

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

DENNIS TYLKA,  
*Petitioner,*

vs.

CLACKAMAS COUNTY,  
*Respondent.*

LUBA No. 2022-093

FINAL OPINION  
AND ORDER

Appeal from Clackamas County.

Dennis Tylka filed the petition for review and reply brief and argued on behalf of themselves.

Stephen L. Madkour filed the respondent's brief and argued on behalf of respondent.

RYAN, Board Chair; RUDD, Board Member, participated in the decision.

ZAMUDIO, Board Member, did not participate in the decision.

AFFIRMED 08/25/2023

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

**NATURE OF THE DECISION**

Petitioner appeals a hearings officer's decision approving a principal river conservation area (PRCA) permit for a single family dwelling.

**MOTION TO DISMISS**

The petition for review was due on May 29, 2023, which was a federal and state holiday. Petitioner filed the petition for review on May 30, 2023. In the respondent's brief, the county moved to dismiss the appeal because, the county alleged, the petition for review was not timely filed.<sup>1</sup>

OAR 661-010-0075(6) provides: "Time deadlines in these rules shall be computed by excluding the first day and including the last day. If the last day is Saturday, Sunday or other state or federal legal holiday, the act must be performed on the next working day." The county's motion is denied. The petition for review was timely filed.

**FACTS**

The applicant applied for a PRCA permit in order to construct a dwelling on their 5,000 square foot lot zoned Recreation Residential (RR) and located adjacent to the Salmon River. The Salmon River is identified as a principal river

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<sup>1</sup> OAR 661-010-0065(3) provides in relevant part that "[a]ll motions must be filed as a separate document and shall not be included with any other filing."

1 in the county's comprehensive plan.<sup>2</sup> Clackamas County Zoning and  
2 Development Ordinance (ZDO) 704.04(A) requires structures to be located "a  
3 minimum of 100 feet from the mean high water line of a principal river[,] and  
4 allows the county to increase the setback "up to 150 feet from the mean high  
5 water line to lessen the impact of development[,] after considering the standards  
6 set forth in ZDO 704.04(A)(1) to (7). The applicant's site plan showed a setback  
7 for the proposed dwelling setback of 128 feet from the river, with a deck setback  
8 of 118 feet from the river.

9 The planning director approved the application with a 128-foot setback,  
10 and petitioner and others appealed the decision to the hearings officer.<sup>3</sup> The  
11 hearings officer held a hearing and at the conclusion held the record open for  
12 additional evidence. The hearings officer then issued a decision approving the  
13 application in the location proposed on the site plan, with a setback of 128 feet  
14 from the river. This appeal followed.

#### 15 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

16 Petitioner's first and second assignments of error include overlapping  
17 arguments and we address them together.

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<sup>2</sup> Clackamas County Zoning and Development Ordinance (ZDO) 316.03(A) and Table 316-1 allow a detached single family dwelling as a permitted use in the RR zone.

<sup>3</sup> According to the decision "[petitioner] owns several property lots along the river frontage adjacent to the subject property and resides \* \* \* a short distance from the proposal site." Second Replacement Record (Record) 3.

1 As noted, ZDO 704.04(A) allows the county to increase the required 100-  
2 foot setback “up to 150 feet” from the mean high water line of a principal river  
3 “to lessen the impact of development” and states:

4 “The following minimum setbacks shall apply to structures  
5 exceeding 120 square feet or 10 feet in height:

6 “A. Structures shall be located a minimum of 100 feet from the  
7 mean high water line of a principal river. This minimum  
8 setback may be increased up to 150 feet from the mean high  
9 water line to lessen the impact of development. In  
10 determining the minimum setback, the following shall be  
11 considered:

12 “1. The size and design of any proposed structures;

13 “2. The width of the river;

14 “3. The topography of the land between the site and the  
15 river;

16 “4. The type and stability of the soils;

17 “5. The type and density of existing vegetation between the  
18 site and the river;

19 “6. Established recreation areas or areas of public access;  
20 and

21 “7. Visual impact of any structures.”

22 ORS 197.307(4) (2019) provides:

23 “Except as provided in subsection (6) of this section, a local  
24 government may adopt and apply only clear and objective standards,  
25 conditions and procedures regulating the development of housing,  
26 including needed housing. The standards, conditions and  
27 procedures:

1       “(a) May include, but are not limited to, one or more provisions  
2       regulating the density or height of a development.

3       “(b) May not have the effect, either in themselves or cumulatively,  
4       of discouraging needed housing through unreasonable cost or  
5       delay.”<sup>4</sup>

6       The planning director’s decision concluded that ORS 197.307(4) prohibits the  
7       county from applying the provisions of ZDO 704.04(A) that allow the county to  
8       increase the dwelling’s setback because that provision contains ambiguous and  
9       subjective factors. Record 164-65.

10       In considering ZDO 704.04, the hearings officer first found that the  
11       requirement of a 100-setback is “clear,” and that the county is not prohibited from  
12       applying that setback provision. Record 16. The hearings officer also agreed with  
13       the planning director’s decision that ORS 197.307(4) restricts the ability of the  
14       county to require a setback of more than 100 feet:

15       “The Hearings Officer agrees with [the planning director’s] analysis  
16       and concurs in [their] finding. The requirement of a 100 foot  
17       minimum setback is a clear and objective standard implementing

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<sup>4</sup> ORS 197.307(4) was amended in 2023 with amendments that took effect on  
July 31, 2023, and now provides, in part:

“Except as provided in subsection (6) of this section, a local  
government may adopt and apply only clear and objective standards,  
conditions and procedures regulating the development of housing,  
including needed housing, on land within an urban growth  
boundary.” *See* HB 3197 (2023) (amending ORS 197.307(4)).

All references to ORS 197.307(4) in this opinion are to ORS 197.307(4)  
(2019).

1 this Section. The appellants and Mr. Mulkey on behalf of 1000  
2 Friends of Oregon contend that this analysis is in contradiction to  
3 the underlying Comprehensive Plan policies Section 704  
4 implements.

5 “I point here to the word ‘shall’ with respect to the minimum 100  
6 foot setback, as opposed to the word ‘may’ with respect to  
7 considering an increased setback (a discretionary standard) beyond  
8 the 100 foot setback that ‘shall’ be imposed. The County correctly  
9 asserts that the 100 foot minimum setback is a clear and objective  
10 standard, whereas imposing a greater setback necessarily imposes a  
11 subjective analysis of the stated criteria ORS 197.307 (4)  
12 specifically provides that a local government (here, Clackamas  
13 County) may adopt and apply only clear and objective standards in  
14 regulating the development of housing. The State Housing Statute  
15 supersedes Goal 5 and related provisions of the County’s  
16 Comprehensive Plan to the extent such provisions allow the County  
17 to apply discretionary or subjective criteria rather than ‘clear and  
18 objective’ standards for housing development. Further, the County  
19 has in fact adopted a clear and objective standard that it is applying:  
20 the minimum setback of 100 feet from the mean high-water line of  
21 a principal river that ‘shall’ be required.” *Id.*

22 In their first and second assignments of error, petitioner challenges those  
23 findings. Petitioner argues that ORS 197.307(4) does not prohibit the county from  
24 applying ambiguous and subjective standards in ZDO 704.04(A)(1) to (7)  
25 because those local standards implement the county’s program to achieve  
26 Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and  
27 Open Spaces), which is adopted and acknowledged in the county’s  
28 comprehensive plan and the ZDO. Petitioner also argues that ORS 197.175(2)  
29 requires the county to make land use decisions in compliance with the

1 comprehensive plan, notwithstanding ORS 197.307(4).<sup>5</sup> We also understand  
2 petitioner to argue that the standards in ZDO 704.04(A)(1) to (7) do not run afoul  
3 of the restriction in ORS 197.307(4) against applying standards other than “clear  
4 and objective standards” because, according to petitioner, requiring additional  
5 setbacks does not restrict the density of the lot, the height of the dwelling, or the  
6 type of housing.

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<sup>5</sup> ORS 197.175(2) provides:

“Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:

- “(a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission;
- “(b) Enact land use regulations to implement their comprehensive plans;
- “(c) If its comprehensive plan and land use regulations have not been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the goals;
- “(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations; and
- “(e) Make land use decisions and limited land use decisions subject to an unacknowledged amendment to a comprehensive plan or land use regulation in compliance with those land use goals applicable to the amendment.”

1       The county responds by pointing to other findings that show that the  
2   hearings officer in fact applied the subjective provisions in ZDO 704.04(A):

3       “I also note with respect to this setback requirement that the proposal  
4   actually has a 128 foot setback from the mean high water mark of  
5   the Salmon River to the structure. This setback appears required by  
6   the topography of the site as there is persuasive and uncontradicted  
7   testimony concerning an escarpment or ‘cliff’ towards the river side  
8   leaving a buildable area that is roughly 61 feet deep on a lot that is  
9   50 feet wide and 100 feet deep. The house shown on the application  
10   is 30 feet wide by 41 feet 6 inches deep and two stories tall, with a  
11   10 foot deck off the back, built right up to the 10 foot side setbacks.  
12   Thus, the proposed house will be just under 2500 sq ft in size and is  
13   consistent in size with other single-family home development in the  
14   area. With the required 20 foot setback to the front property line,  
15   increasing the setback to the maximum 150 feet would effectively  
16   prohibit development of the site with a house that is consistent with  
17   the other single-family homes in the vicinity. There is no public  
18   access or established recreation areas at this location, and no  
19   evidence that any of the other above-listed factors would suggest  
20   requiring a greater setback than the required minimum 100 feet or  
21   the proposed 128 feet. Thus, after considering the above factors, I  
22   find requiring the minimum 100 foot setback sufficient to meet these  
23   criteria, and find that the proposal meets or exceeds this standard.”  
24   Record 16-17.

25   Petitioner quotes this language from the decision and argues that the hearings  
26   officer only summarized the evidence. Petition for Review 39-40. The county  
27   responds that “The Hearings Officer sufficiently identifies the relevant standards  
28   and criteria in ZDO 704.04, states the relied upon facts, and explains the  
29   justification for the land use decision.” Respondent’s Brief 13.

30       We agree with the county. The hearings officer considered the topography  
31   as allowed by ZDO 704.04(A)(3). The hearings officer also considered the lack



1 of established recreation areas and the proposed house design. ZDO  
2 704.04(A)(6); ZDO 704.04(A)(1). The hearings officer found that the proposed  
3 setback for the dwelling and deck exceed the minimum 100-foot setback in ZDO  
4 704.04(A), which is an increase the hearings officer found was justified under  
5 ZDO 704.04(A)(1), (3), and (6), and that the proposed setback “lessens the  
6 impact of development.”

7 We agree with the county that the hearings officer in fact applied subjective  
8 provisions of ZDO 704.04(A) and concluded that a 100-foot setback meets the  
9 applicable criteria, and that a 128-foot setback lessens the impact of development  
10 further. Given that conclusion, petitioner’s challenges to the hearings officer’s  
11 conclusion that ORS 197.307(4) prohibits them from applying ZDO 704.04(A)  
12 to require an increased setback above 100 feet do not provide a basis for reversal  
13 or remand of the decision. In other words, petitioner’s complaint in the first and  
14 second assignments of error is that the hearings officer should do what the  
15 hearings officer in fact did. In the absence of any challenge to the hearings  
16 officer’s application of ZDO 704.04(A), petitioner’s arguments provide no basis  
17 for reversal or remand.

18 Petitioner argues that the scale of development of other houses in the  
19 vicinity is not a relevant consideration. Petition for Review 39-40. However,  
20 petitioner does not any develop an argument explaining why the scale of  
21 development of nearby properties may not be considered when evaluating ZDO  
22 704.04(A)(1).

1       Petitioner also argues that the hearings officer's findings are inadequate to  
2 explain why the applicant could not construct the dwelling in a different location  
3 on another part of the lot. We agree with the county that petitioner has not  
4 identified anything in the ZDO that requires the hearings officer to consider a  
5 different location on the lot other than the location proposed by the applicant.

6       The first and second assignments of error are denied.

### 7   **THIRD ASSIGNMENT OF ERROR**

8       In several arguments under their third assignment of error, petitioner  
9 argues that the hearings officer's decision is not supported by substantial  
10 evidence in the whole record. ORS 197.835(9)(a)(C) (LUBA shall reverse or  
11 remand a decision that is not supported by substantial evidence in the whole  
12 record). Substantial evidence is evidence that a reasonable person would rely on  
13 in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608  
14 (1993).

15       First, petitioner argues that the hearings officer's decision that a 128-foot  
16 setback lessens the impact of development is not supported by substantial  
17 evidence in the whole record. Petitioner argues that ZDO 704.04(A)(2), (3), and  
18 (5) support a 150-foot setback.

19       The county responds that the county has the discretion to apply the factors  
20 in ZDO 704.04(A) to determine the appropriate setback to lessen the impact of  
21 development, and that petitioner has not demonstrated that the hearings officer's  
22 decision that the proposed 128-foot setback lessens the impact of development is

1 not supported by substantial evidence in the whole record. We agree with the  
2 county. Petitioner does not dispute that the lot includes a cliff that influences the  
3 location of development and the size of the building envelope. The hearings  
4 officer's conclusion that a 128-foot setback lessens the impact of development is  
5 supported by substantial evidence in the record. Petitioner's mere disagreement  
6 with the weighing of that evidence does not provide a basis for remand.

7       Next, we understand petitioner to argue that the location of the "mean high  
8 water line" for purposes of establishing the setback is not supported by substantial  
9 evidence in the record because the mean high water line location was not  
10 established "by a license[d] hydrologist or other County personnel that  
11 administrate ZDO 704." Petition for Review 48. Petitioner also argues that the  
12 applicant should have identified the mean high water line in two locations  
13 because the river is not "perfectly parallel to" the subject property. *Id.*

14       ZDO 704.02(C) defines "mean high water line" as "[t]he bank of any river  
15 or stream established by the annual fluctuations of water generally indicated by  
16 physical characteristics such as a line on the bank, changes in soil conditions, or  
17 vegetation line." The hearings officer relied on the site plan and other application  
18 materials submitted by the applicant to conclude that the proposed dwelling is  
19 located 128 feet from the mean high water line. Record 16-17, 88-89, 93. The  
20 county responds that the hearings officer's conclusion regarding the location of  
21 the mean high water line is supported by the site plan and other materials

1 submitted by the applicant, and there is no evidence in the record that undercuts  
2 that evidence.

3 We agree. First, nothing in the definition of mean high water line requires  
4 its location to be established by a licensed hydrologist or by unnamed county  
5 personnel, or requires it to be established in more than one location relative to the  
6 river. Petitioner has not explained why the site plan and other applicant materials  
7 are not evidence of the line's location, or pointed to any evidence in the record  
8 that undercuts that evidence.

9 The third assignment of error is denied.

10 The county's decision is affirmed.