

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 JAMES M. GRIFFIN and
5 SHARRI M. GRIFFIN,
6 *Petitioners,*
7

8 vs.
9

10 JACKSON COUNTY,
11 *Respondent,*
12

13 and
14

15 DENNIS R. KANTOR and
16 REBECCA M. KANTOR,
17 *Intervenors-Respondent.*
18

19 LUBA No. 2001-098
20

21 FINAL OPINION
22 AND ORDER
23

24 Appeal from Jackson County.
25

26 Matthew G. Fawcett, Medford, filed the petition for review and argued on behalf of
27 petitioners.
28

29 No appearance by Jackson County.
30

31 Dennis R. Kantor, Medford and Rebecca M. Kantor, Medford, filed a response brief.
32

33 BRIGGS, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
34 participated in the decision.
35

36 REMANDED

12/07/2001
37

38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.
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NATURE OF THE DECISION

Petitioners challenge a county decision to deny a floodplain fill and removal permit.

MOTION TO STRIKE

Intervenors-respondent (intervenors) filed a two-page response brief a week after the response briefs were due, and one week before oral argument. In a cover letter attached to the brief, intervenors explain that they did not see a copy of the briefing schedule until after they had returned from a trip and therefore they were prevented from filing a brief within the deadline. The brief was not received by LUBA until one day before oral argument, as intervenors mailed the brief to the wrong address. Petitioners move to strike the response brief, arguing that they did not receive a response brief and did not know that a response brief had been filed until they appeared at oral argument and, as a result, were not prepared to respond to the brief. In addition, petitioners argue that the brief does not conform to our rules pertaining to format, nor does the brief respond to petitioners’ assignments of error.

The failure to file a timely response brief and the failure to comply with our rules pertaining to the format of a brief are technical violations of our rules and do not warrant striking the brief unless other parties’ substantial rights are prejudiced. OAR 661-010-0005. Those substantial rights include an adequate time to review the response brief prior to oral argument. *See Muller v. Polk County*, 16 Or LUBA 771, 775 (1988) (a party’s substantial rights include an adequate opportunity to prepare and submit a case). In this case, we conclude that acceptance of the response brief would prejudice the petitioners’ substantial rights. Therefore, intervenors’ response brief is stricken.

1 **FACTS**

2 Petitioners, the applicants below, own a 11.5-acre parcel bordered on the west side by
3 Griffin Creek. Griffin Creek is a designated floodway and a Class 1 stream.¹ A 75 to 100
4 foot swath of the subject property adjacent to Griffin Creek is located within the floodway,
5 and an additional 60 to 200 foot swath is located within the 100-year floodplain
6 (floodplain).² The widest portion of the floodway and floodplain are at the property’s
7 northwest corner. The floodway and floodplain are located within the county’s floodplain
8 overlay (FP) zone. Jackson County Land Development Ordinance (JCLDO) Chapter 254,
9 pertaining to the floodplain overlay zone, permits fill in the floodplain if the fill will not
10 result in stream relocation, erosion or require flood control engineering, and the fill will not
11 result in the placement of a structure within the floodplain. Petitioners propose to excavate an
12 area approximately 30 to 40 feet wide and 200 feet long along Griffin Creek and to place
13 3,500 cubic yards of fill approximately 150 feet east of the creek.³ The area to be excavated
14 is within the floodway; the area to be filled is located within the floodplain, but is not within
15 the floodway.

16 During the proceedings before the county, neighbors and staff from the Oregon
17 Department of Fish and Wildlife (ODFW) testified in opposition to the request, arguing that
18 the fill and removal would adversely affect vegetation within the floodway and floodplain,

¹JCLDO 254.015(16) defines “floodway” as:

“The channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot.”

² JCLDO 254.015(13) defines “floodplain, 100-year” as “[t]he land within the County subject to a one percent chance of flooding in any given year, including the floodway and floodway fringe.” The floodplain is also known as an “area of special flood hazard.” JCLDO 254.015(2). Development within areas of special flood hazard requires a permit. JDLDO 254.025 and 254.030(1).

³Petitioners originally proposed to add 16,500 cubic yards of fill, however, they later amended their application to reduce the fill to 3,500 cubic yards. The proposed excavation is intended to mitigate the effect of the proposed fill by reducing an increase in flood elevation during high-water events.

1 could result in a change in the stream banks, and would result in higher levels of flooding on
2 property located to the west of Griffin Creek. The city of Central Point is located
3 downstream from the subject property. The city also opposed the application because of its
4 potential impact on downstream flooding.

5 The county hearings officer concluded that the proposed fill and removal complied
6 with the provisions of JCLDO chapter 254 with regard to flood hazards. However, the
7 hearings officer determined that petitioners failed to demonstrate to ODFW's satisfaction
8 that the proposed action would not adversely effect "sensitive riparian and wildlife habitat."
9 As a result, the hearings officer concluded that the application did not comply with ordinance
10 provisions pertaining to sensitive riparian areas and fish and wild life habitat and denied the
11 application. This appeal followed.

12 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

13 JCLDO 254.045 provides, in relevant part:

14 "[T]he following uses shall be subject to administrative approval * * * in
15 areas designated under [JCLDO] 254.025. * * * If all requirements of this
16 Chapter are not met, the application shall be denied. * * *

17 " * * * * "

18 "(13) Removal or fill within the 100-year floodplain.

19 " * * * * "

20 "(23) Relocation of a stream channel and removal or fill of materials for
21 erosion and flood control purposes under the jurisdiction of the
22 Division of State Lands (DSL) when [ODFW] determines that
23 sensitive riparian wildlife or fish habitat will not be adversely affected,
24 and the applicant utilizes the services of a professional hydrologist,
25 Oregon registered engineer or the Resource Conservation Service
26 (RCS) or similarly qualified agency who certifies in writing that the
27 proposed activity will not result in an increase of the base flood
28 [level]. This certification requirement may be waived if the nature of
29 the activity allows the Department to conclude that no increase in the
30 base flood will result from the proposed activity. This certification
31 shall also be made directly to the DSL."

1 The hearings officer based his denial on petitioners’ failure to comply with JCLDO
2 254.045(23) and JCLDO 280.060(2)(F).⁴ Petitioners argue in their first assignment of error
3 that the hearings officer erred in applying JCLDO 254.045(23) to the subject application,
4 because the application is not for “relocation of a stream channel and removal or fill of
5 materials for erosion and flood control purposes.” Petitioners contend that their application is
6 a simple removal and fill request pursuant to JCLDO 254.045(13). If the request is properly
7 categorized, petitioners argue, there is no requirement that ODFW determine that the
8 proposed action will not adversely affect sensitive riparian wildlife and fish habitat and,
9 therefore, the hearings officer’s single basis for denial is in error.

10 In their third assignment of error, petitioners concede that their application is subject
11 to review for its potential impact on fish and wildlife habitat, pursuant to LDO
12 280.060(2)(F). *See* n 4. However, petitioners argue that LDO 280.060(2)(F) is an
13 informational requirement. Petitioners contend that they presented evidence to the hearings
14 officer to show that their proposal would not have an adverse impact on fish and wildlife. To
15 the extent that the hearings officer relied on contrary evidence from ODFW staff and
16 opponents to conclude that there is an impact, petitioners argue that that evidence cannot
17 independently provide a basis for denial of the subject application because all LDO
18 280.060(2)(F) requires is that fill and removal applications be “reviewed for [their] impact on
19 fish and wildlife habitat.”

20 Nothing in the challenged decision explains why the hearings officer believed the
21 subject application is for a “relocation of a stream channel and removal or fill of material for
22 erosion and flood control purposes,” and thus subject to JCLDO 254.045(23) rather than

⁴JCLDO 280.060(2)(F) provides, in relevant part:

“All * * * removal or fill operations in excess of 50 cubic yards are subject to review for impact on fish and wildlife habitat. The Division of State Lands also requires a permit for such operations.”

1 JCLDO 254.045(13). While there may be a reason why a “no impact” determination by
2 ODFW is required before the county approves a fill/removal permit in situations other than
3 those described in JCLDO 254.045(23), that reason is not articulated in the decision or in the
4 portions of the record to which we have been directed.

5 With respect to JCLDO 280.060(2)(F), petitioners do not dispute that the provision
6 subjects their proposal to county review for impacts on fish and wildlife habitat. However,
7 they contend JCLDO 280.060(2)(F) is essentially standardless, because it fails to specify the
8 type or degree of “impact on fish and wildlife habitat,” and thus fails to provide a basis for
9 the county to deny the proposed removal and placement of fill or to allow it subject to
10 conditions designed to mitigate impacts.

11 JCLDO 280.060(2)(F) is part of a code section that prescribes stream and lake
12 setbacks for fishery and riparian habitat. Although JCLDO 280.060(2)(F) does not specify a
13 type or degree of impact on fish and wildlife that is prohibited, viewed in context with the
14 other provisions of JCLDO 280.060(2), it is reasonably clear that subsection (F) is concerned
15 with adverse impacts on fish and wildlife habitat. We therefore disagree with petitioners that
16 JCLDO 280.060(2)(F) is a standardless approval criterion, or that noncompliance with the
17 provision would not provide a basis for the county to deny the proposal, or require
18 modifications to avoid adverse impacts on fish and wildlife.

19 The more difficult question is what the standard requires and the evidence that is
20 relevant to JCLDO 280.060(2)(F). The hearings officer’s decision discusses both JCLDO
21 254.045(23) and 280.060(2)(F) in the same paragraph, and concludes that both are
22 mandatory approval standards. Record 12. The hearings officer then concludes that, based on
23 the evidence in the record, he “cannot find [that] sensitive fish habitat will not be adversely
24 affected and the application must, therefore, be denied.” Record 13. That conclusion appears
25 to be directed primarily at JCLDO 254.045(23). As discussed above, unlike JCLDO
26 280.060(2)(F), JCLDO 254.045(23) requires a determination by ODFW that sensitive

1 riparian habitat will not be adversely affected. The hearings officer did not separately discuss
2 JCLDO 280.060(2)(F), which does not grant ODFW a determinative role in finding
3 compliance with that provision. In other words, it is unclear whether JCLDO 280.060(2)(F)
4 forms an independent basis for the hearings officer’s denial. If so, it is not clear what
5 evidence the hearings officer relied upon in concluding that JCLDO 280.060(2)(F) is not
6 met. Given the uncertainty over the meaning and requirements of JCLDO 280.060(2)(F), and
7 the lack of adequate findings addressing that provision, remand is necessary for findings
8 explaining why the hearings officer believes the proposal does not comply with JCLDO
9 280.060(2)(F).

10 The first assignment of error is sustained. The third assignment of error is sustained
11 in part.

12 **SECOND ASSIGNMENT OF ERROR**

13 JCLDO 280.060 contains special setback requirements to provide buffers between
14 certain uses. JCLDO 280.060(2)(A) pertains in part to development in or near Class I streams
15 and provides, in relevant part, that

16 “[n]o structure other than boat landings, docks, marinas, bridges, dams and
17 hydroelectric facilities, or pumping or water treatment facilities shall be
18 located closer than 50 feet to the banks of any Class 1 stream[.] * * * The
19 bank shall be defined as the average high water line. All development
20 permitted within the stream and lake setbacks shall be designed to minimize
21 the removal of riparian vegetation, and shall reclaim lands disturbed by
22 development activities in accordance with the standards of ASC 90-9.”

23 Petitioners argue that the hearings officer improperly applied JCLDO 280.060(2)(A)
24 to the subject application. Petitioners argue that the proposed fill and removal do not involve
25 the construction or the joining together of parts “in some definite manner” and, therefore, the
26 proposed activity does not include a “structure” as that term is defined in JCLDO 00.253.⁵

⁵JCLDO 00.253 defines “structure” as:

1 Although the hearings officer’s decision quotes JDLDO 280.060(2)(A) as an approval
2 criterion, it does not determine that the proposal is for a “structure” or deny the application
3 based on JCLDO 280.060(2)(A). Indeed, the hearings officer’s decision contains no findings
4 addressing JCLDO 280.060(2)(A), other than a cryptic footnote stating that the
5 “requirements of [JCLDO] Chapter 280 [do] not apply to this application.” Record 9, n 2.
6 Whatever that footnote is intended to suggest, it is clear that the hearings officer did not
7 determine that the proposal involves a “structure,” and did not apply the first sentence of
8 JCLDO 280.060(2)(A) to petitioners’ application. Therefore, petitioners’ assignment of error
9 provides no basis for reversal or remand.

10 The second assignment of error is denied.

11 The county’s decision is remanded.

“That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner. For land use regulatory purposes, the term structure shall also include gas or liquid storage tanks but shall exclude fences less than six feet in height and uncovered patios.”

JCLDO 00.75 defines “development” as:

“Any man-made change to improved or unimproved tracts of land, including, but not limited to, * * * dredging, filling, [and] grading * * * operations located within the area.”