BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARY L. SWANSON, CAROL SWANSON,
JAMES S. FORD, LINDA S. FORD
and DOLORES LISMAN,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

COPELAND SAND & GRAVEL, INC.,
Intervenor-Respondent.

LUBA No. 2003-198

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Christian E. Hearn, Ashland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Davis, Gilstrap, Hearn, Saladoff and Smith, PC.

No appearance by Jackson County.

Daniel O'Connor, Medford, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Huycke, O'Connor and Jarvis, LLP.

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

REMANDED 03/23/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a floodplain development permit.

MOTION TO INTERVENE

Copeland Sand & Gravel, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor seeks to develop an aggregate operation in the Applegate River near the Jackson and Josephine County border. Intervenor filed a conditional use application that was denied and is the subject of a separate LUBA appeal, *Copeland Sand & Gravel, Inc. v. Jackson County,* ___ Or LUBA ___ (LUBA No. 2003-193). Intervenor also filed a floodplain development permit concerning the same property. The two matters were referred directly to a county hearings officer for a joint public hearing. Although the hearings officer denied the conditional use permit for aggregate mining, he approved the accompanying floodplain permit. This appeal followed.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer misconstrued the applicable law by denying standing below to petitioner Dolores Lisman (Lisman). In its rebuttal memorandum below, submitted after the close of the evidentiary hearing, intervenor alleged that Lisman did not have standing to contest the floodplain permit before the hearings officer.

> "[Intervenor] does not contest the standing of [the other petitioners], but does contest the standing of [Lisman]. [Lisman] testified that she does not live within the vicinity of the subject site and there is no evidence in the record that [Lisman] is representing a community group recognized by Jackson County." Record 18.

The hearings officer had already closed the evidentiary portion of the public hearing by the time intervenor challenged Lisman's standing. Thus, neither Lisman nor the other petitioners had an opportunity to respond to intervenor's standing challenge. The hearings officer was apparently

persuaded by intervenor's standing argument. The entire extent of the hearings officer's findings, discussion, or analysis of this issue consists of one footnote:

> "[Intervenor] has challenged the standing of one of the Appellants. This Hearings Officer has not considered the testimony of or the evidence offered by that appellant." Record 2.[1]

Intervenor responds that the hearings officer properly denied Lisman standing based upon Jackson County Land Development Ordinance (LDO) 285.110.[2] Intervenor argues that because Lisman neither lives within 750 feet of the subject property nor is acting in the capacity of any neighborhood or community organization, she does not have standing under the LDO.

There are several problems with the hearings officer's decision. The most fundamental problem with the decision (in addition to not identifying the person being denied standing) is that the hearings officer gives no basis, analysis, discussion, reasoning, explanation, or insight into why he denied Lisman standing. It is well established that a quasi-judicial land use decision must explain how the facts relied upon support the final decision. *LeRoux v. Malheur County*, 30 Or LUBA

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[1] Although the hearings officer inexplicably fails to identify the local appellant whose testimony and evidence he refused to consider, the parties agree that the appellant identified in the footnote is Lisman.

[2] LDO 285.110 provides in pertinent part:

> "(1) The [planning department] shall render a tentative decision in writing on an application for a land use permit in accordance with the provisions of applicable law.
>
> "(2) A notice * * * shall be mailed to the applicant and to owners of record of nearby property * * *. Where the subject property is located outside an urban growth boundary and within a farm or forest zone, notice shall be mailed to owners of property within 750 feet. Notice shall also be sent to any neighborhood or community organization recognized by the [Board of County Commissioners] and whose boundaries include the subject property.
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> "* * * * *
>
> "(3) Anyone entitled to notice under Subsection 285.110(2) may request a public hearing on the Department's tentative decision. * * *
>
> "(4) If a request for hearing is timely filed and is accompanied by the required fee, the [planning department] shall not issue a permit and shall set the application for public hearing * * *. If a request for hearing is not received or does not meet with the requirements of Subsection 285.110(3), the [planning department's] decision shall be final."

268, 271 (1995). In the present case, in the absence of any assistance whatsoever from the hearings officer as to why Lisman was denied standing, we cannot properly perform our review function.

Intervenor alleges that the decision to deny standing was based on LDO 285.110(3). However, the rebuttal memorandum that intervenor cites in support of that contention does not mention LDO 285.110. *See* n 2. In fact, the rebuttal memorandum below does not provide any source of authority whatsoever for its argument contesting Lisman's standing. Absent any reference in the findings or citation to anything in the record to support that the hearings officer applied LDO 285.110 to deny Lisman standing, we cannot assume that it was the basis for denying Lisman standing. Even assuming LDO 285.110 formed the basis for denying Lisman standing, there are a number of problems associated with LDO 285.110 as well. Initially, it is unclear whether LDO 285.110(3) is even applicable to the challenged decision. LDO 285.110(3) applies to an appeal of a tentative decision by the planning department made without a public hearing. Presumably, this provision implements ORS 215.416(11), which allows decisions on permit applications to be made without a hearing as long as notice of the decision is provided to designated persons and "any person who is adversely affected or aggrieved, or who is entitled to notice" of the decision is given the opportunity to file an appeal. In the present case, there was no tentative planning department decision. The matter was referred directly to the hearings officer for an initial decision. In addition, LDO 285.110(3) governs who may request a public hearing on a tentative decision, it says nothing about who may *participate* in that hearing.

Even if LDO 285.110(3) were applicable to the challenged decision, that provision may be at odds with ORS 215.416(11). The statute provides that the opportunity for a *de novo* appeal must be provided not only to those entitled to notice, as LDO 285.110(3) provides, but also to those not entitled to notice but who are adversely affected or aggrieved by the decision. *Warf v. Coos County*, 42 Or LUBA 84, 91 n 10 (2002) (noting that persons not entitled to notice may nonetheless be entitled to an appeal); *see also Wilbur Residents v. Douglas County*, 151 Or App

523, 526-27, 950 P2d 368 (1997), *rev den* 327 Or 83 (1998) (holding that persons not entitled to notice under ORS 215.416(11) could still be adversely affected or aggrieved). If the hearings officer had rejected a request for a public hearing from Lisman merely because she was not in the notice area, without considering whether she was also not adversely affected or aggrieved, that would appear to be inconsistent with ORS 215.416(11). *See Friends of Douglas County v. Douglas County*, 39 Or LUBA 156, 167 (2000) (county cannot define operative statutory terms to mean something more restrictive than what is meant by ORS 215.416).

Local governments retain a limited ability to act as a gatekeeper at local land use proceedings, and can, in certain circumstances, deny standing. *See Jefferson Landfill Comm. v. Marion Co.*, 297 Or 280, 284-85, 686 P2d 310 (1984) (stating principle that participants determined by the county to be only disinterested witnesses are not aggrieved by the county's decision and do not have standing to appeal). The extent to which local governments can exercise this gatekeeping function and the potential class of persons that can be denied standing to participate as a party has not been precisely delineated by either this Board or the courts.[3] *League of Women Voters v. Coos Co.*, 76 Or App 705, 709-11, 712 P2d 111 (1985); *Friends of Douglas County*, 39 Or LUBA at 165-72. The present case, however, does not provide the opportunity to explore the reaches of such gatekeeping authority because of the lack of clarity of the hearings officer's decision. For the foregoing reasons, the fifth assignment of error is sustained.

REMAINING ASSIGNMENTS OF ERROR

Because we must remand the decision to address the issue of Lisman's standing, it would be premature to address the remaining assignments of error.[4] *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 148, *aff'd* 183 Or App 581, 54 P3d 636 (2002).

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[3] We also note that a potential problem may arise when persons are allowed to testify and submit evidence only to later be denied standing. *See Friends of Douglas County*, 39 Or LUBA at 171-72 (after allowing a petitioner through the gate, a county may not belatedly send her back through).

[4] It would be particularly premature to address the third and fourth assignments of error. Although the parties do not identify or discuss the issue, petitioners' response to intervenor's "raise it or waive it" challenge

The county's decision is remanded.

under ORS 197.763(1) and 197.835(3) is based upon a letter submitted by Lisman. Record 125. Presumably, when the hearings officer stated that he did not consider the testimony or evidence submitted by Lisman that would also include Record 125.