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

GENE R. BOTHAM and PATRICIA)
BOTHAM,)
)
Petitioners,)
)
vs.)
)
UNION COUNTY,)
)
Respondent,)
)
and)
)
OREGON DEPARTMENT OF FISH)
AND WILDLIFE,)
)
Intervenor-Respondent.)

LUBA No. 98-012
FINAL OPINION
AND ORDER

Appeal from Union County.

Jonel K. Ricker, La Grande, filed the petition for review. With him on the brief was Birnbaum & Ricker. D. Rahn Hostetter, Enterprise, argued on behalf of petitioner.

Russell B. West, Union County Counsel, La Grande, filed a response brief and argued on behalf of respondent.

William R. Cook, Assistant Attorney General, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Hardy Myers, Attorney General; David Schuman, Deputy Attorney General and Michael Reynolds, Solicitor General.

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

REMANDED 07/23/98

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 Petitioners appeal the county's conditional approval of
4 their application for a "lot-of-record" dwelling (the disputed
5 dwelling) in the county's A-4 Timber Grazing Zone.

6 **MOTION TO INTERVENE**

7 The Oregon Department of Fish and Wildlife (intervenor)
8 moves to intervene in this appeal on the side of respondent.
9 There is no opposition to the motion, and it is allowed.

10 **FACTS**

11 ORS 215.705 authorizes dwellings in farm or forest zones
12 on certain lots or parcels lawfully created prior to 1985.¹
13 The relevant Union County land use regulations generally
14 parallel parts of ORS 215.705.² The criteria applied by the
15 county in approving the disputed dwelling are set out at Union
16 County Zoning, Partition and Subdivision Ordinance (UCZPSO)
17 5.03(3)(a)(A)-(H). The county's findings that the challenged
18 application complies with the seven criteria set out at UCZPSO
19 5.03(3)(a)(A)-(G) are not challenged by any party in this
20 appeal. The eighth approval criterion under UCZPSO 5.03,
21 UCZPSO 5.03(3)(a)(H), provides:

22 "The proposed dwelling will comply with the
23 requirements of the acknowledged land use plan and

¹The dwellings authorized by ORS 215.705 are commonly referred to as "lot-of-record" dwellings.

²There is no issue presented in this case concerning differences between the county's land use regulations and the statutory provisions set out at ORS 215.705.

1 other County land use regulations and other
2 provisions of law."³

3 The subject 160-acre property is located within an area
4 designated by the Union County Comprehensive Plan as critical
5 wildlife habitat and big game winter range. In approving the
6 disputed dwelling, the county applied provisions of its
7 comprehensive plan and land use regulations that were adopted
8 to protect the subject property for its values as a critical
9 wildlife habitat and big game winter range. The challenged
10 decision explains:

11 "The County Land Use Plan * * * defines 'critical
12 big game winter range' as those areas where large
13 concentrations of big game are known to occur during
14 winters with normal to above normal amounts of snow,
15 or normal amounts of snow during periods of
16 extremely low temperatures. This area is extremely
17 critical to the continued welfare of the animals
18 dependent upon it." Record 6.

19 The decision goes on to identify UCZPSO 20.09 as the county's
20 land use regulation adopted to regulate significant Statewide
21 Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and
22 Natural Resources) resources. UCZPSO 20.09(3)(A) provides:

23 "When a 3A or 3C (limit conflicting uses) decision
24 has been made as indicated in the comprehensive
25 plan, the applicant must, in coordination with the
26 responsible agency, develop a management plan which
27 would allow for both resource preservation and the
28 proposed use."⁴ If the responsible agency and the

³This criterion is nearly identical to the statutory criterion set forth at ORS 215.705(1)(c).

⁴Under the then applicable Land Conservation and Development Commission Goal 5 administrative rules, the county was required to develop one of three types of "Programs to Achieve the Goal." Those three types of Goal 5 programs are: (1) require protection of a resource site, (2) allow the uses which conflict with the resource site fully, or (3) limit the conflicting

1 applicant cannot agree on such a management plan,
2 the proposed activity will be reviewed through the
3 conditional use process. 3A sites will be preserved
4 where potential conflicts may develop. Conflicts
5 will be mitigated in favor of the resource on 3C
6 sites." (Emphasis added.)

7 The applicant and the Oregon Department of Fish and
8 Wildlife (ODFW) were not able to agree on a management plan
9 for the proposed dwelling. Therefore, the applicant prepared
10 a management plan, which was subject to conditional use review
11 by the planning commission. The planning commission denied
12 the application, finding that "conflicts between wildlife and
13 residential development cannot be mitigated at the proposed
14 site * * *." Record 38. The planning commission also found
15 that the applicant had not demonstrated compliance with the
16 criteria set forth at UCZPSO 20.09(5).⁵

uses. OAR Chapter 660-16-010. These three programmatic options under Goal 5 are commonly referred to as "3A," "3B" or "3C" programs, respectively. The county's comprehensive plan makes a "3C" decision for the subject property.

⁵UCZPSO 20.09(4) requires that "[u]nder the conditional use process land use decisions will consider the economic, social, environmental, and energy consequences when attempting to mitigate conflicts between development and resource preservation. UCZPSO 20.09(5) provides:

"The following criteria shall be considered, as applicable, during the appropriate decision making process:

- "A. ECONOMIC: The use proposed is a benefit to the community and would meet a substantial public need or provide for a public good which clearly outweighs retention of the resources listed in Section 20.09(1).
- "B. SOCIAL: The proposed development would not result in the loss of or cause significant adverse impact to a rare, [one-of-a-kind] or irreplaceable resource as listed in Section 20.09(1).
- "C. ENERGY: The development, as proposed, would support energy efficient land use activities for such things as transportation costs, efficient utilization of urban services, and retention of natural features which create micro climates conducive to energy efficiency.

1 On appeal, the Union County Board of Commissioners
2 (county commissioners) found that it lacked authority under
3 UCZPSO 20.09(3)(A), quoted above, and the Goal 5 rule
4 provisions which UCZPSO 20.09(3)(A) implements, to deny the
5 disputed application. The county commissioners also found
6 that in considering a site subject to a 3C decision, the
7 county commissioners may only "limit the dwelling so as to
8 protect the resource site to some desired extent."⁶ Record 9.

9 Beyond the above noted discussion of UCZPO 20.09(3)(A),
10 the challenged decision does not specifically identify or
11 discuss UCZPSO 20.09 or any of its subsections. There is no
12 express discussion of UCZPSO 20.09(4) or the criteria that are
13 to be considered under UCZPSO 20.09(5). See n5. Neither does
14 the challenged decision cite or discuss UCZPSO 20.09(6), which
15 discusses "conditions" the "reviewing body may impose."⁷

16 The challenged decision acknowledges ODFW's concerns
17 about the proposed house being located at a higher elevation
18 than and over 1/2 mile from the nearest residence and that a
19 new steep access road of approximately 3/4 mile would be
20 required. The decision then explains that the winter range

"D. ENVIRONMENTAL: If alternative sites in Union County for
purposed development are available which would create
less of an environmental impact of [sic] any of the
resources listed in Section 20.09(1), major consideration
should be given to these options."

⁶No party challenges either of these findings.

⁷This provision is central to petitioners' assignment of error and is
discussed more fully below.

1 is, by definition, that area occupied by concentrations of
2 wildlife during "winters with normal to above normal amounts
3 of snow, or normal amounts of snow during periods of extremely
4 low temperature." Record 9. The decision goes on to find
5 that while the record is silent concerning the relevant time
6 period during which snow is present, the "winter conditions"
7 that define the winter range "generally extend from December 1
8 until March 31." Record 9. The county commissioners then
9 approved the application with conditions to mitigate impacts
10 on the critical wildlife habitat areas. One of the conditions
11 limits "residential use to an annual season to extend from
12 April 1 until November 30." Record 9. Petitioners challenge
13 that condition.

14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioners' assignment of error has three parts. First,
16 petitioners contend that the condition that effectively
17 precludes occupancy of the dwelling for four months each year
18 is not authorized by the UCZPSO. Second, petitioners contend
19 that even if such a condition were authorized, the county
20 commissioners' findings that support the condition are not
21 adequate to explain why the four-month period was selected.
22 Finally, petitioners argue the evidentiary record is not
23 sufficient to support the findings that explain why the
24 condition was imposed.

1 **A. UCZPSO 20.09(6)**

2 As discussed above, UCZPSO 20.09(3) requires production
3 of an agreed-to management plan to address possible conflicts
4 or, alternatively, a conditional use review to ensure that
5 conflicts are mitigated. UCZPSO 20.09(4) and (5) identify
6 relevant considerations for the conditional use review, if
7 such a review is required. As relevant, UCZPSO 20.09(6) then
8 provides:

9 "The reviewing body may impose the following
10 conditions, as applicable upon a finding of fact
11 that warrants such restrictions:

12 "* * * * *

13 "C. BIG GAME WINTER RANGE AND BIG GAME CRITICAL
14 HABITAT: A proposed new structure requiring a
15 conditional use may be required to:

16 "1. Be located as close as possible to an
17 adjacent compatible structure (a
18 compatible structure shall be any
19 structure which does not adversely affect
20 the intended use of another structure);

21 "2. Share a common access road or where it is
22 impossible to share a common access road,
23 locate as closely as possible to the
24 nearest existing public road in order to
25 minimize the length of access from the
26 nearest road.

27 "* * * * *."⁸ (Emphasis added.)

28 Petitioners argue the challenged condition is not authorized
29 by UCZPSO 20.09(6).

⁸Three of the subsections of UCZPSO 20.09(6) omitted from the portion of that section quoted in the text identify limitations or requirements that "may" be required to protect "significant aggregate sites," "wetlands and natural areas" and "avian habitat." The other omitted subsection imposes certain requirements within portions of the Minam River Scenic Waterway that are regulated under the Oregon Scenic Waterways Rules.

1 As the county and intervenor point out, ORS 215.416(4)
2 expressly authorizes the county to "impose such conditions as
3 are authorized by statute or county legislation" when
4 approving land use permits. However, that begs the question
5 of whether UCZPSO 20.09(6) is "county legislation" that
6 authorizes the imposition of conditions such as the one
7 imposed in this case. More precisely, nothing in ORS
8 215.416(4) assists us in determining whether UCZPSO 20.09(6)
9 was adopted to limit whatever authority the county may
10 otherwise have to impose conditions of approval when approving
11 lot-of-record dwellings under UCZPSO 20.09.⁹

12 Much of the argument in the response briefs about the
13 different types of conditions that local governments may
14 impose and how those conditions are reviewed by this Board
15 have no bearing on the central issue presented by petitioners.
16 That central issue is whether UCZPSO 20.09(6) limits the scope
17 of the conditions that the county may impose under UCZPSO
18 20.09.

19 The county argues in its brief that the verb "may" in
20 UCZPSO 20.09(6) shows that section was intended to provide the
21 county "may" or "may not" include the specified conditions, or
22 "may include additional conditions." Respondent's Brief 18.

⁹One reason the county might have intended UCZPSO 20.09(6) to limit the scope of permissible conditions of approval is to comply with the requirement of OAR 660-16-010 that 3C Goal 5 programs provide "clear and objective conditions or standards." See Collins v. LCDC, 75 Or App 517, 707 P2d 599 (1985).

1 The county also cites the following from the UCZPSO 21.06
2 provisions governing conditional uses generally:

3 "The following standards and criteria shall govern
4 conditional uses * * *:

5 "1. A conditional use shall ordinarily comply with
6 the standards of the zone concerned for uses
7 permitted outright except as specifically
8 modified by the Planning Commission in granting
9 the conditional use.

10 "* * * * *."

11 The county contends the above quoted provision demonstrates it
12 has broad authority to impose conditions through its
13 conditional use process. The county further argues that the
14 unpredictability of the facts that will be encountered by the
15 county in performing its obligation to mitigate impacts under
16 UCZPSO 20.09(3)-(5) make it unreasonable to interpret UCZPSO
17 20.09(6) to impose the kind of limitation that petitioners
18 contend is imposed by that subsection. Intervenor concurs
19 with the county's argument, and both the county and intervenor
20 argue we must defer to the county's interpretation.

21 We agree with the unstated assumption of all parties that
22 UCZPSO 20.09(6) is ambiguous. It may be that if UCZPSO
23 20.09(6) is interpreted in context with other provisions of
24 UCZPSO 20.09 and the general conditional use provisions in
25 UCZPSO Article 21, it need not be interpreted to limit the
26 scope of the conditions the county may impose to address the
27 requirement of UCZPSO 20.09(3)-(5) that conflicts with

1 identified Goal 5 resources be mitigated.¹⁰ If the county
2 commissioners adopted that interpretation, we may be required
3 to defer to it under the highly deferential standard of review
4 required by ORS 197.829(1) and Clark v. Jackson County, 313 Or
5 508, 836 P2d 710 (1992).

6 Where a petitioner alleges a decision violates an
7 ambiguous land use regulation provision, and a local
8 government argues its interpretation of the ambiguous land use
9 regulation is due deference under ORS 197.829(1), we must
10 first determine whether the decision actually includes a
11 reviewable interpretation that is entitled to deference under
12 ORS 197.829(1). The local government's interpretation may
13 either be express or implied. Alliance for Responsible land
14 Use v. Deschutes Cty., 149 Or App 259, 942 P2d 836 (1997), rev
15 allowed 326 Or 464 (1998). However, LUBA is only required to
16 defer to a local government's interpretation, whether that
17 interpretation is express or implied, where the interpretation
18 is adequate for review. Weeks v. City of Tillamook, 117 Or
19 App 449, 452-53 n3, 844 P2d 914 (1992).

¹⁰We are not sure we agree with respondent that the portion of UCZPSO 21.06 quoted above and in respondent's brief can be interpreted to constitute a general grant of authority to impose conditions of approval. However another section of the Conditional Use Article included in the copy of the UCZPSO on file at LUBA provides "[i]n addition to the general requirements of this ordinance, in granting a conditional use the [Planning] Commission may attach conditions which it finds are necessary to carry out the purposes of this ordinance." Assuming this provision is part of the current UCZPSO, it appears to constitute the kind of general grant of authority to impose conditions of approval that respondent claims is contained at UCZPSO 21.06.

1 Here there is neither an express nor an implied
2 interpretation of UCZPSO 20.09(6). As previously noted, the
3 county commissioners' decision does not expressly cite or
4 address either the considerations and criteria identified by
5 UCZPSO 20.09(3)-(5) or the language of UCZPSO 20.09(6). The
6 decision does find that there was "no objection to the
7 applicant's proposed dwelling and road locations, [and]
8 therefore those sites are accepted as approval conditions."
9 Record 9. However, the decision does not state that this
10 finding is adopted to address UCZPSO 20.09(6). Even if it
11 were, it does not express a reviewable interpretation of
12 UCZPSO 20.09(6).

13 This is not a case where the county's interpretation of
14 the relevant code provisions is inherent in the way the county
15 applied the code. See Alliance for Responsible land Use v.
16 Deschutes Cty., 149 Or App 266-67; Winkler v. City of Cottage
17 Grove, ___ Or LUBA ___ (LUBA No. 96-094, October 6, 1997) slip
18 op. 3; Central Bethany Development Co. v. Washington County,
19 ___ Or LUBA ___ (LUBA No. 96-229, August 26, 1997), slip op.
20 5. Neither is this a case where the county's interpretation
21 can be implied to resolve an irreconcilable conflict between
22 code provisions. See Hough v. City of Redmond, ___ Or LUBA
23 ___ (LUBA No. 97-069, September 8, 1997), slip op. 2-3. As far
24 as we can tell from the decision, the county never considered
25 the question of whether UCZPSO 20.09(6) limits its authority

1 to impose conditions under UCZPSO 20.09.¹¹ Therefore, we do
2 not believe it is appropriate to assume the county
3 commissioners interpret UCZPSO 20.09(6) in the manner the
4 county suggests in its brief, simply because the county
5 commissioners imposed the disputed condition. An equally
6 plausible explanation for the condition is that the county
7 commissioners never considered the question of its authority
8 to impose the condition when it imposed the disputed
9 condition.

10 Where there is no express or implied interpretation, or
11 the local interpretation is inadequate for review, this Board
12 may interpret the plan or land use regulation in the first
13 instance, or remand the decision for the local government to
14 adopt any required interpretations. ORS 197.829(2); Opp v.
15 City of Portland, 153 Or App 10, 14, ___ P2d ___ (1998);
16 Bradbury v. City of Bandon, ___ Or LUBA ___ (LUBA No. 97-033,
17 November 25, 1997), slip op. 3; Friends of Metolius v.
18 Jefferson County, 31 Or LUBA 160, 163 (1996); Marcott
19 Holdings, Inc. v. City of Tigard, 30 Or LUBA 101, 122 (1995).
20 We believe a remand for the county to explain how it
21 interprets UCZPSO 20.09(6) is the appropriate course here.
22 Based on the arguments before this Board, we cannot say that
23 either the interpretation advanced by petitioners or the

¹¹In contrast, it is at least possible to determine that the planning commission decision applied UCZPSO 20.09(4)-(6). We need not and do not express a position whether the planning commission decision includes an interpretation of UCZPSO 20.09(6) which is adequate for review.

1 interpretation advanced by respondents is reversible under ORS
2 197.829(1). The purpose of UCZPSO 20.09(6) is unclear and
3 appears to be subject to more than one interpretation. In
4 such a circumstance, rather than proceed to decide the meaning
5 of UCZPSO 20.09(6) ourselves, it is more appropriate for LUBA
6 to remand the decision to allow the county commissioners to do
7 so. Opp v. City of Portland, 153 Or App 14; Thomas v. Wasco
8 County, 30 Or LUBA 302, 313 (1996).

9 This subassignment of error is sustained.

10 **B. Adequacy of Findings**

11 Assuming without deciding that the county has authority
12 to impose the disputed condition, we discuss the adequacy of
13 the findings the county adopted to justify imposing the
14 condition. Although the county commissioners' findings could
15 be more detailed, they are adequate to explain that the reason
16 the condition was imposed is to prevent the conflicts with
17 wildlife use of this property that might result by virtue of
18 human presence during the months the subject property is being
19 used as winter range. The findings are also adequate to
20 explain that by limiting the possibility of human presence
21 between December 1 and March 31, such conflicts are
22 appropriately limited during that period.¹²

¹²As petitioners note, prohibiting them from living in the home for four months each year would not prevent them from nevertheless travelling to the property during those four months. While that may be true, the county could reasonably conclude the level of human presence during the four months clearly will be reduced if petitioners are not allowed to occupy the dwelling as a full-time residence during that period.

1 This subassignment of error is denied.

2 **C. Evidentiary Support for the Disputed Findings**

3 While the findings are adequate to explain the county's
4 reasons for imposing the condition and why the condition will
5 mitigate identified conflicts, the findings candidly admit the
6 record contains no evidence supporting the selection of
7 December 1 through March 31 as the appropriate period to
8 prohibit occupancy. Record 9. The standard applied by this
9 Board when considering evidentiary challenges to conditions of
10 approval is relatively low. Benjamin Franklin Dev. v.
11 Clackamas County, 14 Or LUBA 758 (1986). However, that
12 standard is not met here. We cannot agree with the county
13 commissioners that it is "general[ly] accepted knowledge" that
14 the subject property only functions as winter range between
15 December 1 and March 31.¹³ The problem here is the almost
16 total lack of evidence on the question. We reject
17 respondent's argument that the staff's suggestion of the time
18 period included in the condition together with the lack of an
19 objection from ODFW are sufficient to constitute substantial
20 evidence of the period of time the subject property functions
21 as winter range.

22 This subassignment of error is sustained.

23 The county's decision is remanded.

¹³We do not mean to suggest that detailed study or a high level of scientific justification is required to support whatever period of time the county commissioners may select. The opinion of a qualified wildlife biologist or other person knowledgeable about winter range undoubtedly would suffice to constitute substantial evidence.