

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

EDWARD NIEDERMEYER,)
)
Petitioner,)
)
vs.)
)
CLACKAMAS COUNTY,) LUBA Nos. 92-065 and 92-089
)
Respondent,) FINAL OPINION
) AND ORDER
and)
)
VIOLA-FISCHER'S MILL COMMUNITY)
PLANNING ORGANIZATION,)
)
Intervenor-Respondent.)

Appeal from Clackamas County.

Frank Josselson, Portland, filed the petition for review on behalf of petitioner. With him on the brief was Josselson, Potter & Roberts.

Michael E. Judd, Oregon City, filed a response brief on behalf of respondent.

Jacqueline Tommas, Estacada, filed a response brief on behalf of intervenor-respondent.

SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED 06/23/92

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county hearings officer decision
4 interpreting the Clackamas County Zoning and Development
5 Ordinance (ZDO).¹

6 **MOTION TO INTERVENE**

7 Viola-Fischer's Mill Community Planning Organization
8 moves to intervene in this proceeding on the side of
9 respondent. There is no objection to the motion, and it is
10 allowed.

11 **FACTS**

12 Petitioner owns a 240 acre parcel zoned Farm Forest 10
13 Acre (FF-10). Petitioner applied to the planning director
14 for an "[i]nterpretation of [the ZDO] to determine whether
15 Planned Unit Developments are permitted in the FF-10 zoning
16 district." Record 113. The planning director issued a
17 decision that "all PUDs [are] flexible lot developments
18 which are excluded from being developed in the FF-10 zoning
19 district * * *." Record 66. Petitioner appealed to the
20 hearings officer. After a public hearing, the hearings
21 officer issued the following decision:

¹Under ZDO 1304.01, the county board of commissioners may review a hearings officer's decision on an application for a ZDO interpretation, if an appeal is filed. Petitioner filed such an appeal, and the board of commissioners declined to review the hearings officer's decision. Petitioner challenges the board of commissioners' decision in LUBA No. 92-089. However, no separate issues concerning the board of commissioners' decision are presented in this consolidated appeal proceeding.

1 "The ZDO is interpreted to the effect that a
2 Planned Unit Development subdivision under
3 [ZDO] 1013 which proposes development of lots
4 smaller than the 10 acre minimum lot size
5 permitted in the FF-10 zoning district constitutes
6 a Flexible Lot Size development, and is prohibited
7 by [ZDO] 1014.04(B)(3)." Record 17.

8 **DECISION**

9 The sole issue presented in this appeal is whether the
10 above quoted interpretation of the ZDO by the hearings
11 officer is correct. We first set out the relevant ZDO
12 provisions.

13 ZDO 301 is the FF-10 district. ZDO 301.07(B) provides
14 that the minimum lot size in the FF-10 zone is 10 acres.
15 ZDO 301.08(B) provides that subdivisions in the FF-10 zone
16 shall be developed as Planned Unit Developments (PUDs), when
17 the criteria of ZDO 1013.02 are met.² ZDO 902 is entitled
18 "Lot Size Exceptions and Modifications." ZDO 902.01(A)(2)
19 provides that land cannot be divided into parcels or lots
20 smaller than the lot size requirement of the applicable
21 zoning district, except when the lot is within a PUD
22 approved under ZDO 1013 or a Flexible Lot Size development
23 under ZDO 1014.04(B).

24 ZDO 1013 ("Planned Unit Development") explains the

²ZDO 1013.02 ("[PUD] Area of Application") states (1) PUDs may be developed on parcels suitable and large enough for development as a PUD under ZDO 1013, and (2) low density and rural residential developments shall be developed as PUDs when located on sites larger than one acre which contain more than a specified amount of designated open space or when in a low density residential zone and more than 20 percent attached dwelling units are proposed.

1 purpose of PUDs and sets out the allowed uses and standards
2 for approval of PUDs. ZDO 1013.06(A)(3)(b) includes the
3 following standard for "density of development" in PUDs:

4 "Individual lot size is unrestricted, provided
5 that the overall density of the development does
6 not exceed the density allowed by the zone in
7 which the development is located."

8 ZDO 1013.07 provides that PUDs creating new lots shall be
9 processed as subdivisions or short subdivisions, depending
10 on the number of lots created.

11 ZDO 1014 is entitled "Design Standards for Land
12 Divisions." ZDO 1014.02 provides that the standards of
13 ZDO 1014 "apply to all subdivisions, short subdivisions,
14 major partitions and minor partitions within the
15 unincorporated area of Clackamas County." ZDO 1014.04(B)
16 ("Flexible Lot Size Developments") provides that land
17 divisions may include lots smaller than the minimum lot size
18 permitted by the applicable zoning district in certain
19 circumstances. On December 12, 1990, the following
20 provision was added to ZDO 1014.04(B):

21 "In the RA-2 zone the smallest lot shall be at
22 least one (1) acre. In the RFFF-5 zone the
23 smallest lot shall be at least two (2) acres.
24 Flexible lot size developments are not allowed in
25 the FF-10 zone." (Emphasis added.) ZDO
26 1014.04(B)(3).

27 Petitioner interprets the challenged decision to say
28 that all PUDs are prohibited in the FF-10 zone. Petitioner
29 argues this interpretation is incorrect because it makes a
30 nullity out of ZDO 310.08(B), which expressly permits PUD

1 subdivisions in the FF-10 zone. Petitioner also argues this
2 interpretation needlessly creates a conflict between
3 ZDO 1013.06(A)(3)(b), which says individual lot size in PUDs
4 is unrestricted, and ZDO 1014.04(B)(3), which states that
5 flexible lot size developments are not allowed in the FF-10
6 zone. According to petitioner, these provisions can be
7 harmonized if it is recognized that PUDs are subject only to
8 the provisions of ZDO 1013, and not to the flexible lot size
9 development provisions of ZDO 1014.04(B).

10 The county disputes petitioner's view that the
11 challenged decision interprets the ZDO to prohibit all PUDs
12 in the FF-10 zone. The county points out that not all PUDs
13 include the creation of individual lots smaller than the
14 minimum lot size of the applicable zone. The county argues
15 that the PUD process can also be used to allow types of uses
16 which are not otherwise allowed in the subject zone, such as
17 commercial facilities under ZDO 1013.05, or to obtain
18 modification of other development standards of the
19 applicable zone, such as setback requirements under
20 ZDO 1013.06(A)(6). Thus, according to the county, under the
21 ZDO not all PUDs are flexible lot size developments and not
22 all flexible lot size developments are PUDs. However, where
23 a PUD would create new lots smaller than the lot size
24 requirements of the applicable zone, it is also a flexible
25 lot size development subject to the requirements of
26 ZDO 1014.04(B).

1 We agree with the county that the challenged decision
2 does not interpret the ZDO to prohibit all PUDs in the FF-10
3 zone, but rather only to prohibit PUDs which would create
4 individual lots less than 10 acres in size. Therefore, the
5 county's interpretation does not conflict with
6 ZDO 301.08(B). We also agree with the county that under
7 ZDO 1014.02, ZDO 1014, including the flexible lot size
8 development provisions of ZDO 1014.04(B), applies to all
9 subdivisions, including PUDs which create new lots. With
10 regard to PUD subdivisions in the FF-10 zone, the county
11 correctly interprets the more recently adopted
12 ZDO 1014.04(B)(3) limitation on flexible lot size
13 developments in the FF-10 zone as an exception to the
14 general provision of ZDO 1013.06(A)(3)(b) that individual
15 lot size in PUDs is unrestricted.

16 The assignment of error is denied.

17 The county's decision is affirmed.