BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF METOLIUS and TONI FOSTER, Petitioners, vs. JEFFERSON COUNTY, Respondent, and DAN RICHARTZ and CINDI RICHARTZ, Intervenors-Respondent.	LUBA No. 95-180 FINAL OPINION AND ORDER

Appeal from Jefferson County.

Bill Kloos, Eugene, filed the petition for review on behalf of petitioners.

No appearance by respondent.

Steven W. Abel, Portland, represented intervenors-respondent.

GUSTAFSON, Referee; LIVINGSTON, Chief Referee; HANNA, Referee, participated in the decision.

REMANDED 05/17/96

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a conditional use permit for development of "travelers' overnight accommodations."

MOTION TO INTERVENE

Dan Richartz and Cindi Richartz, the applicants below, move to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

This is the third time a county decision approving a conditional use permit for the subject property has been appealed to this Board. In Friends of the Metolius v. Jefferson County, 25 Or LUBA 411, 412-13, aff'd 123 Or App 256, adhered to 125 Or App 122 (1993) (Metolius I), and in Friends of the Metolius v. Jefferson County, 28 Or LUBA 591, 593 (1995) (Metolius II), we described the property and the proposal as follows:

> "The subject property consists of 3.03 acres and is designated and zoned Camp Sherman Resort Residential (CSRR). The * * * decision describes the proposal as follows:
>
> > "[Intervenors] are requesting a conditional use [permit] to permit modification of the Black Butte Resort and RV Park consisting of six (6) cabins, a manager's residence, two (2) large A-frame buildings, two (2) mobile homes, and twenty-nine (29) serviced recreational vehicle spaces. The request is to replace all existing structures with a new modified traveler's accommodation consisting

of fifteen (15) cabins * * *."

In Metolius I, we sustained one of petitioners' nine assignments of error and remanded the county's decision because the decision lacked findings to establish compliance with two ordinance provisions, Jefferson County Zoning Ordinance (JCZO) 307(E) and 602(B). In Metolius II, we determined that the county's decision continued to lack findings of compliance with some requirements of JCZO 307(E) and 602(B). We also determined that the county had not interpreted the requirements of Jefferson County Development Procedures Ordinance (JCDPO) 9.1 and JCZO 605, which relate to the duration of county approvals. In addition, we determined the county erred by making its supplemental findings on remand without conducting a hearing to, at a minimum, "allow the parties an opportunity to present argument based on the interpretations adopted by the county on remand." Metolius II at 594.

After conducting a hearing on remand, the county adopted additional supplemental findings approving the conditional use permit. This appeal follows.

FIRST ASSIGNMENT OF ERROR

Petitioners assign as error the county's continued failure to adopt findings interpreting and establishing compliance with JCDPO 9.1 and JCZO 605. Petitioners argue that under those provisions, the conditional use permit originally approved by the county has expired because more

than one year has elapsed from the date of the original local approval.

JCDPO 9.1 states:

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

JCZO 605 states:

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

During Metolius II, intervenors argued that "it should be clear that JCZO 605 and JCDPO 9.1 do not apply to local government decisions, such as the one at issue, while they are on appeal." Metolius II at 594.[1] Petitioners contend otherwise, arguing that the "one year clock" begins when local appeals are exhausted. Petitioners explain their interpretation as follows:

> "First, the one year period is a period to start construction and construction may begin after a final local approval, notwithstanding any appeal to LUBA. Second, the only other reference to appeals in Article 9 is in JCDPO 9.2, and it states that discretionary extensions of permits

[1]We do not have the benefit of either intervenors' or the county's present analysis and argument in our review of this case, since neither filed a response brief.

> issued are 'not subject to appeal.' This limitation necessarily refers to local appeals only since the county cannot determine what is appealable to LUBA." Petition for Review 6.

In Metolius II, we were required to remand the county's decision for the county to interpret these provisions in the first instance. See Weeks v. City of Tillamook, 117 Or App 449, 454, 844 P2d 914 (1992). Petitioners now argue that "LUBA's holding on this issue in Metolius II is law of the case at this point. LUBA is bound to direct the County to do what it has previously told the County to do." Petition for Review 5. We can only surmise that petitioners' underlying argument is that we are bound in this review by the scope of review applicable when we decided Metolius II.

We disagree with petitioners that we created any "law of the case" by remanding the County's decision in Metolius II for an interpretation of the challenged provisions. At the time Metolius II was decided, we lacked authority to interpret the county's code. See Metolius II at 595, and cases cited therein. Since then, ORS 197.829(2) has been amended to allow this Board to interpret local provisions in the first instance. Thus, we are no longer required to remand decisions for interpretations when we are able to make the necessary interpretation. Nor are we bound by our application of caselaw which has been statutorily superseded, simply because that caselaw applied when we considered the issue previously. Our review of this appeal is based on the current statute governing our scope of

review.

Petitioners' proposed interpretations of JCDPO 9.1 and JCZO 605 are untenable. To require the applicant to commence construction within one year of local approval, notwithstanding subsequent appeals of that approval, would require applicants for conditional use approvals to either start construction without knowing whether their application would be approved on appeal; or risk loss of the approval if appeals extend beyond one year following the local approval. If an appeal is ultimately successful, and the local approval is overturned, an applicant who commences construction to comply with the one-year requirement would have commenced, and possibly completed, illegal development. Conversely, if ultimately unsuccessful appeals take more than one year, but the applicant does not take the risk of building without final approval on appeal, when the approval is final following the appeals, the approval is void for failure to timely commence construction. Each of these results is absurd. The only logical interpretation of these provisions is that they require commencement of construction within one year of final approval, i.e., when an approval can no longer be appealed to any local or appellate tribunal.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners contend the county's decision continues to

lack compliance with JCZO 307(E)(3). That provision requires that

> "[t]he proposed use must be in harmony with the natural environment and result in a minimum number of conflicts with existing development."

A. Native Plant Communities

In Metolius II, we determined that the county's decision included no findings

> "identifying or analyzing the native plant communities within the natural environment in the surrounding area." Metolius II at 597.

In remanding for findings on this issue, we further observed:

> "[E]vidence that the proposal would significantly harm native plant communities in the area is a relevant issue the county should have addressed in its findings. * * * This is especially important where, as here, the U.S. Forest Service expressed serious concerns with the proposal's impacts on the area's rare and native plant communities. Specifically, the U.S. Forest Service was concerned that the proposed landscaping would introduce plants to the area that would have deleterious effects on native and rare plant communities." Id.

On remand, the county made the following findings to establish compliance with this criterion:

> "LUBA required the County to identify and analyze the native plant communities within the natural environment and surrounding area pursuant to JCZO 307(E)(3) to determine that the proposed use will be in harmony with the natural environment and result in a minimum number of conflicts with existing development. The natural environment is that area located within a 250 foot radius of the property lines at the subject property. The Board

has previously found that the natural environment consisted of open meadows, ponderosa pine trees and deciduous trees. Further, the Board has found that harmony, for purposes of this criterion, means 'a development which does not substantially interfere with the natural environment.'

"The applicant submitted a letter * * * with comments from * * * [the Forest Service district ranger]. [The district ranger] indicated which plants the United States Forest Service would find disruptive to the native plant community. These plants are identified as the spurred snapdragon, the Rocky Mountain iris, the Foxglove, and Chinese rouses, birds eyes. Native plants in the area consist of open meadows, ponderosa pines, deciduous trees, woody bushes and native grasses and wild flowers. The applicant will add additional ponderosa pines, native deciduous trees, woody bushes, native grasses and native wild flowers.

"The applicant will also agree to the following condition of approval:

> 'The application shall not install non-native plants identified by the United States Forest Service as spurred snapdragon, Rocky Mountain Iris, foxglove and Chinese rouses, birds eyes.'

"* * * * *" Record 17-18.

Petitioners assert the county's finding that native plant communities will be in harmony with the natural environment is inadequate and not supported by substantial evidence in the record.[2] Specifically, petitioners contend that the county has not established where the native plan

[2]While petitioners allege these findings lack substantial evidence, they provide no contradictory evidence to undermine the evidence upon which the county relied.

resources exist on the subject property. According to petitioners, in order to satisfy this standard, the county must explain "where each of these resources currently exists on the site, to what extent each will be displaced by development, and to what degree the displacement will be made up by the applicant's addition of native plants to the site." Petition for Review 10.

We do not read such expansive requirements from the language of the JCZO 307(E)(3). The county's findings respond to our remand order in Metolius II, and are adequate to establish compliance with this criterion.

This subassignment of error is denied.

B. Visual Resources

In Metolius II, we determined that the county's findings regarding the site's visual resources were

> "inadequate to describe the visual qualities that compose the natural environment in the surrounding area * * * because they do not adequately identify the visual resources to enable the county to determine the proposal's impacts on those resources." Metolius II at 597.

On remand, the county made the following finding of compliance with the requirement of JCZO 307(E)(3) regarding visual resources:

> "The Board finds that the evidence demonstrates that visual resources in the surrounding area consist of the native plant communities described above and numerous man-made structures. Also included (when viewed from the site, but outside of the surrounding area) is the Metolius River, Black Butte and certain portions of the Cascade

> Mountain Range. The proposed project has no visual impact on the Metolius River because it is too far away and cannot be seen from the site, it is not within the area, nor can any structure on the site block views of the river. Moreover, existing trees and existing structures on the site currently screen views of Black Butte from the site. Therefore, the proposal is no less harmonious than the existing site with the visual character of the area.
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> "Some views of Black Butte can be seen from the Suttle-Sherman Road. Those views are mostly blocked by existing trees. The proposal will not add to any additional blockage of views of Black Butte from Suttle-Sherman Road.
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> "The views of ponderosa pines and other trees on the site will be improved by the addition of ponderosa pines and other native plantings.
>
> "The Board rejects the Opponents interpretation of JCZO 307(E)(3) that the development must be 'subordinate' to the natural character of the landscape. JCZO 307(E)(3) requires that the development be in 'harmony' with the natural character. The Board previously interpreted the word 'harmony' and this interpretation was unchallenged in the previous LUBA appeal.
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> "* * * *" Record 19.

According to petitioners, JCZO 307(E)(3) requires that "with respect to each identified visual resource, the County make a finding that the proposed use will be in harmony with the visual resource." Petition for Review 11. Petitioners contend that the county has failed to make "the required ultimate finding of compliance" with this provision with regard to each visual resource on the site. Id. Petitioners also argue that the county has not addressed what the Forest Service described as the "tunnel effect" of

a row of trees it desires to maintain along both sides of Shuttle-Sherman Road, which borders the site to the north.

Petitioners' disagreement with the county's findings does not render those findings inadequate. The language of JCZO 307(E)(3) does not support petitioners' expansive reading of it with regard to visual resources. Nor does this provision mandate that in its evaluation of the visual resources, the county must maintain the Forest Service's desired "tunnel effect" along the northern boundary of intervenor's property.

Petitioners also challenge the county's findings regarding the view of Black Butte from Suttle-Sherman Road, on the basis that they are not based on substantial evidence in the record. Petitioners argue that because the proposed accommodations will be both permanent and larger than the existing accommodations, the extent to which Black Butte is blocked will be greater. Petitioners also argue that since intervenors plan to add additional ponderosa pines to the site, views of Black Butte will be blocked from the additional trees.

The language of JCZO 307(E)(3) does not mandate that development of this site preserve all views of Black Butte, and the county's decision does not explain the extent to which those limited views are relevant to compliance with this provision. However, to the extent the county's findings address, as relevant, the impact this development

will have on those views, the findings must be based on substantial evidence. Since petitioners have cited evidence that appears to undermine the county's conclusion, and neither the county nor intervenors have appeared in this case to cite supporting evidence, we must sustain petitioners' allegation that these findings lack substantial evidence.

This subassignment of error is sustained, in part.

C. Air Quality

In Metolius II, we determined the county's findings were inadequate to address petitioners' arguments that fireplaces, which the county determined required no restrictions, would burn more frequently during the winter months when air inversions are common in the area, thus impairing air quality. On remand, the county relied on a consultant's letter to conclude, essentially, that the fireplaces will be used infrequently, and that the addition of 15 fireplaces on air quality will be "indistinguishably minimal." Record 20. Petitioners challenge the adequacy of these findings and the evidence upon which they are based.

The findings do not explain the bases for the consultant's summary conclusions regarding the impact of fireplaces on air quality, and we are cited to no evidence in the record to substantiate those conclusions. The county has not adequately addressed this factor.

This subassignment of error is sustained.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

In Metolius II, we determined the county had not established compliance with JCZO 602(B), because the findings did not "adequately describe the size and impact of the proposal and [did] not attempt to describe its operating characteristics at all." Metolius II at 599. JCZO 602(B) states:

> "Taking into account location, size, design and operation 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."

We determined that it was not possible for the county "to determine the proposal's compliance with JCZO 602(B) without first describing these characteristics as the starting place for the analysis." Id.[3]

On remand, the county adopted findings of compliance with JCZO 602(B). Petitioners challenge those findings in

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[3]We made a similar finding in Metolius I, where we noted that

> "adequate findings to support determinations of compliance with JCZO 602(B) require the county to identify a particular area for consideration; identify the livability characteristics of that area, determine the value and appropriate development of both properties abutting the subject property and in the identified area; and determine the proposal's impacts on those features and characteristics. The county must determine the proposal will result in no more than a minimal adverse impact on the livability, value and appropriate development of the identified area, when compared to the impacts of the development permitted outright." Metolius I at 424.

several respects.

A. Interpretation of "Development Permitted Outright"

On remand from Metolius II, the county adopted a new interpretation of "development permitted outright" for purposes of the comparison required by JCZO 602(B). In its decision appealed in Metolius II, the county determined that "development permitted outright" includes the outright permitted uses listed under JCZO 307(A).[4] On remand, the county revised this interpretation, finding that the uses listed in JCZO 307(A) are not "development" as that term is

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[4]JCZO 307(A) lists uses permitted outright in the CSRR zone as follows:

"A. Uses Permitted outright: In a CSRR Zone, the following uses are permitted outright:

"1. Crop Cultivation or farm gardens, and the keeping of domestic animals subject to the restrictions in Section 407.

"B. Uses Permitted Subject to Siting Standards:

"In a CSRR Zone, the following uses are permitted subject to the siting standards listed in Subsection D of this Section.

"1. One single-family dwelling.

"2. One duplex.

"3. One mobile home subject to Section 408 of this Ordinance.

"4. Subdivision or Planned Unit Development subject to provisions of the Subdivision and Partitioning Ordinance for Jefferson County.

"5. Park, playground, community center owned and operated by governmental agency or non-profit community organization."

used in JCZO 602(B), but rather simply "uses." The county further found:

> "The term 'development' is undefined. The Board interprets the term 'development' as used in JCZO 602(B) to mean the uses permitted outright subject to siting standards in JCZO 307(B)(1)-(8). This is because 'development' means the requirement for or addition of structures making a material change in the use of land.
>
> "The Board rejects the Opponents' argument that crop cultivation and the keeping of animals are development for two reasons. First, there is nothing inherent in either crop cultivation or the keeping of animals that requires structures. Moreover, the keeping of animals does not require a material change in land. Crop cultivation also fails to make a material change in land because it is simply the addition of vegetation. The Board finds that this does not constitute a material change in the use of land.
>
> "The Board also finds that the application will have a minimal adverse impact on the surrounding area compared to the impact of development that is permitted outright (the development listed in JCZO 307(B)(1)-(8)). Other development that is permitted outright includes nonconforming uses pursuant to JCZO 501(A)(1)." Record 22.

Petitioners challenge the county's new interpretation. Petitioners argue that, contrary to the county's finding, the JCZO does define "development," as any "man-made change to improved or unimproved real estate." JCZO 105. According to petitioners, by definition this "expressly" includes the "crop cultivation and keeping of animals" under JCZO 307(A), which the county finds to be uses, rather than development.

While the county may have erred in its statement that "development" is undefined, we do not read the scope of the

definition of "development" as broadly as do petitioners. There is nothing in the definition of "development" that would compel a conclusion that development must include crop cultivation and the keeping of animals. Moreover, given the considerable deference granted to local interpretations of local ordinances, unless the county's interpretation is clearly wrong, we must defer to it. In this case, the county's interpretation that the "uses" permitted under JCZO 307(A) are distinct from the "development" permitted under JCZO 307(B)(1)-(8) is not clearly wrong. Thus, we will defer to the county's interpretation that, under JCZO 602 it must compare the proposed use to development permitted under JCZO 307(B)(1)-(8).

This subassignment of error is denied.

B. Interpretation and Comparison of Nonconforming Use as Development Permitted Outright.

Petitioners next challenge the county's interpretation of "development that is permitted outright" for purposes of evaluating the impacts of the proposed use to include existing nonconforming uses.

Petitioners argue that the county's interpretation that a nonconforming use is permitted outright by the code "is contrary to the language of the code, inconsistent with the purpose of the code and its underlying policy, and also contrary to the state statutes that the code implements. A nonconforming use is the antithesis of development that is permitted outright." Petition for Review at 24.

The county does not explain its interpretation of why a nonconforming use can be considered development permitted outright. We agree with petitioners that the county's summary interpretation is clearly wrong.

Petitioners also argue that even if the existing use could be a basis for comparison, the county's findings that the proposed use will be no more intense than the existing use are inadequate and not based on substantial evidence. Since we reject the county's interpretation that the existing nonconforming use is development permitted outright for purposes of comparison required by JCZO 602, we need not reach these additional arguments.

This subassignment of error is sustained.

C. Interpretation of Minimal Adverse Impact

The county interprets "minimal adverse impact," as that term is applied in JCZO 602(B), as follows:

> "The Board interprets 'minimal adverse impact' to include a recognition of existing impacts from the existing use, regardless of its nonconforming status, as a baseline for the required comparison. The existing use consists of 30 recreational vehicle parking spaces, a 6-unit motel, a manager's residence and assorted out buildings." Record 23.

Petitioners contend the county's interpretation is contrary to and misinterprets the requirements of JCZO 602.

We must affirm the county's interpretation of its own land use regulation unless it is contrary to the express language or purpose of the regulation. ORS 197.829(1)(a)

and (b). Accordingly, we defer to the county's interpretation unless we determine it to be "clearly wrong" or "so wrong as to be beyond colorable defense." Zippel v. Josephine County, 128 Or App 458, 461, 876 P2d 854, rev den 320 Or 272 (1994). In this case, the county's interpretation of the "minimal adverse impact" evaluation required under JCZO 602(B) is contrary to the language of that provision. By its terms, JCZO 602(B) requires the comparison to be between the proposed use and "development that is permitted outright," not between the proposed use and existing development. The county's interpretation is clearly wrong.

This subassignment of error is sustained.

D. Comparison of Impacts

Petitioners challenge the county's comparison of impacts under JCZO 602 on the basis that the county used an "erroneous baseline" for impacts. Since the required comparison is between the proposed use and development permitted outright, not existing development, we agree with petitioners that the county's baseline for comparison is erroneous, and the findings made in reliance on that comparison are inadequate to establish compliance with JCZO 602.

This subassignment of error is sustained.

The third assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

Petitioners allege that the county misapplied the law, and made inadequate findings not supported by substantial evidence when it determined that the existing use is a lawful nonconforming use.

It appears that, in response to petitioners' contrary allegations, the county made findings that the existing use is a lawful nonconforming use. However, a nonconforming use determination is not at issue in this case. These findings are not relevant to the evaluation of the subject conditional use application.

To the extent the county's findings purport to determine the lawfulness of the existing use, we sustain this assignment of error. However, we make no determination on the merits of whether the county could, in an application for a nonconforming use determination, find the existing use to be a lawful nonconforming use.

The fourth assignment of error is sustained.

The county's decision is remanded.