BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PATRICIA CURTIN,
Petitioner,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2008-017

FINAL OPINION
AND ORDER

Appeal from Jackson County.

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

No appearance by Jackson County.

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

REVERSED 05/22/2008

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 a hearings officer's decision denying her application for a forest template dwelling.

FACTS

The challenged decision is on remand from LUBA. *Curtin v. Jackson County*, __ Or LUBA ___ (LUBA No. 2007-101, September 28, 2007) (*Curtin I*). As explained in *Curtin I*, petitioner applied for a forest template dwelling on the subject property, tax lot 1100. Access to tax lot 1100 is via Timberlake Drive, a graveled road that has existed for over 30 years. For present purposes, Timberlake Drive has several distinct sections: (1) a public road owned and maintained by the county, (2) a private road owned by the county, which was acquired through a tax foreclosure, but has not been dedicated or maintained as a public right of way, and (3) a private road that runs through a seven-lot subdivision created in 1968.[1] Tax lot 1100 is one of the seven lots created in 1968. The two private road sections together serve more than 20 lots or parcels. A key issue in the present case is whether tax lot 1100 has a legal right of access over the third section of Timberlake Drive described above.

In *Curtin I*, the hearings officer found that the application satisfied all code provisions governing forest template dwellings, but denied the application because the existing road access did not comply with Jackson County Land Development Ordinance (LDO) 9.5.3, a development standard providing that "[a] private road may provide common access to no more than twelve lots or parcels."[2] LDO 9.5.3 is part of Section 9.5, entitled Access Design

[1] The actual character of the various sections of Timberlake Drive is more complicated. The above description is simplified for convenience.

[2] LDO 9.5.3 sets out width, surface and other standards for private roads. The prefatory paragraph provides, in relevant part:

> "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. * * *"

1 Standards. LDO 9.5.1 describes when Section 9.5 standards apply.[3] In *Curtin I*, the hearings
2 officer relied on LDO 9.5.1 to support his conclusion that the access design standards in
3 LDO 9.5, specifically LDO 9.5.3, apply to proposed development of an existing lot or parcel
4 that will use an existing private road or easement for access. Because the private road
5 portion of Timberlake Drive serves more than 12 lots or parcels, the hearings officer denied
6 the application for noncompliance with LDO 9.5.3.
7 Petitioner appealed the hearings officer's decision to LUBA. We remanded, rejecting
8 the hearings officer's interpretation of LDO 9.5.1, and concluding to the contrary that the
9 standards of LDO 9.5.3 apply only to proposals to *create* public or private roads, not to
10 *existing* private roads that provide access to existing lots or parcels.[4] We stated that "[i]t is
11 undisputed that petitioner's application does not purport to create a new road or driveway
12 * * *" and therefore under LDO 9.5.3 does not apply to petitioner's application. Slip op 4.
13 The county did not file a brief in *Curtin I* and did not appeal our decision to the Court of
14 Appeals.

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[3] LDO 9.5.1 is entitled "Applicability," and provides in relevant part:

> "The access standards of this Section will apply to the *creation* of publicly dedicated roads, private roads and driveways *to serve as access to new lots as part of land division or to provide access to a lot prior to its development*. All access improvements must comply with the requirements set forth in this Section. * * *" (Emphasis added.)

[4] Specifically, we held:

> "Petitioner argues, and we agree, that the hearings officer misread LDO 9.5.1. That provision plainly makes the access standards applicable to the *creation of new roads and driveways* that either (1) serve as access to newly created lots or (2) provide access to existing lots. The hearings officer's interpretation of LDO 9.5.1 ignores the threshold requirement that, in order for the access standards of LDO 9.5 to apply, a new road or driveway must be created to provide access to new or existing lots. It is undisputed that petitioner's application does not purport to create a new road or driveway, and that access to the property is over an existing non-public county road. The hearing officer misconstrued LDO 9.5.1 in determining that LDO 9.5.3 applied to petitioner's application.
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> "We agree with petitioner that the access standards set forth in LDO 9.5.3 do not apply to the application because no road is being created. Because LDO 9.5.3 does not apply to the application, the hearings officer erred in denying the application based on the application's failure to satisfy the access requirements set forth in LDO 9.5.3." *Curtain I*, slip op 4.

On remand, the hearings officer conducted a non-evidentiary hearing and issued a decision that concluded that the standards in LDO 9.5.3 apply, albeit for a different reason than the one LUBA rejected in *Curtin I*.[5] The hearings officer concluded that petitioner's application does in fact involve the "creation" of a private road for purposes of LDO 9.5.1, and therefore denied the application because the existing private road does not comply with the LDO 9.5.3 construction standards for a private road. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer erred in denying the application on remand based on a standard that LUBA determined in *Curtin I* is not applicable. According to petitioner, the doctrine of "law of the case" prohibits the county from revisiting an issue that was resolved on appeal before LUBA or the Court of Appeals, or basing its remand decision on a new, unresolved issue that could have been, but was not, raised during the initial proceedings and on the initial appeal to LUBA. *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992); *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32, 35 (1994).[6]

The county has filed no response brief in this appeal. Absent a county response to the petition for review, we see no purpose in an extended discussion of the hearings officer's

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[5] A different hearings officer issued the decision on remand.

[6] In *Louisiana Pacific*, we explained:

> "Based on the court's holding in *Beck*, and the above reasoning, we conclude the permissible scope of local proceedings following a LUBA remand of a local government's decision, is framed by LUBA's resolution of the assignments of error in the first appeal. Resolved issues, which may not be considered in the local government proceedings on remand, include (1) issues presented in the first appeal and rejected by LUBA; and (2) issues which could have been, but were not, raised in the first appeal. Unresolved issues, which may be considered in a local government proceeding on remand, include (1) issues presented in the first appeal that LUBA either sustains or does not consider, and (2) issues that could not have been raised in the first appeal. Thereafter, in a subsequent appeal to LUBA of a local decision on remand, a petitioner may raise issues concerning the local government's determinations regarding such unresolved issues." 28 Or LUBA at 35 (footnote omitted).

decision or of the doctrine of law of the case. For the following reasons, we agree with petitioner that the hearings officer erred in denying the application on remand in a manner contrary to our resolution of issues in *Curtin I*.

As noted, in *Curtin I* we held in relevant part that under LDO 9.5.1 the standards in LDO 9.5.3 apply to petitioner's application only if petitioner proposes to create a private road, and it was undisputed in that appeal that petitioner did not propose the creation of a private road. We concluded, therefore, that the standards in LDO 9.5.3 did not apply to petitioner's application. Whether those critical rulings were right or wrong, those rulings became "resolved" issues for purposes of *Beck* when no party chose to appeal our decision.

On remand, the hearings officer considered the question that had been "undisputed" on appeal, whether petitioner's application proposed the creation of a private road. The hearings officer examined the various easements created after 1967 involving the seven-lot subdivision where the subject property is located, and concluded that the only easements that gave the subject property legal access over the existing third section of Timberlake Drive were recorded in September 2006, contemporaneously with the filing of petitioner's application for a forest template dwelling. From that premise, the hearings officer reasoned that petitioner's forest template application proposed or at least depended upon the "creation" of a private road in September 2006. Therefore, the hearings officer concluded, LDO 9.5.1 dictates that the access design standards of LDO 9.5 apply to petitioner's contemporaneously filed forest template dwelling application, specifically the LDO 9.5.3 standards for construction of a private road. Because petitioner made no attempt to demonstrate that it was feasible to improve the existing private road to meet LDO 9.5.3 construction standards, the hearings officer therefore denied the forest template dwelling application.

Nothing in our remand to the county suggested that the scope of remand should include exploring new and different bases for concluding that LDO 9.5.3 in fact applies, or

that the county should take up the heretofore undisputed question of whether petitioner's application proposed the creation of a private road, for purposes of LDO 9.5.1.

Absent remand instructions to the contrary, a local government may choose to expand the scope of remand proceedings to consider issues in *addition* to those that formed the basis for remand. *Schatz v. City of Jacksonville*, 113 Or App 675, 681, 835 P2d 923 (1992). However, we do not believe that discretion extends to *revisiting* issues that were actually resolved on appeal. As the Court of Appeals stated in *McKay Creek Valley Ass'n*, 122 Or App *McKay Creek Valley v. Washington County*, 122 Or App 59, 64, 857 P2d 167 (1993) at 64, "the overriding principle of *Beck* is that issues in land use cases must be brought to finality at the earliest available opportunity." The hearings officer denied the application based on an issue that was resolved adversely to the county in LUBA's decision. Under these circumstances, we agree with petitioner that it is inconsistent with *Beck* for the hearings officer to revisit that resolved issue.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Under this assignment of error, petitioner challenges the hearings officer's reliance on LDO 10.2.1(E)(1), a provision that is part of the county's subdivision and partition ordinance.[7] Petitioner argues that LDO 10.2.1(E)(1) has no applicability to petitioner's forest template dwelling application, which does not involve a subdivision or partition or property. Similarly, petitioner argues that the internal citation to ORS 92.014 indicates that LDO 10.2.1(E)(1) is intended to implement that statute, which simply provides that no

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[7] LDO 10.2.1(E)(1) provides:

> "No person may create a street or road, whether public or private, for the purpose of subdivision, partition, or development without approval as required by this Ordinance. 'Creation' of a street or road includes either the physical construction of the roadway, or the recordation of an instrument showing the existence of a right-of-way or easement for multiple parcels access to two (2) or more ownerships. [See ORS 92.014]. This provision does not apply to creation of driveways serving a parcel or tract of land."

1 person may create a street or road for the purpose of subdividing or partitioning land without
2 city or county approval.

3 The hearings officer apparently cited LDO 10.2.1(E)(1) to support his conclusion that
4 recordation of the September 2006 easements had "created" the third private road section of
5 Timberlake Drive, for purposes of LDO 9.5.1. We do not understand the hearings officer to
6 have found that LDO 10.2.1(E)(1) is an approval criterion applicable to petitioner's forest
7 template dwelling application, or to have denied the application based on LDO 10.2.1(E)(1).
8 With that understanding, petitioner's arguments under this assignment of error do not
9 provide an independent basis for reversal or remand.

10 The second assignment of error is denied.

11 **CONCLUSION**

12 Petitioner contends that if the first assignment of error is sustained, then the county's
13 decision "violates a provision of applicable law and is prohibited as a matter of law," and
14 therefore should be reversed. OAR 661-010-0071(1)(c). Petitioner argues that it is
15 undisputed that the forest template dwelling application meets all other approval criteria, and
16 that if the county is precluded under *Beck* from again denying the application for reasons
17 inconsistent with LUBA's rulings in *Curtin I*, LUBA should reverse the decision.

18 The county has not filed a response brief or offered a rationale for remand rather than
19 reversal. We agree with petitioner that, under the circumstances of this case, the county's
20 decision on remand to deny the application under LDO 9.5.3 violated a provision of
21 applicable law and is prohibited as a matter of law.[8]

22 The county's decision is reversed.

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[8] Petitioner does not request that LUBA reverse the county's decision under ORS 197.835(10)(a) and order the county to approve the application, and we do not consider that question.