BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANTHONY NEAL and
NATASHA VOEVODINA NEAL,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

JOHN HENNEMAN
and BONNIE HENNEMAN,
Intervenors-Respondent.

LUBA No. 2006-041

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Thane W. Tienson, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Landye Bennett Blumstein, LLP.

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

William C. Cox, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Gary P. Shepherd.

HOLSTUN, Board Member, participated in the decision.

BASSHAM, Board Chair, did not participate in the decision.

AFFIRMED 07/14/2006

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 county approval of a forest template dwelling.

MOTION TO INTERVENE

John Henneman and Bonnie Henneman (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

FACTS

Intervenors applied for a forest template dwelling on a 23.5-acre parcel located north of the Clackamas River and Highway 224 several miles east of Carver. The property is zoned Timber (TBR) and consists of two tax lots that were previously partitioned from a parcel owned by intervenors' son, who built a forest template dwelling on his remaining property. Portions of the property contain slopes of up to 50%. The planning director approved the application, and petitioners appealed the decision to the hearings officer. The county eventually conducted three *de novo* hearings on the appeal because the recording equipment failed to record the first two hearings. The hearings officer affirmed the planning director's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

At oral argument, petitioners withdrew their first assignment of error.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county erred in finding that certain development standards do not apply to the application. In the TBR zone, a forest template dwelling is a use permitted subject to planning director review.[1] Petitioners argue that the forest template

[1] Clackamas Zoning Development Ordinance (ZDO) 406.05.C provides the approval criteria for forest template dwellings:

"* * * * *

dwelling application must demonstrate compliance with certain development standards. ZDO 406.05.C.3 requires that "[t]he siting standards in [ZDO] 406.09 shall be met." *See* n 1. ZDO 406.09.C provides that "[s]iting of development shall comply with the provisions of [ZDO] 1002 and 1003."[2] According to petitioners, the county erred by not finding compliance with certain subsections of 1002 and 1003.[3]

Initially, intervenors argue that the issues petitioners raise under the second assignment of error were not raised with enough specificity below to preserve their right to raise those issues at LUBA pursuant to ORS 197.763(1) and ORS 197.835(3).[4] Although intervenors concede that petitioners argued that ZDO sections 1002 and 1003 applied below, they argue that petitioners rely on ZDO 406.09.C, in asserting that ZDO sections 1002 and 1003 apply, for the first time in their petition for review. While petitioners could have done a better job of explaining below why they believed sections 1002 and 1003 apply to the

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"2. The tract on which the dwelling will be sited does not include a dwelling;

"3. The siting standards described in Subsection 406.09 shall be met;

"4. The parcel upon which the dwelling is to be located was lawfully created[.]"

[2] ZDO 1002 sets out five single spaced pages of development standards for "PROTECTION OF NATURAL FEATURES." ZDO 1003 set out two more pages of development standards to address "HAZARDS TO SAFETY."

[3] In particular, petitioners argue that the application must comply with ZDO 1002.05 – River and Stream Corridors; 1002.06 – Wildlife Habitats and Distinctive Resource Areas; 1003 – Hazards to Safety; and 1008.03 – Storm Drainage General Standards.

[4] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

disputed decision, the issue was raised with enough specificity that the hearings officer was able to adequately respond to the issue. The issue of whether the hearings officer needed to address those criteria was not waived.

Before the hearings officer, both county staff and intervenors argued that ZDO sections 1002 and 1003 apply if at all later, when building permit approval is required, not at the time planning director approval for a template dwelling is sought. In other words, we understand intervenors to argue that template dwelling approval establishes that a dwelling may be built on the property, and building permit approval ensures that the more detailed building plans comply with the relevant siting and development standards.

We tend to agree with intervenors that at least some of the development standards are likely to be difficult to address in a meaningful way without the detailed plans that typically are not provided until approval of a building permit is requested. We also agree that the reference in ZDO 406.05.C.3 that the ZDO 406.09 siting standards "shall be met," and the directive in ZDO 406.09.C that "development shall comply with the provisions of Section 1002 and 1003" do not necessarily mean that all of those standards apply now, rather than when a building permit is requested. However, if none of those standards were intended to have any bearing on the planning director's approval of template dwellings, it is hard to see why those ZDO sections would be worded as they are. If the county believes none of those siting and development standards are relevant at the time a template dwelling is approved, ZDO 406.05.C.3 and ZDO 406.09.C must be amended to state that intent more clearly.

While we agree with petitioners that the siting standards are not irrelevant at the time the planning director grants forest template dwelling approval, that does not necessarily mean *all* of those criteria do apply at this time or that all of those criteria can be fully addressed before the stage at which a building permit is requested. As we have already noted, the level of detail regarding the actual homesite and dwelling is much more circumscribed at this stage than it will be at the building permit stage. As we have stated

many times, in addressing an approval criterion a local government may: (1) find that the criterion is satisfied, or find that it is feasible to satisfy the criterion and adopt conditions necessary to ensure compliance; (2) deny the proposal; or (3) defer its decision regarding that criterion to a later stage that provides equivalent protections and rights of public participation. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992). Petitioners argue that the hearings officer did not find compliance with the siting and development standards. The hearings officer, however, clearly proceeded under the first option in *Rhyne*, finding that it is feasible to comply with siting requirements and imposing conditions of approval to ensure that result. Under such circumstances, the appropriate question is whether the county's findings of compliance or feasibility of compliance are adequate and supported by substantial evidence.[5] *Salo v. City of Oregon City*, 36 Or LUBA 415, 425 (1999). The decision states:

> "The applicants propose to build a single-family detached home. Based on ZDO 1001.02, the home is subject to ZDO 1002.03, 1002.05, 1002.06, 1003 and 1008.03. The ZDO does not say when these sections apply. Nothing precludes applying them during the building permit process. However the hearings officer can respond to those standards to some extent based on substantial evidence in the record." Record 12.[6]

The hearings officer's decision clearly explains which siting standards the hearings officer believes apply and how the applicable standards are met or how it is feasible to meet those standards with the imposed conditions. Petitioners' most focused argument concerns

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[5] As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

[6] The hearings officer essentially found that it was feasible to comply with any applicable siting requirements and imposed conditions of approval requiring compliance with them.

ZDO 1003.02 which requires a geologic engineering study for development on hillsides of over 20% slopes. The hearings officer found that it was feasible to site the dwelling on portions of the property with slopes between 5% and 10% and therefore ZDO 1003.02 did not apply.[7] Petitioners challenge that interpretation but do not provide a persuasive argument for why the hearings officer's interpretation is wrong as a matter of law. ZDO 1003.02 provides that a geologic engineering study is only required "for development proposed on slopes of twenty percent or greater." We agree with the hearings officer's interpretation that when no "development is proposed on slopes of greater than 20%" that ZDO 1003.02 does not apply.

Petitioners argue that ZDO 1002.02 and 1002.04 are not met.[8] The decision conditions approval on complying with the "development standards of the TBR district." Record 18. Petitioners have not sufficiently developed this argument to explain why those development standards need to be addressed specifically in this decision rather than at the time a building permit is requested.

Petitioners argue that ZDO 1002.05 should have been more specifically addressed. ZDO 1002.05 requires applicants to use erosion control practices and to retain buffers along streams. The hearings officer found that there were no streams on the subject property. However, because intervenors' septic drainfield is located on their son's parcel, the hearings

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[7] The hearings officer's findings state:

> "The hearings officer finds that ZDO 1003.02.B, *et seq*., do not apply to proposed development on areas with slopes less than 20% in this case. Provided the applicants verify the slope of the land where they propose development as discussed above, ZDO 1003.02 would not apply to that development. To the extent that their development involves land sloped more than 20%, the hearings officer finds that development is subject to ZDO 1003.02, and an engineering geologic report is required for the grading, building and/or other permit application for that part of the development." Record 14.

[8] The extent of petitioners' argument regarding ZDO 1002.02 and 1002.04 consists of:

> "* * * there was no condition of requirement with the provisions of ZDO 1002.02 regarding 'General Terrain Preparation.' There was no condition of approval addressing ZDO 1002.04 regarding 'Trees and Wooded Areas.'" Petition for Review 10.

officer required that the septic drainfield be setback 100 feet from the stream on the son's property. Record 12-13. Petitioners do not explain why the hearings officer's action is not sufficient to address ZDO 1002.05.C.

Petitioners argue that the hearings officer erred by finding that ZDO 1002.06 regarding wildlife habitats and wetlands does not apply. According to petitioners, they submitted evidence showing the presence of wildlife habitat on the property. The hearings officer, however, found that the evidence offered by petitioners was not obtained from specific site review and analysis of conditions on the subject property, but instead from petitioners' property and the area in general. The hearings officer found no wildlife habitats or wetlands are present on the property because the site does not contain a wetland listed in the comprehensive plan and the site is not designated as a wildlife habitat on the comprehensive plan. Record 13. The hearings officer chose to rely on the evidence presented by intervenors and county staff over the opposing evidence offered by petitioners. The hearings officer also found that 1002.06 is only applicable to wildlife habitat and wetlands shown on the comprehensive plan. Petitioners do not challenge that interpretation.

Petitioners argue that the decision does not demonstrate compliance with ZDO 1003.04.A.[9] Petitioners' argument is not sufficiently developed for our review. In any event, ZDO 1003.04.A is directed at foundations and crawlspaces. Petitioners offer no explanation for how such a standard can be meaningfully addressed before foundations and

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[9] ZDO 1003.04.A provides:

> "Appropriate siting and design safeguards shall insure structural stability and proper drainage of foundation and crawl space areas for development on land with any of the following soil conditions: Wet/high water table; high shrink-swell capability; compressible/organic; and shallow depth-to-bedrock."

The extent of petitioners' argument concerning ZDO 1003.04 consists of:

> "* * * there is no requirement to satisfy the standards established for 'Soil Hazard Areas' in ZDO 1003.04 despite unrebutted evidence that this is an area of 'shallow depth-to-bedrock.'" Petition for Review 10.

crawl space areas are proposed. The hearings officer's condition of approval that any development comply with the standards is sufficient. Record 18.

Finally, petitioners argue that ZDO 1008.03 is not satisfied.[10] The hearings officer found that it is feasible for intervenors to comply with the ZDO 1008.03 "General Standards" and conditioned his approval on compliance with such standards. Petitioners neither acknowledge nor challenge those findings. The finding and condition of approval are sufficient to establish that ZDO 1008.03 shall be met.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

ZDO 406.05.C.4 provides that approval of a forest template dwelling requires a showing that "the parcel upon which the dwelling is to be located was lawfully created." Petitioners argue that the property is not a lawfully created parcel. The parcel was created in 1989 when intervenors' son partitioned a larger parcel. The partitioning was accomplished by deed, and intervenors' son did not go through county land use approval or review. At the time of partitioning, the property was zoned Timber Transitional – 20-acre minimum (TT-20). Under the TT-20 zoning in 1989, no county land use approval or review was required to create parcels of 20 or more acres unless the partitioning was for non-forest uses. There is no dispute that the parcel created was over 20-acres, but petitioners argue it was created for a non-forest purpose and is therefore an illegally created lot.

In the sixteen years since the parcel was created in 1989, until the current application was filed, the only activity that has taken place on the subject parcel is the growing of trees. Petitioners concede that the "[g]rowing and harvesting [of] timber and other forest products" is a forest use under the ZDO, but they argue that intervenors only grew timber and did not

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[10] The extent of petitioners' argument concerning ZDO 1008.03 consists of:

> "* * * the 'General Standards' pertaining to 'storm drainage' set forth in ZDO 1008.03 were not addressed despite their seeming applicability." Petition for Review 10.

harvest any timber. According to petitioners, because no harvesting of timber occurred the parcel was not in forest use. The hearings officer's findings state:

> "The hearings officer finds that substantial evidence in the record only supports a conclusion that the applicants did not use the site for non-forest purposes in 16 years. Although it might have been the applicants' intention to build a home on the site from the date it was created, there is no substantial evidence in the record to that effect. Therefore [petitioners'] claim is speculative. The site was used for forest purposes for 16 years after it was created and before the applicants applied to use it for a dwelling. That is, trees growing on the property continued to grow there for 16 years. The claim that such an activity is non-forest use of the property is not supported by substantial evidence, administrative rule or case law cited in the record and is not persuasive to the hearings officer. Moreover, based on the list of principal uses permitted in ZDO 403.03.A (1989 ed.), the hearings officer finds that the applicants used the site for forest purposes. There is no suggestion in the relevant law or rules in the record that the applicants were obliged to exercise some level of professional or commercial timber management to avoid using the site for non-forest purposes." Record 11 (footnote omitted).[11]

The hearings officer interpreted forest use to include growing timber. We review the hearings officer's interpretation to determine whether that interpretation is correct, and we are not required to give the hearings officer's interpretation any special deference. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995). We agree with the hearings officer's interpretation. Unlike most agricultural crops that are harvested on at least an annual basis, timber is not harvested annually and frequently has a much longer harvesting cycle. Using a property for nothing but growing trees for 16 years is a forest use. Because the property was not used for a non-forest use, the partition was proper under the ZDO. Therefore the parcel was legally created.

The third assignment of error is denied.

[11] The omitted footnote notes that "growing and harvesting timber and other forest products" and "public and private conservation areas" were forest uses under the applicable ZDO provisions.

FOURTH ASSIGNMNET OF ERROR

ZDO 406.05.C.2 provides that approval of a forest template dwelling requires a showing that "the tract on which the dwelling will be sited does not include a dwelling." Intervenors' son owns an adjacent parcel that contains a single-family dwelling. Petitioners argue that intervenors' son's parcel is part of the same tract as the subject property and therefore the tract already includes a dwelling.

ZDO 406.03 is a special definition section in the TBR zone. It includes definitions for the terms "owner," "ownership" and "tract."[12] ZDO 202 sets out general definitions that apply throughout the ZDO. ZDO 202 defines "owner" to mean "[p]erson or persons holding fee title to a parcel, lot or tract of land, except in those instances when the land is being sold on contract, the contract purchaser shall be deemed the owner."

Relying on the broad definition of "owner" in ZDO 406.03.C, petitioners argue the subject property and intervenors' son's property, which already contains a dwelling, is the same "tract," as ZDO 406.03.E defines that term. The hearings officer rejected that interpretation.

We again agree with the hearings officer's interpretation. The broad definition of "owner" in ZDO 406.03.C to include various relatives corresponds with ORS 215.705(6), which provides a special definition to broaden the universe of "owners" who may qualify for

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[12] As relevant ZDO 406.03 provides:

> "C. 'Owner' means the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild, of the owner or a business entity owned by any one or combination of these family members.
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> "D. 'Ownership' means holding fee title to a parcel, lot or tract of land, except in those instances when the land is being sold on contract, the contract purchaser shall be deemed to have ownership. For purposes of section 406, ownership shall include all contiguous parcels, lots or tracts meeting this definition.
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> "E. 'Tract' means one or more contiguous lots or parcels under the same ownership."

lot of record dwellings under ORS 215.705(1)(a) and county zoning ordinance provisions that implement that statute. The dwellings allowed under ORS 215.705 are only allowed if the "owner" acquired the "lot or parcel" prior to certain dates. The obvious problem with petitioners' interpretation is that neither the ZDO 406.03.E definition of "tract" nor the ZDO 406.03.D definition of "ownership" even use the term "owner." *See* n 12. There is simply no textual or contextual support for petitioners' argument that the broad ZDO 406.03.C definition of "owner," which presumably was adopted by the county to apply to lot of record dwellings in the TBR zone, should be consulted to import a similar expansion of the ZDO 406.03.D definition of "tract." We agree with the hearings officer that the subject property is not part of a tract that already includes a dwelling.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argued that the federal Clean Water Act and Endangered Species Act are applicable approval criteria for a county forest template dwelling. The hearings officer found that the federal acts, while potentially applicable to intervenors, are not county approval criteria.

ORS 215.750(4)(a) provides that a forest template dwelling is not allowed:

> "If it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan and acknowledged land use regulations or *other provisions of law*." (Emphasis added.)

We agree with intervenors that ORS 215.750(4)(a) pertains to local approval criteria, including comprehensive plans, land use regulations, or other *local* provisions of law. ORS 215.416(8)(a) provides:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

Even if the "other provisions of law" language in ORS 215.750(4)(a) could be read to refer to the CWA and the ESA, we do not think that reference could reasonably be construed to require that the county find that the proposal will comply in all regards with the CWA and ESA. It would at most be a statutory recognition that the CWA and ESA may apply and that if they do, appropriate permits from the appropriate federal or state agency may be required before a forest template dwelling may be constructed.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners argue that the county violated ZDO 1303.05 because the hearings officer used notes from the two previous unrecorded hearings as the basis for his characterization of the testimony from those hearings. ZDO 1303.05 requires that:

> "A verbatim record of the proceeding shall be made by written, mechanical or electronic means, which record need not be transcribed except upon review on the record."

After the first two hearings were not recorded due to mechanical difficulties, the hearings officer scheduled a third hearing to cure the error of not recording the first two hearings. The third hearing was recorded and cured any earlier violation of ZDO 1303.05. Petitioners' argument that ZDO 1303.05 was violated is without merit.

Petitioners also appear to argue that the hearings officer erred by relying on notes from those unrecorded hearings in making his decision. We believe petitioners mischaracterize the nature of the hearings officer's actions. Even if the hearings officer had relied on those notes, however, petitioners have not identified any approval criteria that the hearings officer found to be supported by substantial evidence based on his notes from the prior hearings. If petitioners wish to argue that the decision is not supported by substantial evidence because the hearings officer relied on evidence that was not properly in the record, they must identify the improper evidence. Petitioners have not even attempted to make this demonstration.

The sixth assignment of error is denied.

The county's decision is affirmed.