

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 OREGON COAST ALLIANCE,

5 *Petitioner,*

6
7 vs.

8
9 TILLAMOOK COUNTY,

10 *Respondent,*

02/15/18 PM 2:12 LING

11
12 LUBA No. 2017-089

13
14 FINAL OPINION

15 AND ORDER

16
17 Appeal from Tillamook County.

18
19 Sean T. Malone, Eugene, filed the petition for review and argued on
20 behalf of petitioner.

21
22 William Sargent, County Counsel, Tillamook, filed the response brief
23 and argued on behalf of respondent.

24
25 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN Board
26 Member, participated in the decision.

27
28 REVERSED

02/15/2018

29
30 You are entitled to judicial review of this Order. Judicial review is
31 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a planning commission decision approving a conditional use permit (CUP) to site a recreational vehicle as a permanent dwelling.

FACTS

The subject property is a vacant 6.4-acre parcel zoned Small Farm Woodlot 10-Acre (SFW-10) located within Tillamook County. The property abuts federally-owned, Forestzoned property to the north, and privately owned, SFW-10 zoned parcels in all other directions. The SFW-10 zone is an exception zone, for which an exception to Statewide Planning Goals 3 (Agricultural Lands) and 6 (Forest Lands) has been taken. The purpose of the SFW-10 zone is to allow “small-scale farms and large-acreage rural residential homesites on land that has potential for small-scale farm or forest uses, but because of limitations is impractical for the Farm or Forest zone.” Tillamook County Land Use Ordinance (LUO) 3.008(1). The SFW-10 zone allows as a permitted use “[s]ingle-family residential structures.” LUO 3.008(2)(e). The SFW-10 also allows, as a conditional use, “[r]ecreation vehicles.” LUO 3.008(3)(r). LUO 11.030 defines “recreational vehicle” as a “portable temporary dwelling unit * * * which is intended for vacation, emergency or

- 1 recreational use, but not for permanent residential use, unless located in a
- 2 recreational vehicle or mobile/manufactured dwelling park.”¹

¹ LUO 11.030 is entitled “Generally Applied Definitions,” and includes in relevant part:

“RECREATIONAL VEHICLE: A portable temporary dwelling unit, with a gross floor area not exceeding 400 square feet in the set up mode, which is intended for vacation, emergency or recreational use, but not for permanent residential use, unless located in a recreational vehicle or mobile/manufactured dwelling park.

“RECREATIONAL VEHICLE includes the following:

- “(a) CAMPER: A structure containing a floor that is designed to be temporarily mounted upon a motor vehicle, and which is designed to provide facilities for temporary human habitation.
- “(b) MOTOR HOME: A motor vehicle with a permanently attached camper, that is originally designed, reconstructed or permanently altered to provide facilities for temporary human habitation.
- “(c) TRAVEL TRAILER: A trailer that is capable of being used for temporary human habitation, which is not more than eight feet wide, and except in the case of a tent trailer, has four permanent walls when it is in the usual travel position.
- “(d) SELF-CONTAINED RECREATIONAL VEHICLE: A vehicle that contains a factory-equipped, on-board system for the storage and disposal of grey water and sewage.

“This definition of recreational vehicle shall not apply in the F-1 or SFW-20 zones.”

1 The property owner filed a CUP application to site a recreational vehicle
2 on the subject property as a permanent dwelling, including water and septic
3 facilities. Neighbors submitted comments arguing in part that a recreational
4 vehicle authorized under LUO 3.008(3)(r) cannot be used for permanent
5 residential use. On June 22, 2017, planning staff approved the application in
6 an administrative decision. The June 22, 2017 staff decision rejected
7 arguments that the proposed use is not authorized under LUO 3.008(3)(r),
8 citing a long-standing history of county approval of recreational vehicles as
9 permanent dwellings in rural zones where a “recreation vehicle” is allowed as a
10 conditional use. Record 128-29.

11 The staff approval was appealed to the planning commission, which
12 conducted a *de novo* hearing on August 31, 2017. Subsequently, planning staff
13 issued three staff reports and memoranda explaining staff’s position that a
14 “recreation vehicle” authorized under LUO 3.008(3)(r) may be used as a
15 permanent residential dwelling. Record 26-28, 108-09, 110-16.

16 On September 1, 2017, the planning commission issued a decision
17 denying the appeal and upholding the planning staff’s June 22, 2017 decision.
18 However, the planning commission’s decision did not adopt or expressly
19 incorporate any of the subsequent staff reports or memoranda, or adopt any
20 findings of its own. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner argues that the planning commission misconstrued the
3 applicable law in interpreting LUO 3.008(3)(r) in context to authorize siting a
4 recreational vehicle to be used as a permanent dwelling. Petitioner argues that
5 while LUO 3.008(3)(r) authorizes a “recreation vehicle” as a conditional use in
6 the SFW-10 zone, it does not state or imply that the recreational vehicle can be
7 used as a permanent dwelling. Petitioners contend that the context of LUO
8 3.008(3)(r) clearly indicates that the use category “recreation vehicle” is
9 intended to be for temporary, nonresidential occupation, specifically vacation,
10 emergency or recreational use only.

11 **A. Text and Context of LUO 3.008(3)(r)**

12 The mainstay of petitioner’s argument is the definition of “recreational
13 vehicle” at LUO 11.030, which as noted defines that term to mean a “temporary
14 dwelling unit * * * intended for vacation, emergency or recreational use, but
15 not for permanent residential use, unless located in a recreational vehicle or
16 mobile/manufactured dwelling park.”² See n 1. Petitioner notes that nearly all
17 of the examples of recreational vehicle listed under that definition are expressly
18 limited to “temporary human habitation[.]” Further, petitioner notes that LUO
19 11.030 defines “Mobile/manufactured home park” to mean a place where

² Despite the slightly varying terminology, no party disputes that the LUO 11.030 definition of “recreational vehicle” applies to the use category “recreation vehicle” in LUO 3.008(3)(r).

1 mobile homes, manufactured dwellings and recreational vehicles are located,
2 “the purpose of which is to provide permanent residential spaces[.]”³ Petitioner
3 argues that, read together with the definition of “recreational vehicle,” the
4 definition of “Mobile/manufactured home park” clarifies that the county code
5 allows a recreational vehicle to be used as a permanent dwelling only when
6 placed in a mobile/manufactured home park or similar facility.⁴

³ LUO 11.030 provides the following definition:

“MOBILE/MANUFACTURED HOME PARK: A place where either four or more mobile homes/ manufactured homes or mobile homes/manufactured homes and recreational vehicles mixed, are located on one or more contiguous lots, tracts, or parcels of land under a single ownership, the purpose of which is to provide permanent residential spaces for charge or fee paid for the use of facilities, or to offer space free of charge in connection with securing the trade, patronage or services of the occupant.”

⁴ We note that LUO 11.030 includes a definition of “RECREATIONAL VEHICLE SUBDIVISION,” meaning a subdivision that allows “the placement of recreational vehicles outright, subject to all development standards and placement permit requirements.” If there are county zones that allow a “Recreational Vehicle Subdivision,” such zones might allow permanent placement of recreational vehicles on lots within the subdivision, although that is not clear to us. The SFW-10 zone does not allow “Recreational Vehicle Subdivisions.”

We note also that LUO 11.030 defines “RECREATIONAL CAMPGROUND” to include facilities providing for “temporary recreational camping,” along with one “permanent house, mobile home, or recreational vehicle” for the campground manager. This definition suggests that when the county intends to allow a recreational vehicle to be sited as a permanent dwelling, it knows how to express that intent.

1 The county responds that the county’s interpretation of LUO 3.008(3)(r)
2 to provide for use of a recreational vehicle as a permanent dwelling is
3 supported by other context in LUO 3.008.⁵ The county notes that the SFW-10
4 zone allows use of recreational vehicles under two other provisions, both of
5 which are expressly limited in duration. First LUO 3.008(2)(f) allows as a
6 permitted use a “recreational vehicle used only during the construction or
7 substantial improvement of a use for which a building or placement permit has
8 been issued.” Second, LUO 3.008(3)(w) allows the “[t]emporary placement of
9 a mobile home or recreation vehicle to be used because of a health hardship[.]”
10 We understand the county to argue that because LUO 3.008(3)(r) allows the
11 use of a “recreation vehicle” without any express limitation on duration in the
12 SFW-10 zone, unlike LUO 3.008(2)(f) and LUO 3.008(3)(w), that context
13 suggests that the county did not intend to impose any durational limitation on
14 the use of a “recreation vehicle” under LUO 3.008(3)(r).

15 The county’s contextual argument is unpersuasive. It is reasonably clear
16 that LUO 3.008(2)(f) and LUO 3.008(3)(w) include express durational
17 limitations because, under the circumstances where those code provisions
18 allow occupancy of a recreational vehicle, the occupancy is potentially a long-
19 term, essentially residential use. For example, under LUO 3.008(3)(w) a

⁵ The county does not rely upon the arguments set forth in the three staff reports or memoranda at Record 26-28, 108-09, 110-16 to support its arguments on appeal. As noted, the planning commission did not adopt those staff reports and memoranda as findings or part of its decision.

1 recreational vehicle could be occupied as a dwelling for an extended period of
2 time, potentially years, depending on the duration of the health hardship, and
3 under LUO 3.008(2)(f) a recreational vehicle could be occupied as a residence
4 for a similarly lengthy period of time depending on the duration of construction
5 of the primary dwelling. By contrast, there is no need to impose an express
6 durational limitation on the use of a “recreation vehicle” under LUO
7 3.008(3)(r), because that use category is already defined to limit that use to
8 nonresidential vacation, emergency or recreational uses. In other words, it is
9 precisely *because* the use of a recreational vehicle is limited by definition to
10 nonresidential vacation, emergency or recreational uses that LUO 3.008(2)(f)
11 and LUO 3.008(3)(w) must include special language to allow extended use of a
12 recreational vehicle in two limited circumstances that involve something other
13 than nonresidential vacation, emergency or recreational use.

14 As petitioner argues, the only code provisions cited to us that expressly
15 authorize permanent residential occupancy of a recreational vehicle are the
16 definition and provisions for a mobile/manufactured home park. The LUO
17 11.030 definition of “recreational vehicle” states that such vehicles are not
18 intended for “permanent residential use, unless located in a recreational vehicle
19 or mobile/manufactured dwelling park.” When the definition of
20 mobile/manufactured home park is read in conjunction with the definition of
21 recreational vehicle, it becomes even more clear that the county did not intend

1 to allow recreational vehicles to be used as permanent dwelling units outside of
2 a mobile/manufactured home park or similar facility.

3 The county's interpretation gives little or no effect to the categorical
4 limits imposed in the definition of "recreational vehicle" at LUO 11.030.⁶
5 Instead, the county argues only that to the extent there is a conflict between the
6 definition of "recreational vehicle" at LUO 11.030 and the provision for a
7 "recreation vehicle" as a permanent residential use in the SFW-10 zone under
8 LUO 3.008(3)(r), the latter is the more specific provision, and therefore must
9 give way to the broadly applicable definition at LUO 11.030. *See* ORS
10 174.020(2) ("When a general and particular provision are inconsistent, the
11 latter is paramount to the former * * *").

12 However, there is no conflict between the express language of the LUO
13 11.030 definition and LUO 3.008(3)(r) provision for a "recreation vehicle" as a
14 conditional use in the SFW-10 zone. Nothing in the text of LUO 3.008(3)(r)
15 suggests that it allows a recreational vehicle to be used as a permanent

⁶ We note that many of the use categories listed in LUO 3.008(3) have corresponding definitions in LUO 11.030, and many of those definitions include categorical exclusions or limitations. For example, LUO 3.008(3)(v) authorizes "bed and breakfast enterprises" as a conditional use in the SFW-10 zone. LUO 11.030 defines "bed and breakfast enterprise" in relevant part to impose a maximum of 15 persons occupying a residential structure. There can be no possible dispute that that definition imposes limitations on the use category "bed and breakfast enterprise," and that if an applicant proposed a lodging enterprise involving occupancy of more than 15 persons, such a proposal would not qualify as a "bed and breakfast enterprise" authorized under LUO 3.008(3)(v).

1 dwelling. The language of LUO 3.008(3)(r) is entirely silent on that point,
2 which in our view means that the definition at LUO 11.030 is the most
3 straightforward, and controlling, means of resolving any uncertainty regarding
4 the scope or meaning of the term “recreation vehicle” as used at LUO
5 3.008(3)(r).⁷ If there is a conflict between LUO 11.030 and LUO 3.008(3)(r), it
6 stems not from the text of the relevant code provisions, but from the county’s
7 unsupported interpretation. *See Goose Hollow Foothills League v. City of*
8 *Portland*, 117 Or App 211, 217-18, 843 P2d 992 (1992), *overruled on other*
9 *grounds by Church v. Grant County*, 187 Or App 578, 69 P3d 759 (2003)
10 (“[T]o amend legislation *de facto* or to subvert its meaning in the guise of
11 interpreting it, is not a permissible exercise.” (Citations omitted.)).

⁷ LUO 11.020(1) states that:

“The definitions in Article 11 apply to all actions and interpretations under the County of [the LUO]. The meanings of some terms in this chapter may, in certain contexts in which they are used, be clearly inapplicable. In such cases, the context in which the term is used will indicate its intended meaning, and that intent shall control.”

We note that the last sentence of the definition of “recreational vehicle” at LUO 11.030 states that “[t]his definition of recreational vehicle shall not apply in the F-1 or SFW-20 zones.” *See* n 1. By reverse implication, the definition applies in all other county zones, including the SFW-10 zone. If there is any code language in LUO 3.008 or elsewhere suggesting that the definition of “recreational vehicle” at LUO 11.030 is “clearly inapplicable” in the SFW-10 zone, or has a different meaning than that set out in LUO 11.030, the county does not identify it.

1 Because the text and context of LUO 3.008(3)(r) is dispositive, it is not
2 necessary to resort to canons of construction such as that codified in ORS
3 174.020(2). *PGE v. Bureau of Labor and Industry*, 317 Or 606, 610-12, 859
4 P2d 1143 (1993), *as modified by State v. Gaines*, 340 Or 160, 206 P3d 1042
5 (2009). But even if one applies the canon of construction resolving conflicts
6 between provisions in favor of the particular over the general, that canon does
7 not support the county’s interpretation. The definition of “recreational vehicle”
8 at LUO 11.030 is detailed, specific, authoritative and facially dispositive of the
9 issue presented in this case. The listing of “recreation vehicle” at LUO
10 3.008(3)(r) is brief and unspecified, and its brevity and lack of specificity is in
11 fact the source of any interpretative uncertainty in this case. For purposes of
12 ORS 174.020(2), it does not seem accurate to characterize the imprecise
13 language of LUO 3.008(3)(r) as the “particular” provision and the very specific
14 definition of LUO 11.030 as the “general” provision. *See Goose Hollow*
15 *Foothills*, 117 Or App at 217 (“The city’s understanding—that one provision of
16 an ordinance authorizes by silence what another applicable provision expressly
17 prohibits—is little if at all, short of absurd.”).

18 In sum, we agree with petitioner that the county erred in interpreting
19 LUO 3.008(3)(r) to authorize use of a recreational vehicle as a permanent
20 dwelling. The LUO 11.030 code definition of the term “recreational vehicle”
21 makes it clear that under the LUO as currently written the use category
22 “recreation vehicle” at LUO 3.008(3)(r) is limited to nonresidential vacation,

1 emergency or recreational use, and that a recreational vehicle can be used for a
2 permanent residence only within a mobile/manufactured home park or similar
3 facility.

4 **B. County Past Practices**

5 In the June 22, 2017 staff decision upheld by the planning commission,
6 staff cited several instances where staff had previously approved recreational
7 vehicles as permanent dwellings. Record 130. Under the first assignment of
8 error, petitioner also argues that past instances of such approvals have no
9 bearing on whether LUO 3.008(3)(r) is properly interpreted in context to
10 authorize use of a recreational vehicle as a permanent dwelling. We agree with
11 petitioner.

12 The first assignment of error is sustained.

13 **SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR**

14 The second, third and fourth assignments of error concern whether
15 certain statutes support or undermine the county's interpretation that LUO
16 3.008(3)(r) authorizes use of a recreational vehicle as a permanent dwelling.

17 In the August 3, 2017 staff report, planning staff presented several
18 arguments in defense of staff's position that LUO 3.008(3)(r) authorizes use of
19 a recreational vehicle as a permanent dwelling, including citation to ORS
20 446.125, which addresses occupancy of private land by manufactured

1 dwellings and “camping vehicles.”⁸ Record 112. Under the second assignment
2 of error, petitioner argues that ORS 446.125 read in context does not in fact
3 support the staff position. The county appears to agree that ORS 446.125 has
4 no application in the present case. Response Brief 4-5. As noted, the county
5 did not adopt the August 3, 2017 staff report as part of its findings or decision.
6 For that reason, and because on appeal the county appears to concede that ORS
7 446.125 has no applicability in the present case, we need not resolve
8 petitioner’s arguments that ORS 446.125 does not lend support to the county
9 staff position that LUO 3.008(3)(r) authorizes use of a recreational vehicle as a
10 permanent dwelling.

11 Under the third assignment of error, petitioner argues that nothing in
12 ORS chapter 215, which provides the statutory bases for authorizing land uses

⁸ ORS 446.125 is part of a chapter concerning manufactured dwelling and mobile home parks, and provides:

“A person may occupy a manufactured dwelling or a camping vehicle on private land with the consent of the owner of the land if:

“(1) The lot, tract or parcel of land upon which the manufactured dwelling or camping vehicle is situated has an area adequate to provide safe, approved water supply and sewage disposal facilities and is not in conflict with ORS 446.310 (9).

“(2) The person complies with all applicable standards of sanitation, water, plumbing and electrical and sewerage installations prescribed by the laws of this state and the rules issued thereunder, or by local authorities.”

1 within counties, purports to authorize counties to approve recreational vehicles
2 as permanent dwellings. Petitioner argues that the only ORS chapter 215
3 provisions governing use of recreational vehicles instead indicate that such use
4 must be temporary. *E.g.*, ORS 215.755(2) (allowing use of a recreational
5 vehicle as a temporary hardship dwelling).

6 Similarly, under the fourth assignment of error, petitioner argues that
7 ORS 197.493, which provides that local governments cannot restrict the length
8 of occupancy of a recreational vehicle that is located within a manufactured
9 dwelling park, mobile home park or recreational vehicle park, also indicates
10 lack of statutory support for county approval of a recreational vehicle as a
11 permanent dwelling outside placement within a park dedicated to that purpose.⁹

⁹ ORS 197.493 provides:

“(1) A state agency or local government may not prohibit the placement or occupancy of a recreational vehicle, or impose any limit on the length of occupancy of a recreational vehicle, solely on the grounds that the occupancy is in a recreational vehicle, if the recreational vehicle is:

“(a) Located in a manufactured dwelling park, mobile home park or recreational vehicle park;

“(b) Occupied as a residential dwelling; and

“(c) Lawfully connected to water and electrical supply systems and a sewage disposal system.

“(2) Subsection (1) of this section does not limit the authority of a state agency or local government to impose other special

- 1 vehicle as a permanent dwelling, which is prohibited by LUO 3.008(3)(r).
- 2 Accordingly, the county's decision is reversed.