

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

3
4 SISTERS FOREST PLANNING COMMITTEE,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11 and

12
13
14 MATTHEW THOMAS and RACHEL THOMAS,
15 *Intervenors-Respondent.*

16
17 LUBA No. 2003-029

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Deschutes County.

23
24 Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner.

25
26 Laurie E. Craghead, Assistant County Counsel, Bend, filed a response brief and
27 argued on behalf of respondent.

28
29 Brian L. Gingerich and Tia M. Lewis, Bend, filed a response brief on behalf of
30 intervenors-respondent. With them on the brief was Merrill O'Sullivan, LLP. Brian L.
31 Gingerich argued on behalf of intervenors-respondent.

32
33 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,
34 participated in the decision.

35
36 AFFIRMED

08/15/2003

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a partition.

MOTION TO INTERVENE

Matthew Thomas and Rachel Thomas (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 482-acre parcel located west of Highway 97 in the foothills of the Cascades between the cities of Bend and Sisters. The property is zoned Forest Use (F-1) and Wildlife Area Combining Zone (WA) and is designated Forest on the county’s comprehensive plan map. Intervenors applied to partition the parcel into a 322-acre parcel and two 80-acre parcels. The property is currently vacant and has historically been used for commercial forest operations. Surrounding properties are also zoned for forest uses and include commercial timberland, small-scale forest resource uses, and parcels of 40 to 100-acres with existing residences. The partition was approved by the county hearings officer over petitioner’s objections. Petitioner appealed the hearings officer’s decision to the Board of County Commissioners (BCC), which held a *de novo* hearing on the matter. The BCC approved the application, with some modifications. This appeal followed.

INTRODUCTION

This appeal is primarily concerned with the access requirements to residences in forest use zones, particularly when such access is predicated on use of federal agency roads, in this case roads that are maintained by the United States Forest Service (USFS). The applicable partition approval criterion regarding access is Deschutes County Code (DCC) 17.22.020(A)(3), which provides:

“The partition is accessed either by roads dedicated to the public or by way of [USFS] or Bureau of Land Management [BLM] roads where [the] applicant has submitted a written agreement with the appropriate land management

1 agency providing for permanent legal access to the parcels and any required
2 maintenance. This provision shall not be subject to variance[.]”

3 The subject property is not currently accessible by roads dedicated to the public, and
4 intervenors propose access over USFS roads and private roads that will later be dedicated to
5 the public. Sisters Mainline Road (also known as USFS 4606) is a USFS road that runs
6 generally northwest from the City of Bend to the City of Sisters. Sisters Mainline Road
7 adjoins the southern boundary of intervenors’ property. A critical issue below was how
8 access to this segment of Sisters Mainline Road could be achieved from the public road
9 system. Intervenors originally proposed to provide access by way of Johnson Road, a
10 north/south public road that is located east of the subject property. Bull Springs Road, an
11 east/west private road would connect Johnson Road with Sisters Mainline Road, just south of
12 the property.

13 Before the hearings officer, petitioner questioned whether Bull Springs Road would
14 provide the access required by DCC 17.22.020(A)(3), because it is a private road. In
15 response to this issue, intervenors provided an alternative access to the subject property by
16 utilizing a much longer segment of Sisters Mainline Road running south for a significant
17 distance before connecting to Skyliners Road, a public road. The Skyliners Road to Sisters
18 Mainline Road access route was approved by the hearings officer as the primary access, and
19 the Johnson Road to Bull Springs Road to Sisters Mainline Road was approved as secondary
20 access. A number of problems were discovered with the Skyliners Road to Sisters Mainline
21 Road route. The far southern portion of Sisters Mainline Road is very poorly maintained,
22 and the southern portion is also subject to seasonal road closures for wildlife protection. In
23 addition, Sisters Mainline Road runs through a mining pit south of the subject property, and
24 portions of the road in that area may be abandoned or illegally rerouted. For these reasons,
25 the BCC did not approve the Skyliners Road to Sisters Mainline Road access, but instead
26 approved only the Johnson Road to Bull Springs Road to Sisters Mainline Road access.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Permanent Legal Access**

3 DCC 17.22.020(A)(3) requires that proposed new parcels be accessed either from a
4 public road or, if there is a written agreement providing “permanent legal access,” by a USFS
5 or BLM road. As discussed earlier, Sisters Mainline Road is a USFS road. The USFS
6 constructed the road pursuant to easement agreements entered into between the USFS and
7 earlier owners of the land crossed by the road. According to petitioner, the easements are
8 only for the benefit of the USFS and do not benefit the underlying land owners.
9 Furthermore, petitioner argues that because the easement allows the USFS to terminate the
10 easement, and the USFS has allegedly stated an intention to do just that, the proposed access
11 across Sisters Mainline Road cannot be “permanent.”

12 Intervenor respond that petitioner misconstrues the nature of the easements, in that
13 all of the easements in question are reciprocal and give both the USFS and the grantors of the
14 easements the perpetual right to use the roadway. The BCC adopted the following findings
15 of the hearings officer:

16 “The remaining question under the ‘written agreement’ component of this
17 section is whether these easements constitute a written agreement between *the*
18 *applicants* and the USFS. I find the answer to that question turns on whether
19 the applicants are successors in interest to [the prior owners]. * * * I have
20 reviewed the chain of title summary and concur with the applicants that they
21 are successors in interest to [the prior owners].

22 “* * * * *

23 “I find the evidence from the title company submitted by the applicants is
24 substantial, credible evidence from which I can find the applicants are
25 successors to [the prior owners’] interests in Sisters Mainline Road.

26 “* * * * *

27 “I find each of the easement documents expressly recites that the grantor
28 grants an easement ‘for and in consideration of the reciprocal easements
29 received by’ the grantor, and describes the nature of the reciprocal easements.
30 Accordingly, I find each easement has the requisite *quid pro quo* to create an

1 agreement for purposes of the partition access requirement.” Record 5, 1413-
2 14.

3 We agree with intervenors that the easements in question inure not only to the benefit
4 of the USFS, but also to the original grantors and to intervenors as their successors in
5 interest. Petitioner does not challenge the above quoted findings, or explain why they are
6 incorrect, and we do not see that they are. Furthermore, the easements in the record that
7 intervenors identify constitute substantial evidence that the hearings officer and BCC could
8 have relied on to reach that conclusion.¹

9 The hearings officer’s findings also address petitioner’s arguments concerning
10 “permanency,” and the BCC adopted those findings, which state:

11 “* * * the USFS may close its roads to all traffic in the event of a fire or other
12 emergency, and may restrict or prohibit travel on its roads by certain types or
13 weights of vehicles. However, access via dedicated public roads also is
14 subject to closure for fires or other emergencies. And city and county road
15 departments routinely impose a variety of restrictions – from speed to vehicle
16 weight – on dedicated roads they administer. Therefore, I find the language in
17 the easements providing for termination and traffic control do not render the
18 access granted and reserved less than ‘permanent.’” Record 5, 1414-15.

19 Again, petitioner does not specifically challenge these interpretive findings. The
20 county’s interpretations of its own code are entitled to deference under ORS 197.829(1) and
21 *Church v. Grant County*, 187 Or App 518, ___ P3d ___ (2003). Although petitioner claims
22 that the term “permanent” is not subject to interpretation and that the county did not make an
23 interpretation, we believe the above-quoted findings make clear that the hearings officer did
24 interpret the term, and the BCC adopted that interpretation. Therefore, the interpretation is
25 entitled to deference. *See Derry v. Douglas County*, 132 Or App 386, 391, 888 P2d 588

¹ Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984). Where the Board concludes that a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, the choice between conflicting evidence belongs to the local government. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). That a petitioner may disagree with the local government’s conclusions provides no basis for reversal or remand. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993).

1 (1995) (where governing body adopts a lower body’s decision as its own, the adopted
2 interpretation is entitled to deference); *Baker v. Lane County*, 43 Or LUBA 493, 496 (2003)
3 (same). Petitioner does not explain, nor do we see, how the interpretation violates that
4 standard of review.

5 The first subassignment of error is denied.

6 **B. Unnamed Collector Road**

7 The parties dispute whether an approximately 1,625-foot section of unpaved road that
8 connects Bull Springs Road to Sisters Mainline Road is part of Bull Springs Road or a
9 separate, unlawfully established roadway. Petitioner contends that this section is merely an
10 unnamed collector road that is not included in any easement that accesses the subject
11 property, is not a USFS road, is not a private road, and therefore cannot serve as a basis for
12 access under DCC 17.22.020(A)(3). Intervenors respond that the disputed section is actually
13 part of Bull Springs Road and that it connects directly with Sisters Mainline Road to provide
14 uninterrupted access from Johnson Road to Sisters Mainline Road.

15 The confusion over the location of Bull Springs Road stems from development of the
16 Hap Taylor mining pit, which is located directly south of the intersection between the
17 unnamed road segment and Sisters Mainline Road. Sisters Mainline Road runs directly into
18 the mining pit from the south. As part of the mining operation, a portion of Sisters Mainline
19 Road was destroyed or abandoned or otherwise made impassable. In response to this, a
20 detour around the mining pit was constructed. Petitioner argues that the unnamed collector
21 road is actually part of the detour around the mining pit and is not a USFS or private road
22 that provides the access that is required by DCC 17.22.020(A)(3). According to petitioner,
23 Bull Springs Road continues past the intersection with the unnamed collector road into the
24 mining pit. Intervenors contend that Bull Springs Road does not go into the mining pit, but
25 instead intersects with Sisters Mainline Road north of any road disturbances caused by the
26 mining pit.

1 The county found that the disputed section of road is a continuation of Bull Springs
2 Road. While there is conflicting evidence on that point, we cannot say that a reasonable
3 person could not have found the disputed road section to be a continuation of Bull Springs
4 Road.

5 The second subassignment of error is denied.

6 **C. Maintenance Agreement**

7 As quoted earlier, DCC 17.22.020(A)(3) requires that the USFS access roads to the
8 partitioned property be accompanied by a written agreement with the USFS providing for
9 “permanent legal access to the parcels *and any required maintenance.*” (Emphasis added.)

10 Intervenors submitted a 1983 easement to demonstrate that the road is available for access.
11 That easement discusses maintenance obligations and also references a 1975 “Deschutes
12 Road Right-of-Way Construction and Use Agreement” that “remains in full force and
13 effect.” The 1975 agreement is not in the record. Petitioner argues that, without the 1975
14 agreement, intervenors cannot rely on the 1983 easement to satisfy DCC 17.22.020(A)(3).

15 The 1983 easement in the record establishes the obligations in regard to road
16 maintenance. The easement states that, “[t]he costs of road maintenance shall be allocated
17 on the basis of respective uses.” Record 221, 2469-71. The easement admittedly references
18 the 1975 agreement. However, we do not see that DCC 17.22.020(A)(3) necessarily requires
19 that a written agreement that provides for “any regular maintenance” must be submitted with
20 all referenced documents attached or that intervenors’ failure to attach the 1975 agreement in
21 this case means that the county’s decision is not supported by substantial evidence.

22 Finally, petitioner argues that intervenors will be required to obtain a federal permit
23 to plow Sisters Mainline Road in the winter, and therefore all “required maintenance”
24 agreements are not provided. The hearings officer’s decision, incorporated by the BCC,
25 finds that issuance of such permits is contemplated under the 1983 easement, which states
26 that use of Sisters Mainline Road is subject to federal rules and regulations, including

1 regulations requiring permits to plow the road. Record 1415-16. We understand the
2 hearings officer to have concluded that DCC 17.22.020(A)(3) does not require that
3 intervenors go further and actually apply for and receive a federal snowplowing permit at this
4 time. We agree with the county that petitioner does not demonstrate that the county erred in
5 its interpretation and application of DCC 17.22.020(A)(3).

6 The third and fourth subassignments of error are denied.

7 **D. Adequacy of the Findings**

8 Petitioner challenges the county’s findings for failure to respond to arguments that it
9 raised below regarding the approved access. Petitioner raises seven specific arguments it
10 claims the BCC did not address.

11 First, petitioner claims the BCC did not address its argument that the unnamed
12 collector road is not part of Sisters Mainline Road easement. As we discussed under the
13 second subassignment of the first assignment of error, the BCC did address that issue and
14 found that the disputed section to be part of Bull Springs Road. Second, petitioner claims the
15 BCC did not address its argument that the permits issued after the 1983 easement agreement
16 do not pertain to the unnamed collector. This issue was also addressed by the BCC in
17 determining that the disputed section of roadway is part of Bull Springs Road. Third,
18 petitioner claims that the BCC did not address its argument that the decision was not
19 supported by substantial evidence because the 1975 use agreement referenced by the 1983
20 easement is not in the record. As we discussed under the third subassignment of error, the
21 BCC did address that issue and determined that it was not necessary for the 1975 agreement
22 to be in the record.

23 Petitioner also argued that access via Sisters Mainline Road does not constitute
24 “permanent access” because: (1) the easement grantee is the USFS rather than the
25 landowners; (2) the USFS may terminate the easement at any time; and (3) the USFS actually
26 intends to terminate the agreement. These arguments were discussed under the first

1 subassignment of the first assignment of error. The BCC found that: (1) the easement was
2 for the benefit of both the landowners and the USFS; (2) the USFS cannot terminate the
3 landowners' right to use the road; and (3) the USFS has not attempted to terminate the
4 easement.²

5 Finally, petitioner claims the BCC failed to respond to its argument that the operation
6 of the Hap Taylor mining pit has terminated the portion of the Sisters Mainline Road
7 easement that goes through the mine. As discussed earlier, the approved access connects to
8 Sisters Mainline Road north of the mining pit. Even if petitioner is correct that the Sisters
9 Mainline Road easement has been terminated in the mining pit, that is irrelevant to the
10 challenged decision. Petitioner's arguments do not provide a basis for reversal or remand.

11 The fifth subassignment of error is denied.

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 In the second assignment of error, petitioner argues that (1) the county improperly
15 conditioned approval of the partition on public dedication of Bull Springs Road, which is
16 currently a private road; and (2) the county improperly conditioned approval on submission
17 of a revised plat.

18 **A. Road Dedication**

19 DCC 17.22.020(A)(3) requires that access be provided by "roads dedicated to the
20 public" or by federal agency roads. The decision grants approval on the condition that
21 intervenors "shall dedicate Bull Springs Road to the public prior to final plat approval."
22 Record 12. The county found that it is "possible" to achieve this condition. Record 5. The

² Petitioner makes the additional argument that the BCC could not adequately respond to petitioner's arguments by adopting the findings of the hearings officer because the access routes adopted by the two decision makers were different. Petitioner is mistaken. Both access routes were before the hearings officer and the BCC. The hearings officer approved both routes, while the BCC only approved the route utilizing Bull Springs Road. Evidence regarding both routes, however, was before both the hearings officer and the BCC.

1 decision recognized that such public dedication will require that intervenors follow public
2 road dedication procedures in the future:

3 “[O]pponents also argue that the public dedication of Bull Springs Road is not
4 appropriate because of the underlying easements and the need for consent to
5 the dedication from the underlying easement holders. The Board finds that
6 the public dedication process for Bull Springs Road is the appropriate forum
7 within which to address these concerns of the opponents as the public
8 dedication of Bull Springs Road is a quasi-judicial process pursuant to ORS
9 368.073 et seq. in which opponents will have the opportunity to raise all
10 issues and present evidence in opposition to the dedication.” Record 6.

11 It is well established that in addressing an approval criterion a local government may
12 either: (1) find that the criterion is satisfied, or find that it is feasible to satisfy the criterion
13 and adopt conditions necessary to ensure compliance; (2) deny the proposal; or (3) defer a
14 finding of compliance with that criterion to a later process that provides for public notice and
15 the opportunity for a hearing. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-448
16 (1992). In the present case, the county appears to utilize option one. Under such
17 circumstances, the appropriate question is whether the county’s findings of compliance or
18 feasibility of compliance are adequate and supported by substantial evidence. *Salo v. City of*
19 *Oregon City*, 36 Or LUBA 415, 425 (1999).

20 The BCC found that while the public dedication requirement is not currently satisfied
21 with respect to Bull Springs Road, it is possible to achieve compliance by dedicating the
22 road. That conclusion is supported by substantial evidence: (1) the easement at issue
23 requires a public dedication by the other landowners upon intervenors’ request, or at least
24 reasonable efforts to do so; (2) evidence of ownership of the property under the road; and (3)
25 evidence that fee title owners of property under Bull Springs Road are bound by the
26 dedication provision. The county also imposed a condition that effectively prevents final plat
27 approval until Bull Springs Road is dedicated to the public. Petitioner argues that there is not
28 substantial evidence supporting the county’s finding that it is feasible to comply with the
29 dedicated road requirement, because the county has already refused to accept the land under

1 the road. As the county and intervenors explain, however, petitioner misconstrues a
2 statement made by intervenors' counsel at the public hearing and points out that there is no
3 evidence that the county has officially refused a dedication request. Petitioner directs us to
4 nothing demonstrating that such an official rejection of such an offer has occurred. We
5 conclude the county's finding of feasibility of compliance with DCC 17.22.020(A)(3) is
6 supported by substantial evidence.³

7 **B. Revised Plat**

8 As proposed, the two 80-acre parcels did not have actual frontage on Sisters Mainline
9 Road, but instead were provided access by way of easements across the 322-acre parcel. In
10 response to petitioner's argument that direct access is required by DCC 17.36.180, the BCC
11 conditioned approval on the tentative plat being modified to provide the two 80-acre parcels
12 direct access to the road via "flagpoles." Petitioner argues that there is no evidence that such
13 "flagpoles" are feasible in the absence of an actual revised plat depicting their precise
14 location. We disagree. The condition requires that the tentative plat be revised to show
15 flagpoles along the eastern property boundary, approximately where access easements were
16 proposed. Petitioner offers no reason to believe that the plat cannot be revised to provide
17 direct access and frontage, or why the condition is ineffective to ensure compliance with
18 DCC 17.36.180.

19 The second assignment of error is denied.

20 **THIRD ASSIGNMENT OF ERROR**

21 Petitioner argues that the county erred in not requiring intervenors to go through the
22 procedure for modification of an application to change the access route and to change the

³ Petitioner points out that the county's findings use the term "possible" rather than "feasible." We do not believe that choice of words is material. It is obvious from the county's findings that it believes, based on the evidence submitted, that intervenors are likely to obtain the required road dedication. *Rhyme* does not require the use of magic words. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977).

1 two 80-acre lots to flag lots. The DCC defines the term “modification” as including changes
2 to site layout and access points. DCC 22.04.020. Petitioner also argues that its substantial
3 rights were prejudiced because it was not provided an adequate opportunity to respond to the
4 new access route and proposed flag lots.

5 The access route approved by the BCC was not a “new” access route, but the original
6 route proposed by intervenors as their preferred access and a route that was considered and
7 debated throughout the application process. It was only before the hearings officer, in
8 response to objections by petitioner, that the Skyliners Road access was even suggested.
9 Thus, contrary to petitioner’s protestations, the approved access route was not “new” nor was
10 petitioner in any way prejudiced by the BCC. Petitioner had the opportunity to challenge the
11 access route that was approved by the BCC.

12 Although the county could have required that intervenors submit a modified partition
13 application to address the provision of direct road frontage for all three parcels on Sisters
14 Mainline Road, we do not see that the BCC was obligated to demand such a modified
15 application. Petitioner argued below that DCC 17.36.180 requires that all new parcels have
16 road frontage. The BCC agreed with petitioner that DCC 17.36.180 requires frontage for all
17 three parcels and imposed a condition that intervenor submit a revised plat showing the
18 required frontage prior to final plat approval. We do not see that that approach constitutes
19 procedural error or prejudices petitioner’s substantial rights.

20 The third assignment of error is denied.

21 **FOURTH ASSIGNMENT OF ERROR**

22 Petitioner argues that the county erred by approving an access route and revised
23 tentative plat without adequately identifying the route and plat. We disagree. As discussed
24 earlier, the access route uses Johnson Road to Bull Springs Road to Sisters Mainline Road.
25 That is the access shown on intervenors’ plat. Record 503. That is the access described by

1 the BCC during the hearing and approved in the final decision. Record 5-6. The access
2 route was adequately described.

3 Similarly, the revised tentative plat that is required as a condition of approval is
4 adequately described. The BCC findings state:

5 “[Intervenors] shall submit a revised tentative plat showing the
6 reconfiguration of Parcels B and C into flag lots with the flag pole for each
7 parcel running along the property’s eastern boundary south to the Sisters
8 Mainline Road. * * *” Record 12.

9 The property has substantial frontage along Sisters Mainline Road. The record
10 demonstrates that intervenors described the location of the flag lots during the hearing.
11 Record 501. The location and configuration of the flag lots was also discussed in depth
12 during the hearing. Finally, the “flagpoles” that will be used to provide frontage and access
13 to the “flag lots” are located where the originally proposed driveway easements were to cross
14 the larger parcel to provide access to Sisters Mainline Road. The necessary revisions to the
15 tentative plat were adequately described.

16 The fourth assignment of error is denied.

17 The county’s decision is affirmed.