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

DEBORAH VAN DYKE,)
)
Petitioner,)
)
vs.)
)
YAMHILL COUNTY,)
)
Respondent,)
)
and)
)
GKP, INC.,)
)
Intervenor-Respondent.)

LUBA Nos. 98-002 and 98-003

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Charles J. Crawford, Lake Oswego, filed the petition for review and argued on behalf of petitioner.

John C. Pinkstaff, Assistant County Counsel, McMinnville, filed a response brief and argued on behalf of respondent.

Michael C. Robinson, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Stoel Rives.

GUSTAFSON, Board Member; HOLSTUN, Board Chair, participated in the decision.

AFFIRMED 02/25/99

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a subdivision.¹

4 **MOTION TO INTERVENE**

5 GKP, Inc. (intervenor), the applicant below, moves to intervene on the side of
6 respondent. There is no opposition to the motion, and it is allowed.

7 **FACTS**

8 The subject property consists of a single, 69.5-acre parcel, which is located in three
9 different zoning districts. Approximately 50 acres of the parcel is zoned either AF-10 or
10 VLDR-5, both of which allow rural-residential development, and are not exclusive farm use
11 (EFU) zones under ORS Ch. 215. The remaining 19.5-acre portion is zoned EF-80, an EFU
12 zone, and is developed with a single residence. Intervenor applied to the county for approval
13 of a five-lot subdivision, proposing to divide the 50 acres zoned AF-10 and VLDR-5 into
14 five, 10-acre lots. Intervenor did not propose any change to the remaining 19.5 acres zoned
15 EF-80. The notice of public hearing for both the planning commission hearing and appeal
16 hearing before the board of county commissioners describe the request as:

17 "Approval of a 5 lot subdivision in the AF-10 district (the remainder of Tax
18 Lot 5411-900 forms a sixth lot), and conditional use approval to establish a
19 new public road in the Exclusive Farm Use district to serve the lots." Record
20 64, 560.

21 The notices identify the zoning and review criteria as follows:

22 "Zone: AF-10, Agricultural Forestry Small Holding, and VLDR-5, Very Low
23 Density Residential. The new road would cross property zoned EF-80,
24 Exclusive Farm Use.

25 "Review Criteria: May include Sections 402, 501, 502 and 1202 of the
26 Yamhill County Zoning Ordinance; the Yamhill County Land Division

¹Petitioner also appealed the county's conditional use approval for a road to cross adjacent EFU-zoned property. However, the petition for review does not challenge that decision. Because petitioner has provided no basis to reverse or remand the conditional use approval, it is affirmed without further discussion.

1 Ordinance; the Yamhill County Comprehensive Plan; and OAR 660-12-065."
2 Id.

3 The notices do not list as approval criteria the statutory provisions of ORS 215.780 or
4 215.263 regarding creation of new lots and minimum lot size requirements in EFU zones.
5 Nor do they list specific sections of the Yamhill County Comprehensive Plan (YCCP) or
6 specific provisions of Yamhill County Zoning Ordinance (YCZO) Section 402, which
7 address uses allowed the county's EFU districts.

8 In petitioner's Request for Hearing before the planning commission, she states, in
9 part, that

10 "the basis for the hearing is that there is no compelling evidence provided by
11 the developer that ensure[s] this application complies with the Yamhill
12 County Comprehensive Plan related to protecting agricultural and forestry
13 resource lands (Section 401, 501 & 502) or that it will not adversely impact
14 the services and facilities of the area." Record 608.

15 In response to petitioner's Request for Hearing, intervenor submitted a letter in which it
16 explains its position that the application complies with all applicable comprehensive plan
17 goals and policies. Intervenor states, in part:

18 "The property that is the subject of the five-lot subdivision application is
19 zoned AF-10 and VLDR-5. Both of these zoning districts are exception zones
20 and neither are subject to protection under laws or rules governing an
21 agricultural and forestry zoning district. [Petitioner] has not explained why
22 Plan policies related to such resource lands would be applicable to exception
23 areas. No applicable approval standard for the subdivision requires the
24 County to determine the subdivision's impact on adjacent farm or forest land.

25 "For example, Plan Section II(1), policy b, provides in part:

26 "'Yamhill County shall provide for protection of farmland in large
27 blocks through minimum lot sizes of 20, 40 and 80 acres * * *.'

28 "Because the AF-10 zoning district is well below [the] minimum 20-acre
29 standard, it is not subject to the agricultural lands policies in the Plan.
30 Moreover, Plan Section II(1) policy g, states:

31 "'Yamhill County will not permit subdivision on lands designated by
32 the County Comprehensive Plan as exclusive farm use or
33 agricultural/forestry large holding * * *.'

1 "The AF-10 zoning district is an agricultural/forestry small holding district, so
2 it is not subject to this policy." Record 587.

3 Petitioner did not raise any issues concerning compliance with specific
4 comprehensive plan policies either in her testimony before the planning commission, or
5 during the appeal hearing before the board of commissioners.

6 In written testimony presented during the planning commission hearing, petitioner
7 raised the applicability of the county's land development ordinance (LDO) 9.010,
8 Subdivision of Agriculture and Forest Lands:

9 "It is also the intent of the county to preserve, wherever possible, the
10 productive timber and agricultural lands of the county and to ensure that the
11 rural character of an area is not compromised by overdevelopment resulting in
12 excessive traffic, polluted soil and water supplies. The addition of 6
13 dwellings could potentially generate excessive traffic (60 vehicle trips per
14 day). * * *" Record 549.²

15 In its findings of approval of the subdivision, the county commission addressed petitioner's
16 argument regarding LDO 9.010 by stating:

17 "[Petitioner] argued that this application violates LDO 9.010, 'Subdivision of
18 Agriculture and Forest Lands.' LDO 9.010 provides that 'the creation of four
19 or more lots on a single parcel within one calendar year shall not be permitted
20 in the F-40, EF-40 or AF-20 zones as indicated on the official zoning map of
21 Yamhill County.' This criterion does not apply to this subdivision application
22 because it is in an AF-10 zoning district. No lots are proposed to be created in
23 the EF-80 zoning district.

24 "YCZO 301.01(A) lists natural resources zones as including the EF and
25 Agriculture/Forest Large Holding zones, including the AF-20 and EF zoning
26 districts. YCZO 301.01(B), on the other hand, lists rural residential zones as
27 including the AF-10 and VLDR-5 zoning districts. Thus, the AF-10 zoning
28 district is not regulated by LDO 9.010." Record 27.

29 In written testimony presented during both the planning commission hearing and the
30 appeal before the board of commissioners, petitioner also specifically raised an issue

²Intervenor's application initially proposed 6 lots on the 50 acres zoned AF-10 and VLDR-5. During the course of the local proceedings, the request was modified to propose 5 lots. Petitioner's reference to "6 dwellings" is presumably to the initial application. No new dwellings are proposed for the EFU-zoned portion of the property.

1 concerning compliance with YCZO 402.07, which imposes standards for approval of
2 conditional uses in EFU districts. Petitioner did not raise any issues regarding any other
3 subsection of YCZO Section 402, or in any way challenge the subdivision for compliance
4 with other subsections of YCZO Section 402. Nor did petitioner generally raise any issue
5 indicating that she considered the subdivision to affect any EF-80 zoned property.³

6 The county's findings approving the application describe the property subject to the
7 request as follows:

8 "Tax Lot 5411-900 is approximately 69.5 acres in size. Approximately 47
9 acres is zoned AF-10, 3.2 acres is zoned VLDR-5 and the remainder is zoned
10 EF-80. The EF-80 portion of the tax lot is not part of the subdivision and
11 conditional use application." Record 7.

12 The findings describe the application and criteria as follows:

13 "This application requests approval for a five lot subdivision on property
14 zoned AF-10 (Agriculture/Forestry Small Holdings) and VLDR-5 (Very Low
15 Density Residential). The applicable criteria for approval of the subdivision
16 are found in [LDO] 6.000(1), 6.010, 6.020, 6.030, 6.040, 6.050, 6.060, 6.070,
17 6.090, 6.100 and 9.040." Record 9.

18 Petitioner appeals the county's approval of the proposed subdivision.

³Petitioner's written testimony on appeal before the Board of Commissioners relating to YCZO 402.07 states:

"In reference to the applicants' Basis for Appeal, they have indicated that the Planning Commission erred by denying the Conditional Use request to establish a new public road on Exclusive Farm Use [zoned land.] Item B indicated that the proposed local public road would not alter the characteristics of the area and impair agricultural uses as permitted by the EF-80 zoning district (YCZO 1202.02(D) and YCZO 402.07). A public road, consisting of a one thousand four hundred, thirty feet through farm land would alter the characteristics of the area. Also [the county planner] indicated in the staff report * * * that the location of the road will isolate a strip of farm land that is 120 ft. wide. * * * The location of the road would create problems of moving animals from one side to the other. [One commissioner] said, 'That putting a road through EF-80 zone would substantially impair the use of the farm land.' The applicant [and his attorney] would have you believe that there is no reasonable alternative, so therefore they should be given approval. The ordinance (402.07(D)) does not state if no reasonable alternative cannot be located at another location, then you can have a public road go through land zoned EF-80. It states: 'The use will not force significant change in accepted farming or forest practices on surrounding lands devoted to farm or forest use.'" Second Supp Record 689-90.

1 **MOTION TO FILE REPLY BRIEF**

2 Two days before oral argument, petitioner submitted a motion to file a reply brief,
3 with a copy of the proposed reply attached. Intervenor objected to the reply brief, first
4 because the request was not timely filed and secondly because petitioner's reply extends
5 beyond new issues raised in the response brief.

6 The response briefs were filed May 29, 1998. Oral argument was scheduled for and
7 held July 16, 1998. This Board received the motion to file a reply brief on July 14, 1998.
8 The motion did not attempt to establish how the reply was filed "as soon as possible after
9 respondent's brief is filed" as required by OAR 661-010-0039.

10 As stated at oral argument, petitioner's motion to file a reply brief is denied for failure
11 to comply with OAR 661-010-0039.

12 **WAIVER**

13 Both the county and intervenor assert petitioner has waived her right to raise issues
14 regarding compliance with the statutory and code requirements for the minimum lot size
15 requirements and subdivision restrictions in the EFU zone because she failed to raise these
16 issues before the county.

17 Petitioner's response is two-fold. First, petitioner asserts she may raise new issues
18 under ORS 197.835(4)(a) because the county failed to list all applicable criteria in its hearing
19 notices. Specifically, petitioner asserts the notices failed to identify either ORS 215.780 or
20 ORS 215.263, or the corresponding comprehensive plan and local code provisions relating to
21 subdivisions within EFU zones. Second, petitioner asserts that she did raise the issue of the
22 creation of subdivision lots in the EFU zone through her hearing testimony regarding LDO
23 9.010.

24 As relevant here, ORS 197.835(3) limits the issues petitioners may raise in an appeal
25 before this Board to those raised during the local hearings. ORS 197.835(4)(a) relieves a
26 petitioner of the requirement to raise issues below if:

1 "The local government failed to list the applicable criteria for a decision under
2 * * * ORS 197.763(3)(b), in which case a petitioner may raise new issues
3 based upon applicable criteria that were omitted from the notice. However,
4 the board may refuse to allow new issues to be raised if it finds that the issue
5 could have been raised before the local government[.]"⁴

6 The essence of petitioner's argument on the merits of this appeal is that the proposed
7 subdivision actually includes the 19.5-acre EFU-zoned portion of the property. Petitioner
8 argues that because the county failed to acknowledge this ultimate conclusion, the county
9 necessarily failed to provide proper notice, in that it did not list criteria applicable to EFU-
10 zoned property. The county and intervenor counter that the proposal does not include the
11 19.5-acre EFU-zoned portion of the property, and thus the county was not required to include
12 criteria in its notice that would be applicable if the EFU-zoned portion were part of the
13 proposal.

14 The first question thus becomes whether petitioner (or any other participant)
15 adequately apprised the county during the local proceedings of the position taken in this
16 appeal that the EFU-zoned portion of the property was part of the subdivision proposal.
17 Based on petitioner's citation to the record where she purportedly raised this issue, we
18 conclude she did not. Nothing in petitioner's testimony regarding LDO 9.010 would give the
19 county reason to believe that petitioner was intending to raise an issue that the EF-80 zoned
20 portion of the property did not satisfy the minimum lot size requirements or subdivision
21 restrictions in the EF-80 zone.⁵

22 Because petitioner did not raise before the county the issues she wishes to raise here,
23 we next consider whether ORS 197.835(4)(a) allows petitioner to raise new issues

⁴ORS 197.763(3)(e) requires that the local government notice

"[s]tate that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the board based on that issue[.]"

⁵We also note that nowhere in the petition for review does petitioner challenge the county's findings of compliance with LDO 9.010.

1 notwithstanding her failure to raise them before the county.

2 Petitioner argues she may raise new issues because the county failed to list the
3 applicable criteria for the decision required under ORS 197.763(3)(b), specifically ORS
4 215.780 (minimum lot size within the EFU zone), ORS 215.263 (partitions within EFU
5 zone), or the corresponding Yamhill County comprehensive plan or ordinance provisions.
6 Petitioner also argues that the listing of review criteria, which contains a general listing of
7 applicable criteria, is insufficient to adequately identify the applicable standards. Petitioner
8 suggests this deficiency alone relieves her of the requirement to raise issues below, and
9 allows her to raise any new issues on appeal.

10 We agree with petitioner that the county's notice was deficient in failing to adequately
11 identify the approval criteria. However, that deficiency alone does not allow petitioner to
12 raise new issues on appeal. Rather, ORS 197.835(4)(a) provides petitioner the opportunity to
13 raise new issues only to the extent those new issues relate to "applicable criteria that were
14 omitted from the notice."

15 As stated above, petitioner identifies as the "applicable criteria" that the hearing
16 notices failed to list, ORS 215.780, ORS 215.263, as well as the corresponding Yamhill
17 County comprehensive plan and ordinance subsections. However, the notice provisions of
18 ORS 197.763(3)(b) require only a listing of "the applicable criteria from the ordinance and
19 the plan that apply to the application at issue[.]" That statute does not require that the notice
20 include statutory provisions that may apply to the application. Therefore, regardless of their
21 alleged applicability, the county's failure to list ORS 215.780 and ORS 215.263 as approval
22 criteria in its hearing notice does not excuse petitioner from the obligation to raise the issue
23 of compliance with those statutes during the local proceedings below. ODOT v. Clackamas
24 County, 23 Or LUBA 370, 375 (1992). In addition, while petitioner did not discuss at oral
25 argument the applicability of ORS 215.243, petitioner assigns error in her petition for review
26 based on that statute. Again, because petitioner did not raise compliance with ORS 215.243

1 below, she cannot rely on the county's failure to list that statute to relieve her of her
2 obligation to raise issues below in order to raise them on appeal.⁶

3 Petitioner also alleges that the county omitted local comprehensive plan and code
4 provisions corresponding to ORS 215.780 and 215.263. In her first assignment of error
5 petitioner identifies YCZO 402.09(B)(1)(a) as "paralle[ling] the requirements of ORS
6 215.780 by restricting new parcels within the EFU zone * * *." Petition for Review 8.
7 Although the second assignment of error asserts that the proposed subdivision violates both
8 ORS 215.263 "and applicable provisions of the Yamhill County ordinances," the body of that
9 assignment does not allege error to any local provision. Petition for Review 11. In the third
10 assignment of error, in addition to alleging error under ORS 215.243, petitioner alleges error
11 under the YCCP Section II(A)(1), policy g.⁷

12 The county and intervenor acknowledge that criteria applicable to subdividing land
13 located in the EF-80 zone were not listed in the county's notices under ORS 197.763(3), but
14 argue that the notices were not required to list those criteria because they are not applicable
15 approval criteria.

16 Under these circumstances, ORS 197.835(4) permits petitioner to raise new issues
17 concerning these criteria, if the criteria are applicable, and if we determine petitioner could
18 not have raised the issues below. The question of whether references to the criteria relevant
19 to EFU zone were improperly omitted as petitioner asserts, or intentionally excluded as
20 inapplicable, as the county and intervenor assert, goes to the merits of petitioner's appeal:

⁶Petitioner also argues in the first assignment of error that this application is subject to ORS chapter 92, but does not assign any error based on that statute. Rather, petitioner argues that ORS chapter 92 requires the proposed subdivision to comply with other applicable requirements. We note that the county's findings address ORS chapter 92 and find that its requirements are satisfied. Petitioner does not challenge those findings.

⁷Petitioner also alleges a violation of a portion of one sentence in the summary of YCCP Section II, which recognizes the "need to maintain the integrity and viability of the agricultural land base." Petitioner does not, however, cite to any specific goal or policy that implements that summary statement. Regardless of whether petitioner could raise new issues on appeal, this allegation does not raise an issue regarding compliance with a mandatory approval criterion sufficient for our review.

1 whether the challenged subdivision implicates the minimum lot size and subdivision
2 restrictions in the EFU zone. However, we need not determine whether the disputed criteria
3 are applicable to the challenged decision because we find that petitioner could have raised
4 issues regarding the applicability of and compliance with these criteria below, and thus,
5 under ORS 197.835(4)(a), is precluded from raising those issues for the first time on appeal.

6 The record of the local proceedings makes clear that the county unequivocally
7 determined that the EF-80-zoned property was not subject to the subdivision application.
8 The county was not silent on the issue: each of the hearing notices expressly states that the
9 subdivision involves only the AF-10 and VLDR-5 portions of the tax lot, and that there is no
10 subdivision within the EF-80 zoned portion of that lot. In addition, the application itself
11 states that the proposed subdivision affected only the AF-10 and VLDR-5 zones. There is no
12 question in this case that the county did not consider the challenged EFU related code and
13 plan provisions applicable to this application. Had petitioner considered the subdivision to
14 include the EFU-zoned portion of the lot, she was fully apprised of the county's and
15 applicant's position, and even if she did not have knowledge of specific applicable
16 comprehensive plan or ordinance provisions, she had the opportunity to factually challenge
17 that position during the local proceedings.

18 Moreover, petitioner was, or had reason to be, informed of the comprehensive plan
19 and ordinance provisions regarding subdivisions on EFU-zoned land. In her Hearing
20 Request to the county, petitioner challenged compliance of the application with
21 comprehensive plan provisions "related to protecting agricultural and forestry resource
22 lands." Record 608. In response, intervenor submitted a letter that specifically states that
23 YCCP Section II(A)(1), policy g does not apply to the application. Through intervenor's own
24 reference to the policy, petitioner knew, or should have known, of its existence. With regard
25 to the challenged code provision, the notices generally raise as applicable YCZO Section
26 402, which is entitled "Exclusive Farm Use District." Petitioner raised compliance with

1 YCZO 402.07, entitled "Additional Standards for Approval of Conditional Uses [in the EFU
2 District]" with regard to the conditional use permit request on the adjacent EFU land.
3 Record 549, Second Supp Record 689-90. YCZO 402.09, entitled "Standards and
4 Limitations," which petitioner challenges here, follows one paragraph below YCZO 402.07.

5 In DeBates v. Yamhill County, 32 Or LUBA 276 (1997), we determined that the
6 petitioner could raise new issues under ORS 197.835(4)(b) (1995) as a result of the county's
7 failure to identify applicable criteria in its notice, finding that the petitioner could not have
8 raised those issues below. We stated there:

9 "It is possible that because the county's notice did not mention [the challenged
10 YCCP provision], the participants below were not informed of its existence or
11 possible applicability. If they were not so informed, they could not have
12 raised [the challenged YCCP provision] with the specificity the county
13 contends is necessary to avoid waiver. Therefore, petitioner may raise new
14 issues associated with [the challenged YCCP provision] before this Board."
15 Id. at 289.

16 However, we distinguished the factual situation in DeBates in Tandem Development
17 Corp. v. City of Hillsboro, 33 Or LUBA 335 (1997), where we determined that the petitioner
18 was on notice of challenged provisions and, therefore, was required to raise them below. We
19 stated there:

20 "This is not a case like DeBates v. Yamhill County, 32 Or LUBA 276 (1997),
21 where a petitioner can plausibly contend it was not informed of the existence
22 or possible applicability of a relevant code provision. HZC 106 to 111 are
23 collected in a separate chapter of the HZC entitled 'Variances.' When
24 petitioner appealed the challenged variances from the planning and zoning
25 hearings board to the city council, it quoted all of HZC 107 without reference
26 to HZC 106, which directly precedes HZC 107 on the same page of the HZC.
27 Petitioner does not contend it was unaware of the existence of HZC 106.
28 Under these circumstances, we conclude petitioner could have raised issues
29 arising out of the application of HZC 106 before the local government. ORS
30 197.835(4)(b) makes it appropriate to refuse to allow petitioner to raise those
31 issues at LUBA." Id. at 339-40 (footnote omitted).

32 As in Tandem Development, petitioner here does not contend she was unaware of the
33 challenged comprehensive plan and code provisions. Rather, petitioner's own written
34 testimony during the local proceedings revealed her knowledge of the existence and possible

1 applicability the challenged provisions and establishes that "the issues could have been raised
2 before the local government[.]" ORS 197.835(4)(a). Thus, to the extent petitioner took issue
3 with the county's characterization of the application, it was incumbent upon her to identify
4 that issue during the local appeal process. ORS 197.835(4) does not relieve petitioner of the
5 requirements of ORS 197.835(3). Petitioner has waived her right to raise each of the local
6 criteria challenged in this appeal.

7 **ASSIGNMENTS OF ERROR**

8 As explained above, in her first assignment of error petitioner raises compliance with
9 ORS 215.780 and YCZO 402.09(B)(1)(a). In her second assignment of error petitioner
10 raises compliance with ORS 215.263. In her third assignment of error, petitioner raises
11 compliance with ORS 215.243 and YCCP Section II(A)(1), policy g. Because none of these
12 issues were raised below, under ORS 197.835(3) petitioner is precluded from raising them on
13 appeal.

14 Petitioner's assignments of error are denied.

15 The challenged decisions are affirmed.