

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

TIM KOHLER,  
*Petitioner,*

vs.

JACKSON COUNTY,  
*Respondent,*

and

JDRAEGER, LLC,  
*Intervenor-Respondent.*

LUBA No. 2021-014

FINAL OPINION  
AND ORDER

MEMORANDUM DECISION  
(ORS 197.835(16))

Appeal from Jackson County.

Charles Sarkiss filed the petition for review and argued on behalf of petitioner. 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 Member; RYAN, Board Member, participated in the decision.

1           ZAMUDIO, Board Chair, did not participate in the decision.

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3           AFFIRMED

07/13/2021

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

Opinion by Rudd.

Petitioner appeals a hearings officer decision approving a forest template dwelling on a vacant, 61-acre parcel that is located immediately south of and abutting 3131 Deer Trail Lane. The subject property is zoned Woodland Resource, a zone which implements Statewide Planning Goal 4 (Forest Lands). 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 approval criteria are set out in LDO 7.1.1(C).<sup>1</sup> Petitioner's first assignment of error is that the hearings officer misconstrued

<sup>1</sup> LDO 7.1.1(C) provides, in relevant part:

- “4) The standards of this subsection are deemed to comply with the deer and elk habitat protection measures recommended by ODFW and therefore do not require ODFW comment on Type 1 permits issued in conformance with this subsection. A first dwelling on a lawfully created lot or parcel will be located within 300 feet of an existing:
- “a) Public or private road;
  - “b) Driveway that provides access to an existing dwelling on another parcel (provided the new dwelling unit will not take access on it unless the driveway is improved to the private road standards of Section 9.5.3); or
  - “c) Other developed access way that existed as shown on the County 2001 aerials or other competent evidence

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(e.g., a road or driveway for a legal easement recorded prior to the aerial date).

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

“5) *General Development Standards*

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

- “a) Consistency with maintenance of long-term habitat values of browse and forage, cover, sight obstruction;
- “b) Consideration of the cumulative effects of the proposed action and other development in the area on habitat carrying capacity; and
- “c) Location of dwellings and other development within 300 feet of an existing public or private road, or driveway that provides access to an existing dwelling as shown on the County 2001 aerials or other competent evidence. When it can be demonstrated that habitat values and carrying capacity are afforded equal or greater protection through a different development pattern an alternative location may be allowed through

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the discretionary review process described in subsection (6), below;

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

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

“ii) Clustering of new structures within a 200-foot radius of the existing dwelling to achieve the same development effect as would be achieved under i), above.”

“6) *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.

1 LDO 7.1.1(C)(6), that the decision does not comply with LDO 7.1.1(C)(6), and  
2 that the decision is not supported by substantial evidence. Petitioner's second  
3 assignment of error argues that the hearings officer's conclusion that it is feasible  
4 for intervenor to meet LDO 7.1.1(C)(6) is not supported by substantial evidence.  
5 Petitioner's third assignment of error is that the county misconstrued LDO  
6 7.1.1(C)(6), that the decision is not in compliance with LDO 7.1.1.(C)(6), and  
7 that the decision is not supported by substantial evidence, because the county did  
8 not impose conditions necessary to ensure that intervenor will implement all  
9 provisions of the ODFW-approved site plan. Petitioner argues in their fourth  
10 assignment of error that the county's decision exceeded the county's jurisdiction  
11 because the decision does not ensure that the applicable criteria in the LDO are  
12 met. Petitioner argues in their fifth assignment of error that they were denied their  
13 right to participate in the review of the site plan that will ultimately be  
14 implemented.

15       ORS 197.835(16) provides, "[LUBA] may decide cases before it by means  
16 of memorandum decisions and shall prepare full opinions only in such cases as it  
17 deems proper." We do not believe a full opinion is proper in this case. We  
18 addressed the same assignments of error as applied to similar facts in *Kohler v.*  
19 *Jackson County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2021-022, May 28, 2021)

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Authorization of an alternative dwelling location will  
not release an applicant from compliance with any  
other applicable standard of this Ordinance."  
(Emphases in original.)

1   (*Kohler II*), and affirmed the hearings officer's decision approving an application  
2   for a forest template dwelling. For the reasons set out in *Kohler II*, the  
3   assignments of error are denied.

4           The county's decision is affirmed.