19 what is required by its conditions and, if the conditions
20 include exactions, ensure that the requirement of Dolan v.
21 City of Tigard, ___ US ___, 114 S Ct 2309, 2319-20, 129
22 L Ed2d 304 (1994), for "individualized determination[s] that
23 the required dedication is related both in nature and extent
24 to the impact of the proposed development" is satisfied.⁹

⁹The Fifth Amendment to the U.S. Constitution also requires that there be an "essential nexus" between an exaction imposed as a condition of

1 The county's decision is remanded.

approval and a "legitimate state interest." Dolan v. City of Tigard, supra, 114 S Ct at 2317; Nollan v. California Coastal Comm'n, 483 US 825, 837, 107 S Ct 3141, 97 L Ed2d 677 (1987). We do not understand petitioners to contend this "essential nexus" is lacking here.