

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

LELA STROME

Petitioner,

v.

LANE COUNTY BOARD OF  
COMMISSIONERS,

Respondent.

Case No. 16-06-21813

OPINION RE: WRIT OF REVIEW

Both parties agree that this is properly a writ of review proceeding governed by ORS 34.040. The petitioner seeks reversal of an order of the Board of Lane County Commissioners (hereafter, "BCC") legalizing a road commonly known as Hulbert Lake Road. In her petition, she asserts three independent bases for reversal:

1. The BCC made findings and issued an order not supported by substantial evidence in the whole record;
2. The BCC improperly construed ORS 368.201 (1) and (3); and
3. The BCC rendered a decision that is unconstitutional because it deprives the petitioner of property without due process of law.

In addition, the petitioner argues that if the legalization of the road is affirmed, the BCC erred in not awarding her compensation of \$2,290,350 as set forth in her claim.

For the following reasons, this court concludes otherwise and affirms the legalization determination of the BCC and its decision not to award compensation.

**1. The BCC did not render a decision that is unconstitutional because it deprives the petitioner of property without due process of law.**

Nothing urged by the petitioner compels a conclusion that ORS 368.201 is facially

unconstitutional. Nor does she argue that the BCC did not follow the statutory procedure or otherwise deny her the right to present and comment on the evidence. Rather, she appears to argue that if the BCC made findings and issued an order not supported by substantial evidence or improperly construed the applicable law, then she was deprived of due process. Because this argument necessarily depends on resolution of the first two issues, it will be addressed last.

To the extent the petitioner's constitutional argument is based on the refusal of the BCC to award her compensation as part of the legalization, the resolution of her claim for compensation is governed by ORS 368.211. In the absence of any evidence that she established a bridge or any other structure that encroached on the road, and there being evidence that the county constructed the bridge in question, the BCC had substantial evidence to deny the claim.

## **2. The BCC properly construed ORS 368.201 (1) and (3)**

ORS 368.201(1) is broadly worded. It requires only "doubt" as to whether a public road was legally established or was, in fact, established. Doubt may arise through either omission or defect. The basis for legalization under ORS 368.201(3) requires that the road at issue have been used for 10 years or more but does not conform to the location of a road described in the county records.

Under either basis, a road must presently exist. There is no dispute that this condition has been met. Under subsection (1), there must also exist doubt as to whether a public road was legally or, in fact, established.

The county presented evidence that a road approximately congruent with Hulbert Lake Road was viewed in 1855 as revealed in the county records, that the same road appeared on a 1915 plat designated as County Road 160, that a 1915 survey referred to "the County Road" in the location of the viewed road, that a 1922 USGS map showed a road in the same location, and that a 1936 Oregon State Traffic Map also showed a road in that location.

In an affidavit, the Petitioner states that in 1920, when her family purchased a farm on what is now Hulbert Lake Road, a road did not exist from what is now the northern end of Hurlbert Lake Road to their farm or south from their farm to "the Zumwalt house." A road did exist from the Zumwalt house south to the present southern end of Hurlbert Lake Road, but, according to the petitioner, this was originally a "driveway." She also acknowledges that there was access between her family's house and the Zumwalt house, which she characterizes as "field access." It is not clear in her affidavit how her family traveled between their house and the Benton county road to the north before her father constructed a "driveway" connecting the two.

This conflicting evidence and the very fact of this litigation shows that the requisite doubt exists. Accordingly, given the plain language of subsection (1), the BCC had authority to initiate legalization proceedings.

Although the county relies on ORS 368.201(3) as an alternative basis for legalization, it

appears that this is more a fall-back position. If the petitioner claimed that there was (or might have been) a county road, but it was not in the present location of Hulbert Lake Road, this would have been a proper basis for legalization. Apparently, she is not claiming that, so it is not applicable.

The county did not misconstrue these statutes.

**3. The BCC made findings and issued an order supported by substantial evidence in the whole record.**

The gist of Petitioner's view is that the road was "a series of interconnected private drives and field roads," not a public road. Both sides agree that until the Fern Ridge dam was built, much of the ground traversed by the road was subject to seasonal flooding. The county acknowledges that there may have been periods of time when the road was poorly maintained, or not maintained at all and that property owners could have put fences across the road and treated the road as private property. The petitioner argues that her recollection, coupled with the absence of references to the road in various conveyances and surveys overcomes the evidence that a county road existed.

The most relevant of the county's evidence is as follows:

1. 1853: A GLO plat and field notes dated 1853 showing the location of the William Crow residence.

2. 1855: Various entries in the Commissioner's Journal reflecting a petition for establishment of a public road beginning at the Lane-Benton County line south of the William Crow residence and extending south to Fern Ridge. Entries reflecting the appointment of viewers for the road and the viewers' field notes describing the proposed road and recommending establishment of a public road.

3. 1855: Corner report of sections 13, 14, 23, and 24 by viewers indicating "road as viewed and marked passes through this corner."

4. 1871: Field notes of County Road 270 stating:  
"County Road running from Benton County line to Fern Ridge. Changed said road so as to run a viz: Commencing at sec[tion] cor[ner] between secs 13, 14, 23, 24..."

5. 1894: Corner report of sections 13, 14, 23, and 24 indicating the corner "fell in traveled road."

6. 1910: Corner report of sections 13, 14, 23, and 24 indicating the corner "stands about midway in County Road 270." (The county presented uncontroverted evidence that County Road 270 was constructed to realign a portion of County Road 160.)

7. 1911: County survey for Blaine Hovey showing a road running north from section corner 13, 14, 23, 24.

8. 1915: Survey for B.F. Cleek Estate immediately north of the Hovey property and showing a road in the same location and veering to the northwest (almost exactly congruent to Hulbert Lake Road) labeled "County Road 160."

9. 1915: Survey for Fish and Tedder immediately north of Cleek Estate property referring to a "County Road" west of Hulbert Lake near the present location of Hulbert Lake Road.

10. 1922: USGS Map showing a road in the present location of Hulbert Lake Road and designating it as a "metaled road" as opposed to a "private or poor road" or a "track or path."

11. 1936: Oregon State Traffic Map showing a road in the location of Hulbert Lake Road and designating it as a "metal surfaced road."

12. Recent history: There seems to be no dispute that the county has maintained and performed repairs on the road for about the last 40 years.

#### **B. Petitioner's Evidence**

The Petitioner's recollection as set forth in her affidavit is at variance with the above evidence, particularly the 1922 USGS map and the 1936 Oregon State Traffic Map. Both these documents reflect the existence of a "metaled" road where Hulbert Lake Road now runs. The petitioner recalls that in 1920, no road existed in that location except a gravel driveway from the northern terminus to her parents' house and a driveway from the southern terminus to the Adam Zumwalt house. She avers that "sometime in the late 1960's, Lane County personnel arrived at our farm and claimed our driveway and field access was a county road.. \*\*\* As I recall, they eventually put some gravel on our old field road, although it was still essentially a one-track lane." The BCC could reasonably conclude that the cartographers who produced the 1922 and 1936 maps were disinterested persons whose descriptions of the quality of the road would likely be more accurate than the petitioner's recollection.

The petitioner also claims that the road, as viewed, passed through A. F. Zumwalt's claim instead of "near to" it as described in the viewers' field notes. But it appears from one of Petitioner's exhibits (Rec. 180) that both Adam Zumwalt (the viewer) and Andrew Zumwalt had a claim in the vicinity of the road. Although, as petitioner points out, the road traversed a substantial portion of Adam T. Zumwalt's claim, the southwest corner of Andrew F. Zumwalt's claim is very "near to" the present day Hulbert Lake Road. (See Rec. 62-3, 64 ). She also argues that it would have been a conflict of interest for Adam Zumwalt to be a viewer on a road that traversed his property and therefore it is unlikely that the road passed through his property.

Although it is a logical inference that the law has been followed, in this case the BCC could reasonably have found that presumption overcome by substantial documentary evidence that the road did pass through his property.

Petitioner points to a 1942 Corps of Engineers map (Rec. 266) as support for her claim that the road was just a series of driveways and field access. That exhibit depicts Hulbert Lake Road as a "Loose surface graded, dry weather road." It classifies other roads as "unimproved roads." Within that context, the BCC could reasonably have concluded that this map shows a road consistent with the county's characterization of the road and inconsistent with petitioner's.

Much of the remainder of petitioner's argument points to an absence of references to the road in documents, such as deeds and corner reports. Logically, it is far more likely that a document would not refer to a road in existence than that a document would refer to a road that is not in existence. The documents offered by the County refer to an established road in the location of present day Hulbert Lake Road. Petitioner offers no compelling explanation why those documents do not constitute substantial evidence of a road in existence at the time the document was created. The BCC could reasonably have concluded that references to the road were more probative of the road's existence than documents that made no reference to the road.

In a similar vein, the petitioner argues that given the absence of documentary evidence between the 1855 viewing and documentary evidence of the existence of the road, the county abandoned the road by operation of law. Again, petitioner's argument is based on the lack of evidence rather than any affirmative evidence that the road was not established or was abandoned. Given the continued existence of a road (however characterized) that was nearly identical to the proposed road as viewed, it was not unreasonable for the BCC to reject the argument that the road had been abandoned.

### **C. Conclusion as to Substantiality of the Evidence**

Substantial evidence supports the BCC's finding that County Road 160 and Hulbert Lake Road are the same road; that the road has been in continuous existence as a public road since 1955; and that the road has been in its current location since the mid-1800's.

The lack of evidence that the road was actually established with two years is balanced by the lack of evidence that it was not established. Given the fact of the view and evidence that the road existed continuously in the location described by the viewers, the BCC could reasonably conclude that the road had not been abandoned.

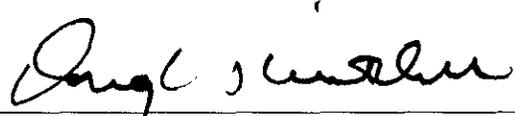
The finding that legalization is in the best interest of the public and adjoining landowners is not subject to review in this proceeding.

Given the above conclusions regarding the proper application of ORS 368.201(1) and the substantiality of the evidence supporting the BCC's decision, I conclude that the Petitioner's due

process rights have not been violated.

Counsel for the respondent should prepare a judgment consistent with this opinion for review by petitioner's counsel before submission to the court.

Dated this 4<sup>th</sup> day of May, 2007

A handwritten signature in black ink, appearing to read "Douglas S. Mitchell", written in a cursive style.

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Douglas S. Mitchell, Circuit Court Judge