BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DENNIS PETERSEN and JANE PETERSEN, Petitioners, vs. YAMHILL COUNTY, Respondent, and SID FRIEDMAN, Intervenor-Respondent.	LUBA No. 96-257 FINAL OPINION AND ORDER

Appeal from Yamhill County.

Michael C. Robinson, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Stoel Rives.

John C. Pinkstaff, Assistant County Counsel, McMinnville, filed a response brief and argued on behalf of respondent.

Sid Friedman, Newberg, filed a response brief and argued on his own behalf.

HANNA, Administrative Law Judge; GUSTAFSON, Chief Administrative Law Judge, participated in the decision.

AFFIRMED 10/22/97

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal the county board of commissioners' (commissioners) denial of a permit for a forest template dwelling.[1]

MOTION TO INTERVENE

Sid Friedman (intervenor) moves to intervene in this proceeding on the side of the county. There is no objection to the motion, and it is allowed.

FACTS

Petitioners applied to build a forest template dwelling on a 40-acre parcel zoned both Exclusive Farm Use 40 (EF-40) and Agriculture/Forestry (A/F-20). The subject property lies about one mile east of Cove Orchard Road. Sunset Knoll Drive runs west from Cove Orchard Road, and extends to the southwest corner of the subject property.

The subject property was created in 1993 when petitioners divided an 80-acre parcel into two 40-acre parcels. The parent 80-acre parcel had been created in 1991 from a much larger parcel. A condition of the 1991 partition was that:

> "Sunset Knoll Drive from Cove Orchard Road to the east boundary of the subject property shall be dedicated and accepted by the County Board of

[1]Dwellings allowed on parcels predominately devoted to forest use under ORS 215.750 and a similar provision of the Yamhill County Zoning Ordinance 403.03(M) are commonly known as forest template dwellings.

> Commissioners as a public road prior to final plat approval. * * * " Record 70.

The owners of the property over which Sunset Knoll Drive passes recorded a roadway dedication on May 1, 1991. However, the County Board of Commissioners never formally accepted the dedication. In reviewing petitioners' application to divide their 80-acre parcel in 1993, the county planning department determined that because the county had not accepted the dedication, Sunset Knoll Drive is a private road and not part of the public road system. Accordingly, the planning department essentially treated the dedication condition imposed in the 1991 partition as constituting a private easement for purposes of the 1993 partition.

In January 1996, petitioners applied for a permit to build a forest template dwelling on the subject property. Under the county's forest template provisions, petitioners are required to demonstrate that all or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160-acre square template centered on the subject tract, and that at least three dwellings existed on January 1, 1993, on the other lots or parcels in the square. Yamhill County Zoning Ordinance (YCZO) 403.03(M)(5). However, because petitioners could not satisfy the square template test, they chose to demonstrate compliance by using a rectangular template, permitted by YCZO 403.03(M)(6) when the subject property abuts a public road:

> "If the tract on which the dwelling will be sited * * * abuts a public road that existed on January 1, 1993, the measurement under [403.03(M)(5)] may be made by creating a 160-acre rectangle that is one mile long and one-fourth mile wide centered on the center of the subject tract and that is, to the maximum extent possible, aligned with the road." (Emphasis added.)

On September 29, 1996, the planning department denied the application for a forest template dwelling because only two dwellings that existed on January 1, 1993, were found on lots or parcels within the rectangular template.[2]

Petitioners appealed the planning department's decision to the commissioners. On November 5, 1996, while the appeal was pending, the planning department issued a revised report which recommended approval of the application, based on the discovery of a mobile home on a parcel within the rectangular template that petitioners had overlooked.

Two days later, on November 7, 1996, the planning department reversed its November 5, 1997 recommendation, based on further research showing that the county had never accepted the dedication of Sunset Knoll Drive as a public road, and thus petitioners could not use the alternative rectangular template test. Because petitioners could not

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[2]The planning department also denied the application because only ten qualifying lots or parcels were found within the template. The convoluted history of how that basis for denial wound through the lower proceedings, and found its final form as an alternative basis for denial in the final decision, is germane only to the second assignment of error, which we decline to reach for reasons expressed below. We therefore describe here only the facts relevant to the first assignment of error.

satisfy the square template test and the rectangular template test could not be applied, the department again recommended denial of the application.

On November 13, 1996, the commissioners held a hearing and voted to deny the appeal, and thus the application, because the subject property did not abut a public road and therefore petitioners could not use the rectangular template test. The final decision, adopted December 11, 1996, also stated as an alternative basis for denial that, even if the rectangular template test applied, an insufficient number of qualifying lots or parcels existed within the rectangle.

This appeal followed.

STANDARD FOR OVERCOMING DENIAL OF APPLICATION

In challenging a local government's denial of a land use application, petitioners must demonstrate that only evidence supporting the application can be believed and that, as a matter of law, they established compliance with each of the applicable criteria. See Horizon Construction, Inc. v. City of Newberg, 28 Or LUBA 632, 635 (1995). To support denial of a land use permit on alternative bases, a local government need only establish the existence of one adequate basis for denial. Rath v. Hood River County, 23 Or LUBA 200, 205 n7 (1992).

ASSIGNMENT OF ERROR

Petitioners assign error to the commissioners' conclusion that they failed to provide substantial evidence

that Sunset Knoll Drive is a "public road" for purposes of YCZO 403.03(M)(6).[3]

A. Application of ORS 368.001(5)

Petitioners first argue that the meaning of "public road" is governed by ORS 368.001, which states:

> "As used in this chapter:
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> "* * * * *
>
> "(5) Public road" means a road over which the public has a right of use that is a matter of public record."

According to petitioners, it is undisputed that (1) a road dedication deed was filed with the County Clerk and made a matter of public record, and (2) the road has been open to the public, with no gates or signs restricting access. Therefore, petitioners conclude, they have established as a matter of law that Sunset Knoll Drive is a public road.

We disagree with petitioners' premise that ORS 368.001(5) applies to the present matter. First, the definition at ORS 368.001(5) is limited by its terms to ORS chapter 368, a general statute regarding county roads that

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[3] The parties dispute the nature of the county's determination regarding Sunset Knoll Drive. Petitioners argue that the county concluded that Sunset Knoll Drive is not a public road. Petition for Review 6. The county argues that the challenged decision is more accurately characterized as finding that petitioners failed to provide substantial evidence that Sunset Knoll Drive is a "public road" for purposes of YCZO 403.03(M)(6). Record 6. We agree with the county that petitioners' characterization tends to shift the burden to the county to demonstrate that Sunset Knoll Drive is not a public road. We reiterate that petitioners bear the burden of establishing that, as a matter of law, their application complies with each of the applicable criteria.

has no evident applicability to forest template dwellings and similar land use proceedings. Second, the statutory source of the alternative template provision is ORS 215.750(5), which is identical to YCZO 403.03(M)(6), except that the statute requires only that the tract abut a "road" rather than a "public road." Thus, whatever the adjective "public" adds to the alternative template test for

purposes of YCZO 403.03(M)(6), it is controlled by local legislative intent rather than statutory definitions.[4]

Moreover, as the county points out, even if ORS 368.001(5) applies to this case, the public's "right to use the road" is alleged to have arisen from a dedication.[5] Thus, whether ORS 368.001(5) applies or not, the crucial issue is whether Sunset Knoll Drive was ever dedicated as a public road. In turn, the issue of dedication depends on whether the county accepted the purported dedication.

The challenged decision finds that, for three reasons, petitioners failed to demonstrate that the dedication of Sunset Knoll Drive was successfully completed and, therefore, that Sunset Knoll Drive is a "public road" for purposes of YCZO 403.03(M)(6):

> "* * * * *
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> "Based on the evidence in the record, there was a lack of substantial evidence that the road between Orchard Cove Road and the subject property is a public road for the following reasons. First, although there is shown on the face of the [1991] partition plat in Docket No. P-58-90 a 'dedicated 60' roadway', there are no words of dedication or

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[4]With respect to forest template dwellings allowed under ORS 215.750, a county may impose local standards in addition to those in the statute. Evans v. Multnomah County, ___ Or LUBA ___ (LUBA No. 96-198, October 7, 1997) slip op 13.

[5]Petitioners suggest that the public has a "right to use" Sunset Knoll Drive because it is not gated or marked as a private drive. Record 148. However, petitioners do not cite any authority for the proposition that the lack of indicia of a private road necessarily leads to the inference of public use, or that such public use transforms a private road into a "public road," as that term is defined in ORS 368.001(5).

> conveyance in the operative terms of the partition plat. Second, although there was a dedication deed in Docket No. P-58-90 which was [recorded], the dedication deed was never accepted in writing by the Board of Commissioners. ORS 92.014 provides that no instrument dedicating land to public use shall be accepted for recording unless such [instrument] bears the approval of the county to accept such dedication. The Dedication Deed for the road does not contain a written acceptance by the Board of Commissioners. Third, county planning department records reflect that the County previously, [in petitioners' 1993 partition] took the position that there had been no acceptance of a dedication of this portion of Sunset Knoll Drive, indicating that this road was not considered part of the public road system. Therefore, the Board is not persuaded by substantial evidence in the whole record that there was acceptance of a dedicated road up to the western property line of the subject property, and based on the information available to the Board during a hearing on this application, the Board concludes that applicant has failed to carry its burden that Sunset Knoll Drive to the west of the subject property was a public road that existed on January 1, 1993." Record 6.

Petitioners dispute the commissioners' reasons for concluding that they failed to prove Sunset Knoll Drive had been lawfully dedicated.[6]

B. Lack of Dedication in the 1991 Partition Plat

Petitioners argue first that the 1991 partition plat referenced in the decision as part of Docket No. P-58-90 is not in the record, and therefore the finding that the

[6]Petitioners' arguments against the decision's third reason merely repeat their arguments against the first and second, and are not discussed separately.

dedication fails because the partition plat lacks operative terms of dedication is not supported by substantial evidence.

Petitioners' argument, as framed, fails to recognize that they had the burden below of proving lawful dedication and the additional burden on appeal of establishing that there is no substantial evidence contrary to lawful dedication. Petitioners do not cite to any evidence that the partition plat contains words of dedication, and do not refute unrebutted testimony that the partition plat lacks those terms. Record 146. The commissioners' finding that the partition plat lacks terms of dedication and its conclusion that petitioners failed to prove dedication on the basis of the partition plat are supported by substantial evidence.

C. Lack of County Acceptance

Petitioners next challenge the finding that the county did not accept the dedication deed recorded May 1, 1991. Petitioners do not dispute that an essential element of both the common law and statutory methods of dedication is the county's acceptance of the dedication. ORS 92.014; Moore v. Fowler, 58 Or 292, 297, 114 P 472 (1911). However, petitioners advance two arguments why, under these circumstances, the county must be deemed, as a matter of law, to have accepted the dedication.

1. Written Acceptance

Petitioners first dispute the commissioners' conclusion that ORS 92.014 requires the county's written acceptance. As it existed on the date the dedication deed was recorded, ORS 92.014 (1989 Edition) provided that:

> "(1) No person shall create a street or road for the purpose of partitioning an area or tract of land without the approval of the city or county having jurisdiction over the area or tract of land to be partitioned.
>
> "(2) No instrument dedicating land to public use shall be accepted for recording in this state unless such instrument bears the approval of the city or county authorized by law to accept such dedication."

Effective September 5, 1991, the legislature amended ORS 92.014(2) to its present form, which states:

> "* * * * *
>
> "(2) Notwithstanding ORS 92.175, no instrument dedicating land to public use shall be accepted for recording in this state unless such instrument bears the approval of the city or county authorized by law to accept such dedication." (Emphasis added.)

ORS 92.175 provides two methods by which land may be dedicated to the public: (1) by dedication on a subdivision plat, or (2) by a separate dedication or donation document on a form provided by the appropriate local government.[7] We

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[7]ORS 92.175(1), 1989 Or Laws Ch. 772 § 3, states in relevant part:

> "(1) Land for property dedicated for public purposes may be provided to the city or county having jurisdiction over the land by any of the following methods:

understand petitioners to argue that prior to the 1991 amendment of ORS 92.014(2) a person could dedicate land to a county by simply recording a dedication document, without regard to the written approval requirement at ORS 92.014(2)(1989 Edition).

We disagree. The 1991 amendment to ORS 92.014(2) clarified that the legislature did not intend the meaning petitioners seek to exploit here. ORS 92.175 merely describes two means by which dedications can be made. It does not address or appear to abrogate other statutory requirements. When the dedication deed in this case was recorded on May 1, 1991, it was subject to the written approval requirement at ORS 92.014(2)(1989 Edition). The commissioners did not err in concluding that petitioners failed to prove a valid dedication under the statutory method.

2. Implied Acceptance

Petitioners' second argument is that the county impliedly accepted the dedication under the common law method of dedication. Oregon law recognizes implied

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"(a) By dedication on the land subdivision plat, condominium plat or replat; or

"(b) By a separate dedication or donation document on the form provided by the city or county having jurisdiction over the area of land to be dedicated."

"* * * * *"

acceptance under several circumstances, including where lots have been sold with reference to a plat that shows the dedication. Douglas County v. Umpqua Valley Grange, 45 Or App 739, 609 P2d 415 (1980). Petitioners argue in this case that the 1991 partition plat in Docket P 58-90 refers to a 60-foot dedicated roadway, and that parcels created by that plat were later sold.[8]

The county responds that petitioners have waived the issue of implied acceptance by sale of parcels referring to a plat containing the dedication and, even if that issue has not been waived, petitioners have not established either that the 1992 partition plat contains a dedication or that parcels sold thereafter referred to the 1991 partition plat.

We need not resolve the county's argument that the limited discussion below of implied acceptance was insufficient to afford the commissioners an adequate opportunity to respond to the particular theory of implied acceptance petitioners assert on appeal.[9] As stated, petitioners bear the burden of establishing that, as a

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[8]Petitioners also seem to argue throughout their brief that the county impliedly accepted the dedication when the county clerk recorded the dedication deed in 1991. Petitioners cite no authority for the proposition that recordation of a dedication deed either constitutes, or obviates the need for, county acceptance. On the contrary, a dedication that lacks an essential element (such as failure to accept the dedication) cannot be rendered valid by recordation. See Nodine v. Union, 42 Or 613, 72 P 582 (1903).

[9]Under ORS 197.763(1), an issue is waived unless it is both raised and "accompanied by statements or evidence sufficient to afford the governing body * * * an adequate opportunity to respond * * *."

matter of law, their application complies with each of the applicable criteria. A necessary predicate to implied acceptance under Umpqua Valley Grange is a partition plat that contains a dedication. The challenged decision determines that the 1991 partition plat did not contain a dedication. Petitioners do not provide us any basis to conclude that, as a matter of law, the decision is wrong. Moreover, petitioners do not establish compliance with the second prong of Umpqua Valley Grange, that parcels were sold with reference to the partition plat containing the dedication. As the county points out, the only deeds contained or mentioned in the record do not refer to 1991 partition plat.

For these reasons, we conclude the commissioners did not err when they determined that petitioners failed to prove that the county accepted the dedication of Sunset Knoll Drive. The commissioners did not err in concluding petitioners failed to satisfy the YCZO 403.03(M)(6) requirement that the subject property abut a public road.

The assignment of error is denied.

No purpose would be served by reviewing the adequacy of the decision's alternative basis for denying petitioners' application, challenged in the second assignment of error. On appeal of a denial of an application on alternative grounds, the county need only demonstrate one adequate basis for denial. Rath v. Hood River County, 23 Or LUBA 200, 205

n7 (1992).

The county's decision is affirmed.