

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DENNIS TYLKA and JOYCE TYLKA,
Petitioners,

VS.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 99-093

FINAL OPINION AND ORDER

Appeal from Clackamas County.

Dennis Tylka and Joyce Tylka, Welches, filed the petition for review and argued on their own behalf.

Michael E. Judd, Assistant County Counsel, filed the response brief and argued on behalf of the respondent.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

REMANDED 04/20/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision determining that a proposal for a recreational vehicle (RV) camping site on river frontage property does not require a permit under the county's River and Stream Conservation Area (RSCA) regulations.

FACTS

The subject property is a 50 by 100-foot lot zoned Residential Recreational (RR), with 50 feet of frontage along the Salmon River. The lot is improved with a gravel driveway and an overgrown 24 by 40-foot gravel parking pad located approximately 17 feet from the river's mean high water line. The Salmon River is a designated resource in the county's Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) inventory. The lot is within an area subject to regulation under the county's RSCA regulations. Clackamas County Zoning and Development Ordinance (ZDO) 704.

We described some of the relevant history of this property in *Tylka v. Clackamas County*, 34 Or LUBA 14, 16-17, aff'd 153 Or App 412, rev den 327 Or 620 (1998) (*Tylka III*):

"In 1989, the previous owners of the subject property cleared and graded the lot's southeast corner and installed a gravel driveway and parking pad, apparently to enable an RV to park on the property for recreational purposes. Petitioners, who own a dwelling on an adjacent lot, complained by phone to the county that the development was illegal. They did not file a formal challenge of that development with the county. The county investigated, but determined that no permit was required for the work at the site. Nonetheless, the property was not used subsequently for RV camping. The only use of the parking pad reflected in the record is occasional use by fishermen to access the river.

"Sometime thereafter, intervenor purchased the lot, and, in November 1996, applied for a conditional use permit to park an RV on the subject property while vacationing. A county hearings officer determined that the proposed RV campsite was permitted as a 'private noncommercial recreational use' or similar use under [ZDO] 813.01(A) or (E), and approved the application. The hearings officer approved the permit with conditions, among them that

1 intervenor obtain a[n RSCA] permit and fire district approval.” (Footnote
2 omitted.)

3 In *Tylka III*, we affirmed the county’s conclusion that the proposed RV campsite was
4 permitted as a private noncommercial recreational use under the county’s code. On August
5 28, 1997, while our decision in *Tylka III* was on appeal, the county adopted a number of
6 revisions to the ZDO as part of periodic review. One revision repealed ZDO 704 (henceforth
7 old ZDO 704) and replaced it with the current version, pursuant to a periodic review work
8 task. The county’s revision to ZDO 704 was approved by the Director of the Department of
9 Land Conservation and Development (DLCD), pursuant to OAR 660-025-0150(1)(a).
10 However, that approval was appealed to the Land Conservation and Development
11 Commission (LCDC). Therefore, ZDO 704 is not yet considered acknowledged to comply
12 with applicable statewide planning goals. OAR 660-025-0160(8).

13 After the appellate course of *Tylka III* was resolved, the landowner filed an
14 application for a RSCA permit pursuant to ZDO 704, as required by the county’s 1997
15 approval. A county hearings officer determined that the proposed RV campsite does not
16 require a RSCA permit, because nothing in ZDO 704 requires county approval for such uses.

17 This appeal followed.

18 **FIFTH ASSIGNMENT OF ERROR**

19 Petitioners argue that the county misconstrued ZDO 704 in finding that the proposed
20 RV campsite is not regulated by its provisions.

21 Both old ZDO 704 and the current version protect identified rivers, including the
22 Salmon, by prohibiting or regulating certain activities within a specified distance of the river.
23 ZDO 704.04 provides a minimum setback of 100 feet from the mean high water line for
24 “primary and accessory structures.”¹ ZDO 704.07(A) requires that a minimum 75 percent of

¹ZDO 704.04 provides in relevant part:

1 the setback distance “shall be preserved with native vegetation” as a buffer area.² Within
2 that buffer area, tree cutting and grading is prohibited, with certain exceptions. In addition,
3 ZDO 704.07(B)(3) provides that “[v]egetation removal may occur when approved by the
4 Oregon Department of Fish and Wildlife (ODFW) upon written notification that such
5 removal is required as part of a river or stream enhancement project.” These provisions
6 implement comprehensive plan policies that require retention of “[e]xisting riparian
7 vegetation along streams and river banks * * * to provide fisheries and wildlife habitat,
8 minimize erosion and scouring, retard water velocities, and suppress water temperatures” and
9 preservation of “a buffer or filter strip of natural vegetation along all river and stream banks
10 * * * not [to] exceed 150 feet.” Clackamas County Comprehensive Plan 13.

11 The hearings officer found that the RV proposed to be parked on the existing gravel

“Minimum setbacks for all primary and accessory structures exceeding one hundred twenty (120) square feet or 10 feet in height shall be as follows:

“A. Principal River Conservation Area

“Primary and accessory structures shall be located at least 100 feet from the mean high water line of the river. This minimum setback may be increased up to 150 feet from the mean high water line to lessen the impact of development [based on several factors].”

²ZDO 704.07 establishes the following “Vegetation Preservation Requirements”:

“A. A minimum of seventy-five percent (75%) of the setback area (distance) shall be preserved with native vegetation.

“B. Tree cutting and grading shall be prohibited within the buffer or filter strip, with the following exceptions:

“1. Diseased trees or trees in danger of falling may be removed; and

“2. Tree cutting or grading may be permitted in conjunction with those uses listed in [ZDO] 704.05 and 704.06 to the extent necessary to accommodate those uses.

“3. Vegetation removal may occur when approved by the Oregon Department of Fish and Wildlife (ODFW) upon written notification that such removal is required as part of a river or stream enhancement project.

“* * * * *

1 pad was not a “structure” as defined under the code, and thus the setback standard at ZDO
2 704.04 did not apply. With respect to the vegetation-removal limitations in ZDO 704.07(A),
3 the hearings officer found that those limitations have application only in the “setback area.”
4 The hearings officer reasoned that because the “setback” standard under ZDO 704.04(A) did
5 not apply, the buffer requirement under ZDO 704.07(A) also did not apply. With respect to
6 the prohibitions on tree-cutting or grading at ZDO 704.07(B), the hearings officer found that
7 provision inapplicable because the applicant did not propose either of those activities.

8 **A. ZDO 704.04**

9 Petitioners first challenge the hearings officer’s conclusion that the proposal to park
10 an RV on the existing gravel pad is not a “structure” as defined by ZDO 202.³ If the
11 proposal is a “structure” within the minimum 100 foot setback area, petitioners argue, then it
12 violates ZDO 704.04. However, we rejected a similar argument in *Tylka III*, 34 Or LUBA at
13 23-24:

14 “While petitioners may be correct that the 1989 construction of the gravel RV
15 pad and driveway constitutes a ‘structure’ for purposes of ZDO 1002.05(B),
16 that structure is already extant and intervenor does not propose to create it.
17 For the reasons expressed above, we disagree that the 1989 development work
18 must be considered as part of intervenor’s application. We further disagree
19 that use of an RV as proposed by intervenor constitutes a ‘structure’ for
20 purposes of ZDO 1002.05(B). An RV parked temporarily on a site does not
21 require ‘location on the ground’ in the sense that a building or sidewalk does.”

22 The hearings officer interpreted the definition of “structure” at ZDO 202 consistently
23 with our interpretation in *Tylka III*. We agree with the county that the hearings officer did
24 not err in concluding that an RV is not a “structure” as defined in the county’s code. Thus,
25 the proposal to park an RV within the setback does not violate ZDO 704.04.⁴

³ZDO 202 defines “structure” as “[a]nything constructed or erected, which requires location on the ground or [is] attached to something having a location on the ground.”

⁴As we noted in *Tylka III*, our standard of review of a hearings officer’s interpretation of a local provision is whether that interpretation is “reasonable and correct.” 34 Or LUBA at 19-20 (citing *McCoy v. Linn County*, 90 Or App 271, 752 P2d 323 (1988)).

1 This subassignment of error is denied.

2 **B. ZDO 704.07**

3 Petitioners next challenge the hearings officer’s conclusion that ZDO 704.07 does not
4 apply. Petitioners argue that the applicant proposes not only to park an RV on the gravel
5 pad, but to “maintain” the 24 by 40-foot gravel pad as a recreational site. Petitioners cite to
6 evidence that native vegetation, including small trees, has reestablished itself on the gravel
7 pad over the intervening years since it was built. Petitioners argue that parking on the pad
8 and maintaining it will entail clearing the pad of existing native vegetation, contrary to the
9 requirements of ZDO 704.07(B)(3) and the purpose of the RSCA regulations.

10 The hearings officer concluded generally that the requirement to preserve native
11 vegetation within a defined buffer area at ZDO 704.07(A) did not apply.⁵ The hearings
12 officer did not address ZDO 704.07(B)(3) or whether the proposed use would entail removal
13 of vegetation in violation of that provision. Neither did the hearings officer address whether
14 the activity proposed by the applicant, including maintenance of the gravel pad, would
15 constitute “tree-cutting or grading.”

16 Petitioners argue, and we agree, that the hearings officer erred in concluding that the
17 buffer requirement at ZDO 704.07 applies only when a structure is proposed. While that
18 interpretation is textually plausible, it is equally plausible, and more consistent with the
19 purpose of ZDO 704, to read ZDO 704.07 to impose a buffer on property within the RSCA
20 regardless of whether a structure is proposed on that property.⁶ Under the hearings officer’s

⁵As noted earlier, this conclusion was based on the hearings officer’s finding that ZDO 704.07 is linked to the setback area requirement at ZDO 704.04. The hearings officer had previously determined that because no structure was proposed the setback standard at ZDO 704.04 did not apply.

⁶The purpose of the RSCA as set forth at ZDO 704.01 is:

“A. To maintain the integrity of the rivers and streams in Clackamas County by
minimizing erosion, promoting bank stability, maintaining and enhancing water
quality and fish and wildlife habitats, and preserving scenic quality and recreational
potentials; and

1 interpretation, a landowner who does not propose to construct a structure on his property
2 could, without county approval, remove all vegetation down to the mean high water line,
3 contrary to the purposes of ZDO 704 described in the comprehensive plan and at ZDO
4 704.01. In our view, ZDO 704.04 imposes a minimum 100-foot setback for property such as
5 the subject property, and that setback exists whether the landowner happens to propose a
6 structure on the property or not. The reference in ZDO 704.07(A) to the “setback area” is a
7 means to identify the scope of the requisite buffer area, not, as the hearings officer
8 interpreted it, to indicate that the buffer requirement applies only when a structure is
9 proposed. Consequently, a minimum buffer zone of 75 feet from the high water line exists
10 for property, such as the subject property, where no more expansive setback has been
11 established. Within that buffer zone, ZDO 704.07(A) and (B) prohibit or regulate certain
12 activities. If the use proposed here entails those activities, then ZDO 704.07 applies.

13 At oral argument, the county argued that ZDO 704.07(B) applies only when the
14 applicant proposes to cut trees or grade the land, and should not be interpreted to apply when
15 a landowner merely removes vegetation within the buffer zone. However, it is not at all clear
16 to us that the ZDO 704.07(B) prohibition against most “[t]ree cutting and grading”
17 necessarily describes the universe of prohibited activity within the area that ZDO 704.07(A)
18 requires to “be preserved with native vegetation.” Even if it does, it is not clear that the
19 activity the applicant proposes here necessarily falls outside the meaning of the operative
20 terms “tree cutting” and “grading.” Neither of those terms is defined in the general ZDO
21 definitions at ZDO 202 or the definitions at ZDO 704.02 that apply specifically to the RSCA

“B. To maintain rivers in their natural state to the maximum extent practicable, thereby recognizing their natural, scenic, historic, economic, cultural and recreational qualities; and

“C. To implement the Rivers Area Design Plan stated in the Comprehensive Plan.”

1 regulations.⁷ ZDO 704.07(B)(3) grants an exception to the general prohibition against “tree
2 cutting and grading” within the buffer for “[v]egetation removal * * * approved by the
3 Oregon Department of Fish and Wildlife * * * as part of a river or stream enhancement
4 project.” ZDO 704.07(B)(3) can certainly be read to imply that other kinds of vegetation
5 removal cannot be approved.

6

⁷As noted earlier, petitioners argue the site has become revegetated with small trees and native vegetation. Maintaining the pad certainly could involve cutting those trees and grading or removing vegetation.

1 It may be that, viewed in context, ZDO 704.07 is properly interpreted as regulating
2 vegetation removal. Or it may be that ZDO 704.07 is properly interpreted as regulating
3 vegetation removal only when substantial amounts are removed.⁸ Or it may be, as the
4 county suggests in its brief, that ZDO 704.07 only regulates certain tree cutting and grading,
5 and does not regulate vegetation removal unless it also constitutes “tree cutting” or
6 “grading.” Whatever the correct interpretation of the regulatory scope of ZDO 704.07 may
7 be, it is unclear whether the activity proposed by the applicant is prohibited by ZDO 704.07.
8 Because the hearings officer improperly interpreted ZDO 704.07 as applying only where a
9 structure is proposed, he did not address these questions.

10 Although pursuant to ORS 197.829(2) we could answer the interpretive question of
11 the regulatory scope of ZDO 704.07 here, that provision is sufficiently ambiguous that
12 remand to the county to address that question in the first instance is appropriate. *Bradbury v.*
13 *City of Bandon*, 33 Or LUBA 664, 668 (1997); *Thomas v. Wasco County*, 30 Or LUBA 302,
14 313 (1996) (remand for a necessary interpretation of a local provision is appropriate where
15 the provision is subject to numerous interpretations). After determining the meaning of ZDO
16 704.07, the county must then determine whether the activity proposed by the applicant is
17 regulated or prohibited by ZDO 704.07.

18 This subassignment of error is sustained.

19 The fifth assignment of error is sustained in part.

20 **FIRST, SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

21 In these assignments of error, petitioners argue from various perspectives that the
22 county erred in failing to address whether the proposed RV campsite was consistent with

⁸We note that ZDO 704 applies generally to “development or tree-cutting activity” within the defined area. ZDO 704.08, 704.09. The code defines “development” as “[a]ny man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or any other activity which results in the removal of *substantial* amounts of vegetation or in the alteration of natural site characteristics.” ZDO 704.02(B) (emphasis added).

1 Goal 5. Petitioners argue that Goal 5 is directly applicable to the county's decision, because
2 that decision was subject to ZDO 704, which has not yet been acknowledged to comply with
3 Goal 5. ORS 197.625(3)(b) provides that:

4 “Any approval of a land use decision, expedited land division or limited land
5 use decision subject to an unacknowledged amendment to a comprehensive
6 plan or land use regulation shall include findings of compliance with those
7 land use goals applicable to the amendment.”

8 Petitioners explain that the necessity of addressing Goal 5 was raised before the
9 hearings officer, but the hearings officer failed to address that issue. Instead, as explained
10 above, the hearings officer found based on examination of the text of ZDO 704 that an RV
11 campsite did not require county approval or a permit under those regulations. In its response
12 brief, the county argues that these assignments of error should be denied because the
13 hearings officer correctly concluded that ZDO 704 does not apply. Because the decision did
14 not approve any activity under ZDO 704, the county argues, no “unacknowledged” land use
15 regulation was applied in approving the challenged land use decision, and thus the predicate
16 to the requirement for findings of compliance with the statewide planning goals under
17 ORS 197.625(3)(b) is absent.

18 In resolving the fifth assignment of error we rejected the reason given by the hearings
19 officer for concluding that ZDO 704.07 does not apply. On remand the hearings officer must
20 consider whether ZDO 704.07 applies in this case, irrespective of the question of whether the
21 application proposes a “structure.” The county concedes that if ZDO 704 applies at all, then
22 remand is necessary to address Goal 5.

23 We agree that it was error for the hearings officer to fail to address petitioner's
24 contention below that Goal 5 applies directly to the challenged decision. If the hearings
25 officer determines on remand that ZDO 704.07 does apply, and ZDO 704.07 remains
26 unacknowledged when the decision on remand becomes final, then Goal 5 must be addressed
27 as required by ORS 197.625(3)(b).

1 Even if the hearings officer determines on remand that ZDO 704.07 does *not* apply,
2 the county cannot avoid addressing whether the proposed use is consistent with Goal 5, as
3 long as ZDO 704 remains unacknowledged. The county's argument to the contrary
4 presumes that the regulatory scope of ZDO 704 is necessarily dispositive of the county's
5 obligation to address applicable statewide planning goals, such as Goal 5, pursuant to
6 ORS 197.625(3)(b). However, the flaw in county's logic is that, as long as ZDO 704
7 remains unacknowledged, the county cannot rely on the assumption that the regulatory scope
8 of ZDO 704 is consistent with Goal 5. In other words, the fact that unacknowledged ZDO
9 704 does not regulate the proposed use does not *necessarily* mean that Goal 5, applied
10 directly, also does not regulate that use. Consequently, as long as ZDO 704 remains
11 unacknowledged, the county cannot rely upon the regulatory scope of ZDO 704 to avoid
12 addressing Goal 5.⁹

13 The first, second, third and fourth assignments of error are sustained.

14 **SIXTH ASSIGNMENT OF ERROR**

15 In this assignment, petitioners argue from various perspectives that the county was
16 required to consider the legality and the impacts of the driveway and gravel pad that were
17 installed in 1989 in deciding whether to approve the proposed RV campsite. We rejected a
18 similar argument in *Tylka III*:

19 “[I]ntervenor has filed a discrete application seeking only to use the property
20 as it exists to park an RV for recreational purposes; no modification of the
21 existing parking area is proposed. Because the previous, unappealed
22 development of the parking area is not a part of this approval, the county
23 could not require a conditional use permit for that existing development as
24 part of its evaluation of the proposed use. Nor can petitioners belatedly
25 challenge the 1989 development through an appeal of the county's decision to
26 allow intervenor to use the property for RV parking.” 34 Or LUBA at 22-23
27 (footnote omitted).

⁹Our agreement with petitioners that the county is obligated to address compliance with Goal 5 does not, of course, imply that we agree with petitioners' further arguments that the proposed use is inconsistent with Goal 5. Those arguments are for the county to address in the first instance.

1 In the present case, petitioners advance similar arguments that the county must
2 consider whether the 1989 development complies with various code provisions, in evaluating
3 whether to approve the proposed RV campsite. Even if such arguments are not precluded by
4 our decision in *Tylka III*, petitioners have not articulated a sufficient reason why this Board
5 should reach a different conclusion on this issue in the present case than in *Tylka III*.

6 The sixth assignment of error is denied.

7 The county's decision is remanded.