

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

3
4 SANDRA GROSS and STEPHEN HUNT,
5 *Petitioners,*

6
7 vs.

8
9 JACKSON COUNTY,
10 *Respondent.*

11
12 LUBA No. 2016-091

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Jackson County.

18
19 Ross Day, Portland, filed the petition for review and argued on behalf of
20 petitioners. With him on the brief was Day Law & Associates, PC.

21
22 Joel C. Benton, County Counsel, Medford, filed a response brief and
23 argued on behalf of respondent.

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

27
28 REMANDED 12/19/2016

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

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NATURE OF THE DECISION

Petitioners appeal a decision by the county code enforcement officer that finds that petitioners violated the county’s land use ordinance and the county’s building codes.

FACTS

Petitioners own property zoned Rural Residential - Five Acre Minimum (RR-5). Petitioners constructed two greenhouses on their property without obtaining (1) land use authorization pursuant to the Jackson County Land Development Ordinance (LDO), or (2) structural, mechanical, or electrical permits pursuant to the county’s building codes, which are codified at Chapter 1420 of the Codified Ordinances of Jackson County (JCCO). The county code enforcement officer observed the greenhouses and plants growing in them and issued a complaint and summons to appear. The hearings officer held a hearing on the complaint. After the hearing, the hearings officer issued a written order that affirmed the complaint, ordered petitioners to discontinue using the greenhouses until required permit applications were filed, and to obtain all required permits within 180 days of the date of the order. The order also imposed fines for violations of the county’s building codes and the LDO. This appeal followed.

1 **JURISDICTION**

2 The county argues that LUBA lacks jurisdiction over the appeal. First,
3 the county argues that the challenged decision is not a land use decision over
4 which LUBA has jurisdiction because the decision falls under the exception in
5 ORS 197.015(10)(b)(A) for decisions that “do not require interpretation or the
6 exercise of policy or legal judgment.”

7 LDO 1.8.1(B) provides in relevant part that it is a violation of the LDO
8 to “[u]se land, construct, occupy, or place improvements, sell or transfer land
9 by an instrument of conveyance, or conduct any activity on land, in any manner
10 not in accordance with the standards set forth in this Ordinance[.]” In the
11 challenged decision, the hearings officer found that petitioners’ construction of
12 the greenhouses violated Jackson County Land Development Ordinance (LDO)
13 1.8.1. Record 13. In so finding, the hearings officer was required to exercise
14 legal judgment in determining that petitioners violated LDO 1.8.1(B) by using
15 their land in a “manner not in accordance with the standards set forth in [the
16 LDO],” and was also required to interpret other provisions of the LDO at LDO
17 3.1.1 and LDO 3.1.2 and exercise legal judgment to conclude that petitioners
18 were required to obtain authorization pursuant to the LDO for the greenhouses.

19 The county also argues that LUBA “lacks jurisdiction” over the appeal
20 because JCCO 1420.04 is not a “land use regulation” as defined in ORS
21 197.015(11). Response Brief 3-4. We have already determined that the
22 challenged decision is not subject to the exclusion at ORS 197.015(10)(a)(B),

1 and because LDO 1.8.1, 3.1.1 and 3.1.2 are “land use regulations,” we reject
2 the county’s argument. However, we understand the county to essentially argue
3 that petitioners’ challenges to the hearings officer’s conclusions regarding
4 LCCO 1420.04 are outside of LUBA’s scope of review. While we agree with
5 the county that JCCO 1420.04 is not a “land use regulation,” LUBA’s scope of
6 review is set out at ORS 197.835, and ORS 197.835(9)(a)(D) expressly
7 authorizes LUBA to reverse or remand a decision where the local government
8 “[i]mproperly construed the applicable law.” Applicable law is not limited to
9 land use regulations. *Beaumont-Wilshire Neighbors v. City of Portland*, 68 Or
10 LUBA 393, 401 (2013). Petitioners’ assignment of error that challenges the
11 hearings officer’s conclusion that petitioners violated JCCO 1420.04 is within
12 LUBA’s scope of review.

13 **FIRST ASSIGNMENT OF ERROR**

14 As relevant here, JCCO Chapter 1420.01 adopts the Oregon State
15 Structural Specialty Code, Mechanical Specialty Code, Electrical Specialty
16 Code, Plumbing Specialty Code and One and Two Family Dwelling Specialty
17 Code that are referenced in ORS Chapter 455. The hearings officer found that
18 petitioners violated JCCO 1420.04, which provides:

19 “No person shall inhabit or occupy, or permit the inhabitation or
20 occupancy of, any premises, including dwellings, other buildings
21 or land, unless all permits required for such premises under any
22 prevailing law have been obtained and are in force. No person
23 shall violate or fail to comply with any of the provisions of the
24 Oregon State Structural Specialty Code, Mechanical Specialty
25 Code, Electrical Specialty Code, Plumbing Specialty Code and

1 One and Two Family Dwelling Specialty Code, as adopted in
2 Section 1420.01[.]”

3 ORS 455.315(1) provides that “the provisions of this chapter do not authorize
4 the application of a state structural specialty code to any agricultural building
5 * * * [.]” ORS 455.315(2)(a) defines “agricultural building” in relevant part to
6 mean:

7 “[A] structure located on a farm or forest operation and used for:

8 “* * * * *

9 “(B) The raising, harvesting and selling of crops or forest
10 products; [or]

11 “* * * * *

12 “(E) Any other agricultural, forestry or horticultural use or
13 animal husbandry, or any combination thereof, including the
14 preparation and storage of the produce raised on the farm
15 for human use and animal use, the preparation and storage
16 of forest products and the disposal, by marketing or
17 otherwise, of farm produce or forest products.”

18 In their first assignment of error, petitioners argue that the greenhouses are
19 “agricultural building[s]” as defined in ORS 455.315. According to petitioners,
20 their greenhouses constitute structures “located on a farm * * * operation” and
21 are therefore exempt “agricultural building[s]” within the meaning of ORS
22 455.315(1).

23 The hearings officer adopted the county’s position below that the
24 agricultural building exemption in ORS 455.315 applies only to buildings that
25 are located on land that is zoned for farm or forest use. Record 11; Stipulated

1 Motion to Take Evidence Not in the Record, Exhibit 2, page 6. Petitioners
2 argue that the agricultural building exemption applies in any zone as long as
3 the structure is “located on a farm * * * operation and used for” one of the
4 enumerated purposes.

5 The county’s reading of the agricultural building exemption as applying
6 *only* on lands zoned for farm or forest use is not supported by the express
7 language of ORS 455.315. To be sure, the agricultural building exemption can
8 apply to structures on land zoned for farm or forest uses, as long as the
9 structures are used in the farm or forest operation for one of the purposes set
10 out in subsections (A) through (E), and are not disqualified as “agricultural
11 buildings” by the provisions of ORS 455.315(2)(b).¹ But nothing in the
12 language of ORS 455.315 references any zoning classifications or otherwise

¹ ORS 455.315(2)(b) provides:

“‘Agricultural building’ does not mean:

“(A) A dwelling;

“(B) A structure used for a purpose other than growing plants in which 10 or more persons are present at any one time;

“(C) A structure regulated by the State Fire Marshal pursuant to ORS chapter 476;

“(D) A structure used by the public; or

“(E) A structure subject to sections 4001 to 4127, title 42, United States Code (the National Flood Insurance Act of 1968) as amended, and regulations promulgated thereunder.”

1 limits the agricultural exemption to *only* land zoned for farm or forest uses.
2 Rather, the language of the statute evidences an intent that the agricultural
3 building exemption applies where the structure is located “on a farm * * *
4 operation[.]”

5 ORS 455.315(3) provides additional support for this reading of ORS
6 455.315(1). ORS 455.315(3) provides that “[n]otwithstanding the provisions of
7 subsection (1) of this section, incorporated cities may regulate agricultural
8 buildings * * * within their boundaries[.]” Incorporated cities rarely, if ever,
9 include farm or forest zoned lands. Accordingly, if the agricultural building
10 exemption applied only to structures on land zoned for farm or forest uses,
11 subsection (3) would be unnecessary.

12 The legislative history of ORS 455.315 also supports this reading.² In
13 1973, the legislature enacted Senate Bill 73, which enacted the statewide
14 building codes now codified at ORS Chapter 455. Two years later, during the
15 1975 legislative session, the agricultural building exemption legislation was
16 introduced as Senate Bill (SB) 45. In written testimony submitted to the House
17 Agriculture and Natural Resources Subcommittee, a member of the Oregon
18 State Grange supported the legislation and took the position that “Senate Bill

² ORS 455.315 was originally codified as ORS 456.758 and then as ORS 456.917. In 1995, it was renumbered as ORS 455.315. As originally enacted, ORS 455.315 provided that an “‘agricultural building’ means a structure located on a farm and used in the operation of such farm for” the purposes set out in subsections (A) through (E).

1 45 takes into account some of the problems assigned especially to family farms,
2 which is to some degree diversified. *The full benefits of this bill are of course*
3 *not restricted to the family farm alone, but to any person or persons engaged in*
4 *agriculture, regardless of acreage.”* Testimony, House Agriculture and Natural
5 Resources Subcommittee, SB 45, April 23, 1975, Exhibit C 7 (statement of
6 George Stevens) (emphasis added). During the same subcommittee meeting,
7 the senior structural engineer in the City of Portland’s Bureau of Buildings
8 testified about the city’s concerns about the safety of allowing agricultural
9 buildings to be exempt from the structural code in “higher density zones,” and
10 used as an example an area of concern in the city that was zoned low-density
11 residential. Tape Recording, House Agriculture and Natural Resources
12 Subcommittee, SB 45, April 23, 1975, Tape 19, Side One (statement of Roy R.
13 Reslock). Multnomah County also expressed concern over higher density areas
14 and the lack of a definition for the word “farm,” and posited that “it is
15 conceivable that substantial commercial or industrial structures could be
16 erected, without regulation, on ‘farm’ like pieces of land as long as some form
17 of plant is growing in the structure.” Testimony, House Agriculture and Natural
18 Resources Subcommittee, SB 45, April 23, 1975, Exhibit C 14 (statement of
19 C.W. Frazier). That participants in the legislative process raised concerns
20 related to exempt agricultural buildings in residentially zoned areas at a
21 minimum suggests that the participants in the legislative process understood
22 the agricultural building exemption to apply to areas zoned for other than farm

1 and forest uses, including residentially zoned areas in cities.³ Subsequent to the
2 April 23, 1975 subcommittee hearing, an amendment to SB 45 to allow cities to
3 regulate agricultural buildings within city boundaries was added, and
4 subsection (3) was included in the final version of SB 45.⁴

5 Given the express language of the agricultural building exemption that
6 applies to structures located “on a farm * * * operation” and the legislative
7 history that evidences an understanding that the exemption would apply in
8 residential zones, we agree with petitioners that the exemption from the state
9 structural specialty code is not limited to structures on land zoned for farm or
10 forest use. The relevant question under the statute is whether the structure is
11 located “on a farm * * * operation[.]”⁵ The evidence in the record is that

³ During the same meeting, Representative Jones suggested that an amendment to the bill was needed to define “a farm” in terms of “size” or other parameters, but no definition was included in the legislation. Tape Recording, House Agriculture and Natural Resources Subcommittee, SB 45, April 23, 1975, Tape 19, Side One (statement of Representative Jones).

⁴ In 2013, the legislature amended ORS 455.315 to include structures used in “forest operations” in the definition of “agricultural building” and to exempt those structures from the state structural specialty code. That legislation also enacted ORS 215.760, which provides in relevant part that an “agricultural building, as defined in ORS 455.315, customarily provided in conjunction with farm use or forest use is an authorized use on land zoned for forest use or for mixed farm or forest use.”

⁵ The hearings officer did not reach the question of whether petitioners’ greenhouses are located on “a farm operation.”

1 petitioners’ greenhouses are used for growing plants, and petitioners argue that
2 the plant growing activity qualifies as a “farm * * * operation.”

3 The phrase “farm * * * operation” is not defined in ORS 455.315. As
4 noted above, one subcommittee member suggested that SB 45 be amended to
5 define the phrase “on the farm” or the word “farm,” in terms of size or some
6 other parameters. *See* n 3. The legislature, however, declined to define the
7 phrase. Thus we turn to the ordinary meaning of the words “farm” and
8 “operation.” Webster’s Third New International Dictionary defines “farm” in
9 relevant part as “a piece of land held under lease for cultivation; * * * any tract
10 of land whether consisting of one or more parcels devoted to agricultural
11 purposes generally under the management of a tenant or the owner[.]”
12 *Webster’s Third New Int’l Dictionary* 824 (unabridged ed 2002). The same
13 dictionary defines “operation” as “a doing or performing esp. of an action [.]”
14 *Webster’s Third New Int’l Dictionary* 1581 (unabridged ed 2002). Given the
15 evidence in the record that petitioners’ greenhouses are on a parcel of land and
16 are used for growing plants, we agree with petitioners that under the plain
17 meaning of the words “farm” and “operation,” petitioners’ greenhouses qualify
18 as “structure[s] * * * located on a farm * * * operation.”

19 It is important to point out, however, that the ORS 455.315 agricultural
20 building exemption is an exemption from the requirement to obtain a permit
21 that is otherwise required by the state structural specialty code. The agricultural
22 building exemption does not provide any authorization for petitioners’

1 greenhouses pursuant to land use and zoning requirements. For the reasons we
2 explain in our resolution of the second assignment of error, petitioners must
3 establish that the greenhouses are allowed uses in the RR-5 zone in order for
4 the agricultural building exemption to be of any real significance, because if
5 the greenhouses are not allowed uses in the RR-5 zone, then an exemption from
6 the state structural specialty code is of little value to petitioners.

7 Finally, petitioners also argue that, as exempt “agricultural buildings,”
8 the greenhouses are exempt from the requirements of each of the structural,
9 electrical and mechanical codes contained in ORS Chapter 455. We disagree.
10 ORS 455.315 exempts agricultural buildings only from the requirements of “a
11 state structural specialty code[.]” ORS 455.010(9) defines the term “[s]tructural
12 code” as “the specialty code prescribing structural standards for building
13 construction.” It is clear that the reference in ORS 455.315 to “a state structural
14 specialty code” refers to the definition of the “structural code” at ORS
15 455.010(9). As the hearings officer correctly noted, if the legislature had
16 intended to exempt agricultural buildings from all specialty codes, it would
17 have used the phrase “state building code,” defined in ORS 455.010(8) to mean
18 “the state specialty codes.”

19 The first assignment of error is sustained, in part.

20 **SECOND ASSIGNMENT OF ERROR**

21 As noted, the hearings officer found that LDO 3.1.1(A) and (C) require
22 petitioners to obtain approval of or verify authorization for their greenhouses

1 under the LDO. The hearings officer found that petitioners’ failure to obtain or
2 verify the use was a violation of LDO 1.8.1.

3 LDO 3.1.1 provides in relevant part:

4 “A) Land Use Permits Required

5 “Before establishing any land use regulated by this Ordinance,
6 other than a Type 1 use, an application for a Land Use Permit will
7 be filed with the Department. Approval criteria applicable to each
8 permit type are specified below. All uses, regardless of permit
9 type, will comply with any applicable standards set forth in
10 Chapters 4 through 8, and with the general development standards
11 set forth in Chapter 9.

12 “ * * * * *

13 “C) Zoning Information Sheet

14 “Zoning Information Sheets (a.k.a., Zoning Clearance Sheets) are
15 used to: (1) provide information regarding the status of
16 development; (2) ensure compliance with all standards and
17 procedures of this Ordinance; and, (3) to authorize Type 1 uses.
18 However, other approvals may be necessary for specific
19 developments, such as, but not limited to, building and septic
20 permits. Such other approvals are addressed in other sections of
21 the County Code. When a Zoning Information Sheet is used to
22 authorize development, the authorization will be valid for a
23 maximum of two (2) years from the date of issuance, provided
24 there has been no change in applicable regulations or laws.”

25 LDO 3.1.2 describes “Type I use[s]:”

26 “Type 1 uses are authorized by right, requiring only non-
27 discretionary staff review to demonstrate compliance with the
28 standards of this Ordinance. *A Zoning Information Sheet may be*
29 *issued to document findings* or to track progress toward
30 compliance. Type 1 authorizations are limited to situations that do
31 not require interpretation or the exercise of policy or legal
32 judgment.* * *” (Emphasis added.)

1 The hearings officer found that LDO 3.1.1 requires either an approved
2 application authorizing the greenhouses under LDO 3.1.1(A), or a Type I land
3 use authorization under LDO 3.1.1(C) and 3.1.2. Record 11.

4 In their second assignment of error, petitioners argue that the
5 greenhouses are “Type I uses” within the meaning of LDO 3.1.2 and that the
6 express language of LDO 3.1.2 makes obtaining authorization of the
7 greenhouses through issuance of a zoning information sheet for the
8 greenhouses permissive, not mandatory. Petitioners also argue that ORS
9 455.315 exempts the greenhouses from any LDO requirement to obtain land
10 use verification prior to construction of the greenhouses.

11 The county responds first that, even assuming without conceding that the
12 greenhouses are Type I uses, petitioners failed to obtain any staff review of the
13 greenhouses under the LDO zoning requirements for uses in the RR-5 zone,
14 and at a minimum obtaining “staff review” of the use is required by LDO 3.1.2.
15 The county also responds that even assuming without conceding that the
16 greenhouses are “agricultural buildings” as defined in ORS 455.315, the LDO
17 still requires a property owner to demonstrate pursuant to the LDO that the
18 building is an allowed use in the applicable zone. Stated differently, we
19 understand the county to take the position that a building’s status as exempt
20 from the state structural specialty code pursuant to ORS 455.315 does not
21 authorize the buildings as an allowed use in any zone, and the LDO requires a

1 property owner to verify the buildings as an allowed use with the county
2 planning department.

3 We agree with the county. First, while documentation of a Type I use
4 through issuance of a Zoning Information Sheet is a permissive method of
5 documenting county review and approval under the language of LDO 3.1.2,
6 staff review of a Type I use is not permissive. LDO 3.1.2 requires for Type I
7 uses “non-discretionary staff review to demonstrate compliance with the
8 standards of [the LDO].” Similarly, as we explain above, even if the structure is
9 an “agricultural building” as defined in ORS 455.315 that is exempt from the
10 state structural specialty code, the ORS 455.315 exemption has no bearing on
11 whether the LDO allows the building. The LDO requires a property owner who
12 seeks to construct that building from verifying that the building is allowed,
13 under the procedures in LDO 3.1.1 and 3.1.2.

14 The second assignment of error is denied.

15 The county’s decision is remanded.