

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

3
4 GUNNAR MERTZ,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2002-103

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Clackamas County.

18
19 Gunnar Mertz, Beaverton, submitted the petition for review and argued on his own
20 behalf.

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22 Michael E. Judd, Assistant County Counsel, Oregon City, submitted the response
23 brief and argued on behalf of respondent.

24
25 BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
26 participated in the decision.

27
28 AFFIRMED

11/19/2002

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.
32

NATURE OF THE DECISION

Petitioner appeals a hearings officer decision that approves, with conditions, a dwelling on property located partially within the Clackamas River floodway.

FACTS

The subject property is a 3.74-acre parcel located between the Clackamas River and a river overflow channel. A relatively steep cliff lies on the northern portion of the property. During high water events, water from the Clackamas River flows through the overflow channel and follows the cliff base until it rejoins the river further downstream. The entire property is located within the 100-year floodplain; approximately one-half of the southern portion of the property is located within the floodway. Development within the floodplain is limited, and no residential development is permitted within the floodway.

Petitioner applied to site a dwelling with attached deck on the subject property. The planning director approved the dwelling and deck with conditions. One condition required that petitioner relocate the proposed structures approximately 30 feet to the north of the dwelling site petitioner proposed. The planning director’s decision was based on evidence that the floodway boundary is located 300 feet south of the north property line, 30 feet farther north than where petitioner’s site plan depicted the floodway boundary. Petitioner appealed the planning director’s decision to the county hearings officer, who affirmed the planning director’s decision. This appeal followed.

ASSIGNMENT OF ERROR

Clackamas County Zoning and Development Ordinance (ZDO) 703.02.A adopts the 1988 Flood Insurance Study for Clackamas County, including the Flood Insurance Rate Map (FIRM) and the Flood Boundary-Floodway Maps from the Federal Emergency Management Agency (FEMA) as the official maps delineating floodways within the county. The planning director has the authority to make any interpretations necessary to establish the location of

1 the floodway based on the FEMA floodway maps and reconcile the established FEMA
2 floodway boundary with site-specific evidence, if such evidence is available. ZDO 703.02.C.
3 Persons contesting the planning director’s siting of the boundary on a particular parcel are
4 given a “reasonable opportunity to request review of the interpretation” and provide evidence
5 that establishes a different floodway location. *Id.*

6 In this case, county planning staff established the floodway line based on a
7 calculation of the boundary scaled from the FEMA floodway maps. Record 130. That
8 preliminary line was later revised to reflect the floodway boundary depicted on an
9 engineering survey (Otak map) that was prepared for an application related to an earlier
10 development proposal on the subject property. Record 177. The Otak map depicted the
11 floodway boundary at approximately 300 feet from the northernmost corner on the property.
12 Record 129. The hearings officer relied on the depiction of the boundary on the Otak map as
13 the best evidence of the floodway boundary because it was a “determination of the floodway
14 boundary prepared by a professional surveyor.” Record 19.

15 Petitioner argues that the county erred in relying on the Otak map that depicted the
16 floodway boundary 30 feet to the north of petitioner’s proposed building site. Petitioner
17 contends that the Otak map is not reliable evidence, because: (1) it is a preliminary survey;
18 (2) it was completed by a registered engineer, not a land surveyor; (3) the engineering survey
19 was not intended to be a definitive boundary survey that locates the floodway on the
20 property; and (4) other evidence in the record, specifically statements from a U.S. Army
21 Corps of Engineers (ACOE) employee, establishes that the floodway boundary is as
22 petitioner depicts it in his site plan. Petitioner explains that pursuant to ORS 672.025, only an
23 Oregon registered land surveyor may establish property boundaries and, as the Otak map was

1 not prepared by a registered land surveyor, it may not be used as evidence to establish the
2 location of the floodway boundary.¹

3 The county concedes that the hearings officer’s decision erroneously refers to the
4 Otak map as being prepared by a “surveyor.” The county argues, however, that the fact that
5 there might be an inaccurate description of the document the hearings officer relied upon
6 does not mean that the evidence contained in the Otak map cannot be considered or has no
7 evidentiary value. The county argues that ZDO 703.02 does not require that a registered land
8 surveyor establish a floodway boundary. According to the county, ZDO 703.02 makes it
9 clear that the planning director, or his designate, may determine the location of floodway
10 boundaries based on scaled extrapolations from FEMA flood maps, and other available, site-
11 specific evidence. According to the county, the fact that the Otak map was not completed by
12 a registered land surveyor does not affect the hearings officer’s conclusion that the Otak map
13 contained the most accurate depiction of the floodway boundary, based on all of the evidence
14 in the record. The county points out that the statements from the ACOE staff person
15 regarding the location of the floodway boundary are equivocal, and were later undermined by
16 statements from other FEMA employees, who recommended that petitioner reconsider his
17 plans to develop the property at all.² Record 243.

¹ ORS 672.025 provides, in relevant part:

“(1) No person shall practice land surveying in this state unless the person is registered and has a valid certificate to practice land surveying[.]

“* * * * *

“(3) [A] registered professional engineer not also registered as a professional land surveyor shall not establish, reestablish or restore land boundaries, corners or monuments between lands not held in common ownership or intended for conveyance.”

² The statements petitioner relies upon to support his argument that the floodway boundary is 330 feet south of the north boundary line are from Kenneth McGowan, a flood specialist from the ACOE. We quote the relevant statements:

1 As a review body, we are authorized to reverse or remand the challenged decision if it
2 is “not supported by substantial evidence in the whole record.” ORS 197.835(9)(a)(C).
3 Substantial evidence is evidence a reasonable person would rely on in reaching a decision.
4 *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff’d* 108 Or App 339, 815 P2d 233 (1991).
5 In reviewing the evidence, however, we may not substitute our judgment for that of the local
6 decision maker. Rather, we must consider and weigh all the evidence in the record to which
7 we are directed, and determine whether, based on that evidence, the local decision maker’s
8 conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346,
9 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584,
10 588, 842 P2d 441 (1992).

11 Petitioner’s challenge to the county’s evidence assumes that a floodway boundary is a
12 “land boundary” and, thus, may only be established by a land surveyor. However, petitioner
13 provides no legal argument to support that assumption. ORS 672.005(b) provides:

14 “[The] ‘practice of * * * professional engineering’ may include:

15 “(A) Surveying to determine area or topography;

16 “(B) Surveying to establish lines, grades or elevations[.]”

17 As ORS 672.025(3) makes clear, for the purposes of this appeal, the important
18 distinction between a land surveyor and a professional engineer is that an engineer may not
19 establish land boundaries between land not in common ownership or intended for property
20 descriptions in deeds of conveyance. *See* n 1. In this instance, the Otak map was created by
21 an engineer and depicts the floodway boundary, topography and elevations on the subject
22 property for a grading permit. The map was not intended to be used to convey title to land.

“* * * I estimate the floodway boundary line to cross the subject lot about 330 [feet] south of
the north corner.” Record 250.

“* * * My first estimate was 300 feet [south] of the [north] corner, so 330 [feet] is giving the
benefit of the doubt to the owner * * *.” Record 164.

1 Therefore, it was not improper for the hearings officer to rely on the Otak map for its
2 evidentiary value, even though it was not created by a land surveyor.

3 In addition, the statements by the ACOE employee that petitioner points to do not so
4 undermine the evidence provided by the Otak map that a reasonable person would not rely on
5 the Otak map. There is no evidence in the record that the ACOE employee is a land surveyor
6 or engineer, or possesses other qualifications that would make his estimate of the floodway
7 boundary more credible than the Otak map.

8 Petitioner's assignment of error is denied. The county's decision is affirmed.