BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CARL KELTZ and LaVELLA KELTZ, Petitioners, vs. JACKSON COUNTY, Respondent, and HENRY LINEBAUGH, BLAIR COCKING, and GEORGE P. McCARTIN, Intervenors-Respondent.	LUBA No. 96-032 FINAL OPINION AND ORDER

Appeal from Jackson County.

Carl Keltz and LaVella Keltz, Jacksonville, filed the petition for review and argued on their own behalf.

No appearance by respondent.

Henry Linebaugh, Salem, filed a response brief on his own behalf.

Blair Cocking and George P. McCartin, Jacksonville, filed a response brief on their own behalf. George P. McCartin argued on his own behalf.

LIVINGSTON, Referee; HANNA, Chief Referee, participated in the decision.

AFFIRMED 12/16/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioners appeal a decision of the county hearings officer denying their application for a forest capability dwelling.

MOTION TO INTERVENE

Henry Linebaugh, Blair Cocking and George P. McCartin (intervenors) move to intervene on the side of the respondent. There is no opposition to the motions, and they are allowed.

FACTS

The subject property, located in the county's Woodland Resource zone, consists of tax lots 10603 (16.08 acres) and tax lot 10607 (20.08 acres). In 1979 tax lot 10607 and tax lot 10608, which had been part of tax lot 10603, were created by deeds as separate lots, without county review or approval. Because of identical errors in the legal descriptions of the properties involved, the deeds, first recorded on January 22, 1979, were "re-recorded" with corrected descriptions on November 15, 1979. On January 30, 1979, after the deeds were first recorded, but before they were re-recorded, a new county requirement that land divisions be reviewed under the land division ordinance and approved by the county became effective.

On July 31, 1995, petitioners applied to construct a forest capability dwelling on tax lot 10603, which they

intend to consolidate with tax lot 10607. The county hearings officer denied the application because the partition of tax lot 10607 from tax lot 10603 occurred without county review and approval and petitioners did not show that tax lot 10607 and tax lot 10603 have easement access to Arrowhead Pass Road, a public road.

This appeal followed.

ASSIGNMENT OF ERROR

The assignment of error states the challenged decision is not supported by substantial evidence and must therefore be remanded pursuant to ORS 197.835(9)(a)(C). However, petitioners' argument touches on at least four points, some of which have nothing to do with the evidence. First, petitioners contend that while the application for a forest capability dwelling requires they demonstrate the existence of an easement from the subject property to a public road, no reference is made in the county's application form to a specific chapter and section of the Jackson County Land Development Ordinance (LDO) where the requirement is stated. Second, petitioners maintain that a warranty deed at Record 149 and a plat map at Record 40 demonstrate adequate easement access exists. Third, they argue that the decision recognizes the existence of the easement as it serves neighboring properties, without acknowledging that it also serves the subject property. Fourth, they contend that although the findings of fact suggest that consolidation of

tax lots 10603 and 10607 will "legalize" the lots, that suggestion is ignored in the subsequent discussion and conclusions of law.

Notwithstanding the disjunction between the assignment of error and the statements that follow, we believe petitioners have alleged certain errors clearly enough to allow the other parties an adequate opportunity to respond. See Eckis v. Linn County, 22 Or LUBA 27, 32, aff'd 110 Or App 309 (1991). We therefore consider petitioners' contentions.

A. Nature of Partition

The challenged decision concludes the partition of tax lots 10603, 10607 and 10608 was not legal because it was not accomplished until after the requirement for county review and approval went into effect. Petitioners do not disagree with that conclusion, but they contend that at the public hearing on their application, they discussed with the hearings officer the consolidation of tax lots 10603, 10607 and 10608.

Petitioners' application for a forest capability dwelling does not mention tax lot 10608. Record 92. Petitioners do not support with citations to the record their contention that the hearings officer was aware of their offer to expand the subject property to include tax lot 10608 and to consolidate tax lots 10603, 10607 and 10608 into one parcel. As far as we can tell, the hearings

officer understood the subject property to include only tax lots 10603 and 10607. These are the only tax lots mentioned in the application. Id.

The challenged decision never adequately explains precisely what problems flow from the illegal partition and whether consolidation of one or more tax lots would solve those problems. However, petitioners do not assign error on that basis. Because lack of access seems to be the true ground for the denial of the application, and one ground is all that is required for us to affirm, see Garre v. Clackamas County, 18 Or LUBA 877, 881, aff'd 102 Or App 123 (1990), we do not dwell on the inadequacies of the decision with respect to the partition and consolidation issues.

B. Access Requirement

The challenged decision explains that parcels created for residential purposes between September 1, 1973 and January 30, 1979 were required to have access onto a public road; and that all parcels created after January 30, 1979 were required to have such access. Record 5. We understand the decision to say that since petitioners propose to use the subject property for a residence, the property must have access onto a public road regardless of whether the partition of tax lot 10607 from tax lot 10603 occurred before or after January 30, 1979. The decision also states that proof of access is necessary to comply with the LDO and

OAR 660-06-029(4).[1] Record 12.

Although petitioners state that no reference is made in the application to a specific chapter and section of the LDO where the requirement for access is stated, they do not argue the access requirement does not apply to the subject property.[2] However, they do contend the hearings officer erred in finding they failed to demonstrate the access requirement is satisfied.

In order to overturn on evidentiary grounds the county's determination that an applicable approval criterion is not met, it is not sufficient for petitioners to show there is substantial evidence in the record to support their position. Rather, the "evidence must be such that a reasonable trier of fact could only say petitioners'

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[1]OAR 660-04-029 provides, in relevant part:

> "The following siting criteria or their equivalent shall apply to all new dwellings and structures in forest and agriculture/forest zones:
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> "* * * * *
>
> "(4) As a condition of approval, if road access to the dwelling is by a road owned and maintained by a private party or by the Oregon Department of Forestry, the U.S. Bureau of Land Management, or the U.S. Forest Service, then the applicant shall provide proof of a long-term road access use permit or agreement. The road use permit may require the applicant to agree to accept responsibility for road maintenance."

[2]Petitioners do not direct us to a state or local requirement that the criteria for approval be specified in the application form, and we are unaware of such a requirement.

evidence should be believed." Thomas v. City of Rockaway Beach, 24 Or LUBA 532, 534 (1993).

The challenged decision discusses two documents upon which petitioners rely to demonstrate the existence of the necessary easement access from the subject property to a public road. The first document, entitled "Description" and recorded in 1988, contains a legal description of property subject to an easement created by the second document, a 1976 warranty deed. Record 145, 149. Based on his review of these documents, the hearings officer concluded that neither "clearly shows what connection, if any, [petitioners] have to the easement or why the easement benefits the subject property." Record 11.

In addition to the two documents, petitioners direct our attention to a map which shows a dotted line, possibly a road, extending north to tax lot 10608 from Wagon Trail Drive, a public road. Record 40. We have reviewed the "Description," the 1976 warranty deed and the map. Petitioners' short, confusing discussion is insufficient to demonstrate that the hearings officer could only have said that petitioners' evidence should be believed.[3]

The assignment of error is denied.

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[3]We don't understand the significance of the finding that the "proposed dwelling is located within 300 feet of an existing road serving other residences in the area." Record 12. However, we do not agree with petitioners that the finding is inconsistent with the conclusion that petitioners have not demonstrated easement access exists.

The county's decision is affirmed.