BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF THE METOLIUS
and TONI FOSTER,
Petitioners,

and

TOMAS FINNEGAN RYAN,
Intervenor-Petitioner,

vs.

JEFFERSON COUNTY,
Respondent.

LUBA No. 2003-186

FINAL OPINION
AND ORDER

Appeal from Jefferson County.

Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioners. With him on the brief was the Law Office of Bill Kloos, PC.

Thomas Finnegan Ryan, Portland, filed a petition for review and argued on his own behalf.

Pamela J. Beery, Portland, filed the response brief and argued on behalf of the respondent. With her on the brief was Joan S. Kelsey and Beery & Elsner, LLP.

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

REMANDED 02//25/2004

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 site plan to expand and redevelop a lodge and tourist cabin facility on a 41.91-acre parcel zoned Camp Sherman Vacation Rentals (CSVR).

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief pursuant to OAR 661-010-0039, to address several issues regarding waiver that are raised in the response brief. There is no opposition to the motion, and the proposed reply brief is allowed.

FACTS

The subject property is developed with an existing lodge and 16 cabins under one ownership. The lodge and cabins are located near Lake Creek, which bisects the property from east to west. Subject to siting standards, the CSVR zone allows (1) single family dwellings, (2) a "lodge complex," (3) "tourist rental cabins," and (4) "accessory recreational facilities." Jefferson County Zoning Ordinance (JCZO) 342(A).[1] The minimum lot size for all permitted uses in the CSVR zone is five acres. JCZO 342(E). Tourist rental cabins are subject to maximum lot

[1] JCZO 105 defines "lodge" and "tourist rental cabins" as follows:

> "Lodge: A building or series of buildings located on a parcel of land under one ownership, consisting of individual units of one or more rooms, each without cooking facilities, that shall be made available for rental to tourists by the night. A lodge complex may include one kitchen and dining room designed for the preparation and serving of meals to unit occupants.
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> "Tourist Rental Cabins: A building or series of buildings on [a] parcel of land under one ownership, having one or more rooms, with cooking facilities in each unit, that shall be made available for rental to tourists by the night or week[, and d]esigned to be rented out to tourists by the night or week."

In addition, JCZO 105 defines "Single Family Detached" to mean "[a] single dwelling unit whose construction is characterized by no common wall or ceiling with another unit and are designed for occupancy by one family only."

coverage standards limiting tourist rental cabins to two units per developable acre. JCZO 342(F)(2).[2]

In 2003, the owners of the subject property applied for site plan approval to renovate the existing lodge and cabins, and to construct an additional 23 "tourist rental cabins." The new cabins would be 1,350-square foot detached dwellings with three bedrooms, three bathrooms, a kitchen, and a covered porch. In addition, the applicant sought approval of a meeting hall with a staff apartment, two parking areas, a recreation building, rest rooms, a picnic shelter, lawn area, hiking paths, future drain field and waste-water facilities. The applicant proposed that the 16 existing and 23 additional cabins be sold as condominiums, while the land underlying the dwellings would be owned by the condominium homeowners' association. Under the proposed condominium declarations, no unit owner may occupy the unit as a permanent residence, or for more than 90 consecutive days. In addition, the condominium declaration required that each unit owner make the unit available for rent for a minimum of 180 days per year. One hundred twenty of those 180 days must occur in the winter, spring and fall months, and 60 days of those days must occur during the summer months. Finally, the declaration prohibits rental periods of longer than 30 consecutive days.

The county planning commission conducted a public hearing and, on July 15, 2003, voted to approve the site plan, with conditions. Petitioners appealed the planning commission decision to the county board of commissioners, which conducted public hearings on September 4 and 18, 2003. On October 21, 2003, the board of commissioners denied the appeal, adopting conditions

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[2] JCZO 342(F)(2) provides, in relevant part:

> "Tourist Rental cabins, including accessory buildings and dwellings for management and employees, shall be limited to two units per acre * * *, with a maximum of 2,800 square feet total buildable space, per acre * * *. An acre shall be considered developed when it has been used to determine allowable density pursuant to this Section.
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> "There shall be one acre of uncommitted, undeveloped open space on the resort property or on property in contiguous ownership to the resort for each developed acre."

of approval that incorporated the restrictions and rental requirements in the condominium declaration.

FIRST ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners contend that the county erred in concluding that the proposed cabins are "tourist rental cabins" within the meaning of JCZO 342(A). According to petitioners, allowing owner-occupancy of the proposed cabins for more than six months of the year is inconsistent with their status as "tourist rental cabins." In addition, petitioners argue that use of the cabins as proposed requires that the cabins be limited to the one dwelling per five acres density standard that applies to single family dwellings rather than the two unit per acre density standard that applies to tourist rental cabins. Finally, petitioners argue that creation of 39 condominium units on the subject property is inconsistent with the definition of "tourist rental cabins" as "buildings on [a] parcel of land under one ownership[.]"

A. Tourist Rental Cabins

Petitioners contend that the residential use by owner-occupants as approved by the decision is necessarily inconsistent with the status of the cabins as "tourist rental cabins." Petitioners argue that under the code definition a tourist rental cabin "shall be made available for rental to tourists by the night or week." It is inconsistent with that definition, petitioners argue, to approve cabins that are available for rental to tourists only part of the time, and to authorize use of those cabins for other uses during other periods. Petitioners contend that the county's contrary interpretation is inconsistent with the text, purpose and policy of the relevant code provisions, and therefore reversible under ORS 197.829(1)(a)–(c).[3] Further, petitioners argue that allowing residential uses

[3] ORS 197.829(1) provides:

> "[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:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

at the proposed density for over half the year is contrary to Statewide Planning Goal 14 (Urbanization), which petitioners contend the relevant code provisions implement. Therefore, petitioners argue, the county's interpretation must be reversed under ORS 197.829(1)(d).

The county responds that the applicant proposed, and the county approved, tourist rental cabins as defined by the code, not single family dwellings. According to the county's decision, the code definitional requirement that tourist rental cabins be "made available" for rental to tourists does not require that the cabins "always" be available to tourists or "only" be available to tourists.[4] The absence of such an express limitation, the county reasons, means that no such limitation was intended. "As written," the county concluded, "the code does allow for at least some owner occupancy." Record 11. The county argues that its interpretation to that effect is consistent with the express language, purpose and policy underlying the code definition, and is not contrary to Goal 14. In addition, the county argues that LUBA and the Court of Appeals affirmed a similar interpretation of a similar code definition in *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411, 417-18 (*Metolius I*), *aff'd* 123 Or App 256, 860 P2d 278 (*Metolius II*), *adhered to on reconsideration* 125 Or App 122, 866 P2d 463 (1993) (*Metolius III*), *rev den* 318 Or 582, 873 P2d 321 (1994).

Because *Metolius I, II* and *III* have a bearing on several issues in this appeal, we discuss those cases in some detail, as well as legislative changes that followed. We also discuss intervening

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"(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; or

"(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[4] The county's decision states, in relevant part:

"The wording of the requirement that cabins be 'made available' to tourists does not require that they are 'always' made available or 'only' made available or continuously made available for these purposes. If such a limitation were desired, the Commission could have made this a specific requirement, but did not do so. As written, the code does allow for at least some owner occupancy. * * *" Record 11.

changes to the standard of review that LUBA is required to apply to local interpretations of local land use criteria.

1. *Metolius I-III*

At issue in *Metolius I* was a proposal to construct 15 cabins on a 3.03-acre parcel in the Camp Sherman Resort Residential Zone, which at that time allowed "traveler's accommodations," defined as "rooms or apartments rented or kept for rent on a daily or weekly basis to travelers[.]" The county imposed a condition of approval limiting owner occupation of the cabins to no more than 36 days per year. The petitioners in that case (who are the petitioners in this case) argued that the proposed cabins fit the definition of single family dwellings, and thus the more restrictive standards applicable to single family dwellings should apply. The county rejected that argument, interpreting "travelers' accommodations" to be a use not limited to a particular structural type, and concluding that the only applicable standards were those governing "traveler's accommodations." We affirmed that interpretation because it was not "clearly contrary" to the express language, policy or context of the code, under the deferential standard of review set out in *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992). *Metolius I*, 25 Or LUBA at 418.

We also rejected the petitioners' argument that the proposed cabins constituted an urban level of use in a rural area and therefore an exception to Goal 14 was required. We held that the county's regulations governing traveler's accommodations were acknowledged to comply with Goal 14, and thus no exception to Goal 14 was required for development allowed under the county's acknowledged code. 25 Or LUBA at 418-19.

The Court of Appeals affirmed, holding that the county's interpretation that the proposed cabins need satisfy only the standards for "traveler's accommodation" was not "clearly wrong," and thus was not reversible under several Court of Appeals' decisions interpreting and applying the *Clark* standard. The court then rejected the petitioners' related argument that owner-occupancy of the proposed cabins for 36 days per year disqualified the proposed cabins as "traveler's accommodations." The court characterized 36 days of owner-occupancy per year as *de minimis*,

and held that under *Clark* the court was "bound to accept the county's interpretation that the '*de minimis*' owner-occupancy condition does not defeat the qualification of the units as traveler's accommodations." *Metolius II*, 123 Or App at 261.[5]

In *Metolius III*, the court granted reconsideration to address the petitioners' argument that, under *Clark*, Goal 14 provided "context" for interpretation of the county code provisions allowing traveler's accommodations. The court rejected that argument, finding that *Clark*'s reference to "context" was to other local plan and code provisions, not to the statewide planning goals. According to the court, *Clark* did not alter the general rule that the goals do not apply after acknowledgment and that development in compliance with acknowledged comprehensive plan and zoning provisions need not be measured for compliance with the goals. The court noted the existence of ORS 197.829(1), but because that statute was adopted after the county decision and was not applicable, the court declined to speculate whether ORS 197.829(1)(d) would require a different result. 125 Or App at 124-27.

2. Post-*Metolius* Code Changes

In 1995, the Department of Land Conservation and Development (DLCD) remanded a county periodic review work task addressing Goal 14, concluding that the code definition of "traveler's accommodations" at issue in *Metolius I, II*, and *III* did not fully comply with Goal 14. The county entered into a mediation process to revise uses allowed in several zones, including the newly-adopted CSVR zone, to assure that the affected areas remain rural land consistent with Goal 14. The end result, in relevant part, was deletion of the provision for "traveler's accommodations" and adoption of the parcel size limitations, density standards and use categories at issue here, codified at JCZO 342, providing for "single family dwellings," "lodge complexes" and "tourist rental

[5] It is worth noting that two of the three judges on the panel filed or joined concurrences stating that, but for the "vestigial scope of review" remaining under *Clark*, the county's interpretation would be "readily rejected." 123 Or App at 261-62 (Durham, J., concurring).

cabins" in the CSVR zone. The findings supporting that legislative amendment state in relevant part that:

> "[T]he new designated zones and allowed uses, both outright and conditional uses, satisfy the requirements of Goal 14 by addressing the inventory of the area and limiting the uses permitted by parcel size, and by limiting the scale and size of structures to insure that these lands remain rural in character and use. * * *" Intervenor-Petitioner's Petition for Review App 10.

Petitioners contend that the purpose of the density and other restrictions applicable to single family dwellings and tourist rental cabins in the CSVR zone is to implement Goal 14, and therefore any county interpretations of those code provisions cannot be inconsistent with their purpose or underlying policy, or contrary to Goal 14, under ORS 197.829(1).

3. Standard of Review

As petitioners point out, the Court of Appeals has recently recharacterized its view of the *Clark* standard that was applied in *Metolius I* and *II*, rejecting the "clearly wrong" shorthand described in a line of cases interpreting *Clark*. As the court stated in *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003):

> "* * * [W]e have summarized [the *Clark*] standard of review as requiring that a local government's interpretation of its code is not reversible unless it is 'clearly wrong.' *Schwerdt v. City of Corvallis*, 163 Or App 211, 218, 987 P2d 1243 (1999); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992). [However, w]e now conclude that that shorthand summary of the standard of review is not precisely consistent with *Clark*. The specific language from *Clark* describing the proper scope of review is that 'LUBA is to affirm the county's interpretation of its own ordinance unless LUBA determines that the county's interpretation is inconsistent with express language of the ordinance or its apparent purpose or policy.' 313 Or at 515. To the extent our summary description of the standard of review under *Clark* suggests that LUBA must sustain all but the most unreasonable interpretations of local land use controls, that description is inaccurate. The legitimacy of an interpretation of a local plan and ordinance provision depends on its consistency with the terms of the provision, the context of the provision, and the purpose or policy behind the provision. Conversely, the validity of the interpretation is not determined solely by the reasonableness of an argument created to support it. The *Clark* decision and ORS 197.850(9), which was enacted after *Clark*, are more correctly characterized as

> consistent with the rules of construction announced in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).
>
> "That understanding is also consistent with ORS 197.829, which governs LUBA's standard of review. That provision requires LUBA to affirm a local government interpretation of its comprehensive plan and land use regulations unless LUBA determines that the interpretation is inconsistent with the express language of the plan or regulation, is inconsistent with the purpose of the plan or regulation, is inconsistent with the underlying policy providing the basis for the plan or regulation, or is 'contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.' ORS 197.829(1)(d)." 187 Or App 524-25 (footnote omitted).

We understand petitioners to argue that any similarity between the interpretations affirmed in *Metolius I* and *II* and the interpretations challenged in the present case is not dispositive, because the extremely deferential articulation of the standard of review applied in those cases is no longer applicable.

4. Analysis

Returning to the present case, we agree with the county that *Metolius I* and *II* have a considerable bearing on the interpretational issue before us, although not quite the bearing the county argues. Like the definition of "traveler's accommodations" at issue in those cases, the key definitional element of "tourist rental cabins" is rental to tourists. As a textual matter, that definition does not necessarily preclude *some* residential use by owner-occupants, as the county found in the present case. However, the proposed uses to which the county applied its interpretations of the relevant definitions in the prior *Metolius* decisions and the present case differ in critical ways. Significantly, the court in *Metolius II* found that "the only use to which respondents propose to put [the proposed cabins] are traveler's accommodations." 123 Or App at 260. Even more significantly, the court found that the period of owner-occupancy in that case, *i.e.*, use of the proposed cabins for something other than "traveler's accommodations," was *de minimis*. *Id.* at 261. Here, the applicant proposed and the county approved use of the cabins more than half the time for something other than "tourist rental cabins." Residential use of the cabins by the owner-occupants for more than six months of the year is simply not *de minimis*.

As the concurrences in *Metolius II* indicated, the interpretation at issue in that case was affirmable only under an extremely deferential articulation of our scope of review that the court has since corrected. It seems unlikely that the court would affirm the interpretation in that case under the scope of review described in *Church*. It seems still more unlikely that the court would affirm the interpretation applied to the significantly different proposal in this case. While the county is correct that the code definition of "tourist rental cabins" does not state that cabins must "always" be available for rental to tourists, it also does not suggest that such cabins need be available to tourists only half the year, and can be made available for other uses the remainder of the year, and still qualify as "tourist rental cabins." The context of the code definition includes the specific density standards applicable to tourist rental cabins, and the other uses allowed in the CSVR zone such as single family dwellings, which are defined and regulated under very different standards. That context strongly suggests an important regulatory distinction between tourist rental cabins and residential uses allowed in single family dwellings. In that context, and against the background of the *Metolius* cases, we conclude that the county's interpretation—that non-*de minimis* residential use of the cabins by the owner-occupants is compatible with their status as "tourist rental cabins"—is inconsistent with the express language of the code, under ORS 197.829(1)(a).[6]

This subassignment of error is sustained.

B. JCZO 1001

JCZO 1001 provides that "[w]here the conditions imposed by a provision of this ordinance are less restrictive than comparable conditions imposed by any other provisions that are more restrictive, the more restrictive shall govern." Petitioners argue that even if the structure and proposed use of the cabins qualify in part as "tourist rental cabins," the proposal to allow residential use by owner-occupants more than half the year also qualifies the cabins as "single family dwellings"

[6] Having reached that conclusion, we need not address petitioners' further argument that for purposes of ORS 197.829(1)(b)-(d) the county's interpretation is also inconsistent with the purpose and policy underlying the code provision, and contrary to Goal 14, which petitioners argue the code definitions and related density standards implement.

under the code. If so, petitioners argue, the more restrictive density standards applicable to single family dwellings must apply, pursuant to JCZO 1001.

The county rejected that argument, concluding that because the proposed cabins met the definition of "tourist rental cabins," they cannot also constitute single family dwellings.[7] The county did not address petitioners' argument under JCZO 1001.

We have already agreed with petitioners that the county erred in concluding that, where a cabin owner has a right to occupy the cabin for all but 180 days each year, that cabin may be viewed as a "tourist rental cabin," simply because the cabins will be available for rent for those 180 days. Whatever *de minimis* use of the disputed cabins by the owners may be possible under the reasoning in *Metolius I-III*, residential use by the owner-occupants for slightly more than one half of the year is not *de minimis* and, consequently, the applicant's and county's characterization of the disputed cabins as "tourist rental cabins" is simply untenable. Although our agreement with petitioners on that point lends some support to petitioners' view that the proposed cabins should be viewed as *de facto* single family dwellings that exceed JCZO maximum density limits, we need not and do not decide that question.

We do not reach this subassignment of error.

C. Parcel of Land Under One Ownership

JCZO 105 defines "tourist rental cabins" in relevant part as "[a] building or series of buildings on [a] parcel of land under one ownership[.]" Petitioners argue that creation of 39 condominium units on the subject property, as proposed, is inconsistent with the definition of "tourist rental cabins," because it does not involve "buildings on a parcel of land under one ownership."

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[7] The decision states, in relevant part:

> "[Petitioners'] argument is not well-taken, based upon the interpretation that the proposals are 'tourist rental cabins' within the meaning of the CSVR Zone. These units can only be either 'tourist rental cabins' or 'single-family dwellings' under the code, since the code applies different requirements to these two different categories of units. Since we have determined that these units meet the special definitional requirements for the [tourist rental cabins under] the CSVR zone, they clearly are not single-family dwellings." Record 47.

The county rejected that argument below, interpreting the definition of "tourist rental cabins" to be met as long as the *parcel* underlying the proposed condominiums is "under one ownership":

> "Under the Oregon Condominium Act, ORS Chapter 100, a 'unit' (here, each cabin) is a separate parcel of real property capable of being conveyed as with any traditional parcel of real property. The difference in this case, is that the submission of the property to condominium ownership does not divide the land, but rather divides the units themselves (so-called 'horizontal' property division). In this application, the land and any common elements remain in one ownership, resting with the unit owners' association. As such, it is the Board of Commissioners' opinion that the submission of this property to condominium ownership meets the County's definition element requiring a 'parcel of land under one ownership' under the Oregon Condominium Act." Record 11.

In support of that interpretation, the county's response brief points to a 1997 letter in the record from an attorney (who happened to represent the applicant before the county during the present proceedings) to the county board of commissioners commenting on proposed versions of JCZO 342 that were being considered by the county during the 1997 mediation process to resolve DLCD's periodic review remand. That letter objects to the then-proposed definitions of "lodge complex" and "tourist rental cabins" as "a building or series of buildings under one ownership." Record 81. The letter argues that that language would preclude separate ownership of different buildings in a resort, and that DLCD's remand did not require such a result. The county argues that the mediation process ultimately resulted in the current language, which places the modifying phrase "under one ownership" after "parcel of land" rather than after "a building or series of buildings." According to the county, that legislative history supports the county's view that, while "tourist rental cabins" must be located on a "parcel of land under one ownership," the county did not intend in adopting the definition of "tourist rental cabins" to require that the cabins and the underlying land be in common ownership.

The phrase "a building or series of buildings on a parcel of land under one ownership" is certainly ambiguous. It could mean, as petitioners read it, that the building(s) and land must be under one ownership. Alternatively, the phrase "under one ownership" could modify only "parcel of land." Both views seem linguistically plausible. The legislative history the county relies on, while not

compelling, supports to the county's view that it did not intend the code definition to preclude separate ownership of buildings, or separate ownership of buildings and land. We cannot say that the county's interpretation to that effect is inconsistent with the express language of that definition, or otherwise reversible under ORS 197.829(1). This subassignment of error is denied.

The first assignment of error (petitioners) is sustained, in part.

SECOND ASSIGNMENT OF ERROR (PETITIONERS)

The county found that the existing lodge and cabins are located closer to Lake Creek than currently allowed under applicable zoning regulations, and are therefore nonconforming structures. Petitioners contend that the county erred in verifying the preexisting lodge and cabins as "nonconforming uses" for purposes of ORS 215.130 and analogous provisions at JCZO 501, without following the procedures and adopting the findings required by the statute and code to verify the existence and scope of nonconforming uses. According to petitioners, the county's failure to undertake separate or formal permit hearings under ORS 215.130(9) or JCZO 501 to verify the existence and scope of nonconforming uses on the property was procedural error that prejudiced petitioners' substantial rights.

Petitioners argue that the decision allows the existing lodge and cabins to be re-roofed and re-sided, and argues that such improvements are "alterations" that require approval under the statute and code, which itself requires findings regarding the existence and scope of the nonconforming use. Further, petitioners argue that the decision allows existing and allegedly nonconforming commercial activities to occur in the lodge, without adequate findings regarding the existence and scope of such nonconforming activities. Finally, petitioners argue that the decision approves relocation and alteration of a nonconforming footbridge across Lake Creek.

The county responds that the only issue raised below regarding nonconforming uses was whether proposed changes to the existing lodge and cabins must be evaluated as alterations to

nonconforming uses.[8] The county argues that no specific issue was raised below regarding (1) the alleged need to follow the code and statutory procedures for verifying nonconforming uses, (2) commercial activities in the lodge, or (3) the footbridge across Lake Creek. The county contends that these issues are waived, under ORS 197.763(1) and 197.835(3). With respect to the existing lodge and cabins, the county argues that the county's findings adequately respond to the issue raised and adequately explain why the proposed re-siding and re-roofing are consistent with JCZO 501.[9]

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[8] Petitioners argue that the issues raised in this assignment of error were raised in the following portion of their appeal statement:

> "The decision fails to address the applicant's proposed alterations to existing nonconforming uses on the subject site as required by JCZO 501 "Nonconforming Uses."
>
> "* * * [T]he proposal is starting with a number of structures that are nonconforming under the code, and it is proposing to make alterations to a number of those structures. For example, a number of structures are too close to the creek. The application is silent about the nonconforming status of the structures and uses. This issue may not be ignored. It must be addressed in the context of this review. * * * This county review must include an analysis of the scope of the nonconformity and the proposed changes. The nonconforming use provisions of JCZO 501 apply." Record 459-61.

Petitioners also cite to the following statements in their final written submittal:

> "Absent full compliance for all uses and structures, a NCU [nonconforming use] verification and alteration approval is needed * * *
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> "Here the applicant wishes to get county approval for a Tourist Rental Cabin use. The applicant has two choices. First, it can demonstrate that all aspects of its use, including the existing structures in the flood hazard area and the riparian setback area, are in full compliance with all the applicable zoning code standards. It has not tried to do this. It is assuming that if it leaves the existing structures alone, they may continue to be used for that use.
>
> "On the contrary, if the applicant does not want to bring all aspects of the use into compliance with the current code, then it must verify that the existing structures and use is a nonconforming use. See the enclosed Holzman decision (Order 0-140-02) to see how this is done. Then it must justify the changes it wants to make on the entire property as an alteration to a nonconforming use under the standards in the statute and the code. It has not attempted to do this. Were it to try, the standards for an alteration could not be met. " Record 119-121.

[9] The county's findings quote portions of JCZO 501, in particular the requirement at JCZO 501(A)(1) that "[a] nonconforming structure, which conforms with respect to use, may be altered later or replaced if the alteration or replacement does not cause the structure to deviate further from the standards of this ordinance."

> "The JCZO 105 defines 'nonconforming use' as 'a lawful existing * * * use at the time this ordinance or any amendment thereof becomes effective, which does not conform to the

We agree with the county that no issue was raised below with sufficient specificity regarding (1) the alleged need to follow additional code and statutory procedures for verifying nonconforming uses, and (2) commercial activities in the lodge. Petitioners' statement suggests that the county can address the "issue" of nonconforming use "in the context of this review," which does not hint that petitioners believed another or different type of review was necessary. The only specific nonconformity mentioned is the location of the existing structures close to Lake Creek, within the setback adopted in 1997. Therefore, any issues regarding the correct procedure to follow or allegedly improper existing commercial use of the lodge are waived.[10]

Petitioners' reference to "structures" arguably included the footbridge as well as the existing lodge and cabins. The county apparently agreed with petitioners that proposed improvements to the lodge and cabins required evaluation under JCZO 501, and adopted findings under that code provision. *See* n 9. Petitioners do not directly challenge those findings. As the findings explain, the lodge and cabins are conforming *uses*, but their location within the setback renders them nonconforming *structures*. The county's findings adequately explain why, even assuming re-roofing and re-siding the lodge and cabins are alterations, they are permitted under JCZO 501 because they do not cause the structure to deviate further from applicable standards.

> requirements of the zone in which it is located. An amendment to the JCZO which took effect on April 9, 1997, adopted the current Riparian Corridor and Flood Plain Combining Zones.
>
> "The existing structures within the Riparian Corridor area were constructed in the 1920s and 1930s as per letter from Kitty Warner. The Commission verifies that the existing structures located within the Riparian Buffer Zone are 'nonconforming.'
>
> "The existing cabins and lodge conform with respect to use and can be altered as the re-siding and re-roofing will not cause the structure to deviate further from the standards of [the] zone as per [JCZO] 501(A)(1) above. The Commission finds that the proposal meets the standards in [JCZO] 501." Record 47.

[10] In the third assignment of error, petitioners raise a similar issue regarding commercial use of the lodge, arguing that there is no basis in law to allow the lodge kitchen to be used to serve the general public, except as a nonconforming use, which requires evaluation under JCZO 501. We understand the county to reassert its waiver argument with respect to that argument, and also to dispute that the applicant proposed or the county approved nonconforming commercial use of the lodge. We agree with the county that no specific issue was raised below regarding nonconforming commercial use of the lodge, and that issue is waived.

Contrary to petitioners' argument, the county did not approve relocation of the footbridge, but instead required that any relocation of the bridge be approved pursuant to the county's variance procedures, which require public hearings. Record 45. Petitioners do not explain why, under these circumstances, the county must in this decision adopt findings under JCZO 501 verifying the nonconforming status of the existing footbridge.

The second assignment of error (petitioners) is denied.

THIRD ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners contend that the county incorrectly calculated the (1) density of tourist rental cabins and required acreage of undeveloped open space, and (2) buildable square footage limitations. In addition, petitioners argue that the county erred in failing to require that the applicants seek subdivision approval, and in approving development on lands required to be undeveloped open space.

A. Density

JCZO 342(F)(2) limits the density of tourist rental cabins, including accessory buildings and dwellings for staff, to two units per acre, and also requires one acre of undeveloped open space for each developed acre. *See* n 2. According to petitioners, the county allowed 41 dwelling units, one more dwelling unit than permitted under JCZO 342(F)(2). Petitioners argue that the total acreage is 41.9 acres, which allows only 20 full developable acres on the property, and therefore only 40 units. In contrast, the county found there were 21 developable acres, after "rounding up" from 20.95 acres (half of 41.90 acres). Under the county's reckoning, the county argues, a density of 42 dwellings is permissible, and therefore the 41 dwellings allowed is consistent with JCZO 342(F)(2).

Petitioners argue that the only defensible way to do the math is to determine the number of full developable acres, in other words to "round down" rather than "round up" when the acreage at issue is not a whole number. However, it is not clear to us why rounding down is any more or less consistent with JCZO 342(F)(2) than rounding up. Even if rounding up is error, the apparent purpose of JCZO 342(F)(2) is to limit developed density by ensuring that the amount of

"developed" acres does not exceed the amount of "undeveloped" acres. Here, the applicant essentially proposes 20.5 "developed" acres and 21.4 "undeveloped" acres, which seems entirely consistent with the purpose of JCZO 342(F)(2).

This subassignment of error is denied.

B. Buildable Space

JCZO 342(F)(2) limits maximum buildable space to 2,800 square feet per developed acre. The applicant proposed, and the county approved, a total buildable area of 58,800 square feet, based on "rounding up" half of the subject property, 20.95 acres, to 21 acres (21 times 2,800 equals 58,800). Petitioners repeat their argument that the county erred in rounding up 20.95 acres to 21 acres, and that, properly understood, JCZO 342(F)(2) limits the total buildable area on the subject property to 58,660 square feet (20.95 times 2,800). In addition, petitioners argue that the county erred in failing to include covered decks or porches attached to the proposed new cabins, in calculating total buildable space.

The county responds that it interpreted its code to allow "rounding up" under the maximum buildable space limitation where the difference is "negligible."[11] In addition, the county argues even if it erred in "rounding up," the difference between 58,660 square feet and 58,800 square feet is insignificant, and therefore any error is harmless.

With respect to the decks or porches, the county concedes that the approved 58,800 square feet of buildable space does not include the 550-square foot covered decks or porches that the applicant proposes to construct along with the new cabins. However, the county argues that it

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[11] The county's findings state, in relevant part:

> "* * * The Applicant's calculation was based upon 21.0 acres of 'developable property.' The Applicant's property measures 20.95 acres and Staff has accepted rounding up of that number for calculation of the maximum square footage. The [board of commissioners] interprets its code to allow rounding up in this instance where, as here, the difference in applicable acreage is .05 acre, which amounts to 1/100th of one percent of the total area in question. As such, the difference resulting from rounding up is negligible and is consistent with the intent of the square footage limitation, which is to assure an appropriate share of undeveloped land in the affected area." Record 47.

interpreted the maximum buildable space limitation in JCZO 342(F)(2) to include "accessory buildings" such as a pool house, shop or garage.[12] Although the county did not expressly consider the question of decks under the maximum buildable space limitation, the county argues that it implicitly adopted an interpretation to the effect that only "buildings" are included within the building space limitation, not accessory structures, such as porches or decks, that are not "buildings."

We cannot say that the board of commissioners' express interpretation that "rounding up" is permissible in calculating the maximum buildable space limitation, where it results in "negligible" increases in buildable space, is inconsistent with the text, purpose or policy underlying JCZO 3.346(F)(2).

With respect to the issue of decks or porches, the proposed design for the new cabins includes large covered porches integrated into the roof and foundation of each cabin; however, the area of such porches was apparently not included in the calculation of "buildable space." Record 991, 1005. The county did not expressly consider the question of whether the proposed decks or porches should be included in the "buildable area," and we do not see that there is an implicit interpretation that is adequate for review. We note that the county apparently viewed accessory structures such as garages or shops to be structures that must be included in the "buildable area." If the county would require the area of a garage or shop attached to a cabin to be included in the "buildable area," it is not immediately clear to us why the county would not also include the area of a

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[12] The county's findings state, in relevant part:

> "* * * Any accessory building such as a pool house or shop/garage would count in the overall 2,800 square foot per acre limitation.
>
> "* * * * *
>
> The clear meaning of [JCZO 342(F)(2)] is that the units would include tourist rental cabins and any accessory buildings or dwellings where management and employees would be living. * * * The definition of 'unit' is not intended to include non-dwelling accessory buildings. [However, a]ccessory buildings are limited in size by the 2,800 square foot per acre limitation contained in the Ordinance and are included within the aggregate square footage calculation. * * *" Record 27.

large covered porch or deck attached to a cabin. The county may be correct that "buildable area" is or should be limited to "buildings." However, we note that, while the county's code does not define "buildable area," it defines "building" to mean "[a] structure built for the support, shelter, or enclosure of persons, animals, chattels, or property of any kind." JCZO 105(B). That description might well include the proposed covered porches or decks, which are indisputably attached to a "building," and which presumably are structures intended to provide support and shelter for persons and chattel. Because the county did not adopt an adequate interpretation of the pertinent code provisions, and the code is subject to several possible interpretations, remand is appropriate to allow the county to interpret the code in the first instance.

This subassignment of error is sustained, in part.

C. Subdivision Approval

Petitioners contend that the proposed creation of 39 condominium units constitutes a "subdivision" as that term is defined in the county's code, and therefore the county erred in failing to apply the county subdivision ordinance.

Petitioners explain that the county zoning ordinance as well as its subdivision ordinance define the term "subdivided land" to include "creation of eleven (11) or more undivided interests in an area or tract land[.]" JCZO 105(B); Jefferson County Subdivision Ordinance (JCSO) 108(B)(40).[13] According to petitioners, the proposed condominium scheme falls within the definition of "subdivided land," and therefore triggers the requirements for a subdivision, because it proposes to create more than 11 undivided interests in a tract of land.

The county's decision rejected this argument, finding that the JCSO requirements did not apply because the applicant did not propose to "divide land" within the meaning or subject to the

[13] JCSO 108(B)(40) provides in relevant part:

> "Subdivide Land: To divide an area or tract of land into four (4) or more lots * * *.
>
> "Subdivide Land is also defined as the creation of eleven (11) or more undivided interests in an area or tract of land * * *."

requirements of the JCSO. We agree. The code definition petitioners cite to apparently reflects the requirements of ORS 92.305 to 92.495, the Oregon Subdivision and Series Partition Control Law. In relevant part, that statute defines "subdivided lands" and "subdivision" to mean creation of 11 or more undivided interests. ORS 92.305(12). That definition expressly excludes "property submitted to ORS 100.005 to 100.910," the Oregon Condominium statute. *Id.* Therefore, whatever the code and statutory definition of "subdivided land" is intended to include, it does not include a condominium development such as that proposed here. This subassignment of error is denied.

D. Undeveloped Open Space

JCZO 342(F)(2) requires that at least half the subject property remain as "uncommitted, undeveloped open space." *See* n 2. Petitioners contend that the county approved a number of improvements in the areas delineated for open space, including bridges, walking paths, a pond, drainfield, and fences, all of which, petitioners argue, constitute "development" as that term is defined in the code.[14]

The county rejected petitioners' argument, finding that the pond and drainfield are in developed areas, that no fences are proposed but perimeter fences requested by state agencies, and that to the extent the existing walking paths are "development" the proposal still meets the 50 percent open space requirement. Record 49. Petitioners do not challenge these findings, or attempt to demonstrate that the challenged improvements, assuming they constitute "development," are to be located in open space areas or, if they are, that they cause the proposal to violate the 50 percent open space requirement. This subassignment of error is denied.

The third assignment of error (petitioners) is sustained, in part.

[14] JCZO 105 defines "development" to include "[a]ny man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations."

FOURTH ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners contend that the county erred in approving development within the Riparian Corridor Buffer Combining zone (RB), contrary to the requirements of JCZO 325.

In relevant part, the RB zone prohibits structures, grading and impervious surfaces within 75 feet of the banks of Lake Creek. The RB zone also prohibits removal of vegetation, with limited exceptions, including "replacement of vegetation with native riparian species," as necessary for "restoration activities." JCZO 325(C)(2)(A). In addition, the RB zone allows nonpaved paths and "[r]eplacement of existing structures and structures in the same location that do not disturb additional riparian surface area," provided they are designed to "minimize intrusion into the riparian area." JCZO 325(C)(3).

The county's decision approves footpaths within the RB zone, but does not approve relocation of the footbridge. Instead, it contemplates that any relocation or addition to bridges over Lake Creek must be pursuant to a request for a variance to RB zone requirements. In addition, the county required the applicant to develop a riparian improvement plan in cooperation with state and local agencies that will, among other things, require revegetation of the riparian area with native vegetation, elimination of noxious plants, and plantings to provide shade along Lake Creek.

Petitioners first argue that the county cannot approve a variance to place new footbridges or relocate the existing footbridge under the variance criteria, which require a finding that absent the variance the property is undevelopable. The county cannot approve a variance, petitioners argue, because the property is already developed. That being the case, petitioners contend, the county erred in approving footpaths depicted on the site plan that lead to the new and relocated footbridges. According to petitioners, approval of dead-end footpaths in the riparian area is inconsistent with RB requirements to "minimize intrusion" into the riparian zone.

Second, petitioners argue that the county erred in authorizing removal of vegetation in the riparian area under a riparian improvement plan, without adopting findings explaining what vegetation will be removed and what vegetation will be replanted. According to petitioners, the

county improperly deferred these issues by imposing a condition of approval to develop a riparian improvement plan, pursuant to a process that does not require notice and public hearing, rather than finding compliance with the requirements of JCZO 325(C)(2)(A).

Finally, petitioners argue that the footpaths the county approved in the riparian area will require grading, contrary to the prohibition on grading in the RB zone. According to petitioners, the county should have conditioned approval to prohibit grading that might be associated with development of footpaths within the riparian zone.

The county responds that during the proceedings below the applicant withdrew from the proposed site plan the new and relocated footbridges and the paths leading to them, and therefore the county did not approve any "dead-end" footpaths, as petitioners allege. The county also disputes that any footpaths approved in the riparian area would violate the requirement to "minimize intrusions" in the riparian zone.

With respect to the riparian improvement plan, the county characterizes that plan as an obligation voluntarily assumed by the applicant and not one required by any approval criterion, including JCZO 325(C)(2)(A). Finally, the county disputes that the applicant proposed or the county approved any "grading" within the riparian area.

We agree with the county that the applicant withdrew the initially proposed new and relocated footbridges, and petitioners' arguments regarding dead-end footpaths do not provide a basis for remand. Further, we agree that the county did not approve any "grading" within the riparian area, within the meaning of the RB zone.

Why the county imposed the condition to develop a riparian improvement plan is not clear to us. However, we agree with the county that JCZO 325(C)(2)(A) does not *require* riparian restoration; instead it provides an exception to the prohibition on vegetation removal, for "restoration activities" that replace (presumably non-native) vegetation with "native riparian species." The applicant is apparently willing (or was required by interested agencies) to undertake riparian restoration, and the county duly imposed a condition requiring development of a plan in

concert with interested agencies and persons, including petitioner Friends of the Metolius. To the extent JCZO 325(C)(2)(A) is an approval criterion, we do not see that it requires particular findings regarding what vegetation may be removed and what vegetation may be planted. Nor do we see that a condition requiring development of a plan to conduct restoration in concert with interested agencies "defers" a finding of compliance with JCZO 325(C)(2)(A), or that such development must be conducted in a public hearing process. Petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The fourth assignment of error (petitioners) is denied.

FIRST ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)

Intervenor-petitioner (intervenor) argues that in order to constitute "tourist rental cabins," the proposed cabins must be "made available for rental to tourists by the night or week." According to intervenor, the county erred in concluding that cabins that are available for rental to tourists slightly less than half the year are "made available" within the meaning of the definition of "tourist rental cabins."

Intervenor's arguments are similar to those raised by petitioners under the first subassignment, first assignment of error. We sustained that subassignment of error, and for the same reasons we sustain intervenor's first assignment of error.

The first assignment of error (intervenor) is sustained.

SECOND ASSIGNMENT OF ERROR (INTERVENOR)

Intervenor's second assignment of error argues that the county erred in approving use of the proposed cabins as single family dwellings without complying with the more restrictive density standards applicable to such uses, as required by JCZO 1001. For the same reasons we declined to reach petitioners' second subassignment of error under the first assignment of error, we decline to reach intervenor's second assignment of error.

THIRD ASSIGNMENT OF ERROR (INTERVENOR)

Intervenor argues that the county erred in failing to include the proposed 550-square foot deck or porches in the calculation of "buildable space." Intervenor's argument is similar to that sustained in petitioners' second subassignment, third assignment of error. For those reasons, we sustain intervenor's third assignment of error.

FOURTH ASSIGNMENT OF ERROR (INTERVENOR)

Intervenor argues that the county erred in relying upon limitations on periods of owner-occupancy in the condominium declarations, because there is no condition of approval or other mechanism to prevent the declarations from being amended at any time.

The county responds that the challenged decision explicitly incorporated the owner-occupancy provisions in the condominium declarations as a condition of approval. Record 57 (Condition T). Thus, the county argues, even if the condominium declarations are later amended, such amendments would not and could not affect the condition of approval limiting periods of owner-occupancy. We agree with the county that Condition T is independent of the condominium declarations, and therefore intervenor's argument that amendment of the condominium declarations could affect the limitation on owner-occupancy does not provide a basis for reversal or remand.

The fourth assignment of error (intervenor) is denied.

The county's decision is remanded.