BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

REGINA PURTZER,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

JOEL SLAUGHTER,
Intervenor-Respondent.

LUBA No. 2012-090

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Regina Purtzer, Medford, filed the petition for review and argued on her own behalf.

No appearance by Jackson County.

Mark S. Bartholomew, 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; RYAN, Board Member, participated in the decision.

AFFIRMED 03/26/2013

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision approving a dwelling in a rural residential zone.

MOTION TO INTERVENE

On December 11, 2012, intervenor-respondent (intervenor) filed a motion to intervene on the side of the county, stating that he is the applicant and appeared during the local proceedings. On December 17, 2012, petitioner objected to the motion to intervene, but did not dispute that intervenor is the applicant or that he appeared during the proceedings below, and thus is entitled to intervene under ORS 197.830(7). On December 21, 2012, LUBA issued an order granting the motion to intervene over petitioner's objection.

On January 17, 2013, petitioner filed a second objection to the motion to intervene, which we construe as a motion to reconsider our December 21, 2012 order. However, petitioner's second objection states no cognizable reason to reconsider our order, or to reject the motion to intervene. Petitioner's motion to reconsider our December 21, 2012 order is denied.

FACTS

The subject property is a 13-acre parcel, roughly L-shaped, that is split-zoned Rural Residential (RR) 5-acre minimum, and RR 2.5-acre minimum. *See* Figure 1 at the end of this opinion for a simplified graphic of the property boundaries and relevant easements. The northern or upper part of the L-shaped parcel is 7.49 acres in size, zoned RR-5, and designated tax lot 2102. It is developed with a barn. The southern or lower part of the L-shaped parcel is 5.5 acres in size, zoned RR 2.5, and designated tax lot 200. Tax lot 200 is developed with a primary dwelling and a garage, both constructed in 1989.

The garage is located in the north central area of tax lot 200, roughly where the L-shaped parcel bends to the north. Sometime prior to 2002, the garage was expanded or

converted to include a second dwelling, but without first obtaining required development approvals or building permits. The challenged decision retroactively approves that second dwelling.

A disputed issue in this appeal is access to the subject property. Tax lot 200 fronts a public road, but access to tax lot 200, tax lot 2102 and other properties is provided by an easement that runs east-west from the public road along the boundary between tax lot 200 and the adjoining parcel to the north, tax lot 3400. This easement is known as the Chaney easement, and it was recorded in 1957 by Chaney, the then-owner of tax lot 3400, to benefit property that included tax lots 200 and 2102. The current owner of tax lot 3400 is McLeod and tax lot 3400 continues to be burdened by the Chaney easement. The Chaney easement provides that the easement is limited to serving one dwelling on the property that is currently comprised of tax lots 200 and 2102.

Petitioner owns property that is located north of tax lot 2102 and tax lot 3400. Petitioner's parcel receives access initially over the Chaney easement, then north along a separate easement (the northern easement) adjacent to the property boundary between tax lot 2102 and tax lot 3400. This northern easement passes close to the location of the garage/second dwelling on tax lot 200. The access to petitioner's property was established in 2003, pursuant to a settlement agreement between petitioner, intervenor and the owner of tax lot 3400, McLeod. The settlement agreement is accompanied by a recorded easement that limits petitioner's use of the Chaney easement to provide access to a single family residential dwelling on petitioner's parcel. Record 135. As part of that settlement agreement, the parties also entered into a road maintenance agreement. Record 143-50.

On July 27, 2012, the county planning division staff issued a notice of tentative decision approving the second dwelling on tax lot 200, subject to conditions of approval. Petitioner appealed the decision to the county hearings officer, raising three grounds for appeal. Petitioner argued that the applicant did not meet applicable county code

requirements with regard to: (1) sanitary sewer service to the second dwelling, (2) fuel breaks, and (3) legal access to the second dwelling.

The hearings officer conducted a hearing on October 1, 2012, and left the record open until October 15, 2012, for any party to submit additional evidence and testimony. The hearings officer provided a second open record period, until October 22, 2012, for responses to any new evidence submitted during the initial open record period. Petitioner submitted additional evidence and responses during both open record periods. Finally, the hearings officer gave the applicant until October 29, 2012, to submit final written argument. On October 29, 2012, both petitioner and intervenor submitted final written argument, but the hearings officer rejected and did not consider petitioner's final written argument.

On November 13, 2012, the hearings officer issued its decision denying petitioner's appeal and approving the application subject to conditions. With respect to the issue of access, the hearings officer agreed with petitioner that use of the Chaney easement to provide access to the second dwelling would be inconsistent with the terms of the easement. However, the hearings officer noted that the current owner of tax lot 3400, the servient estate, had indicated a willingness to modify the easement to allow access for the second dwelling on tax lot 200. Alternatively, the hearings officer noted evidence that intervenor could construct a separate direct access to the public road. Therefore, the hearings officer approved the application, with a condition requiring either (1) recordation of a deed that effectively eliminates the restriction contained in the Chaney easement restricting use of the easement to access one dwelling on tax lots 200 and 2102, or (2) construction of separate direct access to the public road.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

As noted, the hearings officer left the record open until October 29, 2012, for the applicant to submit final written argument, consistent with ORS 197.763(6)(e) and local

procedures implementing the statute.[1] Petitioner apparently understood the hearings officer to provide that she, as the local appellant, also had the right to submit final written argument on or before October 29, 2012. Accordingly, on October 29, 2012 petitioner submitted final written argument. However, based on intervenor's subsequent objection the hearings officer rejected and did not consider petitioner's October 29, 2012 final argument.

Under this assignment of error, petitioner requests that her October 29, 2012 final argument be added to the local record, arguing that the hearings officer failed to give her correct information that final written argument was limited to the applicant.

We understand petitioner to argue that the hearings officer "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights" of the parties. ORS 197.835(9)(a)(B). However, petitioner identifies no procedural error the hearings officer made; on the contrary, petitioner does not dispute that the hearings officer followed the procedure required by ORS 197.763(6)(e). Indeed, had the hearings officer accepted petitioner's October 29, 2012 final argument as petitioner requested, the hearings officer would have violated the applicable procedures, which limit final argument to the applicant. Even assuming that the hearings officer failed to clearly explain to petitioner that the applicable procedures limit final argument to the applicant, any such failure would not constitute procedural error or provide a basis for reversal or remand.

The first assignment of error is denied.[2]

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[1] ORS 197.763(6)(e) provides:

> "Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. * * *"

[2] Petitioner's October 29, 2012 final argument is attached to the petition for review as Appendix 2. In the response brief, intervenor moves to strike both Appendix 1 and 2, on the grounds that they were not initially attached to the petition for review as originally filed, but filed separately a week later. Appendix 1 is apparently a copy of a map from the record. We disagree with intervenor that the delayed filing of Appendices 1 and 2

SECOND ASSIGNMENT OF ERROR

Petitioner argues that one of the alternative conditions the hearings officer imposed regarding access, requiring that the Chaney easement be modified to allow access to two dwellings on tax lot 200, is insufficient. We understand petitioner to argue that when the adjoining landowners entered into the 2003 settlement agreement, it was understood by all parties to the agreement that the Chaney easement limited access to a single dwelling on tax lot 200. We understand petitioner to contend that the hearings officer undermined that shared understanding of the 2003 settlement agreement, by allowing access based upon a modification of the Chaney easement, without also requiring a similar modification of the 2003 settlement agreement.

Petitioner does not argue that the terms of the 2003 settlement agreement limit access to tax lot 200 to a single dwelling, and that does not appear to be the case. The settlement agreement is located at Record 133-39, and petitioner identifies no language in that agreement that purports to limit access to tax lot 200 to one dwelling. The agreement does note that an accompanying easement recorded in 2003 limits access to a single dwelling on *petitioner's* property, Record 135; but as far as we can tell the agreement does not limit the number of dwellings on tax lot 200. Absent such a limitation, petitioner has not demonstrated that the 2003 agreement represents any impediment to providing legal access along the Chaney easement for the second dwelling on tax lot 200. Therefore, petitioner has not demonstrated that the conditions imposed by the hearings officer are insufficient to ensure legal access for the second dwelling.

The second assignment of error is denied.

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necessarily requires that we strike those appendices. There may be other valid reasons to strike one or both appendices, but intervenor does not offer any. In any case, the dispute is immaterial, because we do not need to consider, and have not considered, the contents of either document for any purpose in this appeal. The motion to strike is denied.

THIRD ASSIGNMENT OF ERROR

Jackson County Land Development Ordinance (LDO) 8.7.1(B) requires a 100-foot fuel break around a dwelling, but provides an exception for the sides of the property that abut a private access easement that is maintained through an enforceable written agreement between property owners served by the easement. In the county's initial decision, county staff did not require a 100-foot fuelbreak to the north and east of the second dwelling, where it is bordered by the northern easement established as part of the 2003 settlement agreement that serves petitioner's property.

On appeal to the hearings officer, petitioner argued that the northern easement does not qualify for the exception to the fuelbreak requirement, because the northern easement does not provide access to the second dwelling on tax lot 200. The hearings officer rejected that argument, noting that LDO 8.7.1(B) does not require that the access easement subject to a maintenance agreement provide access to the dwelling at issue. Record 5. The hearings officer then went on to conclude that the 2003 maintenance agreement qualifies as an "enforceable written agreement" for purposes of LDO 8.7.1(B). Record 5-6.

On appeal to LUBA, petitioner repeats her argument that the northern easement established as part of the 2003 settlement does not qualify for the exception in LDO 8.7.1(B), because the northern easement does not serve tax lot 200. In addition, petitioner argues that the maintenance agreement that was part of the 2003 settlement does not govern the northern easement, which provides access exclusively to petitioner's property. According to petitioner, the agreement governs only the shared Chaney easement.

With respect to the first issue, petitioner does not explain why the hearings officer erred in concluding that LDO 8.7.1(B) does not require that a qualifying access easement serve the property at issue. The hearings officer correctly observed that LDO 8.7.1(B) includes no such requirement.

With respect to the second issue raised on appeal, intervenor responds that no issue was raised below regarding whether the 2003 maintenance agreement governs the northern easement, and any such issue is waived. ORS 197.763(1); ORS 197.835(3).

Petitioner did not respond to the waiver challenge, either in a reply brief or at oral argument. Absent some response, we agree with intervenor that the issue of whether the northern easement qualifies for the exception at LDO 8.7.1(B), because no maintenance agreement governs that easement, was not raised below, and is waived.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

LDO 6.3.2(D)(2) provides that the county may approve more than one dwelling on a rural residential zoned parcel, unless the development would be served by either a "new community sewer system" or "any new extension of a sewer system from within an urban growth boundary or from within an unincorporated community." Since 1999, the subject property, including the second dwelling, has been connected to a sewer system operated by Rogue Valley Sewer Services (RVSS). Petitioner argued below that the 1999 connection violates LDO 6.3.2(D)(2)(d) and (e), because it constitutes either a "new community sewer system" or the extension of a sewer system from within an urban growth boundary or unincorporated community.

The hearings officer rejected those arguments, finding that connection of the subject property to the RVSS system does not constitute the establishment of a "new community sewer system." Further, the hearings officer found that there is no allegation or evidence in the record that the RVSS system originates within an urban growth boundary or an unincorporated community. Even if the RVSS system did so originate, the hearings officer concluded, the connection of the subject property to the RVSS system does not constitute a "new extension" of a sewer system from within an urban growth boundary or unincorporated community, within the meaning of LDO 6.3.2(D)(2)(e).

On appeal to LUBA, petitioner repeats her arguments below but fails to explain why the hearings officer's findings rejecting those arguments are erroneous. Absent a more focused challenge to the findings and the interpretations within, petitioner's arguments on appeal do not provide a basis for reversal or remand.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

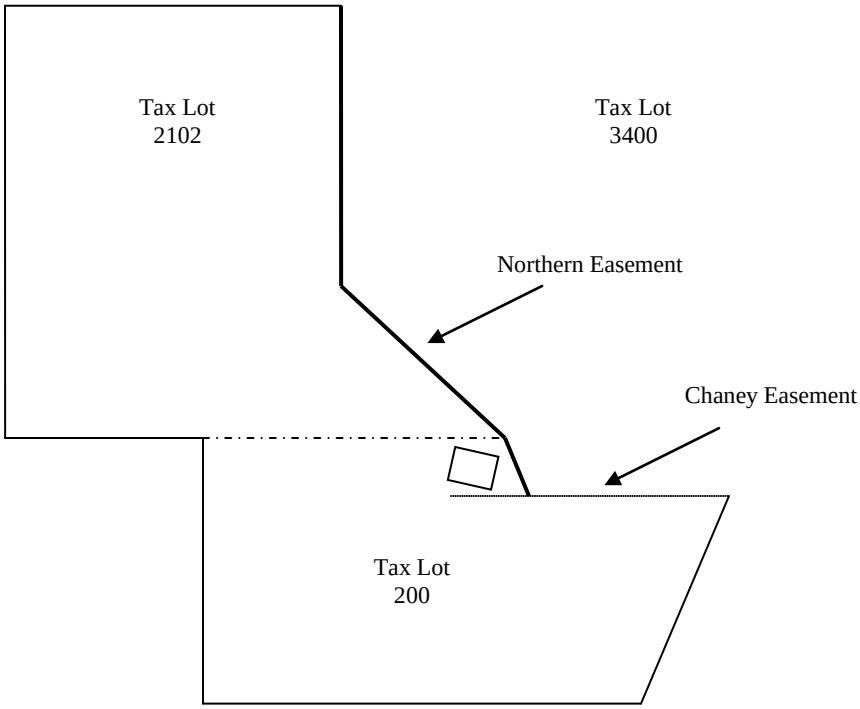
Petitioner argues that the county erred "in its review of documents and response to Appellant's concerns." Petition for Review 12. Petitioner recites several instances when, in petitioner's view, the county allegedly failed to properly handle documents or respond appropriately to petitioner's concerns. Some of the instances apparently involve the barn located on tax lot 2102, not the application for a second dwelling on tax lot 200 that is the subject of the challenged decision. Petitioner concludes by arguing that the county's actions "have not been equitable." *Id.* at 13.

Petitioner does not identify any basis under our governing statutes to reverse or remand the challenged decision based on the county's alleged actions. To the extent petitioner argues under ORS 197.835(9)(a)(B) that the county committed procedural error, petitioner does not identify any procedural requirement that the county violated, or explain how any such violation prejudiced petitioner's substantial rights. Petitioner's complaints under this assignment of error do not provide a basis to reverse or remand the challenged decision.

The fifth assignment of error is denied.

The county's decision is affirmed.

Figure 1


Tax Lot
2102
Tax Lot
3400
Northern Easement
Chaney Easement
Tax Lot
200