BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT BAKER and
ELAINE L. BAKER,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

TERRANCE BLACK and
LINDA BLACK,
Intervenors-Respondent.

LUBA No. 2003-177

FINAL OPINION
AND ORDER

Appeal from Washington County.

Christopher Koback, Portland, filed the petition for review an argued on behalf of petitioner. With him on the brief was Jeffrey J. Schick, and Davis Wright Tremaine LLP.

Christopher A. Gilmore, Assistant County Counsel, Hillsboro, filed a response brief an argued on behalf of the respondent. With him on the brief was Dan R. Olsen.

Gary P. Shepherd, Portland, filed a response brief and argued on behalf of the intervenor-respondents. With him on the brief was William C. Cox.

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

REVERSED 03/11/2004

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a county decision that permits construction of a driveway within an easement crossing petitioners' property.

REPLY BRIEF

Petitioners move to file a four-page reply brief to respond to issues raised in the response briefs that the county's tax assessment records support the county's determination that intervenors' are the "owners" of the driveway easement at issue in this appeal. Petitioners also wish to respond to an issue raised regarding the timeliness of petitioners' fourth assignment of error. We agree with petitioners that those issues are "new matters" that warrant a reply brief. OAR 661-010-0039.[1] Accordingly, petitioners' reply brief is allowed.

FACTS

Terrance Black and Linda Black (intervenors) own ten acres that is developed with a dwelling and barn. Their property is located approximately 430 feet north of SW Laurel Road, a county road. The property is connected to SW Laurel Road by a lengthy, undeveloped dogleg that is 50 feet wide and is a deeded part of the 10-acre property. However, intervenors' property also has shorter and more direct access to SW Laurel Road over a 35-foot wide driveway easement that begins at intervenors' southwest corner, and follows a straight line south along petitioners' western boundary until it reaches SW Laurel Road. Intervenors use this driveway for access.

Intervenors obtained the non-exclusive driveway easement from petitioners' predecessors-in-interest in 1980. Record 228. Over the years, pursuant to a road maintenance agreement

[1] OAR 661-010-0039 provides, in relevant part:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *"

between intervenors and petitioners' predecessors in interest, the driveway has been improved and maintained to provide access to petitioners' property, intervenors' property and to a third parcel[2].

In 2002, intervenors sought county approval to partition their property into two parcels. Parcel One includes the existing dwelling and barn. Parcel Two includes the undeveloped 50-foot wide access to SW Laurel Road. However, as proposed, both parcels will access SW Laurel Road via the 35-foot wide driveway easement. Petitioners objected to the use of the driveway easement for access for the two parcels arguing that, as the underlying fee owners of the easement, Washington County Community Development Code (CDC) 203-1.1 required that petitioners sign the partition application.[3]

The hearings officer did not resolve the question of whether petitioners' permission was necessary to improve the driveway easement in that partition decision, concluding that even if use of the easement did require permission from petitioners, intervenors had demonstrated that they had an alternative access to the parcels that satisfied partition access standards. However, the hearings officer did impose a condition of approval that required a Type II review if the county determined that petitioners' signatures were not needed to obtain development permits.[4]

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[2] Access to the third parcel is not at issue in this appeal.

[3] CDC 203-1.1 provides, in relevant part:

> "Type I, II and III development actions may be initiated only by:
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> "A. Application by all the owners * * * of the subject property, or any person authorized in writing to act as agent of the owners or contract purchasers. * * *"

[4] The relevant condition of approval states:

> "If the County decides the signature of the owner of tax lot 1900 is not required on an application for a grading or other permit to undertake development within the easement over tax lot 1900, the County shall subject that permit application to a Type II process, so that the abutting owner can receive notice that would allow him or her to participate meaningfully in the review of development within his or her property." Record 256-257.

Petitioners own tax lot 1900. The referenced Type II procedure requires notice to petitioners, and an opportunity to provide written comments to the planning director before a decision is made. CDC 203-3. Appeals of the planning director's decision may be made to the county hearings officer. CDC 209.

After intervenors received tentative partition plat approval, intervenors applied for access and grading permits to improve the driveway to county driveway standards. Intervenors sought petitioners' signatures on those applications, but petitioners refused to sign the applications because petitioners believed the proposed driveway design would adversely affect access to their property, particularly access to a garage. During the access and grading permit process, county staff concluded that petitioners' signatures were not needed for staff to consider development applications relating to improvements to the driveway access.

After county staff determined that petitioners' signatures were not needed to process development permits for the driveway easement, intervenors applied for a modification to the partition approval requiring a Type II process for development permits. Intervenors requested that the condition of approval be modified to clarify that petitioners were entitled to participate in a review process regarding development of the driveway easement but that their signatures were not required to apply for development permits. The county combined the modification application with the access and grading permit applications and reviewed them pursuant to the county's procedures for an appeal of a Type II decision. The hearings officer approved intervenors' combined application. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

As set out in n 3, CDC 203-1.1 provides that an application for a development action may be initiated *only* upon receipt of an application by *all* of the owners of the property or "any person authorized in writing" to act as agents of the owners. The hearings officer concluded that petitioners' signatures were not required to process the access and grading permits because (1) intervenors hold a possessory interest in the driveway easement, and the proposed improvements are directly related to the purpose of the easement; and (2) as the holders of the dominant estate, intervenors are *de*

facto agents for petitioners (the owners of the fee simple interest) with respect to development permits pertaining to the easement.[5]

Petitioners concede that as owners of an easement interest in the driveway, intervenors must join in any permit applications that are necessary to develop within the easement. However, petitioners argue that intervenors' easement interest does not mean that intervenors have sole authority to apply for development permits, because petitioners are also owners of the property that the easement crosses. Petitioners contend that CDC 203-1.1 is clear on its face, and explicitly requires that "all owners sign the application." Petitioners argue that the county does not have the authority to determine the relative interests of the parties with respect to the easement in the context of reviewing a land use permit application. *That* determination, petitioners argue, is within the sole purview of the circuit court.[6] Petitioners contend that the county misapplied CDC 203-1.1 and exceeded its jurisdiction by interpreting CDC 203-1.1 to allow a development permit application to proceed without petitioners' signatures as owners.

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[5] The hearings officer's findings state, in relevant part:

> "The hearings officer does not have jurisdiction to determine who may file an application, because such a determination is made by administrative staff when they choose to accept or reject an application. If the hearings officer has such jurisdiction, he would find that [intervenors] can file the application for the modification and miscellaneous review, because [they are] owner[s] of the easement. * * *" Record 12.

> "To the extent the hearings officer has jurisdiction to review the county's determination that the grading permit can be filed without [petitioners'] signature[s], the hearings [officer] agrees with that determination. The hearings officer construes the term 'owner' in CDC 203-1.1.A to include the holder of the dominant estate of an easement, because that holder owns a greater than possessory interest in the property where development is proposed. The hearings officer also finds the term 'agent' for the purposes of CDC 203-1.1.A includes the holder of a dominant estate of an easement, in that the easement authorizes use of the property of the servient estate. Whether or not this constitutes an agency relationship under the common law of agency, the easement confers on the dominant party rights to use of the easement. A reasonable and ordinary corollary of the right to use the easement for access is the right to apply for permits necessary for such use. For purposes of authorizing a land use application under CDC 203, the hearings officer finds this evidence of ownership and/or to agent-status is sufficient." Record 11.

[6] Petitioners stated in oral argument that an action to resolve petitioners' and intervenors' dispute concerning the scope of the easement is pending before the Washington County Circuit Court.

The county and intervenors (collectively, respondents) argue that the hearings officer correctly interpreted CDC 203-1.1 to allow intervenors to apply for development permits. According to respondents, the interpretation is consistent with the definition of "owner" set out in CDC 106-149, and supports the county's interests in allowing development to proceed without unnecessary impediments. Further, respondents argue that the hearings officer's decision does not adjudicate the parties' rights under the easement, but rather, allows intervenors to improve the driveway to meet county standards. Respondents contend that the development permit applications fall well within the scope of the driveway easement granted to intervenors. Finally, respondents contend that the hearings officer's determination that intervenors stand in the shoes of petitioners, and are therefore their "agents" with respect to development within the driveway easement is a reasonable extension of the rights granted to intervenors by the easement. Respondents argue that, in this case, petitioners are properly viewed as adjacent land owners, and not as owners of the easement for the purposes of CDC 203-1.1.

We first turn to the question of whether the hearings officer's interpretation of CDC 203-1.1 is reasonable and correct, before turning to petitioners' jurisdictional challenge.

A. "Owners of the Subject Property"

In relevant part, CDC 106-149 defines "owner" as "[t]he legal owner(s) of record as shown on the tax rolls of the County * * *." Respondents argue that intervenors are listed as the "legal owners of record" in the county tax rolls, because the value of the driveway easement is added to the value of intervenors' property to establish the taxable value of intervenors' dominant estate. Petitioners dispute this contention, and attach to their reply brief a copy of a property data summary printout that shows that the driveway easement is included in the area calculation of their parcel used by the county assessor, and was not included in intervenors' parcel.[7] Petitioners also

[7] Respondents ask that we disregard the property tax summaries attached to the reply brief, arguing that those printouts are not part of the county's record and no motion to take evidence pursuant to OAR 661-010-0045 has been filed. We agree with respondents that the property tax summary printouts are not properly before us and therefore we do not consider them.

argue that the easement area is included in petitioners' tax lot on the county assessors' map. Record 283.

The existence of an easement could affect the value of the property burdened by the easement. Therefore, property tax appraisals may be adjusted to reflect the impact an easement has on the value of the burdened estate. *Rockwood Development Corp. v. Department of Revenue*, 10 OTR 95, 100 (1985). Similarly, the benefits inuring to the dominant estate from the easement must be accounted for in establishing the value of the dominant estate. *Id.* However, the fact that the value of the driveway easement may have been added to the value of intervenors' property has no real bearing on whether petitioners are "owners" of the property within the meaning of CDC 106-149 and 203-1.1.

As we noted above, CDC 106-149 defines "owner" as "[t]he legal owner(s) of record as shown on the tax rolls of the County * * *." The county's construction of that language to exclude petitioners is simply wrong. That some value attributable to the easement may be included in the value the county tax assessor assigns to intervenors' property is irrelevant. The county tax rolls show petitioners as owners of tax lot 1900. If there were no easement, it would be clear petitioners are the owners of all of tax lot 1900. As we have already explained, intervenors own an easement that crosses tax lot 1900. Because the parties do not dispute the point, we assume that intervenors' ownership of that easement qualifies intervenors as being among the owners of the part of tax lot 1900 that is burdened by the easement. But there can be no doubt that petitioners, as owners of the fee simple interest in the property that is subject to that easement, are *also* owners of that portion of tax lot 1900. The hearings officer erred in concluding otherwise.[8]

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[8] It seems likely that the county's requirement that *all the owners* join in an application for development action approval under CDC 203-1.1 was adopted to keep the county from becoming involved in the kind of property owner dispute that is presented in this appeal. As CDC 203-1.1 is written, if there are multiple owners of property and any owner refuses to join in an application for development action approval for that property, that dispute among the property owners must be resolved, through circuit court proceedings if necessary, *before* the application can be submitted. The county presumably could have drafted CDC 203-1.1 to allow it proceed as it did in this case by allowing *any owner* to submit an application for development action approval. If the county had drafted CDC 203-1.1 in that way, an owner who did not sign the application and believed the applicant-

With respect to the hearings officer's conclusion that the terms of the easement creates an "agency" relationship between petitioners and intervenors that gives intervenors the right to apply for development permits on petitioners' behalf, we again disagree with the hearings officer. There is nothing in CDC 203-1.1 or any other standard to which we are cited that would permit the county to recognize intervenors as the agents of petitioners based on the easement agreement for purposes of CDC 203-1.1. A very different question would be presented if the easement expressly authorized intervenors to seek land use permits to exercise their easement rights and to sign applications for such land use permits on petitioners' behalf. However, intervenors do not argue that the easement provides that authorization, and we do not see that it does.[9]

B. Determination of Rights Under the Easement

Respondents argue that the hearings officer's interpretation of CDC 203-1.1 does not establish the rights of the parties under the driveway easement. According to respondents, the hearings officer's decision merely interprets CDC 203-1.1 to allow the submission of a development application for development consistent with the grant of easement by the holder of the dominant estate.

Although it is not entirely clear, we agree with respondents that the hearings officer does not appear to have attempted to resolve the parties' apparent dispute concerning the scope of intervenors' rights under the easement. However, the hearings officer undeniably determined that intervenors are owners of the property. More importantly, the hearings officer determined that petitioners are not "owners" of the property, within the meaning of CDC 106-149 and 203-1.1.A. For the reasons set out above, we conclude that petitioners are owners within the meaning of CDC 106-149 and 203-1.1.A and the hearings officer erred in concluding otherwise. The hearings

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owner was acting inconsistently with the scope of the applicant-owner's ownership interest could seek a remedy in circuit court. However, if CDC 203-1.1 had been drafted in that way, the applicant-owner could submit the application and pursue the approval unless and until a circuit court ordered otherwise.

[9] A copy of the easement that is at issue is found at Record 229, and was amended by a later conveyance that is found at Record 228. Neither document specifically addresses who may apply for development permits for the driveway.

officer also erred in concluding that the disputed application could be accepted without petitioners' joining in the application.

The first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

As quoted in n 5, the hearings officer concluded that he did not have "jurisdiction" to review staff's initial determination that the development permit applications were complete. Petitioners argue that by declining to review staff's initial determination that petitioners' signatures were not required to process the development permits, the hearings officer violated petitioners' substantial rights. The county agrees with petitioners that the hearings officer has authority to review staff's conclusion that the initial application submittal was complete, but argues that in this case, even if the hearings officer erred in concluding he did not have jurisdiction to review initial completeness determinations, he adopted other findings that addressed petitioners' arguments.

We agree with petitioners and the county that the hearings officer has the authority to review staff's initial determinations of compliance with *all* applicable approval criteria. But, while we agree that the hearings officer erred in concluding that he does not have jurisdiction over application completeness determinations, petitioners' assignment of error provides no basis for reversal or remand. The hearings officer adopted alternative findings that adopt staff's reasoning regarding CDC 203-1.1 and addressed petitioners' arguments that staff's analysis was incorrect. *See* n 5. Therefore, whatever error may have occurred by staff's making an initial determination regarding compliance with CDC 203-1.1 without providing petitioners an opportunity to challenge that determination, that error was cured by the hearings officer's subsequent decision addressing petitioners' arguments.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the county erred in approving the access and grading permit applications, because the improvements allowed by those permits do not satisfy a condition of

approval adopted in the partition decision that intervenors make "a timely, continuing, diligent, good faith effort to obtain Fire District approval" of speed bumps or alternative traffic calming measures. Record 73. Petitioners concede that the fire marshal did not approve speed bumps for the driveway, but argue that intervenors did not consider other alternatives proposed by petitioners and county staff to alleviate traffic hazards, such as moving the driveway ten feet to the west, to avoid conflicts with parking areas and the garage located on petitioners' property. Petitioners contend that the hearings officer erred in approving the development permits without requiring a showing that intervenors had considered alternative traffic calming measures.

Intervenors respond that petitioners may not challenge a condition of approval adopted in the partition proceedings in an appeal of the hearings officer's decision to approve development permits and modification of a different condition of approval. In the alternative, intervenors argue that the hearings officer's conclusion that the condition is either satisfied or is unrelated to the proposed development is supported by substantial evidence.

We need not address these arguments, because we have already concluded that the county erred in accepting an application that allows development over the easement that was not signed by all of the owners of the property. As explained below, that error requires that we reverse the county's decision. The arguments under this assignment of error, even if meritorious, would not provide a basis for remand. We see no purpose in resolving this assignment of error under these circumstances. We therefore do not reach the fourth assignment of error.

CONCLUSION

OAR 661-010-0071(1)(c) provides that LUBA shall reverse a land use decision when "[t]he decision violates a provision of applicable law and is prohibited as a matter of law." In addressing petitioners' first and second assignments of error, we concluded that the hearings officer's interpretation of CDC 106-149 and 203-1.1 to allow the county to accept the disputed applications without petitioners joining in the application is "prohibited as a matter of law." Accordingly, the county's decision is reversed.