BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN WIGEN,
Petitioner,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2011-021

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Thaddeus G. Pauck, Medford, filed the petition for review and argued on behalf of petitioner. With him on the brief was Brophy Schmor Brophy Paradis Maddox & Weaver, LLP.

Frank Hammond, Medford, filed the response brief and argued on behalf of respondent. With him on the brief was the Law Offices of Frank Hammond LLC.

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

BASSHAM, Board Member, concurring.

REMANDED 07/15/2011

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer's decision that found petitioner in violation of the Jackson County Land Development Ordinance (LDO). The order imposed a fine of $600 and required petitioner to apply for and obtain all necessary permits to correct the violation.

FACTS

Petitioner's property is a rectangular-shaped parcel, with the longer dimension running north and south. The property is roughly three acres in size. Upton Slough, which eventually flows into the Rogue River, flows across the property towards its southern end providing petitioner roughly 200 feet of frontage on each bank.[1] The much larger portion of the property north of Upton Slough contains a dwelling and some outbuildings, but is predominately comprised of a pasture. Petitioner testified at the hearing below that the property "had pasture all the way down to the creek when I purchased it." Respondent's Brief Appendix 43. Petitioner also testified that he has intermittently grazed horses and llamas in the pasture over the years. *Id.* at 44. Currently, the pasture abuts the north bank and the majority of the northern frontage is vegetated in short grass with the exception of small pockets of blackberries and other vegetation. In contrast, much of the smaller portion of the property south of the slough is covered with dense vegetation. The dispute in this appeal concerns the riparian zone in the northern part of the property along its 200 feet of Upton Slough frontage.

During the hearing below, there was testimony concerning two related matters that seem to be at the heart of this dispute. Petitioner testified that the slough began flooding in

[1] There is some dispute whether the waterway that crosses petitioner's property is Upton Slough or an unnamed tributary of Upton Slough. For purposes of this appeal it does not matter, because all parties agree the waterway is a Class II waterway and the LDO standard at the center of this appeal applies to Class II waterways.

2005. According to petitioner, that flooding was attributable in part to beaver dams in the slough where it crosses petitioner's property.[2] Petitioner testified that he extracted the beaver dam, trees, and other vegetation that had been toppled and damaged by the beavers from the slough. Petitioner stored the extracted material for a while near the north bank of the slough. Sometime in 2009, petitioner hauled away, chipped, and burned this woody material. Petitioner also testified that after completing those activites, he mowed the area where the remnants of the dam and other debris had been stored to "clean everything up." Respondent's Brief Appendix 54.

The second matter concerns activities on petitioner's neighbor's property to the west (Haflich). According to petitioner, the flooding was also attributable in part to Haflich's storage of soil and solid waste on his property and Haflich's construction of a culvert in the slough. These activities led petitioner to file a civil suit that ultimately resulted in a judgment against Haflich. Respondent's Brief Appendix 56. The precise nature of that judgment is not clear to us, but apparently Haflich was required to remove some soil and solid waste from his property that was partially blocking the flow of Upton Slough. Petitioner's neighbor Haflich is apparently the source of complaints about petitioner's activities in the riparian area that have led to county code enforcement officer visits to petitioner's property, but a different neighbor filed the complaint that resulted in the decision before us in this appeal. Record 53.

As explained in more detail below, the LDO requires that "all vegetation and tree cover * * * be retained within * * * 50 feet of the top of the bank of any Class I or 2 stream." On October 26, 2009, the county sent a code enforcement officer to petitioner's property after receiving a complaint of tree and vegetation removal near the waterway in violation of the LDO. This visit appears to have been prompted by petitioner's removal of the beaver

[2] Petitioner testified that the flooding was also attributable in part to soil and solid waste stored on his westerly neighbor's property and his neighbor's placement of a culvert in the slough.

dam and flood related debris, and resulted in a finding of no violation. Supplemental Record 1.[3] The county then received another complaint—this one about the clearing of dead logs near the waterway—which resulted in a second visit to the property by a different code enforcement officer (Officer Walker) on March 19, 2010. While Officer Walker found no violation in regards to the dead logs, he noted in a follow-up letter dated March 22, 2010 that petitioner had, "over the years, done a large amount of clearing on both banks of the [waterway] without consulting with Jackson County Planning or ODFW[.]" Record 11.

The March 22, 2010 letter, and a subsequent letter dated March 26, 2010, apparently served as notices of potential violations as they do not cite any county ordinance nor affirmatively find a violation of county code. Both letters outlined actions later characterized as "voluntary compliance measures" that petitioner could perform to avoid a citation. Respondent's Brief Appendix 67. As described in the March 22, 2010 letter, petitioner could avoid a citation by either refraining from mowing and grazing within fifty feet of the north bank, and thus allow vegetation to grow back naturally, or by developing a replanting plan to submit for ODFW approval. Record 9.

On March 29, 2010, Officer Walker's case log states that petitioner expressed his intention not to take any action until he is officially cited. Record 18. The log also reveals that Officer Walker continued investigating potential code violations on petitioner's property until April 27, 2010, when he temporarily suspended enforcement actions while petitioner resolved his civil suit filed against his neighbor Haflich, who was also under investigation for potential code violations. *Id.* On August 19, 2010, petitioner contacted the county to obtain approval for the installation of a new stove in his home. *Id.* Officer Walker informed petitioner that permits could not be issued for petitioner's property until the open code enforcement case was resolved. To resolve the matter, petitioner requested to be cited and

[3] With the county's agreement, petitioner has attached what he calls a "Supplemental Record" as an appendix to his petition for review. That Supplemental Record follows page 23 of the petition for review.

Officer Walker mailed the citation for violating the LDO riparian vegetation retention standard that day.

After being officially cited, petitioner filed an appeal and a hearing was eventually scheduled for October 19, 2010. Record 19. The hearing was held before a county hearings officer and petitioner and Officer Walker were permitted to testify, present evidence, and cross-examine witnesses. On February 7, 2011, the hearings officer issued a decision that determined that petitioner had "removed vegetation within the Riparian Buffer Zone on [petitioner's property] which vegetation includes growing grasses and blackberries" in violation of LDO 8.6.4. Record 4. The hearings officer imposed a fine of $600 and required petitioner to "apply for all necessary permits within 10 days, and secure all necessary permits within 21 days of the signing of this Order." Record 4-5. The referenced permits are needed to replant vegetation in the riparian setback. As we understand it, to secure the referenced permits, petitioner will have to submit a proposed riparian landscape plan to the Oregon Department of Fish and Wildlife (ODFW). Once ODFW approves the plan, that plan would have to be submitted to the county for approval as well.

MOTION TO STRIKE

In its response brief, respondent moves to strike the appendix to petitioner's brief that appears at App. 1-9, following the Supplemental Record that is also attached as an appendix to the petition for review. *See* n 3. The appendix contains a letter and map from the Oregon Water Resources Department, an affidavit from petitioner's counsel, and an internal ODFW email message. Respondent argues that the appendix constitutes extra-record evidence, and petitioner has not filed a motion under OAR 661-010-0045 to allow LUBA to consider that extra-record evidence.[4] Even if petitioner had filed such a motion, respondent asserts that

[4] LUBA review is generally limited to the record filed by respondent. Under OAR 661-010-0045, in certain limited circumstances, LUBA may consider extra-record evidence.

any evidence within the appendix is irrelevant and would have to be excluded under OAR 661-010-0045(6)(b).[5] Petitioner offered no response to the motion to strike.

We agree with respondent that the appendix constitutes extra-record evidence and that that petitioner has not demonstrated that any of the grounds specified in OAR 661-010-0045(1) that might allow LUBA consider the extra-record evidence are present here. Respondent's motion to strike is granted.

JURISDICTION

Jackson County Codified Ordinances (JCCO) Chapter 294 sets out the procedures that county hearings officers follow in code enforcement proceedings. JCCO 294.21 provides that hearings officer decisions in code enforcement cases are "subject to judicial review by the Circuit Court for Jackson County as provided under ORS 34.010 to 34.100." No party argues that the challenged hearings officer's decision is subject to review by the circuit court under ORS 34.010 to 34.100, via writ of review.

LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1). As defined by ORS 197.015(10), a local government decision is a land use decision if it is "final" and "concerns the * * * application of" "[a] land use regulation.[6] The challenged

---

[5] OAR 661-010-0045(6)(b) limits the extra-record evidence that LUBA may consider—if it considers extra-record evidence—and provides that "[i]rrelevant, immaterial or unduly repetitious evidence shall be excluded."

[6] ORS 197.015(10) provides in part:

"'Land use decision':

"(a) Includes:

"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

hearings officer's decision applies the LDO, which is a "land use regulation" as that term is defined by ORS 197.015(11). As far as we can tell the hearing officer's decision is the county's "final" decision in this matter. The decision on appeal therefore appears to fall within the statutory definition of "land use decision." No party argues that the hearings officer's decision in this enforcement action is not a land use decision or otherwise challenges LUBA's jurisdiction.

THIRD ASSIGNMENT OF ERROR

In his third assignment of error, petitioner argues that several actions by Officer Walker prejudiced his substantial rights and that those actions warrant remand of the hearings officer's decision. First, petitioner complains that Officer Walker improperly interfered with his civil suit against his neighbor Haflich and went so far as to state that the county's enforcement action against petitioner would be dismissed if petitioner dismissed his civil suit against Haflich. Second, petitioner contends that after the hearings officer rendered his decision in this matter, Officer Walker improperly contacted ODFW and misrepresented the hearings officer's decision by advising ODFW that the hearings officer ordered petitioner to completely revegetate the 50-foot setback along the entire 200-foot frontage along Upton Slough. Finally, petitioner contends that although he made a public records request for the county's entire file in this matter, Officer Walker failed to give him copies of his field notes and three photographs that Officer Walker took during a visit to petitioner's property. Officer Walker relied on those field notes to prepare an affidavit, and his oral testimony before the hearings officer in part relied on those field notes. Officer Walker submitted the three photographs to the hearings officer to document the condition of petitioner's property.

Petitioner's first complaint might provide a basis for an action against Officer Walker, but it provides no basis for remand, since it is the county hearings officer's decision

---

"(iv) A new land use regulation[.]"

that is before us in this appeal, not Officer Walker's actions. Petitioner's second complaint suffers the same problem as his first, and since the contact with ODFW came after the hearings officer's decision the contact could not provide a basis for remand of the hearings officer's decision for that reason as well.

Petitioner's third complaint appears to identify failures to produce copies of requested public records. The exclusive remedy for any failures by Officer Walker to produce requested public records is to petition the county district attorney for relief. ORS 192.460. If that does not result in disclosure, petitioner may institute an action in circuit court. ORS 192.480; *Jackman v. City of Tillamook*, 29 Or LUBA 391, 400 (1995). But even if the county initially improperly withheld public records, the photographs and the substance of the field notes was made part of the record before the hearings officer. Petitioner was given a chance to cross-examine Officer Walker regarding both the field notes and photographs and was allowed to submit his own photographic evidence regarding the historical and current condition of his property. Any public records law violation that may have occurred did not prejudice petitioner's substantial rights in the hearing before the hearings officer.[7]

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, petitioner contends that Officer Walker took the position that petitioner's actions with regard to vegetation within the riparian zone constitute "development," as that term is defined by the LDO and therefore constituted a violation of LDO 8.1, which requires that "development" comply with the LDO fifty-foot riparian setback. The hearings officer did not adopt Officer Walker's view that vegetation removal constitutes "development." Again, it is the hearings officer's decision that is before LUBA

[7] As noted earlier, JCCO Chapter 294 sets out procedures that county code enforcement hearings officers follow in adjudicating alleged violations of county ordinances. JCCO 294.10 requires that parties make available "all materials [and] evidence" "which the party in possession intends to offer in evidence at the hearing." As we understand it, although Officer Walker discussed the substance of his field notes, he never entered his field notes into evidence. In any event, petitioner does not argue that Officer Walker's failure to disclose his field notes violated JCCO 294.10.

in this appeal, not legal theories that may have been advanced by Officer Walker but were not adopted by the county hearings officer.

As already noted, the LDO requires that "all vegetation and tree cover * * * be retained within * * * 50 feet of the top of the bank of any Class I or 2 stream." In the remainder of his second assignment of error, petitioner raises two more issues. First, petitioner contends that the hearings officer erred as a matter of law in concluding that the "vegetation" that is protected by the LDO includes "grass." The county argues that petitioner waived this issue because he did not raise it before the hearings officer. ORS 197.763(1); ORS 197.835(3).[8]

ORS 197.763 sets out procedures that govern "the conduct of quasi-judicial land use hearings conducted before a * * * hearings officer on application for a land use decision * * *." This enforcement proceeding was rendered pursuant to a "complaint," not "an application for a land use decision." As far as we can tell, the county did not follow the quasi-judicial land use procedures set out at ORS 197.763 and instead followed its separate procedures for the conduct of code enforcement hearings. *See* n 7. JCCO 294.09 includes a requirement that the hearings officer "advise the parties that any issue which may be the basis for an appeal to the Circuit Court shall be raised not later than the close of the record." JCCO 294.09 appears to establish a raise it or waive it requirement for code enforcement decisions that are challenged in circuit court. The county does not cite JCCO 294.09 in support of its waiver argument, argue that the hearings officer gave the required warning, or argue that JCCO 294.09 establishes a raise it or waive it requirement that applies in appeals of county enforcement decisions that are appealed to LUBA.

[8] Under ORS 197.835(3), LUBA's review of quasi-judicial land use decisions is limited to issues that were raised below. ORS 197.763(1) requires that issues be raised before the conclusion of the final evidentiary hearing on an application for a quasi-judicial land use decision.

Because ORS 197.763(1) and ORS 197.835(3) do not apply, and the county does not argue the issue petitioner seeks to raise was waived under JCCO 294.09, we reject the county argument that the issue was waived. We discuss the riparian vegetation protection standard at LDO 8.6.4(A) in some detail in our discussion of the first assignment of error below, and we sustain the first assignment of error and remand for the hearings officer to better explain the bases for his finding that petitioner violated LDO 8.6.4(A) and his sanction for that violation. In doing so, the hearings officer must also consider petitioner's claim that the "vegetation" that is protected by LDO 8.6.4(A) does not include "grass."

The second issue petitioner raises under the second assignment of error is evidentiary. Petitioner contends that the evidentiary record in this matter shows that he has "retained" vegetation on his property, as required by LDO 8.6.4, and has not "removed" or "mowed" any vegetation in the protected riparian area. We consider this issue and the arguments petitioner advances in support of that issue in our discussion of the first assignment of error below.

The second assignment of error is sustained in part.

FIRST ASSIGNMENT OF ERROR

A. The Riparian Vegetation Retention Standard

The riparian vegetation retention standard that the hearings officer applied and found that petitioner violated is LDO 8.6.4.[9] On its face, LDO 8.6.4(A) is an absolute requirement

[9] LDO 8.6.4 provides in relevant part:

> "A) In order to protect stream corridors and riparian habitat, all vegetation and tree cover will be retained within 75 feet of the top of the bank of the Rogue River, or within 50 feet of the top of the bank of any Class I or 2 stream or other fish-bearing water area including lakes, ponds, perennial, and intermittent fish-bearing streams, but excluding man-made farm ponds. The definitions in Section 8.6.1(A) apply to this Section. Exceptions are as follows:
>
> > "1) Non-native vegetation may be removed and replaced with native plant species, subject to a landscape plan approved by Oregon Department of Fish and Wildlife (ODFW).

that "all vegetation and tree cover" must be "retained within" the specified 50-foot riparian area, with only three exceptions. First, "[n]on-native vegetation may be removed," provided such non-native vegetation is "replaced with native plant species" pursuant to a "landscape plan approved by [ODFW]." Second, vegetation can be removed to develop "water-related or water-dependent uses," again pursuant to an ODFW landscape plan. Third, vegetation may be removed in the riparian zone for "forestry activities that have been granted a permit under the Forest Practices Act." It is undisputed that petitioner did not seek to remove vegetation under any of these three exceptions. Therefore, the only question is whether petitioner took actions that constituted a violation of the LDO 8.6.4(A) requirement that "all vegetation and tree cover" must "be retained within * * * 50 feet of the top of the bank of" Upton Slough where it passes through petitioner's property.

B. The Violation

We set out the key conclusions of law and key parts of the hearings officer's order below:

"CONCLUSIONS OF LAW

"* * * * *

"3. [Petitioner] has removed vegetation within the Riparian Buffer Zone on the Premises which vegetation includes growing grasses and blackberries.

"4. [S]uch removal does not fall within any lawful exceptions and is thus subject to the Land Development Ordinance section 8.6.4.

"5. [Petitioner] failed to obtain the required approvals from Jackson County Planning and ODFW for vegetation removal in Riparian Zone and [therefore violated] JCLDO 8.6.4.

"2) Vegetation may be removed if necessary for the development of water-related or water-dependent uses, subject to a landscape plan approved by ODFW.

"3) Vegetation may be removed for forestry activities that have been granted a permit under the Forest Practices Act."

"Accordingly, [the county's] complaint is hereby affirmed in its entirety and the Hearings Officer makes the following:

"**ORDER**

"1) That Judgment is made against [petitioner] and that [petitioner] apply for all necessary permits within 10 days, and secure all necessary permits within 21 days of the signing of this Order.

"2) That a Money Judgment entered in favor of [the county] in the amount of $600 as a fine and post judgment interest at the rate of 9% per annum beginning the 10th day after the signing of this Order.

"* * * * *." Record 4-5.

C. The Evidence

The evidentiary record developed before the hearings officer includes both contested and uncontested evidence. We discuss that evidence briefly below.

1. The Haflich Testimony

Petitioner's neighbor Haflich testified that he observed petitioner removing vegetation from the 50-foot riparian zone. The hearings officer specifically rejected that testimony as unreliable. Record 2. We therefore assume the hearings officer did not rely on the Haflich testimony in finding that petitioner violated LDO 8.6.4(A) by removing "growing grasses and blackberries."

2. Grazing

It appears undisputed that petitioner has allowed horses and llamas to graze within the 50-foot protected riparian area since petitioner acquired the property and more or less continuously thereafter. Grazing could easily have caused or contributed to the closely cropped appearance of the vegetation along much of the property's northern frontage along Upton Slough. However, the hearings officer does not mention grazing anywhere in his

decision and does not find that such grazing constitutes a violation of LDO 8.6.4(A).[10] We therefore assume the hearings officer was not relying on the grazing that occurred in the riparian zone along the property's northern frontage with Upton Slough in finding that petitioner violated LDO 8.6.4(A). If we are wrong about the hearings officer's view of grazing, he can clarify that point on remand.

3. Beaver Dam Removal

One of the more confusing aspects of this appeal concerns petitioner's removal of the beaver dam from Upton Slough, his ultimate removal of the vegetation used by the beavers to construct that dam, and his removal of other vegetation damaged or killed by the beavers. As previously noted, petitioner removed, chipped, and burned the beaver dam related vegetation in 2009. Petitioner attempted to testify about the removal of that vegetation, but both Officer Walker and the hearings officer seem to have taken the position that none of that vegetation removal constituted a violation of LDO 8.6.4(A) and that petitioner's testimony about that vegetation removal was irrelevant to the complaint filed by the county in this matter. Respondent's Brief Appendix 46-47. With one exception discussed below, there is certainly nothing in the hearings officer's decision that indicates that any of the vegetation associated with the beaver dam removal was part of the violation. We therefore assume that the vegetation that was removed and burned by petitioner in conjunction with the beaver dam removal is not part of the violation. Again, if we are wrong about the significance of the beaver dam removal, the hearings officer may clarify that point on remand.

[10] Petitioner cites a county prepared document entitled "A Landowners Guide to Riparian Areas in Jackson County, Oregon," which in turn specifically cites the LDO 8.6 riparian vegetation retention requirement and does not state that grazing is inappropriate in the riparian vegetation retention area. That publication does suggest that property owners "[l]imit grazing of riparian areas" and "[l]imit or avoid grazing in riparian areas * * * when grasses are dormant and the chance of erosion from runoff is greater." Supplemental Record 3.

4. The Irrigation Pump

Petitioner installed an irrigation pump in the riparian zone and also installed irrigation pipe. Respondent's Brief Appendix 43. Petitioner's testimony suggests he may have done some vegetation trimming in conjunction with this irrigation equipment. The hearings officer's decision makes no mention of this activity, and we assume it played no role in the hearings officer's decision. If this activity regarding the irrigation system played any role in the hearings officer's decision, he may explain the significance of that activity on remand.

5. The Electric Fence

Petitioner also installed an electric fence in the riparian zone to keep his animals out of the slough. Respondent's Brief Appendix 43. Petitioner's testimony suggests he may have done some trimming to keep the wire clear of vegetation. *Id.* at 65. The hearings officer's decision makes no mention of this activity, and we assume it played no role in the hearings officer's decision. If this activity regarding the electric fence played any role in the hearings officer's decision, he may explain the significance of that activity on remand.

6. Mowing

Petitioner conceded that on one occasion, he mowed vegetation in the area of the riparian zone where petitioner previously stored dead vegetation associated with past flooding and the removed beaver dam. Respondent's Brief Appendix 53. Although the hearings officer never explicitly finds that mowing grass in the riparian zone constitutes a violation of LDO 8.6.4, the decision clearly implies that the hearings officer concluded that mowing grass within the 50-foot riparian zone constitutes a failure to retain vegetation and a violation of LDO 8.6.4.[11] If mowing vegetation in the 50-foot riparian zone constitutes a

[11] In his decision, the hearings officer acknowledged petitioner's argument that there can be no failure to retain vegetation, within the meaning of LDO 8.6.4, unless the root systems are removed. The hearings officer never expressly rejected that argument, but apparently did so by implication since mowing grass would presumably leave root systems intact.

failure to retain vegetation, within the meaning of LDO 8.6.4, petitioner has conceded at least one instance of violating the LDO 8.6.4.

But the hearings officer's decision does not appear to be based on this single instance of mowing.[12] The hearings officer seems to have found that there were numerous other instances of mowing and blackberry removal:

> "9. In March 2010, [petitioner] went to the Jackson County Planning Division in response to a warning of violation that he had violated the Riparian Buffer Zone protection of LDO Section 8.6.4. Officer Walker introduced the County's official record of that contact and the representations made at that time by [petitioner]. [Petitioner] is reported in that document to have told the Planning staff that he was only removing blackberries and fallen trees from the Riparian Buffer Zone. The Defendant did not confront this evidence during the hearing.
>
> "* * * * *
>
> "11. [O]fficer Walker testified that during the visit to the Premises [petitioner] stated [he] had a long-standing and regular practice of mowing within the Riparian Buffer Zone on the Premises." Record 3.

The evidence that supports the above findings apparently consists of an unsigned, unsworn affidavit of Officer Walker that appears at Record 7, and Officer Walker's testimony at the hearing. Both the affidavit and Officer Walker's testimony were based in large part on some field notes that Officer Walker took, which are not included in the record.

Petitioner testified during the hearing that he has never removed any blackberry bushes and that the blackberry bushes at issue are growing on his property today. Respondent's Brief Appendix 52. Petitioner submitted a number of photographs to support his testimony. Petitioner also took the position below that with the exception of the single

[12] If this one event is the extent of petitioner's mowing in the riparian setback, it would seem to be at most a technical violation of LDO 8.6.4(A). It seems unlikely that much grass or other vegetation would have been left after the beaver dam related vegetation had been piled on top of it for some time before that debris was hauled away and burned.

instance of mowing in the area where the beaver dam debris was stored, he has not mowed within the 50 foot riparian zone. Respondent's Brief Appendix 53-54.

The hearings officer's finding that petitioner violated LDO 8.6.4(A) by removing "growing grasses and blackberries" appears to rely almost entirely, if not entirely, on Officer Walker's testimony about what petitioner allegedly told him about past mowing and blackberry removal. Again, it does not appear to us that the hearings officer would have found a violation of LDO 8.6.4(A) based on the single instance of mowing that followed petitioner's clean up and removal of the beaver dam debris. Petitioner expressly disputed Officer Walker's position regarding blackberry removal and mowing.

The substantial evidence standard that LUBA applies in reviewing land use decisions is not an exacting standard of review. Where LUBA is able to determine that a reasonable decision maker would rely on the evidence the decision maker relied on, findings that specifically address and resolve conflicting evidence are not necessary. *Tallman v. Clatsop County*, 47 Or LUBA 240, 246 (2004); *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68, 76, *aff'd* 161 Or App 199, 984 P2d 958 (1999); *Angel v. City of Portland*, 22 Or LUBA 649, 656-57, *aff'd* 113 Or App 169, 831 P2d 77 (1992). Although it is a relatively close question, given the critical nature of this conflicting evidence, we are unable to conclude a reasonable person would have relied on Officer Walker's recollection of what petitioner said outside the hearing in view of petitioner's contrary testimony about mowing and removal of blackberries in the hearing. Given the somewhat confused nature of the testimony below, it is not even clear to us that the hearings officer recognized that petitioner's testimony and Officer Walker's testimony directly conflicted on this critical point. *See Gould v. Deschutes County*, 59 Or LUBA 435, 457-58 (2009), *aff'd* 233 Or App 623, 227 P3d 758 (2010) (where hearings officer does not recognize that there is conflicting expert evidence on a critical issue, remand is required). That is not to say the hearings officer could not explain his apparent choice to believe Officer Walker rather than petitioner,

but without that explanation we cannot say a reasonable person would have relied on the record before us to decide this critical issue the way the hearings officer did. On remand the hearings officer must provide that explanation, to support his finding that petitioner has a longstanding practice of mowing grass and blackberries in the riparian area, if he remains of the view that petitioner has engaged in such a longstanding practice.

D. The Sanction or Remedy

The sanction or remedy imposed by the hearings officer in this case included a $600 fine as well as an order that petitioner "apply for all necessary permits within 10 days, and secure all necessary permits within 21 days of the signing of this Order." Although we are not sure we understand the authority the hearings officer relied on to determine the amount of the fine, that aspect of the sanction is clear and understandable, and petitioner does not argue that the county lacks authority to impose a $600 fine.

But the meaning of the hearings officer's order that petitioner seek and receive all permits is exceedingly ambiguous. If petitioner violated LDO 8.6.4 by mowing grass and blackberry bushes in the riparian zone, it would seem that the most likely candidate for a remedy or sanction for such a violation, beyond the fine, would be an order that such mowing and blackberry removal cease. If mowing ceased, anything that has been mowed presumably would grow back. If blackberry bushes have been "removed," rather than merely "mowed," the county might be relying on LDO 8.6.4(A)(1), *see* n 9, to go further with regard to that "removal" violation and require that any removed blackberry bushes be replaced with native vegetation. LDO 8.6.4(A)(1) expressly authorizes petitioner to seek and receive a permit to remove non-native vegetation like blackberries, so long as petitioner replaces those blackberries with native vegetation. If petitioner removed blackberries without seeking a permit under LDO 8.6.4 and without replacing the removed blackberries with native vegetation, it would seem the county is well within its authority to require that

petitioner seek and obtain such a permit for any "removed" blackberry bushes after-the-fact, and plant the required native vegetation to replace any removed blackberries.

But if the hearings officer's order requires that petitioner seek a permit from ODFW to replace the grass growing in the riparian zone with native vegetation, or to plant native vegetation in that grassy area, his authority for doing so is not obvious to us. From one of the documents that is the subject of the county's motion to strike, it appears that Officer Walker believes the hearings officer has ordered petitioner to completely replant the entire 200 feet of frontage along the northern bank of Upton Slough with native vegetation. If that is in fact what the hearings officer ordered, the requirement that the entire 200 feet of frontage be replanted with native vegetation needs to be more clearly articulated, along with the legal and factual basis for imposing such a requirement. By mowing grasses petitioner may have failed to "retain" grasses, within the meaning of LDO 8.6.4(A), but we question whether "mowing" grasses is the same thing as "removing" grasses, within the meaning of LDO 8.6.4(A)(1), so that those grasses must now be replaced with native vegetation. The county's legal theory for why it may order petitioner to submit a plan to ODFW to plant native vegetation in areas where petitioner may have mowed grasses in the past, if that is what the hearings officer intended, is not apparent to us. If that is what the hearings officer intended by his order, he will need to provide an explanation for the factual and legal basis for imposing that requirement.

The county's decision is remanded.

Bassham, Board Member, concurring.

I join the majority in the reasoning and result, but write separately to highlight the several difficulties presented in LUBA's review of the county's enforcement action. In my view, the circuit court is better suited than LUBA to review an enforcement action of the type presented here.

Generally, the circuit court retains jurisdiction over proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulation. ORS 197.825(3)(a). However, LUBA has long held that where the local government conducts its own code enforcement proceeding, and in so doing applies a land use regulation or otherwise renders a decision that falls within the definition of "land use decision" at ORS 197.015(10)(a), LUBA has jurisdiction over an appeal of that decision. *Putnam v. Klamath County*, 19 Or LUBA 616, 619 (1990). In the present case, no party disputes that the county applied a land use regulation, LDO 8.6.4, in determining that petitioner violated that code provision by removing riparian vegetation, and that LUBA has jurisdiction over the decision.

However, the decision in the present appeal differs in several respects from the typical decision resulting from an enforcement action that is sometimes appealed to LUBA. Appeals to LUBA of decisions resulting from local government enforcement proceedings often involve a land use permit that the local government has required the landowner to apply for to authorize a disputed structure or use of land, or turns on a legal determination regarding whether a disputed use of land or structure is a permitted use under the county's land use regulations. Typically, the landowner wishes to continue the disputed use of the land or structure, and the decision on appeal approves or denies that future use. For purposes of our review, such appeals differ little in substance from appeals of run-of-the-mill decisions on applications for land use permits, or an application for a use determination.

The decision in the present appeal differs in that there is little apparent connection to any past or future "land use" or development. The primary issue is whether petitioner violated LDO 8.6.4 on one or more past occasions by mowing grass or removing blackberry bushes in the riparian zone. As applied and enforced in the present circumstances, LDO 8.6.4 is essentially used to punish petitioner's alleged infractions rather than to regulate the use of land per se. Not surprisingly, the proceeding below and the issues on appeal resemble those of a quasi-criminal proceeding. Petitioner pled "not guilty" to the complaint and

testified he did not remove vegetation contrary to LDO 8.6.4. The county enforcement officer, acting both as chief witness and prosecutor, presented evidence that petitioner did. The adjudication of that key evidentiary dispute was conducted pursuant to procedures set out in the county's code at JCCO 294 for adjudicating violations of the county's ordinance. JCCO 294 is presumably based on the statutory procedures for adjudicating violations set out in ORS 153.005 to 153.142. Unlike land use hearings, the county enforcement procedures at JCCO 294 provide for pre-hearing discovery, subpoenas, rules of evidence, and cross-examination of opposing witnesses. Further, consistent with ORS 153.076(2), the county has the heightened burden of proving that the defendant violated the ordinance by a preponderance of the admissible evidence. JCCO 294.06(b). The hearings officer (implicitly) found that the enforcement officer met that heightened burden, and accordingly entered judgment against petitioner for restitution and a monetary penalty.

JCCO 294.21 provides that appeal of the hearings officer's enforcement order is to circuit court, under the writ of review statutes. However, the appeal notice attached to the hearings officer's decision states that "[t]o the extent that this decision applies or interprets provisions of [the LDO] or Comprehensive Plan * * * it may also be appealed to [LUBA.]" Record 5. As noted, no party disputes that LUBA has jurisdiction over the appeal, and the challenged decision appears to fall within the definition of "land use decision," and is thus subject to LUBA's exclusive jurisdiction. If that is the case, then jurisdiction over an appeal of the decision would not lie in circuit court.

In my view, that jurisdictional division of labor is unfortunate in the present case, because LUBA has no experience evaluating evidentiary disputes where one party has the burden of proving the guilt of another party under a preponderance of the admissible evidence standard. Nor does LUBA have any experience dealing with procedural issues arising from pre-hearing discovery, subpoenas, rules of evidence, and cross-examination of opposing witnesses. The circuit court has ample experience in such matters, and is almost

certainly better suited than is LUBA to review an appeal of the kind of enforcement action at issue here, which is punitive in focus, turns on which witness is telling the truth about the defendant's past conduct, and is poorly connected to the actual development or use of land.

Having made that observation, however, I have no suggestions for a solution, which would probably require a legislative fix. It would not be easy to craft legislation that would readily distinguish between those decisions enforcing certain land use regulations that the circuit court is better suited to review, and those that LUBA is better suited to review. For better or worse, the bright jurisdictional line set out in *Putnam* is easy to apply, even if it means LUBA may sometimes have to review issues arising from certain enforcement actions that our function and experience do not prepare us to review.