BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MIKE BURTON,
Petitioner,

vs.

POLK COUNTY,
Respondent,

and

DOUGLAS KILBRIDE,
Intervenor-Respondent.

LUBA No. 2004-067

FINAL OPINION
AND ORDER

Appeal from Polk County.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Johnson & Sherton, PC.

David Doyle, Polk County Counsel, Dallas, filed the response brief and argued on behalf of respondent.

Douglas Kilbride, Dallas, represented himself.

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

REMANDED 01/25/2005

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision that approves a temporary hardship dwelling in a forest zone.

MOTION TO INTERVENE

Douglas Kilbride, one of the applicants below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor owns a 42.95-acre parcel (Tax Lot 100) and an adjoining 15.08-acre parcel (Tax Lot 302). The total 58.03-acre ownership is planned and zoned Timber Conservation (TC) and has frontage on two roads. Frost Road runs along the northern border of Tax Lot 100 and McTimmons Road runs along the eastern edge of Tax lot 302.

There are currently two dwellings on Tax Lot 100. The first dwelling is a manufactured dwelling that is located next to Frost Road at the northern end of Tax Lot 100. That dwelling was placed on Tax Lot 100 in 1979, and we refer to that dwelling as the 1979 dwelling. In 2002, intervenor requested approval from the county to construct a dwelling to replace the 1979 dwelling (the replacement dwelling).[1] On October 11, 2002, intervenor informed the county that he would convert the 1979 dwelling to nonresidential use within three months after the replacement dwelling was completed and occupied. On October 22, 2002, the county approved intervenor's request.[2] The replacement dwelling is located at the south end of Tax Lot 100 approximately 1500 feet south of the 1979 dwelling. Access to the

[1] Under Polk County Zoning Ordinance (PCZO) 177.035(C), a lawfully established dwelling may be replaced if the dwelling to be replaced meets certain standards. PCZO 177.035(C)(5) requires that "[t]he dwelling to be replaced must be removed, demolished or converted to an approved non-residential use, within 3 months of the completion of the replacement dwelling."

[2] A condition of the county's approval of the replacement dwelling was that the 1979 dwelling "be removed, demolished, or converted to nonresidential use within 90-days of occupancy of the replacement dwelling." Record 62.

replacement dwelling is provided by a driveway across Tax Lot 302 to McTimmons Road. The replacement dwelling has its own septic system, but it uses the existing well next to the 1979 dwelling for domestic water. Water is piped from that well to the replacement dwelling.

The replacement dwelling was completed and occupied in October 2003. The 1979 dwelling has not been removed or converted to a nonresidential use, as PCZO 177.035(C) and the county's October 22, 2002 decision require. On December 2, 2003, intervenor applied for approval of a hardship dwelling. Where a resident of an existing dwelling in a TC zone has a hardship, PCZO 177.035(B) allows temporary use of a "manufactured home" or "temporary residential use of an existing building."[3] Intervenor proposed that the 1979 dwelling be allowed to remain in place and be used as a hardship dwelling. The hardship

[3] PCZO 177.035(B) describes the allowed medical hardship dwelling as follows:

> "One manufactured home or the temporary residential use of an existing building in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or relative of the resident, subject to the general review standards in [PCZO] 177.050, if:
>
> "(1) The hardship is certified by a licensed physician[.]
>
> "(2) The manufactured home or existing building converted to residential use is connected to the existing sewage disposal system, unless the Department of Community Development finds the existing system to be inadequate and that it cannot be repaired or is not physically available[.] If the manufactured home will use a public sanitary system, such condition will not be required.
>
> "(3) The applicant agrees to renew the permit every two years.
>
> "(4) Within 3 months of the end of the hardship, the manufactured dwelling or building converted to a temporary residential use, shall be removed, demolished, or converted to an approved nonresidential use.
>
> "(5) As used in this section, 'hardship' means a medical hardship or hardship for the care of an aged or infirm person or persons.
>
> "(6) A temporary residence approved under this section is not eligible for replacement under [PCZO] 177.035(C)."

dwelling would house a person who would care for intervenor's son. The county approved the request, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

The county's TC zone is a zone that implements Statewide Planning Goal 4 (Forest Lands). The PCZO 177.035(B) medical hardship dwelling provision implements a Land Conservation and Development Commission (LCDC) administrative rule, OAR 660-006-0025(4)(t), which limits the uses that may be allowed on forest lands. In his first assignment of error, petitioner alleges that if the 1979 dwelling is to be used as a hardship dwelling, it must be moved and connected to the existing septic system that serves the replacement dwelling rather than the existing septic system that currently serves the 1979 dwelling.[4]

Petitioner first contends that the county's decision should be remanded because it does not adequately respond to petitioner's contention that the hardship dwelling must be connected to the replacement dwelling's septic system. However, petitioner also argues that the county's decision can be read to include an implicit interpretation that PCZO 177.035(B)(2) does not require that the 1979 dwelling be connected to the same septic system that serves the replacement dwelling if it is already served by its own existing septic system. Petition for Review 5-6. We agree that the county's decision includes such an implicit interpretation. We therefore proceed to consider the merits of that implicit interpretation.

We set out the relevant text of PCZO 177.035(B) at n 3 above. OAR 660-006-0025(4)(t) is similarly worded and authorizes:

> "A manufactured dwelling or recreational vehicle, or the temporary residential use of an existing building, in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or a

[4] We understand that the replacement dwelling is located at a significantly higher elevation than the 1979 dwelling. Even if it might be theoretically possible to pump effluent 1500 feet and uphill to use the existing septic system, as a practical matter if the 1979 dwelling must use the same septic system as the replacement dwelling, it would have to be moved and sited close to the replacement dwelling's septic system. We do not understand petitioner to contend otherwise.

> relative as defined in ORS 215.213 and 215.283. The *manufactured dwelling* shall use the same subsurface sewage disposal system used by the existing dwelling, if that disposal system is adequate to accommodate the additional dwelling. * * *[.]"

If the county's decision were guided solely by OAR 660-006-0025(4)(t), it is reasonably clear that the 1979 dwelling could be approved as a medical hardship dwelling and *would not be* required to connect to the same septic system that serves the replacement dwelling. OAR 660-006-0025(4)(t) identifies three categories of potential medical hardship dwellings: (1) manufactured dwellings, (2) recreational vehicles, and (3) existing buildings. It is reasonably clear that the manufactured dwellings that OAR 660-006-0025(4)(t) references are manufactured dwellings that would be brought onto the property temporarily rather than an existing manufactured dwelling building that is already located on the property and connected to a well and septic system. While it may be that OAR 660-006-0025(4)(t) simply did not envision that possibility, we believe the 1979 dwelling is more accurately viewed as an "existing building," than as a "manufactured dwelling," as OAR 660-006-0025(4)(t) uses those terms. Under OAR 660-006-0025(4)(t), manufactured dwellings that are brought onto the property are required to connect to the existing septic system serving the existing residence if the system is adequate. But OAR 660-006-0025(4)(t) does not require that a "recreational vehicle" or "an existing building" be connected to the existing septic system that serves the existing residence. Presumably a recreational vehicle would have its own waste collection system, making connection to a septic system unnecessary. We do not know why LCDC did not require that existing buildings be connected to an existing septic system that serves the existing dwelling if it is feasible to do so. Whatever LCDC's reasoning, OAR 660-006-0025(4)(t) clearly does not require that an existing building that is to be used as a medical hardship dwelling be connected to the same septic system that serves the replacement dwelling. Under OAR 660-006-0025(4)(t), a new septic system could be

approved for an existing building or the existing building could use its existing septic system if it has one.

Turning to PCZO 177.035(B), the county's zoning ordinance language introduces an ambiguity that is not present in OAR 660-006-0025(4)(t). PCZO 177.035(B) allows a "manufactured home" or an "existing building" to be used as a medical hardship dwelling but imposes the following condition:

> "The manufactured home or existing building converted to residential use [must be] connected to the existing sewage disposal system, unless the Department of Community Development finds the existing system to be inadequate and that it cannot be repaired or is not physically available[.]"

We understand the county to have implicitly interpreted the above language of PCZO 177.035(B)(2) generally to require that both new manufactured homes and existing buildings be connected to the existing sewage disposal system that serves the existing dwelling (*i.e.*, the replacement dwelling), but not where the existing building is a building that already has its own existing septic system. In that circumstance, we understand the county to have interpreted PCZO 177.035(B)(2) to allow an existing building to use the existing sewage disposal system that already serves the existing building while it is occupied as a medical hardship dwelling.

Unlike the language in OAR 660-006-0025(4)(t) ("[t]he manufactured dwelling shall use the same subsurface sewage disposal system used by the existing dwelling") the language in PCZO 177.035(B)(2) ("[t]he manufactured home or existing building converted to residential use is connected to the existing sewage disposal system") is ambiguous in a way that is important in this case. Applying the rule and zoning ordinance to this case, OAR 660-006-0025(4)(t) is not ambiguous, the referenced "subsurface sewage disposal system" could only be the subsurface sewage disposal system serving the replacement dwelling. PCZO 177.035(B)(2) refers to "the existing sewage disposal system," which could mean the replacement dwelling sewage disposal system or the 1979 dwelling sewage disposal system.

To be consistent with OAR 660-006-0025(4)(t), PCZO 177.035(B)(2) would likely have to be interpreted to require that a new manufactured home brought onto the property to serve as a medical hardship dwelling must connect to the same septic system that serves the replacement dwelling. This is because, under ORS 197.829(1)(d), ambiguous land use regulations may not be interpreted inconsistently with an administrative rule they were adopted to implement. *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 45-46, 911 P2d 350 (1996). There is no dispute that PCZO 177.035(B)(2) was adopted to implement OAR 660-006-0025(4)(t). However, because OAR 660-006-0025(4)(t) does not require that "existing buildings" be connected to the same septic system that serves the replacement dwelling, it would not be inconsistent with OAR 660-006-0025(4)(t) to interpret PCZO 177.035(B)(2) not to impose that requirement either. Given the ambiguity in PCZO 177.035(B)(2), we believe it is within the county's discretion to interpret PCZO 177.035(B)(2) to allow the 1979 dwelling to use its "existing sewage disposal system" while it is used as a medical hardship dwelling and not to require that the 1979 dwelling be disconnected from that system and moved to a site where it could be reconnected to the "existing sewage disposal system" that serves the replacement dwelling.

Before turning to the second and third assignments of error, we note that petitioner contends that the county's interpretation is also inconsistent with the underlying policy and purpose that is furthered by requiring that the same septic system that serves the existing dwelling be used by the home that will serve as the medical hardship dwelling. ORS 197.829(1)(b) and (c). According to petitioner, that underlying policy and purpose is to "limit proliferation of dwellings" in the TC zone. Petitioner contends that the county's interpretation of PCZO 177.035(B)(2) to allow the 1979 dwelling to use its existing septic system "creates intense pressure to make such dwellings permanent additions to the [TC zone]." Petition for Review 6.

As we have already concluded, the county's interpretation regarding providing septic service to existing buildings that are used for temporary medical hardship dwellings is not inconsistent with OAR 660-006-0025(4)(t). While there is some evidence in the record that questions whether there is a bona fide medical hardship that justifies approval of a hardship dwelling, petitioner does not assign error to that aspect of the county's decision. Under both OAR 660-006-0025(4)(t) and PCZO 177.035(B)(2) residential use of the 1979 dwelling must terminate within 90 days after the medical hardship ends. The only issue is whether for the duration of the medical hardship the 1979 dwelling remains where it is at the north end of Tax Lot 100 and uses its "existing sewage disposal system" or must be moved closer to the replacement dwelling and use its "existing sewage disposal system." In either event, there will be two dwellings on the subject property and two septic systems.[5] We fail to see how the county's interpretation is inconsistent with the underlying policy and purpose of OAR 660-006-0025(4)(t) and PCZO 177.035(B)(2).

The first assignment of error is denied.

SECOND ASSIGNEMNT OF ERROR

The subject property is located at the eastern edge of an identified significant deer and elk winter range area.[6] Residential development is identified as a conflicting use in the designated winter range area. PCZO 182.050(A) imposes the following standards to limit the impacts of conflicting uses on deer and elk:

> "(A) Deer and Elk Winter Range - To minimize impacts to deer and elk populations, the following standards apply * * *:

[5] Of course, if the 1979 dwelling were disconnected from its existing septic system and connected to the septic system that serves the replacement dwelling, the existing septic system that now serves the 1979 dwelling would no longer be in use.

[6] Apparently most of the portion of the county that is occupied by the Coast Range is designated as a significant deer and elk winter range. The subject property lies at the extreme eastern edge of that designated winter range and it appears that properties immediately across Frost Road are not located in the winter range. Record 130.

"* * * * *

"(2) Dwelling units, roads, utility corridors and other development shall be sited on the least productive habitat land and away from sensitive slopes and soils;

"(3) Development shall be clustered and located as close as possible to existing development and services, with only essential roads provided;

"(4) Nonessential roads shall be closed and off-road vehicle use curtailed during the winter and spring."

The county adopted the following findings to address PCZO 182.050(A):

> "The subject property is located within a Significant Resource Overlay zone for deer and elk winter range habitat as depicted on the Polk County Significant Resources Areas Map. The proposed residential development has been identified as a conflicting use pursuant to [PCZO] 182.070(A)(2). * * * Staff finds that the proposed dwelling, roads, utility corridors and other development currently exist and are sited on the least productive habitat land and away from sensitive slopes and soils. *Staff also finds that the existing development is clustered and located as close to other existing development and services [as possible]*. Nonessential roads shall be closed and off-road vehicle use curtailed during the winter and spring." Record 35-36 (underlining and italics added).[7]

With one exception, we agree with petitioner that the above findings are inadequate to demonstrate that approval of continued use of the 1979 dwelling as a medical hardship dwelling is consistent with the PCZO 182.050(A)(2), (3) and (4) standards. The underlined findings are not adequate to demonstrate compliance with PCZO 182.050(A)(2). The fact that the dwelling and associated development currently exists, in and of itself, is legally irrelevant. As petitioner correctly notes, the legal authority for that dwelling to remain on the subject property ended when the replacement dwelling was completed and occupied and three months passed. It may be that this part of Tax Lot 100 contains no sensitive slopes or soils and it may be that the 1979 dwelling and related development that has occupied this part of

[7] We have omitted from the quoted findings the findings that simply restate the PCZO 182.050(A) standards.

Tax Lot 100 for many years has destroyed or compromised its value as productive habitat. However, that explanation is what the county's findings are for, and that explanation is missing.

The county's italicized findings are no better. They simply state that the clustering requirement is met, without explaining why. Petitioners contend that other findings suggest that the site of the 1979 dwelling is in fact not clustered with existing development and services. The county's findings need to explain what the clustering requirement is intended to accomplish and then explain why allowing the hardship dwelling at this location satisfies that clustering requirement.

Finally, the county's finding regarding closure of nonessential roads curtailing off-road vehicle use during the winter and spring simply repeats the standard. However, the county imposed a condition of approval that "[n]onessential roads shall be closed and off-road vehicle use curtailed during the winter and spring." While it is true that this condition simply restates the standard, petitioner does not explain why this condition is not adequate to ensure that non-essential roads are closed and off-road vehicle use is curtailed during the winter and spring. With that condition, we conclude the county's decision adequately addressed PCZO 182.050(A)(4).

The second assignment of error is sustained in part.

THIRD ASSIGNMENT OF ERROR

PCZO 182.040(E)(1) requires that the applicant in this case prepare a management plan.

> "The Management Plan: When a '3-C' decision has been made for a particular resource, as indicated on the Goal 5 inventory sheets, the applicant, in coordination with the County and State or federal managing agency(s), shall develop a Management Plan which comprises the following elements:
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> "(a) A description of the type and extent of resources involved;
>
> "(b) A map showing the exact location of the resource;

"(c) A print-out from the County Assessor's Office indicating ownership within designated buffer strips; and

"(d) A written statement detailing a proposed strategy to protect the identified significant resources. Such strategy may include, but shall not be limited to the following:

"(1) Restriction of conflicting activities during critical periods (e.g., sensitive nesting periods);

"(2) Protecting the resource with buffer strips;

"(3) A Monitoring plan for the site, i.e., determine the long-range effects;

"(4) Permanent or seasonal road closures to protect the resource site; and

"(5) Conservation easements, tax incentives or land donations.

"If the County and applicant concur on provisions of the Management Plan and other applicable criteria are satisfied, approval of the administrative action or conditional use request shall be subject to fulfillment of the management plan objectives."

The county's findings addressing the PCZO 182.040(E)(1) management plan requirement are set out below:

"The property owner provided a description of the resources involved as part of the management plan. The applicant has submitted documentation describing the type and extent of resources involved, and submitted a map that depicts the location of the resources. The applicant has also submitted a proposed strategy to protect the resource that has been coordinated with the Oregon Department of Fish and Wildlife (ODFW). The proposed protection strategy includes utilizing the existing manufactured dwelling on the subject property that is located in an existing residential cluster and adjacent to a gravel road (Frost Road) that is regularly traveled. The applicant shall conform to the protection strategy outlined by the ODFW and submitted by the applicant as the proposed Significant Resource Management Plan. Based on the information provided by the applicant and the ODFW, staff finds that the application meets these criteria." Record 31.[8]

[8] The record includes a letter from ODFW which states:

Petitioner argues that there is no resource management plan, as required by PCZO 182.040(E)(1). Petitioner goes on to argue:

> "* * * There is nothing in the record describing the type and extent of the deer and elk winter range habitat resource on [tax lot 100]. The second sentence in the findings above also addresses the requirement of PCZO 182.040(E)(1)(b) for a map that shows the exact location of the resource. Petitioner has not been able to find any such map in the record. * * *
>
> "PCZO 182.040(E)(1)(d) requires a 'written statement detailing a proposed strategy to protect the identified significant resources.' According to the findings * * * this written 'protection strategy' is something 'outlined' by ODFW and submitted by the applicant 'as the proposed Significant Resources Management Plan.' As explained above, there is no document in the record labeled '(Significant) Resources management Plan.' Additionally, the only document in the record from ODFW appears to be the letter at record 143. * * * This letter does not contain a strategy for protecting the significant resource on the subject property, but rather concludes that the 'proposed hardship dwelling will not increase **existing impacts** to wintering deer and elk.' * * * A conclusion that the proposed development will not increase existing impacts does not satisfy PCZO 182.040(E)(1)(d). * * *" Petition for Review 12-13 (bold lettering in original).

We agree with petitioner that the county's findings are inadequate to demonstrate compliance with PCZO 182.040(E)(1). PCZO 182.040(E)(1) sets out a number of relatively specific requirements. As petitioner correctly notes, the record simply does not include a management plan that addresses those requirements. There may be documents in the record that would permit the applicant to prepare a management plan that addresses the requirements

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> "Lisa Kilbride and I met on December 12, 2003 to discuss the hardship dwelling's impacts to wildlife resources. Deer and elk winter range comprise the primary wildlife issues. The winter range delineation basically encompasses the Coast Range Mountains. The applicant's property is located on the eastern fringe of delineated winter range. The impacts of the dwelling are lessened because of the proximity of the structure to the winter range boundary. Additionally, the structure has existed and been occupied since the 1960s. The structure is located adjacent to an aggregate surfaced road, providing access. The structure is also clustered with other, existing buildings and residences. Utilities are already supplied to the dwelling making further extensions unnecessary.
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> "After reviewing the applicant's proposal, I find the proposed hardship dwelling will not increase existing impacts to wintering deer or elk. * * *." Record 143.

of PCZO 182.040(E)(1), but neither the ODFW letter at Record 143 nor anything else that the parties call to our attention do so.

The third assignment of error is sustained.

The county's decision is remanded.