

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

STEVE HERSHBERGER,  
*Petitioner,*

vs.

DOUGLAS COUNTY,  
*Respondent.*

LUBA No. 2021-065

FINAL OPINION  
AND ORDER

Appeal from Douglas County.

Zack P. Mittge represented petitioner.

Paul E. Meyer represented respondent.

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

DISMISSED 12/20/2021

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

Opinion by Ryan.

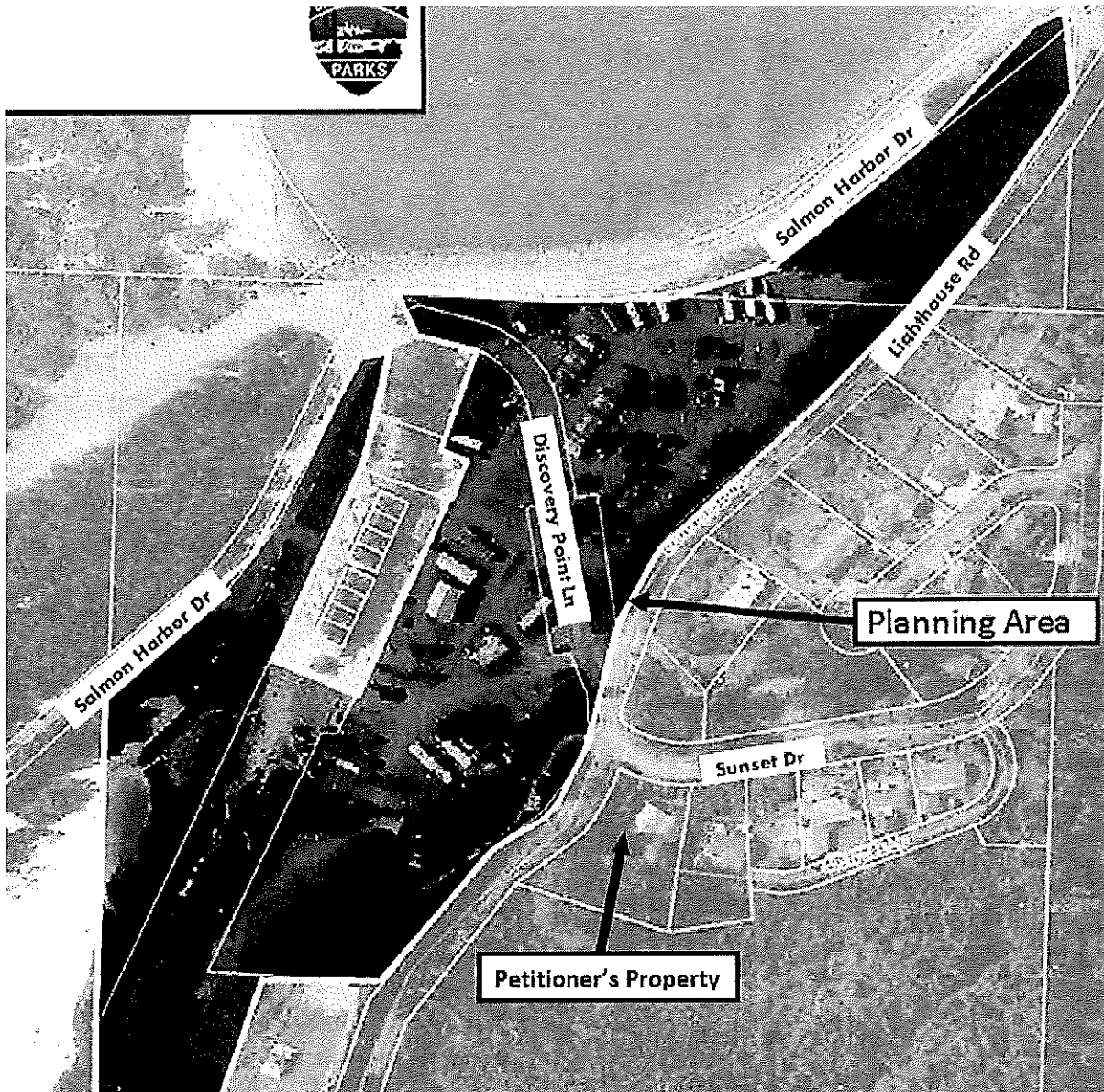
## **NATURE OF THE DECISION**

Petitioner appeals a June 2, 2021 board of county commissioners order vacating a portion of Discovery Point Lane, a county road.

## **FACTS**

In 2018, the county acquired an existing RV Park, which the county now owns and operates as part of Umpqua Dunes County Park (County Park). The County Park includes both the RV Park and a sand dune area south and west of the RV Park. The County Park is bounded on the west and north by Salmon Harbor Drive and on the east by Lighthouse Road. A county road, Discovery Point Lane, runs through the RV Park from Salmon Harbor Drive to Lighthouse Road. Sunset Drive is immediately across Lighthouse Road from Discovery Point Lane. Salmon Harbor Drive and Lighthouse Road intersect at the northeast boundary of the RV Park, approximately one-quarter mile from the intersection of Lighthouse Road and Sunset Drive.

To the south and west of the RV Park are sand dunes that are part of the County Park. The sand dunes are used for All Terrain Vehicle (ATV) riding. A sand ATV path runs from Discovery Point Road, near where it intersects with Lighthouse Road, west through the RV Park and directly to the sand dunes. Below is a graphic derived from Supplemental Record 19, which we have modified to show the location of Salmon Harbor Drive, Discovery Point Lane, Lighthouse Road, Sunset Drive, the RV Park, and petitioner's property.



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2       Petitioner occupies on a part-time basis and rents to others on a short-term  
3 basis a house located on the southeast corner of the intersection of Lighthouse  
4 Road and Sunset Drive, in a residential area east of the County Park. According  
5 to petitioner, petitioner and/or persons renting their house on a short-term basis  
6 ride ATVs in the sand dunes, which they access via Discovery Point Lane and  
7 the sand ATV path. Petition for Review 1; Declaration of Steve Hershberger 1.

1           In 2019, the county began developing a redevelopment plan for the County  
2 Park. Record 34-54. The redevelopment plan contemplates transferring  
3 management of Discovery Point Lane to the county parks department and  
4 vacating Discovery Point Lane. The redevelopment plan contemplates closing  
5 the road to regular vehicular access, using it for additional parking for the RV  
6 Park, and leaving it accessible for emergency evacuation. Record 54. In October  
7 2020, the county began the process of vacating the road and, in December 2020,  
8 the board of county commissioners held a hearing and voted to adopt an order  
9 vacating Discovery Point Lane.<sup>1</sup> At some point that is not clear from the record,  
10 the county also placed a gate in front of Discovery Point Lane at its intersection  
11 with Lighthouse Road to block traffic from entering or exiting the RV Park using  
12 Lighthouse Road. On June 2, 2021, the board of county commissioners adopted  
13 an amended order that vacated Discovery Point Lane and included a condition  
14 that required an easement providing access to Salmon Harbor Drive for the  
15 owners of Tax Lot 1800 as well as the owners of Tax Lot 1700 (Amended  
16 Vacation Order).<sup>2</sup> See n 1. The board of county commissioners did not hold a new  
17 hearing on the Amended Vacation Order prior to adopting it. On June 23, 2021,  
18 petitioner appealed the Amended Vacation Order.

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<sup>1</sup> The December 2020 order included a condition that required an easement providing access to Salmon Harbor Drive for the owners of Tax Lot 1800, and it required that the condition be fulfilled within six months. Record 13.

<sup>2</sup> Petitioner's property is not benefited by those easements.

1     **JURISDICTION**

2           On October 15, 2021, LUBA received the petition for review. The petition  
3     for review states that petitioner has standing because petitioner filed the Notice  
4     of Intent to Appeal (NITA) within 21 days of the date petitioner knew of the  
5     Amended Vacation Order under ORS 197.830(3)(b). As relevant, ORS  
6     197.830(3) provides:

7           “If a local government makes a land use decision without providing  
8           a hearing, \* \* \* a person adversely affected by the decision may  
9           appeal the decision to [LUBA] under this section:

10          “(a)   Within 21 days of actual notice where notice is required; or

11          “(b)   Within 21 days of the date a person knew or should have  
12                  known of the decision where no notice is required.”

13          On November 5, 2021, LUBA received the county’s response brief, which  
14     includes a precautionary motion to dismiss the appeal on two bases: (1) that  
15     petitioner did not include proof that their NITA was timely filed and (2) that  
16     petitioner is not “adversely affected” by the Amended Vacation Order. In an  
17     order dated November 8, 2021, we suspended the appeal and allowed petitioner  
18     to file a response to the county’s motion to dismiss and a reply brief, if warranted.  
19     We now resolve the motion to dismiss.

20          **A.     Timeliness of NITA**

21          Petitioner filed a response to the county’s motion to dismiss. In the  
22     response to the motion to dismiss, petitioner takes the position that the decision  
23     was made without a hearing and that notice of the decision was not provided to

1 them. According to petitioner, they discovered the Amended Vacation Order on  
2 June 10, 2021, when it was included in a packet of materials provided to them in  
3 response to a public records request. Accordingly, petitioner argues, the deadline  
4 for filing the NITA was 21 days from June 10, 2021, and, therefore, the NITA,  
5 which was filed either on June 23, 2021, or June 25, 2021, was timely.<sup>3</sup>

6 Petitioner bears the burden of establishing the board's jurisdiction.  
7 *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). Timely filing  
8 of a NITA is required to establish LUBA jurisdiction. The county has not replied  
9 to petitioner's response or otherwise disputed the facts contained therein. The  
10 county does not argue that petitioner "should have known" of the decision prior  
11 to June 10, 2021, the date that petitioner actually learned of the decision.  
12 Accordingly, based on the undisputed facts asserted by petitioner, we conclude  
13 that the NITA was timely filed.

#### 14 **B. Adversely Affected**

15 The county argues that petitioner is not "adversely affected" by the  
16 Amended Vacation Order, as required by ORS 197.830(3). In the petition for  
17 review, petitioner alleges that their house is located "within sight and sound of  
18 the proposed road vacation and County RV Park." Petition for Review 1. LUBA  
19 has long held that persons living within sight or sound of a proposed development

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<sup>3</sup> The certificate of filing attached to the NITA states that petitioner mailed the NITA via certified mail on June 23, 2021. LUBA received the NITA on June 25, 2021.

1 are presumed to be adversely affected thereby. *Kamppi v. City of Salem*, 21 Or  
2 LUBA 498, 501 (1991). However, the Amended Vacation Order does not  
3 propose any development, and petitioner has not identified any alleged visual or  
4 noise impacts that the road vacation would generate. Accordingly, petitioner's  
5 assertion that they live within sight and sound of Discovery Point Lane does not  
6 establish that they are adversely affected by the Amended Vacation Order.

7 In a declaration attached to the petition for review, petitioner explains that  
8 they and persons renting their house for vacation purposes leave petitioner's  
9 house on Sunset Drive; cross Lighthouse Road to Discovery Point Lane, the road  
10 being vacated; and ride their ATVs on Discovery Point Lane and the sand ATV  
11 path to gain direct access to the sand dunes. Included as an exhibit to petitioner's  
12 declaration is a copy of an online advertisement for renting petitioner's house,  
13 which includes photographs of several ATVs. Petitioner alleges that, by gating  
14 and vacating Discovery Point Lane, the county has blocked their and their guests'  
15 access to the sand dunes and damaged their vacation rental business, business  
16 reputation, and goodwill. Petition for Review 1.

17 The county argues, initially, that petitioner cannot demonstrate that they  
18 are adversely affected by the road vacation because, according to the county,  
19 ORS 821.190 prohibits riding the classes of ATV that are depicted in the exhibit  
20 to petitioner's declaration on "highways" like Lighthouse Road.<sup>4</sup> The county

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<sup>4</sup> ORS 821.190 provides:

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- “(1) A person commits the offense of unlawful operation of an off-road vehicle on a highway or railroad if the person operates a vehicle described in subsection (2) of this section in any of the following described areas:
- “(a) On or across the paved portion, the shoulder, inside bank or slope of any highway, on or across the median of any divided highway or on or across any portion of a highway right of way under construction.
  - “(b) On or across a railroad right of way.
- “(2) This section applies to:
- “(a) Snowmobiles.
  - “(b) Class I all-terrain vehicles.
  - “(c) Class II all-terrain vehicles that are not properly equipped for operation on a highway.
  - “(d) Class III all-terrain vehicles.
  - “(e) Class IV all-terrain vehicles.
- “(3) Exemptions from this section are established under ORS 821.055 (Operation of all-terrain vehicles on certain highways) and 821.200 (Exemptions from general prohibition on operating on highway or railroad).
- “(4) In addition to penalties provided by this section, the operator or owner of a snowmobile or Class I, Class II, Class III or Class IV all-terrain vehicle may be liable as provided under ORS 821.310 (Treble damages for damage to property).
- “(5) The offense described in this section, unlawful operation of an off-road vehicle on a highway or railroad, is a Class B traffic violation.”



1 argues that, because Lighthouse Road is a county road, it is a “public road” under  
2 ORS 368.001(1) and (5).<sup>5</sup> In turn, because Lighthouse Road is a public road, it is  
3 a “highway” under ORS 801.305(1).<sup>6</sup> Therefore, we understand the county to  
4 argue, petitioner cannot be adversely affected by the road vacation because  
5 accessing Discovery Point Lane on an ATV requires illegal activity in the first  
6 place. Petitioner does not dispute the county’s understanding of ORS 821.190.  
7 The county also argues that, independent of whether it vacates Discovery Point  
8 Lane, it has the authority to place a gate in front of it and block vehicular access  
9 to it to address safety concerns. ORS 810.030.<sup>7</sup>

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<sup>5</sup> ORS 368.001 provides, in relevant part:

“(1) ‘County road’ means a public road under the jurisdiction of a county that has been designated as a county road under ORS 368.016.

“(5) ‘Public road’ means a road over which the public has a right of use that is a matter of public record.”

<sup>6</sup> ORS 801.305(1) provides, in relevant part, “‘Highway’ means every public way, road, street, thoroughfare and place, including bridges, viaducts and other structures within the boundaries of this state, open, used or intended for use of the general public for vehicles or vehicular traffic as a matter of right.”

<sup>7</sup> ORS 810.030 provides:

“(1) A road authority may impose restrictions described under this section on its own highways as the road authority determines necessary to do any of the following:

“(a) Protect any highway or section of highway from being unduly damaged.

1       The question we must answer in determining whether petitioner is  
2 adversely affected by the road vacation decision was addressed by the Court of  
3 Appeals in *Devin Oil Co., Inc. v. Morrow County*, 275 Or App 799, 365 P3d 1084  
4 (2015). In *Devin Oil*, the Court of Appeals explained that a petitioner is  
5 “adversely affected” when the challenged decision “either applies to the person

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“ (b) Protect the interest and safety of the general public.

“(2) Restrictions that may be imposed under this section include any of the following:

“ (a) Prohibition of the operation of any or all vehicles or any class or kind of vehicle.

“ (b) Imposing limits on any weight or dimension of any vehicle or combination of vehicles.

“ (c) Imposing any other restrictions that the road authority determines necessary to achieve the purposes of this section. This paragraph does not grant authority to impose speed restrictions.

“(3) Any restrictions or limitations imposed under this section must be imposed by proper order. The restrictions or limitations are effective when appropriate signs giving notice of the restrictions or limitations are erected. A sign giving notice of a restriction or limitation in an order shall be maintained in a conspicuous manner and shall be placed at each end of the highway or section of highway affected by the order and at such other places as is necessary to inform the public.

“(4) Penalties are provided under ORS 818.130 for violation of restrictions imposed under this section.”

1 directly or affects the person's interests in an adverse way." 275 Or App at 807.  
2 In that case, the county extended the time for obtaining building permits under a  
3 previously approved site plan. The court rejected the petitioner's arguments that  
4 its business interests were adversely affected by the county's decision and  
5 concluded that the petitioner had not shown that the county's decision directly  
6 affected its personal or property interests.

7 We conclude that petitioner has not shown that the county's decision to  
8 vacate the road directly affects their personal or property interests in any way.  
9 That is so, in part, because petitioner has not shown that they have a personal or  
10 property interest in using Discovery Point Lane. In addition, petitioner has not  
11 established that the road vacation decision is the mechanism that would deprive  
12 petitioner and their invitees of use of the road. Stated differently, the county could  
13 vacate the road and decide to leave it open to vehicles, including ATVs. The  
14 county could also, without vacating the road, close a portion of it or an entrance  
15 to it to vehicular traffic to address safety concerns, as it has apparently already  
16 done. Finally, petitioner has not demonstrated that they are adversely affected by  
17 a county decision to vacate a road that is likely only accessible on an ATV by  
18 petitioner or their invitees after illegally crossing Lighthouse Road on that ATV.  
19 We agree with the county that an inference can be drawn from petitioner's  
20 declaration and the exhibit attached thereto that petitioner and their short-term  
21 renters must cross Lighthouse Road on ATVs in order to have "direct vehicular

1 access” to Discovery Point Lane and the sand ATV path.<sup>8</sup> Such a crossing  
2 violates ORS 821.190.

3 We agree with the county that petitioner has not established that they are  
4 adversely affected by the Amended Vacation Order. Accordingly, petitioner  
5 lacks standing to bring the appeal and we lack jurisdiction to review it.

6 The appeal is dismissed.<sup>9</sup>

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<sup>8</sup> The Declaration provides, in relevant part:

“6. The road vacation will block *direct vehicular access from the residential properties to the southeast* to [the County] Park and to Salmon Harbor Drive to the north.

“7. The County is currently barring vehicular access to the southeast end of ‘Discovery Point Lane’ as if the road has already been vacated and this obstruction has prevented me and my guests from accessing Salmon Harbor Drive and the [County] Park. It has also damaged my vacation rental business as well as my business reputation and goodwill.”  
Declaration of Steve Hershberger 2 (emphasis added).

<sup>9</sup> We also have serious questions about whether the challenged decision qualifies as a “significant impacts” land use decision, as described in *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982). See *Bohnenkamp v. Clackamas County*, 56 Or LUBA 17 (2008) (concluding that a decision vacating a 30-by-100-foot section of vacant public right-of-way in order to enlarge a single residential lot to the size necessary to construct a single-family dwelling in a developed residential area was not a “significant impacts” land use decision because there were few or no traffic impacts and the land use pattern in the area was already established). However, we need not resolve that question because we conclude that we lack jurisdiction due to petitioner’s lack of standing to appeal the Amended Vacation Order. *McCaffree v. City of North Bend*, \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2019-005, Jan 13, 2020) (slip op at 19).