

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

TIM KOHLER,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

A INCH, LLC,
Intervenor-Respondent.

LUBA No. 2020-091

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Mark S. Bartholomew and Charles Sarkiss filed the petition for review and argued on behalf of petitioner. With them on the brief was Hornecker Cowling, LLP.

No appearance by Jackson County.

Garrett K. West filed the response brief and argued on behalf of intervenor-respondent. With them on the brief was Jarvis, Dreyer, Glatte & Larsen, LLP.

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

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

REMANDED

01/14/2021

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

NATURE OF THE DECISION

Petitioner appeals a hearings officer approval of a forest template dwelling.

MOTION TO INTERVENE

A Inch, LLC (intervenor), the applicant below, moves to intervene on the side of the county. The motion is unopposed and is granted.

BACKGROUND

The subject property is a vacant, 15-acre parcel zoned Woodland Resource (WR), a zone which implements Statewide Planning Goal 4 (Forest Lands).¹ Jackson County Land Development Ordinance (LDO) 5.2.2. The subject property also has an Area of Special Concern 90-1 (ASC 90-1) overlay. ASC overlays are intended, in part, to protect site-specific environmental features through the application of additional development regulations and requirements. The ASC 90-1 overlay is applied to

“all lands on which development can affect survival of Black-tailed deer or Roosevelt elk herds as described in the Natural and Historic Resources Element (Chapter 16) of the Comprehensive Plan. Such

¹ Goal 4 is:

“To conserve forest lands by maintaining the forest land base and to protect the state’s forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.”

1 lands are identified as winter range habitat on base maps prepared
2 by the Oregon Department of Fish and Wildlife (ODFW) and
3 adopted by the Board of Commissioners as ASC 90-1.”² LDO
4 7.1.1(C).

5 On November 27, 2019, intervenor submitted a Type 2 application to develop a
6 forest template dwelling on the subject property pursuant to LDO Table 4.3-1.
7 On July 2, 2020, staff issued its tentative decision approving the application. On
8 July 10, 2020, petitioner appealed staff’s tentative decision to the hearings
9 officer. On August 3, 2020, the hearings officer denied the appeal and approved
10 the forest template dwelling application.

11 This appeal followed.

12 **FIRST ASSIGNMENT OF ERROR**

13 The ASC 90-1 overlay approval criteria are set out in LDO 7.1.1(C). The
14 hearings officer found that, with conditions of approval, the application met the
15 approval criteria in LDO 7.1.1(C)(4). Record 17. Petitioner’s first assignment of
16 error is that the hearings officer’s application of the criteria in LDO 7.1.1(C)(4)
17 to intervenor’s land use application misconstrues applicable law. Petition for
18 Review 11.³ We will reverse or remand a local government decision that
19 “[i]mproperly construe[s] the applicable law.” ORS 197.835(9)(a)(D).

² Opponents advised ODFW of the application, but ODFW did not enter comments into the record. Record 18.

³ Petitioner also alleges that there is not substantial evidence in the record that LDO 7.1.1(C)(4) applies to Type 2 applications. This is an argument that the law has been misconstrued, not a substantial evidence argument.

1 Forest template dwelling applications in the WR zone are subject to a
2 discretionary, Type 2, administrative review process requiring a notice of
3 decision and an opportunity for hearing. LDO 3.1.3. Petitioner argues that,
4 because LDO 7.1.1(C)(5) states that it applies to all discretionary applications,
5 paragraph (C)(5) is the appropriate approval criterion. We agree that LDO
6 7.1.1(C)(5) is properly applied to intervenor's Type 2 application.

7 LDO 7.1.1(C)(4) and (5) provide:

8 "4) The standards of this subsection are deemed to comply with
9 the deer and elk habitat protection measures recommended by
10 ODFW and therefore do not require ODFW comment on
11 Type 1 permits issued in conformance with this subsection. A
12 first dwelling on a lawfully created lot or parcel will be
13 located within 300 feet of an existing:

14 "a) Public or private road;

15 "b) Driveway that provides access to an existing dwelling
16 on another parcel (provided the new dwelling unit will
17 not take access on it unless the driveway is improved
18 to the private road standards of Section 9.5.3); or

19 "c) Other developed access way that existed as shown on
20 the County 2001 aerials or other competent evidence
21 (e.g., a road or driveway for a legal easement recorded
22 prior to the aerial date).

23 "To be considered under the locational criteria of this
24 subsection, any access must, at a minimum, conform with the
25 emergency vehicle access standards of Section 9.5.4. When
26 an initial dwelling is proposed to be sited in an alternative
27 location that does not conform to the standards of this
28 subsection, the alternative location may be allowed through a
29 Type 2 review process in accordance with subsection (6),

1 below.

2 “5) *General Development Standards*

3 The following standards apply to all discretionary land use
4 permits subject to review under this Section, unless a
5 condition of approval when the parcel was created required
6 compliance with prior habitat protection standards. The land
7 use decision will include findings that the proposed use will
8 have minimal adverse impact on winter deer and elk habitat
9 based on:

10 “a) Consistency with maintenance of long-term habitat
11 values of browse and forage, cover, sight obstruction;

12 “b) Consideration of the cumulative effects of the proposed
13 action and other development in the area on habitat
14 carrying capacity; and

15 “c) Location of dwellings and other development within
16 300 feet of an existing public or private road, or
17 driveway that provides access to an existing dwelling
18 as shown on the County 2001 aerials or other
19 competent evidence. When it can be demonstrated that
20 habitat values and carrying capacity are afforded equal
21 or greater protection through a different development
22 pattern an alternative location may be allowed through
23 the discretionary review process described in
24 subsection (6), below;

25 “d) Dwellings other than the initial dwelling on a lot or
26 parcel will comply with one (1) of the following, as
27 applicable:

28 “i) A maximum overall density (within the tract) of
29 one (1) dwelling unit per 160 acres in Especially
30 Sensitive Winter Range units, or one (1)
31 dwelling unit per 40 acres in Sensitive Winter
32 Range units; or

1 “ii) Clustering of new structures within a 200-foot
2 radius of the existing dwelling to achieve the
3 same development effect as would be achieved
4 under i), above.”⁴ (Emphasis in original.)

5 The General Development Standards in LDO 7.1.1(C)(5)(c) allow dwellings to
6 be located within 300 feet of an existing public or private road or driveway. The
7 standards in LDO 7.1.1(C)(4) provide that a first dwelling on a lawfully created
8 parcel must be located within 300 feet of an existing public or private road, a
9 driveway that provides access to an existing dwelling on another parcel, *or*
10 *another developed access way*. The subject property is accessed via an easement,

⁴ LDO 7.1.1(C)(6) provides:

“ODFW Approved Alternate Siting Plan

“Initial dwellings and other development may be sited in locations that do not conform with subsections (4) and (5) above when the applicant demonstrates at least one (1) of the following:

“a) The wildlife habitat protection measures required by Section 7.1.1(C)(4) will render the parcel unbuildable; or

“b) A written authorization approving an alternate siting plan is received from ODFW. Any such authorization must include a statement from ODFW that confirms habitat values and carrying capacity will be afforded equal or greater protection if the dwelling or other development is sited in the alternate location. The written authorization must be made on ODFW letterhead or forms and be signed by an ODFW official with authority to make habitat protection decisions. Authorization of an alternative dwelling location will not release an applicant from compliance with any other applicable standard of this Ordinance.” (Emphasis in original.)

1 an “[o]ther developed access way” under the LDO, and therefore does not comply
2 with LDO 7.1.1(C)(5)(c). Rather than deny intervenor’s application, the hearings
3 officer applied LDO 7.1.1 (C)(4), reasoning that

4 “[t]o interpret the code otherwise is to create an impossibility * * *.
5 There would be no point to the provision of allowing the non-
6 discretionary compliance in Subsection (4)(c) only to have it undone
7 by the discretionary criteria under Subsection (5)(c). The first
8 dwelling in any area that has a private access easement but no public
9 or private road would never be approved because there would never
10 be a driveway within 300 feet.” Record 19.

11 We agree with petitioner that the hearings officer erred in their conclusion
12 that applying LDO 7.1.1(C)(5) impermissibly creates an impossibility because a
13 first dwelling would never be approved. Under LDO 7.1.1(C)(4), a first dwelling
14 on a lot may have an “[o]ther developed access way that existed as shown on the
15 County 2001 aerials or other competent evidence (e.g., a road or driveway for a
16 legal easement recorded prior to the aerial date).” Under LDO 7.1.1(C)(5), this
17 form of access is not an available option. However, there is no absolute right to
18 develop a forest template dwelling, and the inability to meet an applicable
19 approval criterion does not mean that the approval criterion cannot apply.

20 The 2000 version of the LDO similarly directed dwellings generally to
21 locations within 300 feet of existing roads or driveways, as opposed to easements,
22 but was written in a perhaps clearer manner that tends to support an interpretation
23 that what became paragraph (C)(4) does not apply to intervenor’s application.
24 *Former* LDO 280.110(3)(E) (2000) provided, in part:

- 1 “vi) Except as otherwise provided in this Ordinance, *a first*
2 *dwelling on a legally created lot or parcel shall be subject*
3 *only to siting and access review standards of Subsection vii),*
4 *below, unless a condition of approval concerning creation of*
5 *the lot or parcel or its development requires compliance with*
6 *this Section.*
- 7 “vii) General Land Division/Development Standards for all Winter
8 Range Units:
- 9 “Any land use action subject to review under this Section
10 shall include findings that the proposed action will have
11 minimum impact on winter deer and elk habitat based on:
- 12 “a) Consistency with maintenance of long-term habitat
13 values of browse and forage, cover, sight obstruction.
- 14 “b) Consideration of the cumulative effects of the proposed
15 action and other development in the area on habitat
16 carrying capacity.
- 17 “c) *Location of dwellings and all other development within*
18 *300 feet of existing roads or driveways where*
19 *practicable unless it can be found that habitat values*
20 *and carrying capacity is afforded equal or greater*
21 *protection through a different development pattern.*
- 22 “d) New private roads shall be gated between November
23 and April (where permitted by law) to protect wintering
24 deer and elk.
- 25 “e) Comments shall be solicited in writing from ODFW for
26 all land use actions on winter range, other than
27 dwellings which comply with density standards set
28 forth in Subsection v), above. The ODFW shall be
29 given a maximum of ten days to make such comments.
30 Final decision by the County to decline or accept
31 ODFW's position shall be based on substantive
32 findings provided by the applicant.” (Emphasis added.)

1 LDO 7.1.1(C)(5) states that it applies to all discretionary permits. A Type
2 application is an application for a discretionary permit and paragraph (C)(5)
3 necessarily applies. Petitioner argues further that LDO 7.1.1(C)(4) applies only
4 to Type 1 applications based on that provision's text:

5 "The standards of this subsection are deemed to comply with the
6 deer and elk habitat protection measures recommended by ODFW
7 and therefore do not require ODFW comment on Type 1 permits
8 issued in conformance with this subsection."

9 A Type 1 use is

10 "authorized by right, requiring only *non-discretionary* staff review
11 to demonstrate compliance with the standards of this Ordinance. A
12 Zoning Information Sheet may be issued to document findings or to
13 track progress toward compliance. Type 1 authorizations are limited
14 to situations that do not require interpretation or the exercise of
15 policy or legal judgment. Type 1 authorizations are not land use
16 decisions as defined by ORS 215.402." LDO 3.1.2 (emphasis
17 added).

18 A conclusion that LDO 7.1.1(C)(4) applies only to Type 1 applications is also
19 supported by that provision's language distinguishing the Type 2 treatment
20 afforded to initial dwellings that do not conform to its standards:

21 "When an initial dwelling is proposed to be sited in an alternative
22 location that does not conform to the standards of this subsection,
23 the alternative location may be allowed through a Type 2 review
24 process in accordance with subsection (6), below."

25 We believe this interpretation is correct, as it gives meaning to all of the language
26 in paragraphs (4) and (5). The LDO allows as Type 1 residential uses in the WR
27 zone the alteration, restoration, or replacement of a lawfully established dwelling

1 and registered child care facilities/certified group child care homes. LDO Table
2 4.3-1. It is therefore possible for the reference to “first dwelling[s]” in LDO
3 7.1.1(C)(4) to apply to an application for a residential use in the WR zone. The
4 hearings officer misconstrued the law in applying LDO 7.1.1(C)(4) to
5 intervenor’s application.

6 The first assignment of error is sustained.

7 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

8 Petitioner’s second assignment of error argues, in part, that the hearings
9 officer’s decision is not supported by substantial evidence because it relies on lay
10 testimony that LDO 7.1.1(C)(5)(a) and (b) are met. These provisions require that

11 “[t]he land use decision * * * include findings that the proposed use
12 will have minimal adverse impact on winter deer and elk habitat
13 based on:

14 “a) Consistency with maintenance of long-term habitat values of
15 browse and forage, cover, sight obstruction; [and]

16 “b) Consideration of the cumulative effects of the proposed
17 action and other development in the area on habitat carrying
18 capacity[.]”

19 The hearings officer’s finding of compliance with these provisions is based on
20 the hearings officer’s conclusion that intervenor “provided narrative explain the
21 [*sic*] compliance with those subsections and no one argued that the information
22 was not accurate.” Record 19. Petitioner does not challenge this finding or
23 indicate that they preserved the issue of the adequacy of intervenor’s evidence.
24 Where a party “disagrees with the [local government’s] decision without

1 attempting to demonstrate error in the [local government's] findings that interpret
2 and apply [approval criteria, the party] fails to provide a basis for reversal or
3 remand.” *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587, 603 (2000).

4 Petitioner’s second assignment of error also argues that the hearings
5 officer’s decision does not comply with LDO 7.1.1(C)(5) because there is no
6 public road, private road, or driveway that provides access to an existing dwelling
7 within 300 feet of the proposed home site, as required by LDO 7.1.1(C)(5)(c).
8 LDO 7.1.1 (C)(5)(c) provides:

9 “Location of dwellings and other development within 300 feet of an
10 existing public or private road, or driveway that provides access to
11 an existing dwelling as shown on the County 2001 aerials or other
12 competent evidence. When it can be demonstrated that habitat
13 values and carrying capacity are afforded equal or greater protection
14 through a different development pattern an alternative location may
15 be allowed through the discretionary review process described in
16 subsection (6), below[.]”

17 The hearings officer held that, should the approval be appealed and LDO
18 7.1.1(C)(5) be found applicable,

19 “the applicant does not meet [Subsection (5)(c)] because the 300 feet
20 cannot be measured from a private access easement. That option for
21 being within 300 [feet] of a private access easement as opposed to a
22 public or private road or driveway is not in this subsection as it is in
23 Subsection 4(c). There is no private or public road within 300 feet
24 of the proposed dwelling. The definition of a ‘driveway’ in Section
25 13.3.76 requires that it be for a single unit of land and that an
26 easement traverses another property does not qualify as a driveway
27 unless the property over which the easement traverses is prohibited
28 from using that easement. Therefore, since the closest driveway
29 meeting that definition is more than 300 feet away, the application

1 would not comply with this subsection.” Record 19.

2 The hearings officer therefore agrees with petitioner that LDO 7.1.1(C)(5)(c) is
3 not met. The issue is not in dispute. Similarly, petitioner’s third assignment of
4 error is that the application does not comply with LDO 7.1.1(C)(6), a code
5 provision unaddressed in the decision.

6 We review the decision before us and do not issue advisory opinions. *WKL*
7 *Investments Airport, LLC v. City of Lake Oswego*, ___ Or LUBA ___, ___
8 (LUBA No. 2019-056, Sept 25, 2019) (slip op at 17). Accordingly, we do not
9 reach the portion of the second assignment of error concerning LDO
10 7.1.1(C)(5)(c) or the third assignment of error.

11 The second assignment of error is denied, in part.

12 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

13 Petitioner’s fourth and fifth assignments of error are that the hearings
14 officer erred in finding that the application is in compliance with LDO
15 7.1.1(C)(4)(c). We held in our resolution of the first assignment of error that
16 subparagraph (4)(c) does not apply to the application. Accordingly, we do not
17 reach the fourth and fifth assignments of error.

18 **DISPOSITION**

19 Petitioner requests that we reverse or remand the decision. OAR 661-010-
20 0071(1)(c) provides that we will reverse a land use decision when it “violates a
21 provision of applicable law and is prohibited as a matter of law.” *Seitz v. City of*
22 *Ashland*, 24 Or LUBA 311, 314 (1992) (“A reversal of a land use decision by

1 this Board, unlike a remand, means that a local government will not be able to
2 correct all of the identified errors by adopting new findings, by accepting
3 additional evidence, or both.”) The hearings officer’s decision is not prohibited
4 as a matter of law because intervenor’s application may be evaluated and,
5 potentially, approved under the alternative criteria in LDO 7.1.1(C)(6).
6 Accordingly, remand is the appropriate remedy.

7 The county’s decision is remanded.