

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MICHAEL PAPADOPOULOS,
5 *Petitioner,*

6
7 vs.

8
9 BENTON COUNTY,
10 *Respondent,*

11
12 and

13
14 SANDRA LUEBBERS and
15 RICHARD LUEBBERS,
16 *Intervenors-Respondent.*

17
18 LUBA No. 2004-151

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Benton County.

24
25 Michael Papadopoulos, Corvallis, filed the petition for review and argued on his own
26 behalf.

27
28 Vance M. Croney, County Counsel, Corvallis, filed a response brief and argued on
29 behalf of respondent.

30
31 Andrew J. Bean, Albany, filed a response brief and argued on behalf of intervenors-
32 respondent. With him on the brief was Weatherford, Thompson, Cowgill, Black and Schultz,
33 PC.

34
35 DAVIES, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
36 participated in the decision.

37
38 AFFIRMED

02/22/2005

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

NATURE OF THE DECISION

Petitioner appeals the county’s approval of an application for a variance to a county code provision requiring a 300-foot dwelling setback from a resource zone.

MOTION TO TAKE OFFICIAL NOTICE

Petitioner requests that we take official notice of Benton County Ordinance 85-0027, which concerns the establishment of uniform procedures for the naming and addressing of roads, and of the Benton County Development Code (BCC), Chapters 50 to 100. There is no opposition to this motion, and it is allowed.

MOTION TO STRIKE

The county moves to strike from the petition for review diagrams prepared by and documents re-typed by petitioner. The county argues that ORS 197.835(2)(a) limits LUBA’s review to the record and alterations of documents contained in the record are not allowed. *Carver v. City of Salem*, 42 Or LUBA 305, 308-09, *aff’d* 184 Or App 503, 57 P3d 602 (2002). Petitioner replies that the diagrams and re-typed facsimiles are not expressly prohibited by our rules, and that our opinion in *Carver* is limited to the facts of that case where a party altered a map already in the record to illustrate a disputed point.

Because the diagrams and documents are not relevant to our decision, the motion to strike is denied.

MOTION TO FILE REPLY BRIEF

Petitioner moves for permission to file a reply brief. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 5.22-acre parcel zoned Rural Residential with a two-acre minimum lot size (RR-2). It was created through a partition in 2002. To the west of the subject property is land zoned Forest Conservation.

1 On March 4, 2004 intervenors Sandra Luebbers and Richard Luebbers (intervenors)
2 filed an application for a variance to place a dwelling 135 feet from their western boundary
3 line. The provision from which intervenors seek a variance requires that a dwelling be
4 located no closer than 300 feet from a resource zone. BCC 63.405(7).¹ Petitioner argued
5 below that the application must be denied because a road that abuts the subject property, Deer
6 Run Street, is a private road and, therefore, fails to satisfy a BCC requirement that lots and
7 parcels have a minimum 25 feet of frontage on an improved *public* road. The Planning
8 Commission denied the variance based on reasons unrelated to petitioners' arguments.
9 Intervenors appealed the denial to the Board of County Commissioners. On July 13, 2004 the
10 Board of County Commissioners held a *de novo* hearing on the matter and on August 24,
11 2004, reversed the planning commission's decision and approved the variance, allowing a
12 dwelling to be built 200 feet from the resource zone.

13 This appeal followed.

14 **PETITIONER'S FIRST AND SECOND ASSIGNMENTS OF ERROR**

15 Petitioner's first two assignments of error revolve around one central theme: that
16 Deer Run Street, the street that serves as access for the subject property, is not a public road
17 and that the county erred either in concluding otherwise or in not addressing the issue in its
18 decision.² The city and intervenors argue that petitioner's assignments of error have no

¹ BCC 63.405(7) provides:

“A dwelling shall be located no closer than 300 feet from a resource zone, or conform to this standard to the greatest extent possible. If this is not feasible, the owner shall sign a declaratory statement to be recorded in the County Deed Records recognizing resource use of adjacent lands. This requirement shall not be applied to a setback adjacent to a public road, except when required by an approved conditional use permit.” (Emphasis added).

Intervenors apparently did not argue that a variance was not required because the proposed dwelling conforms to the standard “to the greatest extent possible.” Instead, they sought a variance.

² Petitioner's first assignment of error provides: “Benton County erred where it decided the road issue on the basis of its own orders adopted in other proceedings.” His second assignment of error provides: “Benton County erred by not reaching its decision that Deer Run is a public road on the basis of the record before it.”

1 bearing on the variance approval criteria that were applied in the appealed decision and
2 therefore do not provide a basis to reverse or remand the decision.

3 The pre-hearing notice and the staff report for the Board of Commissioner’s hearing
4 listed the following provisions as the applicable approval criteria: BCC 53.405 to 53.425 and
5 BCC 63.405(7). Record 68, 155. BCC 53.405 through 53.425 include the variance approval
6 criteria provisions. According to petitioner, BCC 63.405(7), which is listed as an approval
7 criterion in the county’s notices, requires application of the provisions of BCC Chapter 99.³
8 Based on that analysis, petitioner claims that BCC 99.405(1) provides a review criterion
9 applicable to variances. BCC 99.405(1) states in relevant part, “[e]very new dwelling * * *
10 shall be sited on a parcel or lot which has a minimum of twenty-five (25) feet of frontage
11 along an improved public road.” Petitioner argues that the dwelling for which intervenors
12 seek a variance does not comply with BCC 99.405(1) because Deer Run Street, which
13 provides the only road frontage, is not a public road and the subject property, therefore, does
14 not have the required frontage on a public road.⁴

15 We agree with the county and intervenors that the county was not required to apply
16 BCC 99.405(1) in reviewing the disputed variance application. The applicable criteria are set

³ BCC 63.405 provides, in relevant part:

“All structures allowed in the Rural Residential Zone *shall be sited in compliance with BCC Chapter 99* and the following additional standards:

“* * * * *

“(7) A dwelling shall be located no closer than 300 feet from a resource zone, or conform to this standard to the greatest extent possible. If this is not feasible, the owner shall sign a declaratory statement to be recorded in the County Deed Records recognizing resource use of adjacent lands. This requirement shall not be applied to a setback adjacent to a public road, except when required by an approved conditional use permit.” (Emphasis added).

⁴ Petitioner argues that, although previous owners of the subject and surrounding property dedicated the land for Deer Run Street to the county, the record does not reflect that the county ever properly accepted the dedication.

1 forth in BCC 53.410.⁵ Neither BCC 53.410 nor the other variance provisions, BCC 53.405
2 to 53.425, require that the county apply Chapter 99 in reviewing a variance application.⁶
3 Although BCC 63.405(7) is listed as an approval criterion in the notice and staff report, the

⁵ BCC 53.410 provides:

“Variance Criteria. The decision to approve a variance shall be based on findings that:

- “(1) Physical circumstances or other conditions of the land prevent the property from being reasonably developed in a manner consistent with the standards of the Development Code without significant hardship;
- “(2) Such circumstances or conditions result in a hardship unique to the property in question;
- “(3) The hardship does not result from actions of the applicant nor derive from personal circumstances of the applicant such as age, physical condition, or financial situation;
- “(4) Strict adherence to the standard is unnecessary in that the proposed variance will not alter the essential character of the neighborhood in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property; and
- “(5) The proposed variance is the minimum variance of the standard that will afford relief and is the least modification possible of the provisions of the Development Code.”

⁶ BCC 53.405 provides,

“Purpose. A variance to any requirement of the Development Code may be granted where literal application of the requirement would cause significant hardship caused by unique characteristics of the property.”

BCC 53.415 provides:

“Variance Conditions. Conditions of approval pursuant to BCC 53.220 may be imposed on an approval of a variance to mitigate adverse impacts which may result from granting the variance.”

BCC 53.420 provides,

“Period of Validity. Unless otherwise specified at the time of approval, a variance shall be valid for one (1) year.”

Finally, BCC 53.425 provides,

“Extension of Variance Approval. A variance approval may be extended for good cause at the discretion of the approving authority responsible for the original decision. The applicant shall submit the request for extension in writing to the Planning Official prior to expiration of the initial variance.”

1 challenged decision does not *apply* BCC 63.405(7); it allows intervenors to seek approval to
2 construct a dwelling in the future, not less than 200 feet from the west property line,
3 *notwithstanding* BCC 63.405(7). The listing of that code provision as an applicable criterion
4 does not make it one. Accordingly, the provisions of Chapter 99 do not apply to the subject
5 application. Further, the county’s “findings” addressing access are merely recitations
6 regarding the status of Deer Run Street, and are not necessary to the decision. This is
7 because, as explained above, those findings have nothing to do with the variance approval
8 criteria.⁷

9 It may be that the county’s final determination on compliance with the standard that
10 petitioner seeks to have applied here was made in a previous land use approval.⁸
11 Alternatively, that determination may yet need to be made at some future date; *e.g.*, when the
12 building permit is applied for. In any event, approval of this application for a variance to the
13 setback requirement in BCC 63.405(7) did not require that the county apply and demonstrate
14 compliance with BCC 99.405(1), as petitioner claims.

15 Petitioner’s first and second assignments of error are denied.

16 **THIRD ASSIGNMENT OF ERROR**

17 Petitioner assigns error to the county’s imposition of Condition 5. That condition
18 provides:

⁷ The challenged decision provides, in relevant part:

“**Access** – This property abuts the northern terminus of Deer Run Street, a privately maintained public road, dedicated to Benton County in 1952. A question has been raised regarding the issue of whether Deer Run is a public or private road. A review of the evidence submitted into the record clearly supports the finding that Deer Run has been considered to be a public road since its first dedication in 1952. On two separate occasions the Board of Commissioners adopted orders designating Deer Run as a public road. Because there has been no judicial determination that Deer Run was improperly established, the County will continue to consider Deer Run a lawfully created public road.” Record 13.

⁸ The county suggested at oral argument that the county applied and found compliance with BCC 99.405(1) when it approved the partition application that created the subject parcel.

1 “The property owner shall submit to the Community Development
2 Department a covenant to be recorded in the Benton County Deed Records,
3 binding the property owner, and the property owner’s successors in interest to
4 participate in maintenance and improvements of Deer Run Street.”

5 Petitioner does not argue that the county erred in imposing Condition 5 because it does not
6 relate to the applicable variance approval criteria in BCC 53.410 or because it is not imposed
7 “to mitigate adverse impacts which may result from granting the variance.” BCC 53.415.
8 *See* n 6. Rather, he argues that the condition cannot be imposed because it does not comply
9 with BCC 99.410(2). That provision provides the conditions under which an exception to
10 BCC 99.405(1) may be granted.⁹ Petitioner’s argument seems to be that because BCC
11 99.405(1) is not satisfied, a building permit may only be issued if (1) the applicant submits
12 evidence of an easement or (2) the parcel fronts or obtains access via an unimproved or
13 substandard roadway within a public right-of-way and the applicant causes the roadway to be
14 improved to County Secondary Road Standards. *See* BCC 99.410(2). Petitioner asserts that
15 intervenor has not submitted evidence of an easement, did not seek a variance from BCC

⁹ BCC 99.410(1)(b) provides:

“In the alternative to compliance with 99.405(1), a new dwelling may be allowed without the required frontage if:

“* * * * *

“(b) The roadway within the adjoining public road right-of-way has not been constructed to County Secondary Road Standards in BCC 99.515(4) * * *.”

BCC 99.410(2) provides:

“A building permit for a proposed dwelling which qualifies for an exception pursuant to BCC 99.410(1) may be issued if:

“(a) The applicant submits evidence of an easement of record which provides for access across private property between the subject property and an improved public roadway; or

“(b) If the parcel or lot fronts or obtains access via an unimproved or substandard roadway within a public right-of-way, the applicant causes the roadway to be improved to County Secondary Road Standards in BCC 99.515(4).”

1 99.410(2)(b), and the local code does not allow private participation in the maintenance and
2 improvement of Deer Run. Petition for Review 23.

3 As discussed above, BCC Chapter 99 does not apply to the county's variance
4 decision, and petitioner's third assignment of error does not provide a basis for remanding
5 that decision.

6 Petitioner's third assignment of error is denied.

7 The county's decision is affirmed.