BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

TUMALO IRRIGATION DISTRICT,
Intervenor-Respondent.

LUBA No. 2006-178

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

Laurie E. Craghead, Assistant Legal Counsel, Bend, filed a response brief and argued on behalf of respondent.

Sharon R. Smith, Bend, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Bryant, Lovlien & Jarvis, PC.

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

REMANDED 03/13/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a partition and conditional use permits to build two non-farm dwellings on the resulting parcels. The challenged decision also approves a road dedication.

MOTION TO INTERVENE

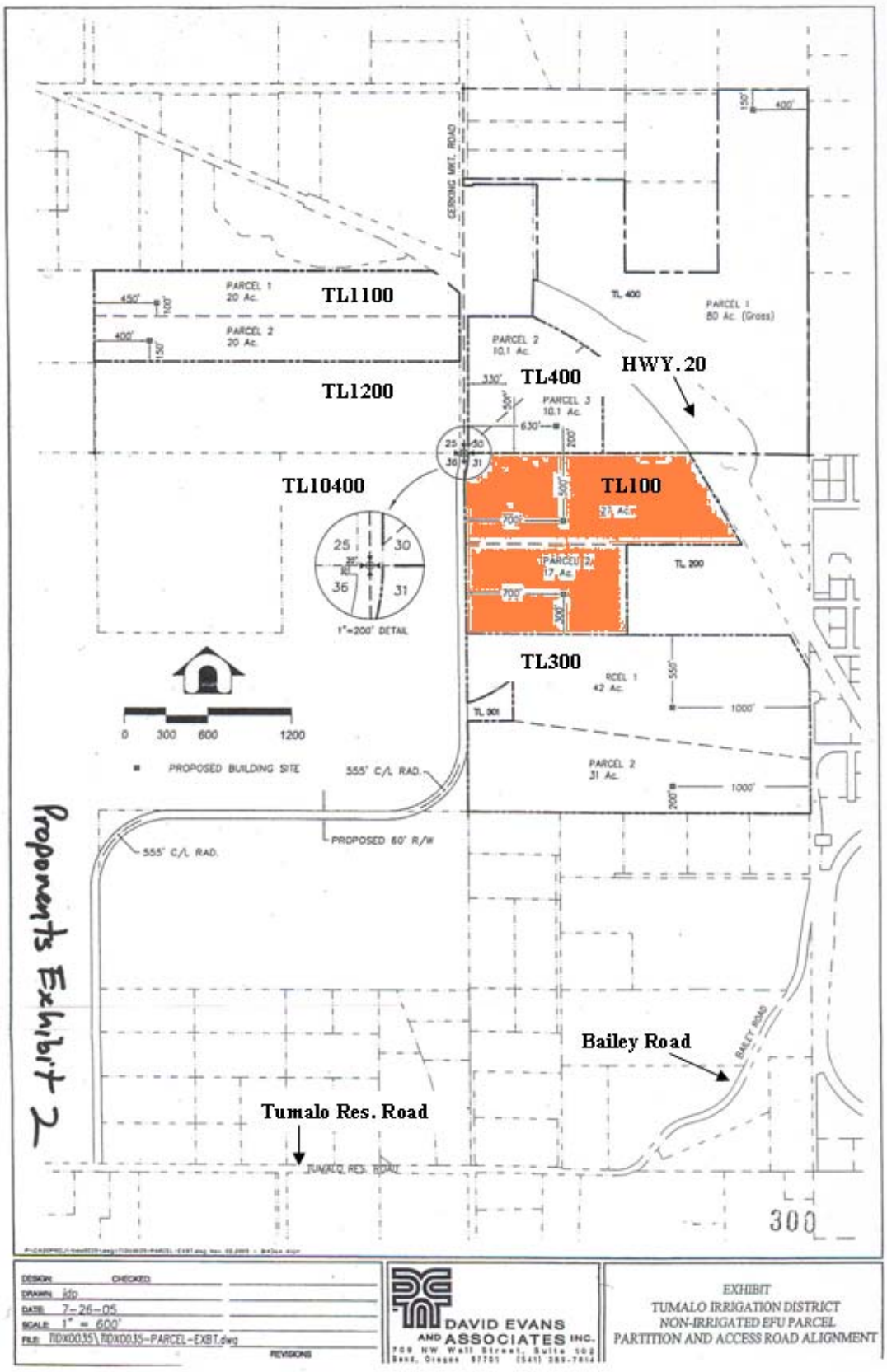
Tumalo Irrigation District (intervenor) moves to intervene on the side of the respondent. There is no opposition to the motion, and it is allowed.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new issues raised in the response brief. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor owns a number of properties that total approximately 728 acres. The properties lie generally south of Highway 20 and west of the unincorporated community of Tumalo in Deschutes County. The decision that is before us in this appeal concerns tax lot 100, which includes approximately 44 acres. The approved partition would divide tax lot 100 into parcels of 27 acres (parcel 1) and 17 acres (parcel 2). The decision approves a non-farm dwelling for each of those new parcels. The challenged decision also approves a road dedication to provide access to (1) the subject property, (2) other properties that are owned by intervenor (tax lots 1100, 400, 10400 and 300), and (3) a county-owned parcel (tax lot 1200). Applications to divide tax lots 1100, 400 and 300 and to authorize additional non-farm dwellings are pending before the county, but have been suspended pending LUBA's resolution of this appeal. A map from the record showing the subject property and nearby properties appears on the next page of this opinion.


TL1100
TL1200
TL400
TL10400
TL100
TL300
HWY. 20
Bailey Road
Tumalo Res. Road
PARCEL 1
20 Ac.
PARCEL 2
20 Ac.
PARCEL 2
10.1 Ac.
PARCEL 3
10.1 Ac.
PARCEL 1
80 Ac. (Gross)
PARCEL 2A
17 Ac.
PARCEL 1
42 Ac.
PARCEL 2
31 Ac.
TL 400
TL 200
TL 301
GERKING MKT. ROAD
BAILEY ROAD
TUMALO RES. ROAD
1"=200' DETAIL
0 300 600 1200
PROPOSED BUILDING SITE
555' C/L RAD.
PROPOSED 60' R/W
Proponents Exhibit 2
DESIGN
CHECKED
DRAWN jdp
DATE 7-26-05
SCALE 1" = 600'
FILE TDX0035\TDX0035-PARCEL-EXBT.dwg
REVISIONS
DAVID EVANS AND ASSOCIATES INC.
EXHIBIT
TUMALO IRRIGATION DISTRICT
NON-IRRIGATED EFU PARCEL
PARTITION AND ACCESS ROAD ALIGNMENT

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Tax lot 10400, which lies west of the proposed road, is zoned Surface Mining (SM) and is the site of an existing mining operation that is nearly complete and in the process of being reclaimed. As shown on the previous page, the proposed roadway would travel north from Tumalo Reservoir Road, which is south of the subject property, for a distance of approximately one and one-half miles. For most of that distance, the proposed road would be located entirely on SM-zoned property. Up to the point where the proposed road approaches the northern boundary of tax lot 100, it is located entirely on SM-zoned tax lot 10400. As the proposed road approaches the northern boundary of tax lot 100, the proposed road shifts slightly to the east so that the road would be located on both SM-zoned tax lot 10400 and EFU-zoned tax lot 100 for approximately 125 feet. As approved in the challenged decision, the proposed road terminates at the southern boundary of EFU-zoned tax lots 1200 and 400. Ultimately the proposed road would continue north to cross, and provide access to, EFU-zoned tax lots 1200, 400 and 1100. Where the proposed road intersects Highway 20, intervenor proposes to construct a secondary emergency access to Highway 20. The primary (*i.e.* all non emergency) access to Highway 20 would be provided via Tumalo Reservoir Road and Bailey Road to the south.

FIRST ASSIGNMENT OF ERROR

It is undisputed that nearly all of the proposed road and its right of way will not be located on EFU-zoned tax lot 100, which is the only property affected by the challenged partition and non-farm dwelling approvals. Most of the road and right of way are to be located on other, SM-zoned property, with only the last 125 feet located partially on EFU-zoned tax lot 100 and partially on SM-zoned tax lot 10400.

Non-farm dwellings are approvable in EFU zones. Deschutes County Code (DCC) 18.16.050(G). The SM zone allows caretaker residences. DCC 18.52.030(C). But the SM zone does not expressly allow non-farm dwellings. Petitioner argues the hearings officer erred by approving the proposed road, because it was approved for the purpose of providing

the access that is required to partition tax lot 100 and approve non-farm dwellings for the resulting parcels. According to petitioner, the county's action "violates the fundamental rule that access may not be developed across a zone for a use in another zone where that use is not allowed in the first zone." Petition for Review 9.

The authority that petitioner cites for the claimed "fundamental rule" is *Roth v. Jackson County*, 38 Or LUBA 894 (2000). That case stands for a far more limited principle. *Roth* concerned a private access road that LUBA concluded was an extension of the business it was approved to serve. As we explain below, the access road in *Roth* was a private driveway that crossed the flagpole portion of a flag-shaped property to serve the business that was located on the flag portion of the property. *Roth* did not concern a right of way that is to be dedicated to the public for the purpose of carrying traffic. Dedicated rights of way almost always cross many different zoning districts. The rule that petitioner suggests would make most dedicated rights of way unapprovable, since dedicated public rights of way are almost always approved to provide access to uses that are not allowed in at least some of the zoning districts those rights of way cross.

The proposed use in *Roth* was a winery. That winery was to be sited on a split-zoned flag shaped property. The winery was to be sited on an EFU-zoned tax lot (the flag) that was located some distance from the county highway. The EFU zone allowed wineries. Access to the winery in *Roth* from the nearby highway was to be provided over a second tax lot, which we described as the "flagpole" portion of the flag shaped property. 38 Or LUBA at 895. That adjacent flagpole tax lot was zoned "suburban residential," a zone that did not allow wineries. Although the flagpole was improved with a roadway and subject to access easements that benefitted other adjoining properties, the flagpole was not a dedicated right of way. Rather, the flagpole was owned by the owner of the tax lot where the winery was to be sited. A similar circumstance apparently existed in *Bowman Park v. City of Albany*, 11 Or

LUBA 197 (1984), which LUBA cited and relied on in *Roth*.[1] Neither of those cases support the broad rule that petitioner describes.

Under DCC 18.52.030(E), Class I and Class II road or street projects are uses permitted outright in the SM zone. The hearings officer found that a roadway across the proposed right of way that will cross the SM-zoned property is permitted as a Class II road or street project.[2] We do not agree with petitioner that the county erred by approving a dedicated right of way and roadway improvements across SM-zoned property. Such rights of way and improvements are allowed outright in the SM zone. The fact that the right of way also adjoins EFU-zoned property and would provide access for uses on that EFU-zoned property that are not allowed on SM-zoned property does not, as petitioner argues, require that the county deny the requested roadway approval. For the reasons explained above, *Roth* and *Bowman Park* are inapposite and do not establish the broad rule that petitioner argues they establish.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As we have already explained, at least part of the proposed right of way and road would cross EFU-zoned land that is subject to Statewide Planning Goal 3 (Agricultural Lands). The subject property and surrounding properties are far from the nearest urban growth boundary and therefore are considered "rural" lands under the statewide planning goals. "[OAR 660-012-0065] identifies transportation facilities, services and improvements

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[1] The facts in *Bowman* are not entirely clear, but apparently the 5.28-acre site was split zoned, with a portion of the site zoned for industrial use and a portion of the site zoned for residential use. 11 Or LUBA at 200. The access that the applicant proposed for an industrial use on industrially zoned portion of the property would have crossed residentially zoned property that the applicant also owned. *Id.* at 202. It is reasonably clear that the proposed roadway across the residentially zoned property in *Bowman* was not to be a dedicated right of way.

[2] DCC 18.04.030 sets out definitions for the county zoning ordinance and includes a definition for "Road and Street Projects." As defined in DCC 18.04.030, a Class II road or street project includes "[t]he construction of a new County road or street within a dedicated pubic right-of-way, where none existed before."

which may be permitted on rural lands consistent with Goals 3, 4, 11, and 14 without a goal exception." OAR 660-012-0065(3) sets out "transportation improvements [that] are consistent with Goals 3, 4, 11, and 14 subject to the requirements of this rule[.]" One of the transportation improvements that OAR 660-012-0065(3) authorizes without requiring an exception to statewide planning goals is set out below:

> "*New access roads* and collectors within a built or committed exception area, or *in other areas where the function of the road is to reduce local access to or local traffic on a state highway*. These roads shall be limited to two travel lanes. Private access and intersections shall be limited to rural needs or to provide adequate emergency access." OAR 660-012-0065(3)(g).

The hearings officer found that the proposed road qualifies as an *access road* that will reduce local access to a state highway:[3]

> "* * * The applicant has submitted substantial evidence to show that the proposed road will replace an existing access directly onto Highway 20. Accordingly, the Hearings Office concludes that the proposed road falls within the OAR 660-012-0065(3)(g) exception. * * *" Record 44

> "For the reasons set out in earlier findings, the Hearings Officer concludes that the proposed road is permissible under OAR 660-012-0065(3)(g). * * * As the applicant has noted, its property currently has access to Highway 20, and the applicant has agreed to give up its access if the proposed road is approved. * * *" Record 58.

Petitioner contends that "the existing access directly onto Highway 20," that the hearings officer alludes to in the above-quoted findings does not actually exist. There are maps in the record that seem to show that some sort of roadway crosses the subject property from the southwest to the northeast and continues onto tax lot 400, intersecting with Highway 20 on tax lot 400 just north of the subject property's northern property line.[4]

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[3] Under OAR 660-012-0065(2)(a):

> "'Access Roads' means low volume public roads that principally provide access to property or as specified in an acknowledged comprehensive plan[.]"

[4] For example the oversized maps that correspond to Record 369 and 799 seem to show evidence of such a roadway.

However, intervenor does not dispute petitioner's contention that there is no developed access from the subject property to Highway 20. We understand intervenor to argue that without regard to whether access to Highway 20 has actually been developed, intervenor has a legal right to develop such access based on a 1951 deed, and that legal right to access qualifies as "local access to * * * a state highway," within the meaning of OAR 660-012-0065(3)(g).

In a 1951 deed to the State Highway Commission, intervenor's predecessor reserved a right of access to its property adjoining Highway 20.[5] Intervenor apparently has proposed to ODOT that it be allowed to exchange or relocate its 1951 reserved right of access to the north where the proposed emergency-only, secondary access is proposed.[6]

While the 1951 deed seems to give the grantor a reserved property right to access Highway 20 from its property in this area, which would seem to include the subject property, there is no evidence in the record that ODOT would actually allow construction of access to Highway 20 from intervenor's property based on that 1951 deed. To the contrary, there is evidence in the record that seems to raise a significant question whether ODOT would now authorize construction of access to Highway 20 pursuant to that 1951 reservation. In an e-

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[5] The reservation of access in that 1951 deed is set out below:

> "[T]here is reserved the right of access from said abutting land to said highway of a width not to exceed 35 feet on the Westerly side only opposite Highway Engineer's Station 34-00, said access to be used in connection with a commercial sand and gravel operation and for ordinary travel to and from the abutting land only and shall not be used in connection with any other commercial institution or activity established or conducted on the adjoining property, which, in any manner, caters to, invites, solicits from or is dependent upon the users of said highway." Record 192.

[6] In a June 9, 2006 letter from intervenor's "Secretary/Manager," intervenor states:

> "* * * Our plan is to relocate the existing deeded access * * * if possible and if not we will pursue a new access easement[.]" Record 194.

We understand intervenor to be proposing in the June 9, 2006 letter that it be allowed to relocate its 1951 reserved access to the north where the emergency-only, secondary access is proposed. However, the letters seems to suggest that if that is not possible, intervenor will seek approval from ODOT for a new access easement.

mail message from ODOT to intervenor's attorney, ODOT acknowledges that it is processing intervenor's application for an emergency-only secondary access to Highway 20 opposite Gerking Market Road, to the north of the subject property. But the last paragraph of that message states:

> "[Tumalo Irrigation District] will not be allowed direct daily access to US 20 along any part of their property frontage as we have agreed to in past discussions." Record 207.

There are at least two significant problems with the hearings officer's findings in this case. The first is that there is nothing in the hearings officer's decision that ensures that the 1951 reservation of access will be relinquished. The hearings officer's decision approves most of the proposed new right of way and road, relying in part on the OAR 660-012-0065(3)(g) exception for rural access roads that will "reduce local access to * * * a state highway." The only reason given for finding that the proposed road will "reduce local access to * * * a state highway" is that the 1951 reservation of access will be relinquished. Even if we assume that is what intervenor proposes to do if it can secure ODOT approval for the emergency-only secondary access, that access has not been approved and intervenor does not propose to give up its 1951 deeded access unless that emergency-only secondary access is approved. The challenged decision has not been conditioned to ensure that the 1951 reserved access will be relinquished. Unless the 1951 reservation of access is relinquished, there can be no argument that the proposed road will "reduce local access to * * * a state highway."

Intervenor suggests that the decision is conditioned on intervenor relinquishing its 1951 reserved right of access. The first condition of approval is set out below:

> "Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application." Record 59.

Based on that condition of approval, intervenor argues:

> "Accordingly, if [intervenor] were to deviate from this proposal, they would be required to seek modification [of] the approval. Accordingly, there is no risk that the existing access reservation would be retained if the emergency access is allowed." Intervenor-Respondent's Brief 13.

We do not understand intervenor's argument. Neither the emergency-only, secondary access nor intervenor's apparent proposal to relinquish the 1951 reservation of access in exchange for that access are part of the current proposal regarding tax lot 100. The challenged decision presumably could have been conditioned to ensure that the 1951 reservation of access is relinquished before the disputed roadway can be constructed, but the challenged decision was not conditioned to ensure that the 1951 reservation is relinquished.

Because the problem we have just identified presumably could be cured with an appropriate condition of approval, we turn to the second significant problem. We do not agree with petitioner that the "local access to * * * a state highway" to a state highway that must be reduced to take advantage of OAR 660-012-0065(3)(g) must be access that already exists, in the sense the access has actually been constructed and is currently providing access. However, neither do we agree with intervenor that relinquishing an unexercised legal right to construct access, no matter what the circumstances, results in a reduction of "local access to * * * a state highway," within the meaning of OAR 660-012-0065(3)(g).

In this case, intervenor does not propose to relinquish its 1951 reservation of access unless ODOT approves the emergency-only secondary access to the north. Therefore, both accesses must be considered to determine whether the proposed road will have the net result of reducing "local access to * * * a state highway." Based on our understanding of the proposed emergency-only secondary access, it will not result in much of an increase in access to Highway 20. Absent emergencies, it may never provide access to Highway 20. If ODOT would authorize construction of access to Highway 20 pursuant to the 1951 reservation of access, it is likely that relinquishing that right of access would more than offset the access that is likely to result from the emergency-only, secondary access, which would result in a reduction of access to a state highway.

While we have already indicated that we do not agree with petitioner that the 1951 reservation of access can only be considered if it has actually been constructed, the current

statutus of the 1951 reservation of access is not irrelevant. That access has not been constructed and if ODOT would not allow it to be constructed under ODOT's current access rules or regulations, we do not believe relinquishing that right of access would reduce "local access to * * * a state highway," within the meaning of OAR 660-012-0065(3)(g). The record that is before us in this appeal is bereft of any evidence that ODOT would allow access to Highway 20 pursuant to the 1951 reservation. That reservation is now well over 50 years old. There is evidence in the record that ODOT would *not* approve a daily use access to Highway 20 from intervenor's property. While it might be that intervenor would have to be compensated if ODOT refuses to allow access pursuant to the 1951 reservation, that does not mean that relinquishing the 1951 reservation of access will reduce "local access to * * * a state highway," within the meaning of OAR 660-012-0065(3)(g). The hearings officer erred by concluding that relinquishing the 1951 reservation will result in reduction of "local access to * * * a state highway," within the meaning of OAR 660-012-0065(3)(g), without requiring substantial evidence that ODOT would actually approve construction of access pursuant to that 1951 reservation of access. Again, relinquishing a reserved right of access does not result in a reduction of "local access to * * * a state highway," within the meaning of OAR 660-012-0065(3)(g), where the only evidence in the record suggests that ODOT would not allow access to be constructed under that reserved right of access.

Petitioner advances four separate subassignments of error under this assignment of error. Some of the arguments that petitioner advances we agree with, others we do not.[7] Our

[7] For example, petitioner argues the scope of the 1951 reservation, the precise location of that access and whether tax lot 100 specifically has a right of access pursuant to that reservation are somewhat uncertain. It appears as though petitioner is correct, but we are not sure we see why that uncertainty is legally relevant. So long as existing access or a right to access that ODOT would allow to be constructed is relinquished, the precise scope, location and beneficiaries of that access seems only marginally relevant under OAR 660-012-0065(3)(g). The rule does not seem to require that the proposed access road serve the identical property that would be served by access that is to be relinquished. But even if we are wrong about that, any additional proceedings that follow this remand can address those questions, to the extent they are relevant under OAR 660-012-0065(3)(g).

decision to sustain the second assignment of error is based on our conclusions above. We need not and do not address all of the other arguments that petitioner advances under its four subassignments of error.

Intervenor advances a waiver argument in response to petitioner's challenge to the adequacy of the hearings officer's findings under its third subassignment of error. To the extent that waiver argument pertains to any of the issues we resolve above, we agree with petitioner that intervenor's waiver argument is without merit.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

DCC 18.16.030(W) provides in part:

> "* * * Transportation uses and improvements may be authorized under conditions and standards as set forth in OAR 660-012-0035 and 660-012-0065."

Petitioner argues the hearings officer erred in concluding that the county need not consider OAR 660-012-0035, simply because it was approving the disputed road based on the authority granted by OAR 660-012-0065(3)(g).[8] Petitioner contends that DCC 18.16.030(W) requires compliance with both "OAR 660-012-0035 and 660-012-0065," not OAR 660-012-0035 *or* 660-012-0065, as the hearings officer effectively found.

DCC 18.16.030(W) identifies two sources of authority for approving transportation uses and improvements: OAR 660-012-0035 and OAR 660-012-0065. OAR 660-012-0035 sets out how the county is to go about evaluating and selecting transportation system alternatives to be included in its transportation system plan. OAR 660-012-0065 sets out how the county may approve transportation facilities on rural lands without a goal exception.

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[8] In rejecting petitioner's contention that the county must apply both OAR 660-012-0035 and OAR 660-012-0065 in approving the disputed road, the hearings officer found:

> "In addition, the Hearings Officer interprets the administrative rule and the DCC provisions to allow the road under either OAR 660-012-0035 or 660-012-0065, not both." Record 44.

If the county wishes to authorize a transportation facility by including it in its transportation system plan, it proceeds under OAR 660-012-0035, and the conditions and standards set out in that section of the rule apply. If the county wishes to approve a transportation facility on rural land without approving an exception, it may proceed under OAR 660-012-0065, as the county did here, and the conditions and standards set out in that section of the rule apply. Presumably, if a county did both things in a single decision, it would need to proceed under both OAR 660-012-0035 and 660-012-0065.

Petitioner's unstated assumption is that when the county approves new rural roadways under OAR 660-012-0065 it must include those roadways in the county's TSP and proceed through the systems alternatives analysis required by OAR 660-012-0035 in doing so. OAR 660-012-0035(10), which petitioner cites, makes it clear in some circumstances the county may proceed under both OAR 660-012-0065 and OAR 660-012-0035. But OAR 660-012-0035(10) also makes it clear that the county is not *required* to do so. OAR 660-012-0035(10) provides:

> "Transportation uses or improvements listed in OAR 660-012-0065(3)(d) to (g) and (o) and located in an urban fringe *may be included in a TSP only if* the improvement project identified in the Transportation System Plan as described in section (12) of this rule, will not significantly reduce peak hour travel time for the route as determined pursuant to section (11) of this rule, or the jurisdiction determines that the following alternatives can not reasonably satisfy the purpose of the improvement project:
>
> "(a) Improvements to transportation facilities and services within the urban growth boundary;
>
> "(b) Transportation system management measures that do not significantly increase capacity; or
>
> "(c) Transportation demand management measures. The jurisdiction needs only to consider alternatives that are safe and effective, consistent with applicable standards and that can be implemented at a reasonable cost using available technology." (Emphasis added.)

OAR 660-012-0035(10) does not *require* that projects approved under OAR 660-012-0065(3) must be included in the transportation system plan, it provides that they *may* be

included in the transportation system plan, but only if they satisfy the other requirements set out in that section of the rule. The hearings officer did not err in concluding that the county need not apply OAR 660-012-0035.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

DCC 17.36.260 appears in the county's subdivision regulations and is entitled "Fire Hazards." DCC 17.36.260 requires "a minimum of two points of access" to parcels that are created by a partition, "[w]henever possible."[9] The hearings officer adopted the following findings to support her conclusion that the disputed partition complies with DCC 17.36.260:

> "The proposed partition has been submitted in conjunction with a road dedication of a new road extending north from Tumalo Reservoir Road. The applicant is proposing dedication of this new road, and has an intergovernmental agreement with Deschutes County to dedicate right of way to the intersection with Highway 20 over County-owned property for emergency access. This dedication is shown in the record [of other partition and conditional use applications]. This entire road dedication will provide secondary emergency access from the new road to Highway 20. It is to be an emergency access only, and will provide the necessary secondary access listed under this criterion." Record 55.

Petitioner contends the above findings are inadequate because "1) * * * there is no finding that ODOT will allow this connection to Highway 20, 2) * * * there is no actual dedication of right of way across County and other lands to get to Highway 20, 3) * * * this road extension is not part of the current land use applications, and 4) * * * there are no Conditions of Approval requiring completion of the road and approval by ODOT." Petition for Review 22.

We agree with petitioner that the hearings officer erred by failing to include a condition of approval to ensure that the secondary access she found is necessary to comply

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[9] DCC 17.36.260 provides:

> "Whenever possible, a minimum of two points of access to the subdivision or partition shall be provided to provide assured access for emergency vehicles and ease resident evacuation."

with DCC 17.36.260 will be constructed. Assuming the required ODOT approval has not yet been granted and is not precluded as a matter of law, the hearings officer presumably could enter a finding that ODOT approval is not precluded as a matter of law. *Gould v. Deschutes County*, 54 Or LUBA 205, 266 (2007), *rev'd and remanded on other grounds* 216 Or App 150, 171 P3d 1017 (2007), *Wetherell v. Douglas County*, 44 Or LUBA 745, 764 (2003); *Bouman v. Jackson County*, 23 Or LUBA 628, 646-47 (1992). So long as it is feasible to approve the other pending applications to secure the needed right of way, the hearings officer could adopt findings to establish that approval of those pending applications is feasible. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992). If those findings are possible, then the hearings officer could enter an appropriate condition of approval to ensure that the needed secondary access is in place before the final partition plat is approved and recorded. *Id*.

Without a condition of approval to ensure that the secondary access that is required by DCC 17.36.260, there is no way to know that that secondary access will be provided in the future. Without that condition of approval, the hearings officer erred in concluding that the partition that is the subject of this appeal complies with DCC 17.36.260.

Intervenor argues that secondary access is not required by DCC 17.36.260 because only two dwellings are proposed. If that legal theory was presented to the hearings officer, it does not appear to have been considered or adopted by the hearings officer. She may consider it on remand.

Intervenor also argues that under LUBA's decisions, where a condition of permit approval will require that the permit applicant seek and receive state agency or federal agency permits, it is not necessary to establish that the permit applicant will be successful in obtaining those permits, only that those permits are not precluded as a matter of law. *Gould*, 54 Or LUBA at 266; *Wetherell*, 44 Or LUBA at 764 (2003); *Bouman* 23 Or LUBA at 646-47

(1992). Intervenor contends that there is evidence in the record that shows that access approval for the emergency-only, secondary is not precluded as a matter of law.

As we have already explained, the county's error under this assignment of error is that the hearings officer did not impose a condition of approval to ensure that the needed secondary access will be constructed. Had the decision imposed the required condition of approval, we might be able to overlook the failure to find that ODOT approval for the needed emergency-only, secondary access is not precluded as a matter of law if the record clearly supported such a finding. ORS 197.835(11)(b). While there is evidence in the record that suggests that the needed ODOT access is probably not precluded as a matter of law, we do not agree that evidence clearly supports such a finding. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 122 (1995) *Blosser v. Yamhill County*, 18 Or LUBA 253, 264 (1989); *Kellogg Lake Friends v. Clackamas County*, 17 Or LUBA 277, 290 (1988), *aff'd* 96 Or App 536, 773 P2d 23 (1989).

For the reasons explained above, the fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Under DCC 18.16.050(G)(1)(a)(iii), a non-farm dwelling may only be approved if it is to be sited on land that is "generally unsuitable for the production of farm crops and livestock."[10] DCC 18.16.050(G)(2) describes how the generally unsuitable analysis is to be carried out and provides that a parcel may not be found to be generally unsuitable *solely* because of its size if it can reasonably be put to farm use in conjunction with other land.[11]

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[10] DCC 18.16.050(G)(1)(a)(iii) provides:

> "The proposed nonfarm dwelling is situated on an existing lot or parcel, or a portion of a lot or parcel that is generally unsuitable for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract."

[11] DCC 18.16.050(G)(2) provides:

Applying assumptions that petitioner does not challenge, the hearings officer found that proposed parcel 1 would be capable of producing gross income of $523.39 per year and that parcel 2 would be capable of producing gross income of $334.08 per year. The hearings officer then found based on those findings and other findings that the disputed parcels are generally unsuitable for producing farm crops or livestock:

> "Thus the total gross beef production potential for the nonfarm parcels combined would be approximately $857.47 annually. This figure represents gross income and does not take into account fencing costs, land preparation, purchase costs of livestock, veterinary costs, or any other costs of production. *Staff also notes that the subject property appears to have little forage for livestock. The understory is sparse and would support only minimal dry land grazing. The site has some rock outcrops, which would significantly limit farm use*.
>
> "This evidence is supported by a forage study submitted by the applicant, which concludes that the available forage on the property would support only 3.5 AUM. The evidence supports a finding that the soil on the proposed non-irrigated parcels is generally unsuitable for the production of livestock." Record 39. (Emphasis added.)

Petitioner contends that intervenor's SM-zoned surface mining property is being reclaimed and petitioner contends that the county erred by failing to consider whether the subject parcels might be suitable for growing farm crops and livestock in conjunction with that parcel. Petitioner also faults the hearings officer for not identifying the value of beef

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> "For the purposes of DCC 18.16.050(G) only, 'unsuitability' shall be determined with reference to the following:
>
> "a. A lot or parcel or a portion of a lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land. * * *
>
> "b. A lot or parcel or portion of a lot or parcel is not 'generally unsuitable' *simply* because it is too small to be farmed profitably by itself. If a lot or parcel or portion of a lot or parcel can be sold, leased, rented or otherwise managed as part of a commercial farm or ranch, it is not 'generally unsuitable.' A lot or parcel or portion of a lot or parcel is presumed to be suitable if it is composed predominantly of Class I-VI soils. Just because a lot or parcel or portion of a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use. * * *" (Emphasis added.)

production that "would be sufficient to establish that the land was not unsuitable [for production of farm crops or livestock]." Petition for Review 25.

Taking petitioner's last point first, we do not fault the county for not attempting to identify the precise level of beef production that would indicate suitability. Neither the county standards nor the statutory and administrative rule standards that the county standards were adopted to implement impose objective standards. Given the amount of litigation that these standards have generated over the years, we can only assume that state policy makers have made a conscious decision to leave these subjective standards as they are.

Turning to petitioner's other point, the parties disagree about whether the reclaimed mining site is being reclaimed for agricultural purposes. There is no evidence that the mine is being reclaimed for that purpose and there is very little evidence regarding whether the reclaimed areas of the former surface mine are suitable for raising farm crops or livestock.

We do not believe the hearings officer was obligated under DCC 18.16.050(G)(2)(a) to consider whether the subject parcels might be suitable for raising farm crops or livestock if considered in conjunction with the adjoining SM-zoned property. The obligation to consider whether the disputed parcels might be suitable for farm use if considered in conjunction with other properties is triggered under DCC 18.16.050(G)(2)(a) if the parcels are found to be "unsuitable solely because of size or location." *Williams v. Jackson County*, ___ Or LUBA ___ (LUBA No. 2007-103, November 2, 2007), slip op 6. The hearings officer's generally unsuitable finding is based in part on other factors that have little or nothing to do with size.[12] Petitioner does not challenge the adequacy of those findings to demonstrate that the disputed parcels are generally unsuitable for raising farm crops or livestock.

[12] The hearings officer's findings note that staff pointed out that property has "little forage for livestock," a sparse understory, minimal dry land for grazing and rock outcrops that "would significantly limit farm use." Record 31.

Even if the DCC 18.16.050(G)(2)(a) obligation to consider whether property "can reasonably be put to farm or forest use in conjunction with other land" applies where the finding of general unsuitability is not based solely on size, we believe there must be some reason to believe that such other lands are themselves suitable for raising farm crops or livestock. The adjoining 511-acre SM-zoned property is not being used for raising farm crops or livestock. As far as the record shows, it is a nearly depleted surface mine that is in the process of being reclaimed. There is grass growing on some of the reclaimed surface and apparently seven of those 511 acres have water rights. Record 120.[13] Without more of a reason to believe those SM-zoned acres are themselves suitable for farm use, we do not believe the hearings officer was obligated to consider that possibility.

Petitioner's final argument under the fifth assignment of error is that each of the new parcels to be created (parcel 1 and parcel 2) must be separately analyzed under DCC 18.16.050(G)(1)(a)(iii). *See* n 10. Petitioner argued below that the hearings officer erred by failing to analyze parcels 1 and 2 separately. The hearings officer rejected that argument:

> "In addition, opponents argue that this standard is not satisfied because it is not specific to each proposed parcel. The Hearings Officer finds that the soil types and limitations are common to both properties and, therefore, if the evidence demonstrates that the entirety of the subject property is unsuitable for agricultural or forest purposes, then the proposed homesites on parcels created from the subject property will be located on land that is generally unsuitable for resource use as well." Record 38.

Intervenor responds that the range expert analyzed 12 plots across the two non-farm parcels. Apparently seven of those plots are on parcel 1 and five of those plots are on parcel 2. Two of the plots are very close to the dividing line between parcels 1 and 2. Eight of the plots are rated poor for forage availability (six on parcel 1; two on parcel 2). Three of the plots are rated fair (one on parcel 1, two on parcel 2). One plot on parcel 2 is rated good. The plot that is rated good is located very close to the boundary between parcels 1 and 2.

[13] The record suggests those water rights are for industrial and aggregate mining purposes. *Id*.

Petitioner argues the hearings officer erred in assuming parcels 1 and 2 were similarly unsuitable.

As intervenor points out, the proposed dwellings are not to be located in the only area rated good for forage availability. Although it is a reasonably close question, we cannot say that the evidence concerning forage availability is such that it was error for the hearings officer to assume parcels 1 and 2 were similarly unsuitable.

The fifth assignment of error is denied.

The county's decision is remanded.