BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HECETA WATER DISTRICT, Petitioner, vs. LANE COUNTY, Respondent, and GORDON B. HOWARD, Intervenor-Respondent.	LUBA No. 92-105 FINAL OPINION AND ORDER

Appeal from Lane County.

D. Ronald Gerber, Florence, filed the petition for review and argued on behalf of petitioner.

William A. Van Vactor, County Counsel, Eugene, filed a response brief and argued on behalf of respondent.

Dale A. Riddle, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Gleaves, Swearingen, Larsen & Potter.

Larry Knudsen, Assistant Attorney General, Salem, filed a state agency brief pursuant to ORS 197.830(7) and argued on behalf of the Department of Land Conservation and Development. With him on the brief were Charles S. Crookham, Attorney General; Jack Landau, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

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

AFFIRMED 01/13/93

You are entitled to judicial review of this Order.

Judicial review is governed by the provisions of ORS 197.850.

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a building permit for a replacement dwelling on land designated Forest Land by the Lane County Rural Comprehensive Plan (RCP) and zoned Impacted Forest Lands (F-2).

MOTIONS TO INTERVENE

Gordon B. Howard, the applicant below, moves to intervene in this proceeding on the side of respondent. There is no objection to his motion, and it is allowed.

The Department of Land Conservation and Development (DLCD) moves to intervene in this proceeding on the side of petitioner. DLCD also asks that if its motion to intervene is denied, its petition for review be considered a state agency brief filed pursuant to ORS 197.830(7).[1]

Respondent and intervenor-respondent (respondents) object to DLCD's motion to intervene. Respondents argue that DLCD failed to appear before the county orally or in writing, as required by ORS 197.830(6)(b). Respondents do

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[1]ORS 197.830(7) provides in relevant part:

> "If a state agency whose order, rule, ruling, policy or other action is at issue is not a party to the proceeding, it may file a brief with the board as if it were a party. * * *"

DLCD contends OAR 660-06-025(3)(p), a provision of its administrative rules implementing Statewide Planning Goal 4 (Forest Lands), is at issue in this case.

not object to DLCD's request to submit a state agency brief under ORS 197.830(7).

DLCD concedes the local record in this matter does not reflect an appearance by DLCD before the county during the proceedings below. However, DLCD argues that the challenged decision gives a new and different interpretation to the term "dwelling," as used in the Lane County Code (LC) and, therefore, effectively amends an acknowledged land use regulation. DLCD further argues that the county failed to notify DLCD of the proposed amendment of an acknowledged land use regulation, as required by ORS 197.610(1). According to DLCD, in these circumstances, DLCD was effectively denied the opportunity to participate in the county proceedings and the appearance requirement of ORS 197.830(6)(b) is obviated.

The challenged decision does not purport to amend an acknowledged land use regulation, but rather to approve a permit pursuant to an acknowledged land use regulation. If the challenged decision misconstrues an acknowledged land use regulation, this Board is authorized to reverse or remand the decision. ORS 197.835(6) and (7)(a)(D). That the county erred in interpreting and applying an acknowledged land use regulation would not, however, mean the county was required to comply with the notice requirements for a postacknowledgment land use regulation amendment. Because the requirement of ORS 197.610(1) for

notice to DLCD of a proposed postacknowledgment amendment is not applicable to the county proceedings in this matter, DLCD provides no basis for concluding the appearance requirement of ORS 197.830(6)(b) was obviated.

DLCD's motion to intervene is denied. The Board will accept DLCD's petition for review as a state agency brief filed pursuant to ORS 197.830(7), and will consider the arguments contained therein as they are relevant to the assignments of error raised in petitioner's petition for review.

MOTION TO DISMISS

Intervenor-respondent (intervenor) contends the challenged decision is not a "land use decision" which this Board has jurisdiction to review. Intervenor argues that under ORS 197.015(10)(b)(B), the challenged decision is excluded from the statutory definition of land use decision, because it approves a building permit "under clear and objective land use standards." Intervenor argues that under LC 16.211(2)(r), "replacement of existing dwellings" is an outright permitted use in the F-2 zone and, therefore, the county was required to approve the requested building permit once it determined the proposed dwelling would replace an existing dwelling. According to intervenor, whether a proposed dwelling "replaces an existing dwelling" is a clear and objective standard.

This Board has exclusive jurisdiction to review local

government "land use decisions." ORS 197.015(10)(a) defines "land use decision" to include a local government decision that concerns the application of a land use regulation.[2] However, ORS 197.015(10)(b) establishes a number of exceptions to the definition set out in ORS 197.015(10)(a), one of which is relevant here. ORS 197.015(10)(b)(B) provides that "land use decision" does not include a local government decision "[w]hich approves or denies a building permit * * * under clear and objective land use standards." We must determine whether the challenged decision is within the exception established by ORS 197.015(10)(b)(B).

ORS 197.015(10)(b)(B) was enacted in its current form in 1991. Or Laws 1991, ch 817, § 1. However, the phrase "clear and objective standards" is not a newcomer to the statutory definition of land use decision. In Hollywood Neigh. Assoc. v. City of Portland, 22 Or LUBA 789, 794-95 (1991), we explained:

> "Prior to 1989 legislative amendments, ORS 197.015(10)(b) provided that 'land use decision':
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> > "'Does not include a ministerial decision of a local government made under clear and objective standards contained in an acknowledged comprehensive plan or land use regulation * * *.' [(Emphasis added.)]

[2]There is no dispute that the challenged decision concerns the application of a land use regulation, namely the Lane Code.

"The Court of Appeals first interpreted this provision in an appeal challenging a building permit for a dwelling customarily provided in conjunction with farm use:

> "'The purpose of ORS 197.015(10)(b) is to make certain local government actions unreviewable as land use decisions, because they are really nondiscretionary or minimally discretionary applications of established criteria rather than decisions over which any significant factual or legal judgment may be exercised. If particular decisions can automatically flow from the existence of general standards which are unaffected by factual variables, the decisions are within the statute's scope. * * *" (Emphasis added.) Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986), rev den 303 Or 74 (1987).'

"Following Doughton, both the Court of Appeals and this Board have held on numerous occasions that decisions which 'require the exercise of significant factual or legal judgment' are not within the scope of former ORS 197.015(10)(b). Flowers v. Klamath County, supra, 98 Or App at 392 (decision classifying a medical waste incinerator as a scrap operation); Kirpal Light Satsang v. Douglas County, 18 Or LUBA 651, 663 (1990) (decision that a proposed use is a private school); Hall v. City of Portland, 18 Or LUBA 180, 182-83 (1989) (minor variance for fence height); Nicolai v. City of Portland, [18 Or LUBA 168 (1989)] (minor partition); McKay Creek Valley Assoc. v. Washington County, 18 Or LUBA 71 (1989) (approval of farm-related dwellings); Kunkel v. Washington County, 16 Or LUBA 407, 413 (1988) (decision that emergency disposal site for dead animals is a farm use)."

In 1989, the legislature amended ORS 197.015(10)(b) to except from the definition of "land use decision" building permits and other decisions which are "made under land use

standards which do not require interpretation or the exercise of factual, policy or legal judgment." ORS 197.015(10)(b)(A) and (C)(1989).[3] It is apparent from this language that ORS 197.105(10)(b)(A) and (C) (1989) closely paralleled the interpretation of pre-1989 ORS 197.015(10)(b) expressed by the Court of Appeals in Doughton.[4] Campbell v. Bd. of County Commissioners, 107 Or App 611, 615, 813 P2d 1074 (1991); Hollywood Neigh. Assoc., supra, 22 Or LUBA at 795-96. However, in 1991, the exception provision specifically applicable to building permits was amended again, to return to language similar to the pre-1989 exception for local government decisions "made under clear and objective standards."

As explained above, in Doughton, the Court of Appeals interpreted the pre-1989 statutory provision establishing an exception to the definition of "land use decision" to mean that a local government decision is "made under clear and objective standards" if the decision does not require the exercise of significant factual or legal judgment. We see no reason to interpret the phrase "issued under clear and objective land use standards" in ORS 197.015(10)(b)(B)

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[3]ORS 197.015(10)(b)(B) establishes another exception to the definition of "land use decision" which is not relevant to this case.

[4]We recognize that ORS 197.015(10)(b)(A) and (C) (1989) did not qualify the type of factual or legal judgment exercised with the term "significant," as did the Court of Appeals when interpreting the pre-1989 statutory provision in Doughton. However, that distinction does not affect the interpretive issue posed in this case.

differently than the Court of Appeals interpreted "made under clear and objective standards" in Doughton.[5] As will be demonstrated below in the discussion of petitioner's assignments of error concerning the interpretation of the definition of the term "dwelling" in the LC, and the application of that interpretation to the facts of this case, the county exercised significant legal and factual judgment in determining whether the proposed dwelling replaces an existing dwelling. We therefore conclude the exception established by ORS 197.015(10)(b)(B) does not apply, and the challenged decision is a "land use decision" subject to our jurisdiction.

The motion to dismiss is denied.

FACTS

The subject F-2 zoned property is approximately 72 acres in size and adjoins Clear Lake. LC 16.211(2)(r) lists "[m]aintenance, repair or replacement of existing dwellings" as a permitted use in the F-2 zone. On October 9, 1990, intervenor, an owner of the subject property, applied to the county for a building permit to replace an existing dwelling

[5]Intervenor quotes from the legislative history of Oregon Laws 1991, chapter 817, and argues this legislative history demonstrates that the amendment to what is now ORS 197.015(10)(b)(B) was intended to broaden the exception established for certain building permits beyond what would have been recognized under Doughton. However, the testimony quoted by intervenor appears to relate primarily to the 1991 changes made to ORS 197.015(10)(b)(A) and does not shed any light on what the legislature intended by essentially returning ORS 197.015(10)(b)(B) to the pre-1989 language with regard to an exception for certain building permits.

on the subject property. There is no dispute that at this time, an approximately 13 foot by 13 foot structure, variously described by the parties as a "cabin" or "shed," was located on the subject property. The nature and past use of this structure is at the center of the parties' dispute in this appeal.

County staff approved intervenor's building permit application on January 24, 1991. The issuance of the building permit was appealed to this Board. Pursuant to an agreement of the parties, the decision was remanded for further processing under county quasi-judicial hearing procedures. Keating v. Lane County, ___ Or LUBA ___ (LUBA No. 91-049, May 2, 1991). On May 3, 1991, the county planning director affirmed the previous staff decision approving a building permit for a replacement dwelling. Petitioner appealed the planning director's decision to the county hearings officer.

On May 29, 1991, pursuant to a process established by LC 14.300(7) allowing the hearings officer to ask the board of county commissioners to issue policy interpretations prior to or during the course of an appeal hearing, the hearings officer asked the board of commissioners to clarify the relationship between LC 16.211(2)(r) and 16.251 (Nonconforming Uses). Record 1187. On June 25, 1991, the board of commissioners adopted an order providing that (1) replacement dwellings under LC 16.211(2)(r) are not

nonconforming uses governed by LC 16.251; (2) the existing dwellings that may be replaced under LC 16.211(2)(r) are limited to dwellings that conformed to applicable zoning regulations when they were originally constructed; and (3) replacement dwellings need not be of the same type, size or location as the original dwelling. Record 1159.

On August 7, 1991, the hearings officer conducted an evidentiary hearing on petitioner's appeal, leaving the record open until August 22, 1991. On January 21, 1992, the hearings officer issued a decision upholding one assignment of error made by petitioner and reversing the planning director's approval of the subject building permit, on the ground that the structure on the subject property was not an "existing dwelling," as required by LC 16.211(2)(r). Record 359. The hearings officer's decision was appealed by both petitioner and intervenor.

The board of commissioners elected to hear only intervenor's appeal. Record 281. The board of commissioners' review was limited to the evidentiary record established before the hearings officer. On March 4, 1992, the board of commissioners held a hearing limited to argument from the parties concerning the interpretation of the LC terms "dwelling" and "dwelling, single-family." On April 1, 1992, the board of commissioners issued an order reversing the hearings officer's interpretation of these terms and remanding the case to the hearings officer to

apply the interpretation adopted by the board of commissioners, based on the evidence in the record. Record 157.

The hearings officer accepted additional written argument from the parties regarding the application of the board of commissioners' interpretation of the terms "dwelling" and "dwelling, single-family" to the facts in the record. Record 154. On May 4, 1992, the hearings officer issued a second decision, approving intervenor's application for a building permit to replace an existing dwelling. Petitioner appealed the hearings officer's second decision to the board of commissioners. On May 13, 1992, the board of commissioners issued an order declining to consider petitioner's appeal. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Under these assignments of error, petitioner contends the county's interpretation of the term "dwelling," as used in LC 16.211(2)(r), misconstrues the applicable law.[6] LC 16.090 defines the relevant terms as follows:

> "Dwelling. A building or portion thereof which is occupied in whole or in part as a residence or sleeping place, either permanently or temporarily, but excluding hotels, motels, auto courts, mobile homes and camping vehicles. Where the term, 'dwelling,' is used in [LC] Chapter 16, it shall mean a single-family dwelling unless otherwise noted."

[6]In support of these assignments of error, petitioner incorporates by reference the argument set out in DLCD's brief.

> "Dwelling, Single-Family. A detached dwelling designed or used exclusively for the occupancy of one family and having housekeeping facilities for one family."

In his first decision, the hearings officer interpreted these terms as follows:

> "The term 'housekeeping facilities' can include many items but commonly is thought to cover the basic essentials that establish a self-sufficiency of residential living: bathroom, cooking and sleeping facilities. * * * As a matter of interpretation, does a 'dwelling' have to have all indices of housekeeping facilities? In a strict sense, no, as outdoor restroom facilities were common in some rural areas before septic tank systems were required. However, by requiring housekeeping facilities the [LC] is attempting to establish a minimum standard that will allow a dwelling to be distinguished from a structure that may provide, temporarily, mere protection from the elements. A dwelling is where people live. * * * There must also be a permanency to these [housekeeping] facilities; otherwise a tent with sleeping bags and a Coleman stove would qualify as a dwelling. * * *" Record 365.

The hearings officer concluded that "the alleged dwelling did not have sufficient housekeeping facilities to be considered a dwelling as defined by the [LC]." Id.

The board of commissioners found the hearings officer erred in interpreting the LC to require that a "dwelling" must contain a certain level of permanent housekeeping facilities on a continuous basis. Record 161. The board of commissioners reversed and remanded the hearings officer's decision, interpreting the above quoted terms as follows:

> "The terms 'dwelling, single-family' and 'dwelling' are distinguished from each other by

factors affecting the frequency of use and the kind of uses for which the structure may be used. [The] 'dwelling, single-family' [definition] does not include * * * factors affecting the frequency or kind of uses other than that it be for the occupancy of one family and that it have housekeeping facilities for one family. In contrast, the term 'dwelling' includes a frequency of use factor indicating that it may be used 'permanently or temporarily' and that the kind of use can be for a 'residence' or 'sleeping place.' In order to reconcile the differences in the definitions of these terms, they shall be interpreted in balance with each other in the following manner. The definition of 'dwelling' includes the provision that 'it shall mean a single-family dwelling' which means that:

"a. The dwelling must be designed or used exclusively for the occupancy of not more than one family;

"b. The use of the dwelling may vary in scope from a 'residence' to a 'sleeping place,' and the use may vary in frequency of occupancy on a 'permanent' or 'temporary' basis;

"c. Housekeeping facilities evidence that a structure has been used as a 'residence' or a 'sleeping place' on a 'permanent' or 'temporary' basis. Such facilities will vary depending on the scope of the use and the frequency of the use of the structure. In other words, the scope and frequency of use of the dwelling will establish and define the level and type of housekeeping facilities evidencing such use. A particular level, type or range of housekeeping facilities is not required. Nor must the facilities evidencing such use necessarily be permanent in nature or continuously present in the structure * * *. In applying a definition of 'replacement dwelling,' greater weight should be given to the permanency of the structure and the fact that it was used either as a residence or a sleeping place than [to] the level or type of housekeeping facilities

[existing] at the time of replacement.

> "This [interpretation] is consistent with applicable legislative history and the historical interpretation given 'dwelling' by Lane County Planning staff. The primary intent of the interrelationship that exists between the words 'dwelling' and 'dwelling, single-family' as they exist in the [LC] is to limit [a] dwelling to not more than occupancy for a single family and not [include] a duplex or dwelling designed for the occupancy of a multiple number of families.[7] * * *" (Emphasis in original.) Record 162-63.

Petitioner and DLCD contend the board of commissioners' interpretation quoted above is contrary to the express language of the LC. Petitioner and DLCD argue that the definition is clear on its face and expressly requires that

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[7]The LC 16.090 definitions of "dwelling, two-family" and "dwelling, multiple[-family]" parallel that of "dwelling, single-family":

> "Dwelling, Two-Family (Duplex). A building consisting of two separate dwelling units with a common roof and common foundation, designed and used exclusively for the occupancy of two families living independently of each other and having housekeeping facilities for each family."

> "Dwelling, Multiple. A building designed and used for occupancy by three or more families, all living independently of each other, and having separate housekeeping facilities for each family."

The current definition of "dwelling," without the last sentence referring to single-family dwelling, was added to the LC in 1984. The definitions of "dwelling, single-family," "dwelling, two-family," and "dwelling, multiple," and the last sentence of the current definition of "dwelling," were added to the LC in 1987. The board of commissioners' decision explains that the findings adopted in support of the 1987 LC amendments state, with regard to the change in the definition of "dwelling," that "dwelling" was used in the LC in such a way as to suggest that the term might include multi-family dwellings and, therefore, "it is appropriate to clarify [the term dwelling] by identifying it as being for a single family only, unless otherwise stated in the [LC]." Record 160; Supp. Record 2.

a dwelling have housekeeping facilities, not merely that it be used as a temporary sleeping place. Petitioner and DLCD maintain the county strained to find a nonexistent inconsistency between the definitions of "dwelling" and "dwelling, single-family," and then relied on the alleged inconsistency to write out what the LC clearly requires -- i.e., that a dwelling must have housekeeping facilities. According to petitioner and DLCD, this is analogous to how a city improperly interpreted its code in Goose Hollow Foothills League v. City of Portland, ___ Or LUBA ___ (LUBA No. 92-087, September 28, 1992), aff'd 117 Or App 211 (1992). Petitioner and DLCD also argue that because the requirement for housekeeping facilities is unambiguous, the county cannot rely on local legislative history to alter its meaning.

There is no dispute that the county adopted LC 16.211(2)(r) to implement a provision of LCDC's administrative rules that allows "[m]aintenance, repair or replacement of existing dwellings" as an outright permitted use of forest lands. OAR 660-06-025(3)(p). Petitioner and DLCD concede that OAR Chapter 660, Division 06 (Goal 4 Rule), does not define "dwelling," but argue that LCDC intended that the common and ordinary meaning of the term apply. According to petitioner and DLCD, the common dictionary definition of "dwelling" is "habitation, place of residence." DLCD Brief 6. Petitioner and DLCD also point

out that the building code adopted by the state Building Code Agency defines "dwelling" as "any building containing two or more 'dwelling units,'" and defines "dwelling unit" as "living facilities for one or more persons including permanent provisions for living, sleeping, eating, cooking and sanitation." (Emphasis by DLCD.)

LUBA is required to defer to a local government's interpretation of its code, so long as the proffered interpretation is not "clearly contrary to the enacted language," or "inconsistent with express language of the ordinance or its apparent purpose or policy." Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). Recent opinions by the Court of Appeals have stated that under Clark, the question for this Board to resolve is not whether a local government interpretation of its own code is "right," but rather whether it is "clearly wrong." Goosehollow Foothills League v. City of Portland, 117 Or App 211, 217, ___ P2d ___ (1992); West v. Clackamas County, 116 Or App 89, 92-93 , ___ P2d ___ (1992).

In this case, we agree with respondents that the board of commissioners' interpretation of the term "dwelling,"[8] as

[8]The final county decision challenged in this appeal is the hearings officer's May 4, 1992 decision on remand from the board of commissioners. However, no party contends the hearings officer misconstrued or failed to apply the interpretation of the term "dwelling" adopted by the board of commissioners in its April 1, 1992 order remanding the matter to the hearings officer. Accordingly, under these assignments of error, we review the county's interpretation of the term "dwelling," as that interpretation is expressed in the board of commissioners' April 1, 1992 order.

used in the LC, balances and gives meaning to all of the terms in the related LC definitions of "dwelling" and "dwelling, single-family." The board of commissioners correctly notes that the LC definition of "dwelling, single-family" does not include a frequency or permanency factor, whereas the definition of "dwelling" provides that a dwelling may be used "temporarily or permanently" as a "residence or sleeping place." In addition, the definition of "dwelling, single-family" does not provide that any particular type or level of housekeeping facilities are required, only that they be "for one family." Reading the two definitions together, the board of commissioners reasonably determined that (1) a dwelling must be designed for or used by exclusively one family; (2) the use of a dwelling may vary in scope from a "residence" to a "sleeping place," and in frequency from "permanent" to "temporary;" and (3) the scope and frequency of use will establish the level and type of housekeeping facilities evidencing such use.

However, because these LC definitions are capable of more than one rational interpretation, and the code provision at issue that uses the defined term was admittedly adopted to implement OAR 660-06-025(3)(p), consideration of the context and purpose of OAR 660-06-025(3)(p) is also relevant. Smith v. Clackamas County, 313 Or 519, 524, ___ P2d ___ (1992). As conceded by respondents, there is

nothing in OAR Chapter 660, Division 06 defining the term "dwelling." The only administrative history of OAR 660-06-025(3)(p) provided by the parties indicates the primary purpose for allowing the listing of replacement dwellings as permitted uses was to prevent preexisting dwellings (in forest zones) from becoming nonconforming uses subject to ORS 215.130. However, this administrative history does not indicate an intent to define "dwelling" in any particular way.

We conclude there is nothing in the board of commissioners' interpretation that is contrary to the words or context of the LC or OAR 660-06-025(3)(p). Petitioner and DLCD have not demonstrated that the county's interpretation of the term "dwelling" is clearly wrong.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioner contends the county committed a procedural error that prejudiced its substantial rights, by refusing to allow additional evidence to be submitted after the board of commissioners adopted a new interpretation of the term "dwelling."[9] Petitioner argues the "new" interpretation adopted by the board of commissioners in its April 1, 1992

[9]Petitioner's assignment of error also contends the county refused to accept additional argument after the board of commissioners adopted a new interpretation in its April 1, 1992 order. However, the record shows that petitioner submitted, and the hearings officer accepted, written argument after the board of commissioners adopted its April 1, 1992 order and prior to the hearings officer's May 4, 1992 decision on remand. Record 90-136.

order significantly changes the existing county interpretation of the term dwelling, which was adopted on August 1, 1988 and followed by the hearings officer in his first decision in this matter. Petitioner points out it submitted requests to reopen the evidentiary record to both the board of commissioners and the hearings officer.[10] Supp. Record 16; Record 90.

Petitioner argues its substantial rights include "an adequate opportunity to submit [its] case and a full and fair hearing." Bradbury v. City of Independence, 22 Or LUBA 783, 785 (1991); Muller v. Polk County, 16 Or LUBA 771, 775 (1988). Petitioner argues these rights are prejudiced where a local government adopts a new interpretation of an applicable approval standard after the evidentiary record is closed, and refuses to reopen the record to allow a party to present evidence addressing the new interpretation.

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[10]Petitioner does not clearly identify the procedural requirements that it believes the county violated by refusing to reopen the evidentiary hearing. However, petitioner does not contend the county violated any procedural requirements established by the LC. Petitioner does cite as applicable ORS 215.416(8), which provides that a county decision on a permit application shall be based on standards and criteria set forth in the zoning ordinance or other county regulation. Petitioner also relies on our decision in Bradbury, supra, in which we explained ORS 197.763(3)(b) and (5)(a) require a local government to identify the standards it believes to be applicable to an application for quasi-judicial land use approval prior to its hearings on such application. Therefore, we treat petitioner's argument under this assignment of error as contending the county's failure to reopen the evidentiary hearing after the board of commissioners allegedly adopted a new interpretation of an applicable standard violated statutory requirements to identify applicable standards prior to the close of the evidentiary hearing, and that this error prejudiced petitioner's substantial rights to an adequate opportunity to prepare and submit its case and a full and fair hearing.

Petitioner relies primarily on Bradbury, 22 Or LUBA at 785-86 (where relevant standards were not identified by city, on remand city must identify the standards and hold an evidentiary hearing to allow presentation of evidence and argument concerning interpretation and application of standards).[11] Petitioner also argues appellate court decisions concerning state agency contested case proceedings establish that an agency must reopen the evidentiary hearing if a new interpretation of an applicable standard is adopted. Martini v. OLCC, 110 Or App 508, 513, 823 P2d 1015 (1992); see also McCann v. OLCC, 27 Or App 487, 492, 556 P2d 973, rev den 277 Or 99 (1977); Sunray Drive-in Dairy v. OLCC, 20 Or App 91, 95, 530 P2d 887 (1975).

Respondents argue the board of commissioners' April 1, 1992 order did not change a previously established county interpretation of the term "dwelling," as that term is used in LC 16.211(2)(r) regarding the "replacement of existing dwellings." Respondents argue the August 1, 1988 "interpretation" was a non-binding staff opinion.[12]

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[11]Petitioner also cites Morrison v. City of Portland, 70 Or App 437, 442, 689 P2d 1027 (1984). However, Morrison establishes that parties have a right to submit additional argument when a local government clarifies its interpretation of applicable approval standards pursuant to remand by this Board. It does not address the question of whether a local government must accept additional evidence after it adopts a new or modified interpretation of an applicable approval standard and, therefore, is not applicable here.

[12]Respondents also contend that the August 1, 1988 interpretation was only one of four different previous staff interpretations dealing with replacement dwellings. However, we note that the other three interpretations address what constitutes "maintenance, repair or

Record 1175-77. Respondents further argue the August 1, 1988 interpretation did not purport to interpret LC 16.211(2)(r), but rather LC 16.211(3)(a)(1988), which provided for "replacement of any legal residence." (Emphasis added.) Respondents also point out that LC 16.211(3)(a)(1988) required that a residence eligible for replacement be "occupied" or "suitable for occupancy," requirements not found in LC 16.211(2)(r). Finally, respondents argue the August 1, 1988 interpretation relies heavily on the dictionary definition of "residence," as well as the LC definition of "dwelling."

Respondents maintain the board of commissioners April 1, 1992 order merely clarified the meaning of the term "dwelling," and did not adopt a "new" interpretation or approval standard. Additionally, respondents argue petitioners have failed to identify how their substantial rights were prejudiced by the county's failure to reopen the evidentiary record. Respondents contend petitioner's requests to reopen the record never specified what evidence petitioner wished to introduce that had not been included in the voluminous evidence submitted during the August 1991 evidentiary hearing before the hearings officer. Respondents also contend petitioner failed to follow procedures set out in LC 14.400(2) for requests to the board

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replacement," not what constitutes an existing dwelling. Record 1172-74, 1178-80.

of commissioners to submit additional evidence or for a remand to the hearings officer for a de novo hearing and, therefore, made it impossible for the county to grant petitioner's requests.

In Bradbury, supra, we recognized that where a local government totally fails to identify the standards applicable to a quasi-judicial land use decision, as required by ORS 197.763(3)(b) and (5)(a), the local government must hold an evidentiary hearing after the applicable standards are identified. However, that is not what happened in this case. Petitioner does not argue the county failed to identify LC 16.211(2)(r) or the LC 16.090 definitions of "dwelling" and "dwelling, single-family" as applicable approval standards prior to the close of the evidentiary hearing. Rather, petitioner argues that by significantly changing the established interpretation of these standards after the close of the evidentiary hearing, and refusing to reopen the evidentiary hearing, the county effectively denied petitioner an opportunity to prepare and submit a case addressing the new interpretation of the approval standards.

Petitioner's argument is based primarily on Martini v. OLCC, McCann v. OLCC, and Sunray Drive-in Dairy v. OLCC, supra.[13] The Court's rulings in these cases are based on

[13]The one land use case relied on by petitioner, Commonwealth Properties v. Washington County, 35 Or App 387, 582 P2d 1384 (1978), does not directly

procedural requirements of ORS ch 183 applicable to state agency contested case proceedings, but not to local government land use proceedings. However, petitioner contends certain provisions of ORS ch 197 and ch 215, applicable to county quasi-judicial permit proceedings, are equivalent to ORS ch 183 requirements for agency contested case proceedings. Petitioner refers specifically to the ORS 183.415(3) provision that parties may "present evidence and argument on all issues," the provision which is the primary basis for the court's ruling in Martini v. OLCC, supra.

Martini v. OLCC, 110 Or App at 514, holds that under ORS ch 183, when a state agency changes an established interpretation of an administrative rule to a significant degree during the course of a contested case proceeding, the parties must be given an opportunity to present evidence (and argument) responsive to the new standard. We do not foreclose the possibility that there may be some circumstances where relevant provisions of ORS ch 197 and 215 impose a similar requirement on county quasi-judicial

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support petitioner's argument. Commonwealth Properties is a challenge to a county decision denying preliminary subdivision plat approval, based on noncompliance with county comprehensive plan policies. The issue the Court of Appeals addressed was how specific county findings denying preliminary subdivision plat approval must be, in order to inform the applicant of what it must do to obtain approval under the applicable standards. Commonwealth Properties does not address the issue of whether a local government may be required to reopen the evidentiary hearing after adopting an interpretation of an applicable standard.

land use proceedings.[14] However, we do not believe this is such an instance.

Here, petitioner has not demonstrated there was an "established" county interpretation of LC 16.211(2)(r) or the term "dwelling" prior to the proceeding below. The August 1, 1988 staff interpretation cited by petitioner interpreted a different LC provision relating to "residences" that are "occupied" or "suitable for occupancy," not "dwellings" as that term is defined in LC 16.090.

In addition, while the revised interpretation of "dwelling" adopted by the board of commissioners made certain types of evidence relating to the presence and permanency of housekeeping facilities less significant, we do not see that it made relevant any new type of evidence that would not have been considered relevant at the time of the evidentiary hearing before the hearings officer. At all times below, the parties should have been aware that evidence concerning the past and current nature, characteristics and use of the subject structure was relevant to the question of whether the structure

[14]However, there are definite differences between the requirements imposed on county quasi-judicial land use proceedings by ORS ch 197 and 215 and those imposed on state agency contested case proceedings by ORS ch 183. See, e.g., Reeder v. Clackamas County, 20 Or LUBA 238, 243 (1990) (ORS 215.416(8) and (9) do not impose on counties the same obligation to explain departures from prior precedent that ORS 183.482(8)(b)(B) imposes on state agencies).

constituted an "existing dwelling."

Finally, petitioner has not, either in its requests to the county to reopen the record, or in its arguments to this Board, explained what aspect of the board of commissioners' interpretation of "dwelling" necessitates the submittal of additional evidence by petitioner. Neither has petitioner established how its substantial right to submit its case to the county is prejudiced, because it has never identified any evidence not already in the record that petitioner desires to submit if the county evidentiary hearing is reopened.[15]

In summary, we do not believe the county violated any provision of the applicable statutes by declining to reopen the evidentiary hearing in this case and, even if the county did commit such a procedural error, petitioner has not demonstrated how its substantial rights were prejudiced thereby.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioner contends the challenged decision exceeds the authority given to the

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[15]We also agree with respondents that the county procedures for requesting a de novo hearing or reopening of the record on remand to the hearings officer set out in LC 14.400(2) require the requesting party to identify the evidence it desires to submit and explain its significance. Where these procedures are not complied with, as was the case here, the county is not obligated to grant such a request pursuant to LC 14.400(3)(c).

county under ORS 215.130(5)-(9) to allow the replacement of a nonconforming use.

Petitioner argues that even if the existing structure is a dwelling, it is a nonconforming use in the F-2 zone. Petitioner argues that dwellings are not outright permitted uses in the F-2 zone, in that a new forest or nonforest dwelling in the F-2 zone would require a special use permit under LC 16.211(6) or (7). Petitioner points out that no such special use permit has been approved for the existing structure. Petitioner also argues that we have previously determined that where a lawfully established existing use would require local government approval of a variance or conditional use permit if the use were built under current regulations, that existing use is a nonconforming use. Miller v. City of Dunes City, 18 Or LUBA 515, 519-21 (1989); Morse Bros., Inc. v. Clackamas County, 18 Or LUBA 188, 194-96 (1989).

Petitioner further argues that a county decision approving replacement of a nonconforming use cannot exceed the authority granted the county by ORS 215.130(5)-(9). Gibson v. Deschutes County, 17 Or LUBA 692 (1989); City of Corvallis v. Benton County, 16 Or LUBA 488 (1988). Petitioner points out that ORS 215.130(6) allows "replacement" of a nonconforming use only when such replacement is necessitated by fire, casualty or other natural disaster. Petitioner contends there is no evidence

or finding that such is the case here. In addition, petitioner further contends that although "replacement," as used in ORS 215.130(6), is not defined in the statute, appellate court decisions indicate that replacement means restoration to a former place, position or condition. Stephens v. Bohlman, 314 Or 344, 351, ___ P2d ___ (1992); Dunmire v. Oregon Mutual Fire Insurance, 166 Or 690, 114 P2d 1005 (1941); Piazza v. Clackamas Water District, 21 Or App 469, 535 P2d 554 (1975).

Petitioner's argument under this assignment of error is dependent on its contention that a lawfully established dwelling that has not been approved under LC 16.211(6) or (7) is a "nonconforming use" in the F-2 zone. The term "nonconforming use" is not defined in ORS 215.130(6)-(9) or elsewhere in ORS ch 215. The Oregon Supreme Court has stated that "nonconforming use" means "any use which does not conform with the zoning law." Polk County v. Martin, 292 Or 69, 71, 636 P2d 952 (1981). In addition, we have stated that a nonconforming use is a use which is contrary to provisions of a local government's comprehensive plan or land use regulations. Scott v. Josephine County, 22 Or LUBA 82, 88 (1991). Thus, it is the county's plan and code which determine whether an existing dwelling is a nonconforming use in the F-2 zone.[16]

[16]Petitioner is correct that in Miller v. City of Dunes City, supra, and Morse Bros., Inc. v. Clackamas County, supra, we determined that a lawfully

During the proceeding below, the county issued an order interpreting the LC to provide that the replacement of an existing dwelling in the F-2 zone is not replacement of a nonconforming use subject to the requirements of LC 16.251. Record 1159. The LC does not set out a definition of "nonconforming use." However, LC 12.251(1) (Verification of Nonconforming Use) identifies a nonconforming use as a use that was lawfully established "prior to the enactment of an ordinance restricting or prohibiting the use." It is clear the F-2 zone restricts new dwellings. LC 16.211(6) and (7). On the other hand, the F-2 zone allows "maintenance, repair or replacement of existing dwellings" as a permitted use. LC 16.211(2)(r). This is consistent with the county's interpretation that lawfully established dwellings that existed when the F-2 zone was applied are not nonconforming uses.

In addition, the county points out that it adopted LC 16.211(2)(r) to comply with the identical language in OAR 660-06-025(3)(p). In support of its interpretation, the county points to legislative history of this administrative rule provision indicating it was intended to allow local governments to make existing dwellings permitted uses in forest zones. Record 1159, 1181-83. In particular, a

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established existing use which would require local government approval of a variance or conditional use permit if the use were built under current regulations, is a nonconforming use. However, those decisions were based on analyses of the applicable local government code provisions, not on general principles of law regarding nonconforming uses.

memorandum by the DLCD director addressing the question of how the Goal 4 rules should treat replacement dwellings in forest zones discusses the problems local governments experience in treating existing dwellings as nonconforming uses and concludes:

> "[E]xisting dwellings should be given conforming status by listing their repair, maintenance, alteration and replacement as an outright [permitted] use, thus exempting these activities from ORS 215.130." Record 1183.

Based on the above, we agree with respondents that under the LC, replacement of an existing dwelling in the F-2 zone is not the replacement of a nonconforming use subject to the restrictions of ORS 215.130(6).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner contends the subject structure was abandoned from 1980 through the early spring of 1990. However, petitioner does not explain why such "abandonment" provides a basis for reversing or remanding the challenged decision.

To the extent petitioner's abandonment argument relates to its contention that the existing structure is a nonconforming use in the F-2 zone, we determine under the previous assignment of error that if the existing structure is a dwelling, it is not a nonconforming use in the F-2

zone.[17] To the extent petitioner is simply arguing that evidence of nonuse of the structure during 1980-1990 establishes that the structure is not a dwelling, we address petitioner's evidentiary challenge to the county's determination that the structure is a dwelling under the seventh assignment of error.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Clear Lake is the sole source of the domestic water provided by petitioner Heceta Water District. In October 1982, the county, at the request of petitioner and the City of Florence, adopted an ordinance establishing a moratorium on all plan amendments, zone changes, land divisions, new construction and mobile home permits for all property within the watershed of Clear Lake, including the subject property. In April 1983, at the request of the county, the Environmental Quality Commission (EQC) established a moratorium on new onsite waste disposal systems within the Clear Lake watershed. In September 1987, intervenor and several neighboring property owners filed a suit in federal court against petitioner, the county and the EQC, alleging the defendants deprived plaintiffs of their property without due process of law and denied plaintiffs equal protection of

[17]Petitioner does not contend the structure was a nonconforming use under county zoning regulations in effect prior to application of the F-2 zone.

the laws. Record 83.

On October 29, 1987, the county entered into a settlement agreement with the plaintiffs in the federal lawsuit. In that agreement, the county agreed to rescind its moratorium and assist the interested parties in resolving the issues raised in the complaint. The plaintiffs agreed to dismiss the county as a defendant, without prejudice and without costs, and not to seek attorneys fees against the county. Record 85. The county also agreed to the following:

> "Upon application of [a] landowner, the County shall review its zoning of the landowner's property within the Clear Lake Watershed, and shall upon resolution of the issues described in Plaintiff's Complaint, rezone the property, if appropriate, to recognize any changes resulting from the resolution of these issues." (Emphasis added.) Id.

As we understand it, petitioner contends the fact that the county entered into the above described settlement agreement, especially considering the provision quoted above, means that in this case petitioner was not provided the impartial tribunal to which it is entitled under Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973).[18]

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[18]Approximately one week after the petition for review was filed, petitioner mailed the Board a letter citing Horizon Construction, Inc. v. City of Newberg, 114 Or App 249, ___ P2d ___ (1992). The letter states petitioner intends to cite as additional argument in support of its sixth assignment of error "that there was undisclosed ex parte contact between the Board of County Commissioners and [intervenor, in view of the fact] that a settlement agreement had been entered into between the County and [intervenor]." The letter also contends the county's actions in this

Petitioner characterizes the above quoted portion of the settlement agreement as a promise to rezone intervenor's property. Petitioner argues that the existence of such an agreement establishes that the county improperly approved intervenor's application in this case "to buy civil peace," rather than on the basis of application of the correct legal standards.

The county argues the settlement agreement imposes no obligation on the county other than what is already imposed by state law. According to the county, the above quoted portion of the settlement agreement does not compel it to rezone the subject the property, but rather states only that the county will consider a rezoning application and approve a zone change "if appropriate," under applicable legal standards. In addition, the county points out the challenged decision is based on an application for a replacement dwelling, not a zone change, and therefore the settlement agreement is totally irrelevant.[19]

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regard violate ORS 227.180(3). Petitioner did not, however, file a motion to amend its petition for review.

Neither petitioner's sixth assignment of error nor the argument thereunder mention undisclosed ex parte contacts or assert a violation of ORS 227.180(3) as a basis for reversal or remand of the challenged decision. Petitioner has not requested, nor has this Board allowed it, to amend its petition for review. In these circumstances, it is not appropriate for us to consider the new arguments raised in petitioner's letter.

[19]In addition, intervenor argues that petitioner's challenge to the board of commissioner's impartiality was not timely made below, under Lane Manual (LM) 3.195, which requires challenges of bias or prejudgment on the part of the board of commissioners to be made not less than five days prior

In establishing actual bias or prejudgment on the part of a local decision maker, the burden is on petitioner to show the decision maker was biased or prejudged the application and did not reach its decision by applying applicable standards based on the evidence and argument presented. Heiller v. Josephine County, ___ Or LUBA ___ (LUBA No. 92-032, August 6, 1992), slip op 4-5; Oregon Worsted Company v. City of Portland, 22 Or LUBA 452, 454 (1991); Waite v. Marion County, 16 Or LUBA 353, 357 (1987); Oatfield Ridge Residents Rights v. Clackamas Co., 14 Or LUBA 766, 768 (1986).

The settlement agreement simply says the county will consider a rezoning application for the subject property, as it is required to do in any case. ORS 215.416(2). The settlement agreement is irrelevant to an application for a replacement dwelling on the subject property, and does not establish bias or prejudgment by the county decision maker.

The sixth assignment of error is denied.

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to a hearing before the board of commissioners. However, petitioner asserts it did not learn of the existence of the settlement agreement until after the hearing before the board of commissioners. Intervenor moves for an evidentiary hearing before this Board to introduce evidence establishing when petitioner first learned of the settlement agreement.

We are authorized to hold evidentiary hearings where there are disputed allegations of fact concerning unconstitutionality of the decision, ex parte contacts or procedural irregularities not shown in the record which, if proved, would warrant reversal or remand of the challenged decision. ORS 197.830(13)(b). Because, as explained in the text, the settlement agreement provides no basis for reversal or remand of the challenged decision, regardless of when petitioner first learned of it, intervenor's motion for evidentiary hearing is denied.

SEVENTH ASSIGNMENT OF ERROR

The hearings officer's decision on remand from the board of commissioners applies the interpretation of "dwelling" adopted by the board of commissioners, which we sustain under the first and second assignments of error, supra, to the evidence submitted in the previous evidentiary hearing before the hearings officer.[20] The hearings officer's decision on remand includes detailed findings and conclusions on the use and permanency of the subject structure. Record 49-51.

Petitioner's seventh assignment of error is "[Intervenor] Failed to Carry Burden of Proof."

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[20]The hearings officer's decision on remand states that the following "interpretive guidelines" are suggested by the board of commissioners' interpretation of the term "dwelling":

> "A dwelling must be designed or used exclusively for the occupancy of not more than one family.
>
> "The use of a dwelling may vary in scope from a 'residence' to a 'sleeping place.' A dwelling need not contain any particular type or level of housekeeping facilities.
>
> "Housekeeping facilities that are present need not be permanent or be used in a continuous, uninterrupted manner.
>
> "The level and type of housekeeping facilities [may] vary with the actual use of the structure.
>
> "The primary inquiry should focus on the permanency of the structure and whether it was used as a residence or sleeping place." Record 48-49.

As previously mentioned, no party contends the hearings officer's "interpretive guidelines," or the hearings officer's decision on remand, misconstrues the interpretation of "dwelling" adopted by the board of commissioners.

Petitioner's entire argument under this assignment of error is the following:

> "[Intervenor] failed to establish that the alleged cabin was a dwelling. [Petitioner] relies upon the arguments set forth in Assignment of Error No. 5 [(Abandonment)] in support of this contention,[21] and the evidence set forth in the 'Supplemental Statement of Facts' below." Petition for Review 20-21.

The Supplemental Statement of Facts following the above quoted argument consists of 27 pages in which petitioner poses 15 factual questions which it considers critical to determining whether the structure on the subject property is a dwelling, and presents a detailed discussion of the evidence in the record bearing on these questions.[22]

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[21]Petitioner's argument under the fifth assignment of error states that between 1980 and 1990, intervenor filed two land use applications listing the subject property as "vacant," and tax assessor's records indicated no improvements of any value. The argument also maintains that overwhelming evidence in the record establishes that between 1980 and 1990, the subject structure contained "no functioning toilet, sink, water heater, cooking facility, heating facility, or sleeping facility." Petition for Review 18.

[22]The following are examples of the 15 questions posed by petitioner:

> "Did the alleged 'dwelling' ever have four walls?"
>
> "Did the alleged 'dwelling' have a door in the existing doorway?"
>
> "Did the alleged 'dwelling' have a reasonably intact floor?"
>
> "Was the plumbing in the alleged 'dwelling' hooked up or attached to the rough plumbing in the walls?"
>
> "Did the alleged 'dwelling' contain sleeping facilities on a temporary or a permanent basis?"

Petitioner does not identify in its argument the legal standard petitioner contends is violated by the county's decision under this assignment of error. However, in the "Supplemental Statement of Facts," petitioner states "the evidence is overwhelming that the derelict 3-sided shed does not meet the Board of County Commissioners re-definition of a dwelling." Petition for Review 29. Giving petitioner the greatest possible latitude, we treat this assignment of error as contending the county's decision that the subject structure is a "dwelling" is not supported by substantial evidence in the whole record. ORS 197.835(7)(a)(C).

We have a further difficulty in reviewing this assignment of error in that petitioner's argument does not relate its contentions or summaries of evidence on various points to either the county's interpretation of "dwelling" or the findings of fact in the hearings officer's decision on remand. In many instances, petitioner appears to be asking us to reweigh the evidence in the record and substitute our judgment for the county's. This we may not do. 1000 Friends of Oregon v. Marion County, 116 Or App 584, ___ P2d ___ (1992).

The Supreme Court has held that what this Board must decide in reviewing a substantial evidence challenge is

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"Was there any evidence that anyone lived in the alleged 'cabin,' either permanently or as a vacation type cabin?" Petition for Review 21-22.

"whether, in light of all evidence in the record, the [local government's] decision was reasonable." Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988). For a decision to be reasonable, it need not be the decision that this Board would have made based on the same evidence. Id. While this Board must consider all relevant evidence cited by the parties, including evidence that detracts from the challenged decision as well as evidence that supports it, it cannot reweigh the evidence. 1000 Friends of Oregon v. Marion County, supra; Eckis v. Linn County, 110 Or App 309, 313, 821 P2d 1127 (1991). Where this Board concludes a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, it defers to the local government's choices between conflicting evidence and of reasonable conclusions to be drawn from the evidence. Angel v. City of Portland, 22 Or LUBA 649, 659, aff'd 113 Or App 169 (1992); Wissusik v. Yamhill County, 20 Or LUBA 246, 260 (1990); Stefan v. Yamhill County, 18 Or LUBA 820, 838 (1990); Douglas v. Multnomah County, 18 Or LUBA 607, 617 (1990).

We are aided in our review by the fact that intervenor has gone through the hearings officer's decision on remand finding by finding, citing evidence in the record that supports each finding. Intervenor-Respondent's Brief 29-34. We have reviewed the evidence cited by intervenor, and the evidence in the record cited by petitioner that is relevant

to the hearings officer's findings. We find that based on this evidence, a reasonable person could conclude, as did the hearings officer, that the subject structure has been "subject to a marginal but regular use as sleeping quarters" and that such housekeeping facilities as were available at those times were consistent with that level of use and, therefore, that the subject structure constitutes a "dwelling," as defined under the LC. Record 50-51.

The seventh assignment of error is denied.

The county's decision is affirmed.