BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAN KOMNING, KEN HOLLIDAY, CLYDE HOLLIDAY, FREDINA SUE McKROLA, and KEN DELANO, Petitioners, vs. GRANT COUNTY, Respondent, and OREGON PARKS AND RECREATION DEPARTMENT, Intervenor-Respondent.	LUBA No. 90-072 FINAL OPINION AND ORDER

Appeal from Grant County.

Kevin J. Keillor, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Stoll, Stoll, Berne & Lokting, P.C.

No appearance by respondent.

Melinda Bruce and Jane Ard, Salem, filed the response brief on behalf of intervenor-respondent. With them on the brief was Dave Frohnmayer, Attorney General; James E. Mountain, Jr., Deputy Attorney General; and Virginia L. Linder, Solicitor General. Melinda Bruce argued on behalf of intervenor-respondent.

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

REMANDED 12/10/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal a decision of the Grant County Planning Commission approving a "Caretaker/Manager's Dwelling as an Accessory Use for Holliday State Park." Record 20.

MOTION TO INTERVENE

The Oregon Parks and Recreation Department moves to intervene on the side of the respondent in this appeal proceeding. There is no objection to the motion, and it is allowed.

FACTS

Holliday State Park is located on a 4.3 acre parcel of land (parcel I). Parcel I was acquired by the state from petitioner Clyde Holliday sometime prior to 1962 Holliday State Park was established on parcel I in 1962. The parcel at issue in this appeal (parcel II) abuts parcel I, is approximately 11 acres in size, and was acquired by the state from petitioner McKrola in 1987. Both parcels are zoned Exclusive Farm Use (EFU-40). The EFU-40 zoning district was applied to both parcels in 1983.[1] The proposal

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[1]It is not certain exactly when the EFU-40 zoning district was first applied to parcels I and II. The parties appear to agree that the EFU-40 zoning district was applied to these parcels in 1983. However, the challenged order states:

> "The current applicable County Zoning is Exclusive Farm Use EFU-40 as set forth by Section 3.010 of County Ordinance No. 83-4, enacted May 23, 1984." Record 26.

is to locate a dwelling on parcel II to house the Holliday State Park ranger.

Although public parks are a conditional use in the EFU-40 zoning district, no conditional use permit has been sought or obtained for either parcel I or II. However, the parties do not dispute the existence of a lawful nonconforming park use on parcel I. The gist of the dispute in this appeal is whether the requirements of the EFU-40 zone govern the use of parcel II.

The procedural posture of this appeal is confusing. We outlined the following facts in an order resolving a motion to dismiss filed by intervenor-respondent (intervenor):

> "[Parcels I and II are] approximately 16 acres in size and [are] zoned Exclusive Farm Use 40 acre minimum (EFU-40). Clyde Holliday State Park was established on [parcel I] sometime around 1962, before the current EFU-40 zoning was imposed. On June 14, 1988, the park ranger applied for a 'first accessory dwelling for management housing' [on parcel II]. This application was on a county form entitled 'Zoning Clearance or Status Request Form.' The county planning department approved the [zoning clearance] on June 14, 1988, without holding a public hearing or providing notice of the decision to persons other than the applicant. In approving the 1988 zoning clearance, the county planning department checked a box on that form which stated:

It is not necessary to resolution of this appeal, however, to determine whether the EFU-40 zoning was applied in 1983 or 1984. To simplify this decision, we assume the date the county applied the EFU-40 zoning district to parcels I and II is 1983.

> "'Approved [-] Applicable Zone permits the proposed use as an Outright use.' Record 168-169.

"On November 11, 1989, the planning director issued a 'Land Use Compatibility Statement' indicating that an on-site sewage disposal system proposed for the site is 'compatible with the LCDC acknowledged comprehensive plan.' Record 173. The reason given on the compatibility statement for the planning director's 'finding' of compatibility states:

> "'Accessory use/permitted use per acknowledged zoning.' Id.

"Thereafter, intervenor obtained Department of Environmental Quality (DEQ) approval for the on-site sewage disposal system. Additionally, intervenor and the park ranger purchased a mobile home to be placed at the proposed * * * site. On January 15, 1990, petitioner Komning observed construction work on [parcel II]. Petitioner Komning inquired of the county planning department regarding the nature of the construction. On January 18, 1990, the county planning director advised petitioner Komning that a mobile home had been approved at the construction site. On February 6, 1990, the county planning department approved intervenor's application for a building permit for proposed construction connected with the installation of the mobile home. On February 20, 1990, petitioners filed an appeal with the planning commission. Nothing in the record establishes when, if ever, petitioners were given written notice of the February 6, 1990 building permit approval. * * *

"The county planning commission heard the appeal, conducted hearings on March 21 and 29, 1990, and denied petitioners' appeal on April 3, 1990. Petitioners then appealed the planning commission's decision to the county court. On April 16, 1990, the county court agreed to hear the appeal, and set a date for public hearing. However, no hearing was ever held. A letter dated May 14, 1990, from the county court's legal

counsel (May 14, 1990 letter), states that all members of the county court had determined they were disqualified form voting on the appeal and no county court hearing would be held concerning the appeal. The May 14, 1990 letter states in part:

> "'[c]ancellation of the hearing would appear to be an act which causes the decision of the County [Planning] Commission to become final insofar as Grant County is concerned. Record 3.'"[2] (Footnotes omitted.) Komning v. Grant County, ___ Or LUBA ___ (LUBA No. 90-072, Order on Motion to Dismiss, September 12, 1990), slip op 1-5.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The county erred by approving the siting of the park caretaker's dwelling on land that is zoned EFU-40 as a use permitted outright and by failing to provide notice and hold a public hearing."

The county planning commission determined that no conditional use permit was required for the proposed dwelling because it constitutes "an 'Accessory Use' to a preexisting permitted use." Record 30. Grant County Zoning Ordinance (GCZO) 1.030(3) defines "accessory use" as:

> "A use or structure incidental and subordinate to the main use of the property and located on the same lot as the main use."

In reaching the challenged decision, we understand the county findings to have determined three things. First,

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[2]Petitioners do not challenge in this appeal the county court's failure to make a decision regarding petitioners' appeal. We express no opinion in this regard. But see Strawn v. City of Albany, ___ Or LUBA ___ (LUBA No. 90-098, December 6, 1990).

that any park use occurring on parcel II (upon which the dwelling is proposed to be located) is a lawful nonconforming park use. Second, that the proposed dwelling is "accessory" to the alleged nonconforming park use. Third, because the proposed dwelling is "accessory" to the alleged nonconforming park use, it is exempt from the otherwise applicable requirement that a conditional use permit be secured for the proposed dwelling.

Petitioners state GCZO 3.010(4)(b)(gg) requires that a conditional use permit be obtained before any nonfarm dwelling may be authorized in the EFU-40 zoning district.[3] Petitioners contend the proposed dwelling is a nonfarm dwelling.[4] Petitioners also argue that no lawful nonconforming park use exists on parcel II. While petitioners acknowledge that GCZO 5.010(1)[5] authorizes

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[3]GCZO 3.010(4)(b)(gg) provides:

> "In an EFU Zone, the following uses and their accessory uses are permitted when authorized in accordance with the requirements of Article 6 of this ordinance and this Section.
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> "* * * * *
>
> "(gg) Single-family residential dwellings * * * not provided in conjunction with farm use * * *."

[4]The parties agree that currently there is no farm use occurring on parcel II.

[5]GCZO 5.010(1) provides:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of this ordinance may be continued. Alteration of any such use may be permitted to

continuation of lawful nonconforming uses, they contend it was not possible for the state to establish a lawful nonconforming park use on parcel II because the state acquired and commenced park use of parcel II in 1987, well after the 1983 application of the EFU-40 zoning district to parcels I and II.

Intervenor argues that parcel II is used in conjunction with the lawful nonconforming park use of parcel I.[6] Intervenor contends parcel II contains a nonconforming park use in that the maintenance shop for Holliday State Park is located on parcel II. From these premises, intervenor reasons parcel II contains a derivative lawful nonconforming park use.[7] In other words, intervenor suggests the

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> reasonably continue the use. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for the alteration of the use. A change of ownership or occupancy shall be permitted."

Where a local ordinance provision is identical to a provision of a state statute, it is appropriate to interpret such identical provisions consistently, absent a specific expression in the local ordinance to the contrary. GCZO 5.010(1) is materially identical to ORS 215.130(5), and there is nothing in the GCZO to suggest that GCZO 5.010(1) should be interpreted differently than ORS 215.130(5).

[6]Grant County did not file a brief in this appeal.

[7]Intervenor argues that petitioners did not challenge the nonconforming park use status of parcel II, and from this concludes that the existence of a lawful nonconforming park use on parcel II may be assumed. However, we disagree with intervenor's assumption that petitioners have conceded the nonconforming use status of parcel II. Specifically, petitioners state in the petition for review:

> "Petitioners do not challenge the use of the property deeded to the State in 1987 as a park except to the extent it is relied upon as a means to circumvent the conditional use requirements for the caretaker's dwelling." Petition for Review 9 n 3.

existence of a lawful nonconforming park use on parcel I makes any park related use of parcel II also a lawful nonconforming use. Intervenor contends the proposed dwelling on parcel II is no more than an alteration of the nonconforming park use of parcel I under GCZO 5.010(1), reasonably allowing the continuation of the park use on parcel I. Intervenor also argues that if there is a nonconforming park use on parcels I or II, the proposed dwelling may only be approved as an alteration of such lawful nonconforming park use, citing Morse Bros. V. Clackamas County, ___ Or LUBA __ (LUBA Nos. 89-069 and 89-090, October 20, 1989), slip op 21-22. Intervenor argues that to the extent the county's findings may be inadequate to establish that the proposed dwelling is an alteration of a lawful nonconforming park use on either parcel I or II, there is evidence in the record which "clearly supports" such a determination. ORS 197.835(9)(b).[8]

> "As the land upon which the caretaker's dwelling is located is zoned EFU-40 and is not in use as a park under a nonconforming use, the dwelling is merely a non-farm dwelling and is subject to the conditional use requirements of [GCZO] 6.050(8)." Petition for Review 10.

[8]ORS 197.835(9)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local

The parties agree that parcel II was acquired by the state in 1987, well after the county's imposition of the EFU-40 zoning district on that parcel. It is well established that for a nonconforming use to be lawful, it must have complied with all land use requirements applicable at the time the use became nonconforming. J & D Fertilizers v. Clackamas County ___ Or LUBA ___ (LUBA No. 90-073, September 20, 1990), slip op 12-13; City of Corvallis v. Benton County, 16 Or LUBA 488, 497 (1988). Further, the Supreme Court has stated that in determining the scope of an alleged nonconforming use:

> "The nature and extent of the prior lawful use determines the boundaries of permissible continued use after the passage of the zoning ordinance." Polk County v. Martin, 292 Or 76, 636 P2d 952 (1981).

There are no findings, and we are cited to no evidence which would clearly support a determination, that there was any park use occurring on parcel II in 1983, when the EFU-40 zoning was imposed. Nothing in the record establishes that Holliday State Park extended beyond parcel I in 1983.[9]

> government, with direction indicating appropriate remedial action."

[9]We note the evidence to which we are cited strongly suggests that the use of parcel I as a park is distinct from the alleged "park" uses of parcel II. Since the state's acquisition of parcel II in 1987, parcel II apparently serves as a regional maintenance facility site for parks and roads in the region, rather than simply as an extension of Holliday State Park.

Accordingly, the county erred in determining a lawful nonconforming park use of parcel II exists.

Further, for the reasons discussed below, we disagree with intervenor's suggestion that the addition of a dwelling to parcel II constitutes a permissible "alteration" of the lawful nonconforming park use of parcel I. GCZO 5.010(1) authorizes alterations of nonconforming uses without regard to otherwise applicable requirements of the affected zoning district. However, the scope of the right to alter a lawful nonconforming use is quite limited. In City of Corvallis v. Benton County, 16 Or LUBA at 494, we stated:

> "* * * The provisions of ORS 215.130 which authorize county approval of alterations to nonconforming uses represent a very limited grant of authority to counties to approve uses which, by definition, are not consistent with their adopted comprehensive plans or land use regulations.
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> "County approval of an alteration of a nonconforming use which does not comply with the relevant provisions of ORS 215.130 exceeds the authority granted to the county by statute, and is subject to reversal or remand * * *." (Footnote omitted; emphasis in original.)

Permissible "alterations" of lawful nonconforming uses may be approved only where they "reasonably continue the [nonconforming] use." (Emphasis supplied.) Here the nonconforming park use of parcel I covers approximately 4 acres of land. The proposal is to place a dwelling on parcel II, an approximately 11 acre EFU zoned parcel which had no park use prior to the state's acquisition of the

parcel in 1987, after it was zoned EFU. The proposal is a significant increase in the scope of the nonconforming park use of parcel I, and clearly does not "reasonably continue" the park use of parcel I. We do not believe that an "alteration" of a lawful nonconforming use includes expansion of the lawful nonconforming use to include an adjacent piece of property not already subject to such nonconforming use, as is proposed in this case.[10] See J&D

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[10]In Gibson v. Deschutes County, ___ Or LUBA ___ (LUBA No. 89-002, May 8, 1989), slip op 12-13, we stated:

> "We understand petitioners to argue that the proposed change, which adds additional facilities/structures to a nonconforming use, covering a greater geographic area, cannot as a matter of law constitute an 'alteration' of a nonconforming use, but rather constitutes an 'expansion' of a nonconforming use. We further understand petitioners to argue that county approval of 'expansion' of a nonconforming use is not authorized by ORS 215.130.
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> "* * * * *
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> "ORS 215.130(9), * * * defines 'alteration' of a nonconforming use to include changes to the use, structure or physical improvements of 'no greater adverse impact to the neighborhood.' This definition specifically includes additions to the physical improvements of a nonconforming use, such as proposed in this case, so long as the change would not have greater adverse impacts on the neighborhood. The statute imposes no other limitations on the changes which may be defined as potentially permissible alterations to nonconforming uses.
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> "We, therefore, conclude there is no reason why the proposed addition of two mobile home sites to the existing mobile home park cannot be considered an alteration to a nonconforming use, so long as the change satisfies the 'no greater adverse impact to the neighborhood' standard of 215.130(9)." (Emphasis in original, footnotes omitted.)

Fertilizers v. Clackamas County, supra; Jessel v. Lincoln County, 14 Or LUBA 376, 379 (1986). Accordingly, the proposed placement of a nonfarm dwelling on parcel II is not properly classified as an "alteration" of the park use of parcel I.

We conclude that notwithstanding the state's purchase of parcel II in 1987, or that parcel II may have been used thereafter for some park purposes, any use established on parcel II after EFU-40 zoning was applied in 1983 is not an alteration to a lawful nonconforming use and must comply with the requirements of the EFU-40 zone.[11]

GCZO 3.010(4)(b)(gg) provides that nonfarm dwellings in the EFU-40 zone require conditional use approval. Additionally, GCZO 3.010(4)(b) and 4.060 require that all accessory uses satisfy the requirements applicable to the principal use of the land.[12]

In Gibson, the issue was not whether the proposed nonconforming use could expand and consume another piece of property which was not already subject to the lawful nonconforming use at issue. The issue was whether additional mobile homes could be added to the land upon which a lawful nonconforming mobile home park was located. We did not mean to suggest in Gibson that any geographic expansion of a lawful nonconforming use could be considered to "reasonably continue" the use, so long as it had "no greater adverse impact to the neighborhood."

[11]Intervenor concedes that if the dwelling proposed for parcel II does not constitute an alteration of a nonconforming park use of parcel I or II, this Board must remand the challenged decision for the county to determine whether the proposed dwelling satisfies applicable land use requirements.

[12]GCZO 3.010(4)(b) provides:

"[conditional uses in the EFU-40 zone] and their accessory uses are permitted when authorized in accordance with Section 6 of

The county did not approve a conditional use permit for the proposed residence as a nonfarm dwelling. Neither did the county adopt findings establishing the proposed dwelling is "accessory" to any principal use of parcel II.[13] Thus, even if the proposed dwelling were "accessory" to some use of parcel II, there are no findings establishing that the proposed dwelling satisfies any of the requirements applicable to any such principal use.[14]

Accordingly, the first assignment of error is sustained.

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this Ordinance [Conditional Uses] and this Section." (Emphasis supplied.)

GCZO 4.060 provides, in part:

"An accessory use shall comply with all requirements for a principal use, except as this ordinance specifically allows to the contrary * * *."

In addition, we note that we are cited to no provisions in the GCZO related to nonconforming uses or to any other GCZO provision which makes GCZO 3.010(4)(b) and 4.060 inapplicable to a proposed "accessory" use to a lawful nonconforming use. We disagree with the suggestion in the county's findings that it may authorize a nonfarm dwelling on EFU-40 zoned land on the basis that such dwelling is accessory to a nonconforming park use (as opposed to being an alteration to a nonconforming use), without determining that such proposed "accessory" dwelling complies with all of the GCZO requirements for the principal use, as required by GCZO 3.010(4)(b) and 4.060.

[13]For the reasons discussed above, we do not believe that a proposed dwelling on parcel II may properly be considered "accessory" to principal uses of parcel I.

[14]We note that park use, the only "principal use" the parties indicate may exist on parcel II, is only permitted in the EFU-40 zone as a conditional use.

SECOND ASSIGNMENT OF ERROR

> "The county erred by failing to comply with the county's zoning requirements for development in a flood plain overlay zone."

Petitioners suggest that the county's findings are inadequate to demonstrate compliance with the flood standards contained in Ordinance No. 83-04 Section 3.080. Petitioners also argue that the findings of compliance with Ordinance No. 83-04 Section 3.080 are not supported by substantial evidence in the whole record.

The challenged decision applies only the flood standards contained in Ordinance No. 88-02.[15]

Intervenor argues the applicable flood standards are those contained in Ordinance No. 88-02. Intervenor argues, among other things, that because petitioners do not challenge the compliance of the appealed decision with Ordinance No. 88-02, we should deny this assignment of error.[16]

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[15]Ordinance No. 83-04 Section 3.080, was repealed on November 30, 1989, by Ordinance No. 88-02. As we understand it, Ordinance No. 83-04 contains the unamended provisions of the acknowledged Grant County Zoning Ordinance, and Ordinance No. 88-02 amends only Section 3.080 of Ordinance No. 83-04.

[16]Intervenor does not offer any argument in favor of applying the flood provisions of Ordinance No. 88-02, other than the following:

> "* * * The director's June 1988 decision on the zoning clearance form is also governed by the Ordinance. Where, as here, an Ordinance is amended between the time of the administrative decision being reviewed and the time of review, the Ordinance in effect at the time of review will apply. Gearhard v. Klamath County, 7 Or LUBA 27 (1982); see also Sommer v. Douglas County, 70 Or App 465, 689 P2d 100 (1984)

We first determine whether the flood standards of Ordinance No. 88-02 or 83-04 apply to the decision below. ORS 215.428(3) provides as follows:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of that application shall be based upon the standards and criteria that were applicable at the time the application was first submitted." (Emphasis supplied.)

Accordingly, the county flood standards in effect at the time intervenor's "application" was submitted to the county apply.[17] However, determining the applicable county flood standards is somewhat complicated because it is not entirely clear what constitutes the "application" in this case.

On June 14, 1988, intervenor submitted an application, for a "first accessory dwelling for management housing at the park." Record 168-169. This application was approved by the planning department on the same day on the following basis:

> (court will review order to determine whether it complies with new statute and rules because new statute and rules would apply on remand.)" Respondent's Brief 11 n 3.

[17]With regard to the cases cited by intervenor, Gearhard v. Klamath County predates ORS 215.428(3), and we do not believe that the rule articulated in Sommer v. Douglas County applies where, as here, a statute specifically states that the regulations in effect at the time an application is filed apply throughout the proceedings on such application.

> "Approved [-] Applicable Zone permits the proposed use as an Outright use." Record 168-169.[18]

On February 6, 1990, intervenor applied for and obtained a building permit for construction associated with the proposed dwelling.

For purposes of determining which county flood standards apply under ORS 215.428(3), the dispositive "application" is the one to which the county's flood control standards are applicable. For example, if there is a county ordinance provision requiring all of the flood control standards to be applied at the time the building permit application is submitted, then the county is correct in applying the provisions of Ordinance No. 88-02, because the building permit application was submitted after the effective date of Ordinance No. 88-02. However, if some or all of the flood control standards must be applied at the time a determination is made on whether the proposed use satisfies the requirements of the zoning district, then the flood control provisions of Ordinance No. 83-04 apply, because the requirements of the EFU-40 district are required to be applied to the 1988 application for Zoning Clearance. See Flowers v. Klamath County, 17 Or LUBA 1078, 1086-1088 (1989) (land use standards applicable at the time of the application for site review).

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[18]In our Order on Motion to Dismiss, we determined that the 1988 Zoning Clearance approval granted a "permit" under ORS 215.402(4). Komning v. Grant County, supra, slip op at 16.

Ordinance 83-04 Section 3.080(6) provides in part:

> "Upon receipt of an application for a use or development permitted in the Zone with which the [Flood Plain Combining Zone] (FP) Zone is combined and that is not permitted by Subsection 2 of this Section, the property shall be classified into portions in the floodway, portions in the floodway fringe, and portions outside the floodplain. Such classification shall be completed by the Planning Director and such classification i[s] only appealable to the Commission. The applicant shall provide information needed to make the classification and determine the the severity of the potential flood conditions including but not limited to the following:
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> "(a) The location of the property with reference to channels stations and flood profile elevations.
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> "(b) The existing topography and proposed grading plans for the property. Contour intervals shall not be more than one-foot for ground slopes up to five percent and for areas immediately adjacent to a stream, two feet for ground slopes between five and ten percent and five feet for greater slopes.
>
> "(c) The location of existing and proposed diking revetments if any.
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> "* * * * *" (Emphasis supplied.)

Accordingly, under Ordinance No. 83-04, application of the FP combining zone provisions is required when the county receives an application for a "use or development." We are, however, cited to no definition in the GCZO of the terms "use or development." Additionally, it is not clear what is meant by those terms. We read the provisions of Ordinance No. 83-04, Section 3.080 as a whole in an effort to make some sense of them and to give meaning to each part. Kenton

Neighborhood Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 88-119, June 7, 1989) slip op 16.

The provisions of Ordinance No. 83-04, Section 3.080(1)(A) authorize the county to deny a proposed development under certain conditions. Additionally, Ordinance No. 83-04 Section 3.080(6) provides that upon receipt of a development application the planning director is required to classify the property subject to development into areas which are within the floodway, the floodway fringe and the floodplain, based on the characteristics of the particular site. Ordinance No. 83-04 Section 3.080(8) provides standards which authorize the county to require redesign of a proposed development in order to "minimize flood damage." Ordinance No. 83-04 Section 3.080(9) provides for specific detailed requirements applicable to mobile homes.[19]

We believe these determinations are required in response to the initial development application. It is at the time of the initial development application that the standards of the applicable zone are applied such that it may be determined whether a proposal can be authorized, and if so under what conditions. It makes sense to apply the flood control regulations which could lead to the denial of the application, or redesign of the proposal, at this time.

[19]The proposed dwelling is characterized by the parties as a mobile home.

Additionally, Ordinance No. 83-04 Section 3.080(7) specifically states that the requirements of that subsection are applicable only at the time of an application for a building permit. No other subsection of Ordinance No. 83-04 Section 3.080 contains such an express limitation. This provides additional support for our interpretation that the other requirements of Ordinance No. 83-04 Section 3.080 apply at the time of the initial development application.

Here, the initial development application was for a "first accessory dwelling for management housing at the park." It was this 1988 Zoning Clearance application that obligated the county to apply its land use standards. This application, in fact, resulted in the county's issuance of the 1988 Zoning Clearance approval, and the county's determination that the proposed use constitutes a use permitted "outright" in the county's EFU-40 zone. See Komning v. Grant County, supra, slip op at 16. We believe that intervenor's application for the 1988 Zoning Clearance constitutes the "application" for purposes of applying applicable flood regulations. See Kirpal Light Satsang v. Douglas County, 96 Or App 207, 772 P2d 944, on reconsideration 97 Or App 614, 776 P2d 1312, rev den 308 Or 302 (1989).

Accordingly, the applicable flood control regulations are those contained in Ordinance No. 83-04 Section 3.080. Because the county adopted no findings of compliance with

the flood control provisions of Ordinance No. 83-04 Section 3.080, it is not possible to ascertain whether any findings of compliance would be supported by substantial evidence. It is for the county to apply its ordinances in the first instance.[20] Because the county has not done so, we must sustain this assignment of error.

The second assignment of error is sustained.

The county's decision is remanded.

[20]Nothing prevents intervenor from submitting a new application. The regulations in effect at the time a subsequent application is filed would control approval or denial of such subsequent application. See Sunburst II Homeowners Association, 101 Or App 458, 790 P2d 1213, rev den 310 Or 243 (1990).