

1 BEFORE THE LAND USE BOARD OF APPEALS

2
3 OF THE STATE OF OREGON

03/14/19 PM 1:34 LUBA

4
5 TILLA-BAY FARMS, INC., and KURT MIZEE,
6 *Petitioners,*

7
8 and

9
10 OREGON COAST ALLIANCE,
11 *Intervenor-Petitioner,*

12
13 vs.

14
15 TILLAMOOK COUNTY,
16 *Respondent,*

17
18 and

19
20 TILLAMOOK PEOPLE'S UTILITY DISTRICT,
21 *Intervenor-Respondent.*

22
23 LUBA No. 2018-115

24
25 FINAL OPINION
26 AND ORDER

27
28 Appeal from Tillamook County.

29
30 Gregory S. Hathaway, Portland, filed a joint petition for review and argued
31 on behalf of petitioners. With him on the brief were Sean T. Malone and
32 Hathaway Larson LLP.

33
34 Sean T. Malone, Eugene, filed a joint petition for review and argued on
35 behalf of intervenor-petitioner. With him on the brief were Gregory S. Hathaway
36 and Hathaway Larson LLP.

37
38 William Sargent, County Counsel, Tillamook, filed a joint response brief.

1 With him on the brief were Tommy Brooks and Cable Huston LLP.

2
3 Tommy Brooks, Portland, filed a joint response brief and argued on behalf
4 of intervenor-respondent. With him on the brief were William Sargent and Cable
5 Huston LLP.

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7 ZAMUDIO, Board Member; RYAN, Board Chair, participated in the
8 decision.

9
10 RUDD, Board Member, did not participate in the decision.

11
12 AFFIRMED 03/14/2019

13
14 You are entitled to judicial review of this Order. Judicial review is
15 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners and intervenor-petitioner (collectively, petitioners) challenge a decision by the board of county commissioners (the board) approving with conditions a conditional use request, administrative review, and floodway/estuary/floodplain development permit for a new electrical transmission line.

FACTS

Intervenor-respondent Tillamook People’s Utility District (TPUD) applied to the county for land use approval to construct a new 115-kilovolt (kV) aboveground transmission line between the Bonneville Power Administration’s (BPA) Tillamook Substation, located to the east of the City of Tillamook, and a new substation (Oceanside Substation) to be located near the community of Oceanside in Tillamook County. The transmission line will run over and through six county land use zones: forest (F), farm (F-1), rural residential (RR-2), rural commercial (RC), estuary natural (EN), and estuary conservation (EC-1). The transmission line crosses property subject to overlays for flood hazard, shoreland, and freshwater wetlands.

Public utility facilities, including substations and transmission lines, are permitted uses in the F and F-1 zones and conditional uses in the RC and RR-2 zones. *See* Tillamook County Land Use Ordinance (TCLUO) 3.004(13) (use table for forest zone); TCLUO 3.002(15) (use table for farm zone); TCLUO

1 3.020(3)(n) (conditional uses in rural commercial zone); TCLUO 3.010(3)(n)
2 (conditional uses in rural residential zone). “Electrical distribution lines and line
3 support structures” are conditional uses in the EN zone and permitted uses subject
4 to estuary development standards in the EC-1 zone. TCLUO 3.102(3)(d) (EN
5 zone); TCLUO 3.106(2)(h) (EC-1 zone).

6 Because the transmission project includes development on and over land
7 in the county with different zoning and overlays, the project is subject to three
8 different land use application review procedures. The portions of the transmission
9 line within the F-1 and EC-1 zones are subject to administrative review. The
10 portions of the transmission line within the F, RC, RR-2, and EN zones are
11 subject to conditional use review. The portions of the transmission line that cross
12 floodplains, floodways, and estuaries are subject to floodway/estuary/floodplain
13 development permit review.

14 Petitioners appeal the board’s decision approving the development, with
15 conditions, after a consolidated review of the planning commission’s decision on
16 all three applications, including the planning director’s authorization of similar
17 use. Record 32–33.

18 **FIRST ASSIGNMENT OF ERROR**

19 With respect to the portion of the transmission line in the EN zone, the
20 county recognized that TCLUO 3.102 does not expressly identify electrical
21 transmission lines as either a permitted use or a conditional use in that zone.
22 However, TCLUO 3.102(3)(d) lists “electrical distribution lines and line support

1 structures” as conditional uses in the EN zone. TPUD requested “similar use”
2 authorization pursuant to TCLUO 1.060(1), and the county agreed that an
3 electrical transmission line is a similar use to an electrical distribution line, and
4 therefore allowed as a conditional use in the EN zone.

5 TCLUO 1.060(1) provides:

6 “Authorization of Similar Uses. Where a proposed use is not
7 specifically identified by this Ordinance, or the Ordinance is unclear
8 as to whether the use is allowed in a particular zone, the Director
9 may find the use is similar to another use that is permitted, allowed
10 conditionally, or prohibited in the subject zone and apply the
11 Ordinance accordingly. However, uses and activities that this
12 Ordinance specifically prohibits in the subject zone, and uses and
13 activities that the Director finds are similar to those that are
14 prohibited, are not allowed. Similar use rulings that require
15 discretion on the part of County officials shall be processed
16 following the Type II procedure of Article 10. The Director may
17 refer a request for a similar use determination to the Planning
18 Commission for its review and decision.”

19 The board expressly interpreted TCLUO 1.060(1):

20 “[W]here a proposed use is not specifically identified in the
21 [TCLUO], or where the [TCLUO] is unclear, the County may make
22 a similar use determination. The only limit on the County’s ability
23 to make a similar use determination under [TCLUO 1.060(1)] is that
24 such a determination cannot be made for a use that is ‘specifically
25 prohibited.’” Record 37.

26 The board reasoned that transmission lines are not specifically permitted or
27 prohibited in the EN zone and the TCLUO is unclear as to whether a transmission
28 line is an allowed use in the EN zone:

29 “For example, TCLUO Section 3.140(6)(b), which applies to all

1 estuary zones, refers to electrical transmission lines and establishes
2 development standards for that type of use. Moreover, Section
3 6.5(6)(a) of Goal 16 of the County's Comprehensive Plan [TCCP],
4 which TCLUO Section 3.140 implements, expressly limits new
5 electric facilities in the EN Zone to electric transmission lines and
6 line support structures. The County's Code therefore appears to
7 contemplate that transmission lines may be located in the EN Zone."
8 Record 37.

9 The board concluded that electrical transmission lines are a similar use to
10 electrical distribution lines. The board explained that no structures are proposed
11 in the EN zone, but the conductor lines will span areas within the EN zone. Thus,
12 the board first compared only the conductors that would be associated with the
13 transmission line with conductors that would be used for a distribution line and
14 found that they are "identical," both physically and functionally, based on the
15 amount of power transmitted over the line. Record 38. The board alternatively
16 reasoned that, even if support structures are considered part of the use,
17 transmission line support structures are similar to distribution line support
18 structures and those two uses should be treated the same under the TCLUO. *Id.*
19 In reviewing the EC-1 zone criteria, the board incorporated by reference its
20 similar use determination and supporting findings from its analysis of the EN
21 zone criteria. Record 66.

22 Similar use determinations are typically processed initially as planning
23 director decisions. TCLUO 1.060(2). Where the determination requires
24 discretion, the determination is processed under Type II review, which requires
25 notice and opportunity to appeal to the planning commission. TCLUO

1 1.060(2)(c); TCLUO 10.040(2). In this case, the planning director made the
2 initial similar use determination, and petitioners appealed that decision to the
3 planning commission, which agreed with the director's decision. Petitioners
4 appealed the planning commission's decision to the board. Record 37–38.

5 Under the first assignment of error, petitioners argue that the county erred
6 by processing the similar use determination as a Type III decision, which elevated
7 the decision to the board of county commissioners. Petitioners argue that their
8 substantial rights were prejudiced by the board's decision on the similar use
9 application because the board's interpretation of its own code is entitled to
10 deference under ORS 197.829, as construed in *Siporen v. City of Medford*, 349
11 Or 247, 252, 243 P3d 776 (2010).

12 As a threshold matter, petitioners have not explained what statutory or
13 other authority provides them with the right to a local government decision issued
14 by a lesser body than the governing body, and consequently with a less deferential
15 standard of review from LUBA, and we know of no authority that supports
16 petitioners' argument. Accordingly, even if the county erred by processing the
17 similar use determination through a process that resulted in a board of county
18 commissioners' decision (as opposed to a planning director or planning
19 commission decision, which are not entitled to so-called *Siporen* deference), that
20 error would provide no basis for reversal or remand because that error would not
21 prejudice petitioners' substantial rights. *See* ORS 197.835(9)(a)(B) (LUBA shall
22 reverse or remand the land use decision if the board finds that the local

1 government “[f]ailed to follow the procedures applicable to the matter before it
2 in a manner that prejudiced the substantial rights of the petitioner”).

3 We also conclude that the board of county commissioners did not commit
4 a procedural error in processing the similar use determination as a Type III
5 review. The county and TPUD (jointly, respondents) point out that the county
6 was required to process land use review for the entire development project using
7 a Type III process because TPUD requested consolidated review, which requires
8 that all three applications be processed according to the highest-numbered review
9 type required for any part of the consolidated review. The development in this
10 case includes conditional uses, which require a Type III review process. *See*
11 TCLUO Table 10.1 (listing applications and associated review types); *see also*
12 ORS 215.416(2); TCLUO 10.020(3).¹ Moreover, as respondents emphasize, the

¹ ORS 215.416(2) provides:

“The governing body shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. The consolidated procedure shall be subject to the time limitations set out in ORS 215.427. The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations.”

TCLUO 10.020(3)(b) provides:

“Consolidated Review. When an applicant applies for more than one type of land use or development permit for the same one or more

1 entire development proposal was before the board of county commissioners
2 because petitioners appealed the consolidated planning commission decision.
3 The board did not err in issuing a similar use determination.

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioners do not challenge the county’s conclusion that transmission lines
7 and support structures are similar to electrical distribution lines and support
8 structures. Petitioners also do not argue that transmission lines are “specifically
9 prohibited” or similar to uses that are prohibited in the EN and EC-1 zones, so
10 that they cannot be authorized as a similar use. *See* TCLUO 1.060(1) (“[U]ses
11 and activities that [the TCLUO] specifically prohibits in the subject zone, and
12 uses and activities that the Director finds are similar to those that are prohibited,
13 are not allowed.”). Instead, in their second assignment of error, petitioners argue
14 that the county erred in making a similar use determination at all. According to
15 petitioners, the county erred by concluding that it is “unclear” whether

contiguous parcels of land, the proceedings may be consolidated if requested by the applicant for review and decision.

“* * * * *

“(b) The applications shall be processed according to the highest numbered review type required for any part of the application. For example, a concurrent review of a Type II review and a Type III review would be processed through a Type III review.”

1 transmission lines are allowed in the EN and EC-1 zones. As explained above,
2 “transmission lines” are allowed in other zones and “distribution lines” are
3 allowed in the EN and EC-1 zones. Petitioners argue that because transmission
4 lines are specifically identified in the TCLUO and not specifically identified in
5 the EN and EC-1 zones, it is “clear” that transmission lines are not allowed in the
6 EN and EC-1 zones.

7 TCLUO 1.060(1) provides that a similar use may be authorized “[w]here
8 a proposed use is not specifically identified by [the TCLUO], *or* [the TCLUO] is
9 unclear as to whether the use is allowed in a particular zone[.]” (Emphasis added.)
10 Petitioners argue that the county may make a similar use determination only if
11 the proposed use is *not* specifically identified *anywhere* in the TCLUO.
12 According to petitioners, if a proposed use is specifically identified anywhere in
13 the TCLUO, the TCLUO is “clear” that the use is not allowed in any zone that
14 does not specifically identify the proposed use as a use allowed in the zone.

15 We reject petitioners’ premise and conclusion. The specific use of the
16 words “transmission line” in other sections of the code does not clearly indicate
17 that the use is not allowed in the EN and EC-1 zones. Under petitioners’ view,
18 any use that is identified anywhere in the code would be impliedly prohibited in
19 any zone in which that use is not specifically identified as an allowed use. That
20 view is not supported by any text in the TCLUO and that view nullifies the
21 purpose of the similar use authorization provision.

1 A similar use determination is not necessary or appropriate where the use
2 is specifically permitted or prohibited in the subject zone. In adopting the similar
3 use determination process, the county contemplated instances where a use is
4 specifically identified as an allowed use in some zones but not specifically
5 identified as an allowed use in the subject zone. That conclusion is supported by
6 the use of the word “or” in TCLUO 1.060(1), quoted and emphasized above.
7 Petitioners’ view is even more untenable when applied to the circumstances of
8 this case, where similar uses are identified using different terminology in
9 different sections of the county’s code. In our view, this case presents exactly the
10 type of situation that the county’s similar use authorization process was designed
11 to address.

12 We agree with the board of county commissioners’ interpretation of
13 TCLUO 1.060 and the conclusion that the TCLUO is unclear regarding whether
14 a transmission line is allowed in the EN and EC-1 zones. First, it is not apparent
15 to us what differentiates an electrical distribution line from an electrical
16 transmission line. Petitioners assert that the “[t]he county has legislatively
17 recognized that there are differences between Electrical Distribution Lines and
18 Power Transmission Lines based on scale, voltage and potential impact to public
19 safety and farm and forest uses.” Petition for Review 24 n 8. However, the county
20 specifically found that electrical distribution and transmission lines are physically
21 and functionally identical. Record 38. Petitioners do not challenge that finding.

1 Second, we agree with the county’s reasoning that the code is at least
2 unclear about whether transmission lines are allowed in the EN and EC-1 zones,
3 because TCCP policies limit new electric facilities in the EN zone to electric
4 transmission lines and line support structures and applicable estuary development
5 standards regulate transmission lines in all estuary zones. TCCP Goal 16, Section
6 6.5(6)(a); TCLUO 3.140(6)(b). The county did not err in concluding that it could
7 make a similar use determination and authorize transmission lines as a similar
8 use in the EN and EC-1 zones.

9 The second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 Petitioners argue that the county erred by referring to the TCCP and
12 estuary development standards in assessing whether a transmission line is
13 permitted or allowed conditionally in the EN and EC-1 zones. Petitioners argue
14 that the TCCP and estuary development standards are “unrelated to the use
15 provisions in the EN and EC-1 Zones.” Petition for Review 31 (emphasis
16 omitted).

17 TCLUO 3.140 provides estuary development standards that regulate
18 development in all five of the county’s estuary zones, including the EN and EC-
19 1 zones. TCLUO 3.140 provides, in part:

20 “(6) ENERGY FACILITIES AND UTILITIES: Siting, design,
21 construction, maintenance or expansion of energy facilities and
22 utilities in estuary zones, shall be subject to the following standards:

23 “* * * * *

1 “(b) Electrical or communication transmission lines shall be
2 located underground or along existing rights-of-way
3 unless economically infeasible.”

4 In making a similar use determination, the board found that TCLUO 3.140
5 supported an interpretation that the TCLUO contemplated transmission lines as
6 allowed and regulated uses in the EN and EC-1 zones. Record 37, 66. Petitioners
7 argue that the TLCUO development standards impose requirements on uses that
8 are allowed in a particular zone, but do not establish whether a use is (or should
9 be) permitted within a zone. We agree; however, estuary development standards
10 are related to the estuary use provisions and provide appropriate and useful
11 context for determining if it is “unclear” whether a use is allowed in the estuary
12 zones for purpose of TCLUO 1.060. Moreover, we agree with the county’s
13 conclusion that the estuary development standards suggest that transmission lines
14 are a use that is allowed in the estuary zones and, at the very least, that
15 transmission lines are not clearly *not* allowed in those zones, as petitioners
16 contend.²

17 The county also relied on context provided by TCCP Goal 16, Estuarine
18 Resources, Section 6.5, Energy Facilities and Utilities, subsection (6), as support

² Petitioners also argue that TCLUO 3.140(6)(b) refers only to communications transmission lines and not electrical transmission lines. That argument is based on a grammatically untenable misreading of that provision and we reject it without further discussion.

1 for its conclusion that the code is unclear as to whether transmission lines are
2 allowed in the EN zone. TCCP Goal 16, 6.5(6) provides:

3 “In Estuary Natural zones, new energy facilities and utilities shall
4 be permitted only if consistent with the resource capabilities of the
5 area and the purpose of the management unit, and shall be limited
6 to:

7 “a. electrical transmission lines and line support structures;
8 and

9 “b. water, sewer and gas lines.”

10 Petitioners argue that the TCLUO implements the TCCP and, because the
11 TCCP is not directly applicable, only the TCLUO use provisions may be
12 referenced to determine whether a use is allowed in a zone. Petitioners argue that
13 the county is prohibited from using the TCCP to support a conclusion that the
14 TCLUO is unclear whether transmission lines are allowed in estuary zones.

15 The TCCP provides useful context for determining if it is “unclear”
16 whether a use is allowed in the estuary zones for purpose of a similar use
17 determination under TCLUO 1.060. We agree with the county’s conclusion that
18 TCCP Goal 16, 6.5(6)(a) suggests that transmission lines are a use that the
19 TCLUO does or should allow in the estuary zones, and at the very least that
20 transmission lines are not clearly *not* allowed in those zones, as petitioners
21 contend. We disagree with petitioners that the county is prohibited from referring
22 to the TCCP to provide context to a similar use determination. Indeed, the county
23 is required to construe the TCLUO in a manner that is consistent with the TCCP.

1 See ORS 197.829(1) (LUBA will not affirm a local government’s interpretation
2 of its land use regulations if LUBA determines that the local government’s
3 interpretation is inconsistent with the express language, purpose, or underlying
4 policy of the comprehensive plan).

5 Finally, we reject petitioners’ argument that the county’s findings are
6 inadequate to explain why the TCLUO is unclear whether transmission lines are
7 allowed in estuary zones. Findings must identify the relevant approval standards,
8 set out the facts, and explain how those facts lead to the conclusion that the
9 approval standard is satisfied. *Heiller v. Josephine County*, 23 Or LUBA 551,
10 556 (1992). As explained above, the county identified TCLUO 1.060 as authority
11 to authorize a similar use. The county’s decision explains its conclusion that the
12 TCLUO is unclear as to whether transmission lines are allowed in the estuary
13 zones. The county’s findings are adequate to support its similar use decision.

14 The third assignment of error is denied.

15 **FOURTH ASSIGNMENT OF ERROR**

16 Petitioners argue that the county’s interpretation of TCLUO 1.060(1) is
17 inconsistent with the express text of the use provision in the EN and EC-1 zones
18 because, according to petitioners, those provisions expressly and clearly do not
19 allow transmission lines in those zones. The fourth assignment of error essentially
20 relies on the arguments asserted in the second and third assignments of error. We
21 reject the fourth assignment of error for the reasons explained under the second
22 and third assignments of error.

1 The fourth assignment of error is denied.

2 **FIFTH ASSIGNMENT OF ERROR**

3 Petitioners argue that the county made inadequate findings that the
4 transmission project is consistent with the general use priorities for estuary zones
5 in TCLUO 3.100(1), which provides, in part:

6 “GENERAL USE PRIORITIES AND AREAS INCLUDED:
7 General priorities, from highest to lowest, for uses within all
8 ESTUARY ZONES shall be:

9 “(a) Uses which maintain the integrity of the estuarine
10 ecosystem.

11 “(b) Water-dependent uses requiring an estuarine location,
12 as consistent with the overall Oregon Estuarine
13 Classification.

14 “(c) Water-related uses which do not degrade or reduce the
15 natural estuarine resources and values.

16 “(d) Non-dependent, non-related uses which do not alter,
17 reduce or degrade the estuarine resources and values.”

18 The challenged decision does not address TCLUO 3.100(1). Before the
19 county, petitioners argued that the transmission lines cannot be approved because
20 the lines will reduce or degrade estuarine resources and values, including
21 aesthetic and biological resources and values. Record 200, 553. Petitioners argue
22 that TCLUO 3.100(1) provides mandatory approval criteria and, at the very least,
23 the county was required to decide whether that provision provides approval
24 criteria. Petition for Review 45. Relying on *Testa v. Clackamas County*, 26 Or
25 LUBA 357, 372–73 (1994), petitioners argue that LUBA may not determine

1 whether TCLUO 3.100(1) is applicable approval criteria in the first instance, but
2 instead must remand the decision to the county.

3 In *Testa*, the petitioners argued that a purpose statement for the subject
4 property's zone constituted approval criteria and that the county erroneously
5 failed to find compliance with the purpose statement and further, that no evidence
6 in the record supported a finding of compliance. LUBA noted that, under the law
7 at that time, LUBA was "required to review a local government's interpretation
8 of its code and may not interpret the local code in the first instance." *Testa*, 26
9 Or LUBA at 373. LUBA observed that, although LUBA might agree with the
10 county's argument in its brief that the purpose statement is not an approval
11 standard, because the challenged decision itself did not interpret that provision,
12 LUBA was required to remand the decision for the county to interpret the purpose
13 statement in the first instance. *Id.*

14 Petitioners' argument fails to acknowledge ORS 197.829(2), which
15 provides:

16 "If a local government fails to interpret a provision of its
17 comprehensive plan or land use regulations, or if such interpretation
18 is inadequate for review, the board may make its own determination
19 of whether the local government decision is correct."

20 ORS 197.829(2) was enacted in 1995, after our decision in *Testa*. Or Laws 1995,
21 ch 595, § 4. The ruling in *Testa* that petitioners rely upon is superseded by ORS
22 197.829(2). We may interpret TCLUO 3.100(1) in the first instance and need not
23 remand for the county to determine whether TCLUO 3.100(1) provides

1 mandatory approval criteria. *See Opp v. City of Portland*, 153 Or App 10, 14, 955
2 P2d 768, *rev den*, 327 Or 620 (1998) (LUBA’s exercise of the interpretive
3 authority is permissive rather than mandatory, and LUBA may remand the
4 decision to the local government to provide an interpretation that the decision
5 omits).

6 Respondents respond, and we agree, that the board was not obligated to
7 specifically address the general priority statement in TCLUO 3.100(1) because it
8 does not constitute approval criteria. Instead, that provision provides an inclusive
9 list of general use priorities. Alternatively, we agree with respondents that, even
10 if the county were required to find that the transmission line development is a
11 “non-dependent, non-related use” which does not “alter, reduce or degrade the
12 estuarine resources and values,” any error in not directly and separately applying
13 TCLUO 3.100(1)(d) is harmless error because the county addressed petitioners’
14 concerns regarding impacts to the estuarine resources and values under other
15 applicable parts of the TCLUO.

16 For example, TCLUO 3.140(6)(f) requires evidence and findings “that the
17 proposed use is consistent with the resource capabilities of the area.” The board
18 noted that the Oregon Department of Fish and Wildlife, the Oregon Department
19 of State Lands, and the US Fish & Wildlife Service had received notice of the
20 application and the county had received no comments from those agencies
21 indicating that the transmission line “would have a detrimental effect on the
22 characteristics, habitats, animals present, or significant biological functions of the

1 identified estuary management units.” Record 43. The board found that impacts
2 on “estuarine species, habitats, biological productivity and water quality are not
3 significant.” Record 40. Petitioners do not assign error to those findings and
4 conclusions.

5 The board also addressed potential aesthetic impacts and first found that
6 the transmission line is not located in any areas with inventoried aesthetic
7 resources. TCLUO 3.140(6)(c) requires that “[a]bove-ground utilities shall be
8 located to have the least adverse effect on visual and other aesthetic
9 characteristics of the area. Interference with public use and public access to the
10 estuary shall be minimized.” The board found that TPUD had reduced any
11 aesthetic impacts in the estuary zones by limiting the use to transmission lines;
12 no poles or other structures would be sited in the estuary zones as part of the
13 development. Record 41–42. Petitioners do not assign error to those findings and
14 conclusions.

15 In sum, we conclude that TCLUO 3.100(1) does not constitute approval
16 criteria. In the alternative, to the extent TCLUO 3.100(1)(d) includes approval
17 criteria, it is satisfied by evidence and findings of compliance with other
18 applicable approval criteria.

19 The fifth assignment of error is denied.

20 **SIXTH ASSIGNMENT OF ERROR**

21 Petitioners argue that the county misconstrued and made inadequate
22 findings not based on substantial evidence in finding that the transmission project

1 “will not force a significant change in, or significantly increase the cost of,
2 accepted farming or forest practices on agriculture or forest lands.” TCLUO
3 3.004(8)(1). TCLUO 3.004(8)(1) implements OAR 660-006-0025, which is part
4 of the administrative rules adopted by the Land Conservation and Development
5 Department (LCDC) implementing Statewide Planning Goal 4 (Forest Lands).
6 As defined by state law, “forest practice” means any operation conducted on or
7 pertaining to forestland, including reforestation, road construction and
8 maintenance, timber harvesting, application of chemicals, and removal and
9 disposal of slash and biomass. *See* ORS 527.620(5) (defining “forest practice”
10 for the Oregon Forest Practices Act). In addition to forest practices, LCDC
11 determined that “locationally-dependent uses,” including “new electric
12 transmission lines with right of way widths of up to 100 feet” may be allowed in
13 the forest environment, subject to standards aimed at conserving forest land.
14 OAR 660-006-0025(1)(c), (4)(q); *see also* OAR 660-006-0025(5).³

³ OAR 660-006-0025(5) provides:

“A use authorized by section (4) of this rule may be allowed provided the following requirements or their equivalent are met. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands:

- “(a) The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands;

1 The transmission line is planned to run through forest land within a 100-
2 foot right-of-way with 25 feet of clearance from the ground to the lines. Record
3 48. TPUD submitted a report analyzing forest impacts (the forest impacts report)
4 and later submitted an updated report in response to opposition submitted by
5 Stimson Lumber Company (Stimson), which owns forest land through which the
6 transmission line will run. Record 309–10. A Stimson representative submitted a
7 one-page letter opposing the proposed transmission line route and suggesting an
8 alternative route. Stimson complained that the proposed route is “unacceptable”
9 to it for the following reasons:

10 “1. The initial footprint removes 36 acres of high-quality timber
11 producing ground.

12 “2. The shadow effects of a transmission line are difficult to
13 measure but can impact the surrounding forest acres in many
14 negative ways.

15 “a. Logistics of forest operations from harvesting to
16 herbicide applications become very difficult and in
17 some cases impossible. Cable logging systems and
18 transmission lines are very incompatible from a safety
19 standpoint and logistics of harvest operations. All of
20 which add to increased costs to operations.

21 “b. Increased vandalism runs hand in hand with the
22 introduction of power line corridors with increased

 “(b) The proposed use will not significantly increase fire
 hazard or significantly increase fire suppression costs
 or significantly increase risks to fire suppression
 personnel[.]”

1 events of garbage dumping, off road use and
2 environmental impacts. Stimson can provide a tour of
3 such negative impact upon request.” Record 310
4 (underscoring in original).

5 The county found that the forest impacts report identified all accepted
6 forest practices that must be analyzed for impacts. The county concluded that the
7 conditional use criteria at TCLUO 3.004(8), and the state law that it implements,
8 required the board to consider impacts only to the property remaining in forest
9 use outside the transmission line right-of-way, which would be converted to non-
10 forest use. The county found that Stimson’s concerns about trespass, vandalism,
11 and theft “are speculative” and not related to any identified forest practice.
12 Record 48. Differently, the county concluded that the transmission lines might
13 result in increased costs for herbicide application and timber harvest operations.

14 The county concluded that the 25-foot clearance under the transmission
15 lines allows logging equipment to move beneath the lines, allowing timber stands
16 on either side of the transmission line to be managed as a single tract, minimizing
17 the cost impacts related to herbicide application and logging activities. The
18 county found that the transmission line route is along existing roads, to a large
19 extent, and that fact reduces the potential cost impact for herbicide application.
20 The county also found that herbicides are routinely applied via helicopter, and
21 that the transmission lines would not increase the cost of herbicide application.

22 Trees that exceed 100 feet in height that are rooted within 50 feet of the
23 transmission line right-of-way boundary would need to be felled away from the
24 transmission lines using directional falling logging techniques. The county found

1 that directional falling is a common forest harvest practice in response to a variety
2 of conditions and utilizing directional falling around the transmission line right-
3 of-way would not result in increased costs based, in part, on evidence that areas
4 where directional falling would be required are minor compared to the entire
5 forest management unit.

6 Overall, the county found that TPUD had conducted an in-depth review of
7 the transmission line impacts on forest practices and there “does not appear to be
8 any factors that are uniquely challenging about applying standard forest
9 practices” in the presence of a transmission line. Record 48. The board found that
10 forest impacts “are not likely to occur and, if they do, will not be significant;”
11 nevertheless, the board imposed a condition of approval “to remove any doubt
12 about the occurrence of such impacts.” Record 49. Condition A(8) requires
13 TPUD to enter into easement agreements with forest land owners whereby TPUD
14 will be obligated to de-energize the transmission line upon request by the
15 property owner when an area within 100 feet of the transmission line is being
16 logged and providing the property owner with the option of having TPUD
17 perform those logging activities. Record 67.

18 Petitioners do not challenge the board’s findings or conditions related to
19 herbicide application and timber harvest practices. Petitioners argue that the
20 transmission project will force a significant change in, or significantly increase
21 the cost of accepted forest practices because the project will remove 36 acres of
22 forest from production and may increase trespass and vandalism, including

1 garbage dumping. Petitioners further argue that the county’s forest impacts
2 analysis failed to consider the cumulative impacts to accepted forest practices.

3 The county properly limited its forest impacts analysis to those forested
4 areas outside of the transmission line right of way. TCLUO 3.004(8) implements
5 and reproduces verbatim OAR 660-006-0025(5)(a). See n 4. As respondents
6 point out, this case is similar to *Oregon Pipeline Company v. Clatsop County*, 71
7 Or LUBA 246 (2015), which involved a permanent easement necessary to
8 construct, maintain, and protect a high-pressure natural gas pipeline.
9 Construction and maintenance of the pipeline would limit tree production in the
10 easement area. The county denied the application, in part, based on its conclusion
11 that restriction on forest uses within the easement area constituted a significant
12 change in forest practices. We rejected that conclusion and remanded the
13 county’s decision in order for the county to correctly apply the rule, both because
14 the county’s construction of the county’s analog to OAR 660-006-0025(5)(a)
15 improperly applied a general significant impact standard and the county failed to
16 adequately explain why limitations on tree production in the permanent easement
17 area around the pipeline would result in “a significant change in * * * forest
18 practices * * * on * * * forest lands.” *Oregon Pipeline*, 71 Or LUBA at 259.

19 Here, we agree with respondents that petitioners’ argument that the
20 transmission line will remove 36 acres from forest production is not sufficient to
21 explain why the development will result in a “a significant change in * * * forest
22 practices * * * on * * * forest lands.” If petitioners’ argument is that OAR 660-

1 006-0025(5)(a) prohibits removing some forest land from production to
2 accommodate a use that is allowed as a conditional use on forest land, we disagree
3 with petitioners' overly broad reading of the forest impacts rule. OAR 660-006-
4 0025(5)(a) contemplates approval of limited non-forest uses on forest land
5 subject to requirements designed to make the use compatible with forest
6 operations and conserve values found on forest lands.

7 With respect to specific impacts alleged from potential trespass,
8 vandalism, and theft, petitioners have not identified any *forest practice* that
9 would be impacted. Accordingly, that argument provides no basis for reversal or
10 remand.

11 Finally, petitioners argue that the county failed to consider and make
12 adequate findings related to cumulative impacts of the transmission line.
13 Petitioners' argument is not very well developed. As we understand the
14 argument, it is that the evidence in this record would not support a finding that
15 individual non-significant impacts, when viewed together, will not force a
16 significant change in, or significantly increase the cost of, accepted forest
17 practices. The only evidence of impacts to forest practices was the letter from
18 Stimson, which asserts individual impacts and does not address the cumulative
19 effect of multiple impacts. Accordingly, even if the board was required to assess

1 the cumulative impacts, an issue that we do not decide here, any error in doing
2 so would provide no basis for reversal or remand.⁴

3 The sixth assignment of error is denied.

4 The county's decision is affirmed.

⁴ The Supreme Court recently explained that, in context of the farm impacts test, “the legislature intended the ‘significant change’ in a farm practice or ‘significantly increased cost’ of a farm practice standard to apply practice by practice and farm by farm, as the text and context of the farm impacts test suggest.” *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 458, ___ P3d ___ (2019) (quoting ORS 215.296). The court remanded the case to the county to decide in the first instance whether cumulative impacts on each farm is significant. In so ruling, the court questioned whether petitioners’ position on the cumulative impacts analysis “runs counter to the farm-focused test for individual changes to accepted farm practices or increases in costs of those practices.” *Id.* at 459–60. Based on the court’s reasoning in *Stop the Dump*, we also question whether petitioners’ proffered interpretation of the forest impacts test regarding cumulative impacts would withstand further scrutiny.