BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK McALISTER,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

MARY-KAY MICHELSEN,
Intervenor-Respondent.

LUBA No. 2004-001

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Duane Wm. Schultz, Grants Pass, filed the petition for review and argued on behalf of petitioner.

No appearance by Jackson County.

Mary-Kay Michelsen, Ashland, filed the response brief on her own behalf. Michael K. Collmeyer, Portland, argued on behalf of intervenor-respondent.

BASSHAM, Board Member; HOLSTUN, Board Chair, participated in the decision.

REMANDED 06/10/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals conditional approval of petitioner's application for a dwelling in conjunction with farm use on a 189.4-acre parcel zoned exclusive farm use (EFU).

MOTION TO INTERVENE

Mary-Kay Michelsen (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The principal issue in this appeal is petitioner's challenge to a condition of approval requiring that the proposed dwelling be located within 300 feet of either Lost Creek Road or the point where a private easement enters the subject property.

The subject property is a rectangular parcel with the long axis running north-south. The property is designated especially sensitive wildlife habitat, and subject to Land Development Ordinance (LDO) 280.110(3)(E)(vii) standards designed to minimize impact of development on winter deer and elk habitat.[1] Lost Creek Road, a county road, crosses the north-east corner of the

[1] The LDO was significantly amended in 2004. All citations to the LDO in this opinion are to the former code applicable to the challenged decision. LDO 280.110(3)(E)(vii) provides:

> "Any land use action subject to review under this Section shall include findings that the proposed action will have minimum impact on winter deer and elk habitat based on:
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> "a) Consistency with maintenance of long-term habitat values of browse and forage, cover, sight obstruction.
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> "b) Consideration of the cumulative effects of the proposed action and other development in the area on habitat carrying capacity.
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> "c) Location of dwellings and all other development within 300 feet of existing roads or driveways where practicable unless it can be found that habitat values and carrying capacity is afforded equal or greater protection through a different development pattern.
>
> "d) New private roads shall be gated between November and April (where permitted by law) to protect wintering deer and elk.

parcel. The subject parcel also has a second access to Lost Creek Road via a private easement across tax lots 1200 and 1300 to the east.

Petitioner's application proposed a dwelling site in the south-central portion of the parcel, accessed via the easement over the adjoining tax lots to the east, and thence 3,200 feet over an old logging road on the property. Petitioner argued that the proposed dwelling location complied with LDO 280.110(3)(E)(vii)(c), because it was within 300 feet of the logging road, which petitioner argued is an "existing road" for purposes of that code provision. County staff disagreed, and approved the dwelling with the following condition of approval (condition 1):

> "The dwelling shall be located within 300 feet of Lost Creek Road. In the alternative, if access will be via the roadway which crosses tax lots 1200 and 1300, the dwelling may be located within 300 feet of the point where this roadway enters the property. If this alternative is chosen, evidence of an easement to allow ingress and egress across tax lots 1200 and 1300 shall be submitted prior to issuance of building or septic permits." Record 175.

Petitioner appealed the staff decision to the hearings officer, seeking reversal of condition 1. Staff submitted a memorandum to the hearings officer explaining the basis for condition 1:

> "Condition #1 was imposed because the property is in an especially sensitive wildlife habitat area. LDO 280.110(3)(E)(vii)(c) requires dwellings and other development to be located within 300 feet of existing roads or driveways where practicable, unless it can be found that habitat values and carrying capacity are afforded equal or greater protection through a different development pattern. The applicant has not provided evidence or argument that it is not practicable to site the dwelling within 300 feet of Lost Creek Road. Instead, he asserts that there is an existing road across the property. Staff's position is that logging roadways and similar tracks or ways do not meet the definition of a road unless they are platted rights-of-way or legally described and conveyed easements. The applicant provided copies of a number of easements, which were reviewed both by staff and * * * the county surveyor. None of the documents submitted describe an easement across the subject parcel. * * *" Record 188-89.

> "e) Comments shall be solicited in writing from ODFW [Oregon Department of Fish and Wildlife] for all land use actions on winter range, other than dwellings which comply with density standards set forth in Subsection (v), above. The ODFW shall be given a maximum of ten days to make such comments. Final decision by the County to decline or accept ODFW's position shall be based on substantive findings provided by the applicant."

After a hearing on petitioner's appeal, the hearings officer concluded that petitioner failed to establish that the logging road is a "road" for purposes of LDO 280.110(3)(E)(vii)(c) and, alternatively, even if the logging road is a "road," petitioner failed to establish that the preferred homesite will have "minimum impact" on wildlife habitat.[2] Accordingly, the hearings officer concurred with the staff decision to impose condition 1. This appeal followed.

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[2] The hearings officer's decision states, in relevant part:

> "As noted above, LDO 280.110(3)(E)(vii)(c) requires the proposed dwelling be situated within '300 feet of existing roads or driveways where practicable unless it can be found that habitat values and carrying capacity is afforded equal or greater protection through a different development pattern.' The ordinance presumes that a homesite located within 300 feet of an existing road or driveway will have only minimum impact on winter deer and elk habitat, while one located elsewhere must be justified by findings that habitat will be, at least, equally protected.
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> "Applicant contends that the proposed homesite is within 300 feet of an existing road because the property has a number of old logging roads, including one in the general proximity of the proposed residence. I have carefully reviewed the evidence with respect to whether or not applicant's preferred homesite is located within 300 feet of an existing road. Although aerial photographs show what appears to be a network of clearings resembling roads scattered over the entire property, there is no persuasive evidence showing the condition or frequency of use of the roadway that would access the proposed site over its considerable length.
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> "Even assuming the clearings are 'roads' or 'driveways' within the meaning of the ordinance, the underlying question remains whether a homesite in applicant's preferred location will have more than minimum impact on deer and elk winter range. In deciding this issue, I place substantial weight on Exhibit 16, a letter from David R. Haight, Wildlife Biologist with [ODFW]. In relevant part, the letter provides:
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> > 'On July 11, 2003, I commented that the project would not have minimum impact on deer and elk habitat because the proposed homesites were over 300 feet from the existing road. On July 19, 2003, I met with the applicants. They provided evidence that one of the proposed homesites is within 300 feet of a primitive road for which the Bureau of Land Management and a private timber company have an easement. Consequently, [ODFW] will not object to the homesite located within 300 feet of this road. This road is gated and apparently does not get a lot of use; therefore, we still feel that locating the homesite within 300 feet of Lost Creek Road would have less impact to the deer and elk winter range habitat.'
>
> "While Mr. Haight indicated ODFW would not object to applicant's proposed homesite, the critical passage is the last phrase of the ending sentence, that locating the homesite within 300 feet of Lost Creek Road would have 'less' impact on habitat. The hearings officer understands Mr. Haight's conclusion to be that, compared to the homesite location approved by the Planning Division, applicant's proposed homesite would have *more impact* on habitat. The only logical conclusion is that applicant's preferred homesite location would not have minimum impact compared to the location approved by the Planning Division.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer misconstrued LDO 280.110(3)(E)(vii)(c) in determining that (1) the logging road on the subject parcel is not a "road" and (2) a homesite within 300 feet of a "road" must also establish that it has "minimum impact" on wildlife habitat.

A. Road or Driveway

Petitioner challenges the hearings officer's conclusion that the logging road is not a "road" as that term is used in LDO 280.110(3)(E)(vii)(c) because "there is no persuasive evidence showing the condition or frequency of use of the roadway that would access the proposed site over its considerable length." Record 4. Petitioner contends that nothing in the LDO makes the existence of a "road" depend on its condition or the frequency of its use. Petitioner cites to the LDO definition of "road," and argues that the logging road falls within that definition, as a "private way that provides ingress to or egress from property by means of vehicles."[3] According to petitioner,

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> "Considering all of the evidence, I am unable to make the required findings that (1) it is impracticable to locate the homesite within 300 feet of Lost Creek Road, or (2) that applicant's proposed homesite is within 300 feet of an existing road or driveway, and (3) that locating the homesite where applicant prefers would have only minimum impact on winter deer and elk habitat. Applicant has failed to carry his burden of proof on this issue and, as a result, I concur with the Planning Division's tentative decision, including condition #1." Record 4-6 (emphasis in original, indented quote from Record 142).

[3] LDO 00.040(227) defines "road" in relevant part as follows:

> "A) Roads: 'Road' means the entire right-of-way of any public or private way that provides ingress to or egress from property by means of vehicles. 'Roads' include, but are not limited to:
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> "i) Ways described as streets, highways, throughways or alleys;
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> "* * * * *
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> "* * * * *
>
> "C) The following are types or forms of access. * * *
>
> "i) State Highway * * *
>
> "ii) County Road * * *
>
> "iii) City Street * * *

the logging road or any similar vehicle track in the interior of the subject parcel is a "road" for purposes of LDO 280.110(3)(E)(vii)(c).

Petitioner does not argue that the logging road is a "driveway" as that term is used in LDO 280.110(3)(E)(vii)(c) and defined at LDO 00.040(84).[4] With respect to whether the logging road is a "road" as that term is used in the LDO, petitioner appears to be correct that the LDO definition of "road" does not assign definitional significance to the road's condition or frequency of use. We agree with petitioner that the hearings officer's reliance on the logging road's condition or frequency of use to conclude that it is not a "road" has no support in the pertinent text and context of LDO 280.110(3)(E)(vii)(c).

"iv) Dedicated Way: A form of local access road dedicated to the public for residential purposes, shown on a map or plat approved by the County * * *

"v) Private Road: A road which provides access to residentially zoned properties to serve one to nine lots, parcels, areas or tracts of land, and which has been approved by the County. A private road shall be considered that portion of a lot or parcel that is used for access purposes as described by an easement. A private road is not maintained by the County, nor can the County contract for its maintenance. * * *

"vi) Ways of Necessity (Gateway Road): A road to provide access from a public road to land that would otherwise have no access, or a landlocked parcel. Such an easement can be forced upon an owner of property only by the official action of the courts.

"vii) Bureau of Land Management Road: A federally owned easement or right-of-way which provides access to federally owned land. * * *

"viii) U.S. Forest Service Road: A federally owned easement or right-of-way which provides access to federally owned land. * * *

"ix) Local Access Road: A public road that has been dedicated to the public for access, but is not part of the County, state or federal road system. A local access road is not part of a public maintenance or improvement program. * * *

"x) Prescriptive Easement: A right to an easement acquired through the uninterrupted use of another's land. * * *

"* * * * *"

[4] LDO 00.040(84) defines "driveway" in relevant part as "[a] legally and physically defined area available and practical for motor vehicle ingress and egress to the building site from a road."

However, it does not follow that petitioner's considerably different view of what constitutes a "road" as that term is defined in the LDO and used in LDO 280.110(3)(E)(vii)(c) is correct. As discussed, the staff decision took the position that only roads that cross platted rights-of-way or legally described and conveyed easements constitute "roads" for purposes of LDO 280.110(3)(E)(vii)(c). That view has some support in the LDO definition of "road," relevant portions of which are set out at n 3. The "types or forms of access" in that definition, which appear to be provided as examples of "roads," all appear to require either a platted right-of-way or a legally recognized easement of some kind. On its face, the staff view of what constitutes a "road" for purposes of LDO 280.110(3)(E)(vii)(c) seems reasonable and consistent with the text and context of that provision. There may be some reason why that staff view is incorrect, but petitioner does not offer any. Because the hearings officer did not adopt the staff interpretation, at least not explicitly, petitioner understandably focuses his argument on the hearings officer's interpretation.

Under these circumstances, remand is necessary for the hearings officer to reconsider what constitutes a "road" under LDO 280.110(3)(E)(vii)(c). If the hearings officer adopts the staff view on that issue, the hearings officer should offer petitioner and other participants the opportunity to challenge or defend that view. Further, if the hearings officer adopts the staff view, then the critical question becomes whether the disputed logging road is located on an access easement. In that event, the hearings officer should address the staff determination that none of easements supplied by petitioner describe an easement across the subject parcel.

B. Minimum Impact

Petitioner also challenges the hearings officer's alternative determination that, even if the logging road is a "road" for purposes of LDO 280.110(3)(E)(vii)(c), petitioner failed to demonstrate that the preferred homesite will have minimum impact on deer and elk winter range, compared to the homesites imposed by Condition 1. According to petitioner, the hearings officer's findings on this point are contradictory and misinterpret the applicable law.

Petitioner argues that the hearings officer first found, correctly, that LDO 280.110(3)(E)(vii)(c) "presumes that a homesite located within 300 feet of an existing road or driveway will have only minimum impact on winter deer and elk habitat[.]" Record 4. However, petitioner argues, the hearings officer inexplicably proceeded to find that the preferred homesite could not be approved, even assuming it was located within 300 feet of an existing road, because the preferred homesite would not have minimum impact compared to the locations approved by staff. Record 5. According to petitioner, compliance with the "minimum impact" standard at LDO 280.110(3)(E)(vii) is determined by addressing the five factors set out at LDO 280.110(3)(E)(vii)(a)—(e), and there is no independent "minimum impact" standard that must be satisfied, notwithstanding compliance or consistency with those five factors.

Finally, petitioner argues that the hearings officer misconstrued LDO 280.110(3)(E)(vii)(e) in relying on ODFW comments to conclude that the preferred homesite does not meet the "minimum impact" standard. Petitioner contends that LDO 280.110(3)(E)(vii)(e) exempts applications for dwellings on parcels that exceed the 160-acre density standard, such as the present application, from the requirement to consider ODFW comments. Therefore, we understand petitioner to argue, it was error for the hearings officer to consider the ODFW comments at all, much less place "substantial weight" on them.

Intervenor responds in relevant part that the hearings officer correctly interpreted LDO 280.110(3)(E)(vii) to require a demonstration that the preferred homesite has "minimum impact" on habitat, even if located within 300 feet of an existing road.

The hearings officer does not explain the basis for his apparent view that there is an independent "minimum impact" standard that must be satisfied, even if each of the five factors at LDO 280.110(3)(E)(vii)(a)—(c) are met. That view seems at odds with his earlier finding that LDO 280.110(3)(E)(vii) "presumes" that a dwelling within 300 feet of an existing road has only minimum impact. The hearings officer may have believed that that "presumption" could be overcome by evidence that the preferred homesite does not, in fact, have only minimum impact on

habitat. Or the hearings officer may have believed that, notwithstanding consistency with LDO 280.110(3)(E)(vii)(c), the preferred homesite was inconsistent with other factors listed at LDO 280.110(3)(E)(vii), such as LDO 280.110(3)(E)(vii)(a), which requires consideration of "[c]onsistency with maintenance of long-term habitat values of browse and forage, cover [and] sight obstruction." We agree with petitioner that remand is necessary for the hearings officer to adopt more adequate findings explaining the basis for his conclusion that, even assuming the logging road is a "road" for purposes of LDO 280.110(3)(E)(vii)(c), the preferred homesite fails to satisfy the "minimum impact" standard at LDO 280.110(3)(E)(vii).

With respect to the hearings officer's consideration of the ODFW testimony, petitioner may be correct that the county is not compelled by LDO 280.110(3)(E)(vii)(e) to seek and consider ODFW testimony under the circumstances of this case. However, petitioner submitted the disputed ODFW testimony, and does not explain why that testimony may not be considered by the hearings officer for any relevant purpose, including compliance with other factors of LDO 280.110(3)(E)(vii). We disagree that the hearings officer misconstrued the applicable law in considering the ODFW testimony.

The first assignment of error is sustained, in part.

SECOND AND THIRD ASSIGNMENTS OF ERROR

In these assignments of error, petitioner argues that the hearings officer's findings are inadequate and not supported by substantial evidence. Because we remanded the hearings officer's decision under the first assignment of error for additional proceedings that will at least require adoption of new or amended findings, there is no point in resolving petitioner's challenges to the existing findings.

We do not resolve the second or third assignments of error.

The county's decision is remanded.