BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TIMOTHY P. SPERBER,
Petitioner,

vs.

COOS COUNTY,
Respondent.

LUBA No. 2008-072

FINAL OPINION
AND ORDER

Appeal from Coos County.

Timothy P. Sperber, Coquille, filed the petition for review and argued on his own behalf.

No appearance by Coos County.

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

BASSHAM, Board Member, did not participate in the decision.

REMANDED 08/28/2008

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 that denies his request for a variance from county road standards.

FACTS

The relevant facts are set out in the petition for review:

> "The Property is less than a mile from the [City of Coquille's] downtown area, and is located within the City's acknowledged UGB. The Property consists of 63.5 acres of undeveloped land somewhat rectangular in shape, being roughly 2,350 feet east to west by 1,200 feet north to south. Although the Property is within the City's UGB, it is zoned Rural Residential-5 (RR-5). Entrance to the Property is about 300 feet from Shelley Lane, a Coos County * * * collector road, and an existing 50-foot wide private easement provides direct access [from the Property] to Shelley Lane.
>
> "* * * * *
>
> "[Petitioner intends] a series partitioning of the Property. Under this concept, the Property's 63.5 acres zoned RR-5 would be divided into 12 residential parcels during the four year period that began in 2007 and will end in 2010. Division of the Property began at the southeast access road and will proceed north and west, to facilitate orderly and economic construction of roads and other infrastructure. There will be 4,010 linear feet of roads at the Property * * *. Based on County standards, the average daily [vehicle] trips (ADT) at the Property is 48.
>
> "In April 2006, in connection with the first three-way partition of the property and the siting of a temporary dwelling, [petitioner was] granted a permit from the County Road Department authorizing [him] to construct roads at the Property under rural road standards rather than under urban road standards." Petition for Review 7-8 (footnotes and citations omitted).

At some point, the county took the position that the internal roads that would be needed to provide access to the parcels that petitioner plans to create by serial partition will need to be constructed to urban standards. Under Coos County Zoning and Land Development Ordinance (LDO) Table 7.3, *urban* standard roads for the proposed parcels would require a 50-foot right of way and a 28-foot paved surface. Under LDO Table 7.2 a *rural* standard road would require a 50-foot right of way and a 12-foot wide paved surface if

the road served no more than three parcels or a 60-foot right of way and a 20-foot wide paved surface if the road served more than three parcels. Petitioner requested the variance to allow his road to meet the rural standard rather than the urban standard. Record 179-203.

Petitioner contends that the LDO 5.3.150 and 5.3.350 variance criteria govern his request for a variance. The city took the position below that those criteria do not apply and that the "Variance Standards on County Facilities" which appear at LDO 7.1.550(14), apply instead. The planning director denied the requested variance. Record 152-53. The staff report that the planning director relied on to deny the request included the following explanation for why the city believes LDO 5.3.150 and 5.3.350 do not apply:

> "[These] criteria [are] for variance[s] to property regulations and standards, not road standards. The correct criteria for [a] variance to the road standards [are] found in [LDO] 7.1.550 Access Management (14) Variance Standards on County Facilities. * * *" Record 164.

Petitioner appealed the planning director's decision to the planning commission, which affirmed the planning director's decision. Record 74-77. The staff report that supported the planning commission's decision provided no additional analysis regarding the correct criteria for the requested variance.

Petitioner appealed the planning commission's decision to the board of county commissioners. The board of county commissioners affirmed the planning commission's decision. Record 3. The planning staff report that supports the board of county commissioners' decision essentially reiterates the position taken in the earlier staff report:

> "The variance application was denied because the applicants chose to apply under the variance criteria in Chapter V of the [LDO] for dimensional standards. Article 7.1 of the [LDO] applies to road development standards in rural and urban areas. Staff has consistently applied the variance criteria from Chapter VII to the urban and rural road improvement standards." Record 11.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Under his first assignment of error, petitioner alleges the county applied the wrong variance criteria. Petitioner devotes 25 pages of the petition for review to argument in support of the first assignment of error. Because we agree with petitioner that the county did not adequately explain why it applied the criteria at LDO 7.1.550(14) and did not apply the variance criteria at LDO 5.3.150 and 5.3.350 in reviewing petitioner's variance request, we remand so that the county can provide that explanation. If petitioner is correct that LDO 5.3.150 and 5.3.350 provide the relevant approval criteria, most of petitioner's arguments under the first assignment of error challenge findings that apply the wrong criteria. Our review of those arguments is at least premature and may be unnecessary.

A. Introduction

The LDO includes ten Chapters (Chapters I through X) and five Appendices. The ten Chapters are broken down into numerous Articles and the Articles are broken down into numerous Sections. We list the ten Chapters by name below:

Chapter I – Introduction (General)

Chapter II – Definitions

Chapter III – Supplemental Provisions

Chapter IV – Zoning

Chapter V – Administration

Chapter VI – Land Divisions

Chapter VII – Street and Road Standards

Chapter VIII – Surveying Standards

Chapter IX – Residential Parks, Campgrounds, Etc.

Chapter X – Off Street Parking

The LDO 5.3.150 and 5.3.350 variance standards that petitioner believes the county should have applied appear in LDO Article 5.3 Variance, which is one of eight articles under Chapter V – Administration. The LDO 7.1.550(14) variance standards that the county actually applied appear in LDO Article 7.1 General Provisions, which is one of three Articles under Chapter VII – Street and Road Standards.[1]

With the above context, we turn first to the LDO 5.3.150 and 5.3.350 variance standards that petitioner argues the county should have applied in this case.

B. LDO 5.3.150 and 5.3.350

LDO 2.1.200 provides the following definition:

> "VARIANCE: A device which may grant a property owner relief from certain provisions of this Ordinance when because of the particular physical surroundings, shape or topographical conditions of the property, compliance would result in a particular hardship upon the owner, as distinguished from a mere inconvenience."

Viewed in context, the "Ordinance" referred to in the above definition is the LDO. Under the above definition, a variance is potentially available to allow a property owner to avoid complying with "provisions of [the LDO]" in certain circumstances.

LDO 5.3.150 prohibits the county from granting a variance where the hardship that justifies the variance is "[s]elf-inflicted."[2] LDO 5.3.350 sets out variance approval criteria.[3]

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[1] The other Articles in Chapter VII are LDO Article 7.2 Rural Road Standards and LDO Article 7.3 Urban Road Standards.

[2] LDO 5.3.150 provides:

> "**Self-inflicted Hardships**. A variance shall not be granted when the special circumstances upon which the applicant relies are a result of the actions of the applicant or owner or previous owners, including but not limited to:
>
> "♦ self-created hardship
>
> "♦ willful or accidental violations
>
> "♦ manufactured hardships[.]"

[3] As potentially relevant here, LDO 5.3.350 provides:

Under those variance criteria, the county must first find that the proposed variance is (1) needed to avoid an "unnecessary physical hardship," or (2) justified by "exceptional or extraordinary circumstances," or (3) needed to avoid depriving the applicant of a privilege others in the zoning district enjoy. If any one of those findings can be made, the county may grant a variance if it "will not be detrimental to the public health, safety, or welfare or materially injurious to properties or improvements in the near vicinity."

The way the county's variance provisions are written and structured we see no reason why they would not apply to petitioner's requested variance. The variance provisions are located in the generally applicable "Administration" Chapter of the LDO. They authorize variances from provisions of the LDO, and the rural and urban road standards appear in Articles 7.2 and 7.3 of the LDO. There is nothing about the text of LDO Article 5.3 or the contextual provisions discussed above that would make the LDO 5.3.150 and 5.3.350 variance standards inapplicable to petitioners request for a variance to the LDO Article 7.3 urban road standards.

"**Criteria for Approval of Variances**. No variance may be granted by the Planning Director unless, on the basis of the application, investigation, and evidence submitted;

"1. Both findings 'A' and 'B' below are made:

"A. i. that a strict or literal interpretation and enforcement of the specified requirement would result in unnecessary physical hardship and would be inconsistent with the objectives of this Ordinance; or

"ii. that there are exceptional or extraordinary circumstances or conditions applicable to the property involved which do not apply to other properties in the same zoning district; or

"iii. that strict or literal interpretation and enforcement of the specified regulation would deprive the applicant of privileges legally enjoyed by the owners of other properties or classified in the same zoning district;

"B. that the granting of the variance will not be detrimental to the public health, safety, or welfare or materially injurious to properties or improvements in the near vicinity."

C. LDO 7.1.550(14)

As noted above, LDO Chapter VII – Street and Road Standards is divided into three Articles, Article 7.1 – General Provisions, Article 7.2 – Rural Road Standards, and Article 7.3 – Urban Road Standards. Article 7.1 is broken down into thirteen Sections that deal with a variety of topics. One of those Sections is LDO 7.1.550 – Access Management. LDO 7.1.550 is itself broken down into 14 Sections. We set out below Sections 1, 2, and 3 and portions of section 4 to provide context. We then set out Section 14, which petitioner contends the county erroneously applied to his variance application:

"**Section 1. Intent and Purpose**

> "The intent of this ordinance is to *manage access* to land development while preserving the flow of traffic in terms of safety, capacity, functional classification, and level of service. Major roadways, including arterials, and collectors, serve as the primary network for moving people and goods. These transportation corridors also provide access to businesses and homes and have served as the focus for commercial and residential development. *If access points are not properly designed*, these roadways will be unable to accommodate the needs of development and retain their primary transportation function. This ordinance balances the right of *reasonable access* to private property with the right of the citizens of the county and the State of Oregon to safe and efficient travel.
>
> "These regulations also further the orderly layout and use of land, protect community character, and conserve natural resources by promoting well-designed road and access systems and discouraging the unplanned subdivision of land.

"**Section 2. Applicability**

> "This ordinance shall apply to all *arterials and collectors* within the county and to all *properties that abut these roadways*.

"**Section 3. Conformance with Plans, Regulations, and Statutes**

> "This ordinance is adopted to implement the *access management policies* of the county as set forth in the Transportation System Plan.

"**Section 4. Definitions**

"1. Access. A way or means of approach to provide pedestrian, bicycle, or motor vehicular entrance or exit to a property.

"2. Access Classification. A ranking system for roadways used to determine the appropriate degree of access management. Factors considered include functional classification, the appropriate local government's adopted plan for the roadway, subdivision of abutting properties, and existing level of access control.

"3. Access Connection. Any driveway, street, turnout or other means of providing for the movement of vehicles to or from the public roadway system.

"4. Access Management. *The process of providing and managing access to land development* while preserving the regional flow of traffic in terms of safety, capacity, and speed.

"* * * * *

"**Section 14. Variance Standards on County Facilities**

"1. The granting of the variation shall be in harmony with the purpose and intent of these regulations and shall not be considered until every feasible option for meeting *access standards* is explored, as determined by the County.

"2. Applicants for a variance from these standards must provide proof of unique or special conditions that make strict application of the provisions impractical. Applicants shall include proof that;

"a. *Indirect access* cannot be obtained;

"b. No financially reasonable engineering or construction solutions can be applied to mitigate the condition; and

"c. *No alternative access is available* from a street with a lower functional classification than the primary roadway.

"3. No variance shall be granted where such hardship is self-created." (Italics added; underlining in original.)

LDO 7.1.550(1), quoted above, states "[t]he intent of this ordinance is to manage access to land development." The referenced ordinance is almost certainly the ordinance that

adopted LDO 7.1.550 –Access Management rather than the LDO as a whole.[4] As the italicized language in LDO 7.1.550(1) – (4) and (14) quoted above makes reasonably clear, LDO 7.1.550 is concerned with access management. LDO 7.1.550(2) states that LDO 7.1.550 is concerned with access to county "arterials and collectors." Simplifying somewhat, petitioner argues that while the variance standards that are set out at LDO 7.1.550(14) might apply in place of the LDO 5.3.150 and 5.3.350 variance criteria if he were seeking a variance to the access standards that govern access to county arterials and collectors, he is not seeking access to a county arterial or collector and is not seeking a variance to whatever access standards would govern such access. Petitioner contends he already has access to Shelly Lane, a county collector. Petitioner contends that the LDO 7.1.550 variance criteria simply do not apply to his application for variances to the standards that govern rights of way and roadway improvements within his property to serve the proposed parcels, since his property does not abut a county collector or arterial.

Without deciding the question, it appears that "access standards" are a subset of the street and road standards set out in LDO Chapter VII and that the LDO 7.1.550 variance criteria apply to access standards and do not apply more generally to other transportation standards in LDO Chapter VII that govern roadway improvement. As petitioner points out, it is hard to see how petitioner would go about proving that "[i]ndirect access cannot be obtained," or that "[n]o alternative access is available from a street with a lower functional

[4] Although we cannot be sure, it seems likely that LDO 7.1.550 – Access Management was adopted to respond to requirements in the Transportation Planning Rule, OAR chapter 660, division 12 for local measures regarding access management. OAR 660-012-0005 provides the following definition:

> "(1) 'Access Management' means measures regulating access to streets, roads and highways from public roads and private driveways. Measures may include but are not limited to restrictions on the siting of interchanges, restrictions on the type and amount of access to roadways, and use of physical controls, such as signals and channelization including raised medians, to reduce impacts of approach road traffic on the main facility."

classification," which is required by LDO 7.1.550(14)(2)(a) and (c), when he is not seeking access to a county collector or arterial.

The county's decision essentially offers only one reason for rejecting petitioner's contention that the LDO 5.3.150 and 5.3.350 variance standards do not apply and the LDO 7.1.550(14) variance standards do apply—that the county has always done it that way. That is not a sufficient response. *Swyter v. Clackamas County*, 40 Or LUBA 166, 184 (2001). The text of the LDO determines the applicable variance criteria, not past county practice. As we have already explained, that text appears to support to petitioner's argument.

Remand is required for the county to adopt a reviewable and sufficient explanation for why it believes the LDO 7.1.550(14) variance standards apply. If the county concludes on remand that petitioner is correct and that the LDO 5.3.150 and 5.3.350 variance standards apply, it should apply those standards instead. In either event, the county may wish to consider adopting findings that address some of the many arguments that petitioner raises in his petition for review. In the event petitioner appeals the county's decision on remand, it seems likely that at least some of those arguments would arise in such an appeal, and the decision before us in this appeal offers no response to a number of those arguments.

The first assignment of error is sustained in part.[5]

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, petitioner alleges that the record in this matter establishes that the application in this matter complies with the LDO 5.3.350 variance criteria as a matter of law. LDO 5.3.350(1)(B) requires that the requested variance to allow rural standard roads rather than urban standard roads will "not be detrimental to the public health, safety, or welfare or materially injurious to properties or improvements in the near vicinity."

[5] In sustaining the first assignment of error we limit our decision to agreeing with petitioner that the county's decision needs to be remanded for a reviewable explanation for the county's decision to apply the LDO 7.1.550(14) variance criteria. We do not reach or decide the other arguments petitioner presents under the first assignment of error.

It is hard to imagine an evidentiary record that would demonstrate compliance with such a subjective standard as a matter of law. The record in this appeal does not do so. The evidence in the record might well be sufficient to support a decision by a reasonable decision maker that the application complies with that standard, but it falls considerably short of demonstrating compliance with that exceedingly subjective standard as a matter of law.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under this assignment of error, petitioner alleges the county was obligated by ORS 215.427(2), and LDO 5.3.250(8) which implements that statute, to notify him of any evidentiary shortcomings the county believed were present in his application.[6] Petitioner argues it was error for the county to fail to give him such notice and then find that petitioner failed to carry his evidentiary burden concerning the LDO 7.1.550(14) variance criteria.

In rejecting a similar argument based on ORS 215.427(2) in petitioner's appeal of a separate county decision that denied his rezoning request, we explained that petitioner misreads ORS 215.427(2):

> "Petitioner misunderstands the purpose and legal effect of ORS 215.427(2). The statute merely provides that a local government may request additional information before proceeding with a permit or rezoning application if it believes such information is necessary. The statute does not mean that once a

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[6] ORS 215.427(2) provides:

> "If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section upon receipt by the governing body or its designee of:
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> "(a) All of the missing information;
>
> "(b) Some of the missing information and written notice from the applicant that no other information will be provided; or
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> "(c) Written notice from the applicant that none of the missing information will be provided."

> local government indicates the application is complete that necessarily means the application includes substantial evidence that all applicable criteria are satisfied. When the local government indicates the application is complete, that merely means that the local government has determined that it has sufficient information to render a decision, not that the application necessarily will be or must be approved. * * *" *Sperber v. Coos County*, ___ Or LUBA ___ (LUBA No. 2008-046, June 23, 2008), slip op at 8.

Because petitioner's third assignment of error in this appeal is similarly based on a misunderstanding of the legal obligation imposed by ORS 215.427(2), it provides no additional basis for remand. The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioner alleges the county is legally obligated to refund 50 percent of his application fees. As relevant, ORS 215.427 provides:

> "(1) [F]or land within an urban growth boundary * * *, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete. * * *.
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> "* * * * *
>
> "(8) Except when an applicant requests an extension under subsection (5) of this section, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days * * * after the application is deemed complete, the county shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application."

Petitioner argues that he demanded refund of 50 percent of his application fee and other fees he paid to the county. According to petitioner, "[s]taff agreed to look into the matter, but as of this date the County has not made any refund." Petition for Review 46.

The only decision that is before us in this appeal is the county's decision denying petitioner's variance application. That decision takes no position regarding refund of application fees under ORS 215.427(8). When the county makes a decision regarding refund of fees, petitioner will be free to seek review of that decision in an appropriate forum if he is dissatisfied with that decision.

The fourth assignment of error is denied.

The county's decision is remanded.