

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 FRIENDS OF THE METOLIUS

5 and WILLIAM JOHNSON,

6 *Petitioners,*

7  
8 and

9  
10 TOMAS FINNEGAN RYAN,

11 *Intervenor-Petitioner,*

12 vs.

13  
14 JEFFERSON COUNTY,

15 *Respondent,*

16  
17 and

18  
19 GORDON C. JONES and JEFFREY JONES,

20 *Intervenors-Respondent.*

21  
22 LUBA No. 2005-139

23  
24 FINAL OPINION

25 AND ORDER

26  
27 Appeal from Jefferson County.

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29 Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioners. With him  
30 on the brief was the Law Office of Bill Kloos, PC.

31  
32 Tomas Finnegan Ryan, Portland, filed a petition for review and argued on his own behalf.

33  
34 No appearance by Jefferson County.

35  
36 Christopher P. Koback, Portland, filed the response brief and argued on behalf of  
37 intervenors-respondent. With him on the brief was Davis Wright Tremaine, LLP.

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39 BASSHAM, Board Member; HOLSTUN, Board Member, participated in the decision.

40  
41 DAVIES, Board Chair, did not participate in the decision.

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AFFIRMED

01/26/2006

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

**NATURE OF THE DECISION**

Petitioners appeal a site plan to redevelop and expand an existing lodge and cabin facility.

**REPLY BRIEF**

Petitioners move to file a reply brief, to address a perceived jurisdictional issue raised in the response brief. There is no opposition to the motion, and the motion is allowed.<sup>1</sup>

**FACTS**

The challenged decision is on remand from LUBA. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 , *aff'd* 200 Or App 416, 116 P3d 220 (2005) (*Friends II*). That decision in turn was on remand from an earlier LUBA decision. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004)(*Friends I*). The basic facts were set forth in those opinions, and need not be repeated in their entirety here. In brief, intervenors-respondent (intervenors) seek site plan approval for a proposal to renovate an existing lodge and 16 cabins and to construct an additional 23 cabins on a 41-acre parcel. The subject property is located in the Camp Sherman Vacation Rental (CSVN) zone, which in relevant part allows (1) single family dwellings on minimum five-acre lots and (2) “tourist rental cabins,” subject to maximum lot coverage standards limiting cabins to two units per developable acre. “Tourist Rental Cabins” as defined under the county’s code are cabins “available for rental to tourists by the night or week.” Jefferson County Zoning Ordinance (JCZO) 105. The original application proposed that the 16 existing and 23 additional cabins be sold as condominiums, with owner-occupancy limited to 185 days per year and 90 consecutive days, and that the cabins be available for rent to tourists the remainder of the year.

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<sup>1</sup> The response brief concedes that LUBA has jurisdiction over the challenged decision, but includes a brief assertion that LUBA lacks “jurisdiction to issue prospective injunctions to enjoin hypothetical violations” of the county’s code. Response Brief 5. The reply brief responds to that assertion. While the parties’ debate on this point is interesting, we dispose of this appeal in a manner that does not require us to consider or resolve that debate.

1           In *Friends I*, LUBA held, essentially, that owner-occupancy of cabins in the CSVR zone  
2 for more than a *de minimis* period disqualifies such cabins as “tourist rental cabins.” LUBA  
3 reiterated that holding in *Friends II*, and the Court of Appeals affirmed, commenting that “only *de*  
4 *minimis* owner occupancy is consistent with the express language of the ordinance \* \* \*.” 200 Or  
5 App at 426, n 8. On remand following the court’s decision, intervenors withdrew all elements of  
6 the application related to ownership or owner-occupancy and modified the application to seek only  
7 site plan approval for an upgrade and expansion of the existing lodge and cabin facility, under the  
8 original site plan. Petitioners and intervenor-petitioner objected, arguing that the county must  
9 resolve the issue of owner-occupancy. Petitioners argued the county can approve the site plan only  
10 if it imposes conditions of approval sufficient to ensure that the cabins will never be used for single-  
11 family dwellings. Petitioners proposed findings and a condition to that end. The county board of  
12 commissioners conducted a hearing on the modified proposal and approved the site plan, finding  
13 that the owner-occupancy issue is moot and declining to impose the suggested condition. This  
14 appeal followed.

15 **ASSIGNMENT OF ERROR (PETITIONERS)**

16 **ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)**

17           The county adopted the following finding addressing the issue of owner-occupancy:

18           “In addition to returning to the original site plan dated August 30, 2003, applicants  
19 withdraw all application components related to the condominium form of ownership  
20 arrangement for the proposed tourist rental cabins. The applicants represented that  
21 the project would be developed simply as an upgrade and expansion of the existing  
22 Lake Creek Lodge Resort, which does not currently have any ownership  
23 arrangement or use, and asked that the County \* \* \* issue a decision which strictly  
24 complied with decisions of LUBA and the Court of Appeals. Thus, the remand  
25 issues related to *de minimis* owner use and modifications to the original site plan  
26 are moot and, therefore, no findings or conditions concerning those issues are  
27 necessary.” Record 3.

1           Petitioners argue that the county failed to adequately address the issue of owner-  
2 occupancy.<sup>2</sup> According to petitioners, where an issue relevant to an approval criterion is raised  
3 below, the county has an obligation to adopt findings addressing that issue. Given how squarely that  
4 issue was presented to the county, petitioners argue, the county’s failure to adopt adequate findings  
5 addressing the issue is “hard to grok.”<sup>3</sup> Petition for Review 14.

6           To the extent the county relies on the above-quoted finding, petitioners argue, that finding is  
7 conclusory and inadequate. Petitioners argue:

8           “\* \* \* [W]ithdrawing from the land use proposal ‘all application components  
9 related to the condominium form of ownership arrangement for the proposed tourist  
10 rental cabins’ does not mean there will be no condominium formed for ownership of  
11 the units. The [JCZO] does not regulate condominium development. Therefore,  
12 removing the condominium issue from the county land use proposal would not  
13 prevent the owner from filing for a condominium under state law and then having the  
14 separate ownership interests in the cabins to sell. Furthermore, it does not mean  
15 there would not be some other form of ownership, short of formal condominium,  
16 that would allow individuals to own the cabins and to occupy them, thus making  
17 them ‘dwelling units, single family’ in the meaning of the code. \* \* \*” Petition for  
18 Review 14.

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<sup>2</sup> Intervenor-petitioner’s assignment of error also argues that the county erred in failing to resolve the issue of owner-occupancy, for substantively the same reasons advanced by petitioners. We discuss both assignments of error together, and refer to petitioners and intervenor-petitioner collectively as “petitioners.”

<sup>3</sup> We find no definition of “grok” in *Webster’s Third New International Dictionary* or other hardbound dictionaries available to us. The on-line reference Wikipedia defines the term as follows:

“**Grok** (pronounced *grock*) is a verb roughly meaning ‘to understand completely’ or more formally ‘to achieve complete intuitive understanding.’ It was coined by science fiction writer Robert A. Heinlein in his novel *Stranger in a Strange Land*, where it is part of the fictional Martian language and introduced to English speakers by a man raised by Martians.

“In the Martian tongue, it literally means ‘to drink’ but is used in a much wider context. A character in the novel (not the primary user) defines it:

‘*Grok* means to understand so thoroughly that the observer becomes a part of the observed—to merge, blend, intermarry, lose identity in group experience. It means almost everything that we mean by religion, philosophy, and science—and it means as little to us (because we are from Earth) as color means to a blind man.’”

If petitioners are suggesting that LUBA should remand findings that fail to induce “complete intuitive understanding” or that fail to cause earthlings to “merge, blend, intermarry, lose identity in group experience,” we are grateful for the suggestion, but must respectfully decline.

1           Petitioners contend that, given the history of this case, the issue of owner-occupancy could  
2 be moot “if, and only if, the use is not permitted to have any owner occupancy of any of the cabins.”  
3 Petition for Review 15. Because the county failed to ensure in its findings and in the conditions it  
4 imposed that no owner occupancy will occur, petitioners argue that the county’s decision must be  
5 remanded. According to petitioners, remand can be avoided only if pursuant to  
6 ORS 197.835(11)(b) LUBA reads the county’s “mootness” finding as a prohibition on any owner-  
7 occupancy of the cabins.

8           As intervenors point out, the issue of ownership of the cabins, as condominiums or in other  
9 forms, is a different issue than that of owner-occupancy. We held in *Friends I* that the  
10 condominium form of ownership of the cabins is not inconsistent with the code definition of “tourist  
11 rental cabin.” 46 Or LUBA at 522. Petitioners cannot raise that issue again in this appeal.  
12 Intervenors also note that the condition petitioners proposed to the county prohibited a  
13 condominium form of ownership or sale of any interest in individual cabins. Record 41. The  
14 condition proposed by petitioners did not directly address the issue of owner-occupancy.

15           In any case, intervenors argue, and we agree, that the above-quoted finding adequately  
16 addresses the issue of owner-occupancy. Intervenors eliminated from the application all proposals  
17 for condominium ownership and owner-occupancy. Intervenors’ attorney explicitly represented to  
18 the county that “[t]he project will be developed simply as an upgrade and expansion of the existing  
19 Lake Creek Lodge Resort.” Record 67. During the hearing, intervenors’ attorney stated that “we  
20 concede on [the owner-occupancy issue] and will be using the cabins as tourist rental cabins with  
21 the condominium ownership deleted from the plan.” Record 61. Based on the modified application  
22 and those representations, the county found that owner-occupancy is no longer part of the  
23 application and therefore the issue of owner-occupancy is moot. That finding seems to us legally  
24 correct and adequate to dispose of the issue petitioners raised below.

25           Petitioners cite no authority requiring the county to impose conditions prohibiting a use that  
26 is not in fact proposed and is not approved, simply because it is possible that at some future date

1 the subject property might be used in a manner prohibited by the code. While the county might  
2 have chosen to impose a condition to that effect, we are not aware of any legal obligation to do so.  
3 Unlike the decisions at issue in *Friends I* and *II*, nothing in the challenged decision purports to  
4 approve owner-occupancy. If in the future the cabins are used in a manner prohibited by the code  
5 or contrary to that approved in the challenged decision, that is an enforcement issue, to be resolved  
6 in the appropriate forum.

7           Petitioners' assignments of error are denied.

8           The county's decision is affirmed.