

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

3  
4 CARL JOHNSON,  
5 *Petitioner,*

6  
7 vs.

8  
9 JACKSON COUNTY,  
10 *Respondent,*

11  
12 and

13  
14 KROUSE RANCH, INC.,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2009-007

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from Jackson County.

23  
24 Christian E. Hearn, Ashland, filed the petition for review and argued on behalf of  
25 petitioner. With him on the brief was Davis, Hearn, Saladoff & Bridges, PC.

26  
27 No appearance by Jackson County.

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29 Daniel B. O'Connor, Medford, filed the response brief and argued on behalf of  
30 petitioner. With him on the brief was Huycke, O'Connor, Jarvis & Lohman LLP and Jud  
31 Holtey.

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

35  
36 REMANDED

06/02/2009

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 appeals a county decision approving a floodplain review permit that allows construction of a bridge.

**MOTION TO INTERVENE**

Krouse Ranch, Inc. (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion and it is granted.

**FACTS**

Intervenor filed an application for a floodplain development permit to construct a bridge spanning the Applegate River. The county processed the application under its Type 1 procedures. Type I procedures do not provide notice or a hearing, or other opportunity for public participation. County planning staff approved the application. This appeal followed.

**ASSIGNMENT OF ERROR**

Petitioner argues that the county erred in processing the permit application under the county’s Type 1 process, which precludes petitioner’s participation, instead of processing the application under the Type 2 process, which requires notice of the decision and the opportunity for a hearing.<sup>1</sup> We understand petitioner to argue that the county committed a procedural error by processing the decision as a Type 1 decision and that petitioner’s

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<sup>1</sup> Jackson County Land Use Ordinance (LDO) 3.1.2 describes the Type 1 process:

“Type 1 uses are permitted by-right, requiring only nondiscretionary staff review to demonstrate compliance with the standards of this Ordinance. A Zoning Information Sheet may be issued to document findings or to track progress toward compliance. Type 1 permits are limited to situations that do not require interpretation or the exercise of policy or legal judgment.”

LDO 3.1.3 describes the Type 2 process:

“Type 2 uses are subject to administrative review. These decisions are discretionary and therefore require notice of a decision and opportunity for hearing.”

1 substantial rights were prejudiced because he was not able to review intervenor’s application  
2 and present contrary evidence. ORS 197.835(9)(a)(B).<sup>2</sup>

3 Intervenor first responds that the decision to approve the permit did not involve  
4 standards that “require interpretation or the exercise of policy or legal judgment” and  
5 therefore under ORS 197.015(10)(b)(A), LUBA does not have jurisdiction over the  
6 decision.<sup>3</sup> ORS 197.015(10)(b)(A) is commonly referred to as the “ministerial decision”  
7 exception to LUBA’s jurisdiction. LDO 3.1.2 uses language that is almost identical to the  
8 language in ORS 197.015(10)(b)(A) to define Type 1 decisions, so that for purposes of the  
9 present appeal, resolving the question of whether the county properly used the Type 1  
10 process also resolves intervenor’s jurisdictional argument under ORS 197.015(10)(b)(A).

11 The parties agree that the applicable approval criteria are located in the Floodplain  
12 Overlay provisions of LDO 7.1.2. Various provisions of the Floodplain Overlay require a  
13 determination of the 100-year floodplain and floodway. LDO 7.1.2(C)(2) provides that  
14 “[a]long the Applegate River the requirements of [LDO] 7.1.2.(F)(7)(d) shall be used” to  
15 determine the floodway. LDO 7.1.2.(F)(7)(d) provides:

16 “Along the Applegate River, where base flood elevations have been provided  
17 on the FIRM but the floodway has not been designated, *no* new construction,  
18 substantial improvement or *other development* (including fill) *in the 100-year*

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<sup>2</sup> ORS 197.835(9)(a)(B) provides in relevant part:

“(9) In addition to the review under subsections (1) to (8) of this section, the board shall reverse or remand the land use decision under review if the board finds:

“(a) The local government or special district:

“\* \* \* \* \*

“(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]”

<sup>3</sup> ORS 197.015(10)(b)(A) provides that a “land use decision” does not include a decision:

“That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]”

1 *floodplain is permitted unless the applicant provides evidence from an*  
2 *Oregon registered professional engineer demonstrating that the cumulative*  
3 *effect of the proposed development, when combined with all other existing*  
4 *development on properties immediately upstream and downstream, will not*  
5 *increase the water surface elevation of the base flood more than one (1) foot.*  
6 The placement of any new building in the floodway which does not replace an  
7 existing building is prohibited unless such prohibition would prevent all  
8 reasonable use of the parcel. The location of the floodway must be  
9 determined by an Oregon registered professional engineer for any new  
10 building replacement or repair, addition, or reconstruction of any existing  
11 building that constitutes substantial improvement[.]” (Emphases added.)

12 County staff determined that the proposed bridge was “other development” under LDO  
13 7.1.2(F)(7)(d) and therefore the cumulative effect of the proposed bridge must not increase  
14 the base flood elevation (BFE) more than one foot.

15 Intervenor’s engineer submitted a detailed report regarding, among other things, the  
16 projected change in BFE. Record 36-91. The report itself describes a four-step process for  
17 determining the projected rise in BFE that involves creating four separate models. In  
18 creating and using these models, various assumptions and parameters are entered into the  
19 models. These assumptions and parameters include site hydrology, boundary conditions, and  
20 roughness coefficients (involving the condition of the river bottom and adjoining banks).  
21 The report also addresses the cumulative impacts of the proposed bridge on three nearby  
22 properties and concludes that LDO 7.1.2.(F)(7)(d) was satisfied. Based on the report, the  
23 county concluded:

24 “A review of the Floodplain Development Permit Information Tables and  
25 findings by the Engineer establish the water surface elevations established the  
26 HEC-RAS program compare favorably to the FEMA HEC-2 Model. As a  
27 result, staff accepts the cross section LA13 water surface elevation of  
28 1,193.92’ as existing. Table 3 compares the existing model to the proposed  
29 model and demonstrates no change in water surface elevation immediately  
30 downstream of the project site on the adjacent lot 1303.

31 “A review of the requested model updates for River Stations in the 120 range  
32 establish an increase in the water surface elevation of 0.1’ on Lots 2201 and  
33 2200 immediately upstream from the project site.

1 “Based on a review of the Floodplain Development Permit Information,  
2 Tables 1, 2, and 3 regarding water surface/base flood elevations, and a review  
3 of the model update information received November 26, 2008, staff concludes  
4 the increase in the water surface elevation/base flood elevation immediately  
5 upstream and down stream will not increase by more than 1.0’. This standard  
6 has been demonstrated as met by the information provided by [intervenor’s  
7 engineer].” Record 107.

8 Intervenor argues that merely determining whether the BFE is increased more than  
9 one foot does not require interpretation or the exercise of policy or legal judgment – it is  
10 either more than one foot or it is not. While we might agree with intervenor that once a  
11 change in BFE for the proposed development has been determined, it does not require  
12 interpretation or the exercise of policy or legal judgment to decide whether that change was  
13 more than one foot, we do not agree that determining how to calculate the change in BFE is  
14 quite that simple. LDO 7.1.2.(F)(7)(d) requires a finding that “the cumulative effect of the  
15 proposed development, when combined with all other existing development on properties  
16 immediately upstream and downstream, will not increase the water surface elevation of the  
17 base flood more than one (1) foot.” An approval criterion that requires a determination  
18 regarding the “cumulative effect” of a proposed development action combined with other  
19 development is quite likely to require either interpretation or the exercise of some legal  
20 judgment. For example, determining what structures or modifications on nearby properties  
21 constitute “development” is likely to require some interpretation and the exercise of legal  
22 judgment. Petitioner argued to the county in his rejected local appeal that the engineering  
23 report failed to include an existing levy within the scope of the “development” considered in  
24 the cumulative effects analysis. Petition for Review 14. Similarly, determining which  
25 properties are “immediately” upstream or downstream may require some interpretation or  
26 legal judgment. While “immediately” presumably includes adjacent properties, it is not  
27 clear that it is limited to adjacent properties.

28 Moreover, the detailed process just described involves many technical calculations  
29 and the use of various assumptions in creating, running, and comparing the various models.

1 Based on those models and the assumptions and parameters contained in them, intervenor's  
2 engineer provided the evidence required by LDO 7.1.2(F)(7)(d) that supported his conclusion  
3 that the cumulative effect of the proposed development, when combined with all other  
4 existing development on properties immediately upstream and downstream, will not increase  
5 the water surface elevation of the base flood more than one (1) foot. Petitioner argues that  
6 using different assumptions, parameters or models might well yield very different results.  
7 We agree with petitioner that an approval criterion that requires a detailed engineering study  
8 such as the present one in order to determine the cumulative effects of existing and proposed  
9 development requires the decision maker to make some determination whether the  
10 engineering study employed the appropriate assumptions, parameters and models. That  
11 determination is one that almost certainly requires some interpretation or legal judgment.

12 We understand intervenor to argue that LDO 7.1.2(F)(7)(d) was satisfied upon  
13 submission of intervenor's expert's report and that county staff was not required to and did  
14 not conduct any meaningful review of the report, perhaps because staff did not believe they  
15 possessed the engineering expertise to conduct that review. Therefore, intervenor argues,  
16 county staff did not exercise any policy or legal judgment. However, the submission of the  
17 report (or any other materials required to be submitted) does not result in an automatic  
18 demonstration that the approval criterion is satisfied. The county is required to make a  
19 decision as to whether the applicable approval criteria are satisfied based on evidence in the  
20 record, and the planning staff was required to review the report and find whether the  
21 applicable approval criterion was met based on that report and any other evidence in the  
22 record. As explained above, that review required the planning staff to exercise policy or  
23 legal judgment in determining whether the evidence supported the applicant's position that  
24 the cumulative effect of the proposed development would not increase the BFE more than  
25 one foot. Even if staff essentially relied on intervenor's engineer to make that determination,  
26 as we understand intervenor to suggest, that does not change the fact that the LDO

1 7.1.2(F)(7)(d) cumulative effects analysis requires interpretation or the exercise of policy or  
2 legal judgment.

3 For the reasons set out above, we conclude that the challenged decision does not fall  
4 under the ministerial decision exception set forth in ORS 197.015(10)(b)(A) and that the  
5 county erred in applying the Type 1 review process set forth in LDO 3.1.2. The Type 1  
6 process does not apply here, and no party argues that some process other than the Type 2  
7 process should have been followed. We therefore assume that the Type 2 process should  
8 have been followed under the LDO. That process requires notice and an opportunity for a  
9 hearing. As we have already explained, the county did not provide such notice and provided  
10 no opportunity for a hearing. Those failures constituted a procedural error that provides a  
11 basis for remand if it prejudiced petitioner's substantial rights. ORS 197.835(9)(a)(B). A  
12 party's substantial rights under ORS 197.835(9)(a)(B) include an adequate opportunity to  
13 prepare and submit a case and a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA  
14 771, 775 (1988). Here, petitioner was given no opportunity to participate locally and that  
15 denial prejudiced his substantial rights. *See Krieger v. Wallowa County*, 35 Or LUBA 305,  
16 308 (1998) (failure to provide code-required notice of application and decision); *Casey Jones*  
17 *Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263, 282 (1998) (failure to provide code-  
18 required notice of final hearing). The county's decision must be remanded so that it can  
19 follow the required Type 2 procedure and provide petitioner the notice and opportunity for a  
20 hearing that is required under the LDO.

21 Petitioner's assignment of error is sustained.

22 The county's decision is remanded.