BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HODGE OREGON PROPERTIES, LLC,
Petitioner,

vs.

LINCOLN COUNTY,
Respondent,

and

ANN M. DENISON,
Intervenor-Respondent.

LUBA No. 2003-157

FINAL OPINION
AND ORDER

Appeal from Lincoln County.

Douglas R. Holbrook, Newport, filed the petition for review and argued on behalf of petitioner. With him on the brief was Litchfield and Carstens, LLP.

Wayne Belmont, County Counsel, Newport, filed a response brief.

Ann M. Denison, Newport, filed a response brief and argued on her own behalf.

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

REMANDED 01/20/2004

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner challenges a county decision approving a forest template dwelling on a 1.2-acre parcel.

MOTION TO INTERVENE

Ann M. Dennison (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject property is triangular-shaped, with the base of the triangle located on the western right-of-way line of the Alsea Highway.[1] The property is forested and steeply sloped. The only level portion of the parcel, and the site proposed for a dwelling, is located approximately 50 feet west of the highway right-of-way. The property is bordered by forest lands managed by the Bureau of Land Management (BLM) to the northwest and commercial forest lands to the southwest. Some properties to the north and south along Alsea Highway have been developed with dwellings. A marina and RV park are located approximately 100 feet to the south of the subject property, across Alsea Highway. The Alsea River flows along the eastern boundary of the Alsea Highway right-of-way.

The subject property is split zoned. Approximately one-third of the easternmost portion of the property is zoned Planned Marine (M-P); the remainder is zoned Timber Conservation (TC). Dwellings are not permitted in the M-P zone. Intervenor proposes to site the dwelling on the portion of the property zoned TC, which allows for forest template dwellings pursuant to Lincoln County Code (LCC) 1.1375(2)(y).

[1] During the proceedings below, intervenor introduced evidence to show that the parcel includes approximately five acres. However, the county relied on county assessment records to conclude that the subject property includes only 1.2 acres. Record 12.

Petitioner opposed intervenor's application below, arguing that intervenor failed to show that the proposed dwelling will not interfere with commercial forest activities, and failed to demonstrate that the dwelling and its septic system will be located entirely on the portion of the property zoned TC, where dwellings are allowed. The county planning director approved the application, with conditions. Petitioner appealed the planning director's decision to the planning commission, which affirmed the planning director's decision. Petitioner then appealed the planning commission decision to the board of county commissioners, which in turn affirmed the planning commission decision, adopting the planning commission's findings and adopting supplemental findings in support of its decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The proposed site plan shows that a portion of the M-P zoned property will be used to site either a primary or secondary septic drainfield. Petitioner argues that because the septic system supports a residential use and is an accessory to the residential use, the septic system may only be allowed on M-P zoned property if residential uses are allowed in the M-P zone. According to petitioner, only water-related development is permitted on the M-P zoned area of the subject property, and that dwellings are not water-related development.

The board of county commissioners concluded that the depiction of the proposed drainfied on the site plan was a conceptual illustration, and that the final location of the septic system would be identified and approved pursuant to subsurface sewage rules administered by the Oregon Department of Environmental Quality (DEQ). The board of county commissioners also concluded that there was nothing in the county's zoning ordinance that regulated the siting of septic systems and, therefore, the fact that all or a portion of intervenor's proposed septic system might be located within the M-P zone did not prevent the county from approving the application for the dwelling, which will indisputably be sited on property zoned TC.[2]

[2] The county's findings state, in relevant part:

We do not believe that the county's conclusion that the zoning ordinance has no bearing on the siting of septic systems is consistent with the county's definition of "dwelling unit." ORS 197.829(1).[3] LCC 1.1115(28) in relevant part, defines dwelling unit as:

> "* * * [Petitioner] entered additional arguments regarding the applicability of the M-P zone standards to the subject request. [Petitioner] argued that the standards of the M-P zone were applicable to the subject decision because the applicant's site plan depicted a 'proposed' sewage disposal area within the M-P zoned portion of the subject property. [Petitioner] further argued that the standards of the M-P zone would prohibit the placement of an on-site sewage disposal system at that location to serve a residential use. [Intervenor] responded by arguing that the site plan depiction of the septic system was of a preliminary nature only and that the required regulatory approvals, which would dictate the ultimate location of the sewage disposal system, had not been secured.
>
> "The planning commission found the M-P zone standards to be inapplicable to the subject request. This finding was based on a determination that the decision of the commission under the criteria applicable to this request was limited to the placement of the proposed dwelling, and that this proposed placement was to be located entirely within the TC zone[d] portion of the subject property. The [board of county commissioners] concurs with this finding of the commission and adopts it as its own determination.
>
> "The [board of county commissioners] also adopts the following additional reasoning:
>
> "The [board of county commissioners] finds that the placement of an on-site sewage disposal system is not, as a jurisdictional matter, a part of the subject decision. [Intervenor's] depiction of such a system on the submitted application materials is for conceptual illustration purposes only. The subject land use decision is in no way determinative of the ultimate location of any system that may be placed on the subject property. The placement of the required on-site sewage disposal system is governed exclusively by the rules and review procedures adopted by the Oregon Environmental Quality Commission * * *. The subject property has not been subjected to the review required pursuant to these rules for the siting and installation of an on-site sewage disposal system and such review is not required by any of the applicable land use criteria for a non-forest dwelling.
>
> "Alternatively, [petitioner] has not cited the [board of county commissioners] to, and the [board of county commissioners] finds no, applicable land use code provision controlling, limiting, or prohibiting the placement of an on-site sewage disposal system. In making this finding, the [board of county commissioners] rejects [petitioner's] argument that on-site site sewage disposal system is, by itself, a 'use' as defined in LCC 1.1115." Record 16-17.

LCC 1.1115(93) defines "use" as "the purpose for which a structure is designed, arranged or intended or for which land is maintained or occupied."

LCC 1.1115(87), in relevant part, defines "structure" as "something constructed or built and having a fixed base on, or fixed connection to, the ground or another structure."

[3] ORS 197.829(1) provides:

"a single unit providing complete, independent living facilities for one or more persons including permanent provisions for living, sleeping, eating, *sanitation* and only one cooking area." (Emphasis added.)

There is no dispute that the county zoning ordinance regulates the siting of dwellings. It is also undisputed that the septic system, wherever it is located, will serve only the proposed dwelling. In that circumstance, we believe that the septic system is part of the dwelling and is therefore subject to the same siting restrictions and limitations that are imposed on the remainder of the dwelling. We reject the county's finding that the septic system is not properly viewed as part of the dwelling.

The parties agree that the M-P zone does not permit dwellings. Therefore, unless the county can find that the dwelling, including the septic system, can be sited on the portion of the property zoned TC, the dwelling may not be allowed.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

LCC 1.1375(7) provides, in relevant part:

"Siting and Fire Protection Standards for Dwellings:

"The following siting fire protection standards shall apply to all new dwellings:

"(a) Dwellings and structures shall be sited on the subject lot or parcel so that:

"(A) They have the least impact on nearby or adjoining forest lands;

"The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

"(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

"(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

"(B) The siting ensures that adverse impacts on forest operations * * * on the tract will be minimized;

"(C) The amount of forest land used to site access roads, service corridors, the dwelling and structures is minimized; and

"(D) The risks associated with wildfire are minimized. The division or commission may impose conditions on any dwelling approval which are deemed necessary to ensure conformance with the standards contained in this paragraph, including, but not limited to, requiring increased setbacks from adjoining properties, siting on that portion of a property least suitable for growing trees, or clustering near existing dwellings or roads." (Bolding omitted.)

The county interpreted LCC 1.375(7)(a) as a *siting* standard rather than an *approval* standard.[4] In this case, the county found that the proposed home site is the only feasible location for

[4] The county's findings state, in relevant part:

"[Petitioner] argued that the planning commission erred in its application of the standards found at LCC [1.1375(7)(a)] * * *. After examining [petitioner's] arguments and the planning commission's findings on these matters, the board [of county commissioners] finds the following:

"[Petitioner]'s arguments appear to misconstrue the standards in question. The standards * * * require the 'least' or 'minimized' impact from the siting of a dwelling on the subject parcel. Thus, the standards are comparative in nature, i.e., they require the selection of the least impact siting option from among those available *on the subject parcel*. In no case would these standards prohibit the siting of a dwelling.

"[Intervenor's] testimony and other evidence in the record demonstrate that residential siting options on the subject parcel are extremely limited. The parcel in question is 1.2 acres in size. Approximately one-third of this area is within the M-P zone, where the placement of a dwelling is impermissible. The remainder of the parcel consists of a small flat bench area just above the M-P zoned portion of the property (the proposed location of the dwelling) and, beyond this area, a small area of steeply sloped land adjoining forested lands to the north and west. Based on the testimony and evidence provided by [intervenor], the planning commission determined that the proposed location of the * * * dwelling was the only practicable location available on the subject property for the siting of a dwelling. On this basis, the commission determined that, if only one location exists for the placement of the dwelling, this location would, by definition, be the location with the least impact in accordance with LCC 1.1375(7)(a).

"The board [of county commissioners] concurs with and adopts this finding. The board [of county commissioners] further finds that even if any other siting options exist on the subject property, such options would, by physical necessity, be located to the west and/or north of the proposed location, and that such alternative locations would be on steeper slopes and in closer proximity to adjoining forested lands and would thus have greater impacts than the selected location." Record 17.

a dwelling. For that reason, the county found the impact the proposed dwelling will have on forest lands cannot be further minimized. In addition, the county noted that the proposed dwelling site must be in the TC zone, and that the area closest to the Alsea Highway is zoned M-P. The county concluded that LCC 1.375(7) is met because the proposed dwelling will be located in the portion of the TC zone that is closest to the Alsea Highway, and that any other location on the parcel where dwellings would be allowed would require construction on steep slopes closer to the adjacent forest lands.

Petitioner argues that LCC 1.1375(7)(a) imposes approval criteria that must be met in order to site a dwelling on the parcel. Petitioner contends that the focus of the criteria is on the proposed dwelling's impact on forest operations, and if a dwelling cannot be sited in such a way as to minimize that impact, the application for the dwelling must be denied. Petitioner further argues that even if the criteria can be read to apply only to the location where a dwelling may be placed and do not, by themselves, provide a basis for denying the application, the findings are inadequate to explain why the proposed home site will minimize the impact of the dwelling on adjacent and nearby forest operations, and those findings are not supported by substantial evidence.

LCC 1.1375(7)(a) implements OAR 660-006-0029(1) and therefore, we do not need to give deference to the county's interpretation of the criteria. Nevertheless, we agree with the county that the criteria do not govern *whether* a dwelling is approved, but rather *where* an approved dwelling may be sited on a parcel. *Fessler v. Yamhill County*, 38 Or LUBA 844, 852 (2000). In addition, we agree with the county that the findings are adequate to explain why the proposed home site minimizes the impact of the dwelling on forest lands. The home site is relatively flat, but further to the west, the slope increases dramatically. Oversized Exhibit G. The county could find, as it did, that the proposed home site is located in the only area where a dwelling could be placed in conformance

with other county standards, and that location, based on the topography of the property, has the least impact on adjacent forest lands.[5]

The second assignment of error is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

LCC 1.1375(6)(b) requires that intervenor "plant a sufficient number of trees on the [subject parcel] to demonstrate that the [parcel] is reasonably expected to meet Department of Forestry stocking requirements at the time specified in Department of Forestry administrative rules."[6] LCC 1.1375(7)(d) and (e) require intervenor to "provide and maintain" primary and secondary fuel breaks on the property.[7] The county found that standards such as LCC 1.1375(d) and (e) impose objective performance standards that can be met through the imposition of conditions of approval and final review by staff pursuant to LCC 1.1210(1).[8] Record 18. The

---

[5] As we noted earlier, the dwelling may not be sited on the one-third of the parcel zoned M-P. Other county criteria prohibit the siting of a dwelling on slopes greater than 40 percent. LCC 1.1375(7)(c). Oversized Exhibit G depicts slopes to the west of the proposed homesite to be between 35 and 75 percent.

[6] LCC 1.1375(6)(b) duplicates OAR 660-006-0029(5)(a). OAR 660-006-0029(5)(d) provides that if a parcel does not meet applicable stocking requirements, the parcel shall be removed from forest tax assessment. LCC 1.1375(6)(e) implements the same penalty for failing to comply with stocking requirements.

[7] LCC 1.1375(7)(d) and (e) provide:

> "(d) A primary fire break no less than 30 feet wide shall be provided and maintained. The primary firebreak may include a lawn, ornamental shrubbery or individual or groups of trees separated by a distance equal to the diameter of the crowns adjacent to each other, or 15 feet, whichever is greater. All trees shall be pruned to at least eight feet in height. Dead fuels shall be removed.
>
> "(e) A secondary firebreak cleared of all dead fuels shall be provided and maintained. The size of the secondary firebreak shall be:
>
> "(A) On slopes of less than 10 percent, 50 feet beyond the primary firebreak.
>
> "(B) On slopes of 11 to 25 percent, 75 feet beyond the primary firebreak.
>
> "(C) On slopes of 26 to 40 percent, 100 feet beyond the primary firebreak.
>
> "(D) On slopes greater than 40 percent, 150 feet beyond the primary firebreak."

[8] LCC 1.1210(1) provides:

county then adopted conditions of approval requiring that intervenor meet the required stocking standards and that intervenor provide and maintain a primary fuel break. The county also required that the secondary fuel break be provided and maintained "as necessary." Record 14.

Petitioner argues that the shape and size of the parcel make it highly unlikely that intervenor can satisfy both the fuel break requirements and the stocking standards. For example, petitioner points to evidence that the dwelling will be located approximately 50 feet from the BLM land. If that is the case, intervenor may satisfy the primary fuel break standards, but cannot fully satisfy the secondary fuel break standards. *See* n 7. Given that evidence, petitioner argues that the county cannot simply adopt conditions of approval that require that those standards be met without adopting findings to show that it is even feasible to meet those conditions.

Petitioner's argument is based on our reasoning in *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-448 (1992), where we said:

> "[T]he county is required to assure that discretionary determinations concerning compliance with approval criteria occur during a stage where the statutory notice and public hearing requirements * * * are observed. * * * Assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure

---

"Procedure for action by the division on ministerial applications not subject to notification requirements:

"(a) The property owner or authorized agent shall submit an application to the division.

"(b) Upon determination that the application is complete, the division may refer the application to affected cities, districts, local, state or federal agencies for comments.

"(c) Within 10 days of determining an application complete, or such longer period as mutually agreed to by the division and the applicant, the division shall approve, deny or, at the director's discretion, refer the application to the Planning Commission for consideration.

"(d) The applicant shall be notified in writing of the division's action.

"(e) All actions of the division may be appealed to the Planning Commission or other hearings body designated by the Board of Commissioners pursuant to LCC 1.1267."

> those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage. * * *
>
> "Where the evidence presented during * * * approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances. * * *" (Citations and footnotes omitted.)

The county argues that our reasoning in *Rhyne* applies only where there is conflicting evidence as to whether the standards can be met. The county further argues that if the standards cannot be met, a building permit will not be issued until intervenor obtains a variance from the standards. The county contends that if intervenor applies for a variance from the stocking requirements or the fuel break standards, petitioner will be given an opportunity to participate in the variance proceedings.

As an initial point, we do not believe that the stocking requirements set out at LCC 1.1375(6) impose approval standards that go to whether a dwelling may be approved on the subject property. As we note above, LCC 1.1375(6) merely provides that the parcel shall be restocked in accordance with Department of Forestry stocking requirements and, if such restocking does not occur, that the parcel shall be removed from forest tax deferral. Those standards, in and of themselves, do not govern whether or where a dwelling on the property will be located.

With respect to LCC 1.375(7)(d) and (e), it is relatively clear from the county's findings that the county imposed the conditions of approval in lieu of finding that such standards can be feasibly met. By choosing that option, the county must allow petitioner an opportunity to participate in the second stage proceedings where that feasibility determination is made. The process set out at LCC 1.1210(1) does not provide petitioner an opportunity to receive notice or participate in the evidentiary proceedings that will result in the county's decision that the conditions of approval are or are not met. Therefore, that process alone is insufficient to provide the protections that are described in *Rhyne*. The county must either adopt findings that explain why they believe the standards can be met in the course of adopting a new decision on remand, or allow petitioner an opportunity to participate in the proceedings where that determination is made.

The third and fourth assignments of error are sustained, in part.

FIFTH ASSIGNMENT OF ERROR

LCC 1.1375(6)(f) provides:

> "The applicant shall provide evidence to the governing body that the domestic water supply is from a source authorized in accordance with the Water Resources Department's administrative rules for the appropriation of ground water or surface water and not from a Class II stream as defined in the Forest Practices Rules, OAR chapter 629. For purposes of this subsection, evidence of a domestic water supply means:
>
> "(A) Verification from a water purveyor that the use described in the application will be served by the purveyor under the purveyor's rights to appropriate water;
>
> "(B) A water use permit issued by the Water Resources Department for the use described in the application; or
>
> "(C) Verification from the Water Resources Department that a water use permit is not required for the use described in the application. If the proposed water supply is from a well and is exempt from permitting requirements under ORS 537.545, the applicant shall submit the well constructor's report to the county upon completion of the well."

The board of county commissioners concluded that, like LCC 1.1375(7)(d) and (e), the verification required by LCC 1.1375(6)(f) can be met by imposing a condition of approval that

requires intervenor to demonstrate to the planning department that intervenor has obtained the required evidence that a domestic water supply is available to serve the subject property in accordance with Water Resources Department rules. Record 18.

For the same reason given for our disposition of petitioner's third and fourth assignments of error, we agree with petitioner that the county's deferral of compliance to planning staff is not appropriate unless the county affords petitioner an opportunity to participate in the proceedings leading to a determination that the standard has been met.

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the county erred in failing to require a showing that an access permit to the subject property can be obtained from the Oregon Department of Transportation (ODOT) for access to the property from Alsea Highway.

Respondents argue that petitioner has not identified any code standard that requires a demonstration that access has been obtained from ODOT in the course of approving a dwelling on property that will use a state highway for access.

A local government is not obliged to adopt findings that demonstrate compliance with requirements from other approval authorities, in the absence of a local code provision that imposes that requirement. *Sitsler v. City of Mill City*, 22 Or LUBA 125, 128 (1991). Petitioner cites to no such local approval standard. Therefore, petitioner's assignment of error provides no basis for reversal or remand.

The sixth assignment of error is denied.

The county's decision is remanded.