BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN PUMA, MARGARET GIACOPELLI,
MARK NOFZIGER and FRIENDS OF LINN COUNTY,
Petitioners,

vs.

LINN COUNTY,
Respondent,

and

THOMAS CORNELL and RHONDA CORNELL,
Intervenors-Respondent.

LUBA No. 2000-082

FINAL OPINION
AND ORDER

Appeal from Linn County.

Christine M. Cook, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Linn County.

Edward F. Schultz, Albany, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Weatherford, Thompson, Ashenfelter & Cowgill, P.C.

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

REMANDED 09/28/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a county decision that approves a conditional use permit and a variance to allow the siting of a medical hardship dwelling.

MOTION TO INTERVENE

Thomas Cornell and Rhonda Cornell (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

MOTION TO FILE CORRECTIONS TO THE PETITION FOR REVIEW

On August 2, 2000, petitioners submitted a motion to file corrected pages to the petition for review. The motion indicates that the pages are to replace pages containing typographical errors. The corrected pages are attached to the motion. There is no opposition to the motion and it is allowed.

FACTS

Intervenors own a 71.14-acre parcel located in the county's exclusive farm use (EFU) zone. A dwelling was initially sited on the property in 1979. In 1998, intervenors applied for a permit to site a new nonfarm dwelling on the property. The county denied that application. Subsequently, intervenors applied for and were granted approval to construct a new dwelling to replace the 1979 dwelling. The new dwelling was substantially completed in late 1999.

Linn County Code (LCC) 933.180(C) requires that, if a replacement dwelling is approved, the original dwelling

> "shall be removed, demolished or converted to an allowable nonresidential use within three months of the construction or the placement of the replacing single-family dwelling."

Intervenors chose to convert the original dwelling to a storage unit. This was done by disconnecting the original dwelling's toilet facilities from the dwelling's septic system. The county approved the conversion in January 2000. In the meantime, intervenors submitted an application for a medical hardship dwelling. According to intervenors' application, the

medical hardship dwelling is necessary to house Mr. Cornell's mother. Intervenors propose to use the 1979 original dwelling as the medical hardship dwelling by reconnecting the toilet to the septic system.

The county planning commission approved the medical hardship dwelling application. Petitioners appealed the planning commission's decision to the board of county commissioners. After a public hearing, the board of county commissioners denied the appeal and affirmed the planning commission decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

LCC 928.325(B)(2) authorizes the siting of a medical hardship dwelling as a conditional use in the EFU zone, subject to the provisions of LCC 932.860 to 932.895 and LCC 934.380. The dwelling may either be a manufactured dwelling or "the temporary conversion of an existing building." LCC 932.860(A). LCC 932.870(C) defines "existing building" as "a building other than a dwelling." Therefore, under the county provisions for a medical hardship dwelling, a storage unit may be converted to a temporary dwelling to house a person with a medical hardship.

LCC 934.380(C) provides that medical hardship dwellings must be located within 200 feet of the caregiver's residence.[1] In this case, the 1979 building is located approximately 800 feet from intervenors' residence. As a result, intervenors were required to submit an application for a variance from that standard. One of the county variance criteria requires a finding that:

> "The nature of the use is not changing, even though the size of the structure supporting the use may be changing. For example, the dwelling * * * would still be used as a dwelling * * *." LCC 938.310(D)(2).

Petitioners contend that, under the county's code, intervenors cannot satisfy both

[1]LCC 934.380(C) provides:

> "The residence of the [person qualifying for a medical hardship] must be sited within 200 feet of, and on the same authorized unit of land as, the residence of the care giver."

LCC 932.860(A) and LCC 938.310(D)(2). According to petitioners, LCC 932.860(A) clearly does not allow an existing dwelling to be used as a medical hardship dwelling, and LCC 938.310(D)(2) just as clearly does not permit the conversion of the storage unit back into a dwelling. Petitioners argue that, while the county may use the variance standards to alleviate a hardship caused by a strict interpretation of the medical hardship dwelling siting requirements, the county may not interpret away the variance standards themselves.

Intervenors argue in response that, according to LCC 938.010(A), the purpose of the variance procedure is to "allow a means of alleviating practical difficulties or unnecessary hardships which * * * might result from an overly strict or literal interpretation and enforcement of certain regulations prescribed by the [LCC]." Intervenors contend that the county properly found that by approving the temporary conversion of a storage building back into a dwelling, the intent of the county's agricultural lands retention policy and the intent of the medical hardship dwelling provisions are met.[2] Intervenors further argue that a temporary conversion of a storage unit to a medical hardship dwelling does not change the ultimate use of the structure; it will be converted back to a storage unit as soon as the medical hardship ceases.

Contrary to intervenors' argument, LCC 938.310(D)(2) does not provide an exception to its requirements for *temporary* conversions of existing dwellings. LCC 938.310(D)(2)

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[2]The county finding that addresses LCC 938.310(D)(2) concludes:

> "Because the existing structure is not changing in size; because the structure was utilized as a dwelling until December, 1999 and was decommissioned as a requirement of an approval of a replacement dwelling; because the facilities that previously served the dwelling at this site will be used for the proposed medical hardship; because no alterations have been made to the interior of the structure except for the decommissioning of the bathroom and because no exterior alterations have been made to the structure so that it resembles anything other than a dwelling, the [board of commissioners] concludes that it serves the public interest and is reasonable to re-convert this structure back into the dwelling that it had been until December of 1999. Allowing this conversion would eliminate the need for placing a mobile home on the property thereby giving the appearance of three dwellings on the property and possibly eliminating the use of some of the farm ground in order to site the mobile home. The [board of commissioners] concludes that the *intent of the criterion* is met." Record 12 (emphasis added).

requires that the use of a structure not change as a result of the variance. The original dwelling was converted to a storage unit. By approving the medical hardship dwelling and variance, the use of the structure changes back to a dwelling. To the extent the county used its interpretive discretion under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and ORS 197.829(1) to interpret LCC 938.310(D)(2) in such a way as to avoid compliance with the terms of that criterion, that interpretation is clearly wrong.[3] *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992). A finding that the "intent" of LCC 938.310(D)(2) is met is not adequate to demonstrate that the terms of that provision have been satisfied, or need not be satisfied.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Prior to approval of a medical hardship dwelling permit, LCC 933.800(A)(1) requires:

> "Approval from the [Linn County Environmental Health Program (EHP)] for connection of the medical hardship dwelling to the sewage treatment system serving the existing residence or a statement from the EHP saying that such connection is not feasible and recommending a possible alternative."

The board of commissioners found that

> "since there was * * * an existing septic system serving the storage building that had previously been a dwelling, the EHP approved continued connection to that system. * * * Opposition was raised to the proposal because there was no statement on record from the EHP stating that it was not feasible to connect the proposed converted structure to the septic system that serves the primary dwelling on the property. * * * [T]he intent of LCC 932.875 is to require the use of existing facilities (septic systems) to the maximum extent practicable. The [board of commissioners] finds that the connection to the

[3]ORS 197.829(1)(a) requires that LUBA affirm a local government's interpretation of its comprehensive plan and land use ordinances, unless the interpretation:

> "Is inconsistent with the express language of the comprehensive plan or land use regulation[.]"

> existing system that serves the structure to be converted to the medical hardship meets the intent of Section 932.875 * * *.
>
> "[The board of commissioners] concludes that the written approval from EHP to use an existing septic system that is already connected to the existing building constitutes their recommendation to use an alternative existing septic system rather than to connect to the system that serves the primary dwelling." Record 7-8.

Petitioners argue that the county misconstrued its code to allow the reconnection to an existing septic system that served the former dwelling. According to petitioners, there is nothing in the record to demonstrate that the EHP found a connection to the primary dwelling infeasible, as LCC 933.800(A)(1) requires. Further, petitioners argue that to the extent the finding interprets anything, it interprets the EHP approval, and not LCC 933.800(A)(1).

Intervenors respond that the county could conclude that connection to the primary dwelling's septic system is infeasible, based on the EHP's endorsement of a connection to an existing alternative system. According to intervenors, the county interpreted the EHP's approval to use the septic system that previously served the storage building to mean that of the two alternatives—connection to the septic system that served the former dwelling, or connection to the septic system serving the primary dwelling—the "worse alternative is not feasible." Intervenors' Response Brief 6.

LCC 933.800(A)(1) allows the county to approve a medical hardship dwelling that does not share the existing residence's sewage treatment system only when the county finds that the EHP has stated that such a connection is infeasible and recommends an alternative. Intervenors do not direct us to any place in the record where the EHP made such a statement and the county did not find that it did. Further, the county's findings do not interpret the code in the way intervenors suggest, or attempt to infer a statement of infeasibility from the EHP's approval.

The second assignment of error is sustained.

CONCLUSION

OAR 661-010-0071 provides, in relevant part, that:

> "(1) The Board shall reverse a land use decision when:
>
> "* * * * *
>
> "(c) The decision violates a provision of applicable law and is prohibited as a matter of law.
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> "(2) The Board shall remand a land use decision for further proceedings when:
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> "* * * * *
>
> "(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law."

Our decision concludes that the county improperly construed both LCC 938.310(D)(2) and LCC 933.800(A)(1). While the question is a close one, in light of the deference given to a governing body's interpretation of its code under ORS 197.829 and *Clark*, we are not prepared to say, as a matter of law, there is no possible interpretation by the board of commissioners that could result in approval of a conditional use permit and variance to allow a medical hardship dwelling under the circumstances described here.

Therefore, the county's decision is remanded.