BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOYCE ESTREMADO,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

THOMAS LOWELL,
Intervenor-Respondent.

LUBA No. 2010-001

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Mark S. Bartholomew, Medford, filed the petition for review and argued on behalf of the petitioner. With him on the brief was Hornecker, Cowling, Hassen & Heysell, LLP.

No appearance by Jackson County.

James R. Dole, Grants Pass, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Cauble, Dole, Sorenson & Ransom LLP.

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

REMANDED 04/26/2010

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision approving a dwelling.

MOTION TO INTERVENE

Thomas Lowell, the applicant below, moves to intervene on the side of the respondent. The motion is allowed.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to address new matters raised in the response brief. The reply brief is allowed.

FACTS

Intervenor applied for what is referred to as an "ownership of record dwelling" on a vacant five-acre parcel zoned Woodland Resource (WR). The subject property is one of three parcels created in 1980 as the result of the county's approval of a minor land partition application submitted by intervenor. One of the criteria applicable to the proposed partition in 1980 required that an application for a minor land partition contain:

> "a statement that the proposed parcels are served with *legal access*, or if they are not so served, that they will not be used for residential purposes and that the applicant will record an instrument providing notice that the parcel is not served with legal access and cannot be used for residential purposes until legal access is provided." (Emphasis added.)

The term "legal access" is defined in the 1980 minor partition ordinance as "[a]ccess to proposed partitioned land in a manner required by the Jackson County Zoning Ordinance." The 1980 version of the county zoning ordinance required that "all lots used for residential purposes shall abut a public road or approved way for a distance of at least 25 feet." Apparently it was clear that the three parcels created by the 1980 partition would not abut a "public road or approved way" because at the time of the partition, access to the parcel was provided by an existing easement road running from Galls Creek Road, a public road, through petitioner's property to the subject property. The easement road serves multiple

properties.[1] In recognition of the lack of required "legal access" for residential purposes that was required by the zoning ordinance, the partition application included the following statement:

> "Forestry and/or agricultural purposes only – by reservation in deeds. Not creating a private road—no residential use." Record 157.

The county administratively approved the partition application in 1980, but no reservation in deeds memorializing the limitation of the properties' use to "forestry and/or agricultural purposes only" was ever recorded.

In 1983, petitioner and intervenor entered into an easement agreement regarding the easement road. The scope and effect of that easement was the subject of litigation between petitioner and intervenor until 1998, when the circuit court found that the scope of the easement included access to the subject property and other properties for residential use. Record 212-13.

The application that is before us in this appeal seeks approval for an ownership of record dwelling on a five-acre parcel created by the 1980 partition. The planning department reviewed intervenor's ownership of record dwelling application, concluded that the subject property has the required legal access based on the 1983 easement, and approved the application. Record 297. Petitioner appealed the decision to the hearings officer. The hearings officer affirmed the planning department's decision, and this appeal followed.

ASSIGNMENT OF ERROR

In 1980 the applicant sought and received approval for parcels that would be used for "[f]orestry and/or agricultural purposes only," and would not be put to "residential use."[2] As

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[1] It appears that the easement is 30 feet wide, but the developed road is less than 30 feet wide and that it is a gravel road. Record 6, 215, 263.

[2] The planning department and the hearings officer both appear to understand the county's 1980 partition approval to have been limited to approval of what was requested: partition into three parcels, the use of which would be limited to forest or agricultural uses.

explained above, that limitation on the use of the three parcels was proposed because the "legal access" required for residential use under the 1980 zoning ordinance was not provided when the partition was approved in 1980.

As a preliminary matter, we note that the hearings officer's decision introduces and uses the term "county-recognized access" in determining that the requirement for "legal access" has been satisfied. Record 4. It appears that the term "county-recognized access" may have come from a staff analysis of the 1980 use limitation as it applied to a 2004 application for a dwelling on the other five-acre parcel created in 1980. In approving an ownership of record dwelling on that parcel in 2004, planning staff took the position that, based on the language in the 1980 partition application, in order for that dwelling to be approved, one of the access standards set forth in Jackson County Land Development Ordinance (LDO) 10.4.3 must be satisfied. Record 4-5, 48.[3] That 2004 dwelling is owned by petitioner and is accessed by an exclusive easement over other property owned by petitioner in accordance with LDO 10.4.3(A)(3). For present purposes, we understand "county-recognized access" to be synonymous with the "legal access" required by either the 1980 zoning ordinance, or by current access requirements for new land divisions found at LDO 10.4.3, which we set out below.

The hearings officer concluded that the existing easement road qualifies as "county-recognized access," as a result of the 1983 easement agreement and circuit court decision concerning that easement agreement, even though there appears to be no dispute that the

[3] That 2004 dwellling approval provided in relevant part:

> "The property is a lawfully created parcel * * * because it was reviewed through file 80-186-MP, which was approved by Jackson County on July 28, 1980. However, at the time of creation, the parcel did not meet minimum road frontage requirements and was therefore limited to resource use until *County recognized access* could be provided. 2004 LDO Section 10.4.3(3) allows access for development purposes to be provided to a single parcel by a properly recorded exclusive easement. The applicant has provided verification of an exclusive easement * * *." Record 48 (Emphasis added).

existing easement road does not satisfy either the 1980 ordinance "legal access" requirements or the current LDO 10.4.3 minimum access requirements. In two subassignments of error under the first assignment of error, petitioner argues that the hearings officer erred in equating intervenor's right of access to the parcel under the 1983 easement with the "legal access" that was required under the 1980 zoning and land division ordinances. According to petitioner, to remove the use limitation and approve residential use of the subject property, the county must find that the easement road satisfies the 1980 zoning ordinance "legal access" requirement that the subject property abut a "public road or approved way" for at least 25 feet.[4] In the alternative, petitioner argues that the 1980 "legal access" requirement could be met if the parcel satisfies the current minimum access standards for land divisions found at Jackson County Land Development Ordinance (LDO) 10.4.3, which according to petitioner replaced the 1980 zoning ordinance minimum access standards. LDO 10.4.3 provides in relevant part:

> "Legal, practical, and physical access must be provided to all parcels or lots created as part of a land division. Access will be by one (1) of the following means:
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> "1) Frontage abutting a publicly maintained or approved private road (see Chapter 9) for a distance of at least 25 feet;
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> "2) Frontage abutting a Bureau of Land Management (BLM) or U. S. Forest Service (USFS) road for a distance of at least 25 feet, provided the applicant, or his authorized representative, provides a copy of written approval for a long-term road access use permit in conformance with the BLM or USFS requirements;
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> "3) A recorded exclusive easement no less than 14 feet in width that connects to a publicly maintained road or approved private road for driveway access. A prescriptive easement is not considered suitable access for division purposes * * *."

[4] Intervenor does not assert that the easement road qualifies as an "approved way" within the meaning of the 1980 zoning ordinance.

The 1983 easement provides a right of access to the parcel in the sense that use of the road is one of the bundle of real property rights possessed by the owner of the subject property. However, it does not necessarily follow that the easement road constitutes "legal access," as that term was used in the 1980 zoning ordinance. There is no dispute that, under the 1980 land division ordinance, a new parcel intended for residential use was required to have more than just a legal right to cross a neighbor's property for access. Under the 1980 land division ordinance, new parcels were required to "abut a public road or approved way for a distance of at least 25 feet." The 1980 use limitation was applied to prohibit residential use unless and until access that satisfied that standard, or a future standard that replaced that standard, was provided. The hearings officer's decision does not explain why the 1980 use limitation to farm or forest use can be lifted or ignored based on the existing easement road that apparently does not comply with either the 1980 requirement for "legal access" or LDO 10.4.3

Petitioner also assigns error to the hearings officer's conclusion that the reasoning in *Curtin v. Jackson County*, 55 Or LUBA 79 (2007) precludes the county from requiring intervenor to provide "legal access" to the subject property in accordance with the 1980 zoning ordinance or LDO 10.4.3.[5] Petitioner argues that *Curtin* is inapposite, because it involved the road improvement *design* standards at LDO 9.5.1, which apply only in specified circumstances, rather than the minimum *access* requirements of LDO 10.4.3, which set out minimum access requirements for all lots or parcels created as part of a new land division. According to petitioner, LDO 10.4.3 is the modern equivalent of the 1980 ordinance legal

[5] LDO 9.5.1 provides:

> "The access standards of this Section apply to the creation of new publicly dedicated roads, private roads and driveways to serve as access to new lots as part of a land division, or to provide access to a lot prior to its development. Additional, higher standards may be required if deemed necessary by the County to ensure that safe and adequate access to lots and parcels will be provided. * * *"

access standard that permitted creation of a lot or parcel for residential use only if the specified road frontage was provided.[6]

We agree with petitioner that the hearings officer's reliance on *Curtin* is misplaced. In *Curtin*, the county denied a forest template dwelling application because a pre-existing private road to the property did not meet the county's road improvement design standards at LDO 9.5.1 and 9.5.3. However, based on the language of LDO 9.5.1, we concluded that the road improvement design standards in LDO Section 9.5 applied only when a new private road is constructed, and therefore did not provide a basis to deny the forest template dwelling, which had access via an existing private road that did not meet the LDO 9.5.1 road improvement design standards. *Curtin* does not stand for the proposition that under no circumstances can the county require that access to a lot or parcel meet applicable county residential minimum *access* standards. Our analysis in *Curtin* turned on the specific language of LDO 9.5.1, and did not address other code requirements or other circumstances.

In sum, we agree with petitioner that remand is necessary for the hearings officer to determine whether the easement road satisfies either the 1980 legal access requirement or the current LDO 10.4.3 minimum access requirement for parcels that are to be developed for residential use. If the easement road does not satisfy either requirement, then it appears that the application must be denied

The assignment of error is sustained.

The county's decision is remanded.

[6] We do not understand petitioner to argue that the easement road must satisfy either LDO Section 9.5 road improvement design standards or any other design standards that may be applicable.