

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

3
4 DANIEL REEVES,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 94-105
10 YAMHILL COUNTY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 PHILIP LISAC and NORMA LISAC,)
17)
18 Intervenors-Respondent.)

19
20
21 Appeal from Yamhill County.

22
23 William C. Cox, Portland, filed the petition for review
24 and argued on behalf of petitioner.

25
26 No appearance by respondent.

27
28 Stephen T. Janik and Richard H. Allan, Portland, filed
29 the response brief. With them on the brief was Ball, Janik
30 & Novack. Richard H. Allan argued on behalf of intervenors-
31 respondent.

32
33 SHERTON, Referee; HOLSTUN, Referee, participated in the
34 decision.

35
36 REMANDED 10/06/94

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order approving a permit
4 allowing placement of a dwelling in the Willamette River
5 Greenway.

6 **MOTION TO INTERVENE**

7 Philip Lisac and Norma Lisac move to intervene in this
8 proceeding on the side of respondent. There is no
9 opposition to the motion, and it is allowed.

10 **FACTS**

11 The subject property consists of 1.7 acres. The
12 Yamhill County Comprehensive Plan (plan) designates the
13 property Very Low Density Residential and Willamette River
14 Greenway. The subject property is zoned Very Low Density
15 Residential - 2 1/2 Acres (VLDR-2 1/2) and Willamette River
16 Greenway Overlay (WRG). The adjoining properties to the
17 east and west are similarly designated and zoned. The
18 subject and adjoining VLDR-2 1/2 zoned properties are the
19 subject of an exception to Statewide Planning Goal 3
20 (Agricultural Lands) that was adopted by the county as part
21 of its acknowledged plan. Petitioner owns the parcel
22 adjoining the subject property to the west, on which a
23 dwelling is located. The subject property is bounded on the
24 south by the Willamette River and on the north by
25 Wilsonville Road. The property across Wilsonville Road is
26 zoned Exclusive Farm Use - 40 Acres (EFU-40) and is in

1 orchard and pasture use.

2 The subject property is rectangular, measuring roughly
3 500 feet north to south and 150 feet east to west. The
4 subject property is comprised entirely of U.S. Soil
5 Conservation Service (SCS) Class II and III soils. The
6 property slopes down from Wilsonville Road, to a relatively
7 level, grassy area in the center of the property. A paved
8 driveway extends from Wilsonville Road to the central
9 portion of the property. In the southern end of the
10 property is a steep bank sloping down to the Willamette
11 River. A stairway leads down the bank to a boat dock.¹

12 The subject application for a WRG permit for a dwelling
13 was filed on October 6, 1993. The application states the
14 applicants are Peter and Colleen Hansen. The application is
15 signed by the Hansens, as applicants, and by intervenor
16 Philip Lisac, as the property owner. Record 73. A
17 statement in support of the application, submitted to the
18 county by intervenor Philip Lisac on December 22, 1993,
19 includes a document entitled "Lisac Proposed Site Plan"
20 (hereafter site plan). The site plan indicates a
21 rectangular proposed dwelling site 100 feet wide by 69 feet
22 deep, located in the central portion of the property.

¹The subject application describes the "present use of the property" as "recreation campsite." Record 72. There apparently is some sort of existing structure near the top of the bank, the nature of which is disputed by the parties. However, the exact nature of the existing structure is not material to this appeal.

1 Record 67. The county's notice of the January 6, 1994
2 hearing before the planning commission on the subject
3 application identifies intervenors as the applicants. On
4 February 18, 1994, the planning commission approved the
5 subject application.

6 Petitioner appealed the planning commission's decision
7 to the board of commissioners. The county's notice of the
8 May 4, 1994 hearing before the board of commissioners on the
9 subject application identifies the Hansens and intervenor
10 Philip Lisac as the applicants. After an additional public
11 hearing, the board of commissioners adopted the challenged
12 order approving the application, with conditions. The order
13 identifies the Hansens and intervenors as the applicants.

14 **FIRST ASSIGNMENT OF ERROR**

15 Yamhill County Zoning Ordinance (YCZO) 902.08.A
16 provides:

17 "An authorized [WRG] permit is not personal to the
18 applicant and shall be deemed to run with the
19 land, provided the subsequent owner or developer
20 adheres to the specific proposal originally
21 approved and complies with any conditions of
22 approval." (Emphasis added.)

23 ORS 197.763(3)(a) requires the county's notice of
24 hearing on a quasi-judicial land use application to:

25 "Explain the nature of the application and the
26 proposed use or uses which could be authorized."

27 Petitioner contends, because the Hansens testified at
28 the planning commission hearing that they are no longer
29 applicants, there was technically no application before the

1 county upon which to render a decision. Petitioner argues
2 intervenors' attorney conceded at the county hearings that
3 intervenors do not intend to construct a dwelling on the
4 property and that no building plans for such a dwelling
5 exist. Petitioner contends that in the absence of a
6 specific proposed structure, the application and notices of
7 hearing violate the above quoted ordinance and statutory
8 requirements because they fail to provide sufficient
9 information identifying the proposal. According to
10 petitioner, intervenors are seeking an improper conceptual
11 approval under which they or their assigns could build any
12 kind of structure so long as it is called a dwelling.

13 We understand petitioner to contend the county lost
14 jurisdiction over the subject application when the Hansens
15 testified they no longer have an interest in the subject
16 property. However, intervenor Philip Lisac signed the
17 subject application as the property owner and, in all of its
18 hearing notices and in the challenged decision, the county
19 recognized intervenor Philip Lisac as an applicant.
20 Petitioner identifies no statutory or code provision
21 prohibiting the county from recognizing a property owner who
22 signs an application as an applicant or from allowing a
23 change in the applicants for a WRG permit. Therefore, in
24 this case, there is at least one applicant that retains an
25 interest in the subject property. Additionally, even if the
26 county committed some procedural error in recognizing

1 intervenors as applicants, we do not see that petitioner's
2 substantial rights were prejudiced by the addition of
3 intervenors as applicants. ORS 197.835(7)(a)(B).

4 The application, together with intervenor Philip
5 Lisac's statement supporting the application, indicate the
6 proposal is to place a driveway, single family dwelling and
7 well on the subject property, with the dwelling to be
8 located within the 100 foot by 69 foot building envelope
9 identified on the site plan.² Record 62-67, 72-73. The
10 notices of hearing state the proposal is to allow placement
11 of a dwelling in the Willamette River Greenway on the
12 subject property. Record 25, 60. This is sufficient to
13 satisfy the requirement of ORS 197.763(3)(a) to "[e]xplain
14 the nature of the application and the proposed use or uses
15 which could be authorized."

16 The challenged decision states that YCZO 902.05
17 (Greenway Permit Application) "sets forth the application
18 requirements for a WRG permit, and nothing in this section
19 requires * * * a detailed description of the [proposed]
20 residence." Record 7. Petitioner does not challenge this
21 finding and points to no statutory or code provision
22 requiring greater specificity in the application with regard
23 to the size, location or configuration of the proposed

²These documents also indicate no development is proposed to occur within 150 feet of the Willamette River. Record 62.

1 single family dwelling than was provided here.³

2 The first assignment of error is denied.

3 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

4 **A. YCZO 502.01**

5 YCZO Section 502 establishes the county's three Very
6 Low Density Residential Districts (VLDR-5, VLDR-2 1/2,
7 VLDR-1). YCZO 502.01 (Purpose) provides, in relevant part:

8 "The purpose of the VLDR Districts is to provide
9 for medium-to-high density rural residential
10 development on selected lands identified as Very
11 Low Density Residential in the Comprehensive Plan.
12 * * * Ultimate density limitations in VLDR
13 Districts shall be determined in part by
14 prevailing lot sizes, and limitations of domestic
15 water sources or soil conditions for subsurface
16 sewage disposal. * * *" (Emphasis added.)

17 Petitioner contends the challenged decision fails to
18 demonstrate that placing a dwelling on the subject 1.7 acre
19 parcel is consistent with the purpose of the VLDR zones.
20 Petitioner specifically argues the county failed to address
21 the provision of YCZO 502.01 requiring that the ultimate
22 density allowed in the VLDR-2 1/2 zone be determined based
23 on limitations on domestic water sources and subsurface
24 sewage disposal, as well as existing lot sizes.

25 The challenged decision explains the county's
26 interpretation of YCZO 502.01:

³To the extent petitioner argues under other assignments of error that there is insufficient evidence in the record to demonstrate compliance with particular WRG permit approval standards, those arguments are addressed infra.

1 "The Statement of Purpose in YCZO Section 502.01
2 is a very generalized statement for that entire
3 section of the [YCZO], and does not include site
4 specific approval standards and criteria. The
5 more specific approval criteria and standards
6 appear in other sections of [YCZO] 502 (see, e.g.
7 [YCZO] 502.06), and would override any purported
8 regulation in YCZO Section 502.01." Record 14.

9 YCZO 502.06 (Standards and Limitations), cited in the above
10 finding, establishes dwelling density, parcel size, parcel
11 dimension and setback standards for each of the three VLDR
12 zones.

13 This Board is required to defer to a local governing
14 body's interpretation of its own enactment, unless that
15 interpretation is contrary to the express words, purpose or
16 policy of the local enactment or to a state statute,
17 statewide planning goal or administrative rule which the
18 local enactment implements. ORS 197.829; Gage v. City of
19 Portland, 319 Or 308, 316-17, ___ P2d ___ (1994); Clark v.
20 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). The
21 county's interpretation of YCZO 502.01 as a generalized
22 purpose statement for all three VLDR zones that is
23 implemented by other provisions in YCZO Section 502, and as
24 not including approval standards for individual permit
25 applications in the VLDR-2 1/2 zone, is well within the
26 discretion afforded the county by ORS 197.829, Gage and
27 Clark.

28 This subassignment of error is denied.

1 **B. YCZO 902.06.D**

2 YCZO 902.06.D requires a WRG permit to meet the
3 following standard:

4 "[T]he quality of the air, water and land
5 resources in and adjacent to the WRG Overlay
6 District shall be preserved * * *."

7 The challenged decision includes the following findings
8 addressing YCZO 902.06.D:

9 "[T]he proposed use, a single family residence,
10 will not have any adverse impact on the air,
11 water, and land resources in the district. A
12 single family residence does not cause adverse
13 impacts upon air quality. As a condition of
14 approval the placement of an on-site subsurface
15 sewage disposal system approved by [the Department
16 of Environmental Quality (DEQ)] will be required,
17 and will be based on an inspection by the county
18 sanitarian. The single family [residence] will
19 not discharge water into the river. The land
20 resource will not be adversely affected because
21 the single family residence is an allowed use
22 under the zoning code and the 150 foot buffer
23 along the river will protect the river bank area."
24 Record 7-8.

25 The decision also imposes the following conditions:

26 "* * * * *

27 "2. The dwelling shall be placed no closer than
28 150 feet from the ordinary high water mark of
29 the Willamette River.

30 "3. The applicant shall not remove any trees
31 within 150 feet of the ordinary high water
32 mark.

33 "* * * * *

34 "5. The applicant shall obtain all appropriate
35 building and septic permits.

1 "6. Runoff from the dwelling shall be directed
2 toward the Willamette River." Record 14-15.

3 Petitioner contends the above quoted findings are
4 impermissibly conclusory and are not supported by
5 substantial evidence in the record. Petitioner argues the
6 subject property is within a region designated by the Water
7 Resources Department as a "Groundwater Limited Area."
8 Petitioner contends the findings should have addressed the
9 impacts of the proposed well and septic tank system on the
10 water and land resources of the adjacent properties.
11 Petitioner argues, however, that such necessary
12 determinations cannot be made without additional information
13 on the size and nature of the proposed dwelling. Petitioner
14 maintains the fact that a single family dwelling is
15 potentially allowable in the WRG zone does not, in itself,
16 establish compliance with YCZO 902.06.D. Petitioner also
17 contends that with regard to the impacts of the proposed
18 septic system, the challenged decision impermissibly defers
19 a determination of compliance with YCZO 902.06.D to future
20 decisions made by DEQ and the county sanitarian, without
21 notice or opportunity for comment.

22 Intervenors argue the county has not delegated its
23 determination of compliance with YCZO 902.06.D to DEQ and
24 the county sanitarian, but rather has properly determined
25 that YCZO 902.06.D can be satisfied if the proposed septic
26 system complies with DEQ requirements and imposed a
27 condition of approval to ensure that it does so.

1 Intervenor point out the county also found the Groundwater
2 Limited Area designation does not prohibit drilling wells
3 for domestic use. Record 4. Intervenor further note the
4 decision includes the following findings:

5 "The applicant has obtained septic tank approval
6 from [DEQ]. [T]here is no issue regarding the
7 availability of water by means of an individual
8 well, which is a common method of providing water
9 in this entire area." Record 14.

10 According to intervenor, these findings, together with
11 those quoted above, are sufficient to establish compliance
12 with YCZO 902.06.D. Finally, intervenor argue the findings
13 are supported by the county staff report and a statement by
14 intervenor's attorney that DEQ septic tank approval has been
15 obtained. Record 18, 53.

16 We agree with intervenor that the challenged decision
17 finds the proposal complies with YCZO 902.06.D, and does not
18 delegate that determination to DEQ or the county sanitarian.
19 However, the county's findings must state the facts it
20 relies on and explain why those facts lead it to the
21 conclusion that YCZO 902.06.D is satisfied. In this regard,
22 we agree with petitioner that the findings are impermissibly
23 conclusory.

24 With regard to air resources, the findings simply
25 conclude that a single family dwelling will not cause
26 adverse impacts on air quality. With regard to land
27 resources, the findings simply conclude, without
28 explanation, that the 150 foot buffer along the river "will

1 protect the river bank area."⁴ Record 8. With regard to
2 water resources, the findings simply rely on the fact that
3 DEQ and county sanitarian approval of the septic system will
4 be required, and that the dwelling will not discharge water
5 directly into the river.⁵ However, the findings do not
6 address issues relevant to water resources raised by
7 petitioner, such as the impacts of runoff from the proposed
8 development and the impacts of drilling and use of an
9 additional well on the water resources of the adjacent
10 properties.

11 Because the county's findings are inadequate to
12 demonstrate compliance with YCZO 902.06.D, no purpose would
13 be served by reviewing the evidentiary support for those
14 findings.⁶ DLCD v. Columbia County, 16 Or LUBA 467, 471
15 (1988).

16 This subassignment of error is sustained.

⁴The findings also state land resources will not be adversely affected because a single family dwelling is an allowed use under the YCZO. However, that a use is listed as permitted does not mean it will necessarily preserve the air, water and land resources of the WRG Overlay District. That is what must be determined under YCZO 902.06.D.

⁵Although the decision also states that DEQ septic system approval has been obtained, and intervenors' attorney's letter in the record states a copy of such approval was submitted to the county, no such approval is included in the record.

⁶However, we note that the only evidence in the record to which we are cited by the parties is a reference to a DEQ septic tank approval, which is not itself in the record, and a statement in the staff report that installation of a septic system satisfying DEQ standards "will assure the neighbors' water and soil will not be contaminated." Record 53.

1 **C. YCZO 902.06.E**

2 YCZO 902.06.E establishes the following standard for
3 WRG permits:

4 "[L]ands exhibiting [U.S. SCS] Class I-IV soils
5 for agricultural production shall be preserved and
6 maintained for farm use."

7 There is no dispute that the subject property is
8 comprised entirely of Class II and III soils. There is also
9 no dispute that the property is the subject of a "committed"
10 exception to Goal 3, adopted by the county as part of its
11 acknowledged comprehensive plan. With regard to the
12 applicability of YCZO 902.06.E in these circumstances, the
13 challenged decision states:

14 "A Goal 3 exception was previously taken for the
15 area in which the property is located which
16 allowed the area to be zoned VLDR-2 1/2.
17 [YCZO 902.06.E] is not applicable because, as a
18 result of the exception taken to agricultural
19 Goal 3, the property is available for residential
20 use and is not required to be preserved and
21 maintained for agricultural use. * * *"⁷
22 (Emphasis added.) Record 8.

23 Petitioner contends YCZO 902.06.E is unambiguous and
24 can only be interpreted to mean that all Class I-IV soils in
25 the WRG zone must be preserved for agricultural use.
26 Therefore, according to petitioner, no dwelling can be

⁷The challenged decision also includes an alternative interpretation of YCZO 902.06.E as being applicable to, but nevertheless satisfied by, the subject proposal. Because we sustain the county's interpretation of YCZO 902.06.E as being inapplicable to land for which an exception to Goal 3 has been taken, we do not consider the county's alternative interpretation.

1 placed on Class I-IV soils in the WRG zone. Petitioner
2 points out that YCZO 902.06.E uses the word "shall" and,
3 under YCZO 202.1 "shall" is mandatory. Petitioner also
4 argues that in J.R. Golf Services, Inc. v. Linn County, 62
5 Or App 360, 661 P2d 91 (1983), the court of appeals
6 interpreted a similar code standard ("agricultural lands
7 shall be preserved and maintained for farm use") not to
8 allow approval of a golf course on such land.

9 As explained above, this Board is required to defer to
10 a local governing body's interpretation of its own
11 enactment, unless that interpretation is contrary to the
12 express words, purpose or policy of the local enactment or
13 to a state statute, statewide planning goal or
14 administrative rule which the local enactment implements.
15 ORS 197.829; Gage v. City of Portland, supra; Clark v.
16 Jackson County, supra. This means we must defer to a local
17 government's interpretation of its own enactments, unless
18 that interpretation is "clearly wrong." Goose Hollow
19 Foothills League v. City of Portland, 117 Or App 211, 217,
20 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89,
21 93, 840 P2d 1354 (1992). Further, where local enactments
22 contain a variety of arguably relevant provisions that
23 equally support different interpretations, the selection of
24 an interpretation is for the local government to make.
25 Reusser v. Washington County, 122 Or App 33, 36-37, 857 P2d
26 182, rev den 318 Or 60 (1993); West v. Clackamas County,

1 supra.

2 YCZO 902.06.E appears to require that all Class I-IV
3 soils in the WRG zone be preserved for farm use. On the
4 other hand, the county comprehensive plan includes a
5 committed exception to Goal 3 for the subject property.⁸
6 Although we are not cited to the specific location or text
7 of that exception, any committed exception to Goal 3 must be
8 based on a conclusion that it is impracticable to put the
9 subject property to farm use. ORS 197.732(1)(b); Goal 2,
10 Part II(b). Thus, with regard to land in the WRG zone for
11 which the county has taken an exception to Goal 3, the plan
12 and YCZO conflict, to the extent the former says it is
13 impracticable to put such land to farm use whereas the
14 latter says Class I-IV soils on such land are to be
15 preserved for farm use. Where such a conflict exists, we
16 cannot say the county is "clearly wrong" in adhering to its
17 plan and interpreting YCZO 902.06.E as inapplicable to land
18 for which an exception to Goal 3 has been taken.⁹

19 This subassignment of error is denied.

20 The second and third assignments of error are denied.

21 The county's decision is remanded.

⁸Exceptions to the statewide planning goals must be adopted as part of a local government's comprehensive plan. ORS 197.732(8); OAR 660-04-015.

⁹The court of appeals' interpretation of a similar code provision in J.R. Golf Services, supra, has little relevance here, as the property at issue in J.R. Golf Services was not the subject of a Goal 3 exception, but rather was zoned for exclusive farm use.