

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

3
4 J. G. DAUENHAUER,
5 *Petitioner,*

6
7 vs.

8
9 JACKSON COUNTY,
10 *Respondent,*

11 and

12
13 LAUREL MILLER and TOM KANE,
14 *Intervenor-Respondents.*

15
16 LUBA No. 2005-142

17
18 FINAL OPINION
19 AND ORDER

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22 Appeal from Jackson County.

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24 Duane WM. Schultz, Grants Pass, filed the petition for review and argued on behalf
25 of petitioner.

26
27 No appearance by Jackson County.

28
29 Mark S. Bartholomew, Medford, filed the response brief and argued on behalf of
30 intervenor-respondents. With him on the brief were P. David Ingalls and Hornecker,
31 Cowling, Hassen and Heysell, LLP.

32
33 BASSHAM, Board Member; DAVIES, Board Chair; HOLSTUN, Board Member,
34 participated in the decision.

35
36 AFFIRMED

03/24/2006

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

NATURE OF THE DECISION

Petitioner, the applicant below, appeals the county’s denial of his site plan application for aggregate mining and processing.

FACTS

This case is before us for the second time. In the first appeal, a neighborhood association challenged the county’s site plan approval for a quarry and associated processing activities on portions of a parcel east of the City of Ashland in unincorporated Jackson County. *Dead Indian Memorial Rd. Neigh. v. Jackson County (DIMR I)*, 43 Or LUBA 511, *aff’d* 188 Or App 503, 72 P3d 648 (*DIMR II*) (2003). Without repeating the procedural questions that were the central issues involved in *DIMR I* and *II*, we remanded the county’s approval because the respondents did not try to defend the approval on the merits. We stated:

“[Respondents do] not attempt to defend the decision on the merits against petitioners’ third through eighth assignments of error. We decline to attempt to resolve these assignments of error in the absence of any assistance from respondents. For example, we receive no help in attempting to resolve the safety concerns raised by petitioners in their sixth assignment of error. We cannot tell from the decision or the portions of the record we have been directed to why those safety concerns are not legitimate. We have similar difficulty resolving the other remaining assignments of error. Under these circumstances, the best course is to remand the decision to the county to respond to the third through eighth assignments of error.” 43 Or LUBA at 517.

On remand, the hearings officer addressed the third through eighth assignments of error from *DIMR I*. The public notice stated that the hearings officer would consider the six assignments of error remanded by LUBA.¹ The hearings officer stated in the final decision

¹ The county’s public notice states:

“The Remand public hearing will consider six assignments of error. The third through eighth assignments of error are paraphrased and quoted as follows: * * * 6) ‘The sixth assignment of

1 that he was “restricted to the LUBA remand issues.” Record 3. The hearings officer denied
2 the third, fourth, fifth, seventh, and eighth assignments of error. The hearings officer,
3 however, sustained the sixth assignment of error relating to traffic and safety issues.² This
4 appeal followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 This assignment of error involves a very narrow question: whether the hearings
7 officer improperly expanded the scope of the remand hearing beyond the issues raised in the
8 sixth assignment of error in *DIMR I*.³ According to petitioner, by considering off-site traffic
9 and safety issues related to the road itself in addition to on-site traffic and safety issues
10 related to the quarry’s access to the road, the hearings officer considered issues not raised in
11 *DIMR I*.

12 Intervenor-respondents (intervenor) respond that (1) the hearings officer did not
13 expand the scope of review on remand beyond the sixth assignment of error from *DIMR I*;
14 (2) even if the hearings officer did exceed the scope of the sixth assignment of error it was

error is directed at safety concerns regarding traffic and access pursuant to Policy J of the
comprehensive plan Transportation Element, that petitioners argue are not addressed by the
decision,’ * * *’ Record 990.

² The decision states:

“Nowhere does the [tentative staff approval] implement the [Board of County
Commissioners’] directive * * * that ‘off-site traffic * * * must be addressed through the
aggregate site plan review process.’ This is a significant omission, particularly in light of the
extensive concerns raised regarding traffic and safety conflicts.

“It is inappropriate to speculate what specific off-site issues should have been analyzed as a
part of site plan review, whether they would have required mitigation or, much less, how
much mitigation might have been achieved. There simply was no consideration of them at
all, and for purposes of the Appeal, it is enough to determine that off-site traffic issues were
not given consideration as required.

“Finding: The Decision is insufficient to meet the requirements of the Ordinance and the
[Land Development Ordinance] with regard to off-site traffic.” Record 12.

³ As petitioner does not challenge the hearings officer’s decision to deny the site plan application on the
merits, we do not discuss or analyze the decision other than to note that such off-site traffic and safety concerns
were the basis for the denial.

1 within his discretion to do so; and (3) even if the hearings officer improperly exceeded the
2 scope of review petitioner failed to object below and is therefore precluded from raising the
3 issue before LUBA.

4 The threshold question therefore is whether the sixth assignment of error from
5 *DIMRI* raised the issue of off-site traffic and safety in addition to on-site concerns.
6 Petitioner bases his argument on the contention that the hearings officer went beyond the
7 “plain language” of the assignment of error. The text of the sixth assignment of error from
8 *DIMRI* states:

9 “Similar applications have led Respondent to require Applicant to construct a
10 100-foot turn lane and 100-foot merge lane on the main public access road to
11 allow the asphalt trucks safe access to and from the site. This important safety
12 concern should have been fully analyzed and addressed, but was not.” Record
13 819.

14 If the scope of review on remand were determined solely by the *text* of the sixth
15 assignment of error, we would be inclined to agree with petitioner that the hearings officer
16 exceeded the scope of review. The argument in support of the sixth assignment of error,
17 however, goes beyond the issue of immediate access from and into the site. The argument in
18 support of the assignment of error continues:

19 “Dead Indian Memorial Road is a winding, mountainous, rural road with steep
20 grades. Site distances are short and many areas of the two-lane road have
21 abrupt cliffs on one side, and sheer cut rock faces on the other. Mitigation
22 measures were not appropriately considered by Respondent in reaching its
23 tentative decision, and Respondent refused to allow any testimony outside the
24 issue of standing.” Record 820.

25 The argument in support of the assignment of error addresses traffic and safety
26 concerns beyond mere ingress and egress to and from the site. The argument states that Dead
27 Indian Memorial Road is a “winding, mountainous, rural road with steep grades” with short
28 “site distances.” The argument also states that “many areas” of the road have “abrupt cliffs”
29 and “sheer cut rock faces.” This discussion refers to off-site portions of the road rather than
30 merely the entrance to the site. While the argument in support of the sixth assignment of

1 error does not go into great detail, we believe it raises the issue of off-site traffic and safety
2 impacts.

3 Petitioner argues that we are bound by the “plain language” of the assignment of
4 error, however, petitioner cites no authority for that position. In fact, our decisions are to the
5 contrary. *Neighbors for Responsible Growth v. City of Veneta*, ___ Or LUBA ___ (LUBA
6 No. 2005-109, February 23, 2006), slip op 13-14; *Jordan v. Douglas County*, 40 Or LUBA
7 192, 194 (2001); *Silani v. Klamath County*, 22 Or LUBA 734, 736 (1992). Even where a
8 petition for review includes no assignments of error, we routinely consider the body of the
9 petition for review to determine whether there are arguments made by petitioners that are
10 sufficiently stated to merit a response by the respondent and review by LUBA. *See Freedom*
11 *v. City of Ashland*, 37 Or LUBA 123, 124-25 (1999) (to the extent LUBA can discern
12 allegations of error from the argument presented in the petition for review LUBA will
13 consider them notwithstanding the failure of a petitioner to include separately stated
14 assignments of error); *Van Sant v. Yamhill County*, 17 Or LUBA 563, 566 (1989) (same);
15 *Faulkender v. Hood River*, 17 Or LUBA 360, 363 (1989) (same). Because the argument in
16 support of the sixth assignment of error in *DIMR I* raises the issue of off-site traffic and
17 safety concerns, the hearings officer did not expand the scope of review on remand.⁴

18 The first assignment of error is denied.

19 **SECOND ASSIGNMENT OF ERROR**

20 Petitioner argues that if the challenged decision is not reversed or remanded under the
21 first assignment of error, then the decision should be remanded because the notice did not
22 identify the applicable standards and criteria. Petitioner’s argument, however, is based on
23 the presumption that the hearings officer expanded the scope of review of the hearing beyond

⁴ Because we find the hearings officer did not expand the scope of review beyond the sixth assignment of error from *DIMR I*, we need not address intervenors’ alternative arguments that the hearings officer had the authority to expand the scope of review and that petitioner failed to preserve the issue by objecting below.

1 the sixth assignment of error from *DIMR I*. As we held in deciding the first assignment of
2 error, the hearings officer did not expand the scope of review of the hearing. Therefore, the
3 notice was proper.

4 The second assignment of error is denied.

5 **CROSS ASSIGNMENTS OF ERROR**

6 Intervenor raise three cross assignments of error in their response brief. Petitioner
7 moves to strike the cross assignments of error based on OAR 661-010-0030(7), which
8 requires that cross petitions for review be filed within the time required for filing the petition
9 for review.⁵ According to petitioner, a cross assignment of error is equivalent to a cross
10 petition for review, and therefore intervenors' cross assignments of error were untimely filed.

11 Intervenor rely on *Reusser v. Washington County*, 24 Or LUBA 652 (1993). In
12 *Reusser*, we held that both respondents and intervenor-respondents could file cross petitions
13 for review and that the issues in the cross petitions for review were not limited to issues
14 raised in the petition for review. *Id.* at 653-54. *Reusser* merely stands for the proposition
15 that respondents may file timely cross petitions for review. As intervenors did not file a
16 timely cross petition for review, *Reusser* is of no assistance.

17 Both parties appear to confuse cross assignments of error with cross petitions for
18 review, a distinction we explained in two recent Jackson County cases. In *Copeland Sand &*
19 *Gravel, Inc. v. Jackson County*, 46 Or LUBA 653, *aff'd* 193 Or App 822, 94 P3d 913 (2004),
20 we explained that cross assignments of error do not seek to overturn the decision, but rather
21 challenge particular aspects of the decision, in the event one or more of a petitioner's

⁵ OAR 661-010-0030(7) provides:

“Cross Petition: Any respondent or intervenor-respondent who desires to file a petition for review may do so by filing a cross petition for review. The cover page shall identify the petition as a cross petition and the party filing the cross petition. *The cross petition shall be filed within the time required for filing the petition for review* and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party.” (Emphasis added.)

1 assignments of error are sustained and the decision is otherwise subject to reversal or
2 remand. *Id.* at 667. As we explained in *Copeland Sand & Gravel*, such cross assignments of
3 error may be raised in the response brief. *Id.* In *Young v. Jackson County*, 49 Or LUBA 327
4 (2005), the intervenor-respondent sought to have the county’s decision affirmed and also
5 filed cross assignments of error in the response brief providing alternative bases for affirming
6 the decision. In *Young*, we explained that LUBA will only address cross assignments of
7 error when an assignment of error is sustained and the decision is otherwise subject to
8 reversal or remand. *Id.* at 343-44. Because we did not sustain any of the petitioner’s
9 assignments of error, we did not address the cross assignments of error. *Id.* at 344. In the
10 present case, because we do not sustain either of petitioners’ assignments of error, we do not
11 reach intervenors’ cross assignments of error.

12 The county’s decision is affirmed.