

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

3
4 CARL R. PELZ and ROSALIE C. PELZ,
5 *Petitioners,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2009-043

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Clackamas County.

18
19 Carl R. Pelz and Rosalie C. Pelz, Portland, filed the petition for review and argued on
20 their own behalf.

21
22 D. Daniel Chandler, Assistant County Counsel, Oregon City, filed the response brief
23 and argued on behalf of respondent.

24
25 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
26 participated in the decision.

27
28 REMANDED

07/22/2009

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

NATURE OF THE DECISION

Petitioners appeal a county decision denying their application for a minor partition.

FACTS

Petitioners own a 44-acre parcel in rural Clackamas County north of Highway 26 in the vicinity of Mount Hood. Petitioners applied to partition their property into two 2-acre parcels and one 40-acre parcel. The subject property is located to the east of, but not adjacent to, East Lolo Pass Road (Lolo Road) which is minor arterial road. The subject property is connected to Lolo Road by two dead-end gravel roads, East Mountain Drive (Mountain Drive) and East Terrace Drive (Terrace Drive). The proposed parcels would use either Mountain Drive or Terrace Drive to access Lolo Road. Lolo Road provides the only arterial access to the subject property. Due to its age and topography, Lolo Road has many vertical and horizontal curves. In the present case, the intersection with Mountain Drive is at the top of a hill and near a horizontal curve. While the intersection with Terrace Drive is on a straighter section of Lolo Road, there is a dip (vertical curve) in Lolo Road between Mountain Drive and Terrace Drive.

The county hearings officer originally denied the proposed partition due to concerns regarding adequate sight distance at the Mountain Drive/Lolo Road and Terrace Drive/Lolo Road intersections. Petitioners appealed the decision to LUBA, and we granted the county's motion for a voluntary remand. On remand, the hearings officer again denied the application. This appeal followed.

INTRODUCTION

We briefly set out the relevant provisions of the Clackamas County Zoning Development Ordinance (ZDO) and Clackamas County Comprehensive Plan (CCCP) before addressing the parties' arguments. ZDO Section 1014.03 provides street design standards for

1 land divisions.¹ ZDO Section 1007.04 provides general design standards for roads,
2 circulation, and parking.² The Clackamas County Roadway Standards (CCRS) apparently
3 provide the standards referenced in the ZDO.³

¹ ZDO 1014.03 provides in relevant part:

“A. Entrances and exits for vehicles shall be designed to encourage smooth traffic flow with controlled turning movements and minimum hazards to pedestrians, passing traffic, or to traffic entering or leaving the development.

“ * * * * *

“H. Street alignments, intersections, and centerline deflection angles shall be designed to the standards of the County Department of Transportation and Development.”

² ZDO 1007.04 sets out the design standards for “Vehicle Access,” which include in relevant part:

“A. The location and design of an access to existing and new developments shall be planned, coordinated, and controlled by the Department of Transportation and Development.

“B. Access control shall be based on the guidelines found in Table V-5 of the Comprehensive Plan. Joint access and circulation drives shall be utilized whenever feasible.

“* * * * *

“D. Visibility:

“1. Developments and subdivisions along all roadways shall be designed to optimize visibility for vehicular traffic.

“2. No planting, signing, or fence shall be allowed which restricts vision.”

³ CCRS 240.4.3 provides in part:

“There may be cases when the ISD cannot be satisfied because of roadway characteristics such as vertical or horizontal curves. In these cases, the ISD should be adjusted as appropriate based on engineering judgment including such parameters as the anticipated traffic and types of vehicles. In these cases, the ISD or SSD shall be used, whichever is greater.

“If a new proposed driveway entrance does not meet these criteria, then the driveway must be moved to a location, which meets these requirements, unless the required ISD can be achieved by removing or trimming vegetation. If moving the driveway or trimming vegetation does not allow the sight distance criteria to be met, the County and applicant shall determine the safest means to provide access. In cases where adequate sight distance is not possible, the applicant shall obtain a Permit & Release from the County.

1 ZDO Section 1007.02 requires that the “location, alignment, design, grade, width,
2 and capacity of all road, circulation, and parking systems within the County shall conform to
3 the Comprehensive Plan * * *.” CCCP transportation policy 16 (Policy 16) implements the
4 comprehensive plan goal of “creating and maintaining a safe, continuous County-wide road
5 system” and identifies as an “[i]mprovement to serve development” a requirement that
6 “development [be] served by adequate roadway facilities.”

7 The county evaluated the application’s compliance with the ZDO and the CCCP by
8 relying on section 240.4.3 of the CCRS. Among other things, CCRS 240.4.3 requires
9 intersection sight distances (ISD) of 500 feet for the intersections of Mountain Drive/Lolo
10 Road and Terrace Drive/Lolo Road.⁴ There is no dispute that the Mountain Drive/Lolo Road
11 intersection does not meet ISD requirements in either direction, and that the Terrace
12 Drive/Lolo Road intersection does not meet ISD requirements from one direction. When
13 ISD cannot be met, CCRS 240.4.3 provides potential alternatives, including using stopping
14 sight distances (SSDs), but the county declined to approve an alternative to the ISD
15 requirements.⁵

16 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

17 These assignments of error contain various challenges to the hearings officer’s
18 determination that the application failed to satisfy ZDO 1007.04 and 1014, and Policy 16
19 regarding access, and for that reason we address these assignments of error together. The
20 hearings officer concluded that the partition application failed to satisfy ZDO 1007.04 and

“The County may, when deemed necessary and at its own discretion, use posted speed, advisory curve speed plus 10 mph, or 85th percentile speed, along with sight distance tables or sight distance formula found in AASHTO, to determine appropriate sight distance requirements for a particular intersection.”

⁴ ISD describes the distance a driver stopped on at an intersection needs to be able to see to safely enter the intersection.

⁵ SSD describes the distance a driver on a major road needs to see in order to safely stop if the intersection is blocked.

1 ZDO 1014 because the existing Mountain Drive/Lolo Road and Terrace Drive/Lolo Road
2 intersections do not meet the ISD requirements set forth in CCRS 240.4.3. Because those
3 intersections do not meet those sight distance requirements, the hearings officer concluded,
4 the application fails to satisfy Policy 16, which requires that development be served by
5 adequate roadway facilities:

6 “ZDO 1007 and 1014 are premised on compliance with the CCRS. If the
7 default standards set out in the CCRS cannot be met, the standards allow the
8 county engineer to consider alternatives, and approve an application subject to
9 alternative standards, if the engineer concludes that the alternative standards
10 accomplish the design intent, or the change is relatively minor and will avoid
11 an undue hardship. CCRS 160.1.4. The applicant has not made those
12 demonstrations to the county engineer’s satisfaction. Because compliance
13 with ZDO 1007.03(A) and 1007.04(A) require compliance with the CCRS or
14 to modified standards allowed by the county engineer, the proposed partition
15 does not satisfy applicable development standards or [CCCP] Policy 16.
16 Therefore, the application must be denied.” Supplemental Record 13.

17 **A. ZDO 1014 and 1007**

18 In evaluating compliance with ZDO 1014 and ZDO 1007, the hearings officer
19 concluded that the applicant was required to demonstrate that the Mountain Drive/Lolo Road
20 and Terrace Drive/Lolo Road intersections comply with the access standards set forth in
21 ZDO 1007.04 and 1014, and by incorporation, with the CCRS. The hearings officer
22 concluded that such compliance is accomplished by meeting the required ISD or by securing
23 approval from the county to use an alternative method specified in CCRS 240.4.3. *See* n 3.
24 Petitioners argue that the standards set forth in ZDO 1007 and 1014 do not apply to existing
25 off-site roads and intersections such as Lolo Road and the Mountain Drive/Lolo Road and
26 Terrace Drive/Lolo Road intersections, but only apply to new proposed roads and
27 intersections. The county responds that the hearings officer correctly determined that ZDO
28 1007 and 1014 require existing roadways and intersections that will serve proposed
29 development to comply with the CCRS.

1 Petitioners appear to be correct that ZDO 1014 applies to the design of adjacent roads
2 fronting the property or within a proposed subdivision or partition, and does not apply to
3 roads or intersections that are not adjacent to or within the property, such as the Mountain
4 Drive/Lolo Road or Terrace Drive/Lolo Road intersections or Lolo Road itself. ZDO
5 1014.03(A) refers to how “entrances and exits” to proposed subdivisions and partitions “shall
6 be designed,” and ZDO 1014.03(H) similarly refers to “street alignments [and] intersections”
7 within developments and specifies how they “shall be designed.” *See* n 1. Moreover, the
8 design standards are standards for *designing* roads and intersections. Thus the focus of the
9 design standards appears to be on the development of future facilities, not the adequacy of
10 existing facilities.

11 Similarly, we agree with petitioners that nothing in ZDO 1007 requires the Mountain
12 Drive/Lolo Road and Terrace Drive/Lolo Road intersections to be improved where no new
13 access points directly to Lolo Road are proposed in connection with the partition. ZDO
14 1007.04(D)(1) refers to access to “[d]evelopments and subdivisions along all roadways.”
15 Because the property is not “along” Lolo Road or even adjacent to the problem intersections,
16 ZDO 1007.04 does not appear to impose any obligations with respect to Lolo Road. In
17 addition, although ZDO 1007.03(A) requires “right of way dedication and improvements” for
18 all new developments and subdivisions if required by the county transportation department,
19 petitioners’ property does not front Lolo Road and therefore no right of way dedication or
20 improvements to the Lolo Road right of way could be required under ZDO 1007.03(A).

21 As such, failure of an existing, non-adjacent intersection to satisfy the standards that
22 would apply to a new road or intersection under ZDO 1007.03, 1007.04, 1014, or the
23 relevant CCRS provisions that provide additional road design standards, does not provide a
24 basis for the county to deny an application for a partition where no new roads or intersections
25 are proposed.

1 **B. CCCP Policy 16**

2 As explained above, Policy 16 implements the CCCP goal of providing a “safe, * * *

3 county-wide road system” and requires “development to be served by adequate roadway

4 facilities.” In both the first and the second assignments of error, petitioners challenge the

5 hearings officer’s findings regarding Policy 16. In the second assignment of error,

6 petitioners argue that the hearings officer erred in determining that Policy 16 requires a

7 determination that all existing roadways serving the parcel meet CCRS design standards. As

8 explained above, the hearings officer determined that a finding that existing roads and

9 intersections comply with the ZDO and the sight distance requirements of CCRS 240.4.3 is

10 necessary to find that the proposal complies with Policy 16. Supplemental Record 13.

11 However, because we conclude above that the ZDO and CCRS design standards are not

12 applicable to existing roads and intersections, and are thus inapplicable to the proposed

13 partition, to the extent the hearings officer concluded that Policy 16 requires a showing of

14 compliance with those ZDO provisions and CCRS 240.4.3, that conclusion is error.

15 In the first assignment of error, petitioners argue that it was inappropriate for the

16 county to even consider access issues at the Mountain Drive/Lolo Road and Terrace

17 Drive/Lolo Road intersections, which are not adjacent to their property, in reviewing their

18 partition application. According to petitioners, the only streets that serve their property are

19 Mountain Drive and Terrace Drive, and there are no problems with the access onto those

20 streets from the subject property. Petitioners describe the roads and intersections that the

21 county considered as the “influence area,” and argue it should only include the proposed

22 driveways from their property to Mountain Drive or Terrace Drive.

23 The hearings officer concluded:

24 “* * * [Petitioner cites transportation policy 16] which requires that

25 ‘development * * * be served by adequate roadway facilities.’ He argues that

26 ‘adequate’ does not mean ‘must meet all new design standards,’ and asserts

27 that because the local road system has adequate capacity to accommodate the

28 proposed parcels, the roadway facilities are ‘adequate’ within the meaning of

1 the policy. The hearings officer disagrees that road capacity is the only
2 measure of adequate ‘roadway facilities.’ Traffic safety is also an issue. With
3 respect to existing and permitted development, the county may not require a
4 property owner to improve substandard roads. Where there is new
5 development subject to discretionary standards, the county may review
6 existing conditions and determine whether the existing facilities are adequate
7 to safely accommodate the proposal. The hearings officer has concluded that
8 existing roadway facilities must be improved to accommodate the traffic
9 generated by the proposed development. If they are not, they are not
10 ‘adequate’ within the meaning of the policy.” Supplemental Record 9.

11 The county responds that under CCCP Policy 16, which requires “development to be served
12 by adequate roadway facilities,” it was proper for the hearings officer to evaluate the
13 adequacy of the road system in the immediate area of the proposed development. The
14 county explains that for dead-end roads such as those for the proposed partition, the county’s
15 consistent practice has been to consider access to and the adequacy of the first intersection
16 where the traveler from proposed development has a choice of directions.

17 Petitioners do not dispute that Policy 16 applies to the proposed partition and requires
18 petitioners to demonstrate that the subject property is served by adequate road facilities, and
19 we therefore assume that it does. Petitioners dispute, however, the county’s view that
20 “adequate” road facilities means facilities that fully comply with all ZDO and CCRS road
21 design standards for new roads. We agreed above with petitioners that the county may not
22 rely on the failure of existing roads and intersections that are not adjacent to the proposed
23 development to meet current CCRS design standards as a basis to deny the proposed
24 partition. Those road design standards do not apply directly to the partition as approval
25 criteria. It may be that those design standards are relevant considerations in determining
26 what “served by adequate road facilities” means for purposes of Policy 16, but the inquiries
27 are not the same. For example, it may be that a particular road or intersection constructed to
28 less stringent design standards that were in effect when the roadway was constructed is
29 “adequate” for purposes of Policy 16, notwithstanding that the road or intersection does not
30 comply with current design standards. The county’s decision does not provide a reviewable

1 explanation for the county’s apparent belief that existing “adequate roadway facilities” under
2 Policy 16 can only include existing roads that meet the design standards that would apply if
3 those roads were being constructed today. Accordingly, remand is necessary for the county
4 to adopt findings that explain what the county understands “adequate” roadway facilities to
5 mean.

6 **C. CCCP Policy 15**

7 In the second assignment of error, petitioners reference CCCP Policy 15, which
8 provides:

9 “Right of way dedication, on-site improvements to the applicable roadway
10 standards as shown on Tables V-2 and V-3, and off-site improvements for
11 new land developments and land division necessary to handle expected traffic
12 loads and travel by alternative modes.”

13 This argument appears to restate the argument presented in the first assignment of error, that
14 the county erred in considering an influence area outside of the area where the proposed
15 parcels intersect with Mountain and Terrace Drives. In support of their argument,
16 petitioners cite CCRS 230.3, which provides in part:

17 “A traffic impact study may be required at the discretion of the County,
18 depending upon the size, location, and perception of the change in traffic
19 conditions of a proposed new development or redevelopment project. In cases
20 where a zone change or conditional use is requested, a transportation impact
21 study will likely be required. The study will be used by County staff to
22 evaluate the proposed development with respect to appropriate land use
23 approval criteria, and to establish conditions of approval.

24 “Development proposals may be required to provide a traffic impact study
25 when site trip generation of 2,000 ADT (average daily traffic) is
26 anticipated. * * *”

27 We understand petitioners to argue that the fact that the county has not required a traffic
28 study means that the county may not evaluate traffic impacts from the proposed partition on
29 off-site locations such as the problem intersections. We disagree with petitioners that the
30 cited CCRS provision demonstrates anything other than that the county retains discretion to

1 require a traffic study. The cited provisions do not preclude the county from considering
2 impacts to the road system in areas that are not adjacent to the parcel to be divided.

3 **D. ORS 374.310(3)**

4 In the second assignment of error, petitioners argue that the county may not deny the
5 partition because to do so would deny them access that is guaranteed by ORS 374.310(3),
6 which provides:

7 “(3) The powers granted by this section and ORS 374.315 may not be
8 exercised so as to deny any property adjoining the road or highway
9 reasonable access. In determining what is reasonable, the department
10 or county court or board of county commissioners shall apply the
11 following criteria:

12 “(a) The access must be sufficient to allow the authorized uses for
13 the property identified in the acknowledged local
14 comprehensive plan.

15 “(b) The type, number, size and location of approaches must be
16 adequate to serve the volume and type of traffic reasonably
17 anticipated to enter and exit the property, based on the planned
18 uses for the property.”

19 According to petitioners, by denying their partition application the county is denying
20 them reasonable access. We agree with the county’s response that ORS 374.310(3) is not
21 applicable to the challenged decision. The statute applies to constructing improvements in
22 state and county rights of way. In the present appeal, the county has not denied access to the
23 property, because petitioners’ property already has access to several public roads. Denying a
24 proposed partition because existing access is substandard does not deny reasonable access to
25 petitioners’ property in violation of ORS 374.310(3).

26 The first assignment of error is denied.

27 The second assignment of error is sustained in part.

28 **THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

29 In the third and fourth assignments of error, petitioners challenge the county’s
30 conclusion that the Mountain Drive/Lolo Road and Terrace Drive/Lolo Road intersections

1 are not safe, arguing that the county misapplied CCRS 240.4.3. We sustained petitioners’
2 second assignment of error and concluded that the county may not rely on the design
3 standards found in ZDO 1007, ZDO 1014, and CCRS 240.4.3 as approval criteria. We
4 therefore need not address petitioners’ arguments directed at those design standards.

5 In the fifth assignment of error, petitioners argue that even if the county is correct
6 regarding its finding that the application failed to comply with CCRS 240.4.3, the county
7 was nonetheless required to grant petitioners a “permit and release” under the second
8 paragraph of CCRS 240.4.3. *See* n 3. As explained above, we determined that CCRS 240.4.3
9 is not an applicable approval criterion. However, even if CCRS 240.4.3 applied to the
10 application generally, the “permit and release” option would not be available to petitioners
11 because the “permit and release” option applies to driveways, not intersections and it is the
12 intersections with Lolo Road that do not meet ISD requirements.

13 The third and fourth assignments of error are sustained.

14 The fifth assignment of error is denied.

15 **SIXTH ASSIGNMENT OF ERROR**

16 Petitioners argue that the county violated ORS 197.522 by not imposing reasonable
17 conditions of approval in order to approve the partition application.⁶ Petitioners argue that
18 the county should have approved the application and imposed two separate conditions of
19 approval pursuant to ORS 197.522: (1) rebuilding Lolo Pass Road and (2) allowing access to
20 the partition at East Zig Zag Road (Zig Zag Road), which is located at a more distant portion

⁶ ORS 197.522 provides:

“A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions on the application to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval.”

1 of the subject property. The county responds that petitioners did not propose reasonable
2 conditions that make the development consistent with applicable approval criteria.

3 We have held that “where ORS 197.522 applies, it imposes the burden on the
4 applicant to propose reasonable conditions that make the development consistent with the
5 applicable criteria.” *Oien v. City of Beaverton*, 46 Or LUBA 109, 126-27 (2003). Although
6 we seriously question whether ORS 197.522 applies in the present circumstances, we need
7 not answer that question, because petitioners have not established that they actually proposed
8 that the county impose a condition of approval to improve Lolo Road.⁷ Furthermore, part
9 and parcel of proposing reasonable conditions pursuant to ORS 197.522 is a demonstrated
10 willingness to meet those conditions of approval. Petitioners concede in their petition for
11 review that their response to the possibility of improving Lolo Road was “that these
12 requirements were far from proportional to the impacts of their proposed minor partition.”
13 Petition for Review 29.

14 As to providing alternative access at Zig Zag Road, the county responds that
15 petitioners did not provide sufficient information to demonstrate that this alternative access
16 would be feasible. For example, petitioners provided no drawings or sketches demonstrating
17 that alternative access would meet all the applicable approval criteria. To the extent ORS
18 197.522 is potentially applicable to the challenged decision, we agree with the county that
19 petitioners have not proposed reasonable conditions that would make the development

⁷ We question whether ORS 197.522 applies outside the context of a declared or de facto moratorium under ORS 197.520 or 197.524. ORS 197.522 was introduced as Senate Bill 1184 and later enacted into law as Section 4, Oregon Laws 1999, Chapter 838, and codified at ORS 197.522 in the section of the Oregon Revised Statutes titled “Moratorium on Construction and Land Development.” The relating clause for SB 1184 identified the subject of the bill as “relating to moratorium on land development.” The relating clause of an act serves as the “title” for the purposes of Article IV, Section 20 of the Oregon Constitution (the “single-subject” requirement). *State v. Fugate*, 332 Or 195, 207, 26 P3d 802 (2001). The single-subject requirement limits every legislative act to one subject that is expressed in the title. Thus the relating clause of SB 1184 appears to limit the applicability of SB 1184 to the moratorium context.

1 consistent with the applicable criteria, and the county did not violate ORS 197.522 by
2 denying the partition.

3 The sixth assignment of error is denied.

4 **SEVENTH ASSIGNMENT OF ERROR**

5 The seventh assignment of error is difficult to follow. The assignment of error is that
6 “[p]etitioners note a significant lack of due process resulting from moving goal posts and
7 double standards.” Petition for Review 32. To the extent petitioners’ seventh assignment of
8 error asserts a constitutional due process argument, they never cite, discuss, or make an
9 argument regarding any specific state or federal constitutional provisions, and thus any such
10 argument is not sufficiently developed for our review. *Sparks v. Tillamook County*, 30 Or
11 LUBA 325, 330 (1996).

12 One of petitioners’ arguments under this assignment of error appears to be that the
13 county continually changed the required ISDs or SSDs under CCRS 240.4.3 necessary to
14 gain approval for the partition. This appears to be the basis for petitioners’ “moving goal
15 posts and double standards” allegation. ORS 215.427(3)(a) is commonly referred to as the
16 “goal post statute” and requires that applications be “based upon the standards and criteria
17 that were applicable at the time the application was first submitted.”⁸ We sustained
18 petitioners’ second assignment of error above and agreed with petitioners that CCRS 240.4.3
19 does not apply to the partition. Therefore, where the county applied ISDs or SSDs specified
20 in CCRS 240.4.3 in order to determine compliance with CCRS 240.4.3, it erred in doing so.
21 However, we do not mean to suggest that the ISDs and SSDs specified in the county road

⁸ ORS 215.427(3)(a) provides:

“If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.”

1 standards are entirely irrelevant, and it may well be that on remand the county could choose
2 to use those sight distances as one measure of the adequacy of roadway facilities serving the
3 development under Policy 16, if there is a supportable reason for using those sight distance
4 measurements.

5 Petitioners also argue that county improperly relied upon roads and intersections
6 being substandard when the county itself is responsible for the substandard state of the roads
7 or intersections. According to petitioners, the slope of Zig Zag Road is too steep to be used
8 as an alternate access only because the county improperly improved Zig Zag Road, and the
9 dip in Lolo Road that reduces ISD at the Mountain Drive intersection below requirements is
10 also due to county error. To the extent we understand those arguments, petitioners have not
11 established that county responsibility for current road conditions, in and of itself, provides a
12 basis for reversing or remanding the challenged decision.

13 Finally, petitioners argue that subsequent to their application, the county approved
14 development on Terrace Drive that will use the same Terrace Drive/Lolo Road intersection.
15 According to petitioners, if the intersection is adequate for new residential construction on
16 Terrace Drive, it is adequate for their partition. As we understand their argument, petitioners
17 challenge the hearings officer's conclusion that:

18 “* * * With respect to existing and permitted development, the county may
19 not require a property owner to improve substandard roads. Where there is
20 new development subject to discretionary standards, the county may review
21 existing conditions and determine whether the existing facilities are adequate
22 to safely accommodate the proposal.” Supplemental Record 9.

23 The hearings officer's distinction between “permitted development” and “new
24 development” is unclear. Apparently the hearings officer believes that a development that is
25 allowed outright need not demonstrate that there are safe and adequate roadways, but
26 development such as the appealed partition, which is allowed under discretionary approval
27 criteria, does require the applicant to demonstrate that the partition will be served by safe and
28 adequate roadways. The hearings officer does not cite any source or authority for that

1 distinction, and we agree with petitioners that to the extent the county relies on that
2 distinction to resolve issues on remand the county must explain the basis for the distinction.

3 The seventh assignment of error is sustained, in part.

4 **EIGHTH ASSIGNMENT OF ERROR**

5 Petitioners argue that the county has in effect imposed a *de facto* moratorium on
6 development in violation of ORS 197.524.⁹ According to petitioners, the county has
7 engaged in a practice of denying proposed development that would access Lolo Road
8 because of inadequate intersections under the CCRS. We recently addressed a similar issue
9 in *Vista Construction, LLC v. City of Grants Pass*, 55 Or LUBA 590, 594-95 (2008):

10 “Public facility related denials that are based on applicable comprehensive
11 plan or land use regulation criteria that require adequate public facilities
12 before permit, land division or construction approval are not included in the
13 net cast by ORS 197.524(1) and the obligations in ORS 197.524(1)(a) and (b)
14 do not follow from such denials.”

15 As in *Vista Construction*, the proposed partition was denied because it did not meet
16 applicable land use regulation criteria that require adequate roadways. For the same
17 reasoning as in *Vista Construction*, the challenged decision is not a *de facto* moratorium in
18 violation of ORS 197.524.

19 The eighth assignment of error is denied.

⁹ ORS 197.524 provides:

“(1) When a local government engages in a pattern or practice of delaying or stopping the issuance of permits, authorizations or approvals necessary for the subdivision or partitioning of, or construction on, any land, including delaying or stopping issuance based on a shortage of public facilities, the local government shall:

“(a) Adopt a public facilities strategy under ORS 197.768; or

“(b) Adopt a moratorium on construction or land development under ORS 197.505 to 197.540.

“(2) The provisions of subsection (1) of this section do not apply to the delay or stopping of the issuance of permits, authorizations or approvals because they are inconsistent with the local government’s comprehensive plan or land use regulations.”

1 **REMEDY**

2 Petitioners request that LUBA order the county to approve the partition under ORS
3 197.835(10(a)(A). ORS 197.835(10(a)(A) provides that LUBA:

4 “* * * shall reverse a local government decision and order the local
5 government to grant approval of an application for development denied by the
6 local government if the board finds:

7 “(A) Based on the evidence in the record, that the local government
8 decision is outside the range of discretion allowed the local
9 government under its comprehensive plan and implementing
10 ordinances[.]”

11 That the county erred in requiring compliance with the design standards set forth in ZDO
12 1007.04 and ZDO 1014, and CCRS 240.4.3, does not mean the decision must be approved as
13 a matter of law. *Smith v. Douglas County*, 93 Or App 503, 508, 763 P2d 169 (1988), *aff’d*
14 308 Or 191, 777 P2d 1377 (1989) (holding that ORS 197.835(10)(A) applies only when an
15 application must be approved as a matter of law). We therefore decline petitioners’ request.

16 The county’s decision is remanded.