

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

3  
4 CAROL PADDOCK,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF LAFAYETTE,  
10 *Respondent,*

11  
12 and

13  
14 BRIDGE STREET PARTNERS  
15 and MICHAEL J. HANKS,  
16 *Intervenors-Respondents.*

17  
18 LUBA No. 2008-194

19  
20 FINAL OPINION  
21 AND ORDER

22  
23 Appeal from City of Lafayette.

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25 Ty K. Wyman, Portland, filed the petition for review and argued on behalf of  
26 petitioner. With him on the brief was Dunn Carney Allen Higgins & Tongue LLP.

27  
28 William A. Monahan, Portland, filed a response brief and Damien R. Hall argued on  
29 behalf of respondent. With him on the brief were Damien R. Hall and Jordan Schrader  
30 Ramis PC.

31  
32 Andrew H. Stamp, Lake Oswego, filed a response brief and argued on behalf of  
33 intervenors-respondents. With him on the brief was Andrew H. Stamp, P.C.

34  
35 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
36 participated in the decision.

37  
38 AFFIRMED

03/13/2009

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

**NATURE OF THE DECISION**

Petitioner appeals a decision by the city approving applications for a planned unit development and a conditional use permit.

**MOTION TO INTERVENE**

Bridge Street Partners and Michael J. Hanks (intervenors), the applicants below, move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

**FACTS**

The challenged decision is the city’s decision on remand from our decision in *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387 (2008). We take the description of the property from our initial decision:

“The subject property is a 21.78-acre parcel zoned Residential (R-1). A portion of the property is located in a Restricted Development Overlay (RDO) zone. The property contains a flat ridge running north to south and is surrounded by steeply wooded slopes on the east, south and west. The north and west boundaries of the property are adjacent to the city’s urban growth boundary and the city limits. The east fork of Millican Creek runs near the eastern edge of the property and Millican Creek runs near the western boundary of the property.

“Petitioners initially proposed a 76-lot Planned Unit Development (PUD), and later reduced the number of proposed lots to 70. Petitioners propose to dedicate approximately seven acres of the steeply sloped areas of the property as open space. The proposed PUD would discharge storm water into Millican Creek. The proposed storm drainage system would send all storm water to a large pipe that would be fitted with an energy dissipater at the point where the storm water discharges into the creek, to protect the banks of the creek from erosion.” *Id.* at 388-89.

As explained above, a portion of intervenors’ property is located within the city’s Restricted Development Overlay District (R-D Overlay). No residential lots are proposed for that portion of the property, but the proposed storm drainage system will be located in that portion of the property.

1 On remand, the city approved the PUD and also approved a conditional use permit for  
2 the portion of the property located within the R-D Overlay. This appeal followed.

3 **ASSIGNMENT OF ERROR**

4 Several sections of the Lafayette Zoning and Development Ordinance (LZDO) are  
5 implicated by the city’s decision. We set out the relevant sections below.

6 LZDO 2.111.04 identifies the circumstances under which a conditional use permit is  
7 required for development of property in an R-D Overlay District:

8 “A. *Unless otherwise permitted in [LZDO] Section 2.111.03, all*  
9 *development within the R-D Overlay District, shall require approval of*  
10 *a Conditional Use, pursuant to Section 3.103. The application may be*  
11 *processed separately or in conjunction with other required land use*  
12 *actions.*

13 “\* \* \* \* \*

14 “C. *With the exception of \* \* \* planned unit developments, a parcel*  
15 *located within the R-D Overlay District is not subject to a conditional*  
16 *use review if the proposed development will be located entirely*  
17 *outside the boundary of the Overlay District.” (Emphases added.)*

18 LZDO 2.111.03 is a list of activities in the R-D Overlay District that do not require a  
19 conditional use permit. In relevant part, LZDO 2.111.03(E) exempts “[p]ublic utilities and  
20 facilities in conjunction with an approved development \* \* \*” from the requirement to obtain  
21 a conditional use permit.<sup>1</sup> If a conditional use permit is required, LZDO 2.111.05 sets out

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<sup>1</sup> LZDO 2.111.03 provides in its entirety:

“Within the R-D Overlay District a conditional use permit shall be required for all new uses, use changes, intensification of uses or site alteration for uses otherwise permitted in the underlying zone except for the following activities which are not subject to review:

- “A. Reasonable emergency procedures necessary for the safety or protection of property.
- “B. Maintenance and repair necessary, and usual, for the continuance of an existing use.
- “C. The placing by a public agency of signs, markers, aids, etc. to serve the public.

1 standards and criteria for a conditional use in the R-D Overlay District, in addition to the  
2 general conditional use standards at LZDO 3.103.<sup>2</sup>

3 The city found that under LZDO 2.111.04(A), conditional use review was not  
4 required for two storm drain lines that serve the PUD but are located on the R-D Overlay  
5 portion of intervenors' property.<sup>3</sup> The city based that decision on its interpretation of the  
6 relevant provisions of the LZDO, specifically LZDO 2.111.03(E) and LZDO 2.111.04(C):

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"D. Activities to protect, conserve, enhance, and maintain public recreational, scenic, historical and natural uses of public lands, identified in a public park master plan approved by the City Council.

"E. Public utilities and facilities in conjunction with an approved development or identified as part of a master utility plan approved by the City Council."

<sup>2</sup> LZDO 2.111.05 provides:

"In addition to the Conditional Use criteria in Section 3.103, a conditional use permit within the R-D Overlay District shall indicate how: (a) the proposal will not affect the following factors; (b) the proposal can be mitigated in some manner to minimize or eliminate potential harmful impacts regarding the following factors; or, (3) *the factors do not apply to the request.* The factors include:

"A. Development shall be directed away from adjacent streams and drainage corridors to the greatest possible extent.

"B. The development, change, or intensification of use shall provide the maximum possible landscaped area, open space, or vegetation between the activity and adjacent streams or drainage corridors.

"C. The fringe along streams and drainage corridors shall be maintained to the maximum extent practical in order to assure scenic quality, protection of wildlife habitat, and protection from erosion. Management of the natural vegetative, including trees or forest cover, shall be subject to the requirements of Section 2.111.06.

"D. Areas of annual flooding, flood plains, and wetlands shall be preserved in their natural state to the maximum possible extent to protect water retention, overflow and other natural functions. The development shall comply with the flood plain or floodway development requirements of the Lafayette Zoning and Development Ordinance." (Emphasis added.)

<sup>3</sup> The city found:

"The \* \* \* application will be reviewed through the conditional use process, but because no private development is proposed in the RD Zone, the review will show the criteria are not applicable \* \* \*." Record 52.

1           “The RD Zone, Section 2.111.03(E), provides an exception and does not  
2 require ‘[p]ublic utilities and facilities in conjunction with an approved  
3 development \* \* \*’ to be reviewed through the conditional use process,  
4 therefore the two public storm drain lines are not required to be reviewed  
5 through the conditional use process. \* \* \* However, the RD Zone, Section  
6 2.111.04(C), refers to ‘\* \* \* a parcel located within the R-D Overlay District’  
7 and requires any parcel that is the subject of a PUD application to be reviewed  
8 through the conditional use process. A portion of the parcel proposed for the  
9 PUD is in the RD Zone, therefore the PUD must be reviewed through the  
10 conditional use process. The practical effect of reviewing the PUD through  
11 the conditional use process is that criteria [LZDO 3.103.03] B-E are met  
12 because no development will occur in the R-D zoned area, except the two  
13 public storm drain lines and they are not required to go through conditional  
14 use review process.” Record 52.

15 From that language, we understand the city to read LZDO 2.111.03(E) broadly to create  
16 something of a categorical exemption from conditional use review for public utilities and  
17 facilities as long as those facilities are uses that are “in conjunction with an approved  
18 development,” even if the “approved development” is a planned unit development.

19           Petitioner and intervenors read LZDO 2.111.03(E)’s exemption much more narrowly  
20 than the city. They argue that the city’s interpretation of LZDO 2.111.03(E) as exempting  
21 the proposed storm drain facilities from conditional use review is inconsistent with the text of  
22 that provision and with other R-D Overlay district provisions. First, they argue that the  
23 proposed storm drain facilities do not meet the requirement for an exemption under LZDO  
24 2.111.03(E) for “public \* \* \* facilities *in conjunction with an approved development* \* \* \*”  
25 because the use of the past tense “approved” refers to a development that received approval  
26 in the past, prior to the proposed development of public facilities in the R-D Overlay district.  
27 Petitioner and intervenors argue that it is unreasonable for the city to interpret that code  
28 provision as referring to the PUD application that was before the city in this matter and made  
29 the public facilities necessary in the R-D Overlay district. Intervenors point to LZDO  
30 1.200.1, which provides that use of present tense words in the LZDO includes the future  
31 tense, and argue that since that code provision does not specify how use of the past tense is to  
32 be treated, the use of the past tense in words used in the LZDO must be given effect.

1 Finally, petitioner argues that under the city’s broad interpretation of LZDO 2.111.03(E),  
2 public utilities and facilities located in the R-D Overlay district escape all planning review.  
3 Petition for Review 7.

4 The city’s response to the petition for review argues that under ORS 197.829(1), the  
5 city’s interpretation of the phrase “in conjunction with approved development” is not  
6 inconsistent with the express language of the zoning ordinance and thus is entitled to  
7 deference.<sup>4</sup> The city explains that petitioner’s arguments focus on the past tense “approved”  
8 while ignoring the phrase “in conjunction with,” which the city explains indicates that the  
9 city did not intend an entirely separate procedure and review for certain aspects of  
10 developments, such as public utilities and facilities. The city also points to LZDO  
11 2.111.04(A), which allows the city to combine review of conditional use applications for  
12 development within the R-D Overlay district with other land use applications. Taken  
13 together, the city argues, its reading of LZDO 2.111.03(E) as providing a categorical  
14 exemption from conditional use review for public utilities and facilities that are part of a  
15 consolidated application and review process is reasonable.

16 We disagree with petitioner and intervenors’ argument that the text of LZDO  
17 2.111.03(E) and its use of the word “approved” clearly means that the exemption from  
18 conditional use review did not apply to the proposed storm drain facilities because the PUD  
19 had not yet been approved at the time the city was considering the applications. The word  
20 “approved” as it is used in LZDO 2.111.03(E) is not a verb, but rather an adjective  
21 describing “development.” Used as an adjective, it does not convey a tense or refer to a past  
22 completed action.

23 Intervenor also argue that when LZDO 2.111.03(E) is read in context with LZDO  
24 2.111.03(A)-(D), *see* n 1, other provisions of LZDO 2.111, and the Lafayette Comprehensive

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<sup>4</sup> At oral argument, the city responded to intervenors’ arguments in their response brief in support of petitioner’s assignment of error.

1 Plan, those provisions together indicate that the proposed storm drain lines should not be  
2 exempted from conditional use review. Intervenor point out that 2.111.03(A)-(D), the other  
3 exceptions to conditional use review in the R-D Overlay district, describe minimal  
4 development activities that, according to intervenors are unlikely to harm the resources that  
5 the overlay zone is intended to protect.

6 Intervenor next argue that the language of LZDO 2.111.04(C) requires conditional  
7 use review. That language specifies that when the proposed development is a PUD,  
8 conditional use review is required for a R-D Overlay district “parcel,” even if all of the  
9 proposed PUD will be located outside of the R-D Overlay district parcel. Intervenor argue  
10 that the city’s interpretation of LZDO 2.111.03(E) is inconsistent with that provision and is  
11 not entitled to deference under ORS 197.829(1).

12 First, we do not agree with intervenors that LZDO 2.111.03(A) – (D) describe less  
13 intrusive activities than the proposed public utilities and facilities. For example, the  
14 activities listed in subsection (D) include “[a]ctivities to protect, conserve, enhance, and  
15 maintain public recreational, scenic, historical and natural uses of public lands \* \* \*,” many  
16 of which could be equally as or more intrusive than public utilities and facilities. Neither do  
17 we agree that even if the activities described in subsections (A) through (D) were less  
18 intrusive, that would require the city to read the exemption found in (E) narrowly. And while  
19 we tend to agree with intervenors that it is difficult to reconcile the public utilities and  
20 facilities exemption found in LZDO 2.111.03(E) with LZDO 2.111.04(C) when the  
21 development is a planned unit development, neither petitioner nor intervenors assign error to  
22 the city’s findings quoted above regarding the interplay between LZDO 2.111.03(E) and  
23 LZDO 2.111.04(C), or otherwise explain why the city’s understanding of that interplay is  
24 incorrect. Absent such a challenge, we agree with the city that its interpretation of LZDO  
25 2.111.03(E) as providing something of a categorical exemption from conditional use review

1 for certain public utilities and facilities is not inconsistent with the other provisions of the R-  
2 D Overlay district, and therefore that interpretation is not reversible under ORS 197.829(1).

3 We also disagree with petitioner’s suggestion that under the city’s interpretation,  
4 public utilities and facilities escape all planning review. The city reviewed the proposed  
5 storm drain facilities under different sections of the LZDO applicable to the proposed PUD  
6 and facilities that serve it, and adopted three pages of findings determining that the proposed  
7 storm drain facilities comply with those standards.<sup>5</sup> Record 26-28. No party challenges the  
8 adequacy of those findings. It is reasonable for the city to interpret LZDO 2.111.03(E) as  
9 exempting public utilities and facilities such as the storm drains that are proposed to serve  
10 the PUD from additional conditional use review where the overall development, including  
11 the proposed storm drainage system, has undergone extensive review under criteria  
12 applicable to PUDs. Accordingly, the assignment of error is denied.

13 The city’s decision is affirmed.

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<sup>5</sup> The city reviewed the proposed storm drainage for compliance with LZDO 2.302.05(I), LZDO 2.208.05(B)(5) and LZDO 2.204.04(A), which provides in relevant part:

“A. All development shall be planned, designed, constructed and maintained to:

“ \* \* \* \* \*

“3. Provide a system by which water within the development will be controlled without causing damage or harm to the natural environment, or to property or persons within the drainage basin[.]” Record 26.