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

G. HOWARD SEPULVADO, JACKSON RANCH, INC.  
and THOMAS W. BECKLEY, TRUSTEE OF THE  
BECKLEY FAMILY TRUST,  
*Petitioners,*

vs.

DOUGLAS COUNTY,  
*Respondent,*

and

OREGON DEPARTMENT OF TRANSPORTATION,  
*Intervenor-Respondent.*

LUBA No. 2009-090

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FINAL OPINION  
AND ORDER

Appeal from Douglas County.

Thomas W. Beckley, Winchester, filed the petition for review and Melvin E. Smith argued on behalf of Thomas W. Beckley. Melvin E. Smith represented G. Howard Sepulvado and Jackson Ranch, Inc.

Paul E. Meyer, County Counsel, Roseburg, filed a joint response brief and argued on behalf of respondent. With him on the brief was Bonnie E. Heitsch.

Bonnie E. Heitsch, Assistant Attorney General, Salem, filed a joint response brief and argued on behalf of intervenor-respondent. With her on the brief was Paul E. Meyer.

RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED

01/27/2010

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

**NATURE OF THE DECISION**

Petitioner appeals a decision by the county approving a conditional use permit for highway improvements.

**FACTS**

The Oregon Department of Transportation (intervenor) sought a conditional use permit to replace an Interstate 5 (I-5) bridge crossing, the Del Rio Road overcrossing, which crosses I-5 near the Winchester Interchange at exit 129. Highway 99 parallels the eastern side of I-5 in this location. The proposal included a relocation of Del Rio Road and its overcrossing approximately 435 feet to the north, and a realignment of that road. In addition, intervenor proposed to realign Highway 99 further to the east, relocate the northbound I-5 interchange ramps at the Winchester exit, and add new turning lanes at the new intersection of Highway 99 and the relocated Winchester Interchange ramps and at the new intersection of Highway 99 and Umpqua College Road.

The relocated northbound interchange ramps and relocated Highway 99 right-of-way are proposed on approximately 9.6 acres of land zoned Exclusive Farm Use-Grazing (FG). The planning director approved the proposed conditional use permit, and the decision was appealed to the county planning commission. The planning commission affirmed the decision, and the decision was appealed to the board of county commissioners, which declined to review the planning commission’s decision. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

**A. Introduction**

OAR 660-012-0065 applies to transportation improvements on rural lands such as the proposed improvements described above. Depending on the proposal, transportation improvements may be exempt from statutes and rules that would ordinarily require exceptions to Statewide Planning Goal 3 (Agricultural Land), Goal 4 (Forestland), Goal 11

1 (Public Facilities) and Goal 14 (Urbanization) for development on land zoned exclusive farm  
2 use. OAR 660-012-0065(3)(a) – (o).<sup>1</sup> OAR 660-012-0065(3)(b) provides that “transportation  
3 improvements that are allowed or conditionally allowed by \* \* \* ORS 215.283 \* \* \*” are  
4 consistent with Goals 3, 4, 11, and 14. ORS 215.283(1) in turn provides that the following  
5 use may be established on land zoned for exclusive farm use:

6 “(L) Reconstruction or modification of public roads and highways,  
7 including the placement of utility facilities overhead and in the  
8 subsurface of public roads and highways along the public right of way,  
9 but not including the addition of travel lanes, where no removal or  
10 displacement of buildings would occur, or no new land parcels would  
11 result.” (ORS 215.283(1)(L)(2007).<sup>2</sup>

12 Certain transportation improvements may also require an analysis of alternatives that  
13 would have lesser degrees of impacts on EFU-zoned land, and a showing of compliance with  
14 ORS 215.296. OAR 660-012-0065(5)(a) – (c).<sup>3</sup> However, if OAR 660-012-0065(3)(b)

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<sup>1</sup> OAR 660-012-0065(3) describes fifteen categories of transportation improvements that fall under the rule’s safe harbor and that are deemed to be consistent with Goals 3, 4, 11 and 14. Only three of those categories of improvements are relevant to this appeal and they are set out below:

“(a) Accessory transportation improvements for a use that is allowed or conditionally allowed by ORS 215.213, 215.283 or OAR chapter 660, division 6 (Forest Lands);

“(b) Transportation improvements that are allowed or conditionally allowed by ORS 215.213, 215.283 or OAR chapter 660, division 6 (Forest Lands);

“\* \* \* \* \*

“(o) Transportation facilities, services and improvements other than those listed in this rule that serve local travel needs. The travel capacity and performance standards of facilities and improvements serving local travel needs shall be limited to that necessary to support rural land uses identified in the acknowledged comprehensive plan or to provide adequate emergency access.”

<sup>2</sup> ORS 215.283(1)(L)(2007) is renumbered ORS 215.283(1)(i) in the 2009 version of the statute and is identical to the 2007 version. To avoid confusion, we refer in this opinion to the 2007 version of the provision.

<sup>3</sup> OAR 660-012-0065(5) provides:

“(5) For transportation uses or improvements listed in subsections (3)(d) to (g) and (o) of this rule within an exclusive farm use (EFU) or forest zone, a jurisdiction shall, in addition to demonstrating compliance with the requirements of ORS 215.296:

1 applies, then the alternatives analysis set forth in OAR 660-012-0065(5) is not required. *See*  
2 n 3.

3 **B. Assignment of Error**

4 The county concluded that the proposed transportation improvements were “properly  
5 characterized as modifications to the existing public road” and “are allowed or conditionally  
6 allowed by ORS 215.283[1][L],” and therefore are authorized under OAR 660-012-  
7 0065(3)(b) without a goal exception and without the alternatives analysis set forth in OAR  
8 660-012-0065(5). Record 5. In his first assignment of error, petitioner challenges the  
9 county’s conclusion that the proposed improvements are properly characterized as  
10 modifications to the existing public road under ORS 215.283(1)(L). The county found that,  
11 based on the application and accompanying maps, the proposed improvements do not add  
12 travel lanes, result in new land parcels, or remove or displace buildings. Record 5.  
13 Petitioner’s entire argument in support of the first assignment of error is set out in a single  
14 sentence, as follows:

15 “This project cannot be characterized as a reconstruction or modification of an  
16 existing road.” Petition for Review 3.

17 The above argument is insufficiently developed for review, and it is rejected for that reason.  
18 *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

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- “(a) Identify reasonable build design alternatives, such as alternative alignments, that are safe and can be constructed at a reasonable cost, not considering raw land costs, with available technology. The jurisdiction need not consider alternatives that are inconsistent with applicable standards or not approved by a registered professional engineer;
  - “(b) Assess the effects of the identified alternatives on farm and forest practices, considering impacts to farm and forest lands, structures and facilities, considering the effects of traffic on the movement of farm and forest vehicles and equipment and considering the effects of access to parcels created on farm and forest lands; and
  - “(c) Select from the identified alternatives, the one, or combination of identified alternatives that has the least impact on lands in the immediate vicinity devoted to farm or forest use.”

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioner’s second assignment of error challenges the county’s analysis of  
4 alternatives under OAR 660-012-0065(5). *See* n 3. However, as explained above, where  
5 OAR 660-012-0065(3)(b) applies, OAR 660-012-0065(5) does not apply. We reject above  
6 petitioner’s first assignment of error, that the county erred in determining that the  
7 improvements fall under the ORS 215.283(1)(L) provision allowing modification of an  
8 existing public road in an EFU zone without a goal exception, and thus OAR 660-012-  
9 0065(3)(b) applies. Accordingly, petitioner’s second assignment of error does not set forth a  
10 basis for reversal or remand of the decision.

11 The second assignment of error is denied.

12 **THIRD ASSIGNMENT OF ERROR**

13 Douglas County Land Use and Development Ordinance (LUDO) 3.35.250 contains  
14 language that is identical to ORS 215.283(1)(L), and provides in relevant part that a  
15 modification of an existing public road is a use allowed outright in the FG zone.  
16 Additionally, LUDO 3.35.250(2) provides that some transportation improvements are  
17 conditional uses in the FG zone, so that the conditional use review criteria found in LUDO  
18 3.39.050 apply.

19 The county concluded that “the realignments are properly characterized as  
20 modifications to the existing road” and that “the realignments are allowed pursuant to LUDO  
21 3.35.250.” Record 5. In a portion of his third assignment of error, petitioner challenges the  
22 county’s conclusion that the proposed improvements are properly characterized as  
23 modifications to the existing public road under LUDO 3.35.250(1). Petitioner’s entire  
24 argument in support of his assertion that the county erred under LUDO 3.3.250(1) is set out  
25 below:

26 “The proposed road improvements are not outright permitted uses under  
27 LUDO 3.35.250(1).

1 As in the first assignment of error, the above argument is insufficiently developed for review,  
2 and it is rejected for that reason. *Deschutes Development*, 5 Or LUBA at 220 (1982).

3 In addition to concluding that the proposed transportation improvements are allowed  
4 outright in the FG zone under LUDO 3.35.250(1), the county adopted alternative findings  
5 that if the proposed improvements do not fall within the category of improvements permitted  
6 outright in the FG zone, then the proposed improvements are conditionally allowed in the FG  
7 zone under LUDO 3.35.250(2), and found that the conditional use review criteria found at  
8 LUDO 3.39.050 were met. As we understand it, petitioner argues that the county erred in  
9 adopting those alternative findings and concluding that the proposed uses are conditionally  
10 allowed in the FG zone. However, because petitioner has not explained how the county erred  
11 in concluding that the proposed uses are allowed outright under LUDO 3.35.250(1), we need  
12 not address petitioner’s challenge to the county’s alternative findings under LUDO  
13 3.35.250(2).

14 The third assignment of error is denied.

15 **FOURTH ASSIGNMENT OF ERROR**

16 OAR 660-012-0065(3)(o) provides in relevant part that “transportation facilities,  
17 services and improvements other than those listed in this rule that serve local travel needs”  
18 are consistent with Goals 3, 4, 11, and 14, but limits the capacity and performance standards  
19 of those facilities serving local travel needs to “that necessary to support rural land uses \* \* \*  
20 or to provide adequate emergency access.” *See* n 1. In the fourth assignment of error,  
21 petitioner argues that the county erred in failing to determine that certain elements of the  
22 proposal, mainly the new interchange ramps, “serve local travel needs” under OAR 660-012-  
23 0065(3)(o), and erred in failing to limit the capacity and performance of the ramps to “that  
24 necessary to support rural land uses \* \* \*” as required by subsection (o) of the rule.

25 Intervenor responds that petitioner may not raise the issue presented in the fourth  
26 assignment of error for the first time at LUBA because petitioner did not raise the issue in the

1 notice of review filed with the county under LUDO 2.500.5(c). *Miles v. City of Florence*,  
2 190 Or App 500, 79 P3d 382 (2003). LUDO 2.500.5 provides:

3 “Every Notice of Review shall contain:

4 “a. A reference to the decision sought to be reviewed;

5 “b. A statement as to how the petitioner qualifies as a party;

6 “c. *The specific grounds relied upon in the petition request for review*; and

7 “d. The date of the decision sought to be reviewed.” (Emphasis added.)

8 The notice of review filed by petitioners states that “the decision incorrectly  
9 determines that the realignment complies with OAR 660-012-0065(3)(a)(b).” Record 55.  
10 Intervenor argues that citing OAR 660-012-0065(3)(a) and (b) is not sufficient to raise an  
11 issue that the proposed improvements, or certain elements of the improvements, serve local  
12 travel needs, because subsections (a) and (b) address different requirements than subsection  
13 (o) and are not subject to the alternatives analysis required by OAR 660-012-0065(5), while  
14 OAR 660-012-0065(3)(o) is subject to that analysis.

15 We agree with intervenor that petitioner failed to raise the issue presented in the  
16 fourth assignment of error in his notice of review. An assignment of error that the proposal  
17 does not comply with OAR 660-012-0065(3)(a) and (b) is not sufficient to raise an argument  
18 that the proposed facilities serve local travel needs under OAR 660-012-0065(3)(o) and that  
19 the capacity and performance of those facilities should be limited. *See Kinnett v. Douglas*  
20 *County*, \_\_ Or LUBA \_\_ (LUBA No. 2009-055, August 3, 2009, slip op 7-8) (petitioners  
21 failed to preserve the issue raised in an assignment of error by failing to specify the issue in  
22 their notice of review); *Sommer v. Douglas County*, \_\_ Or LUBA \_\_ (LUBA No. 2009-067,  
23 October 22, 2009, slip op 4) (same). Accordingly, we do not consider the issue raised in the  
24 fourth assignment of error.

25 The fourth assignment of error is denied.

26 The county’s decision is affirmed.