

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

WARNOCK MCILWAINE and BARBARA MCILWAINE,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

KORINA HARVEY and BRENT HARVEY,
Intervenors-Respondents.

LUBA No. 2023-032

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Zack P. Mittge filed the petition for review and reply brief and argued on behalf of petitioners. Also on the brief was Hutchinson Cox.

No appearance by Douglas County.

Stephen Mountainspring filed the intervenor-respondent's brief and argued on behalf of intervenors-respondents. Also on the brief was Dole Coalwell.

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

REMANDED

10/10/2023

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county board of commissioners decision declining review of a planning commission decision that approved a conditional use permit (CUP) for a horse barn and riding arena as a residential accessory structure on land zoned Rural Residential-5.

FACTS

The subject property is approximately 6.19 acres in size and zoned Rural Residential-5 (5R). Record 71. The subject property is located north of North Umpqua Highway (State Highway 138E) and approximately one mile west of the Urban Unincorporated Area of Glide, and contains a “dwelling, a shop, an older livestock barn and a pole barn for hay storage.” Record 70-71. “Abutting properties are also zoned 5R with that particular enclave of residential zoning surrounded by properties zoned (FG) Exclusive Farm Use-Grazing.” Record 37.

Intervenors-respondents (intervenors) applied to the county for a CUP authorizing a 9,280 square foot horse barn and riding arena as a residential accessory structure. The planning director approved the application subject to four conditions of approval. Record 36.

Neighboring property owners appealed the planning director’s decision to the planning commission. Record 72. The planning commission held a public hearing on the matter and approved the application. The planning commission’s decision adopted by reference the findings of the January 12, 2023, staff report.

1 Record 38. The planning commission's decision was then appealed to the board
2 of commissioners. Record 2. The board of commissioners declined to hear the
3 appeal and affirmed the planning commission's decision as its own. *Id.* This
4 appeal followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 The application proposed constructing to the north of the existing driveway
7 and to the west of a small drainage ditch a "60' x 96' personal use horse barn and
8 riding arena with a 20' wide lean-to on the west and north sides (80' x 116' total
9 dimension)[.]" Record 2. Douglas County Land Use and Development Ordinance
10 (LUDO) 3.8.050(2) provides that "buildings accessory to a single-family
11 dwelling" that do not exceed 2,000 square feet in size are permitted in the 5R
12 zone. LUDO 3.8.075(1) also permits in the 5R zone buildings accessory to a
13 single-family dwelling that are greater than 2,000 square feet in size, subject to
14 "written consent from all surrounding adjacent property owners" or, if written
15 consent cannot be obtained, then subject to county conditional use review.
16 Written consent was not obtained, so the application proceeded with conditional
17 use review. Record 71.

18 In their first assignment of error, petitioners argue that the county
19 misconstrued the law in approving the application for the horse barn and riding
20 arena because they are not "accessory to a single-family dwelling." ORS
21 197.835(9)(a)(D). Relatedly, petitioners also argue that the planning commission

1 made inadequate findings unsupported by substantial evidence regarding that
2 issue. ORS 197.835(9)(a)(C).

3 Intervenor's respond, initially, that petitioners are precluded from raising
4 the issue raised in the first assignment of error, that challenges whether the
5 buildings are "accessory buildings accessory to a single-family dwelling,"
6 because petitioners failed to identify that issue in their local appeal statement.
7 ORS 197.825(2)(a) provides that LUBA's jurisdiction "[i]s limited to those cases
8 in which the petitioner has exhausted all remedies available by right before
9 petitioning the board for review[.]" In *Miles v. City of Florence*, 190 Or App 500,
10 79 P3d 382 (2003), *rev den*, 336 Or 615 (2004), the Court of Appeals concluded
11 that, when the local appeal ordinance requires an appealing party to specify the
12 issues for appeal, and the local ordinance expressly or impliedly limits the local
13 appeal body to the issues so specified, the local appeal body's review is generally
14 limited to the specified issues. 190 Or App at 509-10. We sometimes refer to this
15 type of waiver as exhaustion waiver.

16 Here, LUDO 2.500 requires those seeking review of a lower body's
17 decision by the board of commissioners to file a "Notice of Review." The notice
18 of review must include "[t]he specific grounds relied upon in the petition request
19 for review[.]" LUDO 2.500(5)(c). LUDO 2.700(2) further provides that the board
20 of commissioners' review "shall be a de novo review *limited to the grounds relied*
21 *upon in the notice of review[.]*" Petitioners' notice of review is found at Record
22 19-21.

1 In the reply brief, petitioners respond that the issue in their first assignment
2 of error was raised in their notice of review that challenged the planning
3 commission's Finding No. 3, which provides:

4 "The Planning Commission finds the applicant is requesting a
5 residential accessory structure (60' x 96' personal use horse barn
6 and riding arena with a 20' wide lean-to on the west and north sides
7 (80' x 116' total dimension)) which is larger than the 2,000sf
8 permitted outright in the zone." Record 38.

9 The notice of review asserts that the finding:

10 "goes against Article 8, Section 3.8.050 Permitted Uses No. 2, as
11 there is no mention of a residential accessory building 60' x 96'
12 personal use horse barn and riding arena with a 20' lean-to on the
13 west and north sides (80' x 116'), for a total of 9,280 sq. ft. which is
14 four times larger than the permitted use of 2,000 sq. ft. in Article 8
15 - Rural Residential-5. They already have four horse stalls they built
16 and put in electric without obtaining a permit on the back of their
17 pole barn. The horse riding arena is not listed in the permitted uses
18 under Article 8, Section 3.8.050, No. 2 and should not be included
19 as part of the structure." Record 19.

20 We agree with intervenors. Petitioners did not raise any issue that took the
21 position that the proposed structure should not be approved because it is not
22 "accessory to a single-family dwelling." Rather, petitioners claimed that because
23 a horse riding arena is not specifically listed in LUDO 3.8.050(2) as an example
24 of a "building[] accessory to a single family dwelling," and because the proposed
25 structure is larger than the 2,000 square foot limitation on buildings accessory to
26 single-family dwellings permitted outright under LUDO 3.8.050(2), it should not
27 be approved. That issue is different than the issue petitioners raise in their first

1 assignment of error, which is that the proposed structure is not “accessory” to a
2 single-family dwelling. The issue is waived.

3 Petitioners also argue that the planning commission made inadequate
4 findings that are not supported by substantial evidence regarding whether the
5 proposed structure is “accessory to a single-family dwelling.” Those arguments
6 are derivative of their argument that the proposed structure is not accessory to a
7 single-family dwelling. For the same reasons explained above, we conclude those
8 issues are waived.

9 Petitioners also argue that the findings are inadequate because they fail to
10 respond to testimony that the proposed structure was not necessary for the
11 recreational use of the property and to concerns about intervenors’ guests using
12 the structure. Intervenors respond, and we agree, that petitioners do not identify
13 any applicable criterion that requires intervenors to demonstrate a need for the
14 proposed structure, or that regulates or prohibits the use of the structure by
15 intervenors’ guests.

16 The first assignment of error is denied.

17 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

18 LUDO 3.39.050(1) provides that the county may approve a conditional use
19 if it finds that “[t]he proposed use is or may be made compatible with existing
20 adjacent permitted uses and other uses permitted in the underlying zone.”
21 Petitioners’ second and third assignments of error challenge the county’s
22 conclusion that the proposed structure meets LUDO 3.39.050(1). In their second

1 assignment of error, petitioners argue that the county misconstrued LUDO
2 3.39.050(1) and made inadequate findings unsupported by substantial evidence
3 by failing to evaluate the compatibility of the proposed use with all existing
4 adjacent permitted uses and other uses permitted in the 5R zone. In particular,
5 petitioners argue that the county's findings are inadequate to explain the proposed
6 structure's compatibility with "single-family dwellings, accessory buildings,
7 forest uses, roadside stands, limited home occupations, parks, playgrounds, golf
8 courses, public and semi-public buildings, fish and wildlife management, and
9 utility and communication facilities[.]" Petition for Review 18. Petitioners also
10 argue that the county's findings are inadequate to explain the proposed structure's
11 compatibility with an irrigation pond on the existing adjacent property to the
12 north of the subject property.

13 Because these assignments of error include overlapping arguments, we
14 address them here together.

15 **A. Waived Issues**

16 Intervenor's respond, initially, that some of the issues raised in the second
17 assignment of error were not preserved because they were not raised in the notice
18 of review. In particular, intervenors argue that petitioners failed to raise any issue
19 in the notice of review that argued that the planning commission's decision failed
20 to evaluate the compatibility of the proposed use with "single-family dwellings,
21 accessory buildings, forest uses, roadside stands, limited home occupations,
22 parks, playgrounds, golf courses, public and semi-public buildings, fish and

1 wildlife management, and utility and communication facilities[.]” Petition for
2 Review 18.

3 In the reply brief, petitioners respond that “[c]ompatibility issues were
4 raised repeatedly in the notice of review, with Petitioners pointing out adverse
5 impacts to the contamination of adjoining reservoir used for ‘irrigation and ‘fish
6 culture rearing’ of Large Mouth Bass and Blue Gill Certified by the State of
7 Oregon’ as well as the disruption of the flight path of ‘migratory birds’ attracted
8 to that facility.” Reply Brief 1-2.

9 We understand the issue that petitioners raised in their notice of review to
10 be that because the proposed structure is not a listed permitted use in the 5R zone,
11 it is not and cannot be made compatible with existing adjacent permitted uses and
12 other uses permitted in the underlying zone.¹ The different issue petitioners raise
13 for the first time in their second assignment of error is that the decision errs in

¹ Petitioners’ notice of review took the position that the planning commission’s finding that the proposed use meets LUDO 3.39.050(1) was wrong:

“Finding No. 5 – goes against Article 39, Section 3.39.050.1 because it goes against Article 8, Section 3.8.050 No. 2, as there is no mention of a residential accessory building 60’ x 96’ personal use horse barn and riding arena with a 20’ lean-to on the west and north sides (80’ x 116’), for a total of 9,280 sq. ft. which is four times larger than the permitted use of 2,000 sq. ft. in Article 8 – Rural Residential-5. The horse riding arena is not listed in the permitted uses under Article 8, Section 3.8.050, No. 2 and should not be included as part of the accessory building.” Record 20.

1 failing to address and evaluate all existing adjacent permitted uses or other uses
2 permitted in the zone. That issue is waived.

3 **B. Existing Adjacent Irrigation Pond**

4 In the notice of review, petitioners challenged the compatibility of the
5 proposed structure with the existing adjacent irrigation pond due to manure from
6 the increased number of horses on the property utilizing the structure running into
7 the pond and killing the fish. Petitioners also argued that the location of the
8 structure would interfere with bird flight paths. Petitioners' notice of review is
9 sufficient to raise the issue raised in the second and third assignments of error
10 that challenges the adequacy of the county's findings regarding whether the
11 proposed structure is compatible with the existing adjacent irrigation pond
12 located on the property to the north of the subject property.² In a portion of their
13 second assignment of error and in a portion of their third assignment of error,
14 petitioners challenge the failure of the county's findings to respond to those
15 issues.

² The notice of review includes the following statements regarding compatibility of the proposed structure with the existing adjacent irrigation pond that is used for fish culture and bird habitat:

"The reservoir [on an adjacent property] * * * is large enough to attract migratory birds * * * and [the structure] will disrupt their flight path." Record 21.

"[H]orse manure from the [applicants'] property will run into [the] reservoir and cause nitrification that can kill [the] fish culture." *Id.*

1 ORS 215.416(9) requires that “[a]pproval or denial of a permit * * * shall
2 be based upon and accompanied by a brief statement that explains the criteria and
3 standards considered relevant to the decision, states the facts relied upon in
4 rendering the decision and explains the justification for the decision based on the
5 criteria, standards and facts set forth.” To be adequate, findings must, at a
6 minimum, (1) identify the relevant approval standards, (2) set out the facts that
7 are believed and relied upon, and (3) explain how those facts lead to the
8 conclusion that the proposal either does or does not comply with the relevant
9 standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Findings
10 must also address and respond to specific issues relevant to compliance with
11 applicable approval standards that were raised in the proceedings below. *Norvell*
12 *v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979).

13 Again, LUDO 3.39.050(1) provides that the county may approve a
14 conditional use if it finds that “[t]he proposed use is or may be made compatible
15 with existing *adjacent permitted uses* and other *uses permitted* in the underlying
16 zone.” (Emphases added.) Petitioners argue that “[b]oth ‘Farm use’ and ‘Fish and
17 Wildlife Management’ are outright permitted uses in the 5R zone. LUDO
18 3.8.050.4 & .11.” Petition for Review 19. We agree with petitioners that the
19 county’s findings are inadequate to explain the county’s conclusion that the
20 proposed structure is compatible with the farm use that is the rearing of Large
21 Mouth Bass and Blue Gill in the irrigation pond.

1 Although petitioners characterize the use of the pond by birds as a
2 permitted “Fish and Wildlife Management Use,” it appears to not be part of a
3 management program governing the pond. The findings do not squarely address
4 the proposed structure’s compatibility with the existing adjacent pond’s use by
5 migratory birds but do conclude that the property to the north is not subject to a
6 bird “protection overlay.” Record 77. The applicable standard requires the county
7 to evaluate whether the proposed structure is compatible with “existing adjacent
8 permitted uses,” and it may be that outside its overlays, the county does not
9 regulate the use of a pond by migratory birds and therefore concluded that it is
10 not a permitted use subject to the compatibility analysis. The findings are not,
11 however, clear on this point. Accordingly, we agree with petitioners that the
12 findings are inadequate to explain why the proposed structure is compatible with
13 the existing adjacent pond.

14 **C. Drainage**

15 In their notice of review, petitioners argued:

16 “Water runoff from the roof of a 9,280 sq. ft. accessory building will
17 be 4,640 gallons. 1 inch of rain on 1 square foot of roof will give
18 you approximately ½ gallon of water which will cause additional
19 flooding to the property north of the [applicants’] property.” Record
20 20.

21 In a portion of the second assignment of error and in the third assignment of error,
22 petitioners argue that the findings are inadequate to address the impacts from
23 runoff from the proposed structure on the pond.

1 Intervenors respond that runoff from the proposed structure will be routed
2 into a culvert located east of the subject property and the property to the north,
3 and will not drain in the direction of the pond on the adjacent property to the
4 north. The problem with intervenors' response, however, is the county's decision
5 does not address runoff from the proposed structure in any way. There are no
6 findings addressing intervenors' proposed method of drainage disposal, or
7 addressing why that proposed method ensures that the proposed structure is
8 compatible with the existing adjacent irrigation pond to the north.

9 The second assignment of error is sustained, in part.

10 The third assignment of error is sustained.

11 The county's decision is remanded.