

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioners and others requested approval of lot line
4 adjustments for four parcels in an Exclusive Farm Use zone
5 (EFU). The application included a request that the county
6 grant Petitioner Hicks an easement across a strip of land owned
7 by the county at the north end of Emerald Green Road, an
8 unimproved public road. The easement would give Hicks access
9 from his property to the road.

10 The county approved the lot line adjustments but refused to
11 grant the easement. As a result of the denial, access to
12 Hicks' property continues to be via a private road traversing
13 farmland owned by Petitioner Wagner.

14 Petitioners appeal the county's order denying access to
15 Emerald Green Road.

16 FACTS

17 This appeal is before us on remand from the Court of
18 Appeals. The court summarized the important facts as follows:

19 "In 1979, the county approved two partitioning
20 requests by A. L. Gregory. As part of the resolutions
21 approving the partitions, the county restricted access
22 to a public road, Emerald Green Lane, from the divided
23 parcels. In 1984, petitioner Wagner conveyed to Hicks
24 five acres of land within the area subject to the
25 access restriction. Petitioner and Hicks requested a
26 "lot line adjustment" from the county and, as part of
the request, they sought permission for Hicks to use
Emerald Green Lane. The county granted the lot line
adjustment but denied Hicks access to the road.
Petitioner appealed that denial to LUBA. LUBA
concluded that the county's action did not have a
"significant impact on present or future land use" in
the area and that it therefore did not qualify as a

1 "land use decision" under Billington v. Polk County,
2 299 Or 471, 703 P2d 232 (1985), and City of Pendleton
3 v. Kerns, 294 Or 126, 653 P2d 992 (1982). 79 Or App
4 at 235.

5 Our order dismissing the appeal was reversed and remanded
6 for reconsideration by the Court of Appeals. The court
7 directed us to reconsider whether the decision met either the
8 statutory test (ORS 197.015(10)) or the significant impact test
9 for our jurisdiction.

10 With respect to the significant impact test, our opinion
11 stated:

12 "In this appeal, we have considerable difficulty
13 applying the significant impact test. As we construe
14 the decision, the county refused to waive or rescind
15 previously adopted orders. This has the effect of
16 maintaining the status quo. The significant impact
17 test does not appear to contemplate a situation in
18 which the status quo is maintained by rejection of a
19 proposal to waive or rescind a prior order.

20 "Even if the significant impact test could be applied
21 to the circumstances here, we believe petitioners have
22 not demonstrated that the test is met. As noted, the
23 decision maintains, rather than alters the status quo
24 in this area. The petition does not demonstrate why
25 the county's refusal to allow the requested access
26 will have a significant impact on present or future
land use in the area." Wagner v. Marion County, ___
Or LUBA ___, (No. 85-067 1/21/86).

20 The Court of Appeals disagreed with the premise of our
21 dismissal order "...that a decision not to change an existing
22 situation cannot have a significant impact, no matter what
23 related changes have occurred since the situation came into
24 being...." 79 Or App at 236. In particular, the court noted
25 that after the county imposed the access restriction, it
26 rezoned the area from low density residential to an exclusive

1 farm use designation. We were directed to consider whether, in
2 light of the rezoning, the county's refusal to rescind the
3 access restriction would have significant land use impact.

4 The Court of Appeals also directed us to reconsider whether
5 the challenged decision met the statutory definition of "land
6 use decision." The court concluded:

7 "The significant impact test articulated in Kerns and
8 Billington is one of two alternative ways by which a
9 local decision can come within LUBA's jurisdiction.
10 The other is for the action to be a 'land use
11 decision' as defined in ORS 197.015(10), inter alia,
12 because it involves the application of the goals, a
13 comprehensive plan provision or a land use
14 regulation. The county hearings officer's order,
15 which the governing body affirmed, states that '[t]he
16 standards and criteria relevant to this application
17 are found in the statewide goals and guidelines,
18 Marion County Zoning Ordinance, and the Marion County
19 Comprehensive Plan.' The order does not come down to
20 particulars, nor does it specify whether the standards
21 and criteria governing the lot line adjustment and the
22 access denial have the same sources. On remand, LUBA
23 should reconsider whether the county's action comes
24 within the statutory definition of a 'land use
25 decision,' as well as reconsider the significant
26 impact issue." 79 Or App at 236-37.

After the remand, we invited the parties to brief and argue
the jurisdictional questions. For the reasons discussed below,
we conclude that the challenged decision is a land use decision
reviewable by this Board.

1. The Statutory Test

A decision is a land use decision if it concerns the
application of a comprehensive plan or a land use regulation.
ORS 197.015(10) (a) (A). In Billington v. Polk County, supra,
the Supreme Court stated that the test is met where the plan or

1 land use regulations contain standards or criteria governing
2 the application; a decision that "merely touches some aspects
3 of the comprehensive plan" is not a "land use decision." 299
4 Or at 474.

5 We encounter difficulty in applying the statutory test in
6 this case. The request for access to Emerald Green Road
7 clearly touches on land use concerns. However, petitioners,
8 who bear the burden of establishing our jurisdiction,
9 Billington v. Polk County, supra, 299 Or at 475, have not cited
10 any specific standards or criteria governing the request.
11 Correspondingly, the county's final order tells us that the
12 request is governed by standards and criteria in the statewide
13 goals, the zoning ordinance and the comprehensive plan, but the
14 order does not come down to particulars.

15 Wagner's brief on remand¹ tells us that the access
16 request is part of an application for a lot line
17 adjustment,² and that the adjustment is a "new land use
18 action" requiring consideration of new facts. However, this
19 does little to aid our jurisdictional inquiry. This appeal
20 challenges the denial of access to Emerald Green Road, not the
21 lot line adjustments. We have examined the provisions of the
22 land division and zoning ordinance that the county says govern
23 lot line adjustments, and we find nothing in them that has any
24 bearing on the request for access. Thus, we must look
25 elsewhere for standards or criteria that would bring the case
26 within the statutory test for LUBA's jurisdiction.

1 As we read the record, petitioner Hicks could not obtain
2 access to Emerald Green Road without two related actions by the
3 county (1) allowance of an easement across the reserve strip³
4 separating Hicks' property from the road and (2) vacation or
5 modification of the previous orders barring access from the
6 property to Emerald Green Road.⁴ In terms of the statutory
7 test for our jurisdiction, the question is whether either of
8 those actions is governed by standards or criteria in a
9 statewide goal, the comprehensive plan, or a land use
10 regulation. Billington v. Polk County, supra.

11 A. The Access Easement

12 The county's land division ordinance defines "reserve
13 strip" as:

14 "A strip of land, usually one foot in width across the
15 end of or along the edge of a street, alley, or lot
16 for the purpose of controlling access which is
reserved or held until future street extension or
widening." Section II(30) ordinance No. 540.

17 The ordinance also provides:

18 "RESERVE STRIPS Reserve strips controlling access to
19 public ways may be required by the Commission or
20 Hearings Officer. The land comprising such strips
shall be deeded to Marion County until such time as
21 the Board finds they are no longer needed." Section
IV(6) Ordinance No. 540.

22 The quoted definition indicates that a reserve strip
23 controls access to a street until future street extension or
24 widening. Section IV(6) of the ordinance authorizes the county
25 governing body to retain a reserve strip until it is "no longer
26 needed." Neither provision expressly governs the request at

1 issue in this case--an easement crossing a reserve strip.
2 Indeed, the parties do not direct our attention to any state
3 law,⁵ local ordinance, rule or regulation that would
4 expressly govern an easement request.

5 It is fair to read the above-quoted portions of the land
6 division ordinance as applicable to the access request filed on
7 behalf of Hicks. As noted, the ordinance gives respondent
8 express authority to control access to particular land by means
9 of a reserve strip. Implicit in the right of control is the
10 right to allow limited access to the land protected by the
11 reserve strip.

12 Stated in other terms, since the land division ordinance
13 authorizes the county to take a reserve strip, we believe the
14 same ordinance comes into play when the county is asked to
15 grant the right to cross such a strip. As we construe the land
16 division ordinance, the county may grant an easement of access
17 over a reserve strip where the need to protect the public way
18 would not be compromised by allowance of the particular access
19 request.

20 We conclude that petitioners' request for an easement of
21 access over the reserve strip separating Hicks' property from
22 Emerald Green Road concerned the application of Sections II(30)
23 and IV(6) of Ordinance No. 540. Since the ordinance is a land
24 use regulation, ORS 197.015(11), the decision to deny access is
25 a land use decision within our jurisdiction. ORS
26 197.015(10) (a) (A) (iii); Billington v. Polk County, supra.

1 B. Modification of Previous Orders

2 We find another basis for concluding that the decision
3 falls within the statutory test for a land use decision: it
4 concerned portions of a county land use regulation (Ordinance
5 No. 540) governing the modification of prior land division
6 orders.

7 The county contends it could not grant the access request
8 without also modifying or vacating certain access restrictions
9 adopted in previous partitioning orders. Those orders
10 effectively barred access from the Hicks property to Emerald
11 Green Road.

12 Our rationale here parallels the preceding analysis
13 concerning the request for access across the reserve strip. We
14 find no provision in the county plan or land use regulations
15 that expressly governs the modification or vacation of a
16 previous partitioning order. However, the county advises us
17 that a request of this nature would be considered under the
18 same ordinance that authorizes the county to approve a
19 partitioning order in the first instance. The applicable
20 ordinance is No. 540, Section III(1). This section of the land
21 division ordinance authorizes the county to impose conditions
22 if needed to bring land division applications "into conformance
23 with any applicable ordinances or regulations."

24 As the Court of Appeals noted, petitioners' application in
25 effect asked the county to relieve Hicks of the access
26 restrictions imposed by Partitioning Orders 75-26 and 76-29.

1 It follows that the request concerned application of Section
2 III(1) of the land division ordinance. The decision denying
3 the request is therefore a land use decision reviewable by
4 LUBA. ORS 197.015(10)(a)(A)(iii); Billington v. Polk County,
5 supra.

6 2. Significant Impact Test

7 The preceding discussion is sufficient to establish our
8 jurisdiction over the appeal. We now turn our attention to the
9 significant impact test. This jurisdictional test would have
10 to be addressed if our conclusion under the statutory test is
11 incorrect.

12 A decision is a land use decision if it has significant
13 impact on present or future land use in the area. Billington
14 v. Polk County, supra. The burden of demonstrating that the
15 test is met is on the petitioner. Id.

16 Petitioners' argument that the challenged decision
17 satisfies the significant impact test can be summarized as
18 follows:

- 19 1. The affected area was rezoned from Acreage
20 Residential (AR-3) to EFU in 1979, after the
access restriction was imposed;
- 21 2. Petitioner Wagner began operating a farm on his
22 property in 1984;
- 23 3. As a result of the county's refusal to modify the
24 restriction on access to Emerald Green Road, the
access to Petitioner Hicks' property is a private
road that traverses Wagner's farm;
- 25 4. The private road divides the farm into two
26 sections. This necessitates that gates be
installed and monitored and that the farm be

1 maintained as two independent units. This is not
2 economically feasible. Brief of Petitioners on
Remand at 7.⁶

3 Respondent answers these allegations by first arguing that
4 Wagner is estopped from claiming that the county's decision has
5 negative impact on his farm operation. The estoppel is based
6 on the fact that Wagner bought the land knowing it was
7 traversed by the easement used by Hicks.⁷ However, we do not
8 think that Wagner's prior knowledge of Hicks' right to use the
9 private road has a bearing on the jurisdictional issue before
10 us. Estoppel is an affirmative defense to a claim or a cause
11 of action; it is not a jurisdictional bar.

12 The question here is whether the county's order refusing to
13 make available an alternative means of access (Emerald Green
14 Road) to the Hicks property has significant impact. If the
15 answer is yes, we have jurisdiction over the decision.

16 Billington v. Polk County, supra.

17 The county next challenges the claim that Wagner's farm
18 operation is significantly hampered by the denial of access to
19 Emerald Green Road. The county's brief states:

20 "What Billington and Kerns both stress is that even if
21 there is an impact, it must be a significant one.
22 There is no government action in this case, however,
23 which has a significant impact on present or future
land use. Therefore, LUBA lacks jurisdiction to
consider this appeal." Respondent's brief on Remand
at 5.⁸

24 Petitioners' allegations of significant impact are vague,
25 and this is not a case in which a significant land use impact
26 can be presumed. We simply cannot accept at face value the

1 claim that Hicks' use of the private road for access to his
2 property will significantly impair Wagner's farming operation.
3 Given this circumstance, and the challenge to the factual
4 support for petitioners' allegations, petitioners were
5 obligated to support their allegations with proof that the
6 decision would actually have significant land use impact. Cf.
7 Benton County v. Friends of Benton County, 294 Or 79, 92, 653
8 P2d 1249 (1982). Petitioners did not offer or propose to offer
9 the necessary proof.⁹⁸

10 We conclude that petitioners did not carry their burden of
11 demonstrating significant impact on present or future land
12 uses. Billington v. Polk County, supra.

13 Conclusion on Jurisdiction

14 The challenged decision is a land use decision because it
15 concerns the application of provisions of respondent's land
16 division ordinance. We next turn to the assignments of error
17 in the petition.

18 FIRST ASSIGNMENT OF ERROR

19 The final order states, among other things, that (1) the
20 portion of the Hicks parcel created by the lot line adjustment
21 is subject to the access restrictions (no access to Emerald
22 Green Lane) imposed by Partitioning Orders 75-26 and 76-29 and
23 (2) a Circuit Court injunction enforcing those orders applies
24 to the Hicks' parcel. Petitioners claim these conclusions are
25 "incorrect."

26 The record includes evidence that orders 75-26 and 75-29

1 apply to the land in question. The orders provide that the
2 sole access from the partitioned property (which includes the
3 land now owned by Hicks) shall be by way of an easement
4 connecting the property to Greensbridge Road. The lot line
5 adjustments do not vacate or modify the restrictions imposed by
6 the orders.

7 In any event, the county could deny the request based on a
8 present conclusion that access to Emerald Green Road should not
9 be granted until the road is improved. Thus, petitioners would
10 not be entitled to relief even if we accepted their argument.

11 With respect to the Circuit Court injunction, we note also
12 that the portion of the county's order addressing the
13 injunction is not critical to the decision. The order merely
14 recites that the Hearings Officer felt he could not modify the
15 injunction. The order states:

16 "The reasoning advanced by the applicants are
17 inadequate to alter the decision of the Planning
18 Director. This Hearings Officer has no authority to
19 grant Hicks access to Emerald Green Lane contrary to
20 the orders of the Marion County Board of Commissioners
21 and the permanent injunction of the Marion County
22 Circuit Court. Nor has the Hearings Officer
23 sufficient grounds to recommend modification or
24 vacation of these orders and the injunction." Record
25 at 14 (emphasis added).

26 The final order was developed by the Hearings Officer, but
was adopted by the county governing body. The governing body
does not claim it was bound by the injunction. Rather, it
simply notes the Hearings Officer's view that he did not have
grounds to recommend that the injunction be lifted. Since the

1 portion of the order concerning the injunction is not critical
2 to the legal sufficiency of the order, petitioners gain nothing
3 by attacking it. Pacific Motor Trucking Co. v. Bureau of Labor
4 and Industries, 64 Or 361, 368, 668 P2d 446 (1983) rev den 295
5 Or 773; Cann v. City of Portland, ___ Or LUBA ___ No. 85-090,
6 2/14/86), aff'd 80 Or App 246, 720 P2d 1348 (1986).

7 The first assignment of error is denied.

8 SECOND ASSIGNMENT OF ERROR

9 Petitioners next contend the decision violates state and
10 county law "...by requiring the Wagner property to support a
11 residential access easement totally unrelated to the sustenance
12 of the Wagner farm." Petition at 10. The easement allegedly
13 burdens the farm in two ways: (1) it must be monitored to keep
14 out unauthorized traffic and (2) it splits the property into
15 two farm units, requiring duplication of animal shelters and
16 water wells. Petitioners claim that by imposing these burdens,
17 the county contravened ORS 215.243 (Agricultural Land Use
18 Policy), ORS 215.253 (prohibiting restrictive ordinances
19 affecting farm use zones) Statewide Goal 3 (Agricultural Lands)
20 and certain resource protection policies in the county's
21 comprehensive plan.

22 As already noted, petitioners have not cited evidence
23 showing that the county's decision significantly interferes
24 with the farm operation. This undermines their claim that
25 state and local laws promoting farm use are violated by the
26 decision. Moreover, although the authorities relied on by

1 petitioners generally protect farm land for farm use and
2 discourage governmental activities that would interfere with
3 farm use, these policies are not absolutes. They cannot be
4 viewed in isolation from other governmental policies.

5 Our point is illustrated by ORS 215.253, on which
6 petitioners partly rely in this assignment of error.
7 Subsection (1) of the statute prohibits local laws or
8 restrictions that "unreasonably restrict or regulate" farm
9 structures or accepted farming practices. However, subsection
10 (2) of the statute provides:

11 "Nothing in this section is intended to limit or
12 restrict the lawful exercise by any state agency,
13 city, county or political subdivision of its power to
14 protect the health, safety and welfare of the citizens
15 of this state."

16 The county concluded that this is an appropriate case to
17 balance the goal of promoting farm use with other legitimate
18 governmental goals. The county's order reflects this balance.

19 It states:

20 "The County has an existing, public interest in
21 limiting access to Emerald Green Lane until it is
22 improved to County road standards....Agricultural use
23 of the Wagner property may be enhanced and personal
24 hardship on the Hicks may be reduced by granting
25 access to Emerald Green Lane. But the applicants
26 acquired their property with knowledge or notice of
27 the limitations on their access to Emerald Green
28 Lane. The public interest in adequate public roads
29 outweighs the personal advantages to applicants."
30 Record at 14.

31 We cannot say that the authorities relied on by petitioners
32 override the county's interest in maintaining the restrictions
33 on access to Emerald Green Road. The second assignment of

1 error must therefore be denied.

2 THIRD ASSIGNMENT OF ERROR

3 Petitioners claim the county's decision unconstitutionally
4 discriminates against Hicks. The claim rests on the fact that
5 after the county obtained the reserve strip along Emerald Green
6 Road in 1972, it granted access easements to three abutting
7 landowners. Two easements were granted in 1975.¹⁰ The third
8 was granted in 1978.

9 Petitioners contend that under these circumstances, the
10 county cannot now deny access to Hicks. They rely on the Equal
11 Privileges and Immunities Clause of the Oregon constitution and
12 the Fourteenth Amendment of the United States constitution.¹¹

13 Respondent answers with several arguments, some of which
14 seek to avoid the constitutional issue by raising
15 jurisdictional defenses. The county's brief states:

16 "Respondents do not have jurisdiction to grant an
17 easement over the County's reserve strip through the
18 land use decision process. LUBA does not have
19 jurisdiction to grant an easement over the County's
20 reserve strip through the land use process or any
21 other process. Marion County owns the one foot
22 reserve strip. Whether it chooses to grant an
23 easement over its property is not a land use decision
24 reviewable by LUBA. LUBA does not have the power to
25 force any land owner to convey an interest in real
26 property (ORS Ch. 275 and LUBA's enabling statutes)."
Respondent's Brief at 10.

27 At bottom, these arguments seem to reiterate Respondent's
28 contention that the challenged order is not a reviewable land
29 use decision. The arguments do not come to grips with the fact
30 that if the challenged order is a land use decision, as we hold

1 it is, we have statutory authority to rule on its
2 constitutionality. ORS 197.835(8)(a)(E); Wright v. KECH TV, 300
3 Or 139, 147 n. 13, 707 P2d 1232 (1985).

4 Although the texts of the federal and state constitutional
5 provisions differ, they do not differ in scope. A single
6 analysis will suffice. Olson v. State ex. rel Johnson, 276 Or
7 9, 15-16, 554 P2d 139 (1976); State v. Clark, 291 Or 231,
8 243-44, 630 P2d 810 (1981).

9 Participants claim the decision is constitutionally flawed
10 because it reflects unequal administration of the county's
11 authority over access. However, unequal application of the law
12 is not by itself a constitutional violation. The complaining
13 party must establish intentional or purposeful discrimination,
14 i.e., that he has been singled out based on an unjustifiable
15 standard such as race, religion, or other arbitrary
16 classification. See Williamson v. Lee Optical Co, 348 US 483,
17 487-488, 75 S Ct 461, 99 L. Ed 563 (1955). Unless such suspect
18 classes are involved, the equal protection clause is violated
19 only if there is no rational basis to justify the selective
20 application of the ordinance. City of Eugene v. Crooks, 55 Or
21 App 351, 354, 637 P2d 1350 (1981), pet for rev den 292 Or 722;
22 Medford Assembly of God v. City of Medford, 72 Or App 333, 339,
23 695 P2d 1379 (1984) pet for rev den 299 Or 203.

24 Petitioners do not contend that they were denied access to
25 Emerald Green Road based on race, religion, or other arbitrary
26 classification.

1 The Oregon case coming closest to the situation here is
2 Archdiocese of Portland v. Washington County, 254 Or 77, 458
3 P2d 682 (1969). In that case, the county denied a conditional
4 use permit for a church, school, and gymnasium in a residential
5 area. The permit applicant alleged, among other things, that
6 the denial violated the equal protection guarantees under the
7 state and federal constitutions because all previous applicants
8 for similar uses had been approved. The Supreme Court rejected
9 this claim, first noting that the case did not involve a charge
10 of "any hostility to or prejudice against plaintiff." 254 Or
11 at 87. The court then stated:

12 "Implicit in the plaintiff's contention is the
13 assumption that the Board of County Commissioners of
14 Washington County is bound by the action of previous
15 Boards of County Commissioners of that county. This
16 assumption is not sound. Each Board is entitled to
17 make its own evaluation of the suitability of the use
18 sought by an applicant. The existing Board is not
19 required to perpetuate errors of its predecessors.
20 Even if it were shown that the previous applications
21 were granted by the present Board, there is nothing in
22 the record to show that the conditions now existing
23 also existed at the time the previous applications
24 were granted." 254 Or at 88.

19 Applying the foregoing principles to the present case, we
20 find that petitioners have not demonstrated that the county's
21 decision impermissibly discriminated against them. The final
22 order notes that Emerald Green Road is not improved to county
23 standards. The order concludes that the public interest
24 warrants continued control over the amount of traffic using the
25 road. That is a rational (and therefore constitutionally
26 permissible) conclusion.

1 Petitioners have the burden of demonstrating the
2 unconstitutionality of the decision. They have not carried
3 this heavy burden.¹² Based on the foregoing, the third
4 assignment of error is denied.

5 FOURTH ASSIGNMENT OF ERROR

6 Section 110.800 of the Marion County Zoning Ordinance
7 provides:

8 "Dwellings and all other buildings to be accessible to
9 public street. Every dwelling shall be situated on a
10 lot having direct access by abutting upon a public
11 street or a pre-existing private driveway of a width
12 not less than 20 feet. A private drive shall not
13 serve more than 4 dwelling units unless the parcels,
14 on which those units are proposed to be placed, were
15 established with the approval of the Marion County
16 Planning Commission or Hearings Officer in accordance
17 with state law or the Marion County Zoning Subdivision
18 or Ordinances, prior to May 1, 1977, or were approved
19 under Chapter 121, Planned Development." Petition for
20 Review at 15.

21 The quoted provision allows up to four dwellings to be served
22 by a private road. Petitioners concede that the road
23 traversing the Wagner farm does not serve more than the
24 permitted number of dwellings. However, they contend that the
25 county's decision violates the intent of the ordinance, because
26 it would be more "cost efficient" for Hicks to use Emerald
Green Road as access to his property.

 We reject this contention. The cited ordinance does not
embody a cost-efficiency standard. The ordinance is
unambiguous. We will not go beyond its plain language to
create additional standards based on speculation about
legislative intent.

1 The fourth assignment of error is denied.

2 FIFTH ASSIGNMENT OF ERROR

3 Petitioners next contend that the county "...made a
4 decision not supported by substantial evidence in the whole
5 record by not accepting the opinions of its other departments
6 within Marion County in regard to Hicks accessing Emerald
7 Lane." Petition at 17. They support the claim by citing
8 evidence that certain county departments expressed no objection
9 to the access request.

10 We reject this claim. Petitioners invite us to give
11 controlling weight to the expressions of "no objection" by
12 departmental staff. However, we do not reweigh evidence
13 presented at local hearings. The governing body was entitled
14 to give the staff comments less weight than evidence supporting
15 denial. That evidence meets the substantial evidence test.

16 Braidwood v. City of Portland, 24 Or App 477, 546 P2d 777
17 (1976).

18 The fifth assignment of error is denied.

19 SIXTH ASSIGNMENT OF ERROR

20 Petitioners next claim that the decision is unsupported by
21 substantial evidence because it is inconsistent with the views
22 of persons who reside on land adjacent to Emerald Green Road.

23 The petition states:

24 "Marion County has an obligation to the public to
25 accept the majority decision of the public. To do
26 otherwise is to exceed county authority and violate
the public trust and interest."

1 We know of no legal authority for the proposition advocated
2 by petitioners. Assuming for argument's sake that the majority
3 of area residents favored the application, the governing body
4 was nonetheless empowered to deny it. Petitioners' objection
5 stands on a political, not a legal foundation.

6 The sixth assignment of error is denied.

7 SEVENTH ASSIGNMENT OF ERROR

8 Petitioners next contend that the county made a decision
9 not supported by substantial evidence by assuming that approval
10 of the access request would invite similar requests from others
11 seeking access to Emerald Green Road. They add that the
12 county's concern is groundless because the only property
13 abutting the road which has been denied access is the property
14 at issue in this appeal.

15 The final order does express concern that access approval
16 could invite other applications. However, this is not the sole
17 or even the principal basis for the county's decision. Rather,
18 the decision is expressly based on the public interest in
19 limiting access to the road until it is improved to county
20 standards. Further, we believe the county could take into
21 account the kind of public message that would be given by
22 approval of the request. Owners of land abutting Emerald Green
23 Road might not make further access demands on the substandard
24 road, but nearby landowners might, in the form of land division
25 requests. The county has a legitimate interest in discouraging
26 such applications until the road is improved.

1 This assignment of error provides no basis for remand or
2 reversal of the county's decision. The assignment of error is
3 denied.

4 EIGHTH ASSIGNMENT OF ERROR

5 Petitioners claim the county erred in disregarding their
6 offer to contribute to improvement of Emerald Green Road. They
7 add that "most residents no longer object to Hicks' use of
8 Emerald Lane for access purposes." Petition at 21.

9 We must reject this assignment of error. Petitioners
10 invite us to substitute our judgement for that of respondent on
11 matters of policy. This is not our function. Our review
12 authority is limited by ORS 197.835. None of the statutory
13 bases for remand or reversal are brought into play by this
14 assignment of error.

15 The eighth assignment of error is denied.

16 The county's decision is affirmed.

1 FOOTNOTES

2
3

1
4 Although Wagner and Hicks joined in the petition, only
5 Wagner appealed our dismissal order to the Court of Appeals.
6 On remand, only Wagner filed a supplemental brief. Hicks did
7 not participate on remand.

8
9 Our references to the petition in this opinion refer to the
10 petition filed by Wagner and Hicks.

11

2
12 We find no definition of "lot line adjustment" in the
13 county land division ordinance. Section III(6) of the
14 ordinance does state, however, that

15 "a. In any zone a lot line may be adjusted by mutual
16 consent of the property owners for a nonconforming lot
17 or parcel or to resolve a boundary dispute, provided
18 the adjustment in no way increases the degree of non
19 conformance of the subject property or adjacent
20 properties."

21

3
22 The record shows that the strip was deeded to the
23 county in 1972, as part of a partition approval.

24

4
25 The record shows that the Marion County Circuit Court
26 has also enjoined Wagner and Hicks from violating the
access restrictions imposed by County Orders 75-26 and
76-29. Presumably, vacation of the restrictions would set
the stage for a motion asking the court to vacate the
injunction.

27

5
28 Respondent tells us that the granting of interests in
29 real property is exclusively governed by ORS Ch. 275, the
30 idea evidently being that the statute provides the sole
31 legal basis for the county's action. However, respondent
32 cites no provision of the statute that would have bearing
33 on the access request. We find none.

1
6

2 The petition claims that "The costs of duplicating the
3 animal shelters and water wells would be prohibitive, placing
4 further undue burdens on the sustenance of the Wagner farm."
Petition for Review at 10. However, petitioners do not
support this assertion with facts.

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6 Hicks owned property served by the private easement as
7 early as 1976. Wagner purchased the land traversed by the
easement in 1984.

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9 Participants McCall, Townsend, and Forbes join in this
10 argument.

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12 At oral argument, petitioner Wagner stated that the
13 private road used by Hicks prevents him from grazing cattle
on the farm, but he did not cite evidence to support the
claim.

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15 These easements were evidently granted prior to adoption
16 of partitioning orders 75-26 and 76-29 .

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Article I, Section 20 of the Oregon Constitution Provides:

18 "Equality of privileges and immunities of citizens.
19 No law shall be passed granting to any citizen or
20 class of citizens privileges, or immunities, which,
upon the same terms, shall not equally belong to all
citizens."

21 The Fourteenth Amendment of the U.S. Constitution provides,
22 in part:

23 "Section 1. Citizenship; privileges and immunities;
24 due process; equal protection. All persons born or
naturalized in the United States, and subject to the
25 jurisdiction thereof, are citizens of the United
States and of the State wherein they reside. No State
26 shall make or enforce any law which shall abridge the
privileges or immunities of citizens of the United

1 States; nor shall any State deprive any person of
2 life, liberty, or property, without due process of
3 law; nor deny to any person within its jurisdiction
4 the equal protection of the laws."

5 12

6 The record provides scant information about the
7 circumstances associated with the access easements previously
8 allowed by respondent. We cannot say that the present case is
9 identical to those cases, or that respondent singled out
10 petitioners for impermissible reasons.
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