BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DENNIS TYLKA and JOYCE TYLKA,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

ROBERT HAWKINS,
Intervenor-Respondent.

LUBA No. 2001-074

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Dennis Tylka and Joyce Tylka, Welches, filed the petition for review and argued on their own behalf.

Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 11/19/2001

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a proposal for a recreational vehicle (RV) camping site on river frontage property zoned Residential Recreational (RR).

FACTS

The subject matter of this appeal is before us for the third time. It involves a proposal for an RV camping site on a 50 by 100-foot lot with 50 feet of frontage on the Salmon River. The lot was improved in 1989 with a gravel driveway and a now overgrown 24 by 40-foot gravel parking pad located approximately 17 feet from the river's mean high water line. Intervenor proposes to park an RV on the existing gravel pad for limited periods of time, as a personal recreational use of the property. The Salmon River is a designated resource in the county's Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) inventory. The subject property is within an area subject to regulation under the county's River and Stream Conservation Area (RSCA) regulations, specifically Zoning and Development Ordinance (ZDO) 704.

Some discussion of earlier county and LUBA decisions involving the subject property is necessary, both for historical context and because petitioners raise in the present appeal a number of issues that are similar or identical to issues addressed in earlier decisions.

In *Tylka v. Clackamas County*, 34 Or LUBA 14, 16-17, *aff'd* 153 Or App 414, 960 P2d 397, *rev den* 327 Or 620 (1998) (*Tylka III*), we described some of the relevant history of the subject property:[1]

> "In 1989, the previous owners of the subject property cleared and graded the lot's southeast corner and installed a gravel driveway and parking pad,

[1]Both LUBA and the parties style the cited case *Tylka III*, even though it is the first LUBA decision involving the subject property, to distinguish the present lineage from a line of cases involving the same petitioners and a similar proposal to locate an RV camping site near petitioners' property in the RR zone, but a different applicant and different property. *See Tylka v. Clackamas County*, 24 Or LUBA 296 (1992) and *Tylka v. Clackamas County*, 22 Or LUBA 166 (1991).

> apparently to enable an RV to park on the property for recreational purposes. Petitioners, who own a dwelling on an adjacent lot, complained by phone to the county that the development was illegal. They did not file a formal challenge of that development with the county. The county investigated, but determined that no permit was required for the work at the site. Nonetheless, the property was not used subsequently for RV camping. The only use of the parking pad reflected in the record is occasional use by fishermen to access the river.
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> "Sometime thereafter, intervenor purchased the lot, and, in November 1996, applied for a conditional use permit to park an RV on the subject property while vacationing. A county hearings officer determined that the proposed RV campsite was permitted as a 'private noncommercial recreational use' or similar use under [ZDO] 813.01(A) or (E), and approved the application. The hearings officer approved the permit with conditions, among them that intervenor obtain a[n RSCA] permit and fire district approval." (Footnote omitted.)

In *Tylka III*, we affirmed the county's finding that the proposed RV campsite is a permissible conditional use under the county's code. The subsequent course of events is described in *Tylka v. Clackamas County*, 37 Or LUBA 922, 924, *aff'd* 169 Or App 305, 9 P3d 161, *rev den* 331 Or 284 (2000) (*Tylka IV*).

> "* * * On August 28, 1997, while our decision in *Tylka III* was on appeal, the county adopted a number of revisions to the ZDO as part of periodic review. One revision repealed ZDO 704 (henceforth old ZDO 704) and replaced it with the current version, pursuant to a periodic review work task. The county's revision to ZDO 704 was approved by the Director of the Department of Land Conservation and Development (DLCD), pursuant to OAR 660-025-0150(1)(a). However, that approval was appealed to the Land Conservation and Development Commission (LCDC). Therefore, ZDO 704 is not yet considered acknowledged to comply with applicable statewide planning goals. OAR 660-025-0160(8).
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> "After the appellate course of *Tylka III* was resolved, the landowner filed an application for an RSCA permit pursuant to ZDO 704, as required by the county's 1997 approval. A county hearings officer determined that the proposed RV campsite does not require an RSCA permit, because nothing in ZDO 704 requires county approval for such uses."

In *Tylka IV*, we remanded the decision to the county for necessary interpretation of ZDO 704, specifically to determine whether the proposal involved removal of vegetation from the overgrown gravel pad in a manner that violated the ZDO 704.07 requirement that a

"setback area" from the river shall be preserved with native vegetation. *See* n 9. We further held that the county erred in failing to adopt findings of compliance with Goal 5, as required by ORS 197.625(3)(b).[2]

On remand, the hearings officer conducted a hearing and issued a decision approving a conditional use permit and RSCA permit for the proposed use, concluding that the proposed maintenance of the gravel pad was consistent with ZDO 704, and that the proposed use is consistent with Goal 5 and the Goal 5 administrative rule.

This appeal followed.

INTRODUCTION

A persistent and fundamental theme running through petitioners' assignments of error is that the gravel pad on the subject property was built in 1989 without necessary county approvals, and thus is illegal development. From that premise petitioners argue in various ways that the county's approval of the use proposed in intervenor's application—use and maintenance of the gravel pad in order to site an RV for occasional personal recreational use of the property—is also unlawful. In both *Tylka III* and *Tylka IV*, we rejected similar arguments that the alleged illegality of the gravel pad was a pertinent consideration in reviewing the county's earlier approvals.[3]

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[2]ORS 197.625(3)(b) provides:

> "Any approval of a land use decision, expedited land division or limited land use decision subject to an unacknowledged amendment to a comprehensive plan or land use regulation shall include findings of compliance with those land use goals applicable to the amendment."

[3]In *Tylka IV*, we stated:

> "[P]etitioners argue from various perspectives that the county was required to consider the legality and the impacts of the driveway and gravel pad that were installed in 1989 in deciding whether to approve the proposed RV campsite. We rejected a similar argument in *Tylka III*:
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> > "'[I]ntervenor has filed a discrete application seeking only to use the property as it exists to park an RV for recreational purposes; no modification of the existing parking area is proposed. Because the previous, unappealed development of the parking area is not a part of this approval, the county could not require a conditional

In the present appeal petitioners argue that, notwithstanding *Tylka III* and *IV*, the legality of the gravel pad remains a viable issue, because the hearings officer's decision in the present case relies on the existing gravel pad to approve the proposed use under ZDO 704 and OAR 660-023-0090, an administrative rule implementing Goal 5, in a manner that revives the issue. As discussed below, on remand from *Tylka IV*, the hearings officer rejected petitioners' arguments that the legality of the existing gravel pad was a pertinent consideration under ZDO 704 or Goal 5. Petitioners assign error to those conclusions. With respect to Goal 5, petitioners argue that legality of the existing development is a necessary consideration under Goal 5 and the Goal 5 rules. With respect to ZDO 704, petitioners argue that the code implements Goal 5 and thus the legality of the existing development is also pertinent to ZDO 704.

The county responds that petitioners cannot collaterally attack the 1989 development, and that the hearings officer's approvals in this case do not legitimize the existing gravel pad, or otherwise revive or make relevant the issue of its legality.

Generally, issues that are resolved in prior land use proceedings, as well as issues that could have been raised in those prior proceedings but were not, cannot be relitigated or raised in subsequent proceedings following a LUBA remand. *Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678 (1992). Rightly or wrongly, LUBA has determined that the alleged illegality of the gravel pad is something that the county need not consider in approving proposed use of the pad under its conditional use and RSCA provisions. The

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> use permit for that existing development as part of its evaluation of the proposed use. Nor can petitioners belatedly challenge the 1989 development through an appeal of the county's decision to allow intervenor to use the property for RV parking.' 34 Or LUBA at 22-23 (footnote omitted).

> "In the present case, petitioners advance similar arguments that the county must consider whether the 1989 development complies with various code provisions, in evaluating whether to approve the proposed RV campsite. Even if such arguments are not precluded by our decision in *Tylka III*, petitioners have not articulated a sufficient reason why this Board should reach a different conclusion on this issue in the present case than in *Tylka III*." 37 Or LUBA at 932.

LUBA decisions in which those determinations were made were appealed to, and affirmed by, the Court of Appeals. As far as the county's code is concerned, therefore, *Beck* would seem to preclude petitioners from relitigating that issue. However, the issue of whether Goal 5 requires consideration of the legality of the existing development was not resolved in *Tylka III* or *IV*, nor is it clear that the issue should have been raised in those prior proceedings, but was not. Because of that uncertainty, and in an attempt to bring finality to the issues in this case, we will address petitioners' challenges to the hearings officer's conclusion that legality of the existing development need not be considered under ZDO 704 and Goal 5.

Given the primacy of the Goal 5 question, we will first address petitioners' arguments under Goal 5 and the Goal 5 rule, then their arguments under ZDO 704, and finally arguments under other code provisions.[4]

SECOND, THIRD AND SIXTH ASSIGNMENTS OF ERROR (GOAL 5)

OAR 660-023-0090(8) allows a county to protect a significant riparian corridor by adopting an ordinance that complies with certain "safe harbor" provisions, in lieu of an ordinance that is adopted pursuant to the process set forth at OAR 660-023-0040.[5] One such

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[4]We also impose that organization because the 50-page petition for review sets forth seven diffuse assignments of error and numerous subassignments of error that overlap to a considerable degree. Our allocation of certain issues to certain assignments of error is intended to reflect all portions of the petition for review where that issue is raised, not just the cited assignments of error.

[5]OAR 660-023-0090(8) provides in relevant part:

> "As a safe harbor in lieu of following the ESEE [Economic, Social, Environmental and Energy] 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:
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> "(a) The ordinance shall prevent permanent alteration of the riparian area by grading or by the placement of structures or impervious surfaces, except for the following uses, provided they are designed and constructed to minimize intrusion into the riparian area:
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> "* * * * *
>
> "(D) Replacement of existing structures with structures in the same location that do not disturb additional riparian surface area.

"safe harbor" is a provision for "[r]eplacement of existing structures with structures in the same location that do not disturb additional riparian surface area." OAR 660-023-0090(8)(a)(D). The hearings officer in the present case found that the proposed use and maintenance of the existing gravel pad is consistent with Goal 5 and the Goal 5 rule, because it involved maintenance of an "existing structure" in a manner that will not disturb additional riparian areas, and is therefore consistent with OAR 660-023-0090(8)(a)(D).[6] Petitioners challenge that conclusion on several grounds.

"(b) The ordinance shall contain provisions to control the removal of riparian vegetation, except that the ordinance shall allow:

"(A) Removal of non-native vegetation and replacement with native plant species; and

"(B) Removal of vegetation necessary for the development of water-related or water-dependent uses;

"(c) Notwithstanding subsection (b) of this section, the ordinance need not regulate the removal of vegetation in areas zoned for farm or forest uses pursuant to statewide Goals 3 or 4;

"(d) The ordinance shall include a procedure to consider hardship variances, claims of map error, and reduction or removal of the restrictions under subsections (a) and (b) of this section for any existing lot or parcel demonstrated to have been rendered not buildable by application of the ordinance[.]"

[6]The hearings officer's decision states in relevant part:

"OAR 660-023-0090(6) requires the County to develop a program to achieve Goal 5 using either the 'safe harbor' provisions in Section (8) of this rule or the standard Goal 5 ESEE process in OAR 660-023-0040 and 660-023-0050 as modified by OAR 660-023-0090(7). The hearings officer finds that the proposed use is consistent with the safe harbor provisions; therefore the use is consistent with Goal 5.

"a. OAR 660-023-0090(8) provides a safe harbor for riparian corridors where the adopted ordinance will prevent permanent alteration of a riparian area by grading or by placement of structures or impervious surfaces. However, OAR 660-023-0090(8)(D) expressly authorizes 'the replacement of existing structures with structures in the same location that do not disturb additional riparian surface area.'

"b. The hearings officer finds that the existing gravel driveway and parking pad on the site constitutes a 'structure' as defined by OAR 660-023-0090(1)(f). The applicant did not propose any additional permanent alterations of the Salmon River riparian area. The applicant proposed to maintain the existing 'structure' in its existing location without disturbing additional riparian surface area. Therefore the hearings

A. Applicability of OAR chapter 660, division 23

Petitioners contend first that the county's Goal 5 riparian inventory was adopted pursuant to OAR chapter 660, division 16, not OAR chapter 660, division 23, and therefore the hearings officer erred in applying the "safe harbor" in the latter rule.

According to petitioners, in 1998 the county adopted an inventory, ESEE analysis and program to achieve Goal 5 pursuant to OAR chapter 660, division 16. The county's inventory identifies the Salmon River and a 100-foot setback from the high water mark on each side of the river as significant fish and wildlife habitat. The county's program to achieve Goal 5 with respect to riparian areas includes, apparently, the RSCA provisions at ZDO 704. Petitioners argue that having adopted a Goal 5 program under OAR chapter 660, division 16, it is incorrect for the county to rely upon a safe harbor provision in OAR chapter 660, division 23, to conclude that the proposed use is consistent with Goal 5. Instead, we understand petitioners to argue, the county must undertake an individual analysis of the proposed use under OAR chapter 660, division 16, in which the county determines whether the proposed use is a conflicting use, analyzes the ESEE consequences of allowing the use, and develops a "program" with respect to the proposed use to achieve Goal 5.

The county responds that the hearings officer properly considered OAR chapter 660, division 23 in determining that the proposed use was consistent with Goal 5. We agree. The inquiry under ORS 197.625(3)(b) is whether the decision complies with Goal 5. *See* n 2. Where the county has adopted regulations to implement Goal 5 and the applicable Goal 5 rule, but those regulations are not yet acknowledged, the county must adopt findings that the proposed use complies with its regulations *and* with Goal 5. OAR chapter 660, divisions 16 and 23 both implement Goal 5. Division 23 supersedes division 16 for post-acknowledgment

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officer finds that the proposed use is consistent with the safe harbor provisions of OAR [chapter 660, division 23] and, therefore, Goal 5." Record 7 (footnote omitted).

plan amendments initiated after September 1, 1996. OAR 660-023-0250(1) and (2).[7] Although OAR 660-023-0250(1) and (2) do not specify the applicability of divisions 16 and 23 to those circumstances, such as the present one, where Goal 5 applies directly to a *permit* application initiated after September 1, 1996, the logical implication is that division 23 controls in that circumstance.

There is an additional pragmatic reason for that conclusion. Division 16 contains no specific directives regarding riparian areas, while division 23 does. Whether a local government pursues the ESEE process or the safe harbor approach, OAR 660-023-0090(7) and (8) require the local government to prohibit structures in riparian areas, subject to certain exceptions. One such exception is for replacement of existing structures. OAR 660-023-0090(7)(a)(B); 660-023-0090(8)(a)(D). There is no possible dispute that that exception is consistent with Goal 5. We see no error in considering whether the use proposed in this case falls within that exception, for purposes of determining whether the proposed use complies with Goal 5 under ORS 197.625(3)(b).

B. Legality of Existing Structure

Petitioner next argues that an "existing structure" for purposes of OAR 660-023-0090(8)(a)(D) must be a lawfully approved or lawful nonconforming structure. Such an implication must be read into OAR 660-023-0090(8)(a)(D), petitioners argue, as otherwise a

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[7]OAR 660-023-0250 provides in relevant part:

> "(1) This division replaces OAR 660, Division 16, except with regard to cultural resources, and certain PAPAs [post-acknowledgment plan amendments] and periodic review work tasks described in section (2) * * * of this rule. Local governments shall follow the procedures and requirements of this division or OAR 660, Division 16, whichever is applicable, in the adoption or amendment of all plan or land use regulations pertaining to Goal 5 resources. The requirements of Goal 5 do not apply to land use decisions made pursuant to acknowledged comprehensive plans and land use regulations.
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> "(2) The requirements of this division are applicable to PAPAs initiated on or after September 1, 1996. OAR 660, Division 16 applies to PAPAs initiated prior to September 1, 1996. For purposes of this section 'initiated' means that the local government has deemed the PAPA application to be complete."

landowner could simply construct a structure within the riparian area without obtaining the county's approval and that unlawful development would thereafter be "safe" under the Goal 5 rule and its implementing code provisions.

The county responds that OAR 660-023-0090(8)(a)(D) nowhere states or implies that the county must establish that an "existing structure" was lawfully approved or otherwise constitutes lawful development before the safe harbor applies, and such a requirement should not be read into the rule. With regard to petitioners' hypothetical, the county responds that it has authority and the means to enforce its regulations to require removal of any unlawfully developed structure in a riparian area or elsewhere.[8]

We agree with the county that it would be inappropriate to read into OAR 660-023-0090(8)(a)(D) a requirement that the legality of an "existing structure" must be established in applying the rule. Such a requirement is not expressed anywhere in the rule, nor necessarily implied. The Court of Appeals and LUBA have declined to read such legality requirements into land use standards. *See Marshall v. City of Yachats*, 158 Or App 151, 157, 973 P2d 374, *rev den* 328 Or 594 (1999) (in the absence of a code provision requiring a "legal lot of record" in order to obtain a building permit, whether the subject property was lawfully partitioned is inconsequential to the court's review of a decision to issue a building permit); *McKay Creek Valley Assn. v. Washington County*, 118 Or App 543, 549, 848 P2d 624 (1993) (questioning whether inquiry into the existence of prior governmental approvals creating a parcel is permissible in the absence of a code provision that expressly conditions development of the parcel on whether it is a legal or lawfully created parcel); *Maxwell v. Lane County*, 39 Or LUBA 556, 568-69 (2001), *appeal pending* (applying *Marshall* and

[8]As noted in *Tylka III*, in 1989 county planning staff apparently concluded that development of the gravel pad on the subject property did not require county approval, and therefore declined to institute an enforcement action. 34 Or LUBA at 16. It is not clear whether that continues to be the county's position. However, we understand the county to suggest that nothing in OAR 660-023-0090(8)(a)(D) would prevent the county from instituting an appropriate enforcement action to require removal of the 1989 development, if the county concluded that that development is unlawful.

McKay Creek Valley Assn. to conclude that such inquiry is not permissible, absent express code requirements for a legal or lawfully created parcel). We see no reason to reach a different conclusion with respect to OAR 660-023-0090(8)(a)(D).

The hypothetical situation that petitioners posit depends on petitioners' view that, without reading a legality requirement into OAR 660-023-0090(8)(a)(D), the rule will function to legitimize unlawful development in Goal 5-protected riparian areas. However, we agree with the county that OAR 660-023-0090(8)(a)(D) is simply silent with respect to whether the legality of "existing structures" must be established before the safe harbor applies, and that nothing in the rule prevents the county from enforcing its land use regulations in appropriate circumstances.

In sum, petitioners have demonstrated no error in the county's conclusion that the proposed use is consistent with Goal 5 and the Goal 5 rules, for purposes of ORS 197.625(3)(b).

The second, third and sixth assignments of error are denied.

FIRST, FOURTH AND FIFTH ASSIGNMENTS OF ERROR (ZDO 704)

Although ZDO 704 was not adopted pursuant to OAR 660, division 23, it contains prohibitions on certain structures and activities within certain riparian areas and exceptions to those protections, very much like those in OAR 660-023-0090. ZDO 704.04 provides in relevant part that primary and accessory structures must be set back at least 100 feet from the mean high water line of rivers such as the Salmon River. ZDO 704.07 requires that 75 percent of "the setback area" shall be preserved with native vegetation and prohibits tree-cutting and grading, subject to several exceptions.[9] In *Tylka IV*, we rejected the hearings

[9]ZDO 704.07 provides in relevant part:

> "A. A minimum of seventy-five percent (75%) of the setback area (distance) shall be preserved with native vegetation.

officer's conclusion that ZDO 704.07 only applies where a primary or accessory structure is proposed under ZDO 704.04, and remanded for necessary interpretations and determinations whether the activities proposed in this case fall within the scope of the regulations of ZDO 704.07.

On remand, the hearings officer concluded that proposed removal of vegetation and trees from the gravel pad falls within the scope of ZDO 704.07, but that such activities are nonetheless permitted under the exceptions set forth in ZDO 704.06(B).[10] Specifically, the

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"B. Tree cutting and grading shall be prohibited within the buffer or filter strip, with the following exceptions:

"1. Diseased trees or trees in danger of falling may be removed; and

"2. Tree cutting or grading may be permitted in conjunction with those uses listed in subsection 704.05 and 704.06 to the extent necessary to accommodate those uses.

"3. Vegetation removal may occur when approved by the Oregon Department of Fish and Wildlife (ODFW) upon written notification that such removal is required as part of a river or stream enhancement project."

[10]ZDO 704.06 provides in relevant part:

"EXCEPTIONS TO THE STANDARDS OF SUBSECTION 704.04

"* * * * *

"B. Repairs, additions, alterations to, or replacement of structures, roadways, driveways, or other development, which is located closer to a river or stream than permitted by the setback requirements of Subsection 704.04 shall be permitted, provided that such development does not encroach into the setback any more than the existing structures, roadways, driveways, or other development, and complies with the other provisions of Section 704.

"C. Water dependent uses, such as ODFW fish enhancement projects, private boat docks, marinas, or boat ramps, shall be exempt from the provisions of subsection 704.04, except that structures shall be muted earth tones. All other provisions of Section 704 shall apply to water-dependent uses, and any structure shall be the minimum size necessary to accommodate the use.

"* * * * *

"G. The setback and vegetation buffering provisions of this Section may be modified for purposes consistent with the adopted Economic, Social, Environmental and Energy (ESEE) analyses for the applicable watershed."

hearings officer concluded that maintenance of the existing gravel pad falls within the ZDO 704.06(B) exception for "[r]epairs, additions, alterations to, or replacements of structures, roadways, driveways, or other development" that is within the setback requirements of ZDO 704.04.[11]

Petitioners argued below, and argue to us, that the title of ZDO 704.06 indicates that it is an exception to the setback standards of ZDO 704.04, and therefore ZDO 704.06 does not provide exceptions to the vegetation and tree preservation requirements of ZDO 704.07. The hearings officer rejected that argument:

> "* * * [Petitioners argue] that the title of ZDO 704.06 ('Exceptions to the standards of 704.04') explicitly limits its applicability to ZDO 704.04. However, because ZDO 704.04 contains minimum setback requirements that are referred to in subsequent ZDO sections, removal of vegetation that [is] exempt from the setback requirements of ZDO 704.04 also is exempt from the

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[11]The hearings officer found in relevant part:

> "The hearings officer finds that the applications are subject to the vegetation preservation requirements of ZDO 704.07. However, the hearings officer further finds that vegetation removal within the existing graveled area falls within the exception provided by ZDO 704.06(B).
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> "a. LUBA concluded that the term 'setback area' as used in ZDO 704.07(A) refers to the minimum 100-foot setback from the ordinary high water line required by ZDO 704.04, regardless of whether a structure is proposed. * * * Based on this interpretation, the hearings officer finds that:
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> "i. ZDO 704.07(A) generally prohibits removal of 'native vegetation' (including trees) within 75 feet of the ordinary high water line of the river; and
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> "ii. ZDO 704.07(B) prohibits tree cutting and grading within 100 feet of the ordinary high water line of the river. However, that section allows removal of other native vegetation, grasses and shrubs within the outer 25 feet of the setback area if it does not include grading.
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> "b. However, ZDO 704.06(B) provides an exception to the setback area requirements for maintenance, alteration or replacement of existing development in the setback area, provided such activities do not increase the encroachment in the setback area. The hearings officer finds that ZDO 704.06(B) authorizes the applicant to maintain the existing gravel driveway and parking pad by removing vegetation, including trees, within the existing gravel driveway and parking pad. Even though these improvements are in the setback area, their maintenance does not violate ZDO 704.07." Record 5-6.

> vegetation preservation and other requirements of ZDO 704.07. The exceptions of ZDO 704.06 apply to the vegetation preservation requirements of ZDO 704.07 by implication for the following reasons.
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> "* * * The exceptions of ZDO 704.06 must apply to ZDO 704.07 if the exceptions are to have any meaning. Based on the plain meaning of the words in ZDO 704.04, it applies only to *new structures*. Based on the plain meaning of the words in ZDO 704.06(B), it applies only to maintenance and replacement of *existing development*. This patent conflict between the words used and the title of the section creates an ambiguity that the hearings officer must resolve as applied. Following a common rule of statutory construction, the hearings officer construes ZDO 704.06 so all parts are meaningful. The only way for the exception in ZDO 704.06(B) to have any meaning is for it to apply beyond the limits suggested by the title of the section.
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> "* * * Although this construction of the section avoids the limitation suggested in the title of the section, the hearings officer finds that the title of a section should not control over the words used in the section. The title is just that. Under the circumstances of this case, the standard involves the words in the regulation rather than its title, and those words should be given meaning to the extent they conflict with the title, at least where, as here, there is nothing in the text of the regulations or their context or their legislative history in the record to suggest otherwise.
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> "* * * This result is warranted to give other parts of ZDO 704.06 meaning, too. For instance, ZDO 704.06(C) provides an exception for 'water dependent uses' such as marinas and boat ramps. Construction of such facilities will necessarily require grading and vegetation removal up to the water line. Therefore ZDO 704.06 must provide an exemption to the vegetation preservation requirements of ZDO 704.07 if these exceptions are to have any meaning." Record 6.

We agree with the hearings officer's conclusion. As we suggested in *Tylka IV*, the provisions of ZDO 704 are an interrelated whole, built upon the setback defined in ZDO 704.04. In addition to the hearings officer's reasons, we note that ZDO 704.06 and 704.07 cross-reference each other in a manner that undercuts the implication petitioners seek to draw from the title of ZDO 704.06. For example, ZDO 704.06(G) provides for modification of the "vegetation buffering" provisions of ZDO 704, while ZDO 704.07(B)(2) allows tree cutting and grading within the setback area in conjunction with uses listed in ZDO 704.06, which would include the repair of existing structures under ZDO 704.06(B). Because grading necessarily involves vegetation removal, it is a fair reading of ZDO 704.06(B) and

704.07(B)(2) to allow the proposed tree cutting and vegetation removal in order to maintain an existing structure within the 75-foot vegetation buffer.

Finally, petitioners argue that a legality requirement must be implied into the provisions of ZDO 704, to allow use and maintenance of an existing structure within the setback area only where the applicant demonstrates that the structure was lawfully approved or is a lawful nonconforming structure. We reject that argument and its variants for the same reasons expressed above regarding OAR 660-023-0090(8)(a)(D).

The first, fourth and fifth assignments of error are denied.

SEVENTH ASSIGNMENT OF ERROR (ZDO 1203)

Petitioners challenge the hearings officer's finding of compliance with criteria for issuing a conditional use permit under ZDO 1203.[12]

A. ZDO 1203.01(B)

ZDO 1203.01(B) allows a conditional use where "[t]he characteristics of the site are suitable for the proposed use considering size, shape, location, topography, existence of improvements and natural features." *See* n 12. The hearings officer incorporated findings of compliance with ZDO 1203.01(B) adopted in an earlier decision approving a two-year conditional use permit to allow parking of an RV on the property. Record 150.

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[12]ZDO 1203.01 provides, in relevant part:

> "The Hearings Officer may allow a conditional use * * * provided that the applicant * * * demonstrates that the proposed use also satisfies the following criteria:
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> "* * * * *
>
> "B. The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, existence of improvements and natural features.
>
> "* * * * *
>
> "E. The proposal satisfies the goals and policies of the Comprehensive Plan which apply to the proposed use."

Petitioners challenge those findings, arguing that the site is not suitable for the proposed use, given that it is located within the setback area. Petitioners argue that the setback area is designed to protect Goal 5 resources, and that parking of an RV on the site is inconsistent with the purpose of that setback area. Therefore, petitioners argue, the hearings officer erred in concluding that the site is a suitable location for the proposed use, as required by ZDO 1203.01(B).

The county responds that the focus of ZDO 1203.01(B) is on whether the site is suitable for the proposed use, considering certain factors, not on whether the proposed use is consistent with Goal 5 provisions or the purpose of the setback area. We agree that petitioners read too much into ZDO 1203.01(B), and that that provision does not require inquiry into whether the proposed use is consistent with the county's Goal 5 provisions or the purpose of the setback area prescribed in ZDO 704. Petitioners do not otherwise challenge the hearings officer's findings directed at ZDO 1203.01(B), or the evidence supporting those findings.

B. ZDO 1203.01(E)

ZDO 1203.01(E) requires that the proposed conditional use be consistent with "goals and policies of the Comprehensive Plan which apply to the proposed use." *See* n 12. Petitioners contend that the proposal to park an RV on the site is inconsistent with comprehensive plan policies governing streams and riparian areas.[13]

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[13]Petitioners cite to the following portions of Clackamas County Comprehensive Plan (CCCP) Water Resources Policies, which impose a number of protections for streams and riparian areas:

> "1.0 Maintain rivers and streams in their natural state to the maximum practicable extent through sound water and land management practices. * * *
>
> "2.0 Apply erosion and sediment reduction practices in all river basins to assist in maintaining water quality. Existing riparian vegetation along streams and river banks should be retained to provide fisheries and wildlife habitat, minimize erosion and scouring, retard water velocities, and suppress water temperatures.

The hearings officer incorporated findings of compliance with ZDO 1203.01(E) adopted in an earlier decision. Those findings generally state that the proposal is to park an RV on an existing gravel pad, and therefore the proposal will not further impact riparian vegetation or otherwise involve activities inconsistent with plan policies governing streams and riparian areas. Record 151-52. The hearings officer also addressed, albeit in a different context, petitioners' arguments that the proposed use will require removal of vegetation as part of maintaining the gravel pad, in a manner inconsistent with the cited polices. The hearings officer stated:

> "Vegetation has begun to grow in the previously cleared areas of the site. Use and maintenance of this previously cleared site for parking of an RV pursuant to this permit is likely to destroy some of this vegetation and prevent the site from reverting to its natural state. The hearings officer finds that such destruction of vegetation is incidental to and consistent with the approved

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> "3.0 Require preservation of a buffer or filter strip of natural vegetation along all river and stream banks as shown on the adopted Water Protection Rules Classification Maps (WPRC), the depth of which will be dependent on the proposed use or development, width of river or stream, steepness of terrain, type of soil, existing vegetation, and other contributing factors, but will not exceed 150 feet. * * *
>
> "* * * * *
>
> "9.0 Decisions regarding developments in Principal River Conservation Areas or Stream Conservation Areas shall be consistent with the applicable Economic, Social, Environmental and Energy (ESEE) analyses for the watershed.
>
> "* * * * *
>
> "11.2 Manage development in all Principal River Conservation Areas according to the following siting performance criteria:
>
> "a. Maintain vegetative fringe areas along the river free of structures, grading and tree cutting activities (see Policy 3.0). Diseased trees or those in danger of falling may be removed.
>
> "b. Minimize erosion and sedimentation through drainage control techniques, revegetation of cleared/disturbed areas, phasing of vegetation removal, closure of unused roads, and discouraging off-road vehicles.
>
> "* * * * *
>
> "11.3 Require a minimum setback of not less than 100 feet or more than 150 feet from mean high water level for all structures, except water-dependent uses. * * *"

> [conditional use permit]. If left alone for a sufficient period of time, any lightly graveled surface of the land will eventually revert to its natural state." Record 8.

The county argues, and we agree, that the findings and foregoing reasoning adequately address petitioners' concern that removal of vegetation in the course of maintaining the existing gravel pad is inconsistent with the cited comprehensive plan policies. None of the cited policies address much less prohibit incidental removal of reestablishing vegetation in the course of maintaining an existing structure. As discussed above, ZDO 704, which presumably implements the cited policies, contains exceptions to its vegetation preservation requirements that the proposed use falls within. Petitioners have not demonstrated that the hearings officer erred in finding compliance with ZDO 1203.01(E).

The seventh assignment of error is denied.

The county's decision is affirmed.