

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

3
4 JANE BARDOLF and BARBARA SCHAFFNER,
5 *Petitioners,*

6
7 vs.

8
9 YAMHILL COUNTY,
10 *Respondent,*

11 and

12
13 MILLS DEVELOPMENT COMPANY, LLC,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2010-069

17
18 FINAL OPINION
19 AND ORDER

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22 Appeal from Yamhill County.

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24 Jane Bardolf, Sherwood, and Barbara Schaffner, Sherwood, filed the petition for
25 review and Jane Bardolf argued on her own behalf.

26
27 Rick Sanai, County Counsel, McMinnville, filed a response brief on behalf of
28 respondent.

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30 Michael C. Robinson, Portland, filed a response brief and argued on behalf of
31 intervenor-respondent. With him on the brief were Seth J. King and Perkins Coie LLP.

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

35
36 AFFIRMED

12/14/2010

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

NATURE OF THE DECISION

Petitioners appeal a decision by the county approving a zone change from Exclusive Farm Use (EF-20) to Agriculture/Forestry (AF-20).

MOTION TO INTERVENE

Mills Development Company, LLC, the applicant below, moves to appear on the side of respondent. The motion is granted.

FACTS

The subject property is a vacant 51.8 acre parcel located north and east of the city of Newberg. Approximately 21 acres of the property is partially forested. Properties to the east are zoned EF-20, to the south AF-20, and to the west both EF-20 and AF-10. Properties to the north are zoned Very Low Density Residential Use (VLDR-2.5). In 1993, the zoning of the property was changed from AF-20 to EF-20, and that new zoning took effect in 1997. As we understand it, the EF-20 zone is a resource zone that implements Statewide Planning Goal 3 (Agricultural Lands), while the AF-20 zone is a resource zone that implements both Goal 3 and Statewide Planning Goal 4 (Forest Lands) that is intended for properties with a mixture of agricultural and forest resources.

Intervenor-respondent (intervenor) applied for a zone map amendment from EF-20 to AF-20, and the planning commission approved the application. One of the petitioners appealed the decision to the board of county commissioners (BCC), which approved the application. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Yamhill County Zoning Ordinance (YCZO) Section 1208 provides the approval criteria for a zoning map amendment. YCZO 1208.01 requires in relevant part that approval of a zoning map amendment “shall include findings satisfying the criteria in [YCZO]

1 1208.02 or 1208.03 as appropriate * * *.” YCZO 1208.02 provides general review criteria
2 for zone map changes “except as provided in YCZO 1208.03 * * *.”

3 YCZO 1208.03 provides particular review criteria for zone map changes that involve
4 a change in the zoning designation of a property “* * * from Exclusive Farm Use,
5 Agriculture/Forestry, or Forest to another of these zones * * *,” which would describe the
6 application submitted by intervenor. We set out the relevant part of YCZO 1208.03
7 below:

8 “A quasi-judicial zone change to * * * amend the designation of land from
9 Exclusive Farm Use, Agriculture/Forestry, or Forest to another of these zones,
10 * * * may be authorized, pursuant to Subsection 1208.01, provided that the
11 request satisfies all applicable requirements of this ordinance, and also
12 provided that the applicant demonstrates compliance with the following
13 criteria:

14 “A. The proposed amendment shall comply with the goals, policies, and
15 other applicable provisions of the comprehensive plan.

16 “B. The proposed designation shall be appropriate for the existing or
17 intended use of the property.

18 “C. The proposed amendment shall result in an area of at least 160
19 contiguous acres with the requested designation, including adjacent
20 land.

21 “D. For proposed changes within or to an Exclusive Farm Use designation,
22 the new minimum lot size shall be appropriate to maintain the existing
23 commercial agricultural enterprise in the area.

24 “E. For proposed changes within or to an Agriculture/Forestry
25 designation, the new minimum lot size shall be shown to assure:

26 “1. The opportunity for economically efficient forest and
27 agriculture practices typically occurring in the area; and

28 “2. The opportunity for the continuous growing and harvesting of
29 forest tree species; and

30 “3. The conservation of other forest values found on forest lands.”

31 The remaining section of YCZO 1208 also provides criteria for zone map amendments from
32 EF to the AF designation for particular properties that were zoned AF prior to 1993 and were

1 rezoned to EF as part of periodic review in 1997, which would also describe the application
2 submitted by intervenor. YCZO 1208.04 provides in relevant part:

3 “Certain properties that were zoned Agriculture/Forestry prior to December
4 29, 1993 were rezoned to Exclusive Farm Use as part of Periodic Review.
5 (The rezoning became effective on February 14, 1997.) When the Exclusive
6 Farm Use designation does not adequately reflect the mixed agricultural and
7 forest use of the property, a quasi-judicial zone map change back to
8 Agricultural/Forestry may be authorized, pursuant to Subsection 1208.01, and
9 provided that the applicant demonstrates compliance with the following:

10 “A. The area to be rezoned consists primarily of foothill and ridgetop
11 holdings above the flat terrace and valley floor commercial agriculture
12 areas, and below the contiguous timberlands of the Coast Range.

13 “B. At least 50% of each parcel that is proposed to be rezoned is forested.

14 “C. At least 50% of each parcel that is proposed to be rezoned was
15 designated Agriculture/Forestry prior to December 29, 1993.

16 “D. The area being rezoned contains such a mixture of agricultural and
17 forest uses that neither Goal 3 nor Goal 4 can be applied alone.

18 “E. The proposed amendment shall result in an area of at least 160
19 contiguous acres with the requested designation, including adjacent
20 land.

21 “F. Any amendment that would reduce the minimum lot size complies
22 with the requirements of Section 1208.03(F).”¹

23 The county applied the criteria in YCZO 1208.03 to approve the zone change from EF-20 to
24 AF-20, and did not apply the criteria in YCZO 1208.04.

25 In their first and second assignments of error, petitioners argue that the county erred
26 in approving the application without requiring intervenor to demonstrate compliance with
27 both the criteria set forth in YCZO 1208.03 *and* the criteria set forth in YCZO 1208.04.
28 According to petitioners, YCZO 1208.04 simply establishes *additional* criteria for zone map
29 changes of property to an AF designation specifically for properties that were zoned AF-20

¹ YCZO 1208.04 was added to the YCZO in July, 1998.

1 prior to 1993 but that were rezoned to EF-20 in 1993. There is no dispute that the subject
2 property was zoned AF-20 prior to 1993 and was rezoned in 1993 to EF-20.

3 The BCC found that the criteria set forth in YCZO 1208.04 did not apply to the
4 application, concluding in relevant part:

5 “First, YCZO 1208.03 and 1208.04 are mutually exclusive approval criteria.
6 These sections are not both applicable to the same application. YCZO
7 1208.03 establishes general criteria applicable to zone changes from EFU to
8 AF, while YCZO 1208.04 is specifically directed at certain properties.
9 Moreover, the YCZO does not direct that one or the other apply to a particular
10 application. Rather, the applicant has the choice of whether to have an
11 application reviewed under YCZO 1208.03 or YCZO 1208.04. This
12 application is subject to the provisions of YCZO 1208.03 because those are
13 the criteria selected by the applicant. The applicant has chosen to apply
14 YCZO 1208.03 and the Planning Commission agreed with that choice. There
15 is no basis for the [BCC] to find that the Planning Commission erred.

16 “The alternative nature of these sections is demonstrated by their plain
17 language in three (3) ways. First, both sections provide that a zone change
18 from EFU to AF ‘may be authorized’ pursuant to their respective criteria.
19 YCZO 201.01(B) states that the term ‘may’ is permissive in nature. Thus, the
20 county’s use of the term ‘may’ in these sections provides the applicant the
21 option to file and the County the option to approve the application under
22 either set of standards. If the county had used the mandatory term ‘shall,’ it
23 would have required the applicant to request approval under one or the other
24 set of criteria. Second, the approval criteria of YCZO 1208.04 cross-reference
25 the approval criterion in YCZO 1208.03(F). If both YCZO 1208.03 and
26 1208.04 applied to this application, there would be no need to include the
27 cross-reference to YCZO 1208.03 in YCZO 1208.04. Third, YCZO
28 1208.03(C) and YCZO 1208.04[sic](E) are identical. Again, if both sections
29 applied to this application, there would be no need to repeat this standard.”²
30 Record 9-10.

² The decision also contains the following:

“* * * [Commissioner Lewis] found that YCZO 1208.03 contains the relevant criteria for the map amendment. She noted that YCZO 1208.03 was, in fact, more subjective than YCZO 1208.04 and, therefore, presented slightly more difficult criteria for an applicant. Commissioner Stern noted in her deliberations that either YCZO 1208.03 or .04 could apply but that it was the applicant’s choice as to which set of criteria to apply.” Record 6.

1 Petitioners argue that the county’s interpretation of the relationship between YCZO
2 1208.03 and 1208.04 is inconsistent with the text of the YCZO.³ Petitioners first point to the
3 language in YCZO 1208.03 that requires an application to “satisf[y] all applicable
4 requirements of this ordinance” and argue that that phrase includes YCZO 1208.04 if that
5 provision is “applicable.” Petitioners argue that where an application seeks to change the
6 zone of a property that is indisputably described in YCZO 1208.04 by the introductory
7 description of properties that were rezoned in 1993, YCZO 1208.04 is an “applicable
8 requirement.” Petitioners also argue that the reference in YCZO 1208.04 to a zone map
9 change to AF that “* * * may be authorized, *pursuant to Subsection 1208.01* * * *,” where
10 YCZO 1208.01 requires findings of compliance with YCZO 1208.03, means that YCZO
11 1208.04 intended that both sets of criteria apply.

12 Finally, petitioners argue, YCZO 201.01 further supports their argument that the
13 county’s interpretation of YCZO is inconsistent with the text of the ordinance. YCZO
14 201.01 provides rules of construction for “word, terms and expressions” in the YCZO and
15 provides that “the particular controls the general * * *.” According to petitioners, YCZO
16 1208.04 is a “particular” provision that applies to a limited number of properties described in
17 it, whereas YCZO 1208.03 is a “general” provision that applies to any proposed map change
18 from or to a resource designation.⁴

19 ORS 197.829(1) provides:

³ On November 24, 2010, petitioners submitted a three-page “Memorandum of Supplemental Authorities” that contains petitioners’ argument regarding the reasons why petitioners believe the county’s decision is not required to be affirmed under ORS 197.829(1), as interpreted by the Oregon Supreme Court in *Siporen v. Medford*, __ Or __, __ P3d __ (November 18, 2010), a decision that was issued after the briefing in this appeal concluded and after oral argument was held. Intervenor objects to the memorandum, and we do not consider it. While it is permissible to submit a post-oral argument pleading that advises LUBA and other parties of new, pertinent authority, the memorandum does far more than that, and instead consists almost entirely of additional arguments in support of petitioners’ assignments of error.

⁴ This argument would actually suggest that YCZO 1208.04 applies instead of YCZO 1208.03, but petitioners do not argue for that interpretation. Petitioners argue only that both provisions apply and must be satisfied.

1 “[LUBA] shall affirm a local government’s interpretation of its
2 comprehensive plan and land use regulations, unless the board determines that
3 the local government’s interpretation:

4 “(a) Is inconsistent with the express language of the comprehensive plan or
5 land use regulation;

6 “(b) Is inconsistent with the purpose for the comprehensive plan or land
7 use regulation;

8 “(c) Is inconsistent with the underlying policy that provides the basis for
9 the comprehensive plan or land use regulation[.]”

10 While petitioners’ interpretative arguments may be legitimate interpretations of the relevant
11 provisions of the YCZO, the question we must answer in this appeal is whether the BCC’s
12 interpretation of the YCZO is consistent with the express language, purpose and policy
13 underlying the provision being interpreted, not whether petitioners’ contrary interpretation is
14 better or more consistent with the language, purpose and policy of that provision. *Siporen v.*
15 *City of Medford*, __ Or __, __ P3d __ (November 18, 2010).

16 As quoted above, the BCC rejected petitioners’ interpretation that both YCZO
17 1208.03 and 1208.04 apply, based on the text and context of those provisions. Instead, the
18 BCC concluded that, where either section could apply, the relevant provisions of the YCZO
19 give an applicant a choice between having an application evaluated under YCZO 1208.03 or
20 1208.04, even if the property that is the subject of the application is one that is described in
21 YCZO 1208.04. The BCC relied on the permissive nature of each provision (a zone change
22 “may be authorized”), as well as the fact that some of the criteria in YCZO 1208.04 cross-
23 reference the approval criteria in YCZO 1208.03(F) and that YCZO 1208.03(C) and
24 1208.04(E) are identically worded, neither of which the BCC concluded would be necessary
25 if both provisions must be applied. The BCC’s interpretation of the relevant provisions of
26 the YCZO is not “inconsistent with the express language, purpose, or underlying policy” of
27 the YCZO. ORS 197.829(1). Accordingly, LUBA is required to affirm that interpretation.

28 The first and second assignments of error are denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 In their third assignment of error, petitioners argue that the BCC’s finding that the
3 application satisfies YCZO 1208.03(C) is inadequate because the BCC failed to first
4 determine whether YCZO 1208.04(B) is satisfied. Our conclusion above that affirms the
5 BCC’s determination that YCZO 1208.04 does not apply to intervenor’s application where
6 intervenor sought approval of the requested zone change under YCZO 1208.03 requires that
7 we deny this assignment of error.⁵

8 Petitioners also generally argue that “the county’s findings that the zone change
9 request complies with YCZO 1208.03 are inadequate and are not supported by substantial
10 evidence in the record.” However, other than that statement, petitioners do not develop any
11 argument as to why the county’s findings regarding YCZO 1208.03 are inadequate, and as
12 such, we do not consider it. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218,
13 220 (1982).

14 The county’s decision is affirmed.

⁵ Because we deny the assignment of error, we need not address intervenor’s argument that petitioners are precluded from raising the issue because the issue was not raised during the proceedings before the planning commission or the BCC. ORS 197.763(1).