

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

3  
4                   PAUL MEYER and KRISTEN MEYER,  
5                   *Petitioners,*

6  
7                   vs.

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9                   JACKSON COUNTY,  
10                  *Respondent,*

11  
12                  and

08/31/18 AM 9:21 LUBA

13  
14                  CHRIS HUDSON,  
15                  *Intervenor-Respondent.*

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17                  LUBA No. 2018-056

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19                  FINAL OPINION  
20                  AND ORDER

21  
22                  Appeal from Jackson County.

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24                  Daniel O'Connor, Medford, filed the petition for review and argued on  
25                  behalf of petitioners. With him on the brief was Huycke O'Connor Jarvis, LLP.

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27                  No appearance by Jackson County.

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29                  William H. Sherlock, Eugene, filed a response brief and argued on behalf  
30                  of intervenor-respondent. With him on the brief was Hutchinson Cox.

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

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35                  ZAMUDIO, Board Member, did not participate in the decision.

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37                  AFFIRMED

08/31/2018

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

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**NATURE OF THE DECISION**

Petitioners appeal a hearings officer’s decision approving a floodplain development permit to install riprap and fill along Bear Creek.

**FACTS**

The subject property is a 1.5-acre parcel owned by the State of Oregon. The property is located within the urban growth boundary of the City of Talent, but outside city limits, and is zoned by the county for rural residential use. Bear Creek runs through the subject property, and the entire property is designated a Special Flood Hazard Area (SFHA), and thus subject to the county’s Floodplain Overlay provisions, at Jackson County Land Development Ordinance (LDO) chapter 7.2.<sup>1</sup>

Adjacent to the property is intervenor’s mobile home park, which is located within the city limits of the City of Talent. In the winter of 2005, approximately 15 horizontal feet of streambank along Bear Creek washed away, creating a vertical section of streambank 10 to 12 feet high, and threatening several homes in intervenor’s mobile home park. In 2006, intervenor filed a joint application with the US Army Corps of Engineers and

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<sup>1</sup> LDO 13.3(105)(f) defines “Area of Special Flood Hazard” as “[t]he land in the floodplain within a community subject to a 1% or greater chance of flooding in any given year. Also referred to as the 100-year floodplain. Designation on maps always includes the letter A. Also known as the Special Flood Hazard Area (SFHA).”

1 the Oregon Department of State Lands (DSL) to install streambank protection  
2 measures on the property, in order to stabilize the eroding streambank.

3 For reasons that are not clear, DSL sent the requisite land use  
4 compatibility statement (LUCS) to the City of Talent to process, rather than the  
5 county. The city issued a LUCS for the proposal, after which all state and  
6 federal permits were obtained, and in 2006 the improvements were installed.  
7 The improvements include placement of riprap, three in-stream barbs, and fill  
8 along 100 linear feet of Bear Creek.

9 In 2017 it was discovered that county review and approval was necessary  
10 for the streambank project. Intervenor applied to the county for a floodplain  
11 development permit under LDO 7.2. County planning staff took the position  
12 that the project involved the “alteration of a watercourse,” and was thus subject  
13 to standards at LDO 7.2.7, several of which staff found were not complied  
14 with. County planning staff denied the application. Intervenor appealed to the  
15 hearings officer, arguing that the project took place entirely within the area of  
16 streambank loss, and thus the project did not involve the “alteration of a  
17 watercourse.” The hearings officer conducted a public hearing, at which  
18 petitioners appeared in opposition, arguing among other things that the  
19 streambank project was located within the “floodway” of the creek, and thus  
20 was subject to additional LDO standards, at LDO 7.2.10.

21 On May 1, 2018, the hearings officer issued the county’s final decision,  
22 agreeing with staff that the project involved the alteration of a watercourse, and

1 was thus subject to standards at LDO 7.2.7. However, the hearings officer  
2 found that intervenor demonstrated compliance with all LDO 7.2.7 standards.  
3 The hearings officer rejected petitioners' argument that the project is subject to  
4 LDO 7.2.10 standards that apply to development within the floodway. This  
5 appeal followed.

## 6 **FIRST ASSIGNMENT OF ERROR**

7 Petitioners argue that the hearings officer erred in finding that the  
8 application is not subject to LDO 7.2.10 standards that apply to development  
9 within the floodway.

10 LDO 13.3(105)(x) defines the term "floodway" to mean the "channel of  
11 a river or other watercourse and those portions of the floodplain adjoining the  
12 channel required to discharge the base flood without cumulatively increasing  
13 the water surface elevation more than one foot." Petitioners contend that it is  
14 undisputed that the project placed riprap and stream barbs in the current  
15 "channel" of Bear Creek, that is, in the channel where water flows in non-flood  
16 conditions. Petitioners argue that it is clear under the LDO 13.3(105)(x)  
17 definition that the channel of a water course is necessarily located within the  
18 "floodway" of that watercourse. Based on that definition, petitioners argued to  
19 the hearings officer that because the project involves development in the  
20 channel of Bear Creek, and hence the floodway, the standards at LDO 7.2.10  
21 apply.

1           The hearings officer rejected that argument, relying on the first  
2 paragraph of LDO 7.2.10, which states:

3           “In areas designated as floodways, either on the FIRM or DFIRM,  
4           or by methods described in Section 7.2.4(A)(3), the following  
5           standards apply \* \* \*.”

6           “FIRM” and “DFIRM” refer, respectively, to flood insurance rate maps and  
7 digital flood insurance rate maps that are published by the Federal Emergency  
8 Management Agency (FEMA). The FIRM and DFIRM identify the subject  
9 property as being within a special flood hazard area, on the basis of which the  
10 county has designated the subject property as being within a SFHA and  
11 therefore subject to the Floodplain Overlay provisions at LDO 7.2. *See* n 1.  
12 The FIRM and DFIRM also identify the location of the “floodway” on the  
13 subject property. The hearings officer found, and petitioners do not dispute,  
14 that the riprap, instream barbs and fill were placed entirely outside the  
15 floodway of Beer Creek, as depicted on the FIRM and DFIRM. Because as  
16 relevant here the standards at LDO 7.2.10 expressly apply only to “areas  
17 designated as floodways” on the FIRM or DFIRM, the hearings officer  
18 concluded that the LDO 7.2.10 standards do not apply to the project.<sup>2</sup>

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<sup>2</sup> As the hearings officer noted, the LDO 7.2.10 standards also apply to areas designated as floodways “by methods described in Section 7.2.4(A)(3)[.]” LDO 7.2.4(A)(3) governs where the base flood elevations or floodways have not been determined. The hearings officer concluded, and no party disputes, that base flood elevations and floodways have been determined on the subject property, as shown on the FIRM and DFIRM, and therefore LDO 7.2.4(A)(3) does not apply.

1           On appeal, petitioners cite to testimony from intervenor’s engineer that  
2 the FIRM for Bear Creek has not been updated since 1993, and that it is  
3 evident that in recent years Bear Creek has carved a new channel that is now  
4 partially located outside the boundaries of the floodway as depicted on FIRM  
5 and DFIRM. In such circumstances, petitioners argue, LDO 7.2.3(A)(7)  
6 authorizes the county floodplain administrator or staff designee to determine  
7 where the floodway is currently located, based on “actual field conditions[.]”<sup>3</sup>  
8 Read in context with the LDO 13.3(105)(x) definition of “floodway,” which  
9 necessarily includes the channel of a watercourse within the scope of the  
10 floodway, petitioners argue that where the channel of a watercourse has  
11 apparently shifted outside the boundaries of the floodway as depicted on FIRM  
12 or DFIRM, the hearings officer cannot simply rely on the floodway boundaries  
13 as designated on outdated maps, in order to determine whether the proposed  
14 development is within the regulatory “floodway,” and hence whether the  
15 standards at LDO 7.2.10 apply.

16           Intervenor responds that the plain language of LDO 7.2.10 specifies that  
17 the standards in that section apply, as relevant here, only to “areas designated

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<sup>3</sup> LDO 7.2.3(A)(7) provides:

“Where a determination is needed for the exact location of boundaries of the Areas of Special Flood Hazard including regulatory floodway (for example, where there appears to be a conflict between a mapped boundary and actual field conditions), the Floodplain Administrator or staff designee will make the determination.”

1 as floodways” on FIRM or DFIRM. Intervenor argues that the plain language  
2 of LDO 7.2.10 cannot possibly be interpreted, as petitioners argue, to mean that  
3 the standards at LDO 7.2.10 apply to development *outside* the areas designated  
4 as floodways on FIRM or DFIRM. With respect to LDO 7.2.3(A)(7),  
5 intervenor argues that there is no expert testimony in the record that “actual  
6 field conditions” warrant deviating from the established FIRM base flood and  
7 floodway designations, and further that the county floodplain administrator has  
8 not chosen to exercise the authority granted by LDO 7.2.3(A)(7) to make any  
9 determination based on a conflict between a mapped boundary and actual field  
10 conditions.

11 The hearings officer noted that FEMA has advised that the county may  
12 impose a more expansive definition of floodways than depicted on the official  
13 FIRM and DFIRM, but ultimately concluded based on the text and context of  
14 LDO 7.2.10 that the county has not chosen to do so.<sup>4</sup> The hearings officer did

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<sup>4</sup> The hearings officer’s findings state, as relevant:

“The context and other sections of the County’s Floodplain Overlay (LDO 7.2) support the above interpretation [of LDO 7.2.10 that the floodway is the regulatory floodway as it appears on the FIRM]. First, the introduction to LDO 7.2 states that ‘The degree of flood protection required by this Section is necessary in order to participate in the National Flood Insurance Program and the Community Rating Service (CRS).’ LDO 7.2.1. Nothing in that introduction indicates an intention by the legislative body to interpret or extend the county floodplain regulations further than shown on FEMA’s FIRM. Second, the County adopts by reference FEMA’s Flood Insurance Study and accompanying



1 not address the context provided by LDO 7.2.3(A)(7), cited by petitioners.<sup>5</sup>  
2 However, we agree with intervenor that, while LDO 7.2.3(A)(7) may provide a  
3 mechanism for the county floodplain administrator to effectively extend the  
4 scope of county regulations to floodways located outside the boundaries  
5 designated on FIRM or DFIRM, LDO 7.2.3(A)(7) was not invoked by the  
6 county at all in the present case. Read as context, LDO 7.2.3(A)(7) in fact  
7 supports the hearings officer's textual and contextual analysis that, where the  
8 FIRM or DFIRM designates the location of the floodway, county regulations  
9 governing the floodway apply only to those designated locations, unless and

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FIRM, and supporting data, and incorporates the FIRM into the County's Floodplain Overlay, which indicates an intention to use the FIRM as a regulatory tool. Third, the definition of 'floodway' adopted in the LDO is substantively identical to the definition of 'regulatory floodway' in FEMA's regulations. *Compare* LDO 13.3.105(x) *with* 44 C.F.R. 59.1. Fourth, and most important, the actual regulations in the Floodplain Overlay consistently, and without exception, apply only to the floodways 'on the FIRM or DFIRM' or to the 'regulatory Floodway' for all properties where FEMA has designated a regulatory floodway. LDO 7.2.10; LDO 7.2.10(C). The only exception is for those areas where the SFHA or the floodway has not been determined, and in that case a professional engineer may submit a site-specific analysis. \* \* \*"  
Record 26-27 (underline and italics in original).

<sup>5</sup> That may be because no party cited LDO 7.2.3(A)(7) below or invoked that provision to argue that the county floodplain administrator should resolve a conflict between a mapped boundary and actual field conditions. The preservation section of the first assignment of error does not cite to any place in the record where petitioners' argument regarding LDO 7.2.3(A)(7) was preserved, and LUBA's search of the electronic record found no clear citations to LDO 7.2.3(A)(7) or its operative terms.

1 until the mechanism provided for in LDO 7.2.3(A)(7) is invoked. Accordingly,  
2 petitioners have not demonstrated that the hearings officer erred in interpreting  
3 LDO 7.2.10 consistently with its plain language, to apply only to development  
4 within the floodway boundaries as depicted on the FIRM or DFIRM.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 As noted, the hearings officer agreed with the initial staff decision that  
8 the project involved the “alteration of a watercourse” and that therefore the  
9 standards at LDO 7.2.7 apply. As pertinent on appeal, the initial staff decision  
10 found noncompliance with two LDO 7.2.7 standards, LDO 7.2.7(A) and (G),  
11 which provide:

12 “A. Development will not diminish the carrying capacity of a  
13 watercourse. If any watercourse will be altered or relocated  
14 as a result of proposed development the applicant must  
15 submit certification by an Oregon registered professional  
16 engineer that, in the engineer’s professional opinion and  
17 based upon analysis, the flood carrying capacity of the  
18 watercourse will not be diminished.”

19 “ \* \* \* \* \*

20 “G. The applicant will meet the requirements to submit technical  
21 data in Section 7.2.8 when an alteration of a watercourse  
22 results in the expansion, relocation or elimination of the  
23 special flood hazard area. Should an alteration or relocation  
24 of a watercourse result in the expansion, relocation or  
25 elimination of the [SFHA], a Conditional Letter of Map  
26 Revision will be obtained from FEMA prior to an approval  
27 under this section. A Letter of Map Revision will also be  
28 required.”

1 Staff concluded that intervenor’s engineer failed to submit for review the  
2 “analysis” required by LDO 7.2.7(A), and further failed to provide the  
3 technical data required by LDO 7.2.7(G) to allow staff to determine whether  
4 the watercourse alteration results in the expansion, relocation or elimination of  
5 the SFHA.

6 On appeal to the hearings officer, intervenor argued that LDO 7.2.7(A)  
7 requires only that the applicant submit the certification of a licensed engineer,  
8 based on an analysis, that development will not diminish the carrying capacity  
9 of the watercourse, but does not require the applicant to submit the engineering  
10 calculations and analysis supporting that certification. The hearings officer  
11 agreed with intervenor.<sup>6</sup>

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<sup>6</sup> The hearings officer’s decision states, in relevant part:

“On its face, the language of Criterion A only requires Applicant to ‘submit certification by an Oregon registered professional engineer’ with a professional opinion, based on his or her analysis, that the flood carrying capacity of the watercourse will not be diminished.’ Adding a requirement to submit engineering calculations for Staff review, especially in this instance when the certification and background analysis is not challenged by any party, would ‘insert what has been omitted’ from the LDO by the legislative body and violate ORS 174.010.

“\* \* \* \* \*

“[The applicant submitted a] document from T.J. Bossard and T.J. Bossard Engineering certifying that the ‘flood carrying capacity of the watercourse will not be diminished.’ That document also certified that ‘installation of the three stream barbs has not ‘result(ed) in the **expansion, relocation, or elimination** of the

1 With respect to LDO 7.2.7(G), the hearings officer concluded that the  
2 requirement to submit “technical data,” and the associated requirement to  
3 obtain a conditional letter of map revision from FEMA, is triggered only when  
4 the alteration results in the expansion, relocation or elimination of the SFHA.  
5 Record 23. The hearings officer found that intervenor’s engineer had certified  
6 that the project has not resulted in the expansion, relocation or elimination of  
7 the SFHA, and that there was no expert evidence in the record rebutting that  
8 certification. *Id.* Accordingly, the hearings officer concluded that LDO  
9 7.2.7(G) is met.

10 On appeal, petitioners contend that the “analysis” and “technical data”  
11 referred to in LDO 7.2.7(A) and (G) must be included in the record to  
12 demonstrate that the “flood carrying capacity of the watercourse will not be  
13 diminished,” and that the watercourse alteration will not result in the  
14 expansion, relocation or elimination of the SFHA. According to petitioners,  
15 intervenor’s experts acknowledged that additional analysis will be required to  
16 understand the impact on the base flood elevation caused by changes to the  
17 channel over the last 30 years, and to ensure that the stream barbs are protected,  
18 as required by a condition of approval. Record 69, 275. However, the need for

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[SFHA].’ No evidence was submitted that called into question this certification by Applicant’s professional engineer. The Hearings Officer concludes that the Applicant has submitted substantial evidence satisfying Criterion A.” Record 13-14 (footnotes omitted; bold in original).

1 additional analyses discussed at Record 276 and 69 do not relate to compliance  
2 with either LDO 7.2.7(A) and (G). Petitioners have not demonstrated that the  
3 hearings officer erred in concluding that LDO 7.2.7(A) requires only the  
4 certification by a licensed engineer, and does not necessarily require submittal  
5 of the analysis or engineering calculations the engineer used to provide the  
6 certification.

7 Petitioners have also not demonstrated that the hearings officer erred in  
8 reading LDO 7.2.7(G) to require submittal of technical data and an associated  
9 conditional letter of map revision only when an alteration of a watercourse  
10 results in the expansion, relocation or elimination of the SFHA. Based on  
11 undisputed expert testimony that the project did not result in the expansion,  
12 relocation or elimination of the SFHA, the hearings officer correctly concluded  
13 that submission of technical data and a conditional letter of map revision was  
14 not required.

15 The second assignment of error is denied.

16 The county's decision is affirmed.