

1                           BEFORE THE LAND USE BOARD OF APPEALS  
2                           OF THE STATE OF OREGON  
3

4   ROBERT L. MILLER,                           )  
5    )  
6                    Petitioner,                    )  
7    )  
8            vs.                                    )  
9    )  
10   CLACKAMAS COUNTY,                           )  
11    )  
12                    Respondent.                    )  
13  
14

LUBA No. 95-204  
FINAL OPINION  
AND ORDER

15            Appeal from Clackamas County.  
16

17            Nicholas R. Knapp, Oregon City, filed the petition for  
18 review and argued on behalf of petitioner.  
19

20            Michael E. Judd, Chief Assistant County Counsel, Oregon  
21 City, filed the response brief and argued on behalf of  
22 respondent.  
23

24            GUSTAFSON, Referee; LIVINGSTON, Chief Referee,  
25 participated in the decision.  
26

27                           REVERSED                           04/23/96  
28

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of a three-lot  
4 partition.

5 **FACTS**

6 Petitioner applied to the county to partition his  
7 40,000-square-foot lot into three parcels. Petitioner's  
8 property is located in the county's R-10 zone, a low density  
9 urban residential zone with a minimum required lot size of  
10 10,000 square feet. Each of petitioner's proposed parcels  
11 exceeds 10,000 square feet.

12 The R-10 zone development standards require that each  
13 parcel have a minimum of 60 feet of street frontage. One of  
14 the proposed parcels has 100 feet of frontage on River  
15 Forest Place, which is designated by the county as a county  
16 road. The other two proposed parcels have at least 60 feet  
17 of frontage on a proposed private access and utility  
18 easement extending from River Forest Place.

19 The county planning staff approved the proposed  
20 partition. Neighboring property owners appealed the staff  
21 decision, generally on the basis of impacts from increased  
22 density and development. On appeal, the hearings officer  
23 found that the street frontage requirement in the R-10 zone  
24 mandates that the frontage be on a public road or street.  
25 Accordingly, the hearings officer reversed the staff  
26 decision and denied the partition for failure to satisfy the

1 street frontage requirement.

2 This appeal followed.

3 **SECOND ASSIGNMENT OF ERROR**

4 Petitioner argues that the county's decision must be  
5 remanded because the hearings officer's explanation of the  
6 county's street frontage requirement is inadequate for  
7 review. The county's Zoning and Development Ordinance  
8 (ZDO) Section 301 describes uses allowed and requirements  
9 for uses in the county's urban low density residential  
10 zones.<sup>1</sup> ZDO 301.08(B), Table 1 provides the minimum lot  
11 dimensional requirements for all of the county's urban low  
12 density zones. That table shows the "minimum street  
13 frontage" in the R-10 zone to be 60 feet. The term "minimum  
14 street frontage" is not defined in that table, or elsewhere  
15 in ZDO Section 301. In applying the minimum street frontage  
16 requirement to petitioner's application, the hearings  
17 officer found:

18 "This proposed subdivision cannot \* \* \* satisfy  
19 each of the development standards for the R-10  
20 zoning district. Specifically, Table No. 1,  
21 subsection 301.08(B) of the ZDO requires that each  
22 lot in the R-10 zoning district have at least 60  
23 feet of street frontage. This proposed partition  
24 creates Parcel 1, with approximately 100 feet of  
25 frontage on River Forest Place, a County Road, and  
26 creates Parcels 2 and 3, with no frontage on any  
27 public, County or state road, but with access  
28 proposed on a 20-foot private access and utility

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<sup>1</sup>The county has six zones under the category of "urban low density," ranging in minimum lot size from 7,000 square feet to 30,000 square feet.

1           easement off of River Forest Place. Contrary to  
2           the reasoned arguments of the applicant's  
3           attorney, \* \* \* the 'street frontage' standard of  
4           subsection 301.08(B) requires frontage on a  
5           publicly dedicated road or street, and is not met  
6           by a parcel's boundary extending along a private  
7           access way for the required distance." Record 2.

8           We agree with petitioner that the hearings officer's  
9           interpretation is inadequate for review because it omits the  
10          necessary analytical steps. See Larson v. Wallowa County,  
11          116 Or App 96, 103, 840 P2d 1350 (1992). Nowhere in the  
12          challenged decision does the hearings officer explain his  
13          conclusion that the street frontage standard of ZDO  
14          301.08(B) requires frontage on a public road or street.  
15          However, we disagree that the inadequacy requires that we  
16          remand the county's decision for a more reasoned explanation  
17          The facts in this case are undisputed; we are presented with  
18          a pure question of law, which the parties have thoroughly  
19          discussed in their briefs. In this instance, we find it  
20          appropriate under ORS 197.829(2) to make our own  
21          determination of whether the county's decision is correct.<sup>2</sup>

22          The second assignment of error is denied.

23          **FIRST ASSIGNMENT OF ERROR**

24          Petitioner contends that the hearings officer's

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<sup>2</sup>ORS 197.829(2) provides:

"If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

1 conclusion that the county's street frontage requirement  
2 mandates street frontage be on a public road or street is  
3 contrary to the plain language of the ZDO.

4 While the term "minimum street frontage" is not defined  
5 in the ZDO, ZDO Section 202 does define the line along which  
6 the length of the street frontage is measured. "Lot Line,  
7 Front" is defined, in part, as:

8 "Any boundary line separating the lot from a  
9 public street or road. \* \* \* Where a lot has no  
10 frontage on a public, county or state road, the  
11 front lot line is the line of the easement or  
12 private road serving the lot which is nearest the  
13 residence."

14 Thus, the county plainly recognizes lots fronting on private  
15 roads or easements. The definition of front lot line does  
16 not specifically mention private streets. However, ZDO  
17 Section 202 does include "streets" within the definition of  
18 "road," as follows:

19 "A public or private way created to provide  
20 ingress or egress for persons to one or more lots,  
21 parcels, areas or tracts of land. A private way  
22 created exclusively to provide ingress and egress  
23 to land in conjunction with a forest, farm or  
24 mining use is not a 'road'. The terms 'street'  
25 and 'highway' for the purposes of this Ordinance  
26 shall be synonymous with the term 'road'."  
27 (Emphasis added.)

28 Petitioner points to additional references in the ZDO,  
29 all of which are applicable to this application, to support  
30 its argument that the hearings officer's interpretation is  
31 inconsistent with the ZDO. Specifically, ZDO Section 1014,  
32 which lists general design standards for all lots or

1 parcels, states at ZDO 1014.04(A)(1):

2 "Every lot or parcel shall abut or have adequate  
3 access to a public or private access way, and  
4 shall conform to the minimum frontage requirement  
5 of the applicable zoning district, unless a  
6 variance to these standards is approved."

7 Also, the ZDO partition requirements state, at ZDO  
8 1106.02(E) that "[e]ach parcel shall have legal vehicle  
9 access onto a federal, state, county, public, or private  
10 road or easement."

11 In its brief, the county discounts these references,  
12 arguing that these are general requirements, which are  
13 superseded by the more specific requirements of the urban  
14 residential zoning districts. However, the county does not  
15 cite to any ZDO section or other authority that establishes  
16 different standards for the urban residential zoning  
17 districts. Rather, the county asserts that, as used in the  
18 ZDO, "roads" are used in reference to rural areas, whereas  
19 "streets" are used in reference to urban areas. Under the  
20 county's suggested interpretation, private streets are not  
21 recognized in the urban area, whereas private roads could be  
22 recognized in rural areas.

23 The county also discounts the ZDO definition, asserting  
24 that "the term 'synonymous' should not be read to  
25 necessarily mean that because roads can be private or  
26 public, the same is necessarily true of streets."  
27 Respondent's Brief 5. Rather, the county characterizes the  
28 definition as "'ordinance overkill', likely done in an

1 attempt to harmonize the many instances where the terms are  
2 used interchangeably." Id.

3 To support its argument, the county points out that the  
4 ZDO defines only "public streets," and does not  
5 independently define either "private streets" or "streets."  
6 The county argues that, because the ZDO defines only public  
7 streets, the county does not recognize private streets.  
8 Accordingly, the county concludes any reference to "street"  
9 in ZDO 301.08(B), Table 1 necessarily refers to a public  
10 street.

11 As a threshold matter, the county's argument before us  
12 is limited to a defense of the hearings officer's conclusion  
13 that the ZDO does not recognize private streets. The  
14 county's defense does not address the hearings officer's  
15 finding that ZDO 301.08(B), Table 1 also prohibits private  
16 roads. In fact, the county's contention that streets are  
17 urban while roads are rural is inconsistent with the  
18 hearings officer's own decision in this case, where he  
19 specifically applied the urban development standard of ZDO  
20 301.08(B) to both roads and streets.

21 The county's rationalization is lacking in other  
22 respects as well. First, the county's argument that the ZDO  
23 does not define "street" is incorrect: the ZDO specifically  
24 defines "street" within the definition of "road." Second,  
25 the county's reliance on the lack of a definition for  
26 "private street" and the inclusion of a definition of

1 "public street" is unpersuasive. The fact that the ZDO does  
2 not contain a separate definition for "private street" fails  
3 to establish that the county does not recognize private  
4 streets. The ZDO also does not separately define "private  
5 road," yet the county acknowledges that private roads are  
6 recognized, at least in rural areas.

7 Nor does the fact that the ZDO includes a separate  
8 definition for "public street" indicate an intent not to  
9 recognize private streets. Rather, just as the ZDO  
10 separately defines "public street," the ZDO also separately  
11 defines "public" and "county" roads, in addition to the  
12 general definition of "road." The additional definitions of  
13 public roads, county roads, and public streets refer to the  
14 legal nature and ownership of those particular entities.<sup>3</sup>  
15 None of those definitions limits the ZDO Section 202

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<sup>3</sup>ZDO Section 202 includes separate definitions of county roads, public roads and public streets as follows:

"\* \* \* \* \*

"ROAD, COUNTY: A public road which has been accepted into the County road maintenance system by order of the Board of County Commissioners.

"ROAD, PUBLIC: A road that is created by deed and accepted by the County Courts to provide a public way which has not been accepted by the County for maintenance.

"\* \* \* \* \*

"STREET, PUBLIC: Any thoroughfare or public space not less than 16 feet in width which has been dedicated or deeded to the public for public use intended primarily for vehicle circulation and access to abutting properties."



1 definition of "road" as being synonymous with "street."

2 The county points to several other provisions in the  
3 ZDO to further support its contention that the county  
4 recognizes only public streets. The county considers the  
5 most persuasive of these provisions to be the minimum  
6 setback requirement which, like the minimum street frontage  
7 requirement, is set forth in ZDO 301.08(B), Table 1. The  
8 minimum setback requirement includes a parenthetical  
9 notation that the front setback is "[f]rom centerline of any  
10 public, county, or state road, whichever is greater." The  
11 county urges that if the street frontage as shown on Table 1  
12 could be onto a private street, the front setback  
13 requirement on that table would be meaningless.

14 The county's reliance on the potential conflict between  
15 the Table 1 minimum street frontage and front setback  
16 requirements is troublesome in several respects. First, the  
17 parenthetical reference in the minimum front setback  
18 requirement is itself unclear, and does not necessarily  
19 support the county's position. As petitioner argues, the  
20 statement could be read to mean that if the lot is on a  
21 public, county or state road, the measurement of the front  
22 setback must be from the centerline of such road, in order  
23 to ensure adequate right-of-way for future road expansion.  
24 The ambiguous reference to "whichever is greater" further  
25 confuses the meaning of this parenthetical statement.

26 The county's reliance on this potential conflict also

1 further defeats its other arguments regarding the county's  
2 distinctions between streets and roads. If, as the county  
3 argues, streets and roads are defined as "synonymous" merely  
4 for "ordinance overkill" to address situations where the  
5 county uses the terms "road" and "street" interchangeably,  
6 Table 1 is an example of such "overkill." This is exactly  
7 the type of situation where the county itself argues the two  
8 terms should be used interchangeably.<sup>4</sup> The distinctions  
9 urged by the county do not exist in this situation.

10 Finally, and perhaps most significantly, the county's  
11 reliance on the parenthetical reference to public, county or  
12 state roads in the front setback requirement to argue that  
13 all lots must front public roads or streets is further  
14 diminished by another of the Table 1 requirements, for  
15 "corner vision":

16 "No sight-obscuring structures or plantings  
17 exceeding thirty (30) inches in height shall be  
18 located within a twenty (20) foot radius of the  
19 lot corner nearest the intersection of two public,  
20 county or state roads, or from the intersection of  
21 a private road or easement and a public, county or  
22 state road. \* \* \* (Emphasis added.)

23 Given that Table 1 addresses only urban residential zones,  
24 this reference specifically acknowledges the county's  
25 recognition of private roads or easements in the urban

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<sup>4</sup>In addition, although the county argues public streets are found in urban areas, whereas all types of roads are rural, this table also illustrates the county's use of the term "road" in reference to an urban development standard. In fact, the subject urban parcel fronts a designated county road.

1 residential zones.

2 As applied to this case, we find the county's  
3 definition of "road" significant in two respects. First,  
4 the county expressly states that "road" and "street" are  
5 synonymous. Second, the county expressly excludes from the  
6 definition of road (and its synonymous terms) certain  
7 specified "private ways." Private ways in urban residential  
8 zones are not excluded by the definition. No ZDO references  
9 to which we have been cited by both parties indicate an  
10 intent to limit the definition of road or street as it  
11 applies to ZDO 301.08(B), Table 1.

12 The county has demonstrated no legal basis for the  
13 hearings officer's summary conclusion that, as applied to  
14 ZDO 301.08(B), Table 1, the county recognizes only public  
15 roads and streets. The county's interpretation of ZDO  
16 301.08(B), Table 1 is inconsistent with the language of the  
17 ZDO.

18 The first assignment of error is sustained.

19 Because the hearings officer's only basis for denial of  
20 the proposed partition was his incorrect interpretation of  
21 ZDO 301.08(B), Table 1, the decision must be reversed, and  
22 the application approved consistent with the remaining  
23 findings.

24 The county's decision is reversed.