BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KIM EVANS, Petitioner, vs. MULTNOMAH COUNTY, Respondent, and ARNOLD ROCHLIN, Intervenor-Respondent.	LUBA No. 96-198
	FINAL OPINION AND ORDER

Appeal from Multnomah County.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioner.

Sandra N. Duffy, County Counsel, Portland, filed a response brief. Laurie Craghead argued on behalf of respondent.

Arnold Rochlin, Portland, filed a response brief and argued on his own behalf.

HANNA, Judge; GUSTAFSON, Chief Judge, participated in the decision.

AFFIRMED 10/07/97

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioner appeals the county's denial of (1) a conditional use permit for a nonforest dwelling in the county's Commercial Forest Use Zone, and (2) a variance to reduce the required building setback.

MOTION TO INTERVENE

Arnold Rochlin, (intervenor) moves to intervene in this proceeding on the side of the county. Petitioner objects to the motion. The motion to intervene is discussed in the first assignment of error, and is allowed.

FACTS

Petitioner proposes a nonforest dwelling on a 20-acre parcel located in the county's Commercial Forest Use Zone. The proposed dwelling is to be located on an "L" shaped parcel approximately 50 feet from both the north and the west property lines.

Petitioner submitted her application on July 12, 1995. On June 28, 1996 the county hearings officer signed a decision denying petitioner's application because it failed to comply with the standards of Multnomah County Code (MCC) 11.15.2074(A)(1) and (4) and a variance criterion, MCC 11.15.8505(A)(2). The decision was submitted to the clerk of the Board of County Commissioners (commissioners) on July 3, 1996 and mailed on July 11, 1996. It included a corrected notice stating that the last day to appeal was July 22, 1996, and that the decision would be reported to

the commissioners on July 25, 1996.[1] Petitioner appealed the hearings officer's decision to the commissioners. On July 25, 1996, the commissioners decided to hear petitioner's appeal under Resolution 95-55, which requires a de novo hearing of land use appeals to the commissioners.[2] On July 25, 1996, the commissioners notified petitioner of their decision to consider the appeal and advised that the review hearing would be conducted de novo as required by

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[1]Because the county failed to serve notice of the decision on fourteen of the 34 persons who testified, a corrected notice of decision was issued extending the deadline to appeal from July 13, 1996 to July 22, 1996.

[2]Resolution 95-55 states, in pertinent part:

> "1. Until the Board takes action on a report from the Planning Director, land use appeals reported to the Board after this Resolution is adopted will be conducted in accord with the procedures set forth in Attachment A to this resolution;
>
> "2 The Planning director will notify parties to appeals about this change[.]

Attachment A states, in pertinent part:

> "1. When an appealed decision is reported to the Board, the Board shall set a date and time for the appeal hearing.
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> "2. The scope of review of each appeal shall be de novo, as that term is used in Section 11.15.8270 of the Zoning Code. The record established at the Hearings Officer level, as well as the Officer's Findings and Conclusions, shall be made available to the Board prior to the appeal hearing. The record shall also be available at the hearing itself. However, the parties shall be permitted to introduce new evidence (i.e. evidence not already in the Record) relevant to the case during the hearing, subject to the time limits set by the Board. Evidence can consist of oral statements, written reports, studies or other documents, photographs, slides and similar material.
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> "* * * * *"

Resolution 95-55.

At the review hearing before the commissioners, intervenor appeared for the first time. The commissioners determined that, under the county code, intervenor was a proper party and had standing to appear. The commissioners affirmed the hearings officer's decision, but modified his findings and conclusions, adopting those portions that did not address the application of MCC 11.15.2052(A)(3)(c)(ii) (the fourth assignment of error) and the applicability of Goal 5 (the fifth assignment of error).

This appeal followed.

PROCEDURAL ASSIGNMENTS OF ERROR

Petitioner's first three assignments of error allege procedural errors that prejudiced petitioner's substantial rights.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that, under MCC 11.15.8270(E), intervenor was not a proper party before the commissioners, and therefore the commissioners should not have considered or relied on his testimony and evidence in making their decision. Additionally, petitioner argues that because intervenor was not a proper party before the commissioners, he does not have standing to intervene in this proceeding.

MCC 11.15.8270(E) states:

> "The Board may hear the entire matter de novo; or it may admit additional testimony and other evidence without holding a de novo hearing if it is satisfied that the additional testimony or other evidence could not reasonably have been

> presented at the prior hearing. The Board shall, in making such decision, consider:
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> "(1) Prejudice to parties;
>
> "(2) Convenience or availability of evidence at the time of the initial hearing;
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> "(3) Surprise to opposing parties;
>
> "(4) The competency, relevancy and materiality of the proposed testimony or other evidence."

Petitioner argues that MCC 11.15.8270(E)

> "requires 'new' participants to present evidence and the Board to find a good reason why they failed to appear and participate earlier in the process. There is no evidence directed towards this standard nor any finding made by the Board that would justify the participation of and submission of new testimony by [intervenor] for the first time before the Board of Commissioners.
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> "* * * * *
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> "The review process was altered by the Board to favor opponents, including [intervenor's], participation in the appeal and substantially prejudiced petitioner. The respondent adopted much of [intervenor's] testimony and written argument as the basis for its order." Petition for Review 14-15.

Intervenor responds correctly that MCC 11.15.8270(E) regulates the content of materials that may be presented to the commissioners, and does not address standing before the commissioners. Additionally intervenor explains that it is MCC 11.15.8225(A)(2) that allows him to be a party to an "action proceeding," which is the type of proceeding at

issue here.[3]

MCC 11.15.8270(E) does not prevent the commissioners from accepting evidence or argument from intervenor at the de novo review hearing. Because intervenor appeared below at the review hearing, intervenor has standing to appear at LUBA. OAR 661-10-050.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the commissioners took action on issues that were not properly before them, stating:

> "The [commissioners] did not order review within the ten day time period allowed it by [MCC] 11.15.8260(a), and therefore, the Hearings Officer decision became final with respect to any issues not timely appealed.
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> "Only petitioner's Notice of Review was timely filed with the [commissioners]. It follows, therefore, that the scope of review was limited to those issues raised by petitioner in her Notice of Review. The [commissioners] reviewed and reversed the Hearings Officer on issues that were not appealed by petitioner to the detriment of petitioner.
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> "* * * * *
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> "In this matter, the decision of the Hearings Officer was submitted to the Board Clerk on July 3, 1996. The last day to appeal the decision or order review by Board motion would have been July

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[3]MCC 11.15.8225(A)(2) describes persons who are parties to an action proceeding, and states:

> "Other persons who demonstrate to the approval authority at its hearing, under the Rules of Procedures, that they could be aggrieved or have interests adversely affected by the decision."

> 13, 1996. Because of an error by the County planning staff in delivering the notice, the last day to appeal was extended to July 22, 1996. Petitioner filed a Notice of Review on July 12, 1996. The [commissioners] did not [o]rder a review of the Hearings Officer decision until July 25, 1996, after the extended ten day period for appeal had expired. Neither the County Planning Department, nor any opponent filed a Notice of Review to appeal the Hearings Officer decision. Because the [commissioners were] not timely in ordering review of the Hearing Officer decision and the County Planning Department did not appeal the Hearing Officer decision, the only timely and effective appeal was the Notice of Review submitted by petitioner." Petition for Review 15-16.

Petitioner's argument rests on the application of MCC 11.15.8260(A), which states:

> "Decisions of the Planning Commission or the Hearings Officer shall be final at the close of business on the tenth day following submittal of the written decision to the Clerk of the Board under MCC .8255, unless:
>
> "(1) A Notice of Review from a party is received by the Planning Director within ten days after the decision has been submitted to the Clerk of the Board under MCC .8255; or
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> "(2) The Board, on its own motion, orders review under MCC .8265."[4]

In Forest Park Estate v. Multnomah County, 20 Or LUBA 319, 325 (1990), we had occasion to consider the application of MCC 11.15.8260(A), and stated:[5]

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[4]In some instances the code and the parties omit the first four digits of the code. The four digits omitted in all references in this appeal are "11.15."

[5]MCC 11.15.8260(A) has not been amended since Forest Park Estate v. Multnomah County was decided.

> "Under MCC 11.15.8260(A), a planning commission decision becomes final ten days after being submitted to the county clerk, unless either of two events occurs. One event is the filing of a notice of review by a party within ten days after the planning commission decision is submitted to the county clerk. MCC 11.15.8260(A)(1). The other event is the board of commissioners ordering review in accordance with MCC 11.15.8265. MCC 11.15.8265(A)(2). In contrast to MCC 11.15.8260(A)(1), there is no requirement in MCC 11.15.8265(A)(2) (or MCC 11.15.8265) that a board of commissioners' order of review be adopted within ten days after the planning commission decision is submitted to the clerk.[6]"
>
> _____
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> "[6]* * * Under this interpretation, after a planning commission decision is filed with the county clerk, it simply cannot definitively be determined to be final until ten days have elapsed without the filing of a notice of review by a party and the board of commissioners fails to order review at its next meeting on planning and zoning matters, or at the following meeting, if the board of commissioners specifically continues the matter. * * *"

Petitioner has not demonstrated that the commissioners improperly conducted its review hearing or that they took action on matters that were not properly before them.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner contends that the commissioners' decision to conduct a de novo review of the hearings officer's decision deprived petitioner of the procedural protections of MCC 11.15.8270 as well as the due process protections of the United States Constitution. Petitioner contends that she was the only party to appeal the hearings officer's decision

and that she requested the scope of review be limited to the record before the hearings officer. Thus, petitioner reasons, the county was required to limit the scope of review as petitioner requested. Petitioner argues that Resolution 95-55 is not the equivalent of legislation and cannot be used to alter the protections provided by MCC 11.15.8270.[6]

The county responds:

> "Petitioner claims that [MCC 11.15.8270(E)] allows the [commissioners] to have a de novo hearing only if evidence could not have been presented at the prior hearing. * * * With this, Petitioner ignores the semi-colon after the first de novo. The [criterion] Petitioner relies on applies only to a non-de novo hearing in which the [commission] admits additional testimony. * * * The second sentence requires only that, when deciding whether or not to hold a hearing de novo, the [commissioners] consider the factors that follow.
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> "* * * * *
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> "* * * The [commission] cited MCC 11.15.8260 and .8265 for its authority [to] review all issues on the [commissioners'] own motion. * * * MCC 11.15.8270 provides the [commission] with authority to hold a de novo hearing. The Resolution serves as public notice that the [commission] will hold all hearings de novo. * * * On July 25, 1996, at a public meeting, the [commission] voted to hear the motion de novo. * * * On August 7, 1996, Respondent also sent Petitioner the NOTICE OF DE NOVO HEARING. * * * Furthermore, Petitioner participated in the August 7, 1996 hearing and was able to submit testimony until September 18, 1996, three weeks after the de novo hearing." County's Brief 15-16.

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[6]MCC 11.15.8270(E) is set forth in full, in the first assignment of error.

The county's explanation of its process in this case is consistent with the process set forth in MCC 11.15.8270. Petitioner has not established that the commissioners' decision to conduct a de novo review hearing deprived her of any procedural protection provided by MCC 11.15.8270. Petitioner has not sufficiently developed for our review a legal argument that she was deprived of the due process protections of the United States Constitution, and we will not develop that argument for her. Joyce v. Multnomah County, 23 Or LUBA 116, 118, aff'd 114 Or App 244 (1992); Torgeson v. City of Canby, 19 Or LUBA 511, 519 (1990); Van Sant v. Yamhill County, 17 Or LUBA 563, 566 (1989).

The third assignment of error is denied.

SUBSTANTIVE ASSIGNMENTS OF ERROR

Petitioner argues in the fourth and fifth assignments of error that the county misconstrued the applicable law. In the sixth and seventh assignments of error, petitioner contests the county's conclusion that petitioner failed to carry the burden of proof necessary to establish that her application met the applicable criteria. In the eighth assignment of error, petitioner argues that denial of a variance request is contrary to law and is not supported by substantial evidence in the whole record.

We review these assignments of error mindful that the burden of proof lies with the applicant.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the county should have directly

applied ORS 215.750(1)(c) and the identical implementing rule, OAR 660-06-027(1)(d)(C) rather than applying the county's more restrictive land use regulation that predated the enactment of ORS 215.750.[7] Petitioner argues that the planning staff's reliance on Dilworth v. Clackamas County, 30 Or LUBA 279 (1996) to deny the application is misplaced. In Dilworth we concluded that the county is not precluded from regulating the establishment of dwellings more stringently than is required under ORS 215.750. Petitioner attempts to distinguish this appeal from Dilworth by contending that ORS 197.646 was not raised in Dilworth but is raised as the central issue here.

ORS 197.646 requires:

> "(1) A local government shall amend the comprehensive plan and land use regulations to implement new or amended statewide planning goals, commission administrative rules and land use statutes when such goals,

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[7]ORS 215.750(1) provides, in relevant part:

> "In western Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:
>
> "* * * * *
>
> "(c) Capable of producing more than 85 cubic feet per acre per year of wood fiber if:
>
> "(A) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract; and
>
> "(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels."

> rules or statutes become applicable to the jurisdiction. Any amendment to incorporate a goal, rule or statute change shall be submitted to the department as set forth in ORS 197.610 to 197.625.
>
> "* * * * *
>
> "(3) When a local government does not adopt comprehensive plan or land use regulation amendments as required by subsection (1) of this section, the new or amended goal, rule or statute shall be directly applicable to the local government's land use decisions. The failure to adopt comprehensive plan and land use regulation amendments required by subsection (1) of this section may be the basis for initiation of enforcement action pursuant to ORS 197.319 to 197.335."

The county responds:

"The County's regulation is the 'template test' delineated in MCC 11.15.2052(3)(c). A non-forest dwelling in a CFU zone must meet the standard of five currently existing homes within a 160 acre square which is aligned with section lines and which falls on the lot and at least all or part of eleven other existing lots. MCC 11.15.2052(3)(c). The administrative rule and the corresponding ORS 215.750(1)(c) differ in that the lots and the homes must have existed on January 1, 1993, only three homes are required, those homes can be anywhere on the eleven lots, and the square can have any orientation. OAR 660-06-027(1)(d)(C).

"The statute relied on by Petitioner and the Hearings Officer to negate the County's 'template test,' ORS 197.646(3), states, 'When a local government does not adopt comprehensive plan or land use regulation amendments as required by subsection (1) of this section, the new or amended goal, rule or statute shall be directly applicable to the local government's land use decision.' Nothing in the statute says that the County's ordinance does not also apply." Respondent's Brief 18.

We agree with the county that ORS 197.646 does not preclude a local government from imposing a regulation that is more restrictive than what is required by ORS 215.750 before that regulation is reviewed by Department of Land Conservation and Development. Gisler v. Deschutes County, ___ Or App ___, ___ P2d ___ (September 10, 1997), slip op 7.

Moreover, we disagree with petitioner's implicit argument that the county does not have authority to impose standards in addition to those set forth in ORS 215.750. ORS 215.750(1) introduces the template dwelling standards, stating "[i]n western Oregon, a governing body of a county or its designate may allow the establishment of a single family dwelling * * *." (Emphasis added.) The language of the statute provides for discretionary approval by the governing body. This language may be contrasted with the common introductory language of ORS 215.213(1) and 215.283(1), which states "the following uses may be established in any area zoned for exclusive farm use." ORS 215.213(1) and 215.283(1) do not mention discretionary approval by the governing body. In Brentmar v. Jackson County, 321 Or 481, 900 P2d 1030 (1995), the court explained the application of the introductory phrases used in 215.213 and 215.283:

> "Under ORS 215.213(1) and 215.283(1), a county may not enact or apply legislative criteria of its own that supplement those found in ORS 215.213(1) and 215.283(1). Under ORS 215.213(2) and 215.283(2), however, a county may enact and apply legislative

> criteria of its own that supplement those found in ORS 215.213(2) and 215.283(2)."

The court's rationale is based on the introductory phrase in ORS 215.213(2) and 215.283(2) that refers to ORS 215.296(10) wherein counties are granted authority to establish additional standards or impose conditions to insure conformance with the additional standards. ORS 215.750 establishes a similar qualification when it states "subject to the approval of the governing body." The text and context of the statute establish that a county may impose standards in addition to those in ORS 215.750. See Lindquist v. Clackamas County, 146 Or App 7, ___ P2d ___ (1997) (holding, in a nonfarm dwelling case, that if the text and context of statute are conclusive, it is not necessary to analyze legislative history).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the county should have directly applied Goal 5 and its implementing rules rather than applying the county's land use regulations that implement Goal 5. Petitioner explains the history of the adoption of the county's regulations that implement Goal 5.

> "In February, 1995, LCDC [the Land Conservation and Development Commission] issued reports declaring County Ordinances Nos. 797 and 801 among others, deficient as not meeting the requirements of Goal 5. In response to this, Multnomah County passed Ordinance No. 832 amending Section 11.15.6400 et seq. of the Multnomah County Zoning Code. According to Ordinance No. 832, the County readopted Ordinance No. 801, which included MCC

> 11.15.6426. That provision established the Significant Environmental Concern overlay districts and the SEC-h (wildlife habitat) provision.
>
> "Ordinance No. 801 implemented the previously adopted Ordinance 797 (the '**West Hills Reconciliation Report**'). These standards, which include SEC-h (wildlife habitat) standards, remained unacknowledged at all relevant times herein. It did not become effective until after the application was submitted."[8] Petition for Review 31 (bold in original).

Additionally, petitioner contends that Ordinance No. 832, was signed on September 7, 1995 and did not become effective until October 7, 1995, after her July 12, 1995 application was submitted. Petitioner alleges that because the county's regulations implementing Goal 5 were not acknowledged on the application date, under ORS 197.625(3)(a) and (b) they were not applicable to the application.

In its brief, the county responds that under ORS 197.625 both the county's regulations and the statewide planning goals and implementing rules apply to an application. The county contends that Ordinance 797 (West Hills Reconciliation Report) and the implementing regulation, Ordinance No. 801, were adopted in 1994, and that ORS 197.625 does not preclude their being effective before they are acknowledged.

The record is confusing as to what the county decided with respect to Goal 5 issues and why it decided as it did.

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[8]Unfortunately none of the parties reconciles the ordinance adoption numbers with the code numbers.

Initially the county staff report applied the SEC-h provisions. The challenged decision adopts the county counsel's report which explains the county's application of its Significant Environmental Concern provisions:

> "The County concurs with the analysis done by [intervenor] in his submittal regarding this issue. [Intervenor] and [petitioner's attorney] correctly note that the general criteria found in MCC 11.15.6420 for the Significant Environmental Concern (SEC) overlay is applicable to SEC applications. The reason that they did not do so is that at the time of the application the SEC code had been newly drafted. When Staff began applying the SEC code, they were not applying the general criteria to the areas that had subdistrict designations (eg. SEC-h [wildlife] * * *), i.e. they did apply the general criteria to SEC overlay areas that did not have a subdistrict designation. * * * Since this application was processed, and since the original staff report was written, the Staff has begun applying the general criteria to ALL SEC applications, with or without subdistricts and any new application would be required to meet both the general and specific criteria.
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> "The application of the general SEC criteria could be anticipated to provide additional reasons for denial of the application. Record 115 (Emphasis in original).

The staff report includes both the applicant and staff responses to each element of the West Hills Reconciliation Report wildlife habitat standards and MCC 11.15.6426. The staff report concludes:

> "The application does not demonstrate that there is a minimum departure from the standards required to allow the use because of physical limitations

to the 20 acre parcel."[9] Record 70.

In summary, the hearings officer concluded that ORS 197.625 precluded application of MCC 11.15.6420 and 11.15.6424, and determined that the application met the requirements of Goal 5 and the implementing rules. On appeal, the commissioners reversed the hearings officer's Goal 5 conclusion, adopted the staff report, the county counsel's memo and the findings and conclusions contained in letters submitted by intervenor dated September 13, 1996 and September 17, 1996.[10] There is no indication that the challenged decision applies Goal 5 and the implementing rules to the application.[11]

To determine if the county applied the correct standard, we must determine which regulations are applicable to the application and whether the city applied those regulations. We agree with the county that, under ORS 197.625, both the county's regulations and the land use

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[9]We do not understand how the staff conclusion explains the county's decision that the application does not meet the requirements of MCC 11.15.6426 and the West Hills Reconciliation Report wildlife habitat standards. Nonetheless, it is in part the basis for the challenged decision.

[10]However, intervenor's September 13, 1996 letter does not make any reference to or discuss Goal 5 issues.

[11]Petitioner argues that only Goal 5 and the implementing rules apply to the application. The staff report applies only the SEC-h element of MCC 11.15.6426. The hearings officer applied only Goal 5 and the implementing rules. The commissioners reversed that decision, and instead adopted the staff report and other documents that apply only MCC 11.15.6400 and 11.15.6426.

goals and implementing rules apply to the application.[12] Under the county's charter and ordinance provisions, MCC 11.15.6400 and 11.15.6426, as adopted in Ordinance Nos. 797 and 801, became effective in 1994, before the application was submitted on July 12, 1995.[13] ORS 197.625(3)(a). Thus, MCC 11.15.6400 and 11.15.6426, as adopted in Ordinance Nos. 797 and 801 are applicable to the application. We agree

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[12]ORS 197.625(3) provides, in relevant part:

> "(a) Prior to its acknowledgment, the adoption of a new comprehensive plan provision or land use regulation or an amendment to a comprehensive plan or land use regulation is effective at the time specified by local government charter or ordinance and is applicable to land use decisions, expedited land divisions and limited land use decisions if the amendment was adopted in accordance with ORS 197.610 and 197.615 unless a stay is granted under ORS 197.845.
>
> "(b) Any approval of a land use decision, expedited land division or limited land use decision subject to an unacknowledged amendment to a comprehensive plan or land use regulation shall include findings of compliance with those land use goals applicable to the amendment.
>
> "(c) The issuance of a permit under an effective but unacknowledged comprehensive plan or land use regulation shall not be relied upon to justify retention of improvements so permitted if the comprehensive plan provision or land use regulation does not gain acknowledgment.
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> "* * * * *" (Emphasis added.)

[13]ORS 215.428(3) provides:

> 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 the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted. (Emphasis added.)

with petitioner that the amendments to MCC 11.15.6400 and 11.15.6426 adopted by Ordinance No. 832, which became effective on October 7, 1995, are not applicable to the application. Because MCC 11.15.6400 and 11.15.6426, as adopted in Ordinance Nos. 797 and 801 were not acknowledged on the date of application, under 197.625(3)(b), Goal 5 and the implementing rules are also applicable to the application. Consequently, failure to comply with either the county code provisions or the goal and rule provisions would result in denial of the application. Because the county denied petitioner's application under its code provisions, it is not necessary for us to require the county to evaluate the application under Goal 5 and the implementing rules.[14]

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that:

> "Respondent's finding that petitioner did not meet the standards of MCC 11.15.2074(A)(1) is not supported by and is contrary to substantial evidence in the record." Petition for Review 32.

Petitioner argues that the hearings officer incorrectly relied on a dwelling site other than that chosen by petitioner as having less impact on nearby or adjoining forest or agricultural lands.

MCC 11.15.2074(A)(1) provides:

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[14]We do not find any indication in the challenged decision that the county applied Goal 5 and the implementing rules to the application.

"The dwelling shall be located such that:

> "It has the least impact on nearby or adjoining forest or agricultural lands and satisfies the minimum yard and setback requirements of .2058(C) through (G)."[15]

With respect to this criterion, the commissioners adopted as their own the hearings officer's findings:

> "The Hearings Officer finds that this criteria requires that a dwelling or structure must be located such that is has the least impact on nearby or adjoining forest or agricultural land.
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> "The Hearings Officer finds that the proposed dwelling, if it is located in the northwest corner as requested by applicant, will not have the least impact on nearby forest lands because 50 feet of the secondary firebreak would need to be located off-site, within adjoining forest land. Although the Hearings Officer has previously found that the impact to this adjoining forest land from the fire break would be minimal, there is clear evidence in the record demonstrating that by locating the dwelling in the central portion of the site, where setback variances would not be required and where all fire breaks could be accommodated on site, that such placement would have less impact on adjoining forest land. Therefore, the Hearings Officer finds that this criteria has not been met. Record 193 (Emphasis in original).

Petitioner argues:

> "The County's adoption of the Hearing's Officer's conclusion is fatally flawed for several reasons.

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[15]For purposes of this proposal, MCC 11.15.2058(C) through (G) requires a 200-foot set back from the frontage on a county maintained road from the centerline. Petitioner does not discuss whether she has met the setback requirements. However, petitioner does not dispute that the proposed location of the dwelling is approximately 50 feet from both the north and the west property lines. The county argues that, on this basis alone, petitioner has not met the requirements of MCC 11.15.2074(A)(1). Because petitioner does not argue that she meets this criterion, it is not necessary for us to make this determination.

> It presumes that locating a home in the central portion of the property exists as a reasonable probability. Such is not the case and there is no evidence in the record, clear or otherwise, that would establish such an option exists Uncontroverted evidence in the record directly rebuts this presumption and thus contradicts the conclusion." Petition for Review 33.

Petitioner argues that the central property location is not desirable and should not be considered as an alternative for reasons including that: (1) it is steeply sloped, presenting significant concerns for site development; (2) steeply sloped areas require a 100-foot fire break rather than the 30-foot break required for level ground; (3) removing vegetation for a larger fire break could waste trees that are growing on the site and would result in soil instability; and (4) the home would be impacted by neighboring mining activities. Petitioner points to numerous places in the record where she contends that she raised these concerns with the county.

The evidence pointed to by petitioner that is relevant to consideration of the adequacy of alternative sites consists largely of reports prepared by petitioner's consultants describing why potential central and south alternative site locations are much less desirable than the site chosen by petitioner. Petitioner's planning consultant prepared several reports including a comprehensive 12-page report to rebut the county's conclusion that the proposed dwelling could be sited in an alternative location. The report includes an opening summary, stating:

> "This report, in combination with other information previously submitted on behalf of the applicant, demonstrates that the dwelling location requested by the applicants is the only location on the subject property that is suitable for residential development, considering the configuration of the parcel, the slopes and drainage features on the parcel, potential interference with adjacent and on-site resource uses, and minimization of fire hazards." Record 337.

The following statements taken from the evaluation of the central site alternative are representative of the consultant's evaluation of both site alternatives:

> "Both alternative homesites contain slopes in excess of 30%, and are adjacent to designated slope hazard areas containing slopes in excess of 40%. These steep slopes present significant concerns regarding site development. In order to construct a dwelling at either location a large amount of cut and fill would have to occur, in addition to the establishment of excessive lengths and heights of retaining walls. * * *
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> "The excessive slopes on the south, southeast and southwest sides of these alternative homesites require the extension of the primary fire break 100 feet, instead of 30 feet, from the structure. The removal of vegetation required by the primary fire break, for such an extensive area, may increase soil instability problems within the slope hazard area, thereby increasing potential threats to the homesite. An additional threat to soil stability within this area is the existence of drainage channels to the east and west of this portion of the property.
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> "* * * The combination of drainage channels, steep slopes and required vegetation removal makes alternative homesites within the central portion of the site, not only hazardous, but impracticable due to soil disturbance and interference with forestry and mineral/aggregate resources." Record 339.

Additionally, petitioner's architect concludes:

> "You have an opportunity to site your dwelling down in the damp, dark hole or on the brow of a sunny hill with a commanding southern view. Obviously, those who presume to make this decision for you have never walked on your property. If they had, there would be no question. You have selected the only buildable site." Record 327.

The county contends that the hearings officer considered petitioner's evidence of the alternative sites and found that the dwelling could be located at an alternative site.

As an initial point, petitioner appears to attempt to shift the burden to the county by alleging that the county must have substantial evidence for its conclusion that petitioner did not meet the standards of MCC 11.15.2074(A)(1). It is petitioner's burden to establish that she meets the standards of MCC 11.15.2074(A)(1). It is not the county's burden to establish that petitioner fails to meet the standards of MCC 11.15.2074(A)(1). The Court of Appeals discussed the difficulty in applying the substantial evidence standard to a denial, explaining:

> "When a local government has denied a requested land-use change, the concept of reviewing for substantial evidence to sustain the denial presents difficulties. In a local land-use proceeding the proponent of change has the burden of proof. Could not the local government deny a land-use change on the sole basis that the proponent did not sustain his burden of proof because his evidence was not credible? If so, in what sense would we be expected to say that denial was supported by substantial evidence?
>
> "* * * * *

> "[A] denial is supported by substantial evidence within the meaning of ORS 34.040(3) unless the reviewing court can say that the proponent of change sustained his burden of proof as a matter of law."[16] Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d 1241 (1979) (Footnotes omitted).

Petitioner has not shown that the dwelling could not be located at an alternative site. Thus, there is another potential location for the dwelling. Accordingly, petitioner has not demonstrated that the standard, MCC 11.15.2074(A)(1), is satisfied as a matter of law. Lyon v. Linn County, 28 Or LUBA 402, 406 (1994).

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner argues that:

> "Respondent's finding that petitioner did not meet the standards of MCC 11.15.2074(A)(4) is not supported by and is contrary to substantial evidence in the record." Petition for Review 36.

Again, petitioner appears to attempt to shift the burden to the county by alleging that the county must have substantial evidence for its conclusion that petitioner did not meet the standards of MCC 11.15.2074(A)(1). Again, it is petitioner's burden to establish that she meets the standards of MCC 11.15.2074(A)(4).

MCC 11.15.2074(A) provides, in relevant part

"The dwelling shall be located such that:

---

[16]ORS 34.040(3) requires substantial evidence in a writ of review proceeding.

> "* * * * *
>
> "(4) Any access road or service corridor in excess of 500 feet in length is demonstrated by the applicant to be necessary due to physical limitation unique to the property and is the minimum length required[.]"

With respect to this criterion, the commissioners adopted as their own the hearings officer's findings:

> "In this case, an access road in excess of 500 feet is necessary due to the fact that the site is more than 500 feet away from Skyline Boulevard. The distance to Skyline Boulevard constitutes a physical limitation unique to the property.
>
> "Although this access road, in its present condition, currently provides access to this property as well as other properties beyond this one, the question is whether the proposed length of the access road is the minimum length required to serve a dwelling on the site. The Hearings Officer finds that since the applicant could locate a dwelling in the central or southern portions of the site and thereby reduce the length of the access road, the applicant has not demonstrated that the access road is the minimum length required. Therefore, this [criterion] has not been met." Record 194-95.

Petitioner argues again that the preferred location for the dwelling is in the northern corner of the property. Petitioner then sets forth many of the same reasons as discussed in the sixth assignment of error for arguing that the other locations suggested by the hearings officer are untenable.

As we discussed in the sixth assignment of error, petitioner has not shown that the dwelling could not be located at an alternative site. There is another potential location for the dwelling. Accordingly, petitioner has not

demonstrated that MCC 11.15.2074(A) is satisfied as a matter of law. Id.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioner argues that the county's decision that petitioner did not meet the variance criteria of MCC 11.15.8505(A)(2) is contrary to law and is not supported by substantial evidence in the whole record.[17]

MCC 11.15.8505 sets forth the county's variance approval criteria. MCC 11.15.8505(A) states, in pertinent part:

> "The approval Authority may permit and authorize a variance from the requirements of this Chapter only when there are practical difficulties in the application of the Chapter. A Major Variance shall be granted only when all of the following criteria are met.
>
> "* * * * *

---

[17]Petitioner states that she applied for a variance from firebreak and setback requirements discussed of MCC 11.15.2074(A)(2) which states, in relevant part:

> "The dwelling shall be located such that:
>
> > "* * * * *
> >
> > "(2) Forest operations and accepted farming practices will not be curtailed or impeded[.]"

It appears from the text of petitioner's argument that, notwithstanding petitioner's identification of MCC 11.15.2074(A)(2) as the ordinance that is the subject of this assignment of error, it is actually the second portion of MCC 11.15.2074(A)(1), mentioned in note 12 in the sixth assignment of error that is the subject of this assignment of error. We will address whether petitioner has met her burden with respect to gaining a variance from the second portion of MCC 11.15.2074(A)(1).

> "(2) The zoning requirement would restrict the use of the subject property to a greater degree than it restricts other properties in the vicinity or district."

Petitioner argues:

> "[I]n analyzing whether the zoning requirement requiring 200 foot setbacks restrict this property to a greater degree than it does others in the vicinity or district, rather than comparing the subject property with other property in the vicinity or district, the respondent made its comparison based upon analyses of various locations solely within the boundaries [of] the subject property. Such internal site evaluation is not what the standard in MCC .8505(A)(2) requires.
>
> "* * * * *
>
> "Petitioner has clearly demonstrated that enforcement of the 200 foot setback requirement would restrict the use of other property in the area or district.
>
> * * * * *
>
> "Evidence in the record clearly demonstrate[s] that the central portion of the site, the only area that could potentially meet the 200 foot setback standards on the entire property, is not a viable alternative for a homesite. Therefore such an area cannot be considered as an option, nor be cited as a reason for denial." Petition for Review 41-43.

The county responds to petitioner's setback argument that it must evaluate petitioner's property as a whole with respect to other properties in the vicinity, and that the staff report and hearings officer's decision make clear that it did so.

The challenged decision concludes, with respect to this criterion:

"Even though the Hearings Officer agrees that locating the proposed dwelling in the northwest corner of the site may be the most suitable location from a development standpoint, the applicant has not provided substantial evidence in the record demonstrating that by locating the dwelling in the less suitable central portion of the site where no variances would be required, that such location would restrict the use of the property to a greater degree than it restricts other property in the vicinity. Since it is possible to locate a dwelling in the central location on the site without the variance and since there is no evidence that such a location would be unduly restrictive, the hearings Officer finds that this criteria has not been met." Record 30.

The eighth assignment of error is denied.

The county's decision is affirmed.