

LAND USE
BOARD OF APPEALS
JAN 30 10 04 AM '87

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

3	BRUCE B. KEGG, and)	
4	BETTY G. KEGG,)	
)	
5	Petitioners,)	LUBA No. 86-076
)	
6	vs.)	FINAL OPINION
)	AND ORDER
7	CLACKAMAS COUNTY, ROSEMARY)	
8	FREY, JAMES E. PETTICORD and)	
9	DORIS J. PETTICORD, ROBERT)	
10	BOWMAN and ANN BOWMAN, MICHAEL)	
	BOLDUAN and LINDAY BOLDUAN,)	
	DEAN WESTBROOK and MOLLY)	
	WESTBROOK,)	
)	
11	Respondents.)	

Appeal from Clackamas County.

Thomas R. Page and Eugene A. Frassetto, Portland, filed the petition for review and Thomas R. Page argued on behalf of petitioners. With them on the brief were Stoel, Rives, Boley, Fraser & Wyse.

Michael E. Judd, Oregon City, filed a response brief and argued on behalf of Respondent County.

Donald R. Stark and Barry L. Adamson, Portland, filed a response brief and Donald R. Stark argued on behalf of Respondent-Participants. With them on the brief were Williams, Fredrickson, Stark & Weisensee, P.C.

BAGG, Referee; DuBAY, Chief Referee; KRESSEL, Referee; participated in the decision.

DISMISSED 01/30/87

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 The Clackamas County Board of Commissioners refused to
4 accept petitioners' dedication of a public right-of-way.
5 Petitioners ask that we remand the order.

6 FACTS

7 In 1965 petitioners purchased certain property near Lake
8 Oswego adjacent to the "Skyland" subdivision. The original
9 plat of the Skyland Subdivision included a utility easement
10 road between Lots 46 and 47. The road ran along the northern
11 border of Lot 47. The easement provided access to land outside
12 the subdivision including Tax Lot 400. However, an alternate
13 access was negotiated by the owner of Lots 46 and 47 and the
14 owner of Tax Lot 400, the petitioners herein. Pursuant to
15 their agreement, a 20 foot wide strip along the southern border
16 of Lot 47 was dedicated to the county. The dedication was
17 recorded in the Clackamas County Deed Records on May 25, 1965.

18 On June 3, 1965, the Clackamas County Board of
19 Commissioners vacated the utility roadway along the northern
20 border of Lot 47. The record does not reveal any attempt to
21 modify the subdivision plat.

22 The board of commissioners never accepted dedication of the
23 roadway along the southern border of Lot 47. Further, there is
24 no indication in the record that the county was aware of the
25 new dedication or the reasons for it.

26 After petitioners learned from county officials that the

1 1965 deed dedicating the land to the public had never been
2 formally accepted by the county, they requested county
3 acknowledgement of the roadway as a public road. The board of
4 commissioners considered the matter at a public hearing on
5 September 11, 1986. On September 19, 1986, the board issued an
6 order declining to accept the dedication. This appeal followed.

7 JURISDICTION

8 Petitioners recognize there is a question whether the
9 county's refusal to accept the dedication is a land use
10 decision subject to our review under ORS 197.015(10).¹
11 Petitioners insist we do have jurisdiction to review the action
12 and base their argument on the county's order. The order
13 states, in part,

14 "It appearing that due to changes in development on
15 the property and in the surrounding areas since the
16 dedication to the public in 1965, potential drainage
17 problems and possible adverse impacts of future
18 development facilitated by the proposed roadway, the
19 acceptance of the strip as [a] public right-of-way
20 would not be in the public interest...." Record 1.

21 Petitioners say the county's order utilizes land use
22 criteria as justification for the decision. Further,
23 petitioners argue the decision is controlled by criteria in the
24 county's comprehensive plan and zoning ordinance. Petitioners
25 point out that: (1) both plan and zoning ordinance require
26 consideration of drainage characteristics for any site proposed
for development;² (2) County Plan Policy 17.0 requires
submission of storm drainage and erosion control plans prior to
approval of new development; (3) Part 5 of the county's plan

1 addresses transportation; and (4) the county's order appears to
2 involve transportation issues.³

3 Petitioners next argue that Section 102.02 of the county
4 zoning ordinance mandates application of land use criteria to
5 this decision. Section 102.02 requires that land must not be
6 used or transferred "except in conformity with the regulations
7 herein specified...." The regulations include controls on
8 roadway alignment, design, grade and width as well as access
9 and other matters.⁴

10 The county argues that refusal to accept a dedication is
11 not a land use decision because there are no criteria in the
12 comprehensive plan or zoning ordinance expressly covering
13 acceptance of roadways.⁵ Further, the relevant statutes, ORS
14 368.073 - ORS 368.096, do not require that acceptance or
15 rejection of dedication be consistent with local land use
16 criteria.

17 ORS 368.096(1), provides:

18 "If proceedings to acquire real property for public
19 road purposes have been initiated under ORS 368.073,
20 the county governing body may acquire the property by
any of the following methods:

21 "(a) Acceptance of a dedication or donation."

22 This statute makes no reference to any criteria.

23 We agree with the county's analysis that the statutory test
24 of our jurisdiction (ORS 197.015(10)) is not met. The county
25 land use plan and regulations do not provide standards to
26 govern approval or denial of this decision, and ORS Chapter 368

1 does not require consideration of local plan or ordinance
2 criteria in a road dedication proceeding. See Billington v.
3 Polk County, 299 Or 471, 703 P2d 232 (1985).

4 We also find that this decision will not have "significant
5 impact on present or future land use in the area." Billington,
6 299 Or at 478.

7 Petitioners argue that the county's refusal to accept the
8 roadway will have a significant impact on present or future
9 land uses because either (1) petitioners will be precluded from
10 using certain of their property at all, or (2) traffic flow
11 from petitioners' property will be diverted to other road
12 systems. These alternatives allegedly "involve substantial
13 impacts on present or future land use." Petition for Review at
14 16.

15 The easement is not now used for road purposes. The
16 county's decision simply maintains the status quo. As we
17 stated in Billington v. Polk County, ___ Or LUBA ___ (LUBA No.
18 83-072, December 26, 1985)

19 "This case is distinguishable from the situation in
20 Kerns v. City of Pendleton, supra. In Kerns, the
21 decision to improve a street had significant land use
22 impact, and was therefore reviewable for conformity
23 with land use norms, because the improvement project
24 opened a large area for intensive development. Here,
25 the contrary is true. The partial vacation of
26 Clearview Orchards Road will maintain the status quo
in this rural farming area." Billington, Slip Op at 4.

24 In other words, the county's refusal to accept the
25 dedication does nothing to upset the current state of affairs
26 in the area. The decision to not accept the dedication has no

1 substantial impact on present or future land use.⁶

2 We conclude that we lack jurisdiction to review the
3 county's decision.⁷

4 FIRST ASSIGNMENT OF ERROR

5 "Respondent County failed to make findings sufficient
6 to support its decision."

7 Petitioners argue that the county failed to make any
8 findings supporting its decision.

9 If we assume that the decision on review is a land use
10 decision, we are faced with a question of what criteria apply.
11 The requirement to make findings addressing criteria depends
12 upon the existence of criteria. Petitioners do not identify
13 any particular criteria to be applied.⁸ Presumably,
14 applicable comprehensive plan policies would include
15 transportation policies and zoning ordinance policies
16 controlling site design. See Petition for Review at 12-15.

17 The county concluded the public interest would not be
18 served by accepting the dedication. The county referred to
19 potential drainage problems, changes and development on the
20 property and in the surrounding area, and possible adverse
21 impacts of future development facilitated by the roadway.
22 These findings support the conclusion that the public interest
23 would not be served by accepting the dedication.⁹ Assuming
24 these findings are supported by evidence in the record, we
25 conclude they are sufficient to support the denial. We
26 therefore deny this assignment of error.

1 SECOND ASSIGNMENT OF ERROR

2 "The findings made by respondent county are not
3 supported by substantial evidence in the record."

4 Petitioners claim the county's findings lack evidentiary
5 support. They allege the record does not show any history of
6 development on the property and no evidence as to how
7 petitioners intend to develop it. Therefore, petitioners
8 argue, any statement as to future development is
9 fortune-telling. Petitioners also say no one testified
10 regarding potential causes of drainage problems, and there is
11 no evidence that future development will create adverse impacts
12 on the surrounding area.

13 For these reasons, petitioners claim the findings are not
14 supported by substantial evidence, are conclusional, and do not
15 constitute a basis to sustain the county decision.

16 The record shows existence of developments since 1965
17 (Record 5, 7). There is testimony that a new roadway could
18 increase maintenance problems on Skyland Drive (Record 7, 8)
19 and that new development could create drainage problems (Record
20 6-8).

21 We believe this evidence is sufficient to support the
22 county's findings with respect to potential drainage problems
23 and possible adverse impacts of future development. Only one
24 appropriate finding supported by substantial evidence is
25 sufficient to support a denial, Heilman v. City of Roseburg, 29
26 Or App 71, 591 P2d 390 (1979). We deny this assignment of

1 error.

2 THIRD ASSIGNMENT OF ERROR

3 "Respondent County failed to consider or apply the
4 requisite legal standards under its own comprehensive
5 plan and zoning ordinance in the state land use laws
in making its decision."

6 Petitioners argue the county was obliged to accept the
7 dedication. Petitioners argue that they relied upon the deeded
8 dedication in their purchase of Tax Lot 400 and in their
9 support of the vacation of the platted roadway between Lots 46
10 and 47. Petitioners claim this "relocation of the public road"
11 from the north side of Lot 47 to the southside of Lot 47 was
12 part of a "continuous transaction...." Petition for Review at
13 26. Petitioners claim their reliance "in effect was an
14 acceptance of dedicated right-of-way for the public."
15 Petitioners add that "common law rules of acceptance" require
16 acceptance as a matter of law. Petitioners say "that without
17 such access," petitioners can not build upon their property (we
18 note, however, that Tax Lot 400 abuts Green Bluff Road).
19 Without the ability to make improvements, petitioners' right to
20 use and develop their property is denied.¹⁰

21 The county argues that there is no legal authority
22 supporting the view that acceptance of a dedicated roadway may
23 be implied. The county acknowledges that implied acceptance of
24 roadways within platted subdivisions may exist, but this
25 dedication was not offered as part of a subdivision plat.
26 Therefore, the county argues, until the dedication is accepted,

1 the county is under no obligation to recognize the dedication.

2 We agree with the county. Other than when part of a
3 partitioning or subdivision plat, there is no implied
4 acceptance of a dedication. Miller v. Roy W. Heinrich, Inc.,
5 257 Or 155, 476 P2d 183 (1970).¹¹

6 Petitioners make an additional argument that they relied on
7 county acceptance of the roadway. The county's acceptance of
8 the Skyland Subdivision resulted in acceptance of a platted
9 roadway. That roadway was, however, vacated. The property
10 petitioners wish the county to accept as a public road was not
11 offered for dedication in the Skyland Subdivision Plat.
12 Petitioners' reliance on the original subdivision acceptance
13 can not establish acceptance by the county of a road not shown
14 on the original plat. We deny this assignment of error.

15 This review proceeding is dismissed.

FOOTNOTES

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ORS 197.015(11) states:

"'Land use decision':

(a) Includes:

(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

- (i) The goals;
- (ii) A comprehensive plan provision;
- (iii) A land use regulation; or
- (iv) A new land use regulation; or

(B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals.

(b) Does not include a ministerial decision of a local government made under clear and objective standards contained in an acknowledged comprehensive plan or land use regulation and for local government under ORS 215.402 to 215.438 or 227.160 to 227.185."

2

See Clackamas County Comprehensive Plan, page 137.

3

See also Policy 19.0, 20.0, 21.0 and 22.0.

4

See Clackamas County Zoning Ordinance, Section 1007.02. Further, dedication and improvements of rights-of-way on new development are covered by Section 1007.03 of the ordinance.

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We are cited to nothing in the comprehensive plan or zoning ordinance or state law controlling the county's decision to accept or not accept an offer of dedication. To be sure, issues of drainage and traffic are relevant to land development, but in contrast to land development permits, and other traditional land use actions, nothing in the county's regulatory scheme makes a road dedication subject to these criteria.

6

See Footnote 10, infra. Petitioners have other access to their property. See also Record 12-13.

7

In Wagner v. Marion County, 79 Or App 233, ___ P2d ___ (1986), the Court of Appeals questioned our view that denial of a request for an easement crossing a street plug or reserve strip simply maintained status quo and was not, therefore, a land use decision. We cited Billington v. Polk County, 299 Or 471, 703 P2d 232 (1985). The Court remanded the case to us after noting that the zoning in the area had changed from Low Density Residential to Exclusive Farm Use since the restriction on road travel was established in 1976. Petitioner argued that the restriction on travel over the roadway affected farm use.

The Court stated:

"We imply no answer to the jurisdictional question at this time. We only hold that LUBA's decisional premise, that the decision not to change an existing situation cannot have a significant impact, no matter what related changes have occurred since the situation came into being, is not a satisfactory basis for answering the question." Wagner, 79 Or App at 236.

In this case, the changes in circumstance appear to amount to petitioners' interest in developing the property and an increase in population in the area. We do not find that these changes are such that denial of the dedication has any significant impact on land use. As noted infra, other access is available to this property. Also, unlike in Wagner, the county is not being asked to undo or change a prior action which involves use of land use criteria.

We note also that even if comprehensive plan policies may be applicable to the decision, (because it meets the significant impact test) the county could nonetheless

1 successfully defend the denial based on its view that
2 nonacceptance of the roadway is in the public interest. ORS
3 368.096(1). Heilman v. City of Roseburg, supra. That is, the
4 denial may be a land use decision subject to our review as a
5 result of a "significant impact" analysis, but the county need
not defend the decision by citing plan or land use regulation
criteria. The denial can rest on the failure of the request to
satisfy the broad discretion granted under ORS 368.096(1).

6 We are cited to no plan or ordinance provisions that would
7 compel acceptance of the dedication.

8
9 Petitioners do argue in the first assignment of error that
the county did utilize land use criteria. Petitioners define
these as:

10 "1. The purported 'inevitable development' of other
11 property owned by Petitioners adjacent to the property
intended to be served by the dedicated right-of-way,

12 "2. The impact that this purported development would
13 have on the six existing public roads serving the
Skylands area,

14 "3. Purported changes in development on the property
15 and in the areas since dedication in 1965,

16 "4. 'Potential drainage problems,' and

17 "5. 'Potential adverse impacts of future development
18 facilitated by the proposed roadway.'" Petition for
Review at 16.

19 It is not clear what particular Clackamas County Comprehensive
20 Plan and Zoning Ordinance Criteria petitioners believe should
be applied.

21
22 Presumably, the county's finding regarding the public
23 interest is an expression of a self-imposed standard for review
24 of road dedications. ORS 368.096 provides the county "may
25 acquire" property by dedication. The only criteria applicable
to the exercise of the discretion granted by the statute would
appear to be whether the decision is for a public purpose. See
2 McQuillan Municipal Corporations (3rd Edition, 1979), Section
10.31.

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3 Petitioners do not articulate a claim that their property
4 has been taken without due process of law. We will not
entertain undeveloped claims of unconstitutionality, if indeed
petitioners are claiming a "taking." See Constant v. Lake
Oswego, 5 Or LUBA 311 (1982).

5 Petitioners' claim of no access is unclear. Tax Lot 400
6 abuts Green Bluff Road. Also, petitioners later argue that the
county failed to find "an alternate route of access to Tax Lot
7 400 would be economically or environmentally feasible."
Petition at 29. This language suggests other access is
8 possible, contrary to petitioners' claim that without the
dedication, there is no access.

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10 11

11 See also, Mid-County Cemetery District v. Thomason, 267 Or
12 637, 518 P2d 174 (1974) wherein a "private roadway" may gain
status as a "public roadway" where it is subject to
long-standing use and recognition as a public road.