

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

TIM KOHLER,  
*Petitioner,*

vs.

JACKSON COUNTY,  
*Respondent,*

and

HANKUS, LLC,  
*Intervenor-Respondent.*

LUBA No. 2021-025

FINAL OPINION  
AND ORDER

Appeal from Jackson County.

Charles Sarkiss filed the petition for review. Also on the brief were Mark S. Bartholomew and Hornecker Cowling LLP.

No appearance by Jackson County.

Garrett K. West filed the response brief and argued on behalf of intervenor-respondent. Also on the brief was O'Connor Law, LLC.

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

REMANDED

06/01/2021

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

**NATURE OF THE DECISION**

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

**MOTION TO INTERVENE**

Hankus, 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, 20-acre parcel bordered on the east by Big Buck Road. Record 137. The subject property is zoned Woodland Resource, a zone which implements Statewide Planning Goal 4 (Forest Lands).<sup>1</sup> Jackson County Land Development Ordinance (LDO) 5.2.2. The subject property is also in the Area of Special Concern 90-1 (ASC 90-1) overlay zone. 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

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<sup>1</sup> 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 deer or Roosevelt elk herds as described in the Natural and Historic  
2 Resources Element (Chapter 16) of the Comprehensive Plan. Such  
3 lands are identified as winter range habitat on base maps prepared  
4 by the Oregon Department of Fish and Wildlife (ODFW) and  
5 adopted by the Board of Commissioners as ASC 90-1.” LDO 7.1.1  
6 (C).

7 On November 27, 2019, intervenor submitted an application to develop a  
8 forest template dwelling on the subject property. On September 30, 2020, staff  
9 issued a tentative decision denying the application. On October 12, 2020,  
10 intervenor appealed staff’s tentative decision. On December 7, 2020, the hearings  
11 officer held a public hearing on intervenor’s application. On January 27, 2020,  
12 the hearings officer granted the appeal and approved the forest template dwelling  
13 application.

14 This appeal followed.

#### 15 **FIRST ASSIGNMENT OF ERROR**

16 The ASC 90-1 overlay approval criteria are set out in LDO 7.1.1(C). LDO  
17 7.1.1(C)(5) provides:

#### 18 *“General Development Standards*

19 “The following standards apply to all discretionary land use permits  
20 subject to review under this Section, unless a condition of approval  
21 when the parcel was created required compliance with prior habitat  
22 protection standards. The land use decision will include findings that  
23 the proposed use will have minimal adverse impact on winter deer  
24 and elk habitat based on:

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

1       “b) Consideration of the cumulative effects of the proposed  
2       action and other development in the area on habitat carrying  
3       capacity; and

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

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

15           “i) A maximum overall density (within the tract) of one (1)  
16           dwelling unit per 160 acres in Especially Sensitive  
17           Winter Range units, or one (1) dwelling unit per 40  
18           acres in Sensitive Winter Range units; or

19           “ii) Clustering of new structures within a 200-foot radius  
20           of the existing dwelling to achieve the same  
21           development effect as would be achieved under i),  
22           above.” (First emphasis in original; second emphasis  
23           added.)

24      LDO 7.1.1(C)(5)(c) requires that “dwellings and other development” be within  
25      300 feet of an existing public or private road or a driveway. LDO 13.3(70) defines  
26      “development” as “[a]ny man-made change to improved or unimproved real  
27      state, including but not limited to building or other structures, mining, dredging,  
28      filling, grading, paving, excavation or drilling operations or storage of equipment  
29      or materials.” Petitioner argues in their first assignment of error that the hearings  
30      officer improperly construed the LDO because the county found that only the

1 building envelope—as opposed to all development—was required to be within  
2 300 feet of an existing road. Because only the building envelope, and not all  
3 development, is demonstrated to be within 300 feet of the qualifying road,  
4 petitioner maintains that the decision violates LDO 7.1.1(C)(5)(c).

5 We will reverse or remand a decision that “[i]mproperly construe[s] the  
6 applicable law.” ORS 197.835(9)(a)(D). We will also reverse or remand a  
7 decision if we conclude that it is not in compliance with applicable land use  
8 regulations. ORS 197.835(8).

9 The hearings officer found that the requirement that “dwellings and other  
10 development” be located within 300 feet of an existing public or private road or  
11 a driveway was met by restricting the location of the building envelope:

12 “With the moving and reduction in the size of the building envelope,  
13 the proposed building envelope is within 300 feet of [Big Buck  
14 Road], as seen in the aerial photos at [Record 52, 53, and 137], the  
15 proposed dwelling meets the criteria in the first sentence of [LDO  
16 7.1.1(C)(5)(c)]. Nothing in that sentence requires that the road for  
17 siting purposes under this subsection be one that provides the access  
18 to the subject property.

19 “Therefore, because this application is a type 2 application and [the]  
20 proposed dwelling will be within 300 feet of an existing public or  
21 private road or driveway, the Hearings Officer finds that application  
22 complies with [LDO 7.1.1(C)(5)(c)]. The second sentence is not  
23 applicable.” Record 18.

24 Although the hearings officer stated that “the proposed building envelope,” rather  
25 than “other development,” is “within 300 feet of a private road,” we agree with  
26 intervenor that the hearings officer did not misconstrue the law. This is apparent

1 from the conditions of approval that the hearings officer imposed, which require  
2 that virtually all of the proposed development be located within 300 feet of Big  
3 Buck Road. Condition of Approval 1 mandates that “[t]he proposed residential  
4 development, including the dwelling, accessory structures and propane tank shall  
5 be located within the 200’ x 200’ building envelope completely within 300 feet  
6 of Big Buck Road and setback 150 feet from the north and south property lines.”  
7 Record 25-26. Condition of Approval 2 requires intervenor to submit a revised  
8 site plan prior to the issuance of permits. The revised site plan must demonstrate  
9 compliance with Condition 1, it must show that all sides of the dwelling are  
10 located within 300 feet of Big Buck Road, and it must show that the propane tank  
11 is located within the building envelope. Record 26. The hearings officer did not  
12 misconstrue the law and conclude that development could occur further than 300  
13 feet from Big Buck Road.

14         Petitioner next argues in their first assignment of error that the county erred  
15 in failing to adopt a finding that it is feasible for intervenor to comply with LDO  
16 7.1.1(C)(5)(c). Petitioner further argues that it is in fact not feasible for intervenor  
17 to confine development to a location within 300 feet of a qualifying road or  
18 driveway. In support of this contention, petitioner points to aerial photographs  
19 referenced by the hearings officer in the decision. An approval decision must at  
20 a minimum demonstrate that compliance with discretionary approval criteria is  
21 feasible, that is, that “substantial evidence supports findings that solutions to  
22 certain problems \* \* \* are possible, likely and reasonably certain to succeed.”

1    *Meyer v. City of Portland*, 67 Or App 274, 280 n 5, 678 P2d 741, *rev den*, 297  
2    Or 82 (1984). We will reverse or remand a decision that is unsupported by  
3    substantial evidence in the whole record. ORS 197.835(9)(a)(C). Substantial  
4    evidence is evidence a reasonable person would rely upon in reaching a decision.  
5    *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v.*  
6    *City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988).

7            The aerial photograph at Record 137 shows the location of Big Buck Road  
8    at the subject property's eastern property line. The aerial photograph at Record  
9    52 depicts two yellow lines running from the edge of the building envelope to  
10   Big Buck Road and a third yellow line running from the edge of the building  
11   envelope to a logging road. Petitioner argues that the logging road is not a  
12   qualifying road or driveway for purposes of LDO 7.1.1(C)(5)(c). However, the  
13   conditions of approval do not rely on the logging road for measurement of the  
14   location criterion. The road relied upon in the decision is clearly Big Buck Road.

15           Although dimensions on the aerial photographs would have been helpful,  
16   the photographs at Record 52 and 53 appear to show that only part of the building  
17   envelope is within 300 feet of Big Buck Road. Nevertheless, the hearings officer  
18   found that it was possible to limit development to the area within 300 feet of Big  
19   Buck Road and, as noted, Condition 1 requires that the building envelope be  
20   reduced in size and located further east than is shown on the aerial photographs.  
21   The hearings officer's finding that it is feasible for intervenor to locate the entire  
22   building envelope within 300 feet of Big Buck Road is supported by substantial

1 evidence. The aerial photographs do not show any development or topographical  
2 constraints in the eastern portion of the lot that would prevent shifting the  
3 building envelope so that it is, in its entirety, within 300 feet of Big Buck Road.<sup>2</sup>

4 The first assignment of error is denied.

## 5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioner's second assignment of error is that the conditions are  
7 inadequate to ensure that all development is within 300 feet of a qualifying road.  
8 First, petitioner argues that Condition 2 only requires all sides of *the dwelling* to  
9 be within 300 feet of Big Buck Road. This argument, however, disregards  
10 Condition 1, which provides that "[t]he proposed residential development,  
11 including the dwelling, accessory structures and propane tank shall be located  
12 within the 200' x 200' building envelope completely within 300 feet of Big Buck  
13 Road and setback 150 feet from the north and south property lines." Record 25-  
14 26. Condition 1 ensures that the dwelling, accessory structures, and propane tank  
15 will be within 300 feet of Big Buck Road.

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<sup>2</sup> In their findings under a different LDO provision, the hearings officer explained:

"In viewing the topographical map and aerial photographs, the area closer to Big Buck Road is no different in topography and the timber volume than the originally proposed building envelope. Additionally, [intervenor] indicated in the applica[tion] and in testimony at the public hearing that the area is all pretty much the same." Record 7 (citations omitted).



1           Petitioner also argues, however, that the conditions of approval do not  
2   ensure that a water well associated with the dwelling will be within 300 feet of  
3   Big Buck Road. Instead, Condition 2(I) requires that the well be located no closer  
4   than 100 feet to any parcel boundary. Record 26. We agree with petitioner that  
5   the decision is unclear regarding whether the well is considered part of the  
6   development that is required to be located within the building envelope that is in  
7   turn required to be located within 300 feet of Big Buck Road under Condition 1.  
8   Intervenor responds that the location of the well is irrelevant because, according  
9   to intervenor, the decision does not permit the drilling of the well—that is, the  
10   “development” of the well for purposes of LDO 7.1.1(C)(5)(c)—and that the well  
11   will be subject to non-land use water rights regulations.

12           In imposing Condition 2(I), the hearings officer found the location of the  
13   well to be relevant. “If a local government fails to interpret a provision of its \* \* \*  
14   land use regulations, or if such interpretation is inadequate for review, the board  
15   may make its own determination of whether the local government decision is  
16   correct.” ORS 197.829(2). The county has defined development to include  
17   “excavation or drilling operations.” LDO 13.3(70). We conclude that drilling a  
18   well is development required by LDO 7.1.1(C)(5)(c) to be within 300 feet of a  
19   qualifying road or driveway. Because the conditions of approval do not require  
20   that the well be within 300 feet of Big Buck Road, the conditions of approval are  
21   inadequate to ensure that all development is within the area required by LDO  
22   7.1.1(C)(5)(c). This subassignment of error is sustained.

1           The remainder of the second assignment of error restates arguments from  
2 the first assignment of error and we reject them for the same reasons.

3           The second assignment of error is sustained, in part.

4       **THIRD ASSIGNMENT OF ERROR**

5           Petitioner's third assignment of error is that the record lacks evidence to  
6 demonstrate that all development will be within 300 feet of an existing public or  
7 private road or a driveway, as required by LDO 7.1.1(C)(5)(c). This assignment  
8 of error repeats assertions from petitioner's first assignment of error that the aerial  
9 photographs relied upon by the hearings officer do not show that the building  
10 envelope will be located within 300 feet of Big Buck Road. We reject those  
11 arguments for the same reasons set forth in our resolution of the first assignment  
12 of error. We sustain the second assignment of error in part because the conditions  
13 of approval do not provide that the well must be located within 300 feet of Big  
14 Buck Road, but the well location is not disputed in the third assignment of error.

15           The third assignment of error is denied.

16       **FOURTH ASSIGNMENT OF ERROR**

17           Petitioner argues that the hearings officer's finding that the building  
18 envelope is within 300 feet of a qualifying road is not supported by substantial  
19 evidence. The hearings officer found that

20           "the building envelope must [be] located further east so that the  
21 entire building envelope is within 300 feet of Big Buck Road and  
22 includes the 150-feet of fire fuel break from the building envelope  
23 to both the north and south property lines. Thus, the building

1 envelope will be reduced to a 200-foot by 200-foot square and much  
2 closer to the road. A condition of approval is included requiring a  
3 revised site plan showing the new location.” Record 7.

4 The hearings officer concluded that,

5 “[w]ith the moving and reduction in the size of the building  
6 envelope, the proposed building envelope is within 300 feet of [Big  
7 Buck Road], as seen in the aerial photos at [Record 52, 53, and 137,  
8 and] the proposed dwelling meets the criteria in the first sentence of  
9 [LDO 7.1.1(C)(5)(c)].” Record 18.

10 Petitioner argues that the cited aerial photographs do not support the hearings  
11 officer’s conclusions.

12 As discussed above, unmarked yellow lines on the aerial photograph at  
13 Record 52 appear to show a distance of 300 feet from the edge of the building  
14 envelope to Big Buck Road and to a logging road. Petitioner argues that this aerial  
15 photograph, like the others referenced by the hearings officer, does not show that  
16 the entire building envelope is within 300 feet of Big Buck Road. We agree with  
17 intervenor that petitioner has misread the hearings officer’s statement citing the  
18 aerial photographs. The three photographs referenced in the decision show the  
19 location of Big Buck Road and do not purport to show the final location of the  
20 building envelope. Nothing in the photographs supports a conclusion that moving  
21 the building envelope eastward, as the findings and conditions of approval  
22 require, is not feasible. There is substantial evidence in the record that LDO  
23 7.1.1(C)(5)(c) is met.

24 The fourth assignment of error is denied.

1 **FIFTH AND SIXTH ASSIGNMENTS OF ERROR**

2 LDO 7.1.1(C)(5)(c) provides an alternative path to forest template  
3 dwelling approval in the event that the proposed dwelling cannot be sited within  
4 300 feet of a qualifying road or driveway “[w]hen it can be demonstrated that  
5 habitat values and carrying capacity are afforded equal or greater protection  
6 through a different development pattern \* \* \* through the discretionary review  
7 process described in subsection (6).”

8 LDO 7.1.1(C)(6) provides:

9 *“ODFW Approved Alternate Siting Plan*

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

13 “a) The wildlife habitat protection measures required by Section  
14 7.1.1(C)(4) will render the parcel unbuildable; or

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

26 The hearings officer concluded that LDO 7.1.1(C)(6) is not applicable to  
27 intervenor’s application. Record 19. However, the hearings officer made

1 alternative findings in the event that an appellate body found that LDO  
2 7.1.1(C)(6) applies. The alternative findings conclude that LDO 7.1.1(C)(6)(b)  
3 can be met with a condition of approval requiring intervenor to submit an ODFW-  
4 approved alternative site plan and that it is feasible for intervenor to obtain such  
5 approval. Record 20.<sup>3</sup>

6 We will reverse or remand a decision if we find that the local government  
7 exceeded its jurisdiction. ORS 197.835(9)(a)(A). Petitioner argues in their fifth  
8 assignment of error that the county exceeded its jurisdiction because the decision  
9 allows intervenor to implement an ODFW-approved alternative site plan without  
10 subjecting that site plan to review under the applicable LDO criteria. Petitioner's  
11 sixth assignment of error is that the decision deprives petitioner of the opportunity  
12 to comment on the ODFW-approved site plan that would ultimately be  
13 implemented.

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<sup>3</sup> The hearings officer found

“that subsection 6(b) can be met with a condition of approval requiring submission of ODFW approval of an alternative siting plan prior to the issuance of a building permit. That is a clear and objective standard for which only documentation is necessary. Thus, such a condition does not require the county to provide additional public review. Given that \* \* \* subsections (4) and (5) are similar and were approved by ODFW, the Hearing Officer finds that it is feasible for [intervenor] to obtain such an ODFW approval.” Record 20.

1           We sustain the second assignment of error in part because the conditions  
2 of approval are not sufficient to ensure that the domestic well will be located  
3 within 300 feet of Big Buck Road. LDO 7.1.1(C)(6)(b) is not applicable to the  
4 application if the well is within 300 feet of Big Buck Road because the  
5 application would then “conform with subsection[] \* \* \* (5).” LDO 7.1.1(C)(6).  
6 Because we remand the decision for the county to determine the location of the  
7 well and require that it be located within 300 feet of a qualifying road or  
8 driveway, we do not reach these assignments of error.

9           The county’s decision is remanded.