BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LINDA WEAVER, WARREN WEAVER
and FRIENDS OF LINN COUNTY,
Petitioners,

vs.

LINN COUNTY,
Respondent,

and

PLAINVIEW MENNONITE CHURCH,
Intervenor-Respondent.

LUBA No. 2001-022

FINAL OPINION
AND ORDER

Appeal from Linn County.

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

No appearance by Linn County.

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

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

REMANDED DUE 06/26/2001

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 county approval of a conditional use permit to allow expansion of a church on land zoned for exclusive farm use (EFU).

MOTION TO INTERVENE

Plainview Mennonite Church (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property consists of a 1.69-acre parcel that is owned by intervenor and developed with a church building and parking areas, and a 3.01-acre portion of an adjoining parcel that is leased by intervenor and currently used for additional parking and as a recreation field. The existing building is served by a septic system and drainfield located on the 1.69-acre owned parcel. The soils on both parcels are predominantly high value farm soils. Surrounding lands are zoned EFU, and consist of large agricultural holdings, an agricultural business, and seven dwellings on small lots.

On May 23, 2000, intervenor applied to the county for a permit and variances to expand the existing church building and parking areas.[1] Intervenor originally proposed increasing the size of the existing building from 10,222 square feet to 18,528 square feet, but a later architectural revision reduced it in size. As designed, seating capacity would increase from 300 to 580 persons. Intervenor proposed expanding and improving the existing septic system by placing additional septic facilities in the 3.01-acre leased portion of the adjoining parcel.

The county planning commission held a public hearing September 12, 2000, and voted to deny the application, on the grounds that intervenor had not demonstrated that the

[1]The proposed variances were to setback and paved parking requirements. The challenged decision approves the variances, but that aspect of the decision is not challenged in this appeal.

proposed expansion was compatible with the surrounding area. Intervenor appealed to the board of commissioners, which held hearings on December 6, and December 13, 2000, and voted to overturn the planning commission and approve the proposed expansion. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county misconstrued the applicable law, and failed to adopt adequate findings supported by substantial evidence, in concluding that the proposed septic system could be located on the 1.69-acre owned parcel.

Petitioners explain that the size of the proposed expansion requires improved septic facilities, pursuant to Department of Environmental Quality (DEQ) requirements. Intervenor proposed placing part of the upgraded septic facilities, the "repair area," on the 3.01-acre leased property, pursuant to an easement intervenor acquired in 1999 for that purpose. However, petitioners argue, doing so would violate Linn County Code (LCC) 928.321(B)(2)(f) and OAR 660-033-0130(18), which the code provision implements. Both the code and the rule allow an expansion of an existing church on EFU land only if the expansion occurs "on the same tract."[2] "Tract" as defined by OAR 660-033-0020(10) means "one or more contiguous lots or parcels in the same ownership." Petitioners contend that the owned and leased properties are not part of the same "tract," and therefore the expansion, including the entirety of the upgraded septic system, is permitted only on the 1.69-acre

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[2]LCC 928.321(B)(2) provides in relevant part:

> "The following existing uses may be maintained, enhanced, or expanded if on the same tract and if wholly within the EFU zoning district.
>
> "* * * * *
>
> "(f) Churches and cemeteries in conjunction with churches."

Under OAR 660-033-0120, a church is prohibited as a new use on EFU-zoned land with high value soils. However, OAR 660-033-0120 and 660-033-0130(18), read together, allow existing churches to be "maintained, enhanced, or expanded on the same tract, subject to other requirements of law."

owned parcel. Petitioners argue that the county's decision fails to assure that that upgraded septic system will be located on the owned parcel, nor is there substantial evidence in the record establishing that the upgraded septic system can be located entirely on the owned parcel.

The county's findings address these points under LCC 933.310(B), which requires that the development site has physical characteristics needed to support the use, including "suitability for a sewage treatment system." The county's decision states in relevant part:

> "The testimony in this case indicates the Mennonite Church has been in existence on the subject property for almost 50 years. The Church has had during its almost five decades of use a septic system and a water system which has been used by the church members. The testimony indicated that the system would be upgraded and that there would be a replacement area available on the site. In addition, the church has obtained the right to use adjacent property for an emergency septic system replacement. During the hearing the argument was made that the opponents believe it was not clear that the septic system and repair area had to be on the original church property and [if it] was not all contained on the church property, approval should not be granted. In rebuttal, the applicant made it clear that the upgraded system and the repair area could both be located upon the church-owned property." Record 7.

A. Same Tract Requirement

Intervenor attacks petitioners' premise that LCC 928.321(B)(2)(f) and OAR 660-033-0130(18) are violated if part of the upgraded septic system is located on the adjoining leased property. Intervenor argues that DEQ regulations expressly permit septic systems to cross property boundaries if an appropriate easement is obtained, as was the case here, and that such regulations authorize the county to approve the proposed septic system notwithstanding the "same tract" requirement. Intervenor notes that OAR 660-033-0130(18) authorizes expansions on the same tract, "subject to other requirements of law." Intervenor suggests that the quoted language should be read to authorize an exception to the "same tract" rule, if other legal requirements, such as DEQ regulations, permit cross-boundary septic systems.

Alternatively, intervenor argues that the contiguous owned and leased properties are

"in the same ownership," and thus constitute a "tract" as defined at OAR 660-033-0020(10), because intervenor owns an easement on the leased property to allow placement of a septic system there, and an easement is a recognized ownership interest.

We disagree with intervenor that locating part of the proposed septic system on the leased property is consistent with the "same tract" requirement of LCC 928.321(B) and OAR 660-033-0130(18). DEQ regulations require that the subject property be sufficient to accommodate the septic system, but allow a cross-boundary septic system as an alternative where an easement is obtained and recorded. OAR 340-071-0150(4)(a)(B); 340-071-0130(11). The phrase "subject to other requirements of law" is a reference to other legal requirements that limit what OAR 660-033-0130(18) otherwise permits. We do not read OAR 660-033-0130(18), as intervenor urges, to allow expansion of the church septic system onto a different tract, simply because such expansion is a permissible option under a DEQ rule that is not designed or intended to be a land use regulation. We disagree that the cited DEQ regulations modify or obviate compliance with OAR 660-033-0130(18).

We also disagree that the owned parcel and the leased property are, by virtue of intervenor's easement on the latter, in the "same ownership" and therefore those parcels constitute a "tract" as that term is used at OAR 660-033-0130(18). To constitute the "same ownership" for purposes of the definition of "tract," the ownership interest in the subject properties must be the same. *See Friends of Linn County v. Linn County*, 37 Or LUBA 280, 288 (1999) (a parcel owned by the applicant and a contiguous parcel owned by the applicant and his wife as joint tenants are not in the "same ownership" for purposes of the definition of "tract" at OAR 660-033-0020(10)). The church's easement is legally insufficient to establish an identity of "ownership" between the church-owned 1.69-acre parcel and the adjoining 3.01-acre leased property.

B. Suitability of Owned Parcel for Sewer Treatment System

Finally, intervenor contends that the county's finding that the entire septic system can

be located on the owned parcel is supported by substantial evidence, and is sufficient to assure compliance with LCC 933.310(B) and the "same tract" requirement at LCC 928.321(B)(2), and OAR 660-033-0130(18). According to intervenor, the county essentially found that it was feasible to locate the entire septic system on the owned parcel, and there is no evidence in the record to the contrary. Intervenor argues that it effectively withdrew the proposal to place part of the system on the leased property, and there is no requirement that the county find or otherwise assure that the entire system will in fact be located on the owned parcel.

Intervenor does not cite us to any evidence in the record showing that it withdrew or modified the proposal in this respect, and it is not clear to us what the county approved, or believed it was approving. As intervenor's above arguments illustrate, the challenged decision is sufficiently equivocal on this point that it can be read to allow location of the septic system on the leased property.

That problem aside, we agree with petitioners that, even if the county's decision is understood to approve locating the entire septic system on the owned parcel, there is not substantial evidence in the record establishing that it is feasible to do so. The only evidence on this point is the unsupported statement of intervenor's attorney that the septic system can be contained on the owned parcel.[3] All of the other evidence in the record to which we are cited assumes that part of the system will be located on the leased property.[4] Generally, unsupported assurances by the applicant or the applicant's attorney that an applicable standard will be met are not substantial evidence that the proposal complies with the

[3]The parties direct us to the minutes of the December 13, 2000 hearing before the board of commissioners, where intervenor's attorney informs the commissioners that "The septic can be contained to the existing property." Record 21.

[4]Intervenor's expert submitted a letter regarding "septic system feasibility" that assumes the drainfield repair area would be located within the easement on the leased parcel. Record 154. The approval by the county's health officials assumed that the "disposal area" would be located on the leased parcel. Record 161.

standard. *Wuester v. Clackamas County*, 25 Or LUBA 425, 437 (1993). LCC 933.310(B) requires that the development site has physical characteristics needed to support the use, including "suitability for a sewage treatment system." It may be that the entire septic system can feasibly be located on the church-owned parcel; however, the evidence in the record is insufficient to establish that.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

LCC 934.525 requires that the maximum coverage of principle buildings in the EFU zone "shall not exceed 20 percent of the total property area." Petitioners challenge the county's finding of compliance with LCC 934.525, arguing that the findings and record evidence fail to demonstrate that the proposed expanded church building will not exceed 20 percent coverage of the 1.69-acre owned parcel.

Petitioners state, and no party disputes, that 20 percent of the 1.69-acre parcel is approximately 14,723 square feet. As originally proposed, the principal church building exceeded that coverage.[5] However, in response to petitioners' objections on this point, intervenor submitted a revised architectural roof plan, stamped by the architect, that eliminated a covered walkway. The plan indicates that, as revised, the "total covered area" is 14,719 square feet. Record 209. However, petitioners argued before the county that the revised plan in fact proposes a building that exceeds the maximum coverage by several hundred square feet. The county disagreed:

> "* * * The church presented testimony through its architect that [it] had modified the original design to meet the most restricted reading of the County Ordinance for lot coverage. [Petitioner] Friends of Linn County argued

[5]As relevant, LCC 920.100(B)(60)(a) defines "coverage" as "that portion of a unit of land which, when viewed directly from above, would be covered by buildings and other structures, excluding such structures as fences." LCC 920.100(B)(282) defines "structure" as "anything built or erected above or below ground." The record contains a figure apparently duplicated from the LCC that illustrates the definition of "coverage." Record 91. The figure seems to indicate that "coverage" includes not only the footprint of a building, but also any overhang from the eaves, as well as structures such as carports and patios.

> according to their measurements of the design, they concluded that the lot coverage requirement had not been met. The [board of commissioners] concludes that it will accept the stamped plan from the architect as to the accuracy of the architectural plans and that these architectural plans were measured to the roof gutter, thereby meeting the most restricted reading of the County Ordinance. The [board of commissioners] concludes that it will rely upon the architect's stamped drawing and the architect's calculations showing the lot coverage requirement has been met." Record 8.

Petitioners argue that the "architect's calculations" are not included in the record, and that no reasonable person could conclude based on the information in the record that the proposed church complies with the maximum coverage requirement. Petitioners provided several calculations based on the information in the record, including the revised site plan, each of which exceeded the maximum coverage under LCC 934.525.[6] Petitioners' calculations did not include several proposed objects that arguably constitute "structures" as defined under the LCC, such as two concrete pads, four air conditioning pads, one fire escape pad, a planter, and a concrete walk. Record 90. If such objects were included in the calculations, petitioners argue, the proposal's coverage would exceed the maximum coverage to an even larger, indeterminate degree. Petitioners argue that, in view of the evidence they presented, and in the absence of the architect's actual calculations or at least some explanation from the architect about how the figure of 14,719 square feet was derived, no reasonable person could conclude that the proposed improvements comply with LCC 934.525.

Intervenor responds that the statement on the stamped site plan that the proposed structure's coverage is 14,719 square feet is substantial evidence supporting the county's finding of compliance with LCC 934.525. Although it is a close question, we disagree. Substantial evidence exists to support a finding of fact when the record, viewed as a whole,

[6]Petitioners testified that, based on direct measurement of the copy of the site plan in the record, using the scale stated on the plan (1 inch equals 30 feet), the proposed building as revised covers 14,827 square feet. Record 88. Petitioners also testified that, based on other information in the record, the proposed building covers 15,061 square feet. *Id.*

would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Even if there is some supporting evidence, that evidence may not be substantial when viewed together with the countervailing evidence in the whole record. *Canfield v. Yamhill County*, 142 Or App 12, 17-18, 920 P2d 558 (1996). During the proceedings below, petitioners offered detailed oral and written testimony explaining why they believed the proposal exceeded the maximum lot coverage. Although it would seem to be a relatively simple matter to respond to, intervenor and ultimately the county chose to rely solely on the bare statement on the copy of the revised site plan in the record, that the total covered area was 14,719 square feet.[7] It is important to note at this point that the original revised site plan is not in the record; only a photocopy is in the record. The parties seem to agree that, given the large scale of the site plan and imperfections in copying, it is difficult to calculate accurately the precise coverage from direct measurement of the drawing on the copy in the record. Nonetheless, intervenor does not dispute petitioners' contention that direct measurement of the drawing on the site plan *in the record* appears to show that the proposed building exceeds 14,723 square feet in size. Nor does intervenor dispute the accuracy of petitioners' calculations based on other evidence in the record. In the face of petitioners' countervailing evidence, and given the apparent ease with which the architect's supporting calculations could have been explained, a reasonable person could not conclude, based solely on the statement on the revised site plan, that the proposal complies with LCC 934.525.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

LCC 938.310(D) provides decision criteria for circumstances where a variance from

[7]The architect testified before the board of commissioners on December 13, 2000. However, as far as we can tell from the partial transcript attached to the response brief, the architect did not offer any explanation of how the figure of 14,719 square feet was derived.

development standards is necessary to alter an existing structure. LCC 938.310(D)(3) allows such a variance where "[t]he proposed expansion will have no greater adverse impact to the neighborhood." Petitioners contend that the county erred in concluding that the proposed church expansion will have no greater adverse impact to the neighborhood.[8]

According to petitioners, the existing church has adverse impacts on the neighborhood, specifically large volumes of traffic.[9] Petitioners argue that the proposed expansion will nearly double the number of people, per service, that the church can accommodate, which can only increase traffic impacts, resulting in greater adverse impacts.

The county's decision found to the contrary, reasoning:

> "* * * The opponents indicated that there was traffic in the neighborhood and the traffic may increase. * * * The church presented evidence that the members of the church would be better served if they all could attend the same service. This would bring the same amount of people and traffic to the

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[8]Petitioners also contend under this assignment of error that LCC 938.310(D)(3) implements statutory provisions at ORS 215.130 governing alteration of a nonconforming use. Petitioners argue that the "no greater adverse impact" standard at LCC 938.310(D)(3) implements a similarly worded standard at ORS 215.130(9). That being the case, petitioners argue, no deference is owed to any county interpretation of LCC 938.310(D)(3), and previous LUBA interpretations of ORS 215.130(9) are relevant to the evidentiary question of what circumstances satisfy the "no greater adverse impact" standard at LCC 938.310(D)(3).

The relationship between ORS 215.130 and LCC 938.310(D)(3) is not clear to us. LCC 938.310 provides a procedure governing requests for variances necessary to alter or replace existing structures. The county's code has a separate section, LCC 936.150, that governs alterations or replacement of a nonconforming use. LCC 936.150(C)(2) appears to directly implement ORS 215.130(9)(a) by allowing alteration of a nonconforming use only where the change "does not result in any greater adverse impact to the neighborhood." There is no explanation in the county's code why it chose to impose the same requirement on requests for variances, even where such requests do not involve previously nonconforming uses. The county's decision did not apply or find compliance with LCC 936.150, notwithstanding that the existing use in this case can be viewed as a nonconforming use. It is therefore uncertain whether or not the county's interpretation of the LCC 938.310(D)(3) "no greater adverse impact" standard would be subject to deference under ORS 197.829(1). *See Ray v. Douglas County*, 36 Or LUBA 45, 51-53 (1999) (local interpretation of code standard that is borrowed from statute but that does not implement the statute is subject to deference). However, we need not resolve that question, because we agree with intervenor that the county's finding of compliance with LCC 938.310(D)(3) contains no reviewable interpretation of that provision. We also agree with intervenor that the primary issues under this assignment of error are the adequacy of the county's finding and the sufficiency of the evidence supporting that finding, not the meaning of "no greater adverse impact."

[9]A number of concerns regarding adverse impacts were raised during the proceedings below, but the only impacts at issue in this appeal are traffic impacts. Adjoining landowners testified that traffic and associated noise and safety concerns related to the existing church prevent or impact use of their front and side yards during services. Record 55, 130, 169, 170-71.

> church. The church also argued that the government does not have the ability to regulate the number of people who can attend church. There is nothing to say that even if the application was denied, that more people would not attend the church and the number of services per day would continue to grow. Government does not have the right to tell people where they can choose to exercise their freedom of religion. Traffic is not an issue when there [is] no significant increase. The traffic count of 64 vehicles per day from the east does not overload the capacity for the road or the parking facilities at the church. These are existing facilities which will not be changed by the proposal. * * * For those reasons and other reasons set forth above, and not repeated, this criterion has been met." Record 10.

Petitioners question the county's logic, arguing that concentrating the existing traffic impacts from multiple services into one service is undeniably a greater adverse impact to the neighborhood. Further, petitioners argue that the county's reasoning fails to take into account that, even if the church initially limits itself to a single Sunday service, as the congregation grows beyond that accommodated by the proposed 580-person capacity, the church will likely add additional services. Petitioners cite to evidence that the church envisions future need for a 1,200-seat capacity. Record 107. Petitioners concede that the county cannot limit the number of church attendees or services. However, petitioners contend that the county's inability to impose certain conditions on the church has no bearing on, and does not obviate, the requirement that the request to *expand* the church result in "no greater adverse impact" on the neighborhood.

Intervenor responds that petitioners failed to demonstrate either that the existing church has adverse impacts or that the proposed expansion will result in greater adverse impacts. To the extent there is contradictory evidence on these points, intervenor argues, the county's choice between conflicting evidence is entitled to deference. Intervenor contends that the county properly relied upon the church's intention to consolidate services as a sufficient basis to conclude that the proposed expansion will not cause an increase in traffic impacts.

The challenged decision does not determine whether traffic generated by the existing church causes adverse impacts. Instead it appears to assume such impacts exist, but

concludes that the expansion will cause no *greater* adverse impacts because the church intends to consolidate services and thus the proposal will not generate additional vehicle trips to the site on any given day. We agree with petitioners that the county's rationale fails to explain why the proposal complies with LCC 938.310(D)(3). The proposed expansion nearly doubles the capacity of the church. The decision offers no explanation why concentrating daily vehicle trips into a shorter time period will not result in greater impacts. We also agree with petitioners that the county's rationale fails to recognize that future growth in church membership may exceed the capacity provided by the proposed expansion, and require additional services. Therefore, the county's reliance on the church's intent to consolidate services is insufficient to establish compliance with LCC 938.310(D)(3).

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

LCC 938.310(D)(5) allows a variance associated with alteration of an existing structure where "the foundation, vehicular access, well and an approved septic system were established to serve the use at the nonconforming location and these same improvements will be used to support the proposed use." Petitioners argue that the county's finding of compliance with LCC 938.310(D)(5) misconstrues that provision, is inadequate, and is not supported by substantial evidence. According to petitioners, the proposal cannot comply with LCC 938.310(D)(5), because intervenor proposes upgrading the existing septic system, and thus the redevelopment will not be supported by the "same improvements."

The county's findings regarding LCC 938.310(D)(5) state in relevant part:

> "* * * There is an approved septic system on the property. The septic system is in the process of being upgraded. Preliminary approval has been given by the County and DEQ. Final approval from DEQ cannot occur until the Land Use Compatibility Statement is filed with DEQ. The Land Use Compatibility Statement cannot be completed until after the final decision in this case. The Board received evidence and accepts the evidence that the revised system and repair area can both be located on the original parcel for the church. For those reasons and other above reasons, the criterion has been met." Record 11.

The key issue under this assignment of error is the meaning of LCC 938.310(D)(5). Petitioners interpret LCC 938.310(D)(5) to prohibit a variance to redevelop property where the redevelopment proposes upgrades to the existing septic system, because such an upgraded septic system is not the "same improvement" established to serve the original development. Intervenor argues that the county's above-quoted finding interprets LCC 938.310(D)(5) differently, and that the county's interpretation is entitled to deference. Intervenor does not articulate what that interpretation is, and it is not clear to us that the above-quoted passage contains even an implicit interpretation of LCC 938.310(D)(5) or, if it does, that the interpretation is adequate for review. *Alliance for Responsible Land Use v. Deschutes Cty*., 149 Or App 259, 942 P2d 836 (1997), *rev dismissed* 327 Or 555 (1998) (an implicit interpretation is adequate for review where the local government's unambiguous understanding of the meaning of local legislation is discernible in the manner in which it applies that legislation); *Bradbury v. City of Bandon*, 33 Or LUBA 664, 668 (1997) (same).

Where the decision lacks an adequate interpretation, the Board may interpret the local provision in the first instance, or remand the decision to the county for interpretation. ORS 197.829(2); *Opp v. City of Portland*, 153 Or App 10, 14, 955 P2d 768 (1998).[10] In the present case, we see no point in remanding the decision for interpretation. LCC 938.310(D)(5) does not state or necessarily imply that the original *unimproved* foundation, access, well, and septic system must support the proposed use. Petitioners do not advance any reason to read the code provision in so restrictive a manner. LCC 938.310(D)(5) is more reasonably read to require that the same improvements, as opposed to a different set of improvements, continue to support the use. There may be some

[10]ORS 197.829(2) provides:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

point where improvements to an existing septic system are so extensive that the use can no longer be said to be served by the "same" septic system. However, petitioners have not demonstrated that that point is reached in this case.

The fourth assignment of error is denied.

The county's decision is remanded.