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

ANGELINE ARMSTRONG
and MARY HOKE,
Petitioners,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2020-045

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Ross Day, Portland, filed the petition for review. With him on the brief was Day Law P.C.

Joel C. Benton, County Counsel, Medford, filed the response brief.

RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 09/14/2020

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

1

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county hearings officer’s decision denying, for the
4 second time, petitioners’ application for nonconforming use verification for
5 medical marijuana production on property zoned Rural Residential.

6 **FACTS**

7 The challenged decision is the county hearings officer’s decision on
8 remand from *Armstrong v. Jackson County*, ___ Or LUBA ___ (LUBA No 2018-
9 120, Feb 21, 2019) (*Armstrong I*), in which we remanded the county’s decision
10 denying petitioners’ application to verify medical marijuana production as a
11 nonconforming use on their property zoned Rural Residential (RR).¹ We take the
12 facts from *Armstrong I*:

13 “The subject property is comprised of 17.34 acres and is zoned RR.
14 Petitioners seek verification of nonconforming use for indoor and
15 outdoor production of marijuana including an approximately
16 15,600-square-foot, fenced outdoor production area, where
17 petitioners grow marijuana plants in above-ground containers, and
18 structures associated with production of marijuana including two
19 320-square-foot shipping containers, two 150-square-foot buildings,
20 and one 100-square-foot building. Petitioners contend that the
21 subject property and structures have been used for medical
22 marijuana production since 2005.

23 “The northern boundary of the subject property abuts Highway 238.
24 Poormans Creek transects the property in an approximate east-west

¹ *Armstrong I* included an explanation of the state’s laws authorizing medical and recreational marijuana production. *Id.* at slip op 2.

1 orientation. All of the subject property north of Poormans Creek,
2 what appears to be approximately a quarter of the property, is within
3 the special flood hazard area, an area ‘identified by the Federal
4 Emergency Management Agency in its Flood Insurance Study (FIS)
5 for Jackson County[.]’ [Jackson County Land Development
6 Ordinance (LDO)] 7.2.2(A). In this opinion, we refer to the special
7 flood hazard area as the floodplain. The ‘floodway,’ within the
8 floodplain, is generally the stream channel and the floodplain
9 adjoining the stream channel. These areas are defined by the ‘base
10 flood,’ which is ‘[t]he flood having a one percent (1%) chance of
11 being equaled or exceeded in any given year, i.e., the 100-year
12 flood.’ LDO 13.3(105)(h). In turn, the ‘base flood elevation’ is the
13 ‘water surface elevation during the base flood’ relative to a specified
14 measurement point. LDO 13.3(105)(i). The outdoor production area
15 and the structures associated with petitioners’ marijuana production
16 are situated north of Poormans Creek and within the floodplain
17 where the base flood elevation and the floodway have not been
18 determined, and petitioners would need to obtain a floodplain survey
19 to establish the precise floodway and floodplain boundaries.”
20 *Armstrong I* at slip op 3-4 (citations omitted).

21 In *Armstrong I*, we explained that the hearings officer did not address whether
22 the application satisfied the nonconforming use verification criteria. Instead, the
23 hearings officer concluded that the nonconforming use application must be
24 denied pursuant to LDO 1.8.2(A), which provides that when a violation of the
25 LDO “is documented to exist on a property, the County will deny any and all
26 development permits, unless such application addresses the remedy for the
27 violation, or the violation has otherwise been corrected.” The hearings officer
28 concluded that the record demonstrated that petitioners had violated LDO
29 7.2.2(C)(2)(a) by placing improvements in the floodplain without a floodplain
30 development permit. LDO 7.2.2(C) provides that any development in the special

1 flood hazard area requires a floodplain development permit prior to initiating
2 development. LDO 7.2.2(E), however, provides an exemption for agriculture and
3 grazing activities and practices within the floodplain boundaries as long as any
4 agricultural structures are removable and can be assured of removal by fall or
5 prior to the rainy season.² Petitioners did not dispute that the fence, growing
6 containers, and structures for which petitioners sought nonconforming use
7 verification constitute development within the floodplain for which floodplain
8 development permits are required, absent an exemption. Rather, petitioners
9 argued that growing marijuana is an exempt agricultural use, and that the fence,
10 growing containers, and structures are temporary and removable, and thus also
11 exempt from floodplain development permit requirements pursuant to LDO
12 7.2.2(E). Accordingly, petitioners argued, no violation of the LDO was
13 “documented to exist” on the property pursuant to LDO 1.8.2. The hearings

² LDO 7.2.2(E) provides:

“E) Exemptions

“Finding 2, Policy B) of the Natural Hazards Element of the Comprehensive Plan states: ‘In order to assure maximum usefulness of flood prone areas, regulations should allow for seasonal variations in use. Temporary, removable structures should be allowed during drier months if their removal can be assured by late fall.’ A floodplain development permit is not required for the following uses:

“1) Agriculture and grazing, or managing, growing, and harvesting of timber and other forest products[.]”

1 officer assumed that the fence, growing containers, and structures were
2 temporary and removable, but concluded that the exemption in LDO 7.2.2(E)
3 could not be applied because petitioners had not established that they could be
4 moved to a portion of the subject property outside the floodplain. We agreed with
5 petitioners that nothing in the language of LDO 7.2.2(E) required that structures
6 that are removed from the floodplain be moved to, or stored on, the subject
7 property. *Armstrong I* at slip op 10. We remanded the decision to the county. *Id.*
8 at slip op 13.

9 On remand, the hearings officer concluded that the express language of
10 LDO 7.2.2(E) is not mandatory and, accordingly, does not obligate the county to
11 exempt petitioners from obtaining a floodplain development permit for
12 “temporary, removable structures.” In the alternative, the hearings officer found
13 that, even if LDO 7.2.2(E) obligated the county to exempt “temporary,
14 removable” structures from the requirement to obtain a floodplain development
15 permit, the existing fence is not a “temporary, removable structure.” In addition,
16 and in the alternative, the hearings officer found that, even if the fence is
17 “temporary” and “removable,” a different LDO section, LDO 7.2.13(F), required
18 petitioners to obtain a floodplain development permit for the fence. Record 27-
19 30. Therefore, the hearings officer concluded that LDO 1.8.2 prohibited approval
20 of the application, and denied it. This appeal followed.

1 **SECOND ASSIGNMENT OF ERROR**

2 In their second assignment of error, petitioners argue that the hearings
3 officer’s conclusion that the fence located in the floodplain on petitioners’
4 property is not “temporary” or “removable,” and, accordingly, not exempt under
5 LDO 7.2.2(E) from the requirement to obtain a floodplain development permit,
6 is not supported by substantial evidence in the whole record. Petitioners argue
7 that the only evidence in the record regarding the nature of the fence is
8 petitioners’ affidavit that states that “the fence will be removed too, is removable
9 at the conclusion of the growing season.” Record 109.

10 In challenging a decision denying an application on evidentiary grounds, a
11 petitioner must establish that only the petitioner’s evidence can be believed and
12 that, as a matter of law, the petitioner established compliance with each of the
13 applicable criteria. *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600
14 P2d 1241 (1979); *Horizon Constr., Inc. v. City of Newberg*, 28 Or LUBA 632,
15 635; *aff’d*, 134 Or App 414, 894 P2d 1267 (1995). The hearings officer relied on
16 photographs that depict the fence as being located on the subject property during
17 the rainy season over many years. Record 122-24. According to the county, the
18 photographs in the record are evidence on which a reasonable person would rely
19 to conclude that the fence is not “temporary” and “removable.” We believe that
20 reasonable people could draw inferences either that the fence is removable, based
21 on petitioners’ affidavit, or that the fence is affixed to the ground and not
22 removable, based on the photographs. Accordingly, we may not conclude as a

1 matter of law that the evidence supports petitioners' position that the fence is
2 removable.

3 However, the hearings officer also denied the application on an
4 independent basis that petitioners do not challenge. Where a local government
5 denies a land use application on multiple grounds, LUBA will affirm the decision
6 on appeal if at least one basis for denial survives all challenges. *Wal-Mart Stores,*
7 *Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd*, 195 Or App 762, 100
8 P3d 218 (2004), *rev den*, 338 Or 17, 107 P3d 27 (2005).

9 As noted, the hearings officer concluded that, even if LDO 7.2.2(E)
10 provided an exemption from the requirement in LDO 7.2.2(C) to obtain a
11 floodplain development permit for the fence, a more specific LDO provision,
12 LDO 7.2.13(F), requires a permit. LDO 7.2.13(F) provides, "Fencing and walls
13 located in the special flood hazard area require a floodplain development permit."
14 Petitioners do not address the hearings officer's finding that LDO 7.2.13(F)
15 requires a floodplain development permit or otherwise explain why the hearings
16 officer's conclusion is incorrect. Accordingly, absent any challenge to that
17 independent basis for concluding that the nonconforming use verification could
18 not be approved because an existing violation of the LDO had not been remedied,

1 petitioners' second assignment of error provides no basis for reversal or remand
2 of the decision.³

3 The second assignment of error is denied.

4 **FIRST ASSIGNMENT OF ERROR**

5 In their first assignment of error, petitioners challenge the hearings
6 officer's interpretation of LDO 7.2.2(E) as a hortatory provision that does not
7 require the county to exempt "temporary, removable" structures from the
8 requirement in LDO 7.2.2(C) to obtain a floodplain development permit. As
9 noted, where a local government denies an application on multiple grounds,
10 LUBA will affirm the decision on appeal if at least one basis for denial survives
11 all challenges. In that circumstance, we do not typically address challenges
12 directed at other bases for denial. *Wal-Mart Stores*, 47 Or LUBA at 266.

13 The hearings officer denied the application on the basis that LDO 7.2.13(F)
14 required petitioners to obtain a floodplain development permit for the fence,
15 which petitioners have not procured, resulting in an existing violation of LDO
16 7.2.13(F). Accordingly, the hearings officer concluded that LDO 1.8.2 prohibits
17 approval of the application. We need not reach petitioners' first assignment of
18 error challenging other bases for the hearings officer's denial of the application.

19 The county's decision is affirmed.

³ Petitioners do not argue that a violation cannot be "documented to exist," as provided in LDO 1.8.2, without such a determination being made through a code enforcement proceeding, so we assume for purposes of this opinion that it can.