BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

VIRON FESSLER and LORI FESSLER,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent,

and

WILLIAM L. BARTELS,
Intervenor-Respondent.

LUBA No. 2000-088

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Anna Braun, Salem, filed the petition for review and argued on behalf of petitioners.

Fredric Sanai, Assistant County Counsel, McMinnville, filed a response brief and argued on behalf of respondent.

Michael C. Robinson, Portland, and Michelle Rudd, Portland, filed a response brief on behalf of intervenor-respondent. With them on the brief was Stoel Rives, LLP. Michelle Rudd argued on behalf of intervenor-respondent.

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

REMANDED 10/16/2000

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a decision by Yamhill County approving a forest template dwelling.

MOTION TO INTERVENE

William L. Bartels (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 2.0 acres in size and is roughly shaped like an elongated triangle. The property is zoned F-80, commercial forestry, and is relatively wide from east to west, but it is only 104 feet wide from north to south in the vicinity of the proposed dwelling site. Intervenor and his wife jointly own the subject property.

Tax lot 1601 (north lot), directly to the north of the property, is jointly owned by two revocable trusts, one in intervenor's name and one in his wife's name. Substantial forest operations have been conducted on the north lot. Two channels of Little Russell Creek run east and north through the subject property until they flow off the property to the north. The streams run along and on either side of the property line separating the subject property from the north lot.

The southern boundary of the property is the centerline of Bridgefarmer Road, a county road with a right-of-way width of 40 feet. The paved portion of the road itself is only 13 feet wide. Tax lot 200 (south lot), directly south of the centerline of Bridgefarmer Road, is managed by Stimson Lumber Company (Stimson) for commercial timber production.

In October 1999, intervenor applied for a forest template dwelling. In November 1999, the county planning director approved the proposed dwelling. The November 1999 decision required 75-foot setbacks from the north and south property lines as a condition of approval. In December 1999, the planning director approved an application to amend the

November 1999 decision to reduce the setbacks from 75 to 30 feet. Petitioners appealed the planning director's December 1999 decision to the Yamhill County Board of Commissioners, who affirmed the decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county misconstrued the applicable law and made a decision not supported by adequate findings or substantial evidence in determining that the proposed dwelling complies with certain policies of the Yamhill County Comprehensive Plan (YCP).

Yamhill County Zoning Ordinance (YCZO) 401.03(C) sets forth the standards and criteria for approval of forest template dwellings. YCZO 401.03(C)(3) provides:

> "The dwelling is not prohibited by, and *complies with the Comprehensive Plan* and other provisions of this ordinance and other provisions of law, including but not limited to floodplain, greenway and airport overlay restrictions[.]" (Emphasis added.)

Intervenor responds that the entire YCP is inapplicable to permit decisions because the goals and policies of the YCP have been implemented by the YCZO. However, the county's findings do not identify any YCZO provisions that implement the YCP policies at issue. Absent such identification, the county may not disregard otherwise applicable YCP policies. *Spiro v. Yamhill County*, ___ Or LUBA ___ (LUBA No. 99-171, June 1, 2000), slip op 5; *see Durig v. Washington County*, 35 Or LUBA 196, 202 (1998) (proposition that land use regulations entirely displace comprehensive plan "as a source of relevant approval criteria for approval of individual land development applications * * * requires explicit supporting language" in the comprehensive plan and land use regulations).

Although YCZO 401.03(C)(3) has the effect of requiring that forest template dwellings comply with any relevant YCP requirements, that does not mean that *all* YCP requirements are relevant approval standards for forest template dwellings. *Spiering v. Yamhill County*, 25 Or LUBA 695, 720 (1993). Petitioners identify two YCP policies they believe are applicable to the present decision. YCP Policy II.C.1(1) provides:

> "Yamhill County *will rely* upon the Forest Practices Act and regulations adopted under that Act to ensure protection of surface water on non-federal forest lands from forest activities that negatively impact surface waters." (Emphasis added.)

YCP Policy II.D.1(g) provides:

> "Yamhill County *will rely* upon the Forest Practices Act and regulations adopted under that Act to ensure protection of Fish and Wildlife on non-federal lands from forest activities that negatively impact fish and wildlife." (Emphasis added.)

Petitioners advance numerous arguments in support of their contention that the county's decision violates the quoted policies. We need not specifically address those arguments because we agree with intervenor that the cited YCP policies do not apply directly as approval standards for forest template dwellings. The policies identified by petitioners merely state that the county "will rely" on the Forest Practices Act (FPA) to "protect surface waters" and "fish and wildlife." Stated differently, if the activities associated with the construction of the proposed dwelling affect "surface water" or "fish and wildlife," then the county will rely on the FPA to protect those resources. The cited YCP policies do not require that an application for a forest template dwelling demonstrate as part of the application that the dwelling will comply with the FPA.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county misconstrued the applicable law and made a decision not supported by adequate findings or substantial evidence in determining the setbacks for the proposed dwelling comply with YCZO 401.10(B).

YCZO 401.10(B) sets forth required setbacks in the F-80 zone. YCZO 401.10(B)(1) provides that the minimum setback for all dwellings shall be 30 feet for all uses except that, "[a]djacent to commercial timberland properties, [the] minimum dwelling setback shall be 60 feet." The county imposed a condition of approval requiring that the dwelling be located at least 30 feet from both the north and south property lines. Petitioners argue that the subject

property is adjacent to "commercial timberland properties," and therefore a 60-foot setback is required.

Stimson manages the south lot, and it is not disputed that it is commercial timberland property. However, the 40-foot right-of-way for Bridgefarmer Road extends for 20 feet on both sides of the property line. The county interpreted "commercial timberland properties" to exclude private property that is subject to county rights-of-way. Under the county's interpretation, because the subject property is adjacent to a public right-of-way rather than a commercial timberland property, only a 30-foot setback is required. Record 10.

The county has significant discretion in how it interprets YCZO 401.10(B)(1). ORS 197.829(1).[1] We must affirm the county's decision unless we conclude that the interpretation is "clearly wrong" or "beyond all colorable defense." *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051, *rev den* 324 Or 322 (1996); *Zippel v. Josephine County*, 128 Or App 458, 461, 876 P2d 854, *rev den* 320 Or 272 (1994); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217-18, 843 P2d 992 (1992). Even though intervenor's property line adjoins the south lot, under the county's interpretation, the subject property is physically separated from the south lot by the public right-of-way. Under the deferential standard of review that we are required to apply to the

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[1] ORS 197.829(1) provides:

> "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:
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> "(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 or land use regulation implements."

county's interpretation, we cannot say that the county's interpretation is clearly wrong or beyond all colorable defense.

The north lot is jointly owned by two revocable trusts, one in intervenor's name and one in his wife's name. Intervenor has conducted substantial forest operations on the north lot, and it has been harvested and replanted pursuant to the requirements of the FPA. The county interpreted "commercial timberland properties" not to encompass properties operated by individuals, but only properties "operated by or for the benefit of commercial timber operations." Record 10.

Although the county's interpretation is entitled to significant deference, it may not be inconsistent with the express language or purpose of the ordinance. ORS 197.829(1)(a) and (b). We agree with petitioners that the county's interpretation is inconsistent with both the express language and purpose of the ordinance. The phrase "commercial timberland" is unmistakably directed at the activities that occur on a particular property. Whether the owner or operator is an individual is irrelevant in determining whether a property is a commercial timber property.[2] There is no dispute that the north lot is a "commercial timberland propert[y]" but for the county's interpretation exempting properties owned by individuals. Because we reject the county's interpretation, the north lot is a commercial timberland property and a 60-foot setback is required.

Intervenor asserts that even if the north lot is commercial timberland property, the proposed dwelling nonetheless has a setback of at least 60 feet from any actual present commercial timber uses. The county interpreted "commercial timberland properties" to mean "the portion of properties actually used for the growing of commercial tree species and

[2] The purpose and underlying policy of larger setbacks from commercial timberland properties presumably is to protect dwellings and commercial timber uses from adversely impacting each other. That purpose is not affected by the nature of the person who owns the "commercial timberland properties." ORS 197.829(1)(b) and (c). The express language of YCZO 401.10(B)(1) does not support the county's position that an individual cannot own a "commercial timberland propert[y]" or cannot conduct commercial timber operations on such a property. ORS 197.829(1)(a).

not necessarily [the] entire property." Record 10. The county's findings state that because no commercial tree species are presently growing within the southern 30 feet of the north lot, the 60-foot setback requirement is met. *Id*. The parties dispute whether the trees growing in the creek and the southern portion of the north lot are commercial tree species. We need not address this evidentiary issue because we agree with petitioners that the county's interpretation is inconsistent with the express language and purpose of the ordinance. In the context of a provision imposing minimum setbacks, the word "properties" could only refer to entire properties. It is not possible to interpret the word "properties," as used in YCZO 401.10(B)(1), to mean just the portion of properties that happen to be used for commercial timberland at the time of the application.

In addition to improperly limiting the otherwise unlimited term "properties," the county's interpretation is also inconsistent with the purpose of the ordinance to protect dwellings and commercial timber uses from adversely impacting each other. Even though there may not currently be commercial timberland activities within the southern 30 feet of the north lot, the growing of commercial tree species in that area is allowed outright and could reoccur at any time.[3] Because the county's findings misconstrue the applicable law, we need not address petitioners' arguments regarding the adequacy of the evidence supporting the findings.

The second assignment of error is sustained, in part.

[3] At oral argument, intervenor argued that the FPA prohibits certain forest activities within 20 feet of the streams that separate the two parcels, and therefore no commercial timberland activities could occur within 60 feet of the proposed dwelling. As an initial point, we note that this was not a basis for the county's decision. Furthermore, it is not clear that riparian buffer zones under the FPA do not also constitute commercial timber uses.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the county misconstrued the applicable law and made a decision not supported by adequate findings or substantial evidence in determining that certain siting requirements have been met.

YCZO 401.08 provides:

> "All new dwellings and structures approved pursuant to [YCZO] 401.03 shall be sited in accordance with this section and [YCZO] 401.09.
>
> "A. Relevant physical and locational factors including, but not limited to, topography, prevailing winds, access, surrounding land use and source of domestic water shall be used to identify a site which:
>
> "1. Has the least impact on nearby or adjacent lands zoned for forest or agriculture use; [and]
>
> "* * * * *
>
> "4. Minimizes the risk associated with wildfire."

Petitioners contend that this requirement has not been satisfied, primarily because of the alleged failure to provide adequate setbacks. Because YCZO 401.08 implements OAR 660-006-0029(1), the county is not entitled to deference in interpreting the ordinance.[4] ORS 197.829(1)(d).[5] We agree with petitioners that, contrary to intervenor's assertion, YCZO

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[4] OAR 660-006-0029(1) provides:

> "(1) Dwellings and structures shall be sited on the parcel so that:
>
> "(a) They have the least impact on nearby or adjoining forest or agricultural lands;
>
> "(b) The siting ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized;
>
> "(c) The amount of forest lands used to site access roads, service corridors, the dwelling and structures is minimized; and
>
> "(d) The risks associated with wildfire are minimized."

[5] Intervenor argues that under ORS 197.763(1) petitioners are precluded from raising a "no deference" argument because the issue of the applicable deference was not raised below. ORS 197.763(1) only requires a

401.08(A) is an approval criterion. However, this criterion does not govern *whether* a dwelling may be approved, but rather *where* an approved dwelling should be sited on the lot. In other words, assuming a proposed dwelling meets all the other applicable criteria, YCZO 401.08 requires the county to consider certain factors in determining where the dwelling may be sited.

The county found that the proposed dwelling site has the least impact on nearby or adjacent lands zoned for forest and agriculture use. The county's findings state that the north lot is separated from the subject property by a tributary of Little Russell Creek, as well as the properties to the east and west. The county found the dwelling could not be sited in the northwestern portion of the parcel due to steep terrain. The county found the proposed dwelling is separated from the south lot by the county right-of-way, Bridgefarmer Road. The county also found that the proposed dwelling site minimizes the risk of wildfire due to the numerous conditions of approval addressing fire safety. Record 9. Petitioners do not dispute these findings or the evidence supporting them.

Petitioners' argument is premised on the alleged failure to provide proper setbacks. We agree with petitioners that the setback requirement from the commercial timberland property to the north has not been satisfied. However, that problem aside, petitioners do not establish how the county failed to demonstrate that the "least impact" and "minimize the risk" criteria of YCZO 401.08(A)(1) and (4) are met by the selected home site. A reasonable person could conclude, as the county did, that the siting criteria of YCZO 401.08(A)(1) and (4) are satisfied. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988).

The third assignment of error is denied.

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party to raise an issue with sufficient specificity to preserve it for appeal to LUBA. Once the issue of compliance with an ordinance provision is raised, the issue of how much deference is accorded the local government's interpretation on review need not be raised separately below.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the requirements of the YCZO and the FPA are in conflict and thereby prohibit the approval of a forest template dwelling under the present circumstances.

The county's decision requires intervenor to clear a 30-foot primary firebreak around the proposed dwelling. Record 2. Because Little Russell Creek is approximately 30 feet north of the proposed dwelling site, intervenor will be required to clear a firebreak up to the creek. OAR 629-640-0100(2), one of the administrative rules implementing the FPA, prohibits the removal of understory vegetation and certain trees near fish-bearing streams such as Little Russell Creek when conducting forest operations pursuant to the FPA.[6] According to petitioners, clearing the firebreak as a condition of approval is a forest practice and thereby triggers the restrictions of OAR 629-640-0100(2).[7] Because the condition of approval requires a 30-foot firebreak and OAR 629-640-0100(2) would prevent a 30-foot firebreak under the present circumstances, petitioners argue the forest template dwelling cannot be approved.

Intervenor responds that ORS 527.722(2)(d) allows a local government to regulate the siting of dwellings on forestland without considering the FPA. ORS 527.722(1) and (2)(d), provide, in relevant part:

> "(1) Notwithstanding any provisions of ORS chapters 195, 196, 197, 215 and 227, and except as provided in subsections (2), (3) and (4) of this

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[6] OAR 629-640-0100(2) provides:

> "Operators shall retain:
>
> > "(a) All understory vegetation within 10 feet of the high water level;
> >
> > "(b) All trees within 20 feet of the high water level; and
> >
> > "(c) All trees leaning over the channel."

[7] ORS 527.620(5) defines "forest practice" as "any operation conducted on or pertaining to forestland, including but not limited to: (a) Reforestation of forestland; (b) Road construction and maintenance; (c) Harvesting of forest tree species; (d) Application of chemicals; and (e) Disposal of slash."

> section, no unit of local government shall adopt any rules, regulations, or ordinances or take any other actions that prohibit, limit, regulate, subject to approval or in any other way affect forest practices on forestlands located outside of an acknowledged urban growth boundary.
>
> "(2) Nothing in subsection (1) of this section prohibits local governments from adopting and applying a comprehensive plan or land use regulation to forestland to allow, prohibit, or regulate:
>
> "* * * * *
>
> "(d) The siting or alteration of dwellings[.]"

It is not clear to us that ORS 527.722(2)(d) allows the county to regulate the siting of a dwelling in a manner that supercedes all FPA requirements applicable to forestlands. However, we need not decide that issue, because we reject petitioners' premise that OAR 629-640-0100(2) applies here in a manner that could conflict with the condition imposed by the county. OAR 629-640-0100(2) applies only to "operators." The statute defines "operator" for purposes of the FPA as a landowner or timber owner who conducts an "operation." ORS 527.620(13). An "operation" is defined as "any commercial activity relating to the growing or harvesting of forest tree species." ORS 527.620(12). It is undisputed that intervenor does not propose any commercial activity related to the growing or harvesting of forest tree species on the subject property. The clearing of a firebreak is not a commercial operation that relates to the growing or harvesting of forest tree species. The fact that intervenor may be an "operator" under the FPA with respect to activities he conducts on other lands does not make OAR 629-640-0100(2) applicable to other activities he performs on the subject property that are not "operations." Petitioners have not demonstrated that the county's approval of a forest template dwelling under the YCZO conflicts with OAR 629-640-0100(2) or with any other provision of the FPA brought to our attention.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the county misconstrued the applicable law in determining that a secondary firebreak extending onto the north lot is not required.

Pursuant to ORS 215.750(4)(b), ORS 215.730(1)(b)(G), and OAR 660-006-0035(3), intervenor is required to provide and maintain primary and secondary firebreak areas on land *owned or controlled* by the intervenor. [8] Because the YCZO implements these requirements, the county's interpretation is not entitled to deference. ORS 197.829(1)(d). YCZO 401.09(G) provides, in pertinent part:

> "A secondary firebreak of not less than 100 feet outside the primary firebreak shall also be constructed. The firebreak is only required to be constructed on

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[8] ORS 215.750(4) provides, in pertinent part:

> "A proposed dwelling under this section [alternative forestland dwellings] is not allowed:
>
> "* * * * *
>
> "(b) Unless it complies with the requirements of ORS 215.730."

ORS 215.730(1) provides, in pertinent part:

> "A local government shall require as a condition of approval of a single-family dwelling allowed under ORS 215.705 on lands zoned forestland that:
>
> "* * * * *
>
> "(b) The dwelling meets the following requirements:
>
> "* * * * *
>
> "(G) The owner provides and maintains primary fuel-free break and secondary break areas on land surrounding the dwelling that is owned or controlled by the owner."

[8] OAR 660-006-0035(3) provides:

> "The owners of the dwellings and structures shall maintain a primary fuel-free break area surrounding all structures and clear and maintain a secondary fuel-free break area on land surrounding the dwelling that is owned or controlled by the owner in accordance with the provisions in 'Recommended Fire Siting Standards for Dwellings and Structures and Fire Safety Design Standards for Roads' dated March 1, 1991 and published by the Oregon Department of Forestry."

> land surrounding the dwelling that is *owned or controlled* by the owner * * *." (Emphasis added.)

The subject property is owned jointly by intervenor William L. Bartels and his wife Gloria K. Bartels. The north lot is owned jointly by two revocable trusts, "the William K. Bartels Revocable Trust and the Gloria K. Bartels Revocable Trust." Record 4-5. William L. Bartels and Gloria K. Bartels serve jointly as trustees for both of those trusts. Record 5. Petitioners argue that because William L. Bartels and Gloria K. Bartels own the subject property and are trustees for the north lot, they control the north lot, and the secondary firebreak described in YCZO 401.09(G) must be required in this case.

Intervenor responds that because William L. Bartels and Gloria K. Bartels jointly own the north lot as trustees for two separate trusts, the north lot is controlled not by intervenor and his wife but by the terms of the trusts. That may be true. The trusts, however, are not included in the record, and the burden is on intervenor to demonstrate that the applicable approval criteria are satisfied. *Rochlin v. Multnomah County*, 35 Or LUBA 333, 348 (1998). Without an opportunity to review the trust, the county is not in position to find that the north lot is not "controlled" by William L. Bartels and Gloria K. Bartels, within the meaning of YCZO 401.09(G).[9]

The fifth assignment of error is sustained.

The county's decision is remanded.

[9] The parties have not provided us with any case law or legislative history regarding the meaning of the "control" prong of OAR 660-006-0035(3) or YCZO 401.09(G).