BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BARBARA VELASQUEZ and DON VELASQUEZ,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

ROCKWELL D. SNYDER and RENÉ E. SNYDER,
Intervenors-Respondents.

LUBA No. 2019-041

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Barbara Velasquez and Don Velasquez, Rogue River, filed the petition for review. Barbara Velasquez argued on behalf of petitioners.

No appearance by Jackson County.

Rockwell D. Snyder and René E. Snyder, Rogue River, filed a response brief. René E. Snyder argued on behalf of intervenors-respondents.

ZAMUDIO, Board Member; RUDD, Board Member, participated in the decision.

RYAN, Board Chair, did not participate in the decision.

AFFIRMED 07/09/19

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal a county hearings officer's decision denying petitioners' request for approval to develop an initial single-family dwelling with a reduced setback from adjacent resource land.

MOTION TO TAKE EVIDENCE NOT IN THE RECORD

LUBA review is generally limited to the record in the local proceeding, except in "the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision." OAR 661-010-0045(1). A motion to take evidence must include a statement "explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in [OAR 661-010-0045(1)], and how those facts will affect the outcome of the review proceeding." OAR 661-010-0045(2). It is the movant's burden to demonstrate a sufficient basis for LUBA to take evidence outside the record.

Petitioners move the board to consider as evidence two documents: (1) a contour map of the subject property prepared and signed by a professional land surveyor, dated April 14, 2019, and (2) two tree seedling invoices to petitioner Don Velasquez from the US Forest Service, one for $103, dated March 29, 2000,

and one for $109, dated February 22, 2001. As we understand it, petitioners intend that evidence to establish the slopes on the subject property and petitioners' efforts to reforest the subject property.

Petitioners submitted a contour map into the record during the local proceeding that was not signed or stamped by a professional surveyor and contained an inaccurate scale in the map legend that indicated that one inch on the map equaled one foot on the ground. Record 27–28. The hearings officer found that the contour map was unreliable and inaccurate and, thus, it could not be used to determine slopes on the property. Petitioners argue that the April 14, 2019 map "will resolve the inaccuracy and missing information" in the maps that are in the record that the hearings officer rejected. Motion to Take Evidence 1.

Evidence of the topography of the subject property does not concern the constitutionality of the decision, standing, *ex parte* contacts, or procedural irregularities. Petitioners have not established any basis for us to consider the April 14, 2019 contour map. The same is true of the tree seedling invoices. Evidence of petitioners' reforestation effort on the subject property does not concern the constitutionality of the decision, standing, *ex parte* contacts, or procedural irregularities. Petitioners have not established any basis for us to consider the tree seedling invoices.

Petitioners' motion to take evidence not in the record is denied.

FACTS

The subject property is comprised of 4.9 acres and is zoned Rural Residential 5 (RR-5), which is a nonresource zoning district. The property is developed with a rough access road that leads to a relatively level clearing, which is where petitioners prefer to site an initial dwelling (the clearing). An unplumbed well is located near the clearing, approximately 225 feet from the proposed dwelling site. The intervenors' adjacent property is zoned Woodland Resource (WR), which is a forest resource zoning district, and is developed with a single-family dwelling.

Petitioners requested a reduction of the required 200-foot setback from resource land in order to site an initial dwelling in the clearing and 55 feet from the property line of the adjacent resource-zoned parcel. County planning staff issued a tentative decision denying the request. Petitioners appealed to the hearings officer, who conducted a public hearing on October 1, 2018, at which petitioners submitted evidence and argument in favor of the setback reduction and intervenors submitted evidence and argument in opposition to the setback reduction. At petitioners' request, the hearings officer left the record open until January 22, 2019. The hearings officer issued a decision denying the setback reduction. This appeal followed.

SECOND ASSIGNMENT OF ERROR

The Jackson County Land Development Ordinance (LDO) requires a minimum 200-foot setback from forest and farm zoned land for any residential

structure on nonresource zoned land "as a means to prevent conflicts between resource and non-resource uses." LDO 8.5.3(F).[1] As pertinent here, the county may approve reduction of that special setback requirement, "[w]hen no conforming location exists on the property that can accommodate the proposed residential structure."[2]

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[1] LDO 8.5.3(F) provides, in part:

> "Building setbacks provide a buffer between resource and abutting nonresource land as a means to prevent conflicts between resource and non-resource uses. Unless otherwise approved as provided below, a 200-foot setback from forest and farm zoned lands will be maintained by any new, replacement of a lawfully established or enlarged residential structure (see Section 13.2.3(A)) sited in a nonresource zoning district." (Footnote omitted.)

[2] LDO 8.5.3(F)(2) provides, in part:

> "When no conforming location exists on the property that can accommodate the proposed residential structure, the County may approve reductions of special setback requirements adjacent to Exclusive Farm Use or forest zoning districts under a Type 2 review upon making findings of compliance with this Section and Sections 4.2.3 or 4.3.4, as applicable (see also Section 9.2.10). To be approved, the applicant must provide substantial findings to document that one (1) or more of the following situations exist:
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> "(a) Lawfully established residential structures on abutting resource zoned parcel(s) are near the common lot line with the nonresource parcel, and a reduction of the setback would not affect the resource (see Sections 4.2.3 and 4.3.4); or
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> "(b) Existing residential structures are within the prescribed setback on the subject parcel or abutting nonresource zoned

In the second assignment of error, petitioners complain that the challenged decision disallowing a setback reduction will result in destruction of forest on the subject property outside the clearing. Petition for Review 3. Petitioners argue that the hearings officer erred by failing to consider the adverse impact to the subject property that would be caused by development outside the existing clearing. Intervenors respond that the issue petitioners raise in the second assignment of error was not raised to the hearings officer, and thus was waived. ORS 197.835(3); ORS 197.763(1); *DLCD v. Tillamook County*, 34 Or LUBA 586, *aff'd*, 157 Or App 11, 967 P2d 898 (1998) (ORS 197.835(3) and ORS 197.763(1) require that petitioners at LUBA have raised the issues they wish to raise at LUBA during the local proceeding). Intervenors also argue that the issue is inadequately briefed for our review. Response Brief 4. We agree with intervenors

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> parcels and the County determines that a setback reduction consistent with established building lines will not adversely affect adjacent resource lands; or
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> "(c) The required setback would prohibit the placement of the residential structure on the parcel due to topography, flood hazard, or would adversely impact other physical or natural areas; or
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> "(d) An intervening physical feature such as a river or highway substantially mitigates the adverse effects of placing a residential structure closer to the resource zoned parcel;
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> "* * * When a setback reduction is authorized, development must maintain as much setback from the resource as practicable."

on both points. However, more importantly, petitioners have not established any basis for reversal or remand.

Petitioners have cited no applicable land use regulation that requires the hearings officer to consider impacts to nonresource zoned land in denying a request to reduce a setback from resource land. In zoning the subject property RR-5 and the adjacent property WR, the county determined the characteristics and best uses of those respective properties. It is laudable that petitioners wish to be stewards of the natural resources on their rural-residential zoned property. However, petitioners have not identified any applicable land use criteria that requires the a decisionmaker to weigh the impacts to natural resources on a nonresource zoned parcel that may result from siting development within required setbacks. Accordingly, the second assignment of error provides no basis for reversal or remand. *See* ORS 197.835(8), (9) (setting out bases for reversal or remand, including "the decision is not in compliance with applicable provisions of the comprehensive plan or land use regulations").

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

The area of land outside of required setbacks on the subject property is approximately 103 feet by 400 feet (setback envelope). Petitioners argued to the hearings officer that the subject property does not contain a suitable site to locate a dwelling within the setback envelope due to topography and vegetation. Petitioners also argued that approving the setback reduction would not interfere

with resource activities on intervenors' adjacent WR parcel because no commercial forestry activities are currently occurring on intervenors' property.

The hearings officer rejected both arguments. The hearings officer reasoned that the WR zoning district is not intended to protect only existing commercial forest operations. The hearings officer explained that the setback restrictions are intended to protect current and future woodland resource uses, including noncommercial forest uses and environmental benefits such as wildlife habitat and water and air quality.

The hearings officer also rejected the petitioners' argument that the clearing is the only suitable location to site a dwelling on the subject property due to steep slopes on the subject property. "Development activities on slopes in excess of 20% that are also composed predominantly of expansive soils * * * are subject to the development standards of [LDO 9.3] and are regulated by the State of Oregon Structural Specialty Code and State of Oregon One- and Two-Family Dwelling Specialty Code." LDO 9.3.1(B). "The purpose of the Steep Slope Development standards is to protect the public health, safety and welfare by assuring that development in areas of natural slopes greater than 20% is planned to mitigate the threat to life and property." LDO 9.3.1(A). Development is not prohibited on steep slopes, but proposed development must be assessed by

qualified professionals to identify geologic hazards and development must be designed for safety and stability. LDO 9.3.1(2)(a)–(c).[3]

Petitioners argued that a setback reduction should be approved under LDO 8.5.3(F)(2)(c) because, in combination, the setback requirements and steep topography in the setback envelop "prohibit the placement of the residential structure on the parcel." *Id.*; see n 2. According to petitioners, the grade within the setback envelope is between 25 and 30 percent and a dwelling site would require significant grading that would destabilize the steep slopes.

In support of that argument, petitioners submitted and relied on two contour maps with legends that show one inch equals one foot and contours are two feet apart. Record 27–28. One map appears to depict the setback envelope and another map is marked with numbers at certain locations, which the hearings officer found might correspond to a series of photographs submitted by petitioners. The hearings officer reasoned that the contour maps are "not reliable,

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[3] LDO 9.3.1(2)(c) provides:

> "If the assessment identifies hazards that pose an elevated risk to the site, or where mitigation measures are necessary to safely undertake the proposed development, a detailed geotechnical report evaluating the site conditions and recommending design measures necessary to facilitate a safe and stable development will be required. If the report discloses that the entire parcel is subject to rapidly moving landslides or that the parcel does not contain sufficient buildable area not subject to rapidly moving landslides, the County may deny the application[.]"

accurate or trustworthy evidence" because they are not signed by a registered professional surveyor and contain an incorrect scale. Record 10. Accordingly, the hearings officer found that petitioners' factual assertions regarding the slope percentages were not supported by substantial evidence in the record. *Id.*

Relying on other 40-foot contour maps in the record, sourced from county data, the hearings officer found that there is an area at least 80 feet wide and 150 feet long within the setback envelope between two steep ravines where the slope is 19.4 percent, which is not a "steep slope" as defined by LDO 9.3.1 as a slope greater than 20 percent. Record 10. Further, the hearings officer reasoned that development of a single-family residence is not prohibited on steep slopes. Instead, "professional assessments and evaluations are required to assure that 'the proposed development will be completed without threat to public health, safety and welfare.'" Record 11 (quoting LDO 9.3.1(C)(2)(b)).

The hearings officer concluded that there is a buildable area within the setback envelope that does not contain steep slopes, and that even if there are steep slopes within the setback envelope, there is no evidence in the record demonstrating that any portion of the setback envelope is unbuildable due to steep slopes. Record 11. The hearings officer concluded that petitioners did not establish that "[t]he required setback would prohibit the placement of the residential structure on the parcel due to topography" and thus had not demonstrated a basis to allow a reduction in the required setback. Record 22; LDO 8.5.3(F)(2)(c).

We understand petitioners to argue that the hearings officer erred by disregarding the contour maps at Record 27 and 28 (that were unsigned and marked with an incorrect scale) after concluding that those maps do not constitute substantial evidence of the topography of the subject property. As we understand it, petitioners argue that the finer-scale maps support their argument that the setback envelope is unbuildable because it contains steeps slopes. That is, calculating slopes based on a 40-foot contour map, as the hearings officer did, does not accurately demonstrate the topography in the setback envelope. Petitioners' argument is a substantial evidence challenge. ORS 197.835(9)(a)(C).

"LUBA's evaluation of the substantiality of evidence supporting a decision must consider all the evidence in the record." *Younger v. City of Portland*, 305 Or 346, 358, 752 P2d 262 (1988); *see also Dodd v. Hood River County*, 317 Or 172, 855 P2d 608 (1993) ("Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding."). The substantial evidence standard is not satisfied "when the credible evidence apparently weighs overwhelmingly in favor of one finding and the [decision maker] finds the other without giving a persuasive explanation." *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 271 (2006) (quoting *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206, 752 P2d 312 (1998)). As the fact finder, the hearings officer has discretion to weigh evidence and choose what evidence to rely on in making a decision. *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51, 56, *aff'd*, 259 Or App 139, 314 P3d 1004 (2013);

Friends of Deschutes County v. Deschutes County, 49 Or LUBA 100, 104 (2005) ("Where LUBA concludes that a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, the choice between conflicting evidence belongs to the local government.").

Petitioners have not argued or established that, viewing the record as a whole, credible evidence weighs overwhelmingly in favor of their description of the slopes on the subject property. Petitioners have not argued or established that the evidence upon which the hearings officer *did* rely was not substantial evidence. Petitioners' desire that the hearings officer rely on different evidence to demonstrate slope on the property does not provide a basis for reversal or remand of the challenged decision. *SE Neighbors Neighborhood Assoc*, 68 Or LUBA at 56.

Moreover, petitioners failed to challenge the hearings officer's conclusion that petitioners failed to satisfy LDO 8.5.3(F)(2)(c) based on the hearings officers conclusion that steep slopes do not prohibit development, but instead require further assessment and that petitioners had not provided any expert assessment that the entire setback envelope was unbuildable due to steep slopes. We "will affirm a decision denying an application as long as there is one valid basis for denial." *Hood River Valley Parks and Recreation District v. Hood River County*, 67 Or LUBA 314, 328 (2013). We "must affirm a decision denying a permit application, where the petitioner at LUBA fails to challenge one of several

independent bases for denial." *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195, 210 (1999), *aff'd*, 165 Or App 315, 995 P2d 598 (2000).

Petitioners' first assignment of error is a substantial evidence challenge. Petitioners do not challenge the hearings officer's interpretation of LDO 8.5.3(F)(2)(c) and LDO 9.3.1. Under the hearings officer's unchallenged interpretation and application of those regulations, we must affirm the denial. That is, even if we agreed with petitioners that the hearings officer should have considered the disputed contour maps, and even if we concluded that "the credible evidence apparently weighs overwhelmingly in favor of" a finding that the entire setback envelope contains steep slopes, petitioners have still not established that "the required setback would prohibit the placement of the residential structure on the parcel due to topography," as required to establish a basis for a reduced setback from resource land under LDO 8.5.3(F)(2)(c). Petitioners' first assignment of error provides no basis for reversal or remand.

The first assignment of error is denied.

The county's decision is affirmed.