

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 PATRICIA CURTIN

5 *Petitioner,*

6
7 vs.

8
9 JACKSON COUNTY,

10 *Respondent.*

11
12 LUBA No. 2007-101

13
14 FINAL OPINION

15 AND ORDER

16
17 Daniel O'Connor, Medford, filed the petition for review and argued on behalf of
18 petitioner. With him on the brief was Huycke, O'Connor, Jarvis, & Lohman, LLP.

19
20 No appearance by Jackson County.

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22 RYAN, Board Member; BASSHAM, Board Member, participated in the decision.

23
24 HOLSTUN, Board Chair, did not participate in the decision.

25
26 REMANDED

 09/28/2007

27
28 You are entitled to judicial review of this Order. Judicial review is governed by the
29 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county decision denying an application for a forest template dwelling.

FACTS

The subject property is a 3.22-acre parcel with a comprehensive plan map and zoning designation of Woodland Resource (WR). The subject property is accessed from Timberlake Drive. Although a portion of Timberlake Drive is a dedicated public road that intersects with State Highway 99, the public portion of Timberlake Drive terminates and becomes a road that is owned by the county but that has not been dedicated to the public.¹ That non-public portion of Timberlake Drive provides access for twenty-five lots, including petitioner’s lot, in a subdivision that was platted in 1968. Petitioner’s property is benefited by an easement that burdens the non-public portion of Timberlake Drive, and petitioner accesses her property over that drive.

Petitioner applied for a Forest Template Dwelling pursuant to the provisions of Jackson County Land Development Ordinance (LDO) 4.3.6.² The planning department denied the application, and petitioner appealed the denial to the hearings officer. The hearings officer affirmed the planning department’s denial of the application. This appeal followed.

SECOND ASSIGNMENT OF ERROR

In her second assignment of error, petitioner argues that the hearings officer improperly applied the access standards set forth in LDO 9.5.3 in upholding the planning

¹ The county acquired that portion of the road pursuant to a tax foreclosure sale in 1970. Record 52-60.

² LDO 4.3.6 contains the standards and criteria for forest template dwellings in a forest zone.

1 manager's denial of the application.³ Petitioner argues that LDO 9.5.3 is not an applicable
2 approval criterion.

3 The hearings officer's single basis for denying the application was his conclusion that
4 the access standards for private roads set forth in LDO 9.5.3 were not met. The hearings
5 officer found that LDO 9.5.3 applied to the proposal, based on the language of LDO 9.5.1,
6 which provides:

7 "The access standards of this Section will apply to the creation of publicly
8 dedicated roads, private roads and driveways to serve as access to new lots as
9 part of land division or to provide access to a lot prior to its development. All
10 access improvements must comply with the requirements set forth in this
11 Section. Additional, higher standards may be required if deemed necessary by
12 the County to ensure that safe and adequate access to lots and parcels will be
13 provided. * * *"

14 The hearings officer found in relevant part:

15 "The applicant argues that the private road requirements in LDO 9.5.3 do not
16 apply 'because [petitioner] is not seeking to create a private road nor is the
17 applicant proposing a land division. Instead, [petitioner] is simply seeking a
18 permit to construct a dwelling on a legal parcel utilizing an existing access
19 road in conformance with an easement recorded in 1968.'

20 "My interpretation, however, is that section 9.5.1 makes the private road
21 access requirements in 9.5.3 applicable to existing vacant lots:

22 'The access standards of this Section apply to the creation of new
23 publicly dedicated roads, private roads and driveways to serve as
24 access to new lots as part of land division, *or to provide access to a lot*
25 *prior to its development.*'

³ LDO 9.5.3 provides:

"Private roads are low-volume roads designed to serve primarily residential needs. A private road may provide common access to no more than twelve lots or parcels. Any or all required surveys, maps, plans, and improvements of private roads are the responsibility of the applicant/developer or abutting owners. No funds of the County will be expended for any of the above items nor will the County or any of its officers or employees be liable for failure to improve or repair a private road. * * *"

1 “Applying this interpretation in this case means that the road serving as access
2 to the subject parcel must meet the requirements of LDO 9.5.3. Since the
3 parcel’s access is via a private road and not a public road, the private road
4 must serve not more than 12 parcels. Here, since the private road serves more
5 than 12 parcels, the access does not satisfy the criteria.” Record 3-4 (Emphasis
6 in original, citation omitted).

7 Petitioner argues, and we agree, that the hearings officer misread LDO 9.5.1. That
8 provision plainly makes the access standards applicable to the *creation of new roads and*
9 *driveways* that either (1) serve as access to newly created lots or (2) provide access to
10 existing lots. The hearings officer’s interpretation of LDO 9.5.1 ignores the threshold
11 requirement that, in order for the access standards of LDO 9.5 to apply, a new road or
12 driveway must be created to provide access to new or existing lots. It is undisputed that
13 petitioner’s application does not purport to create a new road or driveway, and that access to
14 the property is over an existing non-public county road. The hearing officer misconstrued
15 LDO 9.5.1 in determining that LDO 9.5.3 applied to petitioner’s application.

16 We agree with petitioner that the access standards set forth in LDO 9.5.3 do not apply
17 to the application because no road is being created. Because LDO 9.5.3 does not apply to the
18 application, the hearings officer erred in denying the application based on the application’s
19 failure to satisfy the access requirements set forth in LDO 9.5.3.

20 The second assignment of error is sustained.

21 **FIRST ASSIGNMENT OF ERROR**

22 In her first assignment of error, petitioner assigns error to the hearings officer’s
23 conclusion that the non-public portion of Timberlake Drive is a “private road” that does not
24 meet the access standards set forth in LDO 9.5.3. Because we determined under the second
25 assignment of error that LDO 9.5.3 is not an approval criterion, we need not decide whether
26 the hearings officer erred in concluding that the county road is a private road under LDO
27 9.5.3.

1 Petitioner asks LUBA to reverse or remand the county's decision. Because petitioner
2 has not explained why the decision warrants reversal under OAR 661-010-0071(1), rather
3 than remand under OAR 661-010-0071(2), the county's decision is remanded.