

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

3  
4 SUSAN LENOX,  
5 *Petitioner,*

6  
7 vs.

8  
9 JACKSON COUNTY,  
10 *Respondent,*

11  
12 and

13  
14 MARIE MARSHALL GARSJO,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2007-014

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from Jackson County.

23  
24 Roger Lee Clark, Eugene, filed the petition for review and argued on behalf of  
25 petitioner.

26  
27 No appearance by Jackson County.

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29 Mark S. Bartholomew, Medford, filed the response brief and argued on behalf of  
30 intervenor-respondent. With him on the brief was Hornecker Cowling Hassen & Heysell,  
31 LLP.

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

35  
36 REMANDED

05/15/2007

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

1

2 **NATURE OF THE DECISION**

3 Petitioner appeals a hearings officer’s decision approving an ownership of record  
4 dwelling.

5 **MOTION TO INTERVENE**

6 Marie Marshall Garsjo (intervenor), the applicant below, moves to intervene on the  
7 side of respondent. There is no opposition to the motion, and it is allowed.

8 **FACTS**

9 The subject property is a 10.65-acre parcel zoned Woodland Resource. The parcel is  
10 wedge-shaped, with narrow frontage onto Little Applegate Road, which crosses the southern  
11 portion of the property. The northern portion of the property rises steeply up from the road,  
12 with slopes of up to 40-50 percent.

13 Intervenor applied to the county for approval of an ownership of record dwelling on a  
14 site on the property approximately 100 feet north of Little Applegate Road, on a ridge 20 to  
15 40 feet above the road. Jackson County Land Development Ordinance (LDO) 9.5.4 provides  
16 standards for emergency vehicle access, and LDO 9.5.4(A)(4) limits the maximum finished  
17 grade of access driveways to 15 percent, which may be increased to 18 percent for certain  
18 intervals.<sup>1</sup> Planning staff approved the dwelling, stating that the “[c]ontour mapping, the site  
19 plan and application submitted by the applicant indicate the access requirements [of  
20 LDO 9.5.4(A)(4)] can feasibly be met with conditions.” Record 149. The staff decision

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<sup>1</sup> LDO 9.5.4(4) provides:

“Maximum finished grade can be no greater than 15 percent. The grade may increase to 18 percent for intervals of up to 100 feet provided there are no more than three 100 foot sections of over 15 percent grade per 1,000 feet. The finished grade may not exceed 15 percent on curves with a centerline radius of less than 150 feet. The approach from a public road or private road cannot exceed 10 percent for a distance of 40 feet.”

1 imposed as a condition of approval the requirement that “[t]he proposed driveway shall meet  
2 the Emergency Vehicle Access standards of LDO Section 9.5.4[.]” Record 151.

3 Petitioner appealed the staff decision to the county hearings officer, arguing in  
4 relevant part that the application fails to demonstrate that it is feasible to construct a  
5 driveway that complies with the maximum grade requirements of LDO 9.5.4(A)(4). The  
6 hearings officer conducted a *de novo* hearing on December 4, 2006, at which both intervenor  
7 and petitioner requested that the evidentiary record be held open for additional evidence.  
8 The hearings officer allowed intervenor until December 11, 2006, to submit additional  
9 evidence, and allowed petitioner until December 18, 2006, to submit rebuttal evidence. The  
10 hearings officer allowed intervenor until December 26, 2006 to submit rebuttal argument.

11 On December 11, 2006, intervenor submitted a letter from Jensen, a registered  
12 engineer with experience in road design and construction, opining in a single paragraph that  
13 a driveway that starts at the southeastern corner of the parcel could be constructed in  
14 conformance with a LDO 9.5.4(A)(4). In addition, intervenor’s representative stated that  
15 intervenor is a licensed geologist with 28 years of professional experience, and that  
16 intervenor conducted a site survey, employing standard survey instruments and practices, and  
17 in her opinion it is feasible to construct a driveway that complies with LDO 9.5.4(A)(4).

18 In response, on December 18, 2006, petitioner submitted a letter from a registered  
19 engineer, Hammond, who opined that the proposed driveway would exceed 23 percent, more  
20 than permitted by LDO 9.5.4(A)(4). In addition, petitioner’s engineer submitted three  
21 topographic maps showing three different driveway alignments, none of which complied  
22 with the grade requirements of LDO 9.5.4(A)(4). Based on that evaluation and topographic  
23 characteristics of the property, Hammond opined that it is not feasible for the access to  
24 comply with the maximum grade standards.

25 After the evidentiary record before the hearings officer closed, intervenor submitted  
26 additional evidence as part of her final legal argument, consisting of a letter from a third

1 registered engineer, Moore. The letter identified three possible alignments starting from the  
2 southwestern corner of the parcel, supported by three topographic maps modified from the  
3 three Hammond maps. Moore opined that it is feasible to construct a driveway that complies  
4 with LDO 9.5.4(A)(4) if the driveway begins at the southwestern corner. However, the  
5 hearings officer did not consider Moore's letter or maps, because they were submitted after  
6 the close of the evidentiary record.

7 On December 28, 2006, the hearings officer issued a decision approving the dwelling,  
8 choosing to rely on the testimony of intervenor and her engineer, Jensen, over the testimony  
9 of petitioner's engineer, Hammond.<sup>2</sup> This appeal followed.

#### 10 **ASSIGNMENT OF ERROR**

11 Petitioner contends that the hearings officer decision that it is feasible to construct a  
12 driveway that complies with the grade requirements of LDO 9.5.4(A)(4) is not supported by  
13 substantial evidence.<sup>3</sup>

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<sup>2</sup> The hearings officer's decision states, in relevant part:

"I do not have the benefit of knowing the education, background, or experience of [Jensen and Hammond], except for the statement of the Applicant's representative that Jensen specializes in road design and construction. While I believe different conclusions could be reached from this conflicting evidence, I am persuaded that the Applicant has sufficiently satisfied her burden of demonstrating that access conforming to the requirements of LDO 9.5.4 is feasible. I therefore find that the grade requirements for the driveway as expressed in LDO 9.5.4 can feasibly be complied with by the Applicant.

"In making this determination, I am influenced by the experience of Jensen, the Applicant's engineer, in road design and construction, and the Applicant's background and experience including her familiarity with the property. I also note that the Department staff reached the same conclusion. While the Applicant submitted, in her final argument, additional evidence from a Texas engineer who confirmed that the grade requirements can feasibly be met, I do not base my finding on that evidence. Sufficient evidence exists without using the information from that engineer for me to find that the grade requirements can feasibly be met." Record 4.

<sup>3</sup> LUBA is authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence

1 According to petitioner, the fact that intervenor is a licensed geologist in no way  
2 qualifies her as an expert on road grades or construction. Jenson’s letter, petitioner argues, is  
3 conclusory, and does not address slopes, grades, distances or state any factual basis on which  
4 the opinion rests. In contrast, petitioner argues, Hammond’s letter provides specific grade  
5 percentages demonstrating that the driveway proposed on the site plan exceeds 23 percent in  
6 grade, and further depicts three alternate alignments demonstrating that it is not feasible to  
7 construct a compliant driveway to the dwelling site. Petitioner submits that no reasonable  
8 decision maker would rely on Jensen’s unsupported assertions over Hammond’s detailed and  
9 factually supported testimony.

10 Intervenor responds that the hearings officer reasonably relied on Jensen and  
11 intervenor’s expertise, and rejected Hammond’s contrary opinion. In addition, intervenor  
12 argues that Hammond’s testimony is inherently less reliable, because Hammond failed to  
13 sign his letter or affix his seal as a registered professional engineer, unlike Jensen. Finally,  
14 intervenor disputes that Moore’s testimony is “new evidence,” and argues that the hearings  
15 officer could have considered that testimony as additional support for the conclusion that it is  
16 feasible to construct a driveway that complies with LDO 9.5.4(A)(4).

17 We do not understand intervenor’s arguments regarding Moore’s testimony.  
18 Intervenor appears to believe that the hearings officer intended to allow intervenor until  
19 December 26, 2006, to submit not only final rebuttal argument, but also rebuttal *evidence*.  
20 However, the basis for that belief is not stated. The hearings officer appears to have  
21 proceeded under ORS 197.763(6) or local procedures implementing that statute, which  
22 generally allow the evidentiary record to be re-opened after a quasi-judicial hearing to allow  
23 additional evidence, followed by (1) closure of the evidentiary record and (2) the applicant’s  
24 final submittal, which “shall not include any new evidence.” ORS 197.763(6)(e). As far as

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in the record to which we are directed, and determine whether, based on that evidence, the local decision maker’s conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

1 we can tell, the evidentiary record closed on December 18, 2006, and the hearings officer  
2 intended that the applicant would submit final argument on December 26, 2006, not  
3 additional evidence. Intervenor does not indicate that she requested that the hearings officer  
4 re-open the record to allow new or additional evidence after December 18, 2006, and  
5 intervenor does not cross-assign error to the hearings officer's failure to consider Moore's  
6 letter and maps submitted on December 26, 2006. Moore's testimony apparently played no  
7 role in the hearings officer's decision, and we consider intervenor's arguments regarding that  
8 testimony no further.

9 With regard to intervenor's qualifications to opine on the feasibility of constructing a  
10 road that complies with LDO 9.5.4(A)(4), the hearings officer apparently gave some weight  
11 to intervenor's "background and experience including her familiarity with the property[.]"  
12 Record 4; *see* n 2. We agree with petitioner that the record does not support assigning a  
13 great deal of significance to intervenor's opinion as an expert on this technical point.  
14 Intervenor's submittals below do not explain why her extensive experience as a geologist  
15 qualifies her to offer a reliable expert opinion regarding the feasibility of constructing access  
16 that complies with LDO 9.5.4(A)(4), other than to state that she conducted a survey of the  
17 site. The survey, found at Record 129, includes no topographic information, does not depict  
18 the building site or any proposed access, and appears to concern only the location of property  
19 lines. Similarly, intervenor's general familiarity with the property as its owner carries little  
20 weight in comparison with the opinion of registered professional engineers on this technical  
21 issue.

22 The hearings officer also cites the staff decision in support. As petitioner points out,  
23 the staff decision relied on "[c]ontour mapping, the site plan and application[.]" but does not  
24 explain why those materials demonstrate the feasibility of the proposed access. The  
25 handdrawn site plan includes no topographic information, but depicts an access driveway  
26 extending almost straight north from Little Applegate Road to the proposed dwelling site.

1 Record 143. The contour map at Record 128 does not show the proposed access, but  
2 comparison of the contour map and site plan suggests that any access road at the location  
3 depicted in the site plan would have to cross three to four ten-foot contour intervals within  
4 approximately 100 feet. Hammond stated that the proposed access road at that location  
5 would significantly exceed the maximum permissible 18 percent grade. We are cited to  
6 nothing in the staff decision or record to the contrary.

7 Jensen's letter states, in relevant part:

8 "Per your request, I have evaluated the possibility of constructing an  
9 emergency access private driveway to serve the proposed dwelling at the  
10 referenced site.

11 "In my opinion the above can be accomplished if the driveway intersects  
12 Little Applegate Road near the southeasterly corner and angles back to the  
13 southwest before continuing northerly to the proposed building site. The  
14 driveway would be constructed in conformance with section 9.5.4 of the  
15 Jackson County LDO and therefore, the elevation of the end of the driveway  
16 at the house site will dictate the future garage floor elevation." Record 37.

17 Jensen's letter is accompanied by no diagrams, but it seems clear that the access route he  
18 suggests is different than the one proposed on the site plan. While conclusory, if Jensen's  
19 letter were the only evidence on this point, it would almost certainly constitute substantial  
20 evidence supporting a finding that it is feasible to construct an access road that complies with  
21 LDO 9.5.4(A)(4). However, as noted, petitioner submitted a letter from Hammond,  
22 accompanied by three topographic maps.<sup>4</sup> One of the maps is apparently intended to

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<sup>4</sup> Hammond's letter states, in relevant part:

"As requested by you I have reviewed the feasibility of the proposed drive way submitted by  
applicant (file: ZON 2006-1279).

"Based upon the parameter required by the [LDO], this access would not meet the standard.  
\* \* \*

"The proposed home site access is too steep from existing county road to home site pad, total  
slope is 23% for proposed drive way. Elevations are represented by 10' increments starting at  
road 2410.00' continuing to 2510.00'. \* \* \*

1 represent an alignment similar to that suggested by Jensen, starting in the southeastern  
2 corner, curving to the southwest and then curving north up to the house site. Record 28. The  
3 map indicates that that alignment includes sections with 39 percent grades. The other two  
4 maps depict alternate alignments, one starting closer to the southwestern corner of the  
5 property, that also exceed maximum permissible grades. Record 29-30.

6 As intervenor notes, Hammond's letter is not signed or stamped. The hearings officer  
7 did not note that omission or appear to rely on it in determining which expert testimony to  
8 believe. Because the hearings officer did not assign any significance to that omission, and  
9 we are uncertain of its significance, we decline to agree with intervenor that the Hammond's  
10 letter is inherently unreliable for that reason.

11 The contrasting expert opinions of Jensen and Hammond are the principal sources of  
12 evidence regarding the feasibility of compliance with LDO 9.5.4(A)(4), and the only expert  
13 testimony properly considered as such by the hearings officer. We agree with petitioner that,  
14 considering the record as a whole, a reasonable decision maker would not have relied upon  
15 Jensen's letter to conclude that it is feasible to construct an access road that complies with  
16 LDO 9.5.4(A)(4). There appears to be no dispute that the original access road proposed on  
17 the site plan would not conform to LDO 9.5.4(A)(4). Jensen's letter asserts but does not  
18 explain why the alternate alignment suggested in his letter (starting at the southeastern  
19 corner, curving southwest and then north) is likely to meet the applicable grade standards.  
20 Hammond's letter evaluates an apparently similar alignment that clearly does not meet those  
21 standards. Hammond opines, based on the alternatives he examined, that it is not feasible to  
22 construct access that complies with the applicable grade standards, given the topography of  
23 the site. While there may be alternative alignments that neither Hammond nor Jensen

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“Attached are 3 engineering maps created by applying topographical data. These maps represent 3 different approaches to meet the criteria on the present application, and all 3 show it is not feasible for the access to comply with the regulations based upon the physical characteristics of the topography, and the data presented in the application.” Record 27.



1 evaluated that are likely to meet the grade standards, perhaps one of the alignments  
2 suggested in Moore's letter, the evidence properly considered by the hearings officer is not  
3 sufficient to establish that. Accordingly, the hearings officer's decision on this point is not  
4 supported by substantial evidence.

5           The assignment of error is sustained.

6           The county's decision is remanded.