

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

3
4 CRAIG HEILLER,
5 *Petitioner,*

6
7 vs.

8
9 JOSEPHINE COUNTY,
10 *Respondent,*

11 and

12
13
14 PHYLLIS PANTER,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2004-213

18 FINAL OPINION
19 AND ORDER

20
21
22 Appeal from Josephine County.

23
24 Craig A. Heiller, Grants Pass, filed the petition for review and argued on his own behalf.

25
26 No appearance by Josephine County.

27
28 Duane Wm. Schultz, Grants Pass, filed the response brief and argued on behalf of
29 intervenor-respondent.

30
31 DAVIES, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
32 participated in the decision.

33
34 AFFIRMED

11/15/2005

35
36 You are entitled to judicial review of this Order. Judicial review is governed by the
37 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals the county’s approval of a lot-of-record dwelling.

MOTION TO INTERVENE

Phyllis Panter, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

STANDING

In order to have standing to appeal a local land use decision to LUBA, a person must have appeared before the local government, either orally or in writing. ORS 197.830(2)(b).¹ Intervenor argues that petitioner does not have standing to appeal in this case because he did not appear on his own behalf before the local government. She argues that petitioner appeared only in a representational capacity, representing the Bruin Nature Conservancy, an organization of which petitioner is the founder and director.

We have held that where an individual submits written and oral testimony on behalf of an organization of which that individual is an active member, LUBA will assume the views offered were those of the individual as well as those of the organization. *Terra v. City of Newport*, 24 Or LUBA 579, 584-85 (1992); *see also Rochlin v. City of Portland*, 31 Or LUBA 509, 510

¹ ORS 197.830(2) provides:

“Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:

“(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and

“(b) Appeared before the local government, special district or state agency orally or in writing.”

ORS 197.015(18) defines “person” as follows:

“any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind.”

1 (1996). In *Rochlin*, an individual appeared before the local government in his capacity as a
2 representative for an organization. The city in that case argued that the petitioner did not have
3 standing because he identified himself in the lower proceedings as “chair” of the organization and
4 therefore did not appear on his own behalf. We disagreed, concluding that while the petitioner
5 acted on behalf of an organization, he himself likely shared the same goals as the organization. We
6 therefore stated that we would not presume that the petitioner was not appearing on his own behalf
7 simply because he did not explicitly state that he was. *Rochlin*, 31 Or LUBA at 510.² Further,
8 nothing in the record indicated that the petitioner was expressing views other than his own in the
9 course of his appearances on behalf of the organization he represented. Finally, we noted that the
10 record demonstrated at least one occasion where the petitioner had clearly acted on his own behalf.
11 *Id.*

12 In this case, petitioner filed the local “appeal application” in his own name. Record 87. The
13 notice of the local appeal hearing identifies the appellant as “Craig Heiller.” Record 82. Indeed, the
14 caption of the challenged decision itself identifies the appellant as “Craig Heiller.” Petitioner
15 apparently introduced himself as “Craig Heiller, Bruin Nature Conservancy, Pine Cone Drive,” at
16 the September 1, 2004 appeal hearing. Record 12. However, he made it clear that he was
17 appearing on his own behalf as well as on behalf of Bruin Nature Conservancy. (“* * * I do speak
18 for our entire Board and not just for myself.”) Record 14.³

² We quoted language from *Terra*, in which we noted that “[i]t is not customary for individuals testifying or submitting documents in local land use proceedings to specifically state they are appearing on their own behalf.” *Terra*, 24 Or LUBA at 584-85.

³ Intervenor interprets that comment as clarification that petitioner spoke for the entire board of Bruin Nature Conservancy, and not only in his capacity as board chair of that organization. However, the evidence in the record that he filed the appeal and otherwise appeared on his own behalf suggests, rather, that he intended to clarify that he was appearing on behalf of the organization as well as on his own behalf.

1 The evidence in the record indicates that petitioner was primarily expressing his own views
2 in the course of his local appeal.⁴ Accordingly, we conclude that he “appeared” on his own behalf
3 for purposes of ORS 197.830(2)(b) and therefore has standing to proceed in this appeal.

4 **FACTS**

5 The subject property includes 42.50 acres of vacant land that is zoned Exclusive Farm
6 (EF). The subject property is not part of a larger farm operation, and is predominantly composed
7 of class IV soil. To the north and east of the subject property are lands zoned EF. To the south
8 and west are lands zoned for and developed with rural residential uses. On June 25, 2004,
9 intervenor applied for a permit to place a lot-of-record farm dwelling on the subject property. The
10 county planning director approved the permit request with conditions on July 14, 2004. Petitioner
11 appealed the decision on July 23, 2004 to the board of county commissioners, which held a public
12 hearing on September 1, 2004. On November 24, 2004 the board of county commissioners
13 affirmed the planning director’s decision, and approved the application. This appeal followed.

14 **INTRODUCTION**

15 In a previous order, we determined that the issues presented in the petition for review,
16 although not identified as assignments of error *per se*, were sufficient to survive intervenor’s motion
17 to strike the petition for review on that basis. *Heiller v. Josephine County*, (LUBA No. 2004-
18 213, Order, June 30, 2005). However, we did note that if the arguments were incomprehensible or
19 insufficiently developed such that it was impossible to discern the arguments, then they would fail to
20 provide a basis for reversal or remand. *Id.* slip op 3 (citing *Borrego v. City of Sheridan*, 30 Or
21 LUBA 65 (1995); *Heiller v. Josephine County*, 23 Or LUBA 551 (1992)); *see also Dolan v.*
22 *City of Tigard*, 20 Or LUBA 411, 416 (1991) (if petition for review fails to set forth facts or legal
23 argument sufficient to persuade LUBA that there is a basis for reversal or remand, LUBA simply

⁴ In a previous motion, intervenor argued that petitioner did not have standing because Bruin Nature Conservancy owns the property that is allegedly impacted by the challenged decision. We do not see that the fact that Bruin Nature Conservancy, rather than petitioner, owns the property is material to the standing issue. The question is whether petitioner “appeared” on his own behalf before the local government.

1 affirms the challenged decision). In many respects, the petition for review in this case fails to present
2 coherent arguments, and in other respects petitioner raises issues that have no obvious bearing on
3 applicable approval criteria and, therefore, do not provide a basis for reversal or remand. To the
4 extent we can discern separate assignments of error, we will attempt to address them.⁵

5 **FIRST ASSIGNMENT OF ERROR**

6 Petitioner contends that the county committed procedural error in processing the subject
7 lot-of-record application and a related lot line adjustment application. Supplemental Petition for
8 Review 7. Apparently, the two applications were submitted together and, according to petitioner,
9 subsequently bifurcated when opposition to the lot-of-record application surfaced. Petitioner
10 asserts that the lot line adjustment application was approved prior to the planning director's
11 approval of the lot-of-record request.

12 As intervenor points out, petitioner cites no authority that would preclude the county from
13 proceeding in the manner that it did in processing the two applications.⁶ Accordingly, this
14 assignment of error does not provide a basis for reversal or remand.

15 This assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioner alleges that a member of the board of commissioners, the final decision making
18 body, was biased. He quotes the following statement by the board member in support of his
19 allegation of bias:

⁵ As explained above, the petition for review does not identify the issues raised as "assignments of error," and intervenor identifies the issues it can extract as "separate issues." However, for purposes of this opinion, we will refer to the separate issues that we can identify as assignments of error.

⁶ At the September 1, 2005 hearing, planning staff explained that the lot line adjustment application and the lot-of-record dwelling application were two separate applications, and that no notice was required for the lot line adjustment determination. Record 16. Accordingly, the applications were processed as two separate applications.

1 “I do have, and have had some issues and conflicts over the years with Mr. Heiller.
2 He has felt the Board and County have done him wrong.” Supplemental Petition for
3 Review 9.

4 However, petitioner fails to quote the following statement by the commissioner, defending his ability
5 to make a neutral decision:

6 “I do not believe that any of these issues will affect my ability to make a decision on
7 this matter.” Respondent’s Brief 12.⁷

8 According to petitioner, when he challenged the commissioner’s impartiality, the commissioner
9 refused to discuss the reasons for the challenge, other than to provide the statement quoted above.
10 Petitioner argues that by failing to address the bases for the challenge, the commissioner “forfeits his
11 opportunity to deny his bias.” Supplemental Petition for Review 9.

12 In order to succeed in a bias claim, petitioner must establish that the decision maker was
13 incapable of making a decision based on the evidence and arguments of the parties. *Sparks v. City*
14 *of Bandon*, 30 Or LUBA 69, 74 (1995). Further, bias must be demonstrated in a clear and
15 unmistakable manner. *Schneider v. Umatilla County*, 13 Or LUBA 281, 284 (1985). We
16 disagree with petitioner that the commissioner’s failure to address his challenge in detail is sufficient
17 to require the commissioner to remove himself from the deliberations on the subject application. It
18 is petitioner’s burden to demonstrate the decision maker was not impartial. Petitioner has not
19 satisfied his burden of demonstrating that the commissioner was not able to make a decision based
20 on the evidence and arguments of the parties.

21 Accordingly, this assignment of error is denied.

22 **THIRD ASSIGNMENT OF ERROR**

23 Petitioner alleges that the notice of the challenged decision was not timely mailed to two
24 individuals who appeared at the hearing. Because the individuals nevertheless appeared at the

⁷ Petitioner also points to the commissioner’s questioning of another opponent’s testimony in support of his allegation of bias. Supplemental Petition for Review 10. We do not see that the minutes of that hearing reflect any indication of bias on the part of the commissioner.

1 hearing, they apparently somehow learned of the hearing. In any event, any failure to send notice of
2 a hearing to persons other than petitioner does not prejudice the substantial rights of petitioner and
3 therefore does not provide a basis for reversal or remand. *Forest Park Estate v. Multnomah*
4 *County*, 20 Or LUBA 319, 333 (1990).

5 This assignment of error is denied.

6 **FOURTH ASSIGNMENT OF ERROR**

7 In this assignment of error, petitioner appears to allege that the location for the proposed
8 dwelling does not comply with applicable siting standards.⁸ Although he does not cite it, Rural Land
9 Development Code (RLDC) 64.080.B provides siting standards for the placement of lot-of-record
10 dwellings.⁹ Petitioner seems to contest locating the proposed structure on the “farmable portion of
11 the property,” not near the road or other residences. Supplemental Petition for Review 17.

12 However, as intervenor points out, the maps in the record indicate that the proposed
13 homesite lies in the upland treed area rather than the lower area that is apparently composed of the
14 high-value farm soils (Record 49, 81), and near the corner of the property and the road (Record
15 132).¹⁰ The board of commissioners relied on the evidence in the record, and its conclusion that the

⁸ Petitioner’s argument relating to intervenor’s attempt to put the property to “exclusively residential use” is either insufficiently developed to allow LUBA to review it or does not provide a basis for remand because petitioner fails to tie it to a plan or code provision or other applicable legal standard.

⁹ Specifically, RLDC 64.080.B.2 provides:

“The placement of dwellings shall be located on the least productive, buildable portion of the parcel taking into consideration terrain, adverse soil or land conditions, drainage and flooding, access, vegetation, location and the size of the tract[.]”

¹⁰ The planning director’s decision, which the challenged decision affirmed, provides in relevant part:

- “1. The proposed dwelling will have no effect on surrounding farm or forest practices or costs. See Section 6.1.A. (§64.080.B.1)
- “2. The dwelling will be situated near the road and other residentially developed parcels and off of the high-value farm soils; that is, on the least productive, buildable portion of the parcel. (§64.080.B.2)
- “3. The proposed dwelling will be located near the corner of the parcel leaving the majority of the land available for farming activity. (§64.080.B.3)

1 subject application complies with the siting standards of RLDC 64.080.B is supported by
2 substantial evidence.

3 This assignment of error is denied.

4 **FIFTH ASSIGNMENT OF ERROR**

5 Petitioner alleges that numerous activities conducted by intervenor in the past have had
6 negative impacts on nearby properties. For example, he alleges that recent grading for the driveway
7 created flood conditions, killed trees and “impeded the historic pattern of natural stream flow,”
8 negatively impacting fish and other wildlife. Supplemental Petition for Review 18.

9 The only approval criterion petitioner cites is the text of RLDC 64.080.B.1, requiring a
10 finding that the proposed development “will not force a significant change in or significantly increase
11 the cost of accepted farm or forest practices on nearby lands devoted to farm or forest use.”¹¹
12 With regard to that approval criterion, the planning director concluded that the proposed dwelling
13 “will have no effect on surrounding farm or forest practices or costs.” *See* n 10. To the extent the
14 construction of intervenor’s driveway could be considered an activity associated with the proposed
15 dwelling, pursuant to RLDC 64.080.B.1, the county considered the evidence of both petitioner and
16 intervenor and concluded that petitioner did not adequately demonstrate that the activity related to
17 intervenor’s driveway contributed to the erosion and flooding on his property.¹² Petitioner does not

“* * * *” Record 43.

¹¹ RLDC 64.080.B.1 provides:

“The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use[.]”

¹² The challenged decision provides, in relevant part:

“5.3 The Board further concludes that Mr. Heiller’s grounds for appeal pertain to his issues with the non-maintained county road and Josephine County and not to the criteria for a lot-of-record farm dwelling.

1 otherwise indicate how the proposed dwelling, or activities associated with it, will force a significant
2 change in or significantly increase the cost of accepted farming or forest practices on his or nearby
3 properties. Accordingly, we conclude that the county's conclusion that the proposal complies with
4 RLDC 64.080.B.1 is supported by substantial evidence.

5 Petitioner raises other arguments that address alleged negative impacts resulting from the
6 challenged approval. For instance, petitioner alleges (1) the approval impacts an old creek bed and
7 will disrupt a migratory corridor for fish, (2) the property contains grades in excess of 15%,
8 presumably contributing to erosion, (3) the county should have required a hydrology report and a
9 septic evaluation, and (4) a required "Waiver of Remonstrance" has not been signed.

10 Petitioner provides no citation to a plan or code provision or other legal authority that
11 arguably requires reversal or remand based on these issues. The county's code does not require
12 denial of the subject application if petitioner is able to identify any manner in which the application
13 will negatively impact neighboring properties. Again, the only suggestion of a reference to an
14 approval criterion is the quotation from RLDC 64.080.B.1, and petitioner does not explain how
15 these issues relate even to that criterion. Because petitioner does not cite any other applicable
16 approval criterion that is allegedly violated with respect to these issues, the issues fail to provide a
17 basis for reversal or remand of the challenged decision.¹³

"5.4 The Board further concludes that Mr. Heiller has not adequately demonstrated that Mrs. Panter's driveway to the proposed dwelling contributes to the erosion and flooding hazards on his property.

"5.5 The Board further concludes that Mr. Heiller has not demonstrated that the applicant failed to meet the criteria for a lot-of-record farm dwelling in the Exclusive Farm zone.

"5.6 The Board further concludes that Mrs. Panter's testimony was more credible than Mr. Heiller's. When given the opportunity to testify, Mr. Heiller responded by repeating an allegation or made new allegations with no credible evidence to support his claims. In contrast, Mrs. Panter provided direct and convincing testimony.

"5.7 The Board further concurs with the Planning Director that the application meets the criteria for a lot-of-record dwelling in the Exclusive Farm zone." Record 10.

¹³ To the extent these issues require discussion, the county found:

1 This assignment of error is denied.¹⁴

2 **RELIEF SOUGHT**

3 OAR 661-010-0030(4)(b)(A) provides that the petition for review shall identify the relief
4 sought. Petitioner makes numerous requests for relief that are beyond LUBA's authority to grant.
5 Generally, LUBA is limited to reversal or remand of the challenged decision, and in certain
6 circumstances, may order the award of attorney fees or costs. OAR 661-010-0075(1)(b), (c) and
7 (e). Petitioner requests an award of \$3,000 for costs incurred in preparing the petition for review.
8 However, petitioner does not indicate why he is entitled to recover those costs, and we do not see
9 that he is.¹⁵

10 The challenged decision is affirmed.

“5.1 The Board concludes that although the potential for erosion is a possibility, the aerial photos, the USGS topographic maps, and the Panters' testimony indicate no slopes over 15% on the driveway and building pad area. Mr. Heiller's testimony indicates a 5-foot drop in elevation over a 30-foot length. In the absence of clear documentation of 15% and greater slopes on the USGS maps or granitically-derived soils in the *Soil Survey of Josephine County*, an erosion control plan is not required by the Josephine County Rural Land Development Code, Section 83.020.

“5.2 The Board further concludes, based on the county GIS maps, that the stream and wetland areas of concern to Mr. LaPierre are not located near the proposed driveway or building pad.” Record 10.

RLDC 64.060.B requires execution of a Waiver of Remonstrance as a condition of approval of any new dwelling in the county's farm zones. The planning director's decision addresses RLDC 64.060.B and finds that a Waiver of Remonstrance has been signed. Record 42. Further, the record contains a copy of a waiver signed by intervenor. Record 133.

Finally, the code does not require a hydrology report, petitioner does not indicate what approval criterion would require the submittal of such a report, and the planning director's decision, affirmed by the board of commissioners, requires as a condition of approval that intervenor obtain septic approval. Record 44.

¹⁴ To the extent there are other issues petitioner attempted to raise in his petition for review, we cannot identify them and are therefore unable to address them.

¹⁵ To the extent petitioner is seeking reimbursement for attorney fees, he does not demonstrate that he is the prevailing party. OAR 661-010-0075(1)(e)(A).