

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 PROTECT GRAND ISLAND FARMS,
5 *Petitioner,*
6

7 vs.
8

9 YAMHILL COUNTY,
10 *Respondent.*
11

12 LUBA No. 2012-100
13

14 FINAL OPINION
15 AND ORDER
16

17 Appeal from Yamhill County.
18

19 Courtney Johnson, Portland, filed the petition for review and argued on behalf of
20 petitioner. With her on the brief were Ralph Bloemers and Crag Law Center.
21

22 Rick Sanai, County Counsel, McMinnville, and Todd Sadlo, Portland, filed the
23 response brief and argued on behalf of respondent.
24

25 RYAN, Board Member; BASSHAM, Board Chair, participated in the decision.
26

27 HOLSTUN, Board Member, did not participate in the decision.
28

29 AFFIRMED 04/23/2013
30

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

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the county approving a post acknowledgement plan
4 amendment and a zoning map amendment to allow gravel mining.

5 **FACTS**

6 The challenged decision is the county’s decision on remand from *Protect Grand*
7 *Island Farms v. Yamhill County*, __ Or LUBA __ (LUBA No. 2012-047, October 9, 2012)
8 (*PGIF I*). We take the facts from our decision in *PGIF I*:

9 “The subject property is a 225-acre site on the southern end of Grand Island in
10 Yamhill County, bordered on the south by SE Upper Island Road, on the north
11 by a slough that is the outlet for Skeeter Creek, on the west by a portion of
12 Willamette Mission State Park, and on the east by the main channel of the
13 Willamette River. Grand Island is a 3,882 acre island located between
14 Lambert Slough (on the west) and the main channel of the Willamette River
15 (on the east). Soils on the island are Class II soils. Farms on the island grow
16 fruits, vegetables, seeds and grains, and draw visitors to pumpkin patches and
17 other agritourism activities. Farms on the island irrigate with both surface
18 water and groundwater. Grand Island is served by a few public roads that
19 generally circle the island, and it is connected to the rest of the county by a
20 single bridge.

21 “[The applicant] proposes to sequentially mine over a 30 year period
22 approximately 175 acres of the subject property in three to nine acre cells,
23 with the non-mined areas continuing to be farmed. After mining is concluded,
24 the subject property will be used for fish and wildlife habitat, wetlands, and
25 public recreation, if allowed by applicable law.” *PGIF I*, slip op 2-3.

26 In *PGIF I*, we sustained some of the petitioner’s subassignments of error. On
27 remand, the county again approved the applications. This appeal followed.

28 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

29 In *PGIF I*, we explained that “[a]ll but eleven acres of the subject property is within
30 the county’s Floodplain (FP) overlay zone and the Willamette River and nearby creeks flood
31 portions of the property regularly during the winter months.” *PGIF I*, slip op 15. The
32 applicant’s conceptual mining plan proposes construction of a 6 to 18 foot tall noise

1 attenuation berm and construction of an approximately one to three feet high (100 feet above
2 mean sea level) berm surrounding the wash water pond for flood control purposes, both to be
3 located entirely within the “floodway.”¹ Construction of the berms will require a floodplain
4 development permit.

5 **A. First Assignment of Error**

6 Yamhill County Zoning Ordinance (YCZO) 901.06 provides the criteria for issuance
7 of a floodplain development permit. YCZO 901.06(B) requires an applicant to show that
8 “[t]he proposed development, *if located within the floodway*, satisfies the provisions of
9 YCZO 901.09.” (Emphasis added.) YCZO 901.09 in turn provides the county’s “Floodway
10 or Watercourse Development Provisions.” YCZO 901.09(B) provides:

11 “Except those uses provided for in subsection 901.04, all development in the
12 floodway shall be prohibited unless certification is provided by a registered
13 professional engineer demonstrating through hydrologic and hydraulic
14 analyses performed in conformance with standard engineering practice that
15 the proposal will not result in any increase in flood levels during the
16 occurrence of the base flood discharge.”

17 The county and the parties refer to YCZO 901.09(B) as the “no net rise” standard.

18 YCZO 901.07 provides the “Floodplain Overlay District General Standards,” and
19 YCZO 901.07(F) provides in relevant part:

20 “F. Fills and Levees.

21 “Except for approved relocation of a water course, *no fill or levee shall extend*
22 *into a floodway area. Fills or levees in a flood fringe area* shall be subject to
23 the following:

24 “1. Fills shall consist only of natural materials such as earth or soil
25 aggregate and including sand, gravel and rock, concrete and metal.

¹ Yamhill County Zoning Ordinance (YCZO) 202 defines “floodway” as “[t]he channel of a river or other watercourse and the adjacent land areas that must remain unobstructed in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot.” YCZO 202 defines “flood fringe” as “[t]he area of the flood plain lying outside the floodway.”

1 “2. Any fill or levee must be shown to have a beneficial purpose and
2 therefore to be no greater than is necessary to achieve that purpose, as
3 demonstrated by a plan submitted by the owner showing the uses to
4 which the filled or diked land will be put and the final dimensions of
5 the proposed fill.

6 “3. Such fill or levee shall be protected against erosion by vegetative
7 cover, rip-rap, bulkheading or similar provisions.” (Emphasis added.)

8 YCZO 901.06(C) applies to development in areas of the floodplain other than the floodway,
9 such as the flood fringe area, and provides that in order to obtain a floodplain development
10 permit the applicant must show that “[t]he proposed development will not increase the water
11 surface elevation of the base flood more than one (1) foot at any point.”

12 In the decision challenged in *PGIF I*, the county found that the applicant had
13 demonstrated that it was feasible to obtain a floodplain development permit under YCZO
14 901.06(B) and 901.09(B). In *PGIF I*, we sustained petitioner’s assignment of error that
15 argued that the county’s findings were inadequate where the findings did not address
16 petitioner’s argument that YCZO 901.07(F) prohibits the proposed berms from being
17 constructed in the floodway and the county from issuing a floodplain development permit for
18 the berms, or otherwise explain why YCZO 901.07(F) does not apply or is satisfied. *PGIF I*,
19 slip op 19.

20 On remand, the county adopted findings explaining that YCZO 901.07(F) does not
21 apply to the proposed berms:

22 “4. Findings addressing LUBA’s requirement that: ‘On remand, the
23 county must determine how YCZO 901.07(F) and 901.09(B) apply to the
24 proposed berms.’”

25 “4.1 * * * As explained below, YCZO 901.07(F) governs development in
26 flood fringe areas, not in the floodway. Development within the
27 floodway is not prohibited – it is governed by YCZO 901.09 and is
28 allowed, subject to compliance with the ‘no net rise’ standard.

29 “* * * * *

1 “4.4.10* * * By its terms, YCZO 901.07(F) governs only fills and levees to be
2 constructed in a flood fringe area, that do not ‘extend into a floodway
3 area.’ [YCZO] defines ‘flood fringe area’ as being: ‘the area of the
4 floodplain lying outside of the floodway.’ YCZO 901.07(F) does not
5 govern proposed ‘fill’ or ‘development’ within the floodway.

6 “4.4.11As support for the County’s conclusion that approval under YCZO
7 section 901.07(F) is of a fill or levee that does not extend into the
8 floodway, approval under that section is not subject to the ‘no net rise’
9 standard applicable to floodway development. Instead, under YCZO
10 901.06(C), an applicant for a fill or levee in the flood fringe need only
11 show that: ‘The proposed development will not increase the water
12 surface elevation of the base flood more than one foot at any point,’ a
13 lesser standard. A fill or levee or other development that extends into,
14 or otherwise takes place within the floodway, is governed by the ‘no
15 net rise’ standard of YCZO 901.09.

16 “ * * * * *

17 “4.4.13Use of the term ‘extend’ in YCZO 901.07(F) supports the Board’s
18 conclusion that the focus of this provision is on earthen structures that
19 start in an upland area or within the flood fringe, but do not extend into
20 a floodway identified on a FEMA map or otherwise. When a structure
21 is proposed that extends into the floodway, it is governed by the ‘no
22 net rise’ standard in YCZO 901.09(B).

23 “4.4.14The Board concludes that YCZO 901.07(F) governs fills or levees in
24 the flood fringe area that do not extend into the floodway. An
25 applicant for permission to construct a fill or levee in the flood fringe
26 must demonstrate that: the fill or levee will not extend into the
27 floodway; the fill or levee will consist of natural materials; the fill or
28 levee has a ‘beneficial purpose’ and is ‘no greater than necessary to
29 achieve that purpose.’ Because the fills or levees contemplated by
30 Section 901.07(F) do not extend into the floodway, they can be
31 constructed by meeting the 901.06(C) requirement (‘[t]he proposed
32 development will not increase the water surface elevation of the base
33 flood more than one (1) foot at any point’) and need not meet the more
34 stringent ‘no net rise’ standard. * * *” Record 5, 9 (underlining in
35 original.)

36 The county interpreted YCZO 901.07(F) to apply only to fills and levees to be constructed
37 entirely in a “flood fringe” area, and thus, not to apply to the proposed berms that will be
38 constructed entirely within the floodway. According to the county, for fills and levees that
39 are constructed within a flood fringe area, an applicant must show that the fills or levee (1)

1 will not extend into the floodway area and (2) will not increase the base flood level more
2 than one foot. According to the county, fills and levees that are to be constructed partially or
3 entirely within a floodway are governed by the “no net rise” standard in YCZO 901.09(B).²

4 Our review of the board of commissioners’ interpretation of the YCZO is subject to a
5 highly deferential standard of review under ORS 197.829(1).³ Under *Siporen v. City of*
6 *Medford*, 349 Or 247, 259, 243 P3d 776 (2010), the board of commissioners’ interpretation
7 that YCZO 901.07(F) does not apply and that YCZO 901.09(B) does apply must be affirmed
8 unless that interpretation is shown to be inconsistent with all of the relevant “express
9 language,” the “purpose,” or the “underlying policy” of the county’s comprehensive plan or
10 land use regulation. Determining whether a governing body’s interpretation is consistent
11 with the express language of the code provision turns on whether the interpretation is
12 “plausible,” considering its text and context. We therefore evaluate petitioner’s challenges to
13 the county’s interpretations under that deferential standard of review.

14 In its first assignment of error, petitioner first argues that the county’s interpretation
15 of YCZO 901.07(F) is inconsistent with the express language of the provision. Petitioner

² Petitioner does not dispute that the proposed berms are “development” under YCZO 901.09(B). “Development” is not defined in the YCZO.

³ ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(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 argues that the express language of YCZO 901.07(F)'s prohibition on "fills or levee" from
2 "extend[ing] into the floodway area" unambiguously prohibits any berms from being located
3 in the floodway. Second, petitioner argues, nothing in the express language of YCZO
4 901.09(B) allows fill to be placed in the floodway where YCZO 901.07(F) expressly
5 prohibits fill from extending into the floodway.

6 Third, petitioner argues, if YCZO 901.07(F) and 901.09(B) conflict with each other,
7 the county's interpretation violates ORS 174.020(2), which provides that "when a general
8 and particular provision are inconsistent, the latter is paramount to the former so that a
9 particular intent controls a general intent that is inconsistent with the particular intent."
10 According to petitioner, YCZO 901.07(F) is a particular provision and YCZO 901.09(B) is a
11 general provision, they are inconsistent with each other, and the county's interpretation is
12 inconsistent with ORS 174.020(2).

13 First, we disagree with petitioner that the county's interpretation of the two provisions
14 is inconsistent with the relevant express language of the YCZO. The two provisions at issue
15 are not inconsistent with each other; rather, each provision addresses a different set of
16 circumstances. The county's interpretation harmonizes any apparent inconsistency in a
17 manner that is consistent with the express language of both provisions. Petitioner's contrary
18 interpretation is based on the inference that YCZO 901.07(F) categorically prohibits all fills
19 and levees in the floodway. However, YCZO 901.07(F) does not say that. Instead, as the
20 county's findings point out, it prohibits only "extending" a fill or levee from the flood fringe
21 into the floodway. As the county concluded, use of the word "extend" suggests that the
22 county was concerned with fills or levees that originate in an area (the flood fringe area)
23 where they would be allowed to increase the base flood level by one foot under YCZO
24 901.06(C), but cross or "extend" into an area that is subject to the more stringent "no net rise
25 standard" of YCZO 901.09(B), without complying with the no net rise standard. That
26 interpretation is entirely consistent with the express language of YCZO 901.07(F).

1 Petitioner also argues that the county’s interpretation is not required to be affirmed
2 because it is inconsistent with the underlying policy that provides the basis for the regulation.
3 ORS 197.829(1)(c). *See* n 3. According to petitioner, the county’s interpretation is
4 inconsistent with Yamhill County Comprehensive Plan Section II.C, Policy K, which
5 provides in relevant part that “[w]ater erosion control structures, including riprap and fill,
6 should be reviewed by the appropriate state permitting authority to ensure that they are
7 necessary, are designed to incorporate vegetation where possible, and designed to minimize
8 adverse impacts on water currents, erosion, and accretion patterns.” YCZO 901.07(F)
9 implements Policy K. Petitioner argues that the county’s interpretation of YCZO 901.07(F)
10 would require fill located in the flood fringe area to meet the requirements of YCZO
11 901.07(F)(1) – (3) (to meet a necessity standard, to be constructed only of natural materials,
12 and be protected from erosion by vegetative cover), while fill located in the floodway would
13 not need to be shown to be necessary or otherwise be subject to any specific vegetation or
14 erosion control measures. According to petitioner, the county’s interpretation is inconsistent
15 with the underlying policy, Policy K that provides the basis for YCZO 901.07(F)(1) – (3).

16 The county responds that the Policy K is directed at ensuring that proposals for fill
17 are “reviewed by the appropriate state permitting authority * * *” and that the county’s
18 interpretation of YCZO 901.07(F) as not completely prohibiting fill in the floodway is
19 consistent with Policy K. We agree with the county. While it may seem incongruous that fill
20 in the floodplain is not subject to the necessary, vegetation and erosion requirements that
21 YCZO 901.07(F) requires of fill placed in the flood fringe, as the county’s findings point out
22 all development in the floodplain is subject to the strict “no net rise” standard, while fill in
23 the flood fringe is subject to the lesser one foot rise standard. Petitioner has not
24 demonstrated Policy K is intended to require that all fill proposed anywhere in the floodplain
25 would be subject to the requirements of YCZO 901.07(F), at least where a more stringent

1 flood control standard applies in a different area of the floodplain than is covered by YCZO
2 901.07(F).

3 In sum, the county's interpretation is plausible, and is not inconsistent with the the
4 express language that is relevant to the interpretation, or inconsistent with any underlying
5 policy of the provision being interpreted. The county's interpretation is required to be
6 affirmed. ORS 197.829(1)(a) – (c); *Siporen*.

7 Finally, petitioner argues that the county's interpretation is not required to be
8 affirmed because it is "contrary to a state statute, land use goal or rule that the comprehensive
9 plan provision or land use regulation implements." ORS 197.829(1)(d). *See* n 3. The
10 county responds that petitioner is precluded by ORS 197.763(1) and ORS 197.835(3) from
11 raising the issue raised in the third subassignment of error under the first assignment of error,
12 that the county's interpretation is not required to be affirmed under ORS 197.829(1)(d).
13 Response Brief 17. The county maintains that petitioner possessed the applicant's proposed
14 findings that proposed that the county adopt the applicant's interpretation of the YCZO
15 provisions at issue, and failed to raise any issue regarding whether the proposed
16 interpretation is contrary state statute, goal, or rule that the YCZO implements. At oral
17 argument, petitioner responded that petitioner is not required to anticipate and raise
18 challenges under ORS 197.829(1) of an interpretation of YCZO that the county might
19 eventually adopt in order to rely on that statute to challenge that interpretation at LUBA. We
20 agree with petitioner.

21 However, petitioner has not established that YCZO 901.07(F) implements any state
22 statute, land use goal or administrative rule. Petitioner argues that the county's Floodplain
23 Overlay District includes areas identified by the Federal Insurance Administration as special
24 flood hazards, and the county's interpretation provides lesser erosion control protections for
25 fill placed in the more hazardous floodway, and greater erosion control protections for the
26 less hazardous areas. Petitioner argues that such an interpretation is inconsistent with

1 *federal* laws that are implemented by the county’s floodplain ordinance in order to qualify for
2 flood insurance. However, petitioner does not point to any federal law that requires the
3 county to interpret its ordinance to categorically prohibit fill or levees in the floodway, and as
4 noted, does not argue that the county’s interpretation is contrary to any state statute, goal or
5 administrative rule that implements the federal law that petitioner relies on. Accordingly, the
6 county’s interpretation is not “contrary to a state statute, land use goal or rule that the
7 comprehensive plan provision or land use regulation implements.”

8 The first assignment of error is denied.

9 **B. Second Assignment of Error**

10 In the second assignment of error, petitioner challenges the county’s conclusion that it
11 is feasible for the applicant to obtain the required floodplain development permit under
12 YCZO 901.06(B). Petitioner’s assignment of error depends on our agreement with
13 petitioner’s arguments in the first assignment of error, which we reject above, that YCZO
14 901.07(F) categorically prohibits the berms that are proposed to be located in the floodway.
15 Accordingly, the second assignment of error is denied.

16 **C. Third Assignment of Error**

17 During the proceedings on remand petitioner argued that petitioner’s interpretation of
18 YCZO 901.07(F) is consistent with the federal regulations governing the federal flood
19 insurance program that allow a local government to adopt more stringent regulations for
20 flood plain management than the federal standards. As we understand it, in response to those
21 arguments the county adopted findings that conclude that the provisions of the county’s
22 floodplain ordinance are not more stringent than the minimum standards required to
23 participate in the federal flood insurance program.

24 In its third assignment of error, petitioner challenges the findings and argues that they
25 are not based on substantial evidence. We understand petitioner to argue that the regulations
26 that allow more restrictive local floodplain management standards provide context that

1 supports petitioner’s interpretation of the YCZO rather than the county’s interpretation of the
2 YCZO. However, the issue remains whether the county’s interpretation is plausible, and
3 petitioner has not demonstrated that the county’s interpretation is “implausible.” *Mark*
4 *Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012).
5 Because we have already concluded that the county’s interpretation of the YCZO is plausible
6 and is required to be affirmed, petitioner’s third assignment of error provides no basis for
7 reversal or remand of the decision.

8 The first, second, and third assignments of error are denied.

9 **FOURTH ASSIGNMENT OF ERROR**

10 One of the applicable approval criteria requires the applicant to show that the mining
11 operation will comply with DEQ noise standards. The decision challenged in *PGIF I*
12 concluded that compliance with DEQ noise standards is feasible, based in part on a noise
13 study by intervenor that recommended using a combination of measures to minimize
14 conflicts from noise. *PGIF I* Incorporated Record 2333-34.⁴ Those measures include
15 operating the excavator sixteen feet below grade, using a quieter excavator, and constructing
16 a noise berm. *Id.* The applicant’s conceptual mining plan proposes a noise attenuation berm
17 varying from six to 18 feet tall in order to minimize conflicts between noise from the mining
18 operations and sensitive uses (residences) on the northern boundary of the property, and to
19 comply with DEQ noise standards.

20 In the challenged decision, the county adopted findings that “[n]o standard requires
21 construction of a noise berm, and the Board is only requiring that one be built if that is the

⁴ The record of this appeal includes the record in *PGIF I*. The record in *PGIF I* incorporated the record of a previous county decision that added the subject property to the county’s inventory of significant aggregate sites, which was appealed to LUBA in LUBA No. 2011-035. We refer to that record as the “*PGIF I* Incorporated Record xxx.”

1 only way to meet DEQ noise standards at some point in the future.” Record 18. The county
2 imposed a new condition of approval, Condition 28, which provides:

3 “Condition 21 of Ordinance 873 is clarified as follows: Notwithstanding any
4 findings or conditions of Ordinance 873 to the contrary, the operator is not
5 required to construct the noise berm described in this condition and as shown
6 in Figure 6 of the Lidstone Report, if other reasonable and practicable control
7 or attenuation measures are utilized by the operator that achieve consistent
8 compliance with applicable DEQ standards as to all sensitive uses (including,
9 but not limited to, use of smaller, quieter equipment, improved mufflers,
10 portable barriers, or a combination of noise control and attenuation measures
11 other than a berm). The proposed noise attenuation berm should only be
12 constructed if necessary to meet DEQ standards as to a sensitive use. If the
13 proposed berm is not constructed, the operator shall take whatever alternative
14 steps are necessary to continue meeting applicable noise standards as to all
15 sensitive uses for the life of the project. Mining shall cease in any area of the
16 site if it cannot be conducted in conformance with applicable DEQ standards
17 as to existing sensitive uses in the area. * * *” Record 18.⁵

18 In the fourth assignment of error, petitioner argues that the county’s conclusion that
19 the noise berm is not required to be constructed is inadequate and is not supported by
20 substantial evidence in the record because the noise study that the county relied on did not
21 specifically evaluate the “improved mufflers” or “portable barriers” referred to in condition
22 28.

23 The county responds, and we agree, that the county’s finding that satisfaction of DEQ
24 noise standards is feasible through a combination of noise control measures that might not
25 utilize a noise attenuation berm are adequate and are supported by substantial evidence in the

⁵ Condition 21 of the decision challenged in *PGIF I* provided in relevant part:

“Noise Mitigation. Prior to mining in Cells 17 or 18, the applicant shall construct noise berms at locations indicated in Figure 6 of the Lidstone Study * * * or take any other steps necessary to meet DEQ noise standards at sensitive uses located northeast of the site. Any sound attenuation berm constructed at the site shall be designed to prevent rerouting of floodwaters and shall be segmented, not continuous. * * * Otherwise, appropriate muffling equipment and portable barriers shall be utilized as necessary by the operator to ensure compliance with DEQ standards. * * *” *PGIF I* Record 117.

1 record.⁶ First, a noise berm is not categorically precluded or required as a mitigation
2 measure, and will be required if other noise control measures are not shown to achieve
3 compliance with DEQ standards. Second, the noise study relied on by the county to
4 conclude in *PGIF I* that compliance with DEQ noise standards is feasible took the position
5 that a combination of measures would be required. But the noise study did not conclude that
6 only a noise berm or even a berm in combination with other measures was the only way to
7 satisfy the applicable DEQ standard. The noise study specifically left open the possibility
8 that other measures without a noise berm could satisfy the standard. *PGIF I* Incorporated
9 Record 2333-34.

10 The fourth assignment of error is denied.

11 The county's decision is affirmed.

⁶ The county argues that petitioner is precluded from raising the issue raised in the fourth assignment of error under ORS 197.763(1) because the issue was not raised below. Response Brief 26. Petitioner responds that the issue was raised at Record 58. We agree with petitioner.