BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

COLUMBIA COUNTY CITIZENS FOR
ORDERLY GROWTH and
JENNIFER KIRKPATRICK,
Petitioners,

vs.

COLUMBIA COUNTY,
Respondent,

and

STEVE MATIACO, JOHN JUNGWIRTH
and CAROLE MATIACO,
Intervenors-Respondent.

LUBA No. 2002-180

FINAL OPINION
AND ORDER

Appeal from Columbia County.

Dana L. Krawczuk, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief was Ball Janik LLP.

No appearance by Columbia County.

Christopher Tingey, Portland, filed the response brief on behalf of intervenors-respondent. With him on the brief was A. Richard Vial and Vial Fotheringham LLP. A. Richard Vial, Portland, argued on behalf of intervenors-respondent.

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

AFFIRMED 04/25/2003

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 three conditional use permits for single family dwellings on three parcels zoned Primary Forest (PF-76).

MOTION TO INTERVENE

Steve Matiaco, John Jungwirth, and Carole Matiaco (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The main issue in this case is whether the county erred in concluding that there are 13 rather than 14 existing dwellings in a section of the county. The challenged decision was adopted following our remand in *Matiaco v. Columbia County*, 42 Or LUBA 277, *aff'd* 183 Or App 581, 54 P3d 636 (2002). We restate the relevant facts from that opinion:

> "[Intervenors] own five contiguous undeveloped parcels located in Township 4 North, Range 2 West, Section 19, zoned PF-76. The five parcels range from 9.48 to 15.02 acres in size. Approximately 534 acres of Section 19 consist of land zoned PF-76, divided into 12 parcels. Approximately four acres of Section 19 consist of lands zoned for community service (CS-1), in two parcels. The remainder of Section 19 consists of lands zoned Rural-Residential (RR-5), divided into 13 parcels, at least nine of which are developed with dwellings. The portion of Section 19 zoned PF-76 is designated Major Habitat and is subject to the county's Big Game Range Overlay (BGR). As relevant here, the BGR zone imposes a residential density standard of one dwelling unit per 38 acres.
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> "In September 2001, [intervenors] filed five separate applications with the county to construct single-family dwellings on each parcel, pursuant to the 'template test' at OAR 660-006-0027 and corresponding land use regulations. To satisfy [Columbia County Zoning Ordinance (CCZO)] 1193 density standards, petitioners submitted a statement that 11 dwellings currently exist within Section 19, or one dwelling per 58 acres.
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> "County planning staff * * * submitted a * * * report finding that 14 dwellings currently existed within Section 19, and therefore that only two of the five applications could be approved consistent with the density standard. The planning commission approved two of the proposed dwellings, but denied dwellings on the three westernmost lots furthest from the access road, on the grounds that allowing more than two dwellings would increase the dwelling density within Section 19 beyond the one dwelling per 38 acres standard specified in CCZO 1193.

> "[Intervenors] appealed the planning commission denial of [the] three dwellings to the board of commissioners [BOC]* * *. * * *
>
> "At the public hearing [held by the BOC] on February 6, 2002, [intervenors] submitted additional evidence supporting their view that only 11 dwellings currently exist in Section 19. [Opponents] submitted testimony that 15 dwellings currently exist in Section 19. On February 13, 2002, the [BOC] deliberated and voted to affirm the planning commission, denying the three disputed dwelling applications, and approving two dwellings. The county's final decision, issued February 20, 2002, interprets CCZO 1193 to require consideration of all dwellings in the entire section, and concludes that [intervenors] had failed to demonstrate there were fewer than 14 dwellings in Section 19. This appeal followed." 42 Or LUBA at 279-81 (footnotes and record citations omitted).

In our decision, we affirmed the BOC interpretation of CCZO 1193.[1] However, we ruled that the county had erred in declining to consider the evidence that intervenors submitted regarding the number of existing dwellings in Section 19.

On remand, the BOC conducted evidentiary hearings on October 23 and 30, 2002, limited to evidence regarding the number of dwellings existing in Section 19. County staff submitted a staff report concluding that there are 13 dwellings in Section 19 (11 existing dwellings and the two dwellings authorized by the county's decision in *Matiaco*). Intervenors submitted additional evidence supporting their position that there are only 13 dwellings in Section 19. Based on that evidence, intervenors argued that approval of three additional dwellings would not exceed the density standard.[2] As relevant here, petitioners presented evidence that there are 14 dwellings in Section 19, if a dwelling on tax lot 604 is included.[3] Therefore, petitioners argued, the county can at most approve only two additional dwellings, not all three.

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[1] The BOC interpreted CCZO 1193 to the effect that, although the Big Game Range Overlay applies only to the 534 acres of Section 19 that are zoned PF-76, the county counts all dwellings located on the approximately 640 acres that are included in Section 19, including those located outside the Big Game Range Overlay, for purposes of applying the one dwelling per 38 acre density standard.

[2] The parties agree that under the county's interpretation and as applied to the present facts the density standard is violated if there are more than 16 dwellings in Section 19.

[3] Petitioners presented evidence and argument regarding a number of different tax lots and dwellings. However, on appeal, petitioners do not challenge the county's findings except insofar as they concern the dwelling on tax lot 604.

Tax lot 604 is zoned RR-5 and is not subject to the BGR overlay zone. The county approved the dwelling on tax lot 604 on May 22, 2002, several months after the county's decision in *Matiaco*. However, the BOC in the present case determined that the relevant question in applying CCZO 1193 is how many dwellings already existed or were approved on the date of its decision in *Matiaco*. Accordingly, the county did not include the dwelling on tax lot 604 in its count. After concluding that 13 dwellings existed in Section 19 for purposes of deciding the issues on remand, the county approved the disputed three additional dwellings. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The BOC declined to count the dwelling on tax lot 604, for purposes of applying the density standard at CCZO 1193, for the following reasons:

> "* * * Final Order No. 10-2002 [the county's *Matiaco* decision] was signed on February 22, 2002, and was thereafter appealed to LUBA. [Petitioners] argue that any dwelling that became a 'dwelling unit' under CCZO 100.17 between the time the application was deemed complete and the time the decision is ultimately made should be counted despite intervening appeals. The [BOC] disagrees. The [BOC] finds that the decision was remanded for determination of the number of dwelling units in Section 19 at the time that the decision was made. While the [BOC] was instructed by LUBA to provide a considered response to [intervenors'] evidence and argument regarding the number of dwellings in the Section, the [BOC] was not instructed to make a decision based on evidence that could not have been considered at the time of the initial decision. Without instructions to the alternative, the [BOC] finds that the remand proceeding is a continuation of the original decision, and the [BOC], therefore, will not consider evidence that it could not have considered in the first proceeding. * * * [T]he [BOC] does not necessarily agree with Staff that the dwelling count should be limited to dwellings in existence at the time the applications are filed. However, the [BOC] finds that the decision must be limited to evidence available at the time the initial decision was made. * * * [Otherwise, opponents] could appeal a decision, presumably [dragging] it out for years, and thereby effectively guarantee that additional dwellings will be added in the Section in the intervening years, and reducing the land available for dwellings in the [BGH] Overlay because of the maximum density standards. Such a result is not called for either in LUBA's remand or otherwise." Record 29 (footnote omitted).

Petitioners argue that the county erred in refusing to count the dwelling on tax lot 604. According to petitioners, once the county reopened the record on remand to accept evidence regarding the number of dwellings in Section 19, it was obligated to consider all evidence submitted on that point. Petitioners characterize the county's refusal to count the dwelling on tax lot 604 as tantamount to a refusal to *consider* petitioners' evidence regarding that dwelling. Petitioners contend

that failure to consider relevant evidence is reversible error. *See Matiaco*, 42 Or LUBA at 288 (the county errs to the extent it rejects all methods or evidence to establish the number of dwellings other than the county's rural address map); *Friends of Linn County v. Linn County*, 37 Or LUBA 280, 285 (1999) (county may not refuse to accept or consider evidence that is relevant to an approval criterion).

Further, petitioners argue that there is no authority for the county's view that it can limit consideration of evidence on remand to evidence that is relevant to determining the number of dwellings that existed or were approved at the time of the initial decision. That view is not authorized by the terms of LUBA's remand, petitioners argue, or by any statute or code provision. Petitioners note that where the legislative intent is to "freeze" the timeframe for which evidence is relevant, that intent is explicitly set forth. *See, e.g.*, ORS 215.750(1)(a)(A) (allowing a template dwelling in a forest zone, only if the prescribed number of parcels and dwellings existed prior to January 1, 1993). According to petitioners, nothing in the code provisions governing the county's decision authorizes the county to apply a temporal limit to the dwelling count, for purposes of CCZO 1193. Absent such authorization, petitioners argue, the county must accept and consider all relevant evidence concerning dwellings that exist or were approved until the date the local evidentiary record on remand is closed, specifically the evidence concerning the dwelling on tax lot 604.

As a general matter, the scope of proceedings on remand from LUBA is governed by the terms of the remand and any applicable local requirements. *Fraley v. Deschutes County*, 32 Or LUBA 27, 36 (1996) (absent instructions from LUBA or local provisions to the contrary, a local government is not required to repeat on remand the procedures applicable to the initial proceeding). A local government is entitled to limit its consideration on remand to correcting the deficiencies that were the basis for LUBA's remand. *Bartels v. City of Portland*, 23 Or LUBA 182, 185 (1992); *Von Lubken v. Hood River County*, 19 Or LUBA 404, 419, *rev'd on other grounds* 104 Or App 683 (1990). Conversely, while not required to do so, a city may expand the scope of its remand hearing beyond the scope of the remand. *Schatz v. City of Jacksonville*, 113 Or App 675, 680, 835 P2d 923 (1992).

Our remand in *Matiaco* was based on the county's misconstruction of law in categorically rejecting intervenors' evidence that there were only 11 dwellings in Section 19, and instead relying on an unexplained staff conclusion, based on the county's rural address map, that there were 14 dwellings in Section 19. As the issues were framed and narrowed to us, the key conflict between the staff number and intervenors' tally centered on tax lots 1700, 601 and 801. Although it was not entirely clear from the nonspecific staff count, it appeared that the staff count assumed there were dwellings on those tax lots, while intervenors presented detailed evidence that no dwellings existed on those tax lots. We remanded for the county to adopt findings resolving the evidentiary conflict between the staff count and intervenors' count. Specifically, we directed the county to address intervenors' contention that a dilapidated, uninhabited "shack" on tax lot 1700 was not a "dwelling unit" under the county's code. Further, we directed the county to consider intervenors' evidence regarding tax lots 601 and 801:

> "Given the specific, direct evidence produced by [intervenors] regarding tax lots 601 and 801, and the absence of support in the record for the staff's apparent position that dwellings exist on those lots, we do not believe that it is consistent with ORS 215.416(9) for the county's findings simply to declare, without any explanation, that the county prefers the staff figure and is not persuaded by [intervenors'] evidence. In our view, some considered response to [intervenors'] evidence and argument regarding tax lots 601 and 801 was necessary to satisfy the county's obligations under ORS 215.416(9). Accordingly, remand is necessary to provide an adequate response." 42 Or LUBA at 290 (footnote omitted).

In the omitted footnote, we noted that "[t]he proceedings on remand could take a number of different forms," and that "we do not intend to prescribe any particular approach." *Id.* n 10. However, we suggested that a logical starting point was for the county to determine where the staff count of dwellings differed from intervenors' count.

Thus, the terms of our remand and the county's corresponding minimum obligations were quite narrow. Arguably, the county was not required to conduct any further evidentiary proceedings at all. It might well have complied with our remand by adopting additional findings clarifying the county's understanding of the staff count and resolving the dispute regarding tax lots 1700, 601 and 801. To the extent further evidentiary proceedings were necessary, the county would have been

within its discretion on remand to limit any evidentiary proceedings to taking evidence to clarify the staff count and the issue of whether any dwellings exist on tax lots 1700, 601 and 801. *Bartels*, 23 Or LUBA at 185.

For whatever reason, the county chose to conduct additional evidentiary proceedings and accept evidence on the broader question of "the issue of the number of dwellings in Section 19."[4] Record 314. County staff submitted a report that essentially agreed with intervenors' position in the initial appeal regarding the number of dwellings in Section 19. In other words, the staff report clarified that staff now agreed with intervenors that there were no dwellings on tax lots 1700, 601 and 801, and that the total number of dwellings in Section 19 is 11 (not counting the two approved in the initial decision). Record 224-26. The staff report noted the existence of the newly approved dwelling on tax lot 604, but did not include that dwelling in the count. Record 225. The BOC decision adopted findings that resolved the disputes with respect to tax lots 1700, 601 and 801. The BOC also adopted findings, quoted above, that explained why the county declined to count the recently approved dwelling on tax lot 604.

Petitioners are correct that nothing in LUBA's remand authorized the county to apply a temporal limitation to the dwelling count required by CCZO 1193. However, nothing in our remand prohibited the county from doing so, either. Nor are we aware of any statute or local code provision that would prohibit the county from taking that approach. More importantly, as discussed above, the scope of our remand was focused on a relatively narrow issue: resolution of the conflict between the staff count and intervenors' tally, particularly with respect to tax lots 1700, 601 and 801. The county would have been entitled on remand to limit the scope of its proceedings to resolving that issue. If it

[4] The county's broader approach to the scope of remand proceedings is understandable. In many cases, and perhaps this case is an example, the scope or type of remand proceedings required by a LUBA remand is not entirely clear, or is left to the county's discretion. If the county takes a narrow, minimalist view of the scope of remand, it risks a challenge in a subsequent appeal to LUBA that the county failed to comply with LUBA's remand.

had expressly done so, the issue of tax lot 604, and any dwelling thereon, would unquestionably not have been an issue that the county was required to address.

Given those circumstances, we conclude that any error the county committed in refusing to consider facts that post-date the initial decision, if it is error at all, is harmless. In essence, the county initially broadened the scope of remand to include matters beyond correcting the deficiencies identified in LUBA's decision, accepted evidence under that broadened scope of remand, and then in its final written decision narrowed the scope of the decision to correcting the deficiencies identified in LUBA's decision. The county was not obligated under the terms of our remand to consider tax lot 604 at all, much less the dwelling constructed on that tax lot after the county's initial decision, and we see no reversible error in the county's belatedly arriving at that view.

The first and second assignments of error are denied.

The county's decision is affirmed.