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

MONTE MARSHALL,)
)
Petitioner,)
and)
)
CHARLOTTE MILLS,)
)
Intervenor-Petitioner,)
)
vs.)
)
CITY OF YACHATS,)
)
Respondent,)
)
and)
)
NORMAN FORRESTER,)
)
Intervenor-Respondent.)

LUBA No. 97-219
FINAL OPINION
AND ORDER

Appeal from City of Yachats.

Monte Marshall, Yachats, filed the petition for review and argued on his own behalf.

Charlotte Mills, Yachats, represented herself.

Michael G. Dowsett, Toledo, filed a combined response brief and argued on behalf of respondent.

Kris Jon Gorsuch, Salem, filed a combined response brief and argued on behalf of intervenor-respondent.

HANNA, Board Member, participated in the decision.

AFFIRMED 8/25/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's approval of a building
4 permit for a single-family dwelling.

5 **MOTIONS TO INTERVENE**

6 Charlotte Mills (intervenor-petitioner) moves to
7 intervene in this proceeding on the side of petitioner.
8 Intervenor-respondent objects that intervenor-petitioner's
9 motion was not timely filed.

10 Recent amendments to ORS 197.830(6) require that motions
11 to intervene in a LUBA appeal be filed within 21 days after
12 the notice of intent to appeal is filed with the Board. The
13 certificate of filing accompanying intervenor-petitioner's
14 motion indicates that it was mailed within 21 days after the
15 notice of intent to appeal was filed with the Board. Under
16 OAR 661-10-075(2), filing a document (other than a notice of
17 intent to appeal) with LUBA may be accomplished by mailing the
18 document via first class mail on or before the date due.
19 Under this rule intervenor-petitioner's motion was timely
20 filed even though it was not received by this Board until 27
21 days after the notice of intent was filed. Intervenor-
22 petitioner's motion to intervene is allowed.¹

23 Norman Forrester (intervenor-respondent), the applicant
24 below, moves to intervene in this proceeding on the side of

¹We refer to petitioner and intervenor-petitioner as petitioners unless the context requires otherwise.

1 respondent. There is no objection to the motion, and it is
2 allowed.²

3 **FACTS**

4 The subject property, described as tax lot 2001, is zoned
5 Residential (R-2) under the city's Zoning and Land Use
6 Ordinance (YZLUO) and designated as Residential under the
7 city's comprehensive plan. The minimum required lot size for
8 a single-family dwelling in this zone is 6,000 square feet.
9 The square footage of tax lot 2001 is either 2,783 or 13,000
10 square feet, depending on whether or not a portion of the 804
11 Trail is included in its area.

12 The 804 Trail is a public walking trail maintained by the
13 State Parks and Recreation Department (SPRD). It was
14 developed following a legal determination in the 1980s that
15 County Road 804 remains in existence as a public right of way.
16 Rendler v. Lincoln County, 76 Or App 339, 709 P2d 721 (1985),
17 aff'd 302 Or 177, 728 P2d 21 (1986).

18 Benton County established County Road 804 in 1890,
19 running from Alsea Bay south through Waldport to the beach,
20 along the beach to a point known as Starr Creek, and then
21 following a headland above the rocky bluff to the Yachats
22 River.³ A section of the road now known as the 804 Trail
23 crosses intervenor-respondent's property along the headland to

²We refer to the city and intervenor-respondent as respondents unless the context requires otherwise.

³This area later became part of Lincoln County.

1 the north of the business district in the City of Yachats.
2 Record 234.

3 After its opening in 1890, the road was traversed
4 regularly but was not improved. With the increase of
5 automobile travel, other more suitable roadways were laid out.
6 The circuit court in Rendler held that the creation of
7 subsequent roadways in the vicinity did not act to vacate
8 County Road 804.⁴ In addition, the court found that where the
9 original road had disappeared due to erosion, a prescriptive
10 easement had been created in the property that the public used
11 to realign the route in compensating for the eroded portions.
12 Record 261. Following the conclusion of all the Rendler
13 proceedings, the county transferred all of its interest in
14 County Road 804 to the SPRD for the development of the 804
15 Trail.

16 In 1993 intervenor-respondent purchased tax lot 2001.
17 Shortly thereafter, he submitted a building permit application
18 to the city. On June 23, 1994, the planning commission
19 approved intervenor-respondent's application to build a
20 single-family dwelling on tax lot 2001. The decision of the
21 planning commission was appealed to the city council, which
22 declined to hear the appeal.

23 The permit approval and the denial of local appeal were

⁴The circuit court decision gives extensive history and factual detail of County Road 804. It was included in the record, and we draw from it to establish many of the facts related to the present matter.

1 appealed to LUBA, which remanded the matter to the city
2 council for further proceedings. Mills v. City of Yachats, 29
3 Or LUBA 1, aff'd 134 Or App 581, 896 P2d 13, rev den 321 Or
4 512 (1995).⁵ In Mills, the city argued that issuance of a
5 building permit is a ministerial act not subject to the local
6 appeal process. However, LUBA determined that the local
7 ordinance provision for appeal of any planning commission
8 decision to the city council was applicable, thus warranting
9 remand without consideration of the merits of the permit's
10 approval by the planning commission.

11 Upon remand, the city council held a de novo hearing on
12 March 6, 1997, reviewing the planning commission's approval of
13 the building permit. On October 9, 1997, the city council
14 issued a final order approving the permit. This appeal
15 followed.

16 **PRELIMINARY MATTERS**

17 Petitioners argue that the subject property is
18 unbuildable because it does not meet the minimum lot size
19 standard. They make eight assignments of error that fall into
20 one of two groups directed at the two separate bases the city
21 used to approve the building permit. The first group,
22 assignments of error one through three, addresses the issue of

⁵In addition to the Mills line of proceedings, we are aware that the Forrester property and building permit have been the subject of the following court actions: Vossen v. Forrester, 155 Or App 323, ___ P2d ___ (1998) (concerning encroachment of the house onto an easement other than the 804 Trail); St. John v. Yachats Planning Commission, 138 Or App 43, 906 P2d 304 (1995) (concerning which land use ordinance was applicable at the time the building permit was issued).

1 the relationship of the 804 Trail to the subject property and
2 its impact on the size of the parcel. The second group,
3 assignments of error four through eight, pertains to the
4 application and interpretation of local ordinances affecting
5 the legal status and building requirements of tax lot 2001.

6 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

7 Petitioners allege that the city's findings concerning
8 the boundaries, dimensions and square footage of the subject
9 property are incorrect. We understand petitioners' position
10 to be that the western boundary of tax lot 2001 is east of the
11 eastern right of way line of the 804 Trail, and that the 804
12 Trail is a unit of property separately held by the SPRD. They
13 rely on prior deeds to tax lot 2001 and its parent lot dating
14 back to 1948 that use language excepting the 804 Trail right
15 of way in the property description. They argue that this
16 evidence in the record conflicts with the evidence the city
17 used in making its decision.

18 Without the inclusion of the land over which the 804
19 Trail lies, the area of tax lot 2001 is 2,783 square feet.
20 Therefore, petitioners conclude it fails to meet the minimum
21 6,000 square feet required by YZLUO 2.020(3)(A)(1) for
22 approval of a single-family dwelling permit.⁶ Petitioners

⁶YZLUO 2.020(3)(A)(1) provides:

"The minimum lot area [in an R-2 zone] shall be 6,000 square feet for a one-family dwelling and 10,000 square feet for a two-family dwelling, and when a lot is served by both a public water supply and public sewage disposal systems."

1 claim that there is not substantial evidence in the record to
2 support the finding that the area of tax lot 2001 is 13,000
3 square feet, because it cannot include property covered by the
4 804 Trail.

5 Respondents argue that the finding that tax lot 2001 is
6 approximately 13,000 square feet is supported by the property
7 description of intervenor-respondent's recorded deed to tax
8 lot 2001, and the dimensions and area noted for the property
9 on the Lincoln County tax assessor's map. Record 211-12,
10 1251, 1355. Respondents assert that the 804 Trail is a right
11 of way that merely encumbers tax lot 2001, and is not a
12 separate unit of land held in fee simple by another entity.
13 They claim that its purpose is to provide access to the public
14 across the property, and as a right of way it does not reduce
15 the size of the lot. Respondents argue that if the area of
16 the trail is included for purposes of determining lot size,
17 tax lot 2001 clearly meets the minimum square footage
18 requirement of 6,000 square feet.

19 In response, petitioners cite to evidence in the record
20 that the predecessor county road to the 804 Trail was first
21 initiated by petition, and established in accordance with
22 Hill's Annotated Code (1887). Petitioners' argument then
23 assumes that this process gave fee title of the land
24 underlying the road to the county. Petitioners emphasize the
25 word "acquire" as used in Hill's Code and present day ORS
26 chapter 368 provisions concerning procurement of property for

1 road purposes. Petitioners do not establish a definition of
2 that word as used in those statutes, but instead seem to
3 interpret it to mean that when "acquiring" property for roads
4 the full fee passes, somehow involving the power of eminent
5 domain.

6 Respondents answer that even if the road was acquired
7 through condemnation, the acquisition was that of a right of
8 way and not a fee simple estate. This position is supported
9 by case law of the era when the road was established. McQuaid
10 v. Portland & V. Railway Co., 18 Or 237, 246, 22 P 899 (1889)
11 (the fee to the land constituting the street, whether acquired
12 by dedication or eminent domain, is in the adjacent lot-
13 owners); Huddleston v. City of Eugene, 34 Or 343, 352, 55 P
14 868 (1899) (when a street is vacated, ownership of the land
15 underlying the street shall vest in the abutting owners,
16 because the public has only an easement in such land); Lankin
17 v. Terwilliger, 22 Or 97, 99, 29 P 268 (1892) (the fee and all
18 rights of property not incompatible with the public enjoyment
19 as a road remain in the owners; and when the road is
20 discontinued by act of public authority, the land covered by
21 it immediately reverts to them, unencumbered by the easement
22 or servitude).

23 Both parties cite to Rendler in support of their
24 positions. Because the case involved the subject at issue
25 before us, we consider the circuit court's discussion germane
26 to and instructive in our analysis. The Rendler decision was

1 the result of a proceeding for declaratory judgment to
2 determine the rights of the parties as to "the existence or
3 the nonexistence of a public road known as County Road 804
4 across the plaintiffs' property." Record at 234. Throughout
5 the discussion, the circuit court refers to County Road 804 as
6 a "right of way."⁷ The term "right of way" indicates an
7 interest similar to an easement in that it is a right to pass
8 over the property of another.⁸ The circuit court found, and
9 the Court of Appeals agreed, that the right of way still
10 existed and had been added to through a prescriptive easement.
11 Rendler, 76 Or App at 348.

12 In further support of the position that the 804 Trail is
13 an encumbrance on intervenor-respondent's property, the
14 circuit court found that in 1962 County Road 804 was noted on
15 the county tax assessor's maps. This action was taken in
16 order to "decrease the acreage in the right of way from the
17 determination of the assessments for the property that it
18 crossed." The process was part of a statewide program to
19 "enable the property owners to have the benefit of not being
20 charged taxes on roads that crossed their property." Record
21 245 (emphasis added).

⁷Black's Law Dictionary (5th ed 1979) defines "right of way" as a term sometimes "used to describe a right belonging to a party to pass over land of another[.] * * * As used with reference to [a] right to pass over another's land, it is only an easement[.]"

⁸Black's Law Dictionary (5th ed 1979) defines "easement" as "[a] right of use over the property of another."

1 As a review body, we are authorized to reverse or remand
2 the challenged decision if it is "not supported by substantial
3 evidence in the whole record." ORS 197.835(9)(a)(C).
4 Substantial evidence is evidence a reasonable person would
5 rely on in reaching a decision. City of Portland v. Bureau of
6 Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Carsey v.
7 Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991).
8 When there is conflicting evidence in the record, deference is
9 given to the local government's evaluation of the evidence in
10 making its findings if a reasonable person could reach the
11 same conclusion in view of all the evidence in the record.
12 Tigard Sand and Gravel, Inc. v. Clackamas County, ___ Or LUBA
13 ___ (LUBA No. 96-182, April 9, 1997), slip op 18; Mazeski v.
14 Wasco County, 28 Or LUBA 178, 184 (1994), aff'd 133 Or App 258
15 (1995).

16 In the case before us, the city relied on current
17 documents describing the area of tax lot 2001 and a well-
18 reasoned analysis of the effect of the 804 Trail on the
19 property. Petitioners' conflicting evidence of prior deeds
20 that contain language open to interpretation is not sufficient
21 to undermine the city's choice of evidence used to support its
22 conclusion. We agree with respondents that the 804 Trail is a
23 right of way over intervenor-respondents's property, and that
24 its area is included in the dimensions of tax lot 2001. The
25 city's finding that the area of the property is approximately
26 13,000 square feet, and thus meets the 6,000 square feet

1 minimum lot size requirement for building permit approval, is
2 supported by substantial evidence in the record.

3 Petitioners' first, second and third assignments of error
4 are denied.

5 Because we determine above that the property meets the
6 lot size requirements of YZLUO 2.020(3)(A)(1), it is not
7 necessary for us to reach petitioners' assignments of error
8 four through eight, which address the city's alternate basis
9 for approving the building permit.

10 The city's decision is affirmed.