BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BILL BURNESS and KATIE BURNESS,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

GREAT AMERICAN PROPERTIES
LIMITED PARTNERSHIP,
Intervenor-Respondent.

LUBA No. 2010-032

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners.

Paul E. Meyer, Douglas County Counsel, Roseburg, filed a response brief and argued on behalf of respondent.

Stephen Mountainspring, Roseburg, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Dole Coalwell Clark Mountainspring and Mornarich, PC.

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

AFFIRMED 10/29/2010

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

Petitioners appeal a county decision granting tentative approval of a rural subdivision.

REPLY BRIEFS

Petitioners move to file reply briefs to respond to waiver and mootness arguments in the county's and intervenor-respondent's response briefs. The reply briefs are allowed.

MOTION TO SUPPLEMENT AUTHORITIES

On September 23, 2010, intervenor-respondent (intervenor) moved to cite as supplemental authority an Oregon Supreme Court case issued that date. The motion is allowed.

FACTS

The subject property is a 170-acre parcel located near the rural community of Melrose in Douglas County. The subject property is planned and zoned for rural residential use with a five-acre minimum lot size. The proposed subdivision would create 34 five-acre lots. Two county roads, Melrose Road and Colonial Road, border the property on the northwest, west and south. Access to the new lots is via Melrose Road, with internal private streets over easements.

The county planning director approved the tentative subdivision plat, and petitioners appealed that approval to the planning commission, which denied the appeal and approved the plat. The board of county commissioners declined to review petitioner's appeal of the planning commission decision, which made the planning commission decision the county's final decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The first assignment of error contains six subassignments of error regarding various subdivision approval criteria.

A. Five-Acre Lots: LUDO 4.100.2

In the first subassignment of error, petitioners argue that the proposed five-acre lots do not meet the five-acre minimum required by the Douglas County Land Use Development Ordinance (LUDO), because the internal roads are counted towards the five-acre minimum. Petitioners argue that counting the area of internal roads towards the five-acre minimum lot size is inconsistent with LUDO 4.100.2, which provides that land divisions "conform in all respects with the applicable regulations" of LUDO Chapter 3 with respect to "lot size and dimensions." LUDO Chapter 3 includes the rural residential zoning standards, which require a five-acre minimum lot size.

Intervenor responds that petitioners failed to raise below any issue under LUDO 4.100.2 with respect to how the minimum lot size is affected by internal roads, and therefore any such issue under LUDO 4.100.2 is waived.[1] In a reply brief, petitioners argue that they raised the issue below in their local appeals to the planning commission and board of commissioners, where they stated:

> "LUDO 4.100(2) requires compliance with Chapter 3 including 'uses of land, lot size and dimensions, space for off street parking, landscaping and other requirements as may be set forth.' The decision states that the development standards of Article 8, the (5R) zone, applies, but does not identify which criteria of the development chapter apply or make findings." Record 40.

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[1] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

However, the above-quoted language does not raise any cognizable issue regarding how internal roads are to be taken into consideration in determining whether minimum lot size requirements are satisfied. Strangely enough, there appears to be no dispute that that a similar issue was raised below under a different LUDO provision, LUDO 4.100(12)(a), which requires in relevant part that lot "[d]imensions shall not include part of existing or proposed streets." LUDO 4.100(12)(a) appears to be specifically concerned with the question of how internal roads affect calculation of lot size and dimensions; LUDO 4.100.2 at best seems indirectly concerned with that question.

We address the parties' arguments regarding LUDO 4.100(12)(a) below under the sixth sub-assignment of error. For present purposes, we agree with intervenor that no issue was raised below under LUDO 4.100.2 regarding how internal roads are to be taken into consideration in determining whether minimum lot size requirements are satisfied, and therefore the first subassignment of error is denied.

B. Continuation of Adjoining Streets: LUDO 4.100.3

LUDO 4.100.3 requires in relevant part that the subdivision "provide for the continuation of major and secondary streets existing in adjoining subdivisions, or for their proper projection when adjoining property is not subdivided or partitioned," unless topographic conditions make continuation impractical.[2] Petitioners argue that the county failed to adequately address LUDO 4.100.3 and to support its findings with substantial evidence. In particular, petitioners argue that the county failed to require that the subdivision's internal roads connect to existing roads in two adjoining subdivisions.

[2] LUDO 4.100.3 provides:

> "A subdivision or partition shall provide for the continuation of major and secondary streets existing in adjoining subdivisions or partitions, or for their proper projection when adjoining property is not subdivided or partitioned, and such streets shall be of a width not less than the minimum requirements for streets set forth in these regulations. Where the Approving Authority determines that topographic conditions make such continuation or conformity impractical, exceptions may be made as provided in § 4.450 of this chapter."

According to petitioners, one adjoining subdivision plat appears to show a road stubbed to the subject property's northeastern boundary, and both adjoining subdivisions have existing roads separated by only one residential lot from the subject property's boundaries, lots which petitioners suggest could be converted to connecting roads.

Intervenor responds that petitioners waived this issue by failing to raise it with sufficient specificity below. According to intervenors, petitioners' only argument below regarding LUDO 4.100.3 was an argument that the planning director's and planning commission's findings regarding LUDO 4.100.3 were "conclusory" and "insufficient" to establish compliance with that standard, and that the findings are "not supported by the facts." Record 48, 348. Petitioners reply that their arguments at Record 48 and 348 clearly raised the issue of compliance with LUDO 4.100.3 and allow petitioners to challenge before LUBA the adequacy of the findings and supporting evidence regarding compliance with LUDO 4.100.3. We agree with petitioners. The planning commission adopted supplemental findings concluding that no connectivity is required because neither of the two adjoining subdivisions have streets stubbed to the property line with the subject property, which suggests that petitioners raised at least that issue with sufficient specificity to allow the county and other participants an opportunity to respond. Record 118.[3]

As framed by the findings and argument below and on appeal, the issues appear to boil down to (1) whether the county's finding that no roads are stubbed to the subject property boundary line is supported by substantial evidence, and (2) whether LUDO 4.100.3 requires connectivity to roads not stubbed to the property line. On the first issue, we agree

[3] The county adopted as findings a December 17, 2009 letter from intervenor's attorney stating, in relevant part:

> "The street system proposed on the tentative plan does not connect to streets in adjoining land divisions. There are two adjacent subdivisions, which are shown on staff exhibit 16. The plat for Fir Ridge Estates, which lies north and east of the property, is submitted and shows that its roads end internally. The plat for Champagne Creek Estates, Phase I, which lies east of the property, is submitted and likewise shows the roads end internally." Record 118.

with intervenor that the finding that no roads are stubbed to the boundary line is supported by substantial evidence. Both parties cite and rely on Record 133, a plat of Champagne Creek Estates Phase I, which depicts a 30-foot wide "access and utility easement to benefit this plat" labeled Chardonnay Way. The easement is a spur off of the larger internal road serving Champagne Creek Estates, known as Champagne Creek Drive, and the spur provides access to lots 13, 14, 15 and 16. Lot 13 and the southern portion of lot 14 appear to border the northeastern corner of intervenor's property. The spur road ends at the junction of lots 13 and 14 and the extreme northeastern tip of intervenor's property, where the road widens into what appears to be a turnaround that also provides access to lot 13. Intervenor argues that from the shape and size of the spur road, and the plat notation that the spur road is intended only to "benefit this plat," it is clear that the spur road is not intended to be stubbed to intervenor's property line as a connecting road between the properties. We agree with intervenor that a reasonable person could conclude from the plat at Record 133 that the spur road is an internal road that is not intended to be a connecting road with adjoining properties. The record supports the county's finding that the adjoining subdivision roads are internal roads.

The other argument advanced under this subassignment of error is whether LUDO 4.100.3 requires connection not only to roads stubbed to the property line, but also internal roads separated by lots from the property line. The findings do not address this interpretational argument, presumably because petitioners did not make it with any specificity below. Petitioners argue that whether LUDO 4.100.3 requires connection to internal roads is not a separate "issue" for purposes of ORS 197.763(1), but merely a more specific "argument" under the general issue of compliance with LUDO 4.100.3, challenging the county's apparent view that LUDO 4.100.3 is concerned only with roads stubbed to the property line. *See Friends of Linn County v. Linn County*, 54 Or LUBA 191, 195 (2007) (ORS 197.763(1) does not require a party to raise the precise argument below that they assert

on appeal to LUBA). However, even if that argument is within our scope of review, we agree with intervenor that petitioners have not established that the county erred in understanding LUDO 4.100.3 to be concerned only with roads stubbed to the property line. LUDO 4.100.3 includes requirements for "continuation" of streets existing in adjoining subdivisions and the "proper projection" of streets when the adjoining property is not subdivided. Where the adjoining subdivision has already been subdivided under the county's code, as in the present case, the requirement for "continuation" of existing streets is fairly read to take the existing road network in the platted subdivision as a given, and not to require that the developer stub roads to the property line in the hope that someday unplatted new intersections and new roads in existing platted subdivisions will be created to cross existing residential lots in order to connect to the subject property.

The second subassignment of error is denied.

C. Service to Adjacent Areas: LUDO 4.100.5

LUDO 4.100.5. provides in relevant part that a private road can provide access to rural residential lots upon findings "that such road provides access for not more than 50 units of land and service to adjacent areas or additional units of land is prevented by existing development pattern, topography, physical characteristics, land use regulations or other circumstances affecting the area to be served."[4] Petitioners argue that the county erred in approving a private road to serve less than 50 lots without also making the additional findings regarding service to adjacent areas required by LUDO 4.100.5. To the extent such a finding is found somewhere in the documents adopted by the county as supplemental findings, petitioners argue that they are not supported by substantial evidence.

[4] LUDO 4.415(1)(b) imposes an identically worded requirement. Under the third assignment of error, petitioners advance an identical challenge to the county's findings. Our resolution of this subassignment of error also disposes of that argument under LUDO 4.415(1)(b).

Intervenor responds that the county adopted a finding, at Record 126, explaining why service to adjacent areas is prevented by the existing development pattern, topography, and other circumstances.[5] Intervenor identifies evidence supporting that finding. Petitioners fail to acknowledge or challenge the finding at Record 126, and present no focused evidentiary challenge to those findings. Absent a more developed argument, petitioners' arguments do not provide a basis for remand. The third subassignment of error is denied.

D. Right of Way Width: LUDO 4.100.6

The county found that a short section of the right of way for Melrose Road, the county road adjoining and providing access to the subdivision, is less than the 70 feet required under current LUDO standards for a major collector. The county required intervenor to provide an "additional setback" for lots 23 and 24 adjoining Melrose Road, to facilitate any future right of way expansion. An additional setback is one option authorized under LUDO 4.100.6(a)(1) to reserve future right of way, "where appropriate."[6]

Petitioners object to the additional setback, arguing that it will reduce the size of lots 23 and 24 below five acres, and therefore is not "proper." Petitioners also argue that "it can

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[5] The county adopted as part of its supplemental findings the following:

> "Service to adjacent areas by the private road system in the proposed subdivision is prevented by the road design, the existing development pattern (adjacent areas served by their own internal road systems), topography (Champagne Creek isolates areas to the east), land use regulations (additional parcels may not be served), and other circumstances (deed restrictions limit use of the road system to the lots)." Record 126.

[6] LUDO 4.100.6(a) provides, in relevant part:

> "The right-of-way widths of streets shall conform to the widths and standards designated in the Douglas County Comprehensive Plan * * *
>
> "1. In the land division process, the 'offer-to-sell' is an appropriate method for reserving future right-of-way for eventual purchase by the County. Where appropriate, an applicant may choose to agree to additional setbacks in lieu of the offer to sell."

be argued that the 'additional setbacks' option is 'not appropriate' and that it cannot be justified under Policy 10, Objective E of the Trans Plan." Petition for Review 7.[7]

The county adopted findings rejecting those arguments.[8] Petitioners do not acknowledge or challenge those findings. Absent a more developed argument, petitioners have not demonstrated a basis for reversal or remand. The fourth subassignment of error is denied.

E. Block Length: LUDO 4.100.11

LUDO 4.100.11 requires that the "width of blocks shall be adequate to allow two tiers of lots, unless exceptional conditions render this requirement undesirable, as determined by the Approving Authority" pursuant to several factors, including topography, lot size and local and through traffic needs to serve the area. The lotting pattern in the proposed subdivision is generally formed by central spine roads with lots on either side of the road, and does not include "blocks" in the traditional sense of two rows of lots bounded by roads.

The planning director found that the subdivision included no "blocks" and thus LUDO 4.100.11 did not apply. Record 291. In response to petitioners' arguments below, the planning commission adopted the following supplemental finding:

> "* * * This is a one-block subdivision. The block length and width for the subdivision are appropriate because of the size of the lots (5 acres is a large

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[7] Petitioners do not quote or provide a copy of "Policy 10, Objective E of the Trans Plan," so we are not sure what it says.

[8] The county adopted the following supplemental finding:

> "The subdivision will include an expanded setback for Lots 23 and 24 to prevent structural improvements in the [area] that may be needed to expand the right-of-way for Melrose Road to 70 feet along that short section. At the time that the subdivision shall be approved, each lot will meet the 5 acre minimum. Ultimately, the county may never expand the right-of-way in that area. Appellant does not develop his argument nor cite any support for his conclusion that the condition of an expanded setback is not proper and cannot be justified under Transportation Objective E, Policy 10, of the county comprehensive plan. The county has interpreted and applied that requirement in the manner utilized here, i.e., to require ultimate setbacks in the case of substandard roads, and calculating parcel sizes based on ownership and not encumbrances * * *." Record 120.

> rural residential lot), the location of the streets (each parcel fronts on at least one street, and stub streets area adequately provided), the steep hilly topography (which makes traditional block and other alternate lotting patterns impractical), and traffic needs (the access to the property is through the west and south portions of the property only), which necessitated a nontraditional lotting pattern." Record 120.

Petitioners challenge the planning director's finding that the subdivision includes no blocks and that LUDO 4.100.11 does not apply, but fail to acknowledge or challenge the planning commission's above-quoted finding. Absent some challenge to that finding, petitioners' arguments do not provide a basis for reversal or remand. The fifth subassignment of error is denied.

F. Units of Land: LUDO 4.100.12

LUDO 4.100.12 includes standards for the size, width, shape, orientation, frontage, etc. of units of land.[9] Petitioners argue that the county erred in authorizing lots that violate LUDO 4.100.12(a), (b), (c) and (e). We address each contention separately.

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[9] LUDO 4.100.12 provides, in relevant part:

> "a. Size, width, shape and orientation of each unit of land created shall be appropriate for the location of the subdivision and for the types of use permitted. Dimensions shall not include part of existing or proposed streets. Each unit of land shall be buildable, except a public utility lot. Depth and width of utility lots shall be adequate to provide for standard setbacks for service structures, and to furnish off-street parking facilities required by the kind of use contemplated. In no other case shall the width or area be less than that prescribed for the zone in which the lot is proposed.
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> "b. Each side lot line shall be at right angles to the adjacent street line or radial to a curved street line, unless the Approving Authority determines that variation from these requirements is necessitated by unusual circumstances such as topography and site location.
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> "c. Lots with double frontage shall be avoided, except where the Approving Authority determines that such lots are essential to provide separation of residential development from major traffic arterials or adjacent nonresidential activities, or to overcome specific disadvantages of topography and orientation. A planting screen easement at least ten (10) feet wide, across which there shall be no rights of access, may be required along the line of lots abutting such a traffic arterial or other incompatible use. Such area shall be considered the rear portion of the lot.
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> "* * * * *

1. Lot Dimension and Streets: LUDO 4.100.12(a)

LUDO 4.100.12(a) provides that lot dimensions "shall not include part of existing or proposed streets." *See* n 9. Petitioners argue that lots 9, 10 and 21 are five-acre lots with private road easements over them, and that the county erred in including the proposed streets in those lots' dimensions, contrary to LUDO 4.100.12(a). According to petitioners, LUDO 4.100.12(a) requires that the area of "streets" be excluded from the lot dimensions, with the result that lots 9, 10 and 21 are reduced below the five-acre minimum.

The county found:

> "The subdivision complies with LUDO 4.100(12). The size, width, shape, and orientation of each lot is appropriate for its location in the subdivision and for rural residential use. The subdivision will be served by a private road system located on easements, not on deeded rights-of-way. No LUDO provision prohibits the use of easements for private roads. Road easements are expressly allowed for private road systems in subdivisions with 15 to 50 parcels. LUDO 4.100(5)(a)(2)(d); 4.425(3)(a).
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> "Lots are not prohibited from being bisected by an access easement, so long as the property has sufficient area for building a residence. Lots 9, 10, and 21 are impacted by easements so far as market value may be concerned, but not as to functionality. Each of the three lots has adequate locations for siting a residence consistent with the required setbacks." Record 120-21.

Intervenor argues that the county correctly interpreted LUDO 4.100.12(a) to exclude deeded rights-of-way from lot dimensions, but not to exclude access easements, in which ownership of the subservient estate remains with the lot owner.

Petitioners offer no focused challenge to the above-quoted findings, which take the position that LUDO 4.100(12) does not exclude road easements from lot dimensions. That interpretation of LUDO 4.100(12) may or may not be sustainable on appeal, but absent some

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> "e. 'Bowling Alley' shapes shall not be permitted except where unusual circumstances exist. 'Bowling Alley' shape is defined as a unit of land where the length is substantially greater than the width. Unusual circumstances may include such site characteristics as topography and orientation which preclude a more acceptable design."

challenge to those findings and that interpretation, petitioners' arguments do not provide a basis for reversal or remand. This sub-subassignment of error is denied.

2. Side Lot Lines: LUDO 4.100.12(b).

LUDO 4.100.12(b) requires that side lot lines be at right angles to streets or radial to curves, absent a finding that a variance is necessary due to unusual circumstances. Petitioners argue that few if any of the proposed lots comply with LUDO 4.100.12(b), but the county made no findings justifying a variance. However, as intervenor notes, petitioners overlook the findings at Record 121, which justify such a variance. This sub-subassignment of error is denied.

3. Double Frontage Lots: LUDO 4.100.12(c)

LUDO 4.100.12(c) prohibits double frontage lots absent a finding that double frontage lots are essential to provide separation of residential development from major traffic arterials or adjacent nonresidential activities, or to overcome specific disadvantages of topography and orientation. Petitioners argue that lots 1-3, 14-18, and 20-22 appear to be double frontage lots, which petitioners define broadly as lots that border two or more roads, including corner lots and lots that border on both an internal private road and one of the external county roads. According to petitioners, the county erred in concluding that these lots are not "double frontage" lots, simply because they have only one access from a bordering private road. Petitioners contend that "frontage" is a different concept than "access," and LUDO 4.100.12(c) prohibits double frontage lots, not lots with double access.

In its findings, the county defined a "double frontage" lot as one with a "direct access street on two parallel sides." Record 121. Under that definition, the county found, corner lots do not constitute double frontage lots. The county also concluded that the lots that border on both an internal private road and an external county road are not "double frontage" lots, because access to the subdivision is restricted and no lot can obtain access directly from the county roads. *Id.* Finally, the county found that to the extent any lot could be

considered a double frontage lot, such a lot is "essential to provide separation of residential development from adjacent nonresidential activities (e.g. farming), and to overcome the property's topography and orientation." *Id.*

Petitioners do not acknowledge the findings at Record 121, and in particular offer no challenge to the county's final conclusion that to the extent any lots are considered double frontage lots, they are justified as essential to separate residential and nonresidential activities or to overcome topographic limitations. Absent a more developed challenge, petitioners' arguments do not provide a basis for reversal or remand. This sub-subassignment of error is denied.

4. Bowling Alley Lots: LUDO 4.100.12(e).

LUDO 4.100.12(e) prohibits "bowling alley" lots, defined as "a unit of land where the length is substantially greater than the width," absent "unusual circumstances" such as "topography and orientation which preclude a more acceptable design." The planning director's decision identifies three long narrow lots (28, 29 and 30) as "bowling alley" lots. The most elongate lot, Lot 30, has an average width of 181.72 feet and an average length of 1243.62 feet, for a length to width ratio of 6.84 to 1. Record 121. However, the planning director found that the steep "topography of the three lots lends itself to that design in order to accommodate suitable building sites." Record 292.

Petitioners challenge that finding, arguing that the planning director failed to find that topography or other circumstances "preclude a more acceptable design." Petitioners suggest that a different design with fewer and larger lots would easily eliminate the bowling alley lots. In addition, petitioners argue that the planning director failed to consider lots 12, 13, 18, 24 and 31 as potential bowling alley lots, which also are much longer than wide.

Intervenor cites to a supplemental finding that takes the position that none of the lots in the subdivision are bowling alley lots, as that term is properly understood.[10] That finding at Record 121 appears to conflict with the planning director's finding at Record 292, both of which were adopted by reference by the planning commission. However, the two findings can be viewed as alternatives. Petitioners do not challenge the finding at Record 121, which takes the position that only lots equal to or greater than the approximate length to width ratio of an actual bowling alley constitute "bowling alley" lots for purposes of LUDO 4.100.12(e). While that interpretation may or may not be sustainable, absent some focused challenge to that interpretation petitioners' challenge of the planning director's alternative finding does not demonstrate a basis for reversal or remand. This sub-subassignment of error is denied.

The sixth subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county failed to adopt necessary findings and conditions regarding phasing of the proposed subdivision, as required by LUDO 4.150.3 and 4.150.4.

Intervenor proposed and the county approved development in three phrases, pursuant to LUDO 4.150.3, which imposes time limits for final plat approval for each phase. Petitioners argue first that the county's decision failed to impose the required time limits. However, the adopted findings at Record 123 and 295 appear to do precisely that.

LUDO 4.150.4(a)(3) requires a finding that "phasing is necessary due to the nature of the development, and that the applicant will be able to comply with the proposed time

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[10] The supplemental findings state:

> "A bowling alley lot has dimensions approximately the same as a bowling alley. A standard bowling alley, not including the approach, is 42 inches wide by 60 feet long, yielding a length to width ratio of 17.14:1. Lot 30, the most elongate lot in the subdivision, has an average width of 181.72 feet and an average length of 1243.62 feet, for a length to width ratio of only 6.84:1. Thus none of the lots in the subdivision is bowling alley shaped." Record 121.

limitations." Petitioners contend that the county failed to make the required findings. However, a supplemental finding at Record 123 appears to do precisely that.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

LUDO 4.415.1(c) sets out "Special Improvement Standards for Subdivisions or Partitions Located in Rural Residential Areas," and requires in relevant part that "[a]ll private roads shall be vested in a homeowner's association," which the developer must form.[11] Petitioners contend that this requirement is not met, because the proposed private roads will be located on easements, and the individual lot owners, rather than the homeowner's association, will own the underlying fee.

Intervenor responds that petitioners raised no issue below regarding LUDO 4.415.1(c) nor argued that private road easements would violate that code provision. On the merits, intervenor argues that the county commonly requires that deeds for private road easements be vested in a homeowners' association to comply with LUDO 4.415.1(c), as part of the final plat approval process.

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[11] LUDO 4.415.1(c) provides:

> "All interior streets whether private roads or public access roads not publicly maintained shall be maintained by the property owners in the subdivision or partition. All lots or parcels shall be subject to adequate covenants running with the land meeting County standards which require streets to be maintained by owners. All streets not publicly maintained shall be maintained to the standards specified in §4.420 or §4.425 depending on the number of lots or parcels to which the road provides access, except as modified by this section.
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> "All private roads shall be vested in a homeowner's association. The developer shall be responsible for the formation of the homeowner's association of which the developer (or if the developer is not the owner of the development, then such owner) shall be a member until all the lots are sold.
>
> "Provided that private roads in partitions need not be vested in a homeowner's association if adequate perpetual maintenance is assured through covenants, maintenance agreements or agreements to participate in future special districts and such covenants or agreements are approved by the Planning Director."

Petitioners reply that they argued below to the planning commission and board of commissioners that "[t]he decision and application fail to address LUDO 4.415." Record 50, 350. Petitioners contend that that language is sufficient to put the county on reasonable notice that it needed to address all of the requirements of LUDO 4.415, including the LUDO 4.415.1(c) requirement that title to private roads be vested in the homeowners' association.

We agree with intervenor that the issue raised in this assignment of error was not raised below and is waived. The planning director's decision did in fact address LUDO 4.415.1(c), at least the requirements in the first paragraph. Record 297, 300, 302-303. Petitioners' very general claim that the planning director's decision "fail[ed] to address LUDO 4.415" as a whole was not sufficient to put the county and intervenor on reasonable notice that petitioners believed that the decision violated the specific LUDO 4.415.1(c) requirement that private roads be vested in the homeowner's association. Even if the issue were not waived, petitioners do not explain why LUDO 4.415.1(c) must be read to effectively prohibit private road easements in rural residential subdivisions, or why deeding easements to the homeowners' association as part of final plat approval would be insufficient to satisfy the requirement that private roads be vested in the homeowners' association.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The fourth assignment of error is styled a precautionary one, advanced in case the county or intervenor rely on any evidence in the applicant's final submittal, which is a December 31, 2009 letter with six attachments.[12] Petitioners contend that the December 31, 2009 letter was the applicant's "final written argument" for purposes of ORS 197.763(6)(e),

[12] Petitioners explain:

> "Petitioners assign this issue as error, as a precaution against the possibility that the county or the Intervenor will point to some evidence among that objected to as support for some finding in this decision. * * *" Petition for Review 15.

which under the statute is not supposed to include "new evidence." If the county or intervenor cites to the disputed evidence as support for some finding in the decision, we understand petitioners to argue, then LUBA should conclude that the county's procedural error prejudiced petitioners' substantial right to rebut evidence supporting the decision.

Petitioners objected to the planning commission that the December 31, 2009 letter included new evidence. The planning commission concluded that the December 31, 2009 letter did not include any new evidence. Record 72. The planning commission adopted the December 31, 2009 letter itself as part of its supplemental findings. Record 73. In addition, the planning commission adopted findings explaining why each of the six attachments does not constitute "new evidence." Record 76-77.

The county responds that the evidentiary record was still open on December 31, 2009, and argues that if the letter or attachments in fact included new evidence the planning commission could have considered it without error. Intervenor responds that no party on appeal has relied on any purported new evidence in or attached to the December 31, 2009 letter to provide evidentiary support for the decision, and thus petitioners' precautionary assignment of error is moot.

In a reply brief, petitioners disagree with the county that evidentiary record was held open until December 31, 2009. In response to intervenor, petitioners identify three places in the planning commission findings that discuss three of the six attachments to the December 31, 2009 letter. Therefore, Petitioners argue, the alleged procedural error in accepting new evidence is not moot or harmless error.

Petitioners make no effort, even in the reply brief, to demonstrate that the alleged new evidence in or attached to the December 31, 2009 letter is in fact "new evidence" for purposes of ORS 197.763(6)(e). Petitioners do not challenge the county's findings at Record 76-77 explaining why the planning commission concluded that the six attachments are not new evidence. In addition, the fourth assignment of error is precautionary in nature and

explicitly predicated on the county or intervenor citing evidence in or attached to the December 31, 2009 letter to provide evidentiary support for the county's decision. Intervenor is correct that the response briefs do not cite or rely on the December 31, 2009 letter or its attachments in response to any evidentiary dispute under the first three assignments of error. As far as petitioners have established, none of the planning commission findings at issue in the first three assignments of error cite or rely on the disputed evidence. For that reason alone, the fourth assignment of error does not provide a basis for reversal or remand.

The fourth assignment of error is denied.

The county's decision is affirmed.