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

OREGON DEPARTMENT OF FISH AND WILDLIFE,
Petitioner,

vs.

JOSEPHINE COUNTY,
Respondent,

and

JAMES R. HENDERSHOT and
KIRSTEN M. HENDERSHOT,
Intervenors-Respondents.

LUBA No. 2008-222

FINAL OPINION
AND ORDER

Appeal from Josephine County.

William R. Cook, Senior Assistant Attorney General, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Attorney General John Kroger.

No appearance by Josephine County.

James R. Dole, Grants Pass, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was Cauble, Dole, Sorenson & Ransom, LLP.

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

REMANDED 06/18/2009

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

NATURE OF THE DECISION

Petitioner Oregon Department of Fish and Wildlife (ODFW) appeals county approval to construct improvements within a 50-foot riparian setback along the Rogue River.

MOTION TO INTERVENE

James R. Hendershot and Kirsten M. Hendershot (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 Josephine County Rural Land Development Code (RLDC) 72.040 generally prohibits development within the riparian corridor, which for a Class I stream such as the Rogue River is 50 feet wide.¹ RLDC 72.040(3) allows exceptions to that general prohibition on development within a riparian corridor, if five standards are met, including a finding that proposed development will not “occupy more than 50 percent of the width of the riparian area measured from the upland edge of the corridor,” (hereafter, Exception 3(b)).²

¹ For Class II streams, the riparian corridor setback area is 25 feet.

² RLDC 72.040(B), adopted in 2006, provides, in relevant part:

“Riparian Corridor Setback Area. Development within riparian corridors shall be limited as follows:

- “1. **SETBACK DISTANCES.** The riparian corridor setback area shall be 50’ wide for Class 1 Streams and 25’ wide for Class 2 Streams (based upon stream classifications established and maintained by the Oregon Department of Fish and Wildlife).
- “2. **RIPARIAN CORRIDOR DEVELOPMENT.** Development within a riparian corridor setback area by fill or excavation, by placement of structures, by construction of impervious surfaces, or by removal of vegetation (with or without other development) is generally prohibited, except as listed in subsections 2.a through 2.j below. [Listing specific exceptions, including water-dependent uses] * * *
- “3. **EXCEPTIONS.** Exceptions may be granted to the general prohibition of uses specified in subsection 2 above. Requests for development shall require preapplication review procedures for site plan review as set forth in Article 42.030, but shall be judged using the following standards only:

1 Intervenors own property along the Rogue River, developed with a single family
2 dwelling. From the existing dwelling, the property slopes toward the river, ending in a steep,
3 near-vertical cliff extending down to the river. An existing stairway leads down the cliff to a
4 dock.

5 Intervenors proposed a number of improvements between the house and riverbank,
6 including a swimming pool and spa surrounded by a deck, a concrete and synthetic plank
7 patio and deck that is cantilevered over the top of the cliff, and a riverside seating area.
8 Intervenors' engineer prepared a survey that purports to locate the upland boundary of the 50
9 foot riparian corridor and setback area. The survey shows that a portion of the swimming
10 pool deck, the steps leading down from the pool to the cantilevered deck, the cantilevered
11 deck, and the riverside seating area are within the 50-foot setback area.

12 ODFW submitted four sets of comments challenging the survey's location of the
13 riparian corridor and further arguing that some of the proposed improvements occupy more
14 than 50 percent of the width of the riparian area measured from the upland edge of the

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- “a. The development will result in equal or better protection for the riparian area because the riparian area will be restored, buffered, or enhanced through other special measures; and
 - “b. *The exception will not authorize alterations to occupy more than 50 percent of the width of the riparian area measured from the upland edge of the corridor; or*
 - “c. An existing lot or parcel proposed for development is rendered not buildable by application of the riparian setback.
 - “d. A riparian area mitigation plan shall be required for all circumstances covered by subsections a, b and c above. The requirement for a mitigation plan may be waived if both the county and the Oregon Department of Fish and Wildlife agree a mitigation plan is unnecessary.
 - “e. Notice of all proposed exceptions, to include copies of proposed mitigation plans, if not waived, shall be given to the Oregon Department of Fish and Wildlife, the Division of State Lands, and the Department of Environmental Quality consistent with the notice requirements contained in Section 32.030 (*Mailed Notice*).” (Emphasis added.)

1 corridor. Planning staff denied the application. Intervenors appealed the staff denial to the
2 county commission, which voted to approve the application. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 In its fourth assignment of error, ODFW argues that the survey that the county
5 commissioners rely on inaccurately locates the upland boundary of the corridor. In its first
6 assignment of error, ODFW argues that even if the survey’s failure to accurately locate the
7 upland boundary is overlooked, the county commission misconstrued Exception 3(b) and
8 improperly authorized development that occupies more than 50 percent of the width of the
9 riparian corridor. According to ODFW, RLDC 72.040(B) implements a “safe harbor”
10 provision of OAR 660-023-0090, part of the rule implementing Statewide Planning Goal 5
11 (Natural Resources, Scenic and Historic Areas, and Open Spaces). OAR 660-023-0090(8)(e)
12 authorizes local governments to permit alterations within a riparian corridor, limited to “no
13 more than 50 percent of the width of the riparian area measured from the upland edge of the
14 corridor.”³ ODFW argues that as applied to a Class I stream with a riparian corridor that is
15 50 feet wide, the effect of OAR 660-023-0090(8)(e) and RLDC 72.040(B)(3)(b) is to limit
16 the geographic location of permitted alterations to the upland half (25 feet) of the corridor.
17 ODFW contends that some of the proposed development in this case, such as the deck

³ OAR 660-023-0090(8) provides, in relevant part:

“As a safe harbor in lieu of following the ESEE process requirements of OAR 660-023-0040 and 660-023-0050, a local government may adopt an ordinance to protect a significant riparian corridor as follows:

“* * * * *

“(e) The ordinance may authorize the permanent alteration of the riparian area by placement of structures or impervious surfaces within the riparian corridor boundary established under subsection (5)(a) of this rule upon a demonstration that equal or better protection for identified resources will be ensured through restoration of riparian areas, enhanced buffer treatment, or similar measures. In no case shall such alterations occupy more than 50 percent of the width of the riparian area measured from the upland edge of the corridor.”

1 cantilevered over the river and the riverside seating area, clearly intrude more than halfway
2 into the riparian corridor and are therefore not authorized under RLDC 72.040(B)(3)(b).

3 The county commission disagreed with ODFW’s interpretation, instead adopting an
4 interpretation advocated by intervenors. According to the county, Exception 3(b) is intended
5 to allow alterations that do not exceed 50 percent of the area or square footage of the riparian
6 corridor, calculated by multiplying the 50-foot width of the corridor by the length of the
7 property frontage on the river.⁴ Because the proposed improvements do not occupy more
8 than half of the total square footage of the riparian corridor, the county concluded the
9 improvements are not precluded by Exception 3(b).

10 We agree with ODFW that the county commission misconstrued Exception 3(b). We
11 first observe that, contrary to intervenors’ understanding, the county commission’s
12 interpretation of Exception 3(b) is not entitled to any particular deference under *Clark v.*
13 *Jackson County*, 313 Or 508, 836 P2d 710 (1992), or ORS 197.829(1).⁵ That is because

⁴ The county commission findings state, in relevant part:

“The Board finds that the written testimony dated September 30, 2008 and oral testimony presented by [intervenors’ attorney] is consistent with [the] legislative intent in the adoption of the development code as it applies to riparian area and the flexibility that the code established to evaluate projects on a case-by-case basis. The Board finds that the testimony of [ODFW’s representative] is not consistent with the Board’s understanding and interpretation of the ordinance standards. The Board further finds that a majority of the Board members that considered the current request also adopted the riparian ordinance and have the knowledge of the clear intent and application of the ordinance. The Board further finds that the testimony of [intervenors’ attorney] provides a clear analysis of the interpretation of the ordinance and that the exception is to provide flexibility in the area that is to be occupied and is not an additional setback within the riparian area.” Record 6 (underline in original).

⁵ ORS 197.829(1) codified and elaborated on *Clark*, and provides:

“[LUBA] 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;

1 RLDC 72.040(B)(3)(b) directly implements OAR 660-023-0090(8)(e) and, indeed, uses
2 exactly the same language. Where a plan provision or land use regulation is clearly designed
3 to implement a statute, goal or rule, the local government may not interpret that plan
4 provision or land use regulation in a manner inconsistent with the statute, goal or rule it
5 implements. *Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241 (1992). That
6 standard of review is codified in ORS 197.829(1)(d). Where a local regulation implements a
7 statute, land use goal or rule, our standard of review of a governing body’s interpretation of
8 that regulation is whether the interpretation is “contrary to a state statute, land use goal or
9 rule” that the local regulation implements. Under ORS 197.829(1)(d), the initial, and
10 ultimately dispositive, question is what the statute, land use goal or rule means.⁶

11 Turning to the text of Exception 3(b), the prohibition on alterations that occupy more
12 than 50 percent of the riparian corridor is directed at the “width” of the riparian area
13 “measured from the upland edge of the corridor.” Exception 3(b) could be worded more
14 clearly. But the most straightforward interpretation of that language is that alterations may
15 extend into the riparian corridor from the upland boundary toward the stream for half (50

“(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.”

⁶ The county’s decision and intervenors both emphasize that two of the three county commission members were on the commission when it adopted the 2006 ordinance implementing OAR 660-023-0090, and those two commission members recalled that the commission’s intent in adopting RLDC 72.040(B)(3)(b) was to apply the 50 percent measurement to the area or square footage of the riparian corridor, consistent with intervenors’ interpretation.

As explained above, the critical issue is the meaning of the state administrative rule that RLDC 72.040(B)(3)(b) implements, not the intent of the local governing body that adopted the implementing code provision. In any case, a legislator’s statements regarding the intent of previously enacted legislation is not competent legislative history. *DeFazio v. WPPSS*, 296 Or 550, 561, 679 P2d 1316 (1984) (“[t]he views legislators have of existing law may shed light on a new enactment, but it is of no weight in interpreting a law enacted by their predecessors”).

1 percent) of the width of the riparian corridor (whether that width is 50 feet for a Class I
2 stream or 25 feet for a Class II stream). Under that interpretation, alterations are permitted
3 within the upland half of the corridor, subject to the exception standards, but are not
4 permitted within the half of the riparian corridor that is closest to the stream, which thus
5 receives an additional level of protection compared to the upland half of the riparian corridor.

6 The county's contrary view has little support in the text or context of the rule. The
7 rule does not refer to the "square footage" of the riparian corridor or otherwise suggest that
8 the regulatory effect of the rule is determined by the "area" of the corridor, *i.e.*, its length
9 multiplied by its width. The rule explicitly mentions only one dimension, width, and clearly
10 links the 50 percent figure to the width of the riparian area, "as measured from the upland
11 boundary." Under the county's interpretation, the requirement to measure width from the
12 upland boundary has no particular meaning or purpose, since alterations can be made
13 anywhere within the riparian corridor as long as the total square footage does not exceed 50
14 percent of the corridor's square footage. If Exception 3(b) was intended to apply without a
15 geographic limitation within the riparian corridor, that intent could have been expressed by
16 simply providing that "the exception will not authorize alterations to occupy more than 50
17 percent of the riparian area," without references to width or measurement from the upland
18 boundary.

19 Intervenor's argue that under ODFW's interpretation Exception 3(b) essentially
20 imposes a second 25-foot "setback" within the 50-foot riparian setback, and argues that if the
21 intent was to impose a setback within a setback, it would have been much clearer to have
22 simply imposed a 25-foot setback using those terms. However, as ODFW points out, the 50
23 percent standard is intended to apply to riparian corridors of different widths, depending on
24 stream classification. The rule drafters reasonably chose not to write separate rules for
25 different stream classifications, but a single rule in more general language.

1 Further, we agree with ODFW that granting more protection to the half of the riparian
2 corridor that is closest to the river than to the upland half of the corridor is consistent with
3 the presumed purpose of OAR 660-023-0090(8), to ensure protection of riparian resources
4 and the water source that generates that riparian area. The general purpose of a setback is to
5 put distance between a conflicting use and a protected resource, in this case subdivision
6 development and the Rogue River . Under the county’s apparent view of Exception 3(b), a
7 landowner could completely develop the riparian area immediately adjacent to the Rogue
8 River, as long as the upland half of the riparian corridor is unaltered. That makes no sense,
9 given the presumed purpose of the rule to protect the stream and adjacent areas.

10 In sum, we agree with ODFW that the county commission misconstrued Exception
11 3(b) and erred in approving alterations that occupy more than 50 percent of the width of the
12 riparian corridor.

13 The first assignment of error is sustained.

14 **SECOND ASSIGNMENT OF ERROR**

15 Under this assignment of error, ODFW challenges the adequacy of the findings
16 addressing Exception 3(b) and the evidentiary support for those findings. However, because
17 remand under the first assignment of error will require an amended application and a
18 different set of findings with respect to Exception 3(b), we see no point in addressing the
19 adequacy of the existing findings or the evidence supporting them.

20 We do not reach the second assignment of error.

21 **THIRD ASSIGNMENT OF ERROR**

22 RLDC 72.040(B)(3)(a) allows development within the riparian corridor if the county
23 finds that “the development will result in equal or better protection for the riparian area
24 because the riparian area will be restored, buffered, or enhanced through other special
25 measures.” *See* n 1. This “equal or better protection” standard also implements OAR 660-

1 023-0090(8)(e). Under the third assignment of error, ODFW argues that the county's
2 findings with respect to RLDC 72.040(B)(3)(a) are not supported by substantial evidence.⁷

3 ODFW contends that the equal or better standard requires the county to compile a
4 "ledger" of negative and positive effects of the proposed development and explain why the
5 net impact of the development compared to proposed mitigation such as landscaping or
6 erosion control results in "equal or better protection" for the riparian area. According to
7 ODFW, no reasonable decision maker could conclude that the modest amount of landscaping
8 and erosion control that intervenors proposed as mitigation "equally or better" protects the
9 riparian area, given the proposed improvements such as the swimming pool, deck, stairs,
10 patio, cantilevered deck, etc. that will cover large portions of the riparian area.

11 Intervenor's respond that the county's findings are supported by substantial evidence,
12 including the testimony of intervenors' engineer and landscape experts. According to
13 intervenors, ODFW does not challenge that testimony or explain why it is not "substantial
14 evidence" on which a reasonable person could rely to conclude that the equal or better
15 standard is met.

⁷ The county's findings state, in relevant part:

"C. The Board finds that testimony by [intervenors' engineer] provides substantial evidence that the drainage and grading improvements to the site will more than compensate for the area that will be covered by the deck in order to control run off and maintain a stable slope. The Board finds that the proposed mitigation plan will better the riparian area through the implementation of grading and erosion control improvements over the existing conditions. The Board further finds that no opposition testimony was presented from experts in this field that contradicted or in any way reduced the testimony from the applicant's representatives. The Board therefore relies heavily on the expert testimony on behalf of the applicant.

"D. The Board finds that the proposed vegetation to be added to the site (additional trees, shrubs and ground cover) * * * will restore the riparian area to a better condition as compared to the existing lawn grasses.

"E. The Board finds that the substantial planting in the riparian area as shown on the site plan is a significant improvement over current conditions on the site to restore native plants in the riparian area that have been replaced with lawn grasses prior to the time that there was any regulation in riparian areas." Record 6.

1 We agree with intervenors that ODFW has not demonstrated that the county's
2 findings on the equal or better standard are not supported by substantial evidence. While the
3 county did not compile a "ledger" of positive and negative impacts of development, it
4 explained that the riparian area is now almost entirely planted in non-native lawn grasses,
5 which will be replaced by native riparian plantings under the proposed landscaping and
6 erosion plan. In other words, under current conditions the existing riparian area has
7 relatively little value as a riparian area, but it will be significantly improved under the
8 landscape plan. While the proposed development is extensive, ODFW has not established
9 that no reasonable person could conclude, on the record as a whole, that the proposal equally
10 or better protects the riparian area.

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 Under the fourth assignment of error, ODFW argues that the applicants' engineer and
14 the county failed to properly determine the upland boundary of the riparian area. Until that is
15 done it is not possible to know exactly what development is subject to the riparian area
16 regulations.

17 As amended by the 2006 ordinance, RLDC 11.030 defines "riparian area boundary"
18 in part as "[a] line located a certain distance back from the ordinary high water line for
19 riparian areas in which certain uses or activities are prohibited and/or regulated to protect or
20 enhance beneficial riparian attributes." In turn, RLDC 11.030 defines the "ordinary high
21 water line" as "[a] line on the bank or shore of a riparian area to which high water ordinarily
22 rises annually in season," based on certain physical characteristics.⁸

⁸ RLDC 11.030 provides:

"ORDINARY HIGH WATER LINE (OHWL). A line on the bank or shore of a riparian area to which high water ordinarily rises annually in season. The OHWL excludes exceptionally high water levels caused by large flood events. The OHWL shall be used to designate the

1 ODFW argues that intervenors' engineer failed to locate the ordinary high water line
2 on the property and measure the riparian setback from that line. According to ODFW, the
3 engineered drawings instead appear to measure the riparian setback from the "water's edge,"
4 which is presumably not the same thing as the ordinary high water line. Confusingly, ODFW
5 argues, the topographic survey labels the upland boundary as the "50' riparian setback from
6 top of bank." ODFW contends that nothing in the record identifies the ordinary high water
7 line, the line from which the setback must be measured, or clarifies whether it is located at
8 the "water's edge," the "top of bank," or somewhere else.

9 Intervenors respond that the record is clear that the riparian setback was measured
10 from the "top of bank." According to intervenor, while the top of bank is not necessarily the
11 same location as the ordinary high water line, in the present case the two geographic
12 locations are almost certainly overlap from a bird's eye view, given the steepness of the river
13 bank. Intervenors contend that using the top of bank is a more conservative means of
14 determining the setback than the ordinary high water line, because the top of bank is located
15 at a higher elevation toward the upland side than the ordinary high water line, and it is
16 therefore harmless error to use the top of bank to determine the riparian end of the setback.

upland edge of a riparian area for the purpose of measuring riparian corridor setbacks. The
OHWL may be determined in the field by observing the following physical characteristics:

- "A. The location of a clear, natural line impressed on the shore;
- "B. Changes from riparian to upland vegetation (e.g., from willows to oak or fir trees);
- "C. Changes in the texture of sediment deposits or the character of soils (e.g., from sand,
sand and cobble, cobble and gravel to upland soils);
- "D. The location below which fine debris (such as, needles, seeds, leaves, cones) are no
longer present;
- "E. The location at which water-carried litter or debris, water stained leaves and water
lines on tree trunks become apparent; and/or
- "F. Any other appropriate physical or scientific evidence that is credible to show the
place where high water ordinarily rises annually in season."

1 Intervenors may well be correct that measuring the setback from the top of bank is a
2 more conservative measuring point than using the ordinary high water line. Nonetheless, we
3 decline to conclude that failure to determine the setback using the ordinary high water line,
4 as required by the RLDC, is harmless error. It is not clear to us what measurement point the
5 engineer used to determine the setback, and even if we assume the engineer used the top of
6 bank, we cannot tell for certain that using the top of bank is harmless error. Accordingly,
7 remand is warranted for the county to either (1) require that intervenors' engineer measure
8 the setback from the ordinary high water line, or (2) adopt findings explaining why it is
9 appropriate to use a different point of measurement.

10 The fourth assignment of error is sustained.

11 The county's decision is remanded.