BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SUSAN LENOX,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

MARIE MARSHALL GARSJO,
Intervenor-Respondent.

LUBA No. 2008-095

FINAL OPINION
AND ORDER

Appeal from Jackson County.

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

No appearance by Jackson County.

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

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

AFFIRMED 10/14/2008

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioner appeals from a hearings officer's decision approving an owner-of-record 4 dwelling.

5 **MOTION TO INTERVENE**

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

8 **FACTS**

9 The subject property is tax lot 600, a 10.65-acre parcel zoned Woodland Resource. 10 The parcel is wedge-shaped, with a narrow frontage on Little Applegate Road, which 11 traverses the southern portion of the property. The northern portion of the parcel rises 12 steeply from the road, with slopes of 40-50 percent. Petitioner owns the adjoining property 13 to the north, which is zoned Open Space Reserve (OSR).

14 Intervenor applied to the county for an ownership-of-record dwelling on tax lot 600. 15 On March 5, 2008, county planning staff administratively approved the application. 16 Petitioner appealed the staff decision to the hearings officer. The county appeal form for a 17 staff decision made without a hearing requires the appellant to state the "Reason for Appeal 18 of Staff Decision (Required)." Record 137. Petitioner wrote on the form "Property does not 19 meet numerous details of LDO [Land Development Ordinance] requirements."

20 On May 5, 2008, the hearings officer held a hearing on the appeal. Intervenor's 21 attorney filed a motion to dismiss the appeal, arguing that petitioner failed to state on the 22 county appeal form any reasons for the appeal, as required by LDO 2.7.5(D)(2)(c).[1] The

[1] LDO 2.7.5(D) provides:

> "1) Decisions made without first holding an initial evidentiary hearing may be appealed by any person or entity who:
>
> "a) Is entitled to notice under this Section; or

1 hearings officer took the motion under advisement, and conducted the hearing, accepting
2 evidence and testimony from intervenor's representatives and from petitioner. At the
3 conclusion of the hearing, intervenor requested and received additional time to submit
4 rebuttal evidence.

5 On June 6, 2008, the hearings officer issued a decision that (1) grants the motion to
6 dismiss the appeal on the grounds that petitioner failed to adequately state any reasons for the
7 appeal on the county appeal form, and (2), in the alternative, approves the application on the
8 merits. This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 Petitioner argues that the hearings officer misconstrued the applicable law in
11 concluding that failure to list in the notice of appeal specific reasons for the appeal violates
12 LDO 2.7.5(D)(2)(c). According to petitioner, the county's code provides that appeal of a
13 staff decision made without a hearing is to a *de novo* hearing at which the parties may raise
14 any issue, or provide specific arguments to issues raised in the notice of appeal.

15 We agree with petitioner that the hearings officer erred in dismissing petitioner's
16 appeal for failure to list specific reasons for the appeal on the county appeal form.
17 LDO 2.7.5(D) clearly implements the statutory provisions for making a permit decision

---

"b) Is adversely affected or aggrieved by the decision, whether or not they received notice.

"2) An appeal must:

"a) Be made in writing;

"b) Identify the decision that is being appealed and the date of the decision;

"c) State the reason(s) for the appeal;

"d) Be received by the Planning Staff at the address listed in the notice prior to the end of the appeal period; and

"e) Be accompanied by the required fee established by the County."

without a hearing, under ORS 215.416(11).[2] Under the statute, and under the county code provisions that implement the statute, the county may make a decision without a hearing, provided that it notify persons entitled to notice if the county had conducted a hearing in the first place, and offers those persons the opportunity to request a *de novo* hearing to a hearings officer. Importantly, ORS 215.416(11)(a)(E)(ii) provides that "[t]he presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal[.]"

LDO 2.7.5(D)(2)(c) merely requires that the appellant state the reason for the appeal. Nothing in the LDO cited to our attention provides that failure to state specific reasons for the appeal on the county's appeal form deprives the hearings officer of jurisdiction over the appeal, or allows the hearings officer to limit the issues considered at the hearing to those

---

[2] ORS 215.416(11)(a) provides, in relevant part:

> "(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.
>
> "* * * * *
>
> "(D) An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing.
>
> "(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:
>
> > "(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;
> >
> > *"(ii) The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal*; and
> >
> > "(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing." (Emphasis added).

1 listed in the notice of appeal. To the extent any such LDO provisions existed, they would
2 plainly be inconsistent with ORS 215.416(11)(a).

3 While there are other circumstances where local code provisions or other authority
4 may limit the issues that may be considered on local appeal to those raised in the notice of
5 local appeal, a permit decision made without a hearing under ORS 215.416(11)(a) is not one
6 of them.[3] When a county makes a permit decision without a hearing under
7 ORS 215.416(11)(a), the notice of the tentative decision that the county provides to those
8 entitled to notice may be the first inkling such persons have that a permit application is
9 pending before the county and that the county has in fact already considered and approved
10 the application. A person in that circumstance has a very limited time to obtain a copy of the
11 tentative decision and any staff report or other information from the record, determine
12 whether there are grounds to oppose the decision, and file a local appeal requesting a *de novo*
13 hearing. The legislature apparently believed that it is inappropriate, given that limited
14 timeline, to require that the issues addressed at the *de novo* hearing be limited to those stated
15 in the notice of local appeal. Accordingly, the hearings officer erred in interpreting LDO
16 2.7.5(D)(2)(c) to require petitioner to list specific reasons for the appeal in the notice of
17 appeal, and in dismissing the appeal for failure to list specific reasons in the notice of appeal.

18 Petitioner's first assignment of error is sustained. However, as noted above, at
19 intervenor's request the hearings officer went on to address the merits of the issues that
20 petitioner raised at the May 5, 2008 hearing, as well as the testimony and rebuttal evidence
21 that intervenor submitted. In other words, as a precautionary alternative the hearings officer
22 appears to have complied with the statute and LDO and provided petitioner a *de novo*
23 hearing not limited to the issues raised in the notice of appeal. While petitioner challenges

---

[3] The permit-without-a hearing provisions of ORS 215.416(11)(a) do not apply to appeals to the governing body or other review body of a permit decision that is made *after* providing a hearing. In such circumstances, issues addressed on appeal before the governing body and LUBA may be limited to issues raised in the notice of appeal. *See Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003).

1 the hearings officer's findings on the merits, she does not argue that the hearings officer
2 committed procedural error in going on to address the merits of the appeal. That being the
3 case, the hearings officer's error in nominally dismissing the local appeal is harmless error
4 that does not provide a basis for reversal or remand.

5 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

6 LDO 4.3.4 requires a finding that the proposed use will not "force a significant
7 change in, or significantly increase the cost of, accepted farming or forest practices on
8 agriculture or forest lands." Petitioner testified to the hearings officer that the proposed
9 dwelling would adversely impact her agricultural practice of raising cattle, because it is
10 possible that her cattle could cross onto the subject property and escape down the proposed
11 driveway onto Little Applegate Road. According to petitioner, steep ravines currently keep
12 her cattle from escaping over the subject property, and the proposed driveway will reduce the
13 effectiveness of that topographic barrier. In the second and third assignments of error,
14 petitioner argues that the hearings officer failed to address this issue.

15 Intervenor responds that allowing cattle to trespass onto neighboring land and relying
16 on the neighboring property's steep topography or other features to keep the cattle from
17 escaping down to a public road is not an "accepted farming practice." Intervenor argues the
18 hearings officer was not require to adopt findings addressing that issue. We generally agree.
19 The hearings officer adopted findings of compliance with LDO 4.3.4 that petitioner does not
20 challenge. Although the hearings officer did not specifically address petitioner's contention
21 that the proposed driveway might allow her cattle to reach the public road, the hearings
22 officer is obligated to adopt findings addressing that contention only if it raises a "legitimate
23 issue" concerning a relevant approval criterion. *Knight v. City of Eugene*, 41 Or LUBA 279,
24 293 (2002). Petitioner does not explain why allowing her cattle to cross onto tax lot 600,
25 without the owner's approval, constitutes an "accepted farming practice" or why intervenor
26 is obligated to maintain the ravines or other features on tax lot 600 that may currently keep

petitioner's cattle from reaching the public road. Because the issue raised regarding the possibility that her cattle might trespass onto tax lot 600 and in that way reach Little Applegate Road does not appear to be a legitimate issue concerning compliance with LDO 4.3.4, petitioner has not demonstrated that the hearings officer erred in failing to address that issue.

Petitioner also argues that the hearings officer failed to address an issue she raised during the hearing regarding the possible impact of a domestic well serving the proposed dwelling on her wells, which serve both her dwelling and her cattle operation.

Intervenor responds that while the county's decision requires that the dwelling be served by a domestic water supply, the decision does not approve a well or even require that the dwelling be served by a well, rather than some other source water for the dwelling. Further, intervenor argues that petitioner cites no reason to believe that a well on tax lot 600 would have any impact at all on petitioner's wells.

The hearings officer noted that petitioner had raised issues regarding "lack of water," among other issues, but concluded that those issues were adequately rebutted by the applicant or addressed in the staff findings. Record 4. It is not the case, then, that the hearings officer did not address the issue raised by petitioner. While that finding is brief, so were petitioner's allegations regarding water. Petitioner does not cite any reason on appeal to believe that a well on tax lot 600 would interfere with her wells and, as far as we can tell, cited no such reasons to the hearings officer. Given the lack of a focused challenge to the findings at Record 4, petitioner has not demonstrated that the hearings officer's findings regarding impact on petitioner's wells are inadequate.

The second and third assignments of error are denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 Petitioner argues that the hearings officer's finding that the proposed driveway 3 complies with LDO 9.5.4 emergency vehicle access standards is not supported by substantial 4 evidence.[4]

5 Intervenor submitted two letters from a registered engineer along with several 6 drawings to demonstrate that a driveway can be constructed to the building site in 7 compliance with LDO 9.5.4 standards. Record 16-17, 100-101. The engineer testified that

---

[4] LDO 9.5.4 provides, in relevant part:

> "Emergency vehicle access must be constructed of an all weather surface to within 150 feet of all habitable structures and significant outbuildings (See Section 13.3). Access at a minimum will meet the following requirements:
>
> "A) ***Driveway Access Requirements***
>
> "1) Minimum surface width will not be less than 12 feet. Driveway segments having curves with a centerline radius of less than 150 feet require a minimum 14 foot width;
>
> "2) A minimum clear height of 13½ feet must be maintained for the entire width of the driveway;
>
> "3) Access must be designed and constructed to maintain a minimum 50,000 pound load carrying capacity. If not designed by an engineer, road access must be constructed of a minimum of six (6) inches of base rock or equivalent;
>
> "4) Maximum finished grade can be no greater than 15%. The grade may increase to 18% for intervals of up to 100 feet provided there are no more than three (3) 100 foot sections of over 15% grade per 1,000 feet. The finished grade may not exceed 15% on curves with a centerline radius of less than 150 feet. The approach from a public road or private road cannot exceed 10% grade for a distance of 40 feet;
>
> "* * * * *
>
> "10) Bridge driving surfaces must be a minimum of eight and one-half (8½) feet in width. A clear minimum width of 14 feet must be maintained above the surface of the bridge. All bridges will have a 50,000 pound load carrying capacity. Non-combustible construction is preferable;
>
> "11) Any required culverts must meet the minimum standards in Section 9.5.3(G). * * *"

1 "[t]he driveway can easily be constructed to access the proposed building site in
2 conformance with section 9.5.4 of the Jackson County LDO." Record 100. The hearings
3 officer found, in relevant part, that

> 4 "Despite the evidence submitted by [Appellant], I find that the information
> 5 submitted by the Applicant and her engineer (Record 113-14, 168-69, 171-72)
> 6 provide substantial evidence that the driveway grade and emergency access
> 7 requirements can be feasibly met. I find that this information is more credible
> 8 than that submitted by the [Appellant] and is supported by a registered
> 9 professional engineer." Record 4.

10 Petitioner argues that the engineer's letters and other evidence submitted by
11 intervenor do not actually address the specific standards at LDO 9.5.4. According to
12 petitioner, the engineer did not, for example, explain how the proposed driveway will comply
13 with LDO 9.5.4(A)(4) requirement that the driveway not exceed a 15 percent grade. Further,
14 petitioner argues that the engineer failed to address a second ravine identified by petitioner
15 and the need for an additional culvert or bridge over the ravine. Finally, petitioner argues
16 that the engineer failed to address the fact that the ravines are Class 2 streams under the
17 county's code. Therefore, petitioner concludes, the county's finding that the proposed
18 driveway can be constructed in compliance with LDO 9.5.4 standards is not supported by
19 substantial evidence.

20 As framed, this assignment of error is a substantial evidence challenge. However,
21 petitioner merely complains that the engineer's testimony did not specifically address each
22 element of LDO 9.5.4. Petitioner does not acknowledge the detailed drawings submitted
23 with the engineer's letter, or argue that the driveway depicted on those drawings violate any
24 LDO 9.5.4 standard. For example, petitioner does not argue that the proposed driveway
25 exceeds the 15 percent grade required by LDO 9.5.4(A)(4), and the driveway layout at
26 Record 17 indicates otherwise. *See* Record 17 (table showing the maximum grade of the
27 driveway is 15 percent).

With respect to the second ravine, the drawings at Record 17-19 indicate that the proposed driveway crosses only one ravine, over a proposed culvert, on the east side of the dwelling site. The site plan at Record 19 appears to show a second drainage on the west side of the proposed dwelling. That may be the second ravine identified by petitioner, but if so the proposed driveway does not cross it, and petitioner does not explain why the existence of that drainage has any significance under LDO 9.5.4. Petitioner does not cite any support in the record for her assertion that the two ravines are Class 2 streams, or explain the significance of that fact, even if they are Class 2 streams. Absent a more focused challenge, petitioner's arguments under this assignment of error do not provide a basis for reversal or remand.

Petitioner's fourth assignment of error is denied.

CONCLUSION

As explained above, although we sustain the first assignment of error and conclude that the hearings officer erred in dismissing petitioner's appeal, that error is harmless because the hearings officer in fact went on to address the merits of the appeal. Petitioner's challenges on the merits do not provide a basis for reversal or remand. Accordingly, the county's decision is affirmed.