

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

3
4 FRIENDS OF THE METOLIUS and)
5 TONI FOSTER,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 JEFFERSON COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 DAN RICHARTZ and CINDI RICHARTZ,)
18)
19 Intervenors-Respondent.)

LUBA No. 94-163
FINAL OPINION
AND ORDER

20
21
22 Appeal from Jefferson County.

23
24 Bill Kloos, Eugene, filed the petition for review and
25 argued on behalf of petitioners. With him on the brief was
26 Johnson & Kloos.

27
28 No appearance by respondent.

29
30 Steven W. Abel, Portland, filed the response brief and
31 argued on behalf of intervenors-respondent. With him on the
32 brief was Stoel Rives Boley Jones & Grey.

33
34 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
35 Referee, participated in the decision.

36
37 REMANDED 01/25/95

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county court order approving a
4 conditional use permit for development of "traveler's
5 overnight accommodations."

6 **MOTION TO INTERVENE**

7 Dan Richartz and Cindi Richartz, the applicants below,
8 move to intervene on the side of respondent in this appeal
9 proceeding. There is no objection to the motion, and it is
10 allowed.

11 **FACTS**

12 This is the second time a county decision approving a
13 conditional use permit for the subject property has been
14 appealed to this Board. In Friends of the Metolius v.
15 Jefferson County, 25 Or LUBA 411, 412-13, aff'd 123 Or
16 App 256, adhered to, 125 Or App 122 (1993) (Metolius I), we
17 stated the following facts:

18 "The subject property consists of 3.03 acres and
19 is designated and zoned Camp Sherman Resort
20 Residential (CSRR). The * * * decision describes
21 the proposal as follows:

22 "[Intervenors] are requesting a
23 conditional use [permit] to permit
24 modification of the Black Butte Resort
25 and RV Park consisting of six (6)
26 cabins, a manager's residence, two (2)
27 large A-frame buildings, two (2) mobile
28 homes, and twenty-nine (29) serviced
29 recreational vehicle spaces. The
30 request is to replace all existing
31 structures with a new modified
32 traveler's accommodation consisting of

1 fifteen (15) cabins * * *. Record 4.

2 "The county planning commission considered
3 intervenors' application. However, the planning
4 commission's vote on a motion to approve the
5 application resulted in a tie. The planning
6 commission referred the application to the county
7 governing body, the county court. The county
8 court unanimously approved a motion to review the
9 application on its own motion. Thereafter, the
10 county court conducted a de novo public hearing
11 and approved the application."

12 In Metolius I, petitioners assigned nine errors. We
13 sustained the ninth assignment of error and remanded the
14 decision on the basis that the decision lacked findings of
15 compliance with Jefferson County Zoning Ordinance
16 (JCZO) 307(E) and 602(B).

17 On remand, the county court did not conduct a hearing
18 or provide petitioners with any opportunity to provide
19 input. Instead, the county court adopted supplemental
20 findings of fact and supplemental conclusions of law
21 regarding the remand issues during a public meeting. This
22 appeal followed.

23 **PRELIMINARY ISSUE**

24 As stated above, we remanded the decision in Metolius I
25 because it lacked findings of compliance with relevant
26 approval standards. Also as indicated above, the county
27 conducted no hearing on remand. This is error. In response
28 to our remand in Metolius I, the county adopted interpretive
29 findings. At a minimum, on remand the county should have
30 conducted a hearing to allow the parties an opportunity to

1 present argument based on the interpretations adopted by the
2 county on remand. Morrison v. City of Portland, 70 Or
3 App 437, 441-42, 689 P2d 1027 (1984).

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioners argue that under Jefferson County
6 Development Procedures Ordinance (JCDPO) 9.1 and JCZO 605,
7 the conditional use permit originally approved by the county
8 expired because more than one year has elapsed from the date
9 of original approval.

10 JCDPO 9.1 states:

11 "DURATION OF APPROVAL. All land use approvals shall
12 be valid for a period of one year, unless a longer
13 duration is granted as part of the approval. The
14 one year period shall run from the date a land use
15 approval is no longer appealable."

16 JCZO 605 states:

17 "TIME LIMIT ON A PERMIT FOR A CONDITIONAL USE.
18 Authorization of a conditional use may be void after
19 one year or such lesser time as the authorization
20 may specify unless substantial construction has
21 taken place. However, the Planning Commission may
22 extend authorization for an additional period not to
23 exceed one year, on request."

24 Intervenors contend it should be clear that JCZO 605
25 and JCDPO 9.01 do not apply to local government decisions,
26 such as the one at issue, while they are on appeal.
27 Intervenors also argue petitioners should have raised this
28 issue on remand.

29 We consider the latter question first. Petitioners
30 never had an opportunity to participate in the county's

1 process for adopting its decision on remand. Therefore, it
2 was not possible for them to have raised this issue below.

3 Second, the challenged decision does not contain an
4 interpretation of JCZO 605 and JCDPO 9.1. It is well
5 settled that this Board must grant considerable deference to
6 the county court's interpretation of its own code. ORS
7 197.829; Gage v. City of Portland, 319 Or 308, 860 P2d 282
8 (1993). Moreover, in reviewing the county court's decision,
9 this Board cannot interpret the county's ordinances in the
10 first instance. Weeks v. City of Tillamook, 117 Or App 449,
11 454, 844 P2d 914 (1992). The interpretation of the county's
12 ordinances is not so obvious that we may step in and
13 interpret the county's code for it. See Gage v. City of
14 Portland, 123 Or App 269, 274-75, 860 P2d 282, adhered to
15 125 Or App 119, rev'd on other grounds 319 Or 308 (1994);
16 see also Towry v. City of Lincoln City, 26 Or LUBA 554, 560
17 (1994); Terra v. City of Newport, 24 Or LUBA 438, 448
18 (1993). Therefore, the challenged decision must be remanded
19 for an interpretation of JCZO 605 and JCDPO 9.1.

20 The first assignment of error is sustained.

21 **SECOND ASSIGNMENT OF ERROR**

22 Under this assignment of error, petitioners present
23 seven separate subassignments¹ challenging the findings and
24 evidentiary support for the county's decision. All but the

¹Subassignments B and C in the petition for review deal with similar issues and they are considered together below.

1 last of the subassignments of error concern the proposal's
2 compliance with JCZO 307(E)(3)² and JCZO 602(B).³

3 **A. Surrounding Area**

4 The county interpreted the term "surrounding area," as
5 used in JCZO 602(B), to include land within a 250-foot
6 radius of the property lines of the subject property.
7 Petitioners argue this interpretation is incorrect.

8 At the outset we note the challenged decision is
9 adopted by the county court -- the county governing body.
10 This Board is required to defer to a local governing body's
11 interpretation of its own enactments where the
12 interpretation is not clearly contrary to the express words,
13 purpose or context of the local enactment. ORS 197.829;
14 Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992).
15 The court of appeals has held LUBA's scope of review under
16 Clark and ORS 197.829 requires that LUBA defer to a
17 governing body's interpretation of its own code so long as

²JCZO 307(E)(3) requires the following:

"The proposed use must be in harmony with the natural environment and result in a minimum number of conflicts with existing development."

³JCZO 602(B) provides:

"Taking into account location, size, design and operating characteristics, the proposal will have a minimal adverse impact on the (a) livability, (b) value, and (c) appropriate development of abutting properties and the surrounding area compared to the impact of development that is permitted outright."

1 the local interpretation is not "so wrong as to be beyond
2 colorable defense. * * *" Zippel v. Josephine County, 128
3 Or App 458, 461, 876 P2d 854, rev den 320 Or 272 (1994).

4 The county's interpretation of JCZO 602(B) that
5 "surrounding area" means the land within 250 feet of the
6 property lines of the subject property is not beyond
7 colorable defense, and we defer to it.

8 This subassignment is denied.

9 **B. Characterization of the "Natural Environment"**⁴

10 The challenged decision characterizes the "natural
11 environment" referred to in JCZO 307(E)(3) as consisting of:

12 "* * * open meadows, Ponderosa pine trees, and
13 deciduous trees." Supplemental Record 3.

14 Petitioners contend the county's characterization of
15 the "natural environment" affected by the proposed
16 development under JCZO 307(E)(3) is erroneous. Petitioners
17 contend the evidence establishes the natural environment
18 consists of visual resources, air and ground water quality
19 and native plant communities that were not adequately
20 identified or analyzed by the county.

21 There are no findings identifying or analyzing the
22 native plant communities within the natural environment in
23 the surrounding area. We do not understand any party to

⁴Under this subassignment, petitioners repeat arguments advanced above that the surrounding area for consideration should be greater than the 250-foot radius discussed above. We resolve this argument, supra, and do not reconsider it here.

1 dispute that native plant communities are a characteristic
2 of the natural environment of the area. Therefore, evidence
3 that the proposal would significantly harm native plant
4 communities in the area is a relevant issue the county
5 should have addressed in its findings. Norvell v. Portland
6 Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979). This is
7 especially important where, as here, the U. S. Forest
8 Service expressed serious concerns with the proposal's
9 impacts on the area's rare and native plant communities.
10 Specifically, the U. S. Forest Service was concerned that
11 the proposed landscaping would introduce plants to the area
12 that would have deleterious effects on native and rare plant
13 communities.

14 Intervenors cite findings which, reasonably read,
15 determine that visual resources, air quality and groundwater
16 are attributes of the natural environment of the area.
17 Regarding visual resources, the findings cited by
18 intervenors simply state "the 'livability' characteristics
19 of the surrounding area include scenic qualities * * *."
20 Supplemental Record 5. These findings are inadequate to
21 describe the visual qualities that compose the natural
22 environment in the surrounding area. They are inadequate
23 because they do not adequately identify the visual resources
24 to enable the county to determine the proposal's impacts on
25 those resources.

26 Regarding big game habitat, the comprehensive plan

1 identifies the subject property as being within an area of
2 big game habitat. The findings appear to acknowledge that
3 the property is so located. Nevertheless, the analysis in
4 the challenged decision of the habitat values in the area is
5 compromised because the county assumes the impact of the
6 existing activity on the subject property is approximately
7 equal to that which is proposed. However, the challenged
8 decision fails to consider the impact of the proposed
9 year-round facility on deer migration. Existing activities
10 on the property are primarily seasonal. Little human
11 activity occurs on the subject property during the winter
12 months, when deer migrate. The findings concerning big game
13 habitat are inadequate.⁵

14 Regarding air quality, the county adopted findings that
15 the fireplaces associated with the proposal do not require
16 restrictions. Record 11-12. However, these findings do not
17 take into account petitioners' arguments that the fireplaces
18 will likely burn more frequently during the winter months
19 when air inversions are common in the area. This is a
20 relevant issue the county should address in its findings.

21 Regarding groundwater, reasonably read, the challenged
22 decision contains findings explaining the proposed sewage

⁵We recognize that resolving this issue in this manner inevitably blends the identification of the characteristics of the natural environment under JCZO 307(E)(3) with petitioners' other arguments regarding the county's findings on impact and conflicts minimization under JCZO 307(E)(3) and 602(B).

1 disposal system will not adversely affect groundwater in the
2 area because sewage will be adequately treated,
3 notwithstanding high water tables. Record 11. Further,
4 these findings are supported by substantial evidence in the
5 whole record. Record 208.

6 This subassignment is sustained, in part.

7 **C. Minimum Conflicts**

8 The challenged decision determines the proposal will
9 not have more than minimal off-site conflicts with the
10 natural environment. Petitioners state the subject property
11 is within the 1/4-mile wild and scenic river planning
12 corridor for the Metolius River and contend the challenged
13 decision erroneously fails to address the proposal's impact
14 on the corridor. Specifically, petitioners argue the
15 challenged decision fails to address adverse impacts the
16 proposal would have on the wild and scenic river corridor,
17 as identified by the U. S. Forest Service at
18 Record 139-150.⁶

19 We agree with petitioners that the proposal's impacts
20 on the wild and scenic river corridor, within which the
21 subject property is located, appears to be a relevant
22 consideration under JCZO 307(E)(3). The challenged decision
23 states only that the "applicant has indicated that it will

⁶Intervenors argue petitioners waived this argument because they did not raise it in Metolius I. We disagree. We believe petitioners' arguments under the ninth assignment of error in Metolius I were broad enough to preserve this issue.

1 comply with the comments of the United States Forest Service
2 * * *." Record 7. These findings do not address the
3 whether the proposal will have more than minimal conflicts
4 with the wild and scenic area and, if so, what those
5 conflicts might be and how they will be resolved. The
6 county must either identify the attributes of the wild and
7 scenic river corridor, identify conflicts, and determine
8 whether those conflicts will be minimal or explain why it
9 need not do so under JCZO 307(E)(3).

10 This subassignment of error is sustained.⁷

11 **D. JCZO 602(B)**

12 Petitioners argue the county failed to sufficiently
13 describe the operating characteristics of the proposal to
14 provide a basis for analysis under JCZO 602(B).

15 Petitioners are correct that the challenged decision
16 does not adequately describe the size and impact of the
17 proposal and does not attempt to describe its operating
18 characteristics at all. It is impossible to determine the
19 proposal's compliance with JCZO 602(B) without first
20 describing these characteristics as the starting place for
21 the analysis.

⁷Petitioners also contend the findings are somewhat inconsistent in the manner in which they characterize the development in the area. While we agree with petitioners that the findings are somewhat inconsistent, they clearly identify what the county believes to be the development in the area and petitioners indicate they agree with at least one of the county's characterizations in this regard. See Petition for Review 16. That the county also uses an abbreviated description of the development does not provide a basis for reversal or remand of the challenged decision.

1 This subassignment is sustained.

2 **E. Minimal Impact of Proposal on Uses Permitted**
3 **Outright**

4 Petitioners argue the findings comparing the proposal
5 with uses allowed outright are erroneous. Specifically,
6 petitioners argue the county failed to make the required
7 comparison considering the uses allowable on the subject
8 property under JCZO 307(A)(1). JCZO 307(A)(1) provides the
9 following uses are permitted outright:

10 "Crop cultivation or farm gardens, and the keeping
11 of domestic animals subject to [other
12 restrictions.]"

13 Petitioners contend the county unfavorably compared the
14 proposal to livestock uses and crop cultivation or farm
15 gardens without an adequate evidentiary basis for doing so.
16 Petitioners also state the challenged decision assumes the
17 existing development on the subject property is permitted as
18 a nonconforming use. Petitioners contend such a
19 determination concerning the status of the existing uses of
20 the property has never been made, and that it is erroneous
21 for the county to assume the existing development is a
22 lawful nonconforming use.

23 We agree with petitioners.⁸

⁸We express no position on whether the county could determine at some other point that the existing development on the property is properly considered a lawful nonconforming use. We simply agree with petitioners that there is nothing to establish a nonconforming use has been determined to exist on the subject property at this point.

1 This subassignment is sustained.

2 **F. Statewide Planning Goal 14 (Urbanization)**

3 Petitioners argue JCZO 602(B) indirectly implements
4 Goal 14 and that under ORS 197.829(4),⁹ we should reverse
5 the county's decision because it interprets JCZO 602(B) in a
6 manner that violates Goal 14. Petitioners also argue the
7 comprehensive plan designates the subject property as rural
8 land. Petitioners contend that because it is rural land,
9 the county cannot interpret its conditional use permit
10 standards to allow travelers accommodations, as proposed,
11 because such would allow an urban use in violation of the
12 plan. Petitioners contend to do so violates ORS 197.829(2)
13 and (3).

14 We address petitioners' ORS 197.829(4) argument first.
15 The court of appeals determined the decision appealed in

⁹ORS 197.829 provides as follows:

"The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless [LUBA] determines that the local government's interpretation:

"(1) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(2) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(3) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan on land use regulation; or

"(4) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

1 Metolius I was not subject to the requirements of
2 ORS 197.829. Friends of the Metolius, supra, 125 Or App at
3 127. However, the challenged decision is a new decision
4 adopted by the county and arguably ORS 197.829(4)
5 potentially applies. Nevertheless, for ORS 197.829(4) to
6 apply, the connection between the local ordinance provision
7 and the statewide planning goal it is arguably designed to
8 implement must be a fairly close one. ORS 197.829(4) was
9 not adopted to allow LUBA to reconsider the propriety of the
10 original acknowledgment of comprehensive plans and land use
11 regulations. Historical Development Advocates v. City of
12 Portland, 27 Or LUBA 617 (1994).

13 The county's plan and land use regulations, including
14 JCZO 602(B), have been acknowledged under ORS 197.251 as
15 being in compliance with the statewide planning goals.
16 Petitioners assume JCZO 602(B) was adopted to implement the
17 "rural density" limit imposed by Goal 14. See 1000 Friends
18 of Oregon v. LCDC (Curry County), 301 Or 447, 477, 724 P2d
19 208 (1986). However, nothing in JCZO 602(B) suggests it was
20 intended to implement the rural density limit of Goal 14,
21 and we do not see that it was. Therefore, 197.829(4) does
22 not apply, and this subassignment provides no basis for
23 reversal or remand of the challenged decision.¹⁰

¹⁰The balance of petitioners' arguments under this subassignment simply repeat arguments both we and the court of appeals previously rejected in Metolius I.

1 This subassignment is denied.

2 **G. Interpretation of Traveler's Accommodations**

3 Regarding petitioners' arguments that the county
4 court's interpretation of its code that traveler's
5 accommodations are conditionally allowable on the subject
6 property, the county's interpretation is not so wrong as to
7 be beyond colorable defense and is not clearly inconsistent
8 with the county's plan. The interpretation is not contrary
9 to ORS 197.829(2) and (3).

10 This subassignment is denied.

11 The second assignment of error is sustained, in part.

12 The county's decision is remanded.

13