BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES T. CHURCH and
PHILIP L. GERSTNER
Petitioners,

vs.

GRANT COUNTY,
Respondent.

LUBA No. 2002-061

FINAL OPINION
AND ORDER

Appeal from Grant County.

Robert S. Lovlien, Bend, filed the petition for review and argued on behalf of petitioners. With him on the brief was Bryant, Lovlien and Jarvis, P.C.

John M. Junkin, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Bullivant Houser Bailey.

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

REVERSED 11/14/2002

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 a county decision denying their application for a single-family dwelling on a five-acre parcel, zoned Rural Residential 10-acre minimum (RR-10).

FACTS

The challenged decision is the county's decision on remand from LUBA. *Church v. Grant County*, 40 Or LUBA 522 (2001). We recite the pertinent facts from our earlier opinion:

> "On November 20, 1997, petitioners applied to partition a 22-acre parcel into three parcels. Parcels 1 and 2 were each five acres in size, while parcel 3 was approximately 12 acres in size. The county administratively approved that partition, notwithstanding that two of the resulting parcels did not conform to the minimum parcel size in the RR-10 zone.
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> "On February 6, 1998, petitioners applied to partition the 12-acre parcel into two smaller parcels, five and seven acres in size. The county administratively approved that partition, notwithstanding that the resulting parcels did not conform to the RR-10 minimum parcel size.
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> "The county subsequently discovered its errors and, on November 25, 1998, adopted an ordinance that allowed it to revoke any final land use decision that the county determines to violate clear and objective code standards. The county then applied that ordinance to revoke both of the above-described partitions. Petitioners appealed that decision to LUBA. We concluded that the county's revocation of the two final partition decisions was prohibited as a matter of law and, accordingly, reversed the county's decision. *Church v. Grant County*, 37 Or LUBA 646 (2000).
>
> "Petitioners then submitted [an] application for administrative approval of a single-family dwelling on tax lot 600, the five-acre parcel created in the 1998 partition. The county planning director exercised an option under the county's code to place the application before the county planning commission. After a hearing on the matter, the planning commission denied the application. Petitioners appealed to the governing body, the county court. The county court conducted two public hearings and, on June 28, 2001, issued its decision affirming the planning commission's decision, thus denying the application. * * *." *Id.* at 523.

The county's denial was based on an interpretation of Land Development Code (LDC) 13.010, which provides standards under which nonconforming lots, uses and structures may be used or developed, despite their nonconformity. On review, we concluded that the county's interpretation was erroneous and not sustainable under ORS 197.829(1), because it had the effect of nullifying one provision of LDC 13.010. However, we remanded the decision to the county, rather than reversing the decision, because the meaning of and relationship between the provisions of LDC 13.010 were unclear, and we could not say there was no sustainable interpretation that would support a county decision to deny petitioners' application.

On remand, the county court conducted a hearing and, on May 8, 2002, issued a decision concluding that LDC 13.010 did not apply at all to petitioners' application. Because that code provision was the only asserted basis for petitioners' right to construct the proposed dwelling, the county denied petitioners' application. This appeal followed.

ASSIGNMENT OF ERROR

LDC 67.050 imposes a 10-acre minimum lot size for any residential use in the RR-10 zone.[1] The county's decision takes the position, at least implicitly, that LDC 67.050 imposes

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[1] LDC 67.050 provides, in relevant part:

"The following limitations on uses permitted by this Section shall apply in an RR Zone:

"* * * * *

"F. In the RR Zones, the following minimum lot sizes for each respective RR Zone shall apply:

"1. For Residential Use:

"RR-5 zone	5 Acres
"RR-10 zone	10 Acres

"* * * * *

"2. For non-residential uses the minimum lot size shall be as determined necessary to accommodate the intended use taking into account required setbacks, access and parking, buffer areas, potential expansion of future use

a standard applicable to any residential development within the RR-10 zone, *viz.*, no residential development may be approved in the RR-10 zone unless the subject property is at least 10 acres in size. From that premise, the county concludes that petitioners' application for residential development on the five-acre parcel must be denied unless some other provision of the county's code would authorize residential development on a substandard parcel.

In apparent response to that view of the code, petitioners relied, and continue to rely, on LDC 13.010(A). LDC 13.010 is entitled "Non-Conforming Lots or Parcels," and provides as follows:

> "A. *The minimum area or width requirements shall not apply to an authorized lot as defined by Section 11.030 of this Code. An authorized lot may be occupied by any use permitted in the applicable Zone subject to all other standards of this Code.*
>
> "B. No lot area, yard or other open space, existing on or after the effective date of this Code, shall be reduced in area, dimension or size below the minimum required by this Code.
>
> "C. The general lot size or width requirements of this Code shall not apply when a portion of a tax lot under single ownership, in an area excepted from Statewide Planning Goals, is isolated from the remainder of the property by a public road.
>
> "D. Lots which were legally created prior to January 1, 1985, and which do not meet the current minimum frontage, lot width or lot sizes required for the Zone, are deemed acceptable for development." (Emphasis added.)

Petitioners argued, and the county agreed, that the subject property is an "authorized" parcel as defined by LDC 11.030(176), because it was created by partition.[2] Therefore,

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> conversion, resource carrying capacities, and other factors deemed necessary."

[2] LDC 11.030(176) defines "Lot or Parcel, Authorized" as:

> "[A] separate unit of land created by one of the following:

petitioners argued to the county, LDC 13.010(A) allows the subject parcel to be occupied by any use allowed in the RR-10 zone, including dwellings, notwithstanding that the minimum area requirement for dwellings in the RR-10 zone is 10 acres.

The county initially disagreed with petitioners, based on its view that LDC 13.010(D) and not (A) controlled, and barred, development of the subject property. We rejected that view in our previous opinion. On remand, the county took the position that LDC 13.010 did not apply at all to the subject property. That position is based on the curious fact, noted in our previous opinion, that the subject property does not fall within the literal definition of a "nonconforming" lot or parcel in the LDC.[3] In relevant part, the code definition of "nonconforming" lot or parcel is limited to lots or parcels that existed prior to the adoption of "this Code." The challenged decision finds that "this Code" is a reference to the LDC, which was adopted in 1997. Because the subject property was created after 1997, the county reasons, it is not a "nonconforming" lot or parcel. The county then turns to LDC 13.010, and interprets that provision to apply only to nonconforming lots, parcels or structures as defined in the LDC. Specifically, the county finds that:

> "[LDC] Article 13, including Article 13.010(A) waiver of minimum area and width requirements, does not apply to Tax Lot 600. The language of [LDC]

> "A. A parcel of land in a recorded subdivision, legally created under the law in force at the time; (ORS 92.010)
>
> "B. A parcel in an unrecorded subdivision plat that was filed with the Department of Commerce in accordance with regulations in effect at the time of filing;
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> "C. A parcel created by a land partitioning as defined in ORS 92.010;
>
> "D. By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances, codes, or regulations;
>
> "E. Does not include a unit of land created solely to establish a separate tax account."

[3] LDC 11.030(209) defines "Nonconforming Lot, or Structure" as "[a] parcel of land or a structure which lawfully existed prior to the adoption of this Code, but which does not meet the standards for lot area, dimension, setbacks, or other criteria in this Code." As the county found, the LDC uses the terms "lot" and "parcel" interchangeably.

> 13.010(A) must be read in context, and that reading requires the term 'authorized lot' to apply only to nonconforming authorized lots, *i.e.*, lots as defined by LDC 11.030(203), which were created prior to the adoption of the LDC." Record 8.

Because LDC 13.010(A) does not operate to allow residential development of the subject property, the county concluded, the proposed development must be denied, for failure to comply with the 10-acre minimum imposed by LDC 67.050.

Petitioners challenge the county's interpretation that LDC 13.010(A) does not apply to the proposed development. According to petitioners, it is undisputed that the subject property is an "authorized lot," and LDC 13.010(A) expressly allows development of an authorized lot, notwithstanding failure to meet a minimum area requirement. That the subject property is not a "nonconforming" parcel as defined in the county's code, petitioners argue, has no bearing on the question of LDC 13.010(A)'s applicability. Petitioners contend that the county's interpretation effectively reads LDC 13.010(A) out of the code, is clearly wrong, and therefore cannot be sustained under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).

As we understand the county's interpretation, it does not effectively read LDC 13.010(A) out of the code, as petitioners contend, although it grants that provision only a time-limited applicability. As the county interprets LDC 13.010(A), it applies only to authorized lots that fit within the literal terms of the code definition of "nonconforming" lots. Under the county's view, an authorized lot that was created after 1997, but that does not conform to applicable minimum area requirements, may not be developed under LDC 13.010(A).[4]

[4] The county declined at oral argument to speculate as to whether a lot created after 1997 that was conforming at the time of creation, but that later became nonconforming when, for example, the zoning changed, could be developed under LDC 13.010(A). Although we need not resolve the issue, it is difficult to see how such lots would be treated differently under the county's interpretation than lots such as the subject property that were lawfully created after 1997 but were nonconforming from the beginning. It is worth noting in this regard that it is not necessarily clear that a five-acre lot or parcel in the RR-10 zone is "nonconforming" in the usual sense of that word until a particular use or development is proposed. That is because non-

That interpretation does some violence to the terms of LDC 13.010(A). By definition, a "nonconforming lot" must lawfully exist prior to the LDC date of adoption. *See* n 3. The definition of "authorized lot" appears to set out the recognized means by which lots or parcels may be lawfully created. Thus, it would seem that all nonconforming lots as defined by the LDC are necessarily authorized lots. Arguably, the county used the term "authorized lot" in LDC 13.010(A) advisedly, and would have reworded LDC 13.010(A) to refer to "nonconforming lots" if it had intended a narrower meaning.[5] The term "nonconforming lot" appears nowhere in LDC 13.010 except in the title. It is a questionable interpretational approach to view the code definition of a term that appears only in the title of a code provision to limit the meaning of a different term that appears in the provision itself, and that is itself defined without any such limitation. Further, the county knows how to apply a time limitation to development allowed under LDC 13.010, because it expressly stated such a limit in LDC 13.010(D). The lack of an express time limit in LDC 13.010(A) suggests that the county did not intend one to apply. Finally, we note that, as far as we can tell, the term "authorized lot" appears in the LDC only in the definition section and in LDC 13.010(A). If that is the case, the county's interpretation would appear to render "authorized lot" as defined and used in the LDC mere surplusage.

In short, the county's decision reasons that, because the title of LDC 13.010 refers to "nonconforming lots or parcels," the text of LDC 13.010(A) is concerned *only* with "nonconforming lots" as that term is defined, and limited, in the LDC. The text of LDC 13.010(A), however, uses different terms that are not so limited. The county's interpretation appears to give no independent meaning to the key term "authorized lot."

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residential uses allowed in the RR-10 zone do not have a specific minimum area size. *See* n 1 (LDC 67.050(F)(2)).

[5] For example, if the county intended LDC 13.010(A) to be limited to lots and parcels that meet the code definition of a "nonconforming lot," it could easily have worded LDC 13.010(A) to state that.

LUBA must defer to a local governing body's interpretation of its code unless that interpretation is inconsistent with the express language, purpose or underlying policy of the provision. ORS 197.829(1)(a)-(c).[6] The pertinent question under ORS 197.829(1) and *Clark* is whether any person could reasonably interpret the provision in the manner the county does here. *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996). However, the deference due to a local government's interpretation does not extend to interpretations that depart so profoundly from the text as to constitute, in practical effect, an amendment of the code provision in the guise of interpretation. *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 218, 843 P2d 992 (1992). As we explained in our earlier decision in this case, an interpretation that effectively eliminates a code term or provides it no meaning is not generally entitled to deference under ORS 197.829(1) or *Clark*. 40 Or LUBA at 529.

Petitioners do not dispute that, as the title indicates, LDC 13.010 is concerned with "nonconforming lots or parcels," in some sense of the term "nonconforming." If the terms of LDC 13.010 are ambiguous, and there is doubt as to what kind of lots and parcels qualify for development under those terms, it is not inappropriate to look to pertinent code definitions, including potentially the definition of "nonconforming lot." Under those circumstances, the fact that the text of LDC 13.010(A) contains no time limitation such as that found in the definition of "nonconforming lot" would not *necessarily* mean that it is inconsistent with the

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[6] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

express language of that provision to read such a limitation into it. However, context should not trump text, or effectively replace a key textual term with another term that is defined in materially different ways. As relevant here, the *text* of LDC 13.010(A) is not ambiguous. It plainly and pointedly applies to "an authorized lot as defined by Section 11.030." Any ambiguity arises only when considering the definition of "nonconforming lot" at LDC 11.030(209). That term appears nowhere in the text of LDC 13.010 and is, at best, context that may be useful in illuminating the meaning of ambiguous terms in the text. As explained above, under the county's interpretation, the term "authorized lot" must be understood as implicitly meaning a "nonconforming authorized lot." However, because it appears that all nonconforming lots are authorized lots, that is the same thing as saying "nonconforming lot." The county's interpretation is inconsistent with the express language of LDC 13.010(A), because it effectively reduces the defined term "authorized lot" to the defined term "nonconforming lot," which is not used in LDC 13.010(A), in a manner that appears to eliminate the term "authorized lot" from any function in the code. The leeway the county has under ORS 197.829(1) and *Clark* to determine the meaning of ambiguous local legislation does not extend that far. We agree with petitioners that the county has misinterpreted the applicable law.

The assignment of error is sustained.

Petitioners request that we reverse rather than remand the county's decision. In relevant part, OAR 661-010-0071 provides that LUBA shall remand a land use decision that "improperly construes the applicable law, but is not prohibited as a matter of law." OAR 661-010-0071(2)(d). In contrast, OAR 661-010-0071(1)(c) provides that LUBA shall reverse a land use decision when, in relevant part, "the decision violates a provision of applicable law and is prohibited as a matter of law." The county has twice denied petitioners' application based on different interpretations of LDC 13.010 that we have found to be clearly erroneous. We see no point under the present circumstances in remanding the

decision. Accordingly, we conclude that the county's denial is "prohibited as a matter of law" and thus must be reversed.

The county's decision is reversed.