

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 FRIENDS OF YAMHILL COUNTY

5 and BETTY WODARCZAK,

6 *Petitioners,*

7
8 vs.

9
10 YAMHILL COUNTY,

11 *Respondent,*

12
13 and

14
15 AL NORDGREN,

16 *Intervenor-Respondent.*

17
18 LUBA No. 2003-009

19
20 FINAL OPINION

21 AND ORDER

22
23 Appeal from Yamhill County.

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25 William K. Kabeiseman, Portland, filed the petition for review and argued on behalf
26 of petitioners. With him on the brief was Garvey, Schubert, Barer, LLP.

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28 No appearance by Yamhill County.

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30 John C. Pinkstaff, Portland, filed the response brief and argued on behalf of
31 intervenor-respondent. With him on the brief was Ramis, Crew, Corrigan & Bachrach, LLP.

32
33 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
34 participated in the decision.

35
36 REMANDED

06/25/2003

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision approving a nonfarm dwelling on a 4.1-acre
4 parcel zoned Exclusive Farm Use (EF-80).

5 **FACTS**

6 The subject property is an undeveloped triangular-shaped parcel located about one-
7 half mile east of the intersection of Sunset Knoll Drive and Cove Orchard Road. Sunset
8 Knoll Drive, a 60-foot easement, bisects the property in a line that is roughly parallel with
9 the hypotenuse of the triangle.¹ The property slopes downward to the west, with 20-30
10 percent slopes at the southwest corner, 12-20 percent slopes in the middle where it is bisected
11 by Sunset Knoll Drive, and 30-45 percent slopes at its northwest corner. The property is
12 predominately forested and is not in agricultural production. The current stand of trees is 15
13 to 50 years of age and consists primarily of red alder, bigleaf maple, and Oregon white oak.

14 Intervenor-respondent (intervenor) submitted an application for a nonfarm dwelling
15 pursuant to Yamhill County Zoning Ordinance (YCZO) 402.03(I) (nonfarm dwellings
16 located on parcels created prior to 1993).² The planning director approved the application,
17 with conditions. The planning director’s decision was appealed to the board of county
18 commissioners, which affirmed the planning director’s decision. This appeal followed.

¹ Sunset Knoll Drive was dedicated to the public in 1991. However, the county never accepted that dedication and, therefore, the county treats the road as a private easement.

² YCZO 402.03(I), implements ORS 215.284(1)(b) and OAR 660-033-0130(4). YCZO 402.03(I) permits nonfarm dwellings on parcels created prior to 1993, provided seven criteria are met. YCZO 402.03(I)(2) requires, in relevant part, that the proposed dwelling:

“[W]ill be sited on a lot or parcel that is predominantly composed of Class IV through VIII soils that would not, when irrigated, be classified as prime, unique, Class I or II soils.”

1 **SECOND ASSIGNMENT OF ERROR³**

2 The sole dispute in this appeal is whether the proposal complies with YCZO
3 402.03(I)(2). *See* n 2. The Soil Survey for Yamhill County shows that the property is
4 predominately composed of Willakenzie (WkD) soils. These soils are Class III-e soils and, as
5 such, would preclude use of the subject parcel for a dwelling under YCZO 402.03(I)(2).
6 Intervenor submitted to the county the results of a soil investigation conducted by a qualified
7 soil scientist. Intevenor’s expert evaluated the soils on the property and concluded that,
8 despite the evidence included in the Soil Survey, 55.4 percent of the property is composed of
9 Class IV through VIII soils. That conclusion was based in part on the soil scientist’s
10 determination that the Sunset Knoll Drive easement, comprising approximately 25.6 percent
11 of the property, was converted from Class III-e to Class VI soils as a result of road
12 improvements constructed within the easement in 1991. The county accepted the results of
13 the soil investigation report and concluded that YCZO 402.03(I)(2) was satisfied.

14 Petitioners argue that the county erred in relying on the soil investigation report. First,
15 petitioners argue that the city improperly placed the burden of proof on opponents to
16 demonstrate that the easement was *not* Class IV or higher soils. Second, petitioners argue
17 that the soil investigation report is not substantial evidence that supports the county’s
18 ultimate conclusion that YCZO 402.03(I)(2) has been met.

19 **A. Burden of Proof**

20 An applicant has the burden of proof throughout a quasi-judicial process to
21 demonstrate that all applicable approval criteria have been satisfied. *Rochlin v. Multnomah*
22 *County*, 35 Or LUBA 333, 348 (1998), *aff’d* 159 Or App 681, 981 P2d 399 (1999). Citing the
23 following findings, petitioners argue that the county improperly shifted the burden of proof
24 to petitioners:

³ The petition for review includes two assignments of error. However, at oral argument, petitioners withdrew their first assignment of error. Therefore, we address only petitioners’ second assignment of error.

1 “[T]he burden of proof is on the applicant to make a showing, based on
2 substantial evidence in the record that he satisfies the approval criteria. Once
3 that showing has been made, the burden of providing contrary substantial
4 evidence shifts to the opponents.” Record 16.

5 Petitioners are correct that the above findings can be read to suggest that the county in this
6 case applied an improperly shifting burden of proof, with the applicant enjoying what
7 petitioners describe as a rebuttable presumption if his initial evidentiary presentation includes
8 substantial evidence that, viewed alone, would result in permit approval unless opponents
9 thereafter ultimately carry a separate, county-created burden of proof to present substantial
10 evidence that the application does not meet applicable approval criteria.

11 Just because the above-quoted findings can be read in isolation to suggest the county
12 improperly shifted the burden of proof in this case from the applicant to the petitioners does
13 not mean that the county actually did so. Provided the record demonstrates that the county
14 recognized that the burden of proof remained with the applicant throughout the local
15 proceedings and that the county was obliged to review all of the evidence in the record to
16 determine whether the applicant carried his burden of proof, the above-quoted findings
17 provide no basis for reversal or remand. Based on our review of the findings and the record,
18 we agree with intervenor that the county did not improperly shift the burden of proof in this
19 matter to petitioners.

20 The decision includes several pages of findings that respond to each of petitioners’
21 evidentiary arguments. Record 19-26. Those findings show that the board of county
22 commissioners considered petitioners’ evidence, but concluded that the evidence did not so
23 undermine intervenor’s evidence that a reasonable person would not rely on intervenor’s
24 evidence. Because the county did not improperly shift the burden of proof, petitioners’
25 assertions provide no basis for reversal or remand. The first subassignment of error is denied.

1 **B. Substantial Evidence**

2 Petitioners argue that the county’s finding that YCZO 402.03(I)(2) has been satisfied
3 because over 55.6 percent of the property is made up of Class IV through Class VIII soils is
4 not supported by substantial evidence, because the board of county commissioners
5 incorrectly inferred from the soil investigation report that the entire easement has been so
6 altered by the construction of the road bed and road that it is no longer properly classified as
7 Class III-e. According to petitioners, the soils investigation report either does not include the
8 easement in its soils evaluation or improperly assumes that because part of the easement has
9 been improved, the soils under the entire easement are Class IV or higher soils. Petitioners
10 contend that neither one of these assumptions result in reasonable estimates of the percentage
11 of the subject property that is composed of Class IV-VIII soils.

12 Petitioners also argue that they presented photographs of the easement showing that
13 the actual driving surface of the road is only 10-15 feet wide, and is graveled, rather than
14 paved. Petitioners acknowledge that there is evidence in the record suggests that a roadbed
15 and road surface encompassing a swath up to 26 feet wide was established within the
16 easement.⁴ However, petitioners dispute that that evidence supports the county’s conclusions
17 that (1) the road bed and road as built, was actually constructed at the full 26-foot width for
18 its entire length; and (2) that even if the road was constructed to the maximum width, that

⁴ That evidence is a road construction contract dated March 22, 1991. That contract provides that the construction company would

“[Construct a] new road from county right-of-way to undeveloped lots. This will include approximately 4800 feet using existing surface road and the rebuilding of the lower road. Road surface to be a minimum of 18 feet wide with 10 [inch] culverts approximately every 500 feet.

“Owner will be responsible for permits and use of existing grades. Any other additional work to be on a time and material basis. Work will commence with the weather permitting or as project necessitates. * * *” Record 70.”

Attached to that contract is a cross section of the Sunset Knoll Drive turnaround at the “end of [the] project,” and a “Typical Section” showing two nine foot travel lanes and two four foot shoulders. Record 71.

1 such construction had the effect of converting the soils underneath the road to Class IV or
2 higher soils. Petitioners further dispute that the evidence demonstrates that if the entire 26-
3 foot roadbed was built, that the 26-foot roadbed and road removed the *entire* 60-foot
4 easement width from the Class III-e soils classification.

5 Intervenor responds that the county could rely on the two soil investigation reports
6 prepared by intervenor's soil scientist to find that YCZO 402.03(I)(2) has been met.
7 According to intervenor, those reports provide an expert assessment of the road easement and
8 demonstrate that the establishment of a road within the easement has either removed, covered
9 or compacted the soils within the easement to such an extent that the entire easement is no
10 longer available for resource use. In addition, intervenor argues that the photographs
11 petitioners rely on do not show what petitioners assert: that the disturbance to the soil is
12 limited to a narrow graveled area. According to intervenor, the photographs do not show the
13 amount of roadbed preparation that was done to support the roadway itself. Intervenor also
14 argues that the photographs have limited evidentiary value because they do not show the
15 entire length of the roadway, nor do they accurately reflect the actual widths of the graded
16 and graveled surfaces, shoulders, culverts and other improvements within the easement.
17 Intervenor argues that the board of county commissioners properly weighed the credibility of
18 petitioners' non-expert opinions and evidence regarding the soils within the roadway against
19 the credibility of intervenor's soils expert and concluded that intervenor's evidence was
20 sufficient to establish that YCZO 402.03(I)(2) had been satisfied. Intervenor argues that this
21 conclusion is particularly reasonable because intervenor obtained a review of the two soils
22 investigation reports from another soil scientist, and that second soil scientist concurred with
23 the findings contained in those reports.

24 In the first soils investigation report, intervenor's soil scientist did not identify the
25 soils located within the easement or in an area where the soils were disturbed to

1 accommodate a foundation for a dwelling.⁵ The first report states that soils classifications for
 2 those two areas are “not applicable” and places those two areas of the subject property in the
 3 “non-high value” farmland category. The second report is an addendum to the first report
 4 where, intervenor argues, the soil scientist clarifies that he considers both the foundation area
 5 and the road easement to be Class VI soils.⁶

⁵ The first soil investigation report is found at Record 159-160. It states, in relevant part:

“This property is currently in predominantly mixed forest, with some brushy openings. There is an older excavation of a house that was never built and soils in that area (2000 [square feet]) had the solum removed (upper three feet of topsoil and subsoil). The truncated soils in the area of the house excavation have clayey saprolite on the surface and are no longer productive farmland in their current condition. There is a designated easement for [Sunset Knoll Drive] through the property that encompasses part of the WkD soil map unit. *Using the premise that the use of this area as a road easement, and the existence of a gravel road and associated ditches and cuts in that easement, effectively precludes this easement area from agricultural and forestry production.*” Record 159 (emphasis added).

“Table of Findings

“Map Unit	High Value Farmland[Y/N]	Capability Class	Percent of Area
“WkD	Yes	III-e	44.7
“WeE	No	IV-e	19.5
“WeF	No	VI-e	9.2
“Disturbed soil area	No	N/A	1.0
“Road Easement	No	N/A	25.6.” Record 160.

⁶ The addendum states, in relevant part:

“This addendum * * * is made to provide land capability classifications for areas remapped Disturbed Soil Area and the Road Cut/Road Easement. The soil conditions in the road easement and in the Disturbed Soil Area * * * are such that the soil has extreme limitations for use as agricultural land. The topsoil has been removed and the upper portions of the subsoil have been truncated. In the Disturbed Soil Area there remains a cut area with weathered sedimentary rock at the ground surface. This area would make a very poor seedbed and has low available water holding capacity and severely diminished effective rooting depth. This area is classified as capability class VI. The area of the road cut/road easement has been compacted and rockered and is currently a functional road.

“Based on the assignment of capability class VIs for the Disturbed Area, * * * 55.4 percent [of the] area [is designated] non-high value farmland soils and class IV and higher. This percentage has not changed from the original report, the capability class for these two cover types has simply been specified where previously it was listed as N/A * * *.” Record 161.

1 We agree with petitioners that the county’s conclusion that the entire 60-foot
2 easement for the entire length of the subject property has been converted to a Class VI soil is
3 not supported by substantial evidence. Over 25 percent of the property is subject to the
4 easement. If even a small portion of that easement is not properly classified as Class VI soil,
5 the parcel is not “predominantly composed of Class IV through VIII soils” and YCZO
6 402.03(I)(2) is not satisfied. Therefore, the soils classification of the *entire* 60-foot easement
7 is of critical importance. The evidence shows that at least part of the easement is developed.
8 However, petitioners provided testimony and evidence that the actual impact of the road
9 construction is much more limited. Neither the first soil report nor the second clearly states
10 that the entire, or even the majority, of the 60-foot easement was impacted by road
11 construction to such a degree that the soils can no longer be classified as Class I-IV soils. To
12 the extent the reports can be read to imply such a statement, nothing in the record directed to
13 our attention appears to corroborate that implication. On the contrary, the evidence to which
14 we are directed suggests that only part of the easement was developed or otherwise affected
15 by road construction. There is nothing in the record to which we are directed, including the
16 soils reports, that provides an explanation for why road construction on part of the easement
17 so affected the remainder of the 60-foot easement that the soils over the *entire* easement
18 should no longer be considered Class I-IV soils.⁷

19 The second subassignment of error is sustained. The second assignment of error is
20 sustained in part.

21 The county’s decision is remanded.

⁷ The second soil scientist’s review is not particularly helpful in establishing the soils classification within the easement. That review put forth the conclusion that the road easement has essentially ceased to be agricultural soils because of its conversion to road use. Record 170. Like the first soils investigation report, the second soil report appears to assume that, because part of the easement is improved, that entire easement is no longer available for resource use and therefore the soils classification scheme is not applicable to that area.