

LAND USE  
BOARD OF APPEALS

Aug 31 4 32 PM '88

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

CHRISTOPHER CANFIELD, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
LANE COUNTY, )  
 )  
Respondent, )  
 )  
and )  
 )  
BARRY NORTHROP, )  
 )  
Intervenor- )  
Respondent. )

LUBA No. 88-001  
FINAL OPINION  
AND ORDER

Appeal from Lane County.

Michael Farthing, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Gleaves, Swearingen, Larsen & Potter.

Stephen L. Vorhes, Eugene, and Joseph J. Leahy, Springfield, filed a joint response brief and argued on behalf of respondent and intervenor-respondent. With them on the brief was Harms, Harold & Leahy.

BAGG, Chief Referee; HOLSTUN, Referee; SHERTON, Referee, participated in the decision.

REVERSED 08/31/88

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals a Lane County decision approving a  
4 variance to road access requirements.

5 FACTS

6 On December 16, 1986, intervenor-respondent Barry Northrop,  
7 the applicant, requested an access variance for a 72 acre  
8 parcel owned by the Church of Self-Reliance.<sup>1</sup> The parcel is  
9 zoned Rural Residential 10 Acre Minimum (RR-10). The property  
10 has physical access to Row River Road, a county public road,  
11 via Cerro Gordo Road and Ross Lane, both private roads. The  
12 property over which Cerro Gordo Road and Ross Lane are  
13 constructed is owned by the Cerro Gordo Cooperative, Inc.  
14 These roadways are subject to the Cerro Gordo Cooperative, Inc.  
15 Charter, which is an overall statement of conditions, covenants  
16 and restrictions for the 1,159 acres of the Cerro Gordo Ranch.  
17 The Cerro Gordo Cooperative maintains Cerro Gordo Road and Ross  
18 Lane as private roads providing access to numerous properties  
19 within Cerro Gordo Ranch. The 72 acres, along with the  
20 roadways, are within the Cerro Gordo Ranch.

21 Petitioner claims the applicant may, by complying with  
22 certain requirements imposed by the Cerro Gordo Cooperative,  
23 obtain access to Row River Road over Cerro Gordo Road and Ross  
24 Lane. However, the applicant has not joined the Cerro Gordo  
25 Cooperative. Instead, the applicant claims a right to access  
26 over Cerro Gordo Road and Ross Lane through a "grant of

1 easement and maintenance agreement" from Carl Hinkle and Joan  
2 Livine. Record 353, p. 8. However, the validity of this  
3 easement is in question. An additional easement by which the  
4 applicant claims access is an "Access Easement" given by<sup>2</sup>  
5 petitioner Christopher Canfield<sup>3</sup> to the Church of Self  
6 Reliance. Supplemental Record 30. Access from applicant's  
7 parcel to Row River Road, a public road, is necessary before  
8 the applicant will be entitled to building permits.<sup>4</sup> Lane  
9 Code Sec. 15.135.

10 The hearings official found the property did not meet the  
11 requirements of Lane Code Sec. 15.135 which provides the  
12 property must have "reasonably safe and usable vehicular access  
13 either directly to a public road or directly to an approved  
14 private road or a private access easement." The hearings  
15 official found the property lacked access to an "approved  
16 private road."<sup>5</sup>

17 The hearings official also found the applicant could not  
18 automatically rely on his asserted private access easements for  
19 compliance with Lane Code 15.135. The official found  
20 utilization of Ross Lane and Cerro Gordo Road under those  
21 easements would conflict with the minimum requirements for  
22 private access easements specified in Lane Code 15.055.  
23 Specifically, the hearings official ruled such use would  
24 conflict with Lane Code 15.055(3) which provides:

25 "Private access easements shall not be approved if the  
26

1 road is presently needed or is likely to be needed for  
2 access to adjacent properties or to be utilized for  
3 public road purposes in the normal development of the  
4 area."

5 He concluded Lane Code 15.055(3) would be violated because  
6 "Ross Lane is presently needed for access to adjacent  
7 properties." Record 54. The county interpreted this conflict  
8 with Lane Code 15.055(3) to require a variance to that  
9 subsection.<sup>6</sup>

10 FIRST ASSIGNMENT OF ERROR

11 "The County exceeded its jurisdiction by making a  
12 determination that access to the Subject Property has  
13 been "eroded" through subsequent foreclosures and lot  
14 line adjustments."

15 Petitioner argues that the county "exceeded its  
16 jurisdiction"<sup>7</sup> by finding that the variance was needed to  
17 reestablish legal access to the property. The hearings officer  
18 found the property lost legal access through a series of  
19 foreclosures and lot line adjustments.<sup>8</sup> Record 54.

20 The hearings officer's discussion is essentially a  
21 determination that, although the subject property was created  
22 by an approved partitioning, it lost access because of  
23 subsequent events, and the county will not automatically  
24 consider it to meet the access requirements of the code.

25 Petitioner asserts no basis under this assignment of error  
26 for us to reverse or remand the county's decision based on a  
determination that this finding is erroneous. Petitioner  
simply suggests the county's allegedly erroneous view of the  
availability of private road access causes it to reach

1 erroneous conclusions about the need for a variance and  
2 satisfaction of the criterion for granting a variance.

3 Whether a variance was properly granted in this case is  
4 discussed under the second assignment of error.

5 The first assignment of error is denied.

6 SECOND ASSIGNMENT OF ERROR

7 "County erred in its interpretation of the criteria  
8 applicable to variance applications and erroneously  
misapplied the applicable law."

9 Lane Code Sec. 15.140 provides that the Lane Code's general  
10 variance criteria are applicable to any variance to the  
11 requirements of Lane Code Sec. 15.135. The general variance  
12 requirements are set forth in Lane Code Sec. 15.900.  
13 Additionally, certain requirements in Lane Code Sec. 15.140 may  
14 apply where appropriate. We consider Lane Code Sec. 15.900  
15 first.

16 A. Practical Difficulty or Unnecessary Hardship,  
17 Lane Code 15.900(2)(a).

18 Petitioner claims that Lane Code Sec. 15.900(2)(a) is not  
19 satisfied in this case. Lane Code Sec. 15.900 (2)(a) provides  
20 that an applicant is to demonstrate that

21 "strict or literal interpretation in enforcement of  
22 the specified requirements would result in practical  
23 difficulty or unnecessary hardship and would be  
inconsistent with the objectives of this chapter."

24 Petitioner says that the hearings official erred in finding  
25 the practical difficulty or unnecessary hardship criterion was  
26 satisfied. Petitioner claims that the parcel has and continues

1 to have a means of obtaining access from the Cerro Gordo  
2 organization.

3         Petitioner then engages in lengthy discussion about other  
4 portions of the hearings officer's decision addressing this  
5 criterion. In sum, petitioner complains that any easement  
6 granted to the Church of Self Reliance was never intended to  
7 supercede the Cerro Gordo Charter and the declaration of  
8 private road, documents controlling use of the roadway.

9         This discussion is not relevant. The question is whether  
10 the county demonstrated that strict compliance with the access  
11 requirement in the code would result in practical difficulties  
12 or unnecessary hardship. We conclude that strict adherence  
13 would not result in practical difficulties or unnecessary  
14 hardship. The applicant's apparent desire not to seek private  
15 road access from the Cerro Gordo Cooperative is not a practical  
16 difficulty or unnecessary hardship. It is a personal  
17 preference. Chou v. City of Keizer, 15 Or LUBA 420, 422-423  
18 (1987) in which we said practical difficulty and unnecessary  
19 hardship must arise "out of the property itself \* \* \* \* \* [and]  
20 [t]he fact [parties] have argued over the course of several  
21 years does not create an unnecessary or unreasonable hardship  
22 on practical difficulties." There is no showing of a practical  
23 difficulty or unnecessary hardship in this case<sup>9</sup>.

24         This subassignment of error is sustained.  
25  
26

1 B. Exceptional or Extraordinary Circumstances or  
2 Conditions, Lane Code 15.900(2)(b).

3 Petitioner next claims that Lane Code Sec. 15.900(2)(b) is  
4 not satisfied by this decision. This criterion requires a  
5 finding that there are "exceptional or extraordinary  
6 circumstances or conditions" affecting this property not  
7 affecting other properties in the same vicinity.

8 The hearings official found as follows:

9 "The exceptional circumstances which apply to the  
10 subject property and not to surrounding properties,  
11 lies with the former's method of creation and the land  
12 use implications flowing therefrom. The property was  
13 created through foreclosure, where assurances of  
14 access were not considered. This variance request is  
15 necessary to address and resolve this shortcoming."  
16 Record 58.

17 Special conditions or circumstances affecting property must  
18 relate to physical circumstances about the property, not legal  
19 difficulties or inconvenience. Lovell v. Independence Planning  
20 Comm., 37 Or App 3, 586 P2d 99 (1978); Patzkowsky v. Klamath  
21 County, 8 Or LUBA 64 (1983). We do not understand the  
22 petitioner to be landlocked through some condition inherent in  
23 the land itself.

24 In Cope v. City of Cannon Beach, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
25 87-022, August 7, 1987) we were presented with a similar fact  
26 situation and decision.

27 "The city found the fact that Lots 12 and 13 are the  
28 only buildable lots in the vicinity without access to  
29 a public street, and this constitutes exceptional or  
30 extraordinary circumstances. In essence, the city  
31 claims that because the lots do not abut city streets  
32 there is an extraordinary circumstance warranting  
33 relief from the city's requirement that lots must abut

1 streets to be buildable. The circularity of this  
2 rationale is obvious. Id. slip op at 6.

3 A condition of uncertain access may be one which may be  
4 unfortunate and inconvenient, but it is not a circumstance  
5 inherent in the land. Further, it appears that private road  
6 access is available through the Cerro Gordo Cooperative. We  
7 are not cited to evidence in the record suggesting that it is  
8 not available.

9 This subassignment of error is sustained.

10 C. Deprivation of Privileges of Other Property  
Owners, Lane Code 15.900(2)(c).

11 Petitioner complains that under Lane Code 15.900(2)(c) the  
12 county is required to find that strict or literal  
13 interpretation of the regulation would deprive the applicant of  
14 privileges enjoyed by other owners of property in the same  
15 vicinity. The petitioner claims there is no such showing.  
16 Indeed,

17 "the whole purpose of this appeal is to prevent the  
18 granting of a privilege to one owner in the Cerro  
19 Gordo project that is not enjoyed by other owners who  
20 would be forced to shoulder that person's  
responsibility in maintaining and developing the road  
system for Cerro Gordo." Petition for Review 26-27.

21 Respondents reply that the evidence shows the applicant  
22 would not have access without the variance. However,  
23 respondents offer nothing to suggest that the applicant is  
24 unable to obtain access through the Cerro Gordo Cooperative.  
25 Without such a showing, we do not believe the criterion is met.

26 This subassignment of error is sustained.

1 D. Detriment to Other Properties, Lane Code  
2 15.900(2)(d).

3 Petitioner next challenges the hearings officer's finding  
4 that Lane Code Sec. 15.900(2)(d) is met. This criterion  
5 requires a showing that the variance will not be detrimental or  
6 damaging to other properties and improvements in the area. The  
7 petitioner argues that as a result of the applicant's use, the  
8 present users of the Cerro Gordo Road will be required to  
9 shoulder more than their fair share of the cost for future road  
10 maintenance and improvements. Petitioner alleges that this  
11 fact alone is sufficient to show noncompliance with this  
12 criterion.

13 Respondents argue this requirement is met by imposition of  
14 conditions. The conditions require the applicant to pay his  
15 fair share of taxes in the road. Further, the applicant is  
16 required to observe all reasonable road use regulations made by  
17 the Cerro Gordo Cooperative, Inc. Record 52-53.

18 We understand petitioner to quarrel with the conditions  
19 because they do not state how the measurement of a "fair share"  
20 of tax expenses is to be calculated. That is, the applicant's  
21 view of what his fair share tax expenses might be may be  
22 somewhat different than that of the Cerro Gordo organization.

23 We agree with petitioner. Without a specified method of  
24 determining fair share of the expenses, the county does not  
25 have a sufficient basis for concluding the access requirement  
26 will not be detrimental or damaging to other properties in the  
vicinity.

1 We sustain this subassignment of error.

2 E. Lane Code 15.140

3 Petitioner next turns his attention to Lane Code Sec.

4 15.140. Lane Code Sec. 15.140(1) provides:

5 "In addition to other provisions stated in Lane Code  
6 15.900, the variance application may be considered for  
7 approval if it is deemed necessary because of either  
8 the unusual uses, title limitations, location or date  
9 or means of creation of the lots or parcels or because  
10 of the limitations imposed by the arrangement of the  
11 contiguous or adjacent lots or parcels."

12 Under this criterion, the hearings officer found the variance  
13 was necessary because the property was created through the  
14 action of two court foreclosures and lot line adjustments. The  
15 hearings officer found these processes do not address land use  
16 impacts dividing the property. Record 56. The hearings  
17 officer also concluded the property was created without direct  
18 access to a public road and without access to an approved  
19 private road or private easement. He found Ross Lane and Cerro  
20 Gordo Road were private roads for other parcels, but they have  
21 not received county approval to serve the subject property.

22 While we agree that justification for the variance under  
23 the variance criterion expressed in Lane Code Sec. 15.900 is  
24 inadequate, we do not agree that the county erred in concluding  
25 Lane Code Sec. 15.140(1) was satisfied. The property does not  
26 now have approval access to Cerro Gordo Road. It must obtain  
that access through some means. A variance to county access  
requirements is one such means. The "means of creation of the  
lots" is a sufficient basis for proceeding to determine whether

1 the general variance criteria in Lane Code Sec. 15.900 are met.

2 This portion of the second assignment of error is denied.

3 The second assignment of error sustained, in part.

4 THIRD ASSIGNMENT OF ERROR

5 "The County erred by adopting a condition of approval  
6 of the variance which improperly delegated authority  
7 for determining satisfaction of the condition and  
8 failed to provide a procedure to allow Petitioner and  
other interested parties to comment on whether the  
condition is satisfied."

9 Under the county's decision, there are two documents  
10 necessary for the applicant to obtain a building permit. The  
11 applicant is required to obtain an access easement to the  
12 subject property and an "appropriate legal instrument" that  
13 requires the applicant and his successors to pay their fair  
14 share of maintenance and taxes. Record 52-53. The document  
15 must recite the applicant's agreement to waive any right to  
16 object to making the Cerro Gordo Road system public and to  
17 allow necessary utilities to use the easement. Petitioner  
18 claims these conditions are not adequate to insure the  
19 applicant's compliance with the variance criteria, or the Cerro  
20 Gordo private road system standards.

21 In addition, petitioner says a third condition, that the  
22 applicant observe all reasonable road use regulations of the  
23 Cerro Gordo Cooperative (Record 53), is not adequate to ensure  
24 that the rules will be followed. Petitioner says that there is  
25 no safeguard against the applicant reversing or changing any of  
26 the required documents once a house is constructed, nor does

1 the condition provide a process by which petitioners and other  
2 parties can comment on and object to sufficiency of attempts to  
3 satisfy the conditions.

4 Respondents reply that none of the allegations indicate  
5 there is any violation of any state statute or county code  
6 provision. According to respondent, petitioner failed to show  
7 (1) the conditions are required under provisions of the Lane  
8 Code or any state law and (2) failure to comply with the  
9 conditions violates any applicable criterion in the Lane County  
10 Land Use Regulatory Program or state law.

11 Lane Code 15.135 requires that parcels have reasonably safe  
12 vehicular access. The first condition, requiring the applicant  
13 to obtain a private easement allowing access to the use of Ross  
14 Lane and Cerro Gordo Road, is necessary to provide this access,  
15 at least in the county's view. It is not clear to us why  
16 petitioner believes this condition is inappropriate or  
17 prohibited under any provision of the Lane Code or state law.

18 Petitioner does complain that there is a county policy  
19 favoring creation and use of a private road as opposed to a  
20 private access easement. Lane Code Sec. 15.410(7) provides:

21 "There is within Lane County a number of different  
22 types of forms of access used to gain ingress and  
23 egress to a particular property development. These  
24 are listed below in estimated order of decreasing  
25 desirability, for meeting the normal access needs of  
26 developments:

27 "\* \* \* \* \*

28 "(h) private roads;

29 "(i) private road easements \* \* \*." See Record 32.

1 However, we do not find the county code to mandate use of a  
2 private road over a private access easement. The fact a  
3 preference exists does not, in this case, mean the county is  
4 obliged not to allow a private access easement as access.

5 Petitioner's claim that the condition is defective because  
6 Cerro Gordo Corporation conditions for use of the roadway have  
7 not been met is not a ground for reversal or remand. The Cerro  
8 Gordo declaration of private road, including conditions for use  
9 of the roadway, is not part of the county's land use regulatory  
10 requirements. Failure to comply with the declaration is a  
11 private matter, not one for the county or this board.

12 The second condition, regarding the creation of a legal  
13 instrument making the applicant responsible for part of the  
14 road taxes, is another subject of petitioner's complaint. We  
15 have already discussed the adequacy of this condition. We  
16 agree that it is defective because there is no clear means of  
17 determining what a "fair share of the taxes" may be. We note  
18 in this regard that Lane Code Sec. 15.900(4) allows for the  
19 imposition of conditions that protect "the best interest of the  
20 surrounding property or neighborhood \* \* \*." We agree with  
21 petitioner that this subsection is not fulfilled by the  
22 imposition of this condition because it does not adequately  
23 protect the Cerro Gordo organization.

24 The same objection is raised with regard to the third  
25 condition, the requirement that the applicant abide by the  
26 Cerro Gordo road use regulations. Petitioner's objection is

1 there is no requirement that future owners and guests comply  
2 with these regulations. Petitioner complains that there is no  
3 way to enforce this provision.

4 We do not believe these difficulties are reasons to reverse  
5 or remand the decision. Petitioner's view that the conditions  
6 will be violated is speculation. We do not believe the county  
7 is obliged to assume future violations of the condition.

8 Lastly, petitioner objects to the fourth condition,  
9 requiring the submission of a "subdivision guarantee report,"  
10 to show that the previous three conditions are satisfied.

11 Again, we do not understand this condition to be subject for  
12 review by this Board. A question of enforcement of the  
13 conditions is not a matter of concern in this forum.

14 This assignment of error is sustained in part.

15 FOURTH ASSIGNMENT OF ERROR

16 "County erred in that the decision of the Hearings  
17 Official, including numerous findings of fact and  
18 conclusions of law, are [sic] not supported by  
substantial evidence."

19 In this assignment of error, petitioner complains about a  
20 lack of evidentiary support for several findings made by the  
21 hearings officer. However, petitioner does not explain why the  
22 findings are significant. There is no showing that the  
23 challenged findings are necessary to illustrate compliance with  
24 any county criteria, and without such a showing, even if the  
25 findings are defective, we have no basis to remand or reverse  
26 the decision.

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This assignment of error is denied.  
The decision of Lane County is reversed.

1 FOOTNOTES

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3 \_\_\_\_\_  
4 1  
5 The Church of Self Reliance was a co-applicant for the  
6 variance.

7 \_\_\_\_\_  
8 2  
9 The effect of this easement is disputed by the parties.  
10 The parties do not suggest that LUBA may determine the validity  
11 of these easements or their legal effect, and we do not do so.  
12 Similarly we need not determine what access rights, if any, the  
13 applicant enjoys over Cerro Gordo Road and Ross Lane by virtue  
14 of a 1962 easement granted to the Bureau of Land Management by  
15 the Cerro Gordo Cooperative's predecessors in title, Signar and  
16 Rose Lindroth. Supplemental Record 34.

17 \_\_\_\_\_  
18 3  
19 Christopher Canfield is the Cerro Gordo "Community  
20 Developer responsible for initiating and continuing the Cerro  
21 Gordo ranch project". Petition for Review at 1.

22 \_\_\_\_\_  
23 4  
24 The applicant does not yet own the property. He plans to  
25 purchase the property from the Church of Self Reliance. With  
26 the purchase of the property, it is the applicant's belief that  
27 he will obtain the church's right to use the Cerro Gordo Road  
28 and Ross Lane. The basis for this view is the applicant's  
29 belief that the easement, upon which the Church of Self  
30 Reliance bases its right to use the roadways, will be passed to  
31 him with the purchase of the property. See Record 39;  
32 Supplemental Record 40.

33 \_\_\_\_\_  
34 5  
35 Neither Cerro Gordo Road nor Ross Lane are specifically  
36 designated as private access roads to serve the subject  
37 property. The roads are approved to serve other parcels in the  
38 Cerro Gordo development. Record 51. The parties dispute  
39 whether the county's approval of Cerro Gordo Road and Ross Lane  
40 for access to the property was lost due to subsequent  
41 foreclosures and lot line adjustments. See footnote 9, infra.

42 \_\_\_\_\_  
43 6  
44 The parties appear to believe the hearings officer granted

1 a variance also under subsection (1) of Lane Code Sec. 15.055  
2 provides that private easement may provide access to only four  
3 or fewer lots. The property is vacant, and the applicant  
4 apparently intends to construct only one single family dwelling  
5 on the lot. Therefore, we are uncertain as to why the parties  
6 believe the hearings officer also varied subsection (1) of Lane  
7 Code 15.055. A review of the hearings officer's order does not  
8 suggest the hearings officer considered this criterion  
9 necessitated a variance. See Record 54.

6 \_\_\_\_\_  
7 7

7 We find no basis, and petitioner asserts none, upon which  
8 to conclude the county exceeded its jurisdiction in determining  
9 the property does not currently meet the access requirements in  
10 the code. Lane County clearly has jurisdiction to determine  
11 whether a parcel has access which complies with code  
12 requirements. This determination is part of the county's land  
13 use regulating function. It is a necessary part of the  
14 county's building permit approval process. Whether the county  
15 properly exercised this jurisdiction is a separate issue.

12 \_\_\_\_\_  
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13 This finding addresses Lane Code Sec. 15.135(2), which  
14 provides:

14 "Any lot or parcel which has been created in an  
15 approved and recorded subdivision plat, partition map,  
16 or minor subdivision shall be considered as meeting  
17 the access requirements of L.C. 15.130 and L.C. 135."

17 \_\_\_\_\_  
18 9

18 We emphasize that reliance on a private access easement  
19 rather than securing approval of private road access apparently  
20 is permitted under Lane Code Sec. 15.135(1). However, the  
21 applicant's personal preference is simply not a sufficient  
22 basis for compliance with the stringent standard contained in  
23 Lane Code Sec. 15.900(2)(a).