BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID BOGAN and SARAH BOGAN,
Petitioners,

vs.

COOS COUNTY,
Respondent.

LUBA No. 99-177

FINAL OPINION
AND ORDER

Appeal from Coos County.

Michael C. Robinson, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Stoel Rives, LLP.

Steven R. Lounsbury, Coquille, filed the response brief and argued on behalf of respondent.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member participated in the decision.

AFFIRMED 06/06/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the county's denial of a request to use an existing structure as a watchman/caretaker dwelling on a residential lot.

FACTS

The subject property is an 11,781-square foot oceanfront lot zoned Controlled District (CD-10), within the City of Bandon's urban growth boundary. The CD-10 zone is a mixed use zone allowing residential and commercial uses as permitted uses. Among the allowed conditional uses in the CD-10 zone are industrial uses, multi-family dwellings and watchman/caretaker dwellings. The immediate area consists of vacant lots and several single-family dwellings owned by absentee owners.

In 1970, prior to adoption of the county's land use regulations, a 780-square foot dwelling (the old dwelling) was constructed on the property. The old dwelling contains a kitchen, a bathroom and one bedroom. In 1977, the county issued a zoning compliance letter which authorized construction of a separate 1,560-square foot dwelling on the property (the principal dwelling). The compliance letter states that the "[o]ld dwelling [is] to be removed from property or utilities disconnected when [the principal] dwelling is used as a residence." Record 113. In 1980 the county issued a "verification letter" which allowed an expansion of the authorized principal dwelling to 3,392-square feet. The verification letter noted the existence of the old dwelling, and referred to it as an office and as a one-bedroom residence. The principal dwelling was occupied in 1982. Both dwellings on the property share a subsurface sewage disposal system, and are served by the City of Bandon's water system.

Petitioners own the subject property, but reside elsewhere and use the principal dwelling as a vacation house. In 1997, petitioners asked the county whether they could rent the old dwelling as a residence. The county responded that only one of the dwellings on the property could be used as a residence. Petitioners then filed a conditional use application to

use the old dwelling as a watchman/caretaker dwelling. The planning commission denied the application. Petitioners appealed to the county board of commissioners, which heard the appeal on October 13, 1999, and affirmed the planning commission's denial. This appeal followed.

THIRD AND SIXTH ASSIGNMENTS OF ERROR

The county denied the proposed watchman/caretaker dwelling on several grounds, including the following:

> "1. The conditional use sought does not comply with the applicable review standards and special development standards within a CD-10 zoning district, as set forth in * * * 3.3.100(2) of the Coos County Zoning and Land Development Ordinance [(LDO)]. More specifically,
>
> "* * * * *
>
> "b. Use of the subject dwelling as a residence would be considered a 'new residence.' [LDO] 3.3.100(2) requires that every new residential dwelling unit shall have its own separate lot or parcel." Record 3.

The county also finds in section 2 of the decision that:

> "A zoning compliance letter was issued by the County Planning Department on June 2, 1977 regarding the subject structure. Construction of a new residence was allowed on condition that the old residence be removed or disconnected from utilities upon occupancy of the new residence. The new residence was constructed and occupied." Record 4.

A. LDO 3.3.100(2)

Petitioners argue, first, that the county erred in determining that the old dwelling is a "new residential dwelling unit," within the meaning of LDO 3.3.100(2), and thus prohibited because it does not have its own legal lot.[1] Petitioners contend that the old dwelling has

[1]LDO 3.3.100(2) provides in relevant part:

> "Every new residential dwelling unit shall have its own legal, separate lot or parcel, excepting:

existed for 30 years, was constructed and initially used as a residence, and thus by no stretch of the imagination can it be a "new" residential dwelling unit.

In the same vein, petitioners contend that residential use of the old dwelling is or should be recognized under various LDO provisions that grandfather uses existing in 1975 when the LDO was adopted. At the very least, petitioners argue, the fact that the old dwelling was in residential use in 1975 and thus a lawful grandfathered use at that time should preclude the county from now determining that the dwelling would constitute a "new residential dwelling unit" if residential use is resumed.

Finally, petitioners argue, LDO 3.3.100(2) cannot be intended to apply to a watchmen/caretaker dwelling, because such a dwelling is defined at LDO 2.1.200 as a "dwelling unit accessory to another primary use of the property, providing living quarters for a watchman or a caretaker." Petitioners argue that, if a watchman/caretaker dwelling is intended to be an "accessory" use to the primary use of the property and in conjunction with a permitted or conditional use as LDO 4.2.700(72) requires, then it must be located on the same lot or parcel. Under the county's interpretation of LDO 3.3.100(2), petitioners argue, a new watchman/caretaker residence would always violate that section because it must simultaneously be accessory to and in conjunction with another use and yet have its own separate legal lot or parcel.

The county responds that it correctly concluded, based on the 1977 zoning compliance letter, that lawful residential use of the old dwelling ceased when the principal

---

> "A. family hardship dwellings,
>
> "B. dwellings in conjunction with farm use on EFU lands,
>
> "C. planned unit developments,
>
> "D. two-family duplex or multi-family dwellings,
>
> "E. Additional dwellings in conjunction with farm use in the 'Mixed Agricultural-Forest Use' areas. * * *"

dwelling was constructed, and that its use since then, if any, has been non-residential. The county notes that petitioners identified the use of the property as a "studio/office" since the principal dwelling was occupied. Record 168. The county argues that it correctly determined under these circumstances that resumed residential use of the old dwelling would render the dwelling a "new" residential unit subject to the requirements of LDO 3.3.100(2).

The challenged finding, although brief, adequately expresses the county's understanding that it is the proposal to resume residential *use* of the old dwelling that renders that dwelling a new residential dwelling unit. We understand the county to take the position that in the circumstances present in this case, the date the dwelling was built is not determinative.[2] The next section of the decision recites the undisputed fact that the 1977 zoning compliance letter conditioned approval of the principal dwelling on removal of the old dwelling or its utilities. Although the two findings are not expressly linked in the decision, the condition in the 1977 compliance letter has an obvious bearing on the county's conclusion that "[u]se of the subject dwelling as a residence would be considered a 'new residence.'" Read as a whole, the county's decision clearly rejects petitioners' view that an existing structure cannot be a "new residential dwelling unit" for purposes of LDO 3.3.100(2). The county's interpretation of LDO 3.3.100(2) is adequate for review and subject to a deferential standard of review. ORS 197.829(1); *Clark v. Jackson County*, 313 Or 508, 826 P2d 710 (1992); *Weeks v. City of Tillamook*, 117 Or App 449, 844 P2d 914

[2]Findings of noncompliance with applicable criteria need not be as exhaustive or detailed as findings necessary to show compliance with applicable criteria. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351, 371 (1994) (*quoting Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978)). However, findings of noncompliance must be adequate to explain the local government's conclusion that applicable criteria are not met, and must suffice to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Salem-Keizer School Dist. 24-J*, 27 Or LUBA at 371.

(1992). We cannot say that it is inconsistent with the express language of LDO 3.3.100(2) or clearly wrong to apply that provision to a proposal to resume residential use of an existing structure that, under current circumstances, cannot be lawfully used as a residence.

We disagree with petitioners that the LDO provisions that grandfather uses existing on the date the LDO was adopted demonstrate that the county's interpretation is erroneous, or otherwise preclude the county from determining that resumed residential use of the old dwelling would render it a "new residential dwelling unit." That the old dwelling was a lawful residential use on the date the LDO was adopted does not prevent loss of that status as a result of subsequent decisions, such as the 1977 zoning compliance letter.

Finally, although it is a closer question, we also disagree with petitioners that the county's interpretation would effectively render it impossible to locate a watchman/caretaker dwelling anywhere in the CD-10 zone. Petitioners argue in their fourth assignment of error that a watchman/caretaker dwelling is a conditional use in the CD-10 zone and thus not an accessory use in that zone. *See* LDO 2.1.200 (definition of accessory use). While a watchman/caretaker dwelling must be in conjunction with a permitted or conditional use, petitioners have not demonstrated either as a matter of fact or law that a watchman/caretaker dwelling can only be "in conjunction" with another use in the CD-10 zone if it is located on the same lot or parcel as that use.

B. 1977 Zoning Compliance Letter

In the sixth assignment of error, petitioners argue that the county erred to the extent that it considered the 1977 zoning compliance letter an approval criterion and an independent basis for denying the requested watchman/caretaker dwelling. However, it is reasonably clear from the challenged decision that the county did not consider the 1977 compliance letter an approval criterion or that violation of any condition of the letter is a legal basis to deny the application. Section 1 of the decision sets forth four bases for denial: noncompliance with LDO 4.2.700, 3.3.100(2), 4.4.600, and 3.1.300(F). In section 2, the

decision recites the above-quoted facts regarding the 1977 compliance letter. The decision evidently considers the 1977 compliance letter relevant to its bases for denial, as discussed above, but does not treat that letter as an approval criterion or an independent basis for denial.

C. LDO 3.3.100(4)

In the alternative, petitioners argue that, even if the county is correct that resumed residential use of the old dwelling would render it a new residential dwelling unit under LDO 3.3.100(2), the county erred in failing to consider the effect of LDO 3.3.100(4). According to petitioners, LDO 3.3.100(4) exempts from minimum lot standards parcels and tracts created before adoption of the LDO and, notwithstanding LDO 3.3.100(2), allows development on such substandard lots otherwise consistent with the LDO.

LDO 3.3.100 provides in relevant part:

> "Except as provided in (4) below no buildings or structures shall be located on a lot, parcel or tract unless the lot, parcel or tract conforms with the requirements of the district in which it is located.
>
> "* * * * *
>
> "(4) Exceptions to Minimum Lot Standards * * * This only applies if the use is permitted outright by the subject zoning district (except if the use is a conditional use, the conditional use provisions shall govern); and if the lot or parcel is 'landlocked' without access, access must be created prior to approval or issuance of any land development zoning clearance letter or permit. Further, this subsection is subject to resource protection limitations as provided elsewhere in the Comprehensive Plan. * * *
>
> "A. Grandfathered Parcel or tract: Where a legally created parcel or tract was of record prior to adoption of this Ordinance, the parcel or tract may be used subject to all other property use and development standards of the district in which the parcel or tract is located. * * *"

According to petitioners, LDO 3.3.100(4) provides that if the use proposed on a grandfathered lot or parcel is a conditional use such as a watchman/caretaker dwelling, then the conditional use provisions shall govern development of that parcel. In other words,

petitioners argue, because the CD-10 zone allows a watchman/caretaker dwelling in conjunction with a principal use, any contrary provisions in LDO 3.3.100(2) do not control. Petitioners argue that LDO 3.3.100(4) "overrides other provisions of the LDO for preexisting lots such as this." Petition for Review 17.

The county responds, and we agree, that the exception in LDO 3.3.100(4) is to *minimum lot standards*, and does not purport to except development on substandard lots or parcels from otherwise applicable requirements such as the requirement, at LDO 3.3.100(2), that every new residential dwelling unit have its own legal, separate lot or parcel. The statement in LDO 3.3.100(4) that "conditional use provisions shall govern" proposals for a conditional use on substandard lots does not state or imply that otherwise applicable requirements do not apply. Petitioners have not established that LDO 3.3.100(4) overrides LDO 3.3.100(2) or that the county erred in applying the latter to deny the proposed dwelling.

The third and sixth assignments of error are denied.

FIRST, SECOND, FOURTH AND FIFTH ASSIGNMENTS OF ERROR

To prevail before LUBA in defending a decision denying an application for development, the county need only demonstrate one adequate basis for denial. *Evenson v. Jackson County*, 36 Or LUBA 251, 253 (1999); *Garre v. Clackamas County*, 18 Or LUBA 877, 881, *aff'd* 102 Or App 123, 792 P2d 117 (1990). Because we affirmed one of the county's bases for denial, we need not address the remaining assignments of error, which challenge the county's other bases for denial.

The county's decision is affirmed.