

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 GENE R. BOTHAM and
5 PATRICIA BOTHAM,
6 *Petitioners,*

7
8 vs.

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10 UNION COUNTY,
11 *Respondent,*

12
13 and

14
15 OREGON DEPARTMENT OF
16 FISH AND WILDLIFE,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2002-045

20
21 FINAL OPINION
22 AND ORDER

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24 Appeal from Union County.

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26 D. Rahn Hostetter, Enterprise, filed the petition for review and argued on behalf of
27 petitioners.

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29 Russell B. West, LaGrande, and Shelley K. McIntyre, Assistant Attorney General,
30 Portland, filed a joint response brief and argued on behalf of respondent and intervenor-
31 respondent.

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

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36 AFFIRMED

11/01/2002

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

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners’ decision that approves the siting of a lot-of-record dwelling, with conditions.

FACTS

Petitioners own a 160-acre parcel approximately four miles east of the city of Cove. Since 1997, they have been seeking approval for a dwelling on their parcel, to be located on the knob of a hill, overlooking the valley to the southwest (preferred site). Pursuant to local code provisions that implement ORS 215.705, petitioners are entitled to a lot-of-record dwelling on the property. However, the property is located within the county’s critical wildlife habitat and big game winter range. Under the Union County Zoning, Partition and Subdivision Ordinance (UCZPSO), dwellings that are otherwise allowed may be permitted in those designated areas, provided the applicant coordinates with the Oregon Department of Fish and Wildlife (ODFW) to develop a management plan that would allow for both preservation of the habitat area and the dwelling. UCZPSO 20.09(3)(A). If the applicant and ODFW cannot agree on a management plan, the proposed dwelling may be approved according to the county’s conditional use process. *Id.*

Petitioners and ODFW could not agree on a management plan. Therefore, the county considered petitioners’ application through its conditional use process. The planning commission denied the application, and petitioners appealed the planning commission decision to the board of county commissioners. The board of county commissioners approved two sites for a dwelling on the subject property. Petitioners’ preferred site was approved but the board of county commissioners limited occupancy of the dwelling on that site to April 1st through November 30th of each year. Approval for a year-round dwelling was given for the second site (alternative site), located at a lower elevation; however, petitioners would be required to mitigate the effect of the dwelling on wildlife by: (1)

1 constructing only one outbuilding in addition to the dwelling; (2) installing fencing around
2 landscaping and gardens to exclude big game; (3) permitting ODFW to haze elk across the
3 subject property at any time without prior permission; (4) constructing a pond for wildlife
4 use; (5) limiting livestock on the property to 10 animal unit months (AUM); (6) enhancing
5 vegetation for wildlife use; (7) foregoing further land divisions; and (8) complying with
6 county siting standards for dwellings and structures.¹ This appeal followed.

7 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

8 **A. Subconstitutional Arguments**

9 Petitioners argue in the first assignment of error that the county did not have the
10 authority to limit the times of the year that the dwelling on the preferred site could be
11 occupied. In the second assignment of error, petitioners challenge the county’s authority to
12 impose the conditions of approval that were applied to the alternative site. According to
13 petitioners, the only conditions of approval that may be imposed on a lot-of-record dwelling
14 are those conditions set out in UCZPSO 20.09(6)(C), which pertain to uses in the critical
15 wildlife habitat area.² Petitioners argue that by imposing the occupancy limitation on the

¹ If we understand the parties and the decision correctly, the potential conflicts between the dwelling and wildlife are greatest in the winter when big game are driven from higher elevations by deep snow. During those times of the year many more animals are present on the subject property and nearby properties seeking food and shelter. The county apparently takes the position that the location of the preferred site is in a part of the habitat where siting limitations will not successfully mitigate adverse impacts on wintering wildlife from an occupied dwelling, necessitating a prohibition on occupancy of a dwelling sited in that location from December through March. Because the alternative site is in a part of the habitat where there are fewer inherent conflicts, the county apparently believes the eight conditions are sufficient to mitigate those impacts between December and the end of March, making it unnecessary to prohibit occupancy during those months.

² UCZPSO 20.09(6) provides, in relevant part:

“The reviewing body may impose the following conditions, as applicable, upon a finding of fact that warrants such restrictions:

“* * * * *

“C. BIG GAME WINTER RANGE AND BIG GAME CRITICAL HABITAT: A proposed new structure requiring a conditional use may be required to:

“1. Be located as close as possible to an adjacent compatible structure * * *;

1 preferred site, and the eight conditions on the alternative site, the county exceeded its
2 authority by imposing conditions that are not otherwise allowed by the ordinance. In
3 addition, petitioners argue that to the extent the county has the authority to impose such
4 conditions, the rationale for imposing them is not supported by substantial evidence.

5 The county and intervenor-respondent (respondents) respond that the board of county
6 commissioners interpreted UCZPSO 20.09(6)(C) and UCZPSO 21.03 to allow the county to
7 impose a broad range of conditions aimed at minimizing the impact of the proposed
8 development in those circumstances where the county's conditional use permit process is
9 used to approve a dwelling in the critical wildlife habitat area instead of a mutually agreed-
10 upon management plan.³ Respondents point out that UCZPSO 20.09(3)(A) requires that,
11 when development is proposed in the critical wildlife habitat area, preference must be given
12 to protecting the resource. Respondents contend that, in many cases, a management plan
13 contains a myriad of conditions that otherwise could not be imposed on an applicant under
14 UCZPSO 20.09(6), and that by using the conditional use process set out at UCZPSO 21.03,
15 the county can replicate the flexibility that private parties and ODFW have to craft conditions
16 to ameliorate the impact of development on the resource when the collaborative process fails.
17 The county argues that its interpretation of its own ordinance is subject to deference under
18 ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).⁴

“2. Share a common access road or where it is impossible to share a common
access road, locate as closely as possible to the nearest existing public road
in order to minimize the length of access from the nearest road.”

³ UCZPSO Article 21.00 sets out the county's conditional use review process. UCZPSO 21.03 provides, in relevant part:

“In addition to the general requirements of this ordinance, in granting a conditional use the
Commission may attach conditions which it finds are necessary to carry out the purposes of
this ordinance. * * *”

⁴ ORS 197.829(1) 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:

1 With respect to the eight conditions of approval attached to the alternative site, the
2 county argues that petitioners proposed those conditions of approval, albeit in support of a
3 year-round dwelling on the preferred site. Respondents contend that petitioners should not
4 now be allowed to challenge conditions that they suggested themselves. In addition, the
5 county argues that conditions seven and eight must be imposed under UCZPSO 5.06, 5.07
6 and 5.08 because the property is located in the Timber-Grazing (A-4) zone, a combined Goal
7 3/Goal 4 zone, and those conditions are intended to ensure compliance with statutory
8 minimum parcel size requirements and fire resistant development standards for forested
9 areas.

10 With respect to the evidentiary challenge, respondents point to evidence in the record,
11 including testimony from a wildlife biologist, that a prohibition on occupancy on the
12 preferred site during the winter months would reduce impacts on elk overwintering in the
13 area. In addition, respondents point to testimony that the proposed conditions of approval for
14 the alternative dwelling site would ameliorate some of the impacts of an occupied dwelling
15 on wintering wildlife.

16 Petitioners' reliance on UCZPSO 20.09(6)(C) to provide an exclusive list of
17 conditions to mitigate the effect of the dwelling is a plausible interpretation of the county's
18 ordinance provisions. However, we may only reverse or remand a decision based on a local
19 government's interpretation of local land use legislation if that interpretation is clearly
20 wrong. ORS 197.829(1); *Goose Hollow Foothills League v. City of Portland*, 117 Or App

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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 provision or land use regulation implements.”

1 211, 843 P2d 992 (1992). The interpretation adopted by the board of county commissioners
2 is well within the discretion afforded local governments by ORS 197.829(1) and *Clark*.
3 Therefore, the county has the authority, pursuant to the board of county commissioners’
4 interpretation of UCZPSO 20.09(3)(A) and 21.03, to impose conditions of approval in
5 addition to those set out in UCZPSO 20.09(6)(C) for uses within critical wildlife habitat
6 areas when that use is approved through conditional use review. Further, we agree with the
7 county that the evidence it cites is substantial evidence to support a conclusion that the
8 conditions of approval for a dwelling on one of the two approved sites would lessen the
9 impact of the dwelling on wintering wildlife. Accordingly, the first assignment of error is
10 denied and the second assignment of error is denied in part.

11 **B. Constitutional Argument**

12 As noted above, the county imposed eight conditions of approval to allow a dwelling
13 on the alternative site. Petitioners advance a second argument under their second assignment
14 of error that conditions three through six

15 “were imposed on petitioners * * * in violation of petitioners’ rights under the
16 Fifth Amendment to the United States Constitution. *Dolan v. City of Tigard*,
17 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994).” Petition for Review 6.

18 LUBA will not consider claims of constitutional violations where the parties raising
19 such claims do not supply legal argument in support of those claims. *Sparks v. Tillamook*
20 *County*, 30 Or LUBA 325, 330 (1996); *Joyce v. Multnomah County*, 23 Or LUBA 116, 118,
21 *aff’d on other grounds* 114 Or App 244, 835 P2d 127 (1992). Petitioners do not explain why
22 they believe that the four disputed conditions of approval constitute exactions subject to the
23 *Dolan* analysis. Nor do petitioners provide any argument to support their contention that
24 those conditions, if they are exactions, constitute a violation of petitioners’ Fifth Amendment
25 rights.

26 The second assignment of error is denied.

27 The county’s decision is affirmed.