

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a forest
4 capability dwelling on a 10-acre parcel.

5 **MOTION TO INTERVENE**

6 Billy and Edith Schuessler (intervenors), the
7 applicants below, move to intervene on the side of
8 respondent in this proceeding. There is no opposition to
9 the motion, and it is allowed.

10 **MOTION TO STRIKE**

11 The county moves to strike the numerous attachments to
12 the petition for review that are not part of the challenged
13 decision, the record or relevant law.

14 OAR 661-10-030 provides, in relevant part:

15 "(3) Contents of Petition: The petition for
16 review shall:

17 "* * * * *

18 "(e) Contain a copy of the challenged
19 decision, including any adopted findings
20 of fact and conclusions of law;

21 "(f) Contain a copy of any comprehensive
22 plan provision, ordinance or other
23 provision of local law cited in the
24 petition, unless the provision is quoted
25 verbatim in the petition.

26 "(4) The petition for review may include
27 appendices containing verbatim transcripts of
28 relevant portions of tapes that are part of
29 the record.

30 Additionally, except as provided in ORS 197.835(2)(b),

1 our review is confined to the record. ORS 197.835(2)(a).
2 We allow the motion to strike the materials that are not
3 part of the challenged decision, the record, subject to
4 official notice or relevant law.¹ See Blatt v. City of
5 Portland, 21 Or LUBA 337, 341, aff'd 109 Or App 259 (1991)
6 rev. denied 314 Or 727 (1992). The remainder of the
7 materials are otherwise allowed by OAR 661-10-025. We do
8 not consider the references in petitioner's brief to the
9 materials stricken.

10 **FACTS**

11 A county hearings officer approved a forest capability
12 dwelling on a 10-acre parcel designated Woodlot Resource and
13 protected as an Especially Sensitive Winter Range for Black-
14 tailed deer and Roosevelt elk. The decision was made under
15 Land Development Ordinance (LDO) chapters 210 (standards for
16 forest capability dwellings and 280 (supplemental
17 provisions). To comply with ORS 215.750, the proposed
18 dwelling is located so that all or part of at least eleven
19 other lots or parcels, three of which contain dwellings,
20 will be within a 160-acre square centered on the center of
21 the subject parcel.

22 Petitioners appeal the hearings officer's decision.

¹Materials stricken: Appendix 1, 32 and 44. Materials of which we take official notice: Appendix 33-43 and 45-61.

1 **ASSIGNMENT OF ERROR**

2 Petitioner argues that the county's decision violates
3 LDO 280.110(3)(E) Area of Special Concern 90-1 (LDO
4 280.110(3)(E)), the county code provision that ensures
5 protection of specified Goal 5 resources. Petitioner
6 describes three bases which separately or collectively
7 support its conclusion that the county improperly applied
8 LDO 280.110(3)(E). The crux of petitioner's argument,
9 particularly in relation to the second and third bases, is
10 that in order to protect Goal 5 resources, dwelling density
11 standards that were adopted by the county to gain
12 acknowledgment of its plan must continue to be applied,
13 perhaps in an even more vigorous fashion. Petitioners make
14 this argument despite, and perhaps because of, intervening
15 state legislation allowing more opportunities for dwellings
16 than were allowed when the county's plan was acknowledged.

17 LDO 280.110(3)(E) states, in relevant part:

18 "* * * * *

19 "**v. Land Division and Development Standards:**

20 (1) **Especially Sensitive Winter Range** units
21 shall be maintained at a maximum overall
22 density (within the parcel/ownership or
23 proposed land division) of 1:160 or
24 grouping structures/development (within
25 a 200-foot radius) to achieve the same
26 development effect.

27 "* * * * *

28 "vi. Except as otherwise provided in this
29 ordinance, a first dwelling on a legally

1 created lot or parcel shall be subject only
2 to siting and access review standards of
3 Subsection (vii) unless a condition of
4 approval concerning creation of the lot or
5 parcel or its development requires compliance
6 with this section.

7 **"vii. General land division/development standards**
8 **for all winter range units.**

9 Any land use action subject to review under
10 this section shall include findings that the
11 proposed action will have minimum impact on
12 winter deer and elk habitat based on:

13 "(a) Consistency with maintenance of long-
14 term habitat values of browse and
15 forage, cover, sight obstruction.

16 "(b) Consideration of the cumulative effects
17 of the proposed action and other
18 development in the area on habitat
19 carrying capacity.

20 "(c) Location of dwellings and all other
21 development within three hundred feet of
22 existing roads or driveways where
23 practicable unless it can be found that
24 habitat values and carrying capacity is
25 afforded equal or greater protection
26 through a different development pattern.

27 "(d) New private roads shall be gated between
28 November and April (where permitted by
29 law) to protect wintering deer and elk.

30 "(e) Comments shall be solicited in writing
31 from the Oregon Department of Fish and
32 Wildlife for all land use actions on
33 winter range other than dwellings which
34 comply with density standards set forth
35 in Subsection (v) above. The ODFW's
36 position shall be on substantive
37 findings provided by the applicants."
38 (Underscore emphasis added, bold in
39 original.)

1 **A. Standard of Review**

2 Because the challenged decision was made by the
3 county's hearings officer, rather than its governing body,
4 we owe any interpretation no deference under ORS 197.829 and
5 Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710
6 (1992). Gage v. City of Portland, 319 Or 308, 877 P2d 1187
7 (1994); Watson v. Clackamas County, 129 Or App 428, 431-32,
8 879 P2d 1309 (1994). The standard of LUBA review of the
9 hearings officer's decision is whether any interpretation of
10 an ordinance is reasonable and correct. McCoy v. Linn
11 County, 90 Or App 271, 752 P2d 323 (1988).

12 **B. Densities Allowed Under A Facial Reading of LDO**
13 **280.110(3)(E)**

14 The challenged decision states:

15 "The Hearings Officer holds that the language of
16 LDO 280.110(3)(E)(vi) is clear and unambiguous in
17 subjecting first dwellings on legally created lots
18 or parcels to only the siting and access review
19 requirements of LDO 280.110(3)(E)(vii)(c). We are
20 left then with * * * an ordinance provision which,
21 being clear and unambiguous, requires no
22 construction." Record 14.

23 Petitioner argues that the county improperly construed
24 LDO 280.110(3)(E) when it allowed the dwelling without
25 applying all of the LDO 280.110(3)(E) standards for density
26 of dwellings. Petitioner states:

27 "Respondent's interpretation of its land use
28 regulations implementing maximum allowable
29 densities (1:160) in Especially Sensitive winter
30 range units (LDO 280.110) as exempting forest
31 dwellings on existing parcels from compliance with
32 those maximum densities is inconsistent with the

1 express language of LDO 280.110(3)(E)." Petition
2 for Review 1.

3 Specifically, petitioner argues with respect to LDO
4 280.110(3)(E), "subsection (vi), by its terms, limits the
5 extent to which subsection (vii) applies to first dwellings
6 on legally created lots or parcels. It does not limit
7 applicability of subsection (v)." Petition for Review 8.

8 Petitioner contends that the exception referenced in
9 LDO 280.110(3)(E)(vi) to the otherwise general rule, is a
10 reference to the density limitation in LDO 280.110(3)(E)(v).
11 Petitioner contends that the LDO 280.110(3)(E)(v) limitation
12 on density should have been, but was not applied to this
13 application.

14 The county responds, "The county ordinance is
15 unambiguous on its face. Because of that, the Hearings
16 Officer declined to 'interpret' it and it is the county's
17 position that LUBA should decline to 'interpret' it as
18 well." Respondent's Brief 9. Although petitioner has
19 offered its interpretation of the ordinance, if an
20 interpretation is required, it is for the county to make in
21 the first instance, and for us to determine if any
22 interpretation made by the county is reasonable and correct.
23 McCoy v. Linn County, supra.²

²LUBA will not exercise its discretion under ORS 197.829(2) to interpret a county provision in the first instance where the purpose of the provision is unclear and subject to numerous interpretations. Thomas v. Wasco County, ___ Or LUBA ___ (LUBA No. 95-098, January 12, 1996).

1 LDO 280.110(3)(E)(v) sets forth a density ratio
2 requirement. LDO 280.110(3)(E)(vi) allows certain dwellings
3 subject to lesser standards. However, LDO 280.110(3)(E)(vi)
4 includes two qualifications, the first of which is at issue,

5 "Except as otherwise provided in this ordinance, a
6 first dwelling on a legally created lot or parcel
7 shall be subject only to siting and access review
8 standards of Subsection (vii) unless a condition
9 of approval concerning creation of the lot or
10 parcel or its development requires compliance with
11 this section. (Emphasis added.)

12 LDO 280.110(3)(E)(vii) requires findings based on five
13 considerations.

14 The county's argument that LDO 280.110(3)(E)(vi)
15 clearly requires a first dwelling to comply with LDO
16 280.110(3)(E)(vii) but not with LDO 280.110(3)(E)(v) is
17 untenable. The "except as otherwise provided in this
18 ordinance" phrase is an unclear reference. As petitioner
19 explains, the exception could be a limitation on the
20 application of LDO 280.110(3)(E)(vii) rather than a
21 limitation on the application of LDO 280.110(3)(E)(v).
22 Absent a definitive interpretation by the county we are
23 unable to fathom the meaning of the LDO 280.110(3)(E)(vi)
24 exception.

25 As we stated in Mental Health Division v. Lake County,
26 17 Or LUBA 1165, 1176 (1989):

27 "[I]t is the local government which, in the first
28 instance, should interpret its own enactments.
29 Fifth Avenue Corp. v. Washington Co., 282 Or 591,
30 599, 581 P2d 50 (1974). Although our acceptance

1 or rejection of a local government's
2 interpretation of its own enactment is determined
3 by whether we believe that interpretation to be
4 correct, we do consider the local government's
5 interpretation in our review, and give some weight
6 to it if it is not contrary to the express
7 language and intent of the enactment. McCoy v.
8 Linn County, supra, Sevcik v. Jackson County, [16
9 Or LUBA 710, 713 (1988)]."

10 Notwithstanding LUBA's latitude under McCoy, supra, to
11 interpret the ordinance, we will give that opportunity to
12 the county in the first instance.

13 **C. Densities Allowed Under LDO 280.110(3)(E) In**
14 **Consideration of the Comprehensive Plan and Goal 5**
15 **Resource Background Document**

16 Petitioner contends:

17 "Respondent's interpretation of [LDO
18 280.110(3)(E)] is * * * inconsistent with the
19 purpose for LDO 280.110 and the underlying policy,
20 as expressed in Respondent's Comprehensive Plan
21 and Goal 5 Resource Background Document, that
22 provides the basis for LDO 280.110." Petition for
23 Review 1

24 Petitioner argues that the enactment of ORS 215.750 (HB
25 3661, the template test that would allow this dwelling)
26 creates an incongruity in the law: where once land division
27 and dwelling density standards established by ordinance
28 precluded excess density, the application of ORS 215.750
29 without those standards negates necessary protection.
30 Petitioner argues that Jackson County's Goal 5 protections
31 were acknowledged based on the protections afforded by
32 division and density standards that no longer apply under
33 the county's application of ORS 215.750. Because, absent

1 petitioner's interpretation of LDO 280.110(3)(E), those Goal
2 5 protections would no longer be in place, petitioner urges
3 that its interpretation of LDO 280.110(3)(E)(vi), described
4 in the facial application discussion, be allowed to provide
5 some Goal 5 protection to the smaller lots or parcels on
6 which dwellings are now allowed. Petitioner contends that
7 this reasoning comports with the county's plan and Goal 5
8 Background Document.

9 The challenged decision states:

10 "The Hearings Officer holds that these provisions
11 of the comprehensive plan relating to fish and
12 wildlife do not constitute independent approval
13 criteria for this application. Neither the
14 language in the plan nor the context in which it
15 appears indicates that Jackson County intended the
16 plan to do anything more than express the county's
17 general policy regarding fish and wildlife
18 habitat. The Hearings Officer holds that the
19 language of LDO 280.110(3)(E)(vi) is clear and
20 unambiguous in subjecting first dwellings on
21 legally created lots or parcels to only the siting
22 and access review requirements of LDO
23 280.110(3)(E)(vii)(c). We are left then with a
24 comprehensive plan provision which contains no
25 approval standards and an ordinance provision
26 which, being clear and unambiguous, requires no
27 construction." Record 14.

28 We agree with petitioner that permitting a dwelling
29 under ORS 215.750, absent other protections, to some extent
30 negates Goal 5 protections in place at acknowledgment. ORS

1 215.750 does not directly prohibit this result.³ However,
2 the county has not explained how the direction in the rule
3 implementing ORS 215.750 is addressed in the challenged
4 decision. OAR 660-06-025(6), provides:

5 "Nothing in this rule [uses authorized in forest
6 zones] relieves governing bodies from complying
7 with other requirement[s] contained in the
8 comprehensive plan or implementing ordinances such
9 as the requirements addressing other resource
10 values (e.g., Goal 5) which exist on forest
11 lands."

12 It is for the county to explain how its interpretation
13 of LDO 280.110(3)(E)(vi) is consistent with OAR 660-06-
14 025(6).

15 **D. Densities Allowed Under LDO 280.110(3)(E) in**
16 **Consideration of LCDC's Interpretation at**
17 **Acknowledgment**

18 Petitioner argues "Respondent's interpretation is
19 contrary to the interpretation which Land Conservation and
20 Development Commission ascribed to Respondent's land use
21 regulations when it acknowledged them as in compliance with
22 Statewide Planning Goal 5." Petition for Review 1-2.
23 Petitioner further explains:

24 "Whether or not the Hearings Officer's
25 determination that the Comprehensive Plan
26 provisions are review criteria is not the
27 question. This issue is whether those provisions,
28 and their supporting documentation, [are] relevant
29 to the correct interpretation of an ambiguous land

³If a gap in the statute exists, it is for the legislature to fill. See Craven v. Jackson County, 135 Or 250, 255, 898 P2d 809, rev den 321 Or 512 (1995).

1 use regulation. Petition for Review 10.

2 Petitioner quotes numerous passages from communications
3 of the Department of Land Conservation and Development
4 (DLCD) staff with the county indicating what the ordinance
5 must include to gain acknowledgment. Although the DLCD's
6 communications regarding the necessary substance of the
7 ordinance is not dispositive of the meaning the county may
8 now ascribe to that ordinance, the content of those
9 communications may warrant consideration. On remand, the
10 county may justify its interpretation of LDO 280.110(3)(E)
11 as not contrary to the context of the comprehensive plan.
12 See DLCD v. Tillamook County, 30 Or LUBA 221 (1995).

13 The assignment of error is sustained.

14 The county's decision is remanded.

15