BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF THE METOLIUS
and WILLIAM JOHNSON,
Petitioners,

and

TOMAS FINNEGAN RYAN,
Intervenor-Petitioner,

vs.

JEFFERSON COUNTY,
Respondent,

and

GORDON C. JONES and JEFFREY JONES,
Intervenors-Respondent.

LUBA No. 2004-119

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.

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

Jacqueline G. Haggerty, County Counsel, Madras, filed a response brief and argued on behalf of respondent.

Robert S. Lovlien, Bend, filed a response brief and argued on behalf of interveners-respondent. With him on the brief was Bryant, Lovlien, and Jarvis, PC.

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

REMANDED 02/02/2005

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a decision approving a site plan to redevelop and expand a lodge and cabin facility in the Camp Sherman Vacation Rental (CSVR) zone.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief responding to new matters raised in the response briefs. The county filed an objection to the proposed reply brief, but withdrew that objection at oral argument. The reply brief is allowed.

FACTS

The county's decision is on remand from LUBA. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004) (*Friends I*). We repeat the salient facts from that opinion:

> "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). 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 coverage standards limiting tourist rental cabins to two units per developable acre. JCZO 342(F)(2).
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> "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." *Id.* at 511-12 (footnotes omitted).

The county approved the proposed site plan, and that approval was appealed to LUBA. The principle issue on appeal was whether the proposed cabins, conditioned to allow up to 185 days of owner occupancy per year, were "tourist rental cabins," as the county found, or "single-family dwellings," which under the county code are subject to more stringent standards, including a one dwelling unit per five acre density standard.[1] After reviewing several LUBA and Court of Appeal opinions regarding a similar superseded county provision for "traveler's accommodations," and the legislative history of the current code provision for "tourist rental cabins," we held that the county erred in interpreting its code to allow more than *de minimis* residential use of the cabins by the owner-occupants. Such use, we held, is incompatible with the status of the cabins as "tourist rental cabins." *Id.* at 519-20. We rejected all other assignments of error, except for a subassignment of error regarding whether covered porches and decks must be included in calculating the total "buildable space," for purposes of a code provision limiting buildable space for tourist rental cabins to 2,800 square feet per acre.

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[1] JCZO 3.342(A) provides for the following uses in the CSVR zone:

"1. Single Family Dwelling or manufactured home subject to Section 408.

"2. Lodge Complex

"3. Tourist Rental Cabins

"4. Accessory recreational facilities for guests, including pools, courts, barns, storage, and maintenance structures."

JCZO 1.105 defines "Travelers Accommodations" permitted in the CSVR zone, to include the following:

"A. LODGE COMPLEX: 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 one dining room designed for the preparation and serving of meals to occupants.

"B. TOURIST RENTAL CABINS: A building or series of buildings, located 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."

On remand, the county board of commissioners held a public hearing limited to the two remand issues. During the hearing, the county board rejected evidence submitted by opponents as being outside the scope of remand. However, the county allowed the applicants, intervenors-respondent (intervenors), to propose modifications to the approved site plan and proposal, and allowed intervenors to submit additional evidence with respect to those modifications. With respect to the issue of whether the proposed cabins qualified as "tourist rental cabins," the board of commissioners imposed a condition requiring that the cabins be available for tourist rentals at least 245 days per year, allowing up to 120 days of owner-occupancy, and found that the cabins, so conditioned, were "tourist rental cabins."[2] With respect to the issue of "buildable space," the board of commissioners found that all covered decks and porches must be included in calculating buildable space, but not some uncovered decks. The board of commissioners approved the site plan, as modified, on July 7, 2004. This appeal followed.

MOTION TO STRIKE

The county moves to strike a "conceptual site plan" dated April 28, 2004, that is attached to petitioners' petition for review. The county argues that the conceptual site plan is not part of the

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[2] Condition 5 of the county's decision states:

"Owner Occupancy/Rental Terms

"A. No unit owner shall be allowed to occupy a condominium unit as a permanent residence.

"B. Owner use shall be restricted to 30 days of continuous occupancy per calendar quarter, and a maximum of 60 days of continuous use when such use overlaps two calendar quarters. This restriction would allow up to 120 days of owner use annually, provided it is spread throughout four calendar quarters. All units shall be available for rental a minimum of 245 days per calendar year. Condominium unit owners shall have no authority under any circumstances to cancel a Rental Agreement, or take any other action which in substance or effect would result in a circumvention of these restrictions on owner usage.

"C. No unit within Lake Creek Lodge shall be rented for a period of more than 30 consecutive days.

"D. Staff housing, including the manager's cabin, shall be exempt from the restrictions in this Paragraph." Record 11 (original emphasis deleted).

record. Petitioners respond that the record indicates that intervenors submitted the conceptual site plan to the county during the remand proceedings, presumably to reflect proposed modifications to the site plan approved in *Friends I*. *See* Record 689 (material submitted by intervenors, including "Conceptual Site Plan dated April 28, 2004 prepared by J.T. Atkins & Company"). If the conceptual site plan is not part of the record, petitioners argue, then there is nothing in the record showing what modifications the county approved on remand, and the county's decision must be remanded for that reason alone.

The county replies that the modifications approved on remand are reflected in the revised project description found at Record 701 and App 16 of petitioners' petition for review, not the conceptual site plan, which was never submitted into the record.

The "conceptual site plan" is not in the local record filed with LUBA and, apparently, was not the basis for the modifications approved by the county on remand. To the extent petitioners argue that it should have been included in the record, it is too late to lodge a record objection. The county's motion to strike is granted.

FIRST ASSIGNMENT OF ERROR (PETITIONERS)

Petitioners contend that the county repeated its error in *Friends I* in concluding that the proposed cabins are not subject to regulation as "single-family dwellings," and in approving more than *de minimis* use of the proposed cabins by the owner-occupants. According to petitioners, the county's decision on remand simply increased the required number of days that the cabins must be available for tourist rentals from 180 days to 245 days per year, and reduced the number of consecutive days an owner can occupy a cabin to 30 consecutive days per quarter. Petitioners contend that these limits are still inconsistent with the status of the cabins as "tourist rental cabins," and that the proposed cabins are therefore subject to the more stringent requirements for "single-family dwellings."

Our opinion in *Friends I* lays out in some detail the history of the applicable JCZO regulations governing tourist rental cabins, and our understanding of the pertinent LUBA and Court

of Appeals precedent (known as *Metolius I, II,* and *III*).[3] As our opinion explains, the *Metolius* cases have a considerable bearing on the question of what level of owner-occupancy is consistent with the status of a dwelling as a "tourist rental cabin" under JCZO 3.342. The interpretation at issue in the *Metolius* cases was a governing body determination that a *de-minimis* amount of owner-occupancy (in that case, 36 days per year) is consistent with the approval of a dwelling for "travelers accommodations," under the predecessor to JCZO 3.342. The Court of Appeals affirmed that interpretation, albeit with clear misgivings, under an extremely deferential articulation of its standard of review that the court has since modified.[4] For present purposes, the real significance of *Metolius II* lies in the concurrence. Two of the three judges on the panel filed or joined concurrences stating that, but for the "vestigial scope of review" remaining under that extremely deferential standard of review, the county's failure to apply the density requirements for single-family dwellings "could not be sustained." 123 Or App at 261 (Durham, J., concurring).[5] It is reasonably

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[3] *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).

[4] The pertinent holding in *Metolius II* is as follows:

> "We agree with LUBA that, under *Clark [v. Jackson County*, 313 Or 508, 836 P2d 710 (1992)], it and we are 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. * * *" 123 Or App at 261.

[5] The concurrence states, in relevant part:

> "I agree with the lead opinion that, under the vestigial scope of review that remains after *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), we are compelled to accept the county's interpretations of the ordinance. I write separately to note that, if meaningful review of the kind that predated *Clark* were possible, the county's failure to apply the density requirements for single-family dwellings could not be sustained.
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> "The units that respondents propose to install are both traveler's accommodations and single-family dwellings. The county's order appears to admit as much, but then goes on to apply only the standards for approving traveler's accommodations, because the 'use proposed for the cabins is as * * * traveler's accommodations.' In other words, the county has 'interpreted' the ordinance to make the applicable approval criteria depend on the applicants' stated intention of what they will do with the cabins, rather than on what the cabins are. The fallacy in that interpretation is graphic in the light of [JCZO] 1001, which expressly

clear that had the court reviewed the interpretation at issue in that case (*i.e.*, 36 days of owner-occupancy per year do not disqualify dwellings as traveler's accommodations) under a less deferential standard of review, at least two of the three members of the panel would have rejected the interpretation and concluded that the proposed use was subject to regulation as single-family dwellings. As we explained in *Friends I*, the court subsequently abandoned the extremely deferential articulation of the standard of review it applied in *Metolius II*. *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003). We noted in *Friends I* that it seemed highly unlikely that the court would affirm the interpretation reviewed in *Metolius II* under the less deferential standard of review articulated in *Church*, and even less likely that the court would affirm the interpretation applied to the significantly different proposal reviewed in *Friends I*, which allowed 185 days of owner occupancy per year.[6]

> contemplates that one facility can embody two separate 'uses' and, when it does, the criteria for approving the more restricted use apply.
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> "However, it is impossible for us to say that the interpretation is 'clearly wrong,' and thus reversible under Clark. *See Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992). There are too many provisions and too many interpretations that enter into the county's rationale for us to reject its end result. For example, as the lead opinion indicates, we cannot ascribe clear error to the county's reliance on the ordinance provision that ostensibly makes its conditional use approval criteria exclusive for the proposal to alter this existing conditional use. Nevertheless, were it not for *Clark*, that reliance could and would be readily rejected. It is a transparent device for bolstering the county's assiduous efforts to remove the single-family dwelling approval criteria from the picture, although respondents' proposal is for the installation of single-family dwellings." *Id.* at 261-62 (footnote omitted).

[6] We stated in *Friends I*:

> "* * * 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

Nonetheless, in *Friends I* we did not follow that reasoning to its logical conclusion and go on to agree with petitioners that *any* amount of owner-occupancy—even a *de minimis* 36 days per year—requires the county to apply the more stringent regulations governing single family dwellings in the CSVR zone. Instead, we essentially applied the holding of *Metolius I*—more accurately, the negative implication of that holding—that a *de minimis* amount of owner-occupancy does not disqualify a dwelling as tourist accommodations and require regulation as a single family dwelling. That is, we held that more than *de minimis* owner occupancy *does* disqualify a dwelling as a "tourist rental cabin." We further concluded that more than six months per year of owner-occupancy is "simply not *de minimis*." 46 Or LUBA at 519. Accordingly, we concluded that the county's interpretation of JCZO 3.342 was inconsistent with the express language of that code provision, and remanded under ORS 197.829(1)(a).[7] No party appealed our decision to the Court of Appeals.

> 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*.
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> "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)." 46 Or LUBA at 518-520.

[7] 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:

On remand, as noted, the county reapproved the application based on conditions limiting continuous days of owner occupancy to 30 days per quarter, for a total of 120 days per year. *See* n 2. However, the county made no attempt to demonstrate that 120 days of owner occupancy is *de minimis*. Instead, the county essentially disagreed with our analysis in *Friends I*.[8] It also disagreed with our understanding of the *Metolius* cases and our scope of review.[9] While the county

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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

In *Friends I*, we declined to reach petitioners' arguments that the county's interpretation was also inconsistent with the purpose and policy of the code provision, and contrary to Goal 14, which petitioners argued the pertinent code provisions implement, for purposes of ORS 197.829(1)(b) through (d). 46 Or LUBA at 520, n 6.

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

> "To the extent that LUBA's decision states that more than 36 days of owner use annually ['de minimis' use] is inconsistent with the express language of the ordinance [LUBA Opinion #2003-186, page 10, lines 17-20], we specifically reject such a finding as inconsistent with the express language of the Zoning Ordinance, the context in which the CSVR zone was adopted and acknowledged, and the underlying policy which includes economic development in the CSVR zone. As stated above, we find the Lake Creek Lodge condominium proposal to be a very creative and economically viable way of operating and expanding an existing and historic facility which is permitted in the CSVR zone. All concerns raised about potential future conversions to single family dwellings are effectively dealt with in conditions of approval." Record 5.

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

> "Although LUBA relied heavily on the Metolius I, II, III decisions in deciding this case, those decisions were based on prior ordinance provisions which have been totally replaced and subsequently acknowledged. Moreover, in that case, the subject resort property involved a conditional use in a residential zone; a much higher density was proposed; and, as the court noted, there were no legal restrictions against owner usage or conversion to residential property, as there is in this case, which appears to be LUBA's primary concern herein. LUBA went far beyond the holding in Metolius II, by making the explicit statement that any owner use in excess of 36 days was inconsistent with the [JCZO]. We respectfully disagree for the reasons stated herein.

is certainly entitled to its opinion on those points, if the county believed our *Friends I* decision was in error the most direct means to correct such errors as applied to intervenors' application was to appeal our decision to the Court of Appeals, which the county did not do. That point aside, we are not persuaded by the county's decision or the respondents' arguments in this appeal that our analysis in *Friends I*, our understanding of the *Metolius* cases, or our understanding of the scope of review was erroneous. We adhere to our reasoning and holding in *Friends I*: given the significant regulatory distinctions between "single family dwellings" and "tourist rental cabins" in the CSVR zone, and our understanding of the *Metolius* cases, the proposed uses may be approved under the less stringent regulations governing "tourist rental cabins" only if their use for something other than "tourist rental cabins" is *de minimis*.[10]

As noted, the county's decision makes no attempt to demonstrate that reserving use of the proposed cabins for 120 days per year for owner-occupancy is *de minimis*, consistent with their status as "tourist rental cabins." The respondents' briefs do not argue that it is, and we do not see that it is. In the *Metolius* cases, the county interpreted its code to conclude that a *de minimis* amount (36 days per year) of owner-occupancy is consistent with "travelers' accommodation," and LUBA and the Court of Appeals affirmed that interpretation. While the county is not necessarily bound to impose a similar 36-day limitation in the present case, for the reasons explained above and

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> "LUBA also misread and misapplied *Church v. Grant County*. Nothing in that case allows LUBA to decide that condominium time-share ownership is not consistent with the CSVR zone, contrary to the reasonable findings and interpretation of Jefferson County. While the Court of Appeals clarified and somewhat eased the *carte blanche* extent of the original *Clark* standard, LUBA still does not have the authority to substitute its subjective judgment for that of the local governing body, and is bound by a reasonable local government interpretation that the application is consistent with its zoning regulations, given context and policy." Record 9-10.

[10] Admittedly, our conclusion is strongly influenced by our above-described understanding of the *Metolius* cases, particularly the concurrence in *Metolius II*. If the county is correct that we are reading too much into those cases, or overstating their relevance to the present case, then the question of whether the county's interpretation is sustainable under *Church* and ORS 197.829(1) becomes a much closer question. However, we continue to believe that we correctly understand the *Metolius* cases and their bearing on the present case.

in *Friends I* it can approve the proposed dwellings as "tourist rental cabins" only if it limits owner-occupancy of the cabins to a level that can be accurately described as *de minimis*.

Finally, petitioners note that 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."[11] Petitioners argue, as does intervenor-petitioner, that JCZO 1001 plainly requires the county to apply the more restrictive regulations governing single family dwellings. The meaning of JCZO 1001 was raised before the county in *Friends I* and during the remand proceedings, but not addressed by either county decision. We found it unnecessary to address petitioners' arguments under JCZO 1001 in *Friends I*, and again see no purpose in addressing those arguments. At best, JCZO 1001 provides additional support for our holding, above, and does not provide an independent basis for reversal or remand.

The first assignment of error (petitioners) is sustained.

SECOND ASSIGNMENT OF ERROR (PETITIONERS)
FIFTH ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)

The new cabins proposed under the approved site plan feature 1,340 square feet of interior space and 554 square feet of outdoor decks and porches. The typical proposed cabin includes 294 square feet of covered porch area and 260 square feet of open decks. JCZO 3.342(F)(2) limits the density of tourist rental cabins to two units per developed acre, with a maximum of 2,800-square feet total of "buildable space," per acre.[12]

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[11] We note, in passing, that the concurrence in *Metolius II* cited JCZO 1001, in concluding that the county's interpretation "would be readily rejected" under a less deferential standard of review. 123 Or App at 262.

[12] JCZO 3.342(F) provides, in relevant part:

"Per Acre Ratio – Maximum Lot Coverage Maximum Rental Units

"* * * * *

The county's original decision did not include the 554 square feet of outdoor decks and porches in the calculation of "total buildable space" in approving the proposed cabins under JCZO 3.342(F)(2). In *Friends I,* we agreed with petitioners that remand was necessary for the county to interpret "buildable space" and determine whether the proposed porches and decks must be included in calculating "buildable space" under JCZO 3.342(F)(2).[13]

On remand, the county accepted intervenors' proposal to treat covered porches as part of "total buildable space" but to treat open decks differently.[14] To support that distinction between

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> "2. Tourist Rental Cabins, including accessory buildings and dwellings for management and employees, shall be limited to two units per acre ratio, with a maximum of 2,800 square feet total buildable space, per acre ratio. 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.
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> "Portions of landscape requirements for developed recreational facilities, visitor oriented accommodations, yards, streets, and parking areas shall not be included in the undevelopable open space."

[13] We concluded in *Friends I*:

> "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 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." *Friends I,* 46 Or LUBA at 528-29.

[14] The county's decision states, in pertinent part:

open decks and covered porches, the county cited to JCZO 503, which allows open decks no more than 30 inches in height to intrude up to five feet into a required yard setback.[15]

Petitioners argue that the county's interpretation of "buildable space" to include covered porches but not open decks is unsupportable.[16] According to petitioners, there is no basis in the code to distinguish open decks from dwellings, accessory buildings, covered porches and other structures subject to the requirements of JCZO 3.342(F)(2). Petitioners cite to legislative history of JCZO 3.342(F)(2) suggesting that "buildable space" is intended to mean the same as "building

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> "The applicant has proposed a reasonable interpretation for the calculation of total buildable space: specifically that all covered decks and porches should be included in the calculation, and provided [that] open decks meet the General Exceptions in Article 5, Section 503, they are exempt from the 2800 square feet per developed acre limit. We adopt that interpretation. This will be a condition of approval to which building plans must adhere. In adopting this interpretation, we are mindful that prior to the 1997 amendments, the ordinance allowed 4,500 square feet of 'building coverage' per developed acre; thus, the current ordinance language has already significantly reduced [to 2,800 square feet] the overall size of allowable development. Therefore, we find this interpretation to be consistent with the context of the ordinance amendments, the express exception language, and the underlying policy for both in the CSVR zone." Record 6.
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> "* * * [G]iven the exception for open decks in JCZO 503, it is consistent with the ordinance to exclude open decks which meet the exception criteria from the calculation of total buildable space. We refer to the overall context of the commercial vacation zone [CSVR], and the underlying policy discussions in the adoption of the amendments to the ordinance, in addition to the express language of the zoning ordinance, in reaching the conclusion that uncovered porches or decks that meet the exception under JCZO 503 need not be included in the calculation of total buildable space." Record 10.

[15] JCZO 503 provides, in relevant part:

> "The following exceptions to yard requirements are authorized for a lot in any zone:
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> "* * * * *
>
> "B. Projections from Buildings:
>
> "* * * * *
>
> "2. Uncovered terraces, decks or platforms may project or extend into a required yard not more than five (5) feet. Such terraces, decks or platforms including guardrails or fencing shall not extend thirty (inches) above grade or ground level."

[16] Intervenor-petitioner makes similar arguments under the fifth assignment of error, that any decks must be included within the 2,800-square foot buildable area limitation. We address both assignments of error here.

coverage," in other words, the maximum extent to which buildings can cover a lot. Petitioners note that excluding open decks from the calculation of "total buildable space" would allow decks of any size, theoretically even decks that cover most of the subject parcel, contrary to the apparent purpose of JCZO 3.342(F)(2) to limit lot coverage.

The county responds that it is reasonable to apply the JCZO 503 exception for uncovered decks within yard setbacks as a contextual indication that open decks, or some open decks, are exempt from regulation under JCZO 3.342(F)(2). According to the county, any open deck area that exceeds the exception limits at JCZO 503 must be included in the "buildable area" calculation. Intervenors respond that the county correctly interpreted "buildable space" to mean essentially "habitable space," as that term is defined in the JCZO, and correctly relied on JCZO 503 to determine that open decks are not regulated under JCZO 3.342(F)(2). Intervenors contend that the county's interpretation is consistent with the express language, purpose and underlying policy of JCZO 3.342(F)(2), and must be affirmed. ORS 197.829(1).

The county did not, as intervenors suggest, interpret "buildable space" to mean "habitable space." As the county recognized in its initial decision, JCZO 3.342(F)(2) includes (presumably uninhabitable) accessory buildings such as garages and shops within the 2,800 square foot "buildable area" restriction. Further, petitioners appear to be correct that the "buildable space" limitation is intended to be a maximum lot coverage limitation. The heading of JCZO 3.342(F) states that its subject is "Maximum Lot Coverage Maximum Rental Units." *See* n 12. The 2,800-square foot "buildable area" limitation is the only discernible "maximum lot coverage" limitation in JCZO 3.342(F). That is consistent with the legislative history petitioners cite, indicating that the "buildable area" language is intended to limit "building coverage," presumably meaning the area of a lot or parcel covered by buildings, not the area of interior or habitable space. As we noted in *Friends I*, the county code defines "building" broadly in a manner that arguably includes the proposed covered porches and open decks.

With respect to JCZO 503, it is difficult to see what bearing that provision has on the meaning of "buildable area" in JCZO 3.342(F)(2). JCZO 503 is a general exemption to yard setbacks applicable in all zones. JCZO 3.342(F)(2) is a specific limitation applicable only in the CSVR zone that is apparently intended to limit the lot coverage, and indirectly the density, of a particular kind of development, tourist rental cabins. At best, JCZO 503 indicates that the county code treats open decks less than 30 inches in height differently from other structures with respect to yard setbacks. However, the question of what kind of structures can intrude into a yard setback and how tall those structures can be are very different questions from what kind of structures must be included in calculating a 2,800-square foot per acre maximum lot coverage limitation.

In addition, the county's decision exempts from JCZO 3.342(F)(2) only decks that meet the requirements of JCZO 503, *i.e.*, decks that intrude no more than five feet into a yard setback and are no more than 30 inches in height. Decks that do not meet the JCZO 503 exemption, *i.e.*, that intrude more than five feet into a yard setback or are more than 30 inches in height, are subject to JCZO 3.342(F)(2), and must be included within the 2,800-square foot "buildable area" limitation. If, as it appears, the purpose of JCZO 3.342(F)(2) is to limit lot coverage, it is difficult to see why a deck that is too tall or that intrudes too far into the yard setback is subject to the JCZO 3.342(F)(2) "buildable area" limitation, while a lower deck inside the yard setback or an identical deck outside the yard setback is not.[17] The county's interpretation of JCZO 3.342(F)(2) to include porches and some open decks, but not others, inconsistent with the express language, purpose and underlying policy of that code provision.[18]

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[17] The findings quoted at n 14 above refer to the "overall context" of the CSVR zone and the "underlying policy discussions" in adopting JCZO 3.342, but do not identify what context or policy discussions are referred to. As far as we can tell or the parties can point out to us, nothing in JCZO 3.342, its context, or its legislative history suggests a regulatory distinction between covered porches and some, but not all, open decks.

[18] As we noted in *Friends I*, JCZO 3.342(F) was adopted following extended mediation with the Department of Land Conservation and Development (DLCD), as part of periodic review to conform the county code provisions regarding travelers accommodations with Statewide Planning Goal 14 (Urbanization). The language of JCZO 3.342(F), including the 2,800-square foot "buildable area" limitation, presumably was adopted to conform the county's regulations with Goal 14. Nonetheless, we do not consider whether JCZO 3.342(F)

We do not mean to foreclose the possibility that the county may distinguish between covered porches and uncovered decks or other structures for purposes of JCZO 3.342(F). However, the county's findings provide no explanation for the distinction it draws, to include porches and some open decks but not others within the "buildable area," other than to cite to JCZO 503 and unidentified "context" and "policy discussions." For the reasons explained above, that interpretation cannot be sustained.

The second assignment of error (petitioners) and the fifth assignment of error (intervenor-petitioner) are sustained.

THIRD ASSIGNMENT OF ERROR (PETITIONERS)

On remand following *Friends I*, the county's notice of hearing stated that the remand hearings would be limited to the two issues remanded by LUBA. Notwithstanding that limited scope, the county allowed intervenors to propose certain modifications to the approved site plan, and apparently approved some modifications. However, the county refused to consider evidence that petitioners and others submitted with respect to several issues, on the grounds that the evidence was irrelevant to the two bases for remand.[19] The county also rejected petitioners' argument that the proposed modifications required a new application.[20]

"implements" Goal 14 or whether the county's interpretation is "contrary" to Goal 14, for purposes of ORS 197.829(1)(d).

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

> "Several opponents attempted to introduce evidence of activities at Lake Creek Lodge occurring after this case was remanded by LUBA, and facts not in the record of the case and not relevant to the remand issues. Counsel for applicant moved to strike any evidence which was not related to the issues remanded by LUBA. All such evidence was excluded as irrelevant to the remand proceeding." Record 1.
>
> "Because the reason for this decision and the attendant hearings was the remand from LUBA, it is appropriate that the scope of the remand proceedings be limited to the issues remanded: (a) the interpretation of 'tourist rental cabins' as it relates to owner use; and (b) the calculation of 'total buildable space' as it relates to decks and porches. Any other evidence we consider irrelevant, and therefore was not considered." Record 3

In a footnote, the county' s decision adds:

Petitioners contend that the county committed procedural error by (1) failing to require intervenors to submit a new application; (2) refusing to accept or consider evidence that petitioners submitted during the remand hearings regarding the requested modifications; and (3) refusing to consider issues raised regarding alleged alterations to and replacement of nonconforming structures on the subject property following remand.

A. New Application

According to the petitioners, the modifications proposed by intervenors on remand are so substantial that the county was obligated to require intervenors to file a new application, and require intervenors to demonstrate that the modifications complied with all applicable approval standards. Petitioners assert that they submitted evidence that compared the approved site plan with the "conceptual site plan" dated April 28, 2004, and raised a number issues whether the modified site plan complied with applicable criteria. Record 143-51. The county never addressed these issues, petitioners contend.

> "Some documents containing both relevant and irrelevant information were allowed to be taken into the record for consideration *only* of the relevant evidence; this does not convert the irrelevant evidence to relevant for purposes of the record. For example, opponents argued that because existing uses were nonconforming uses [NCU], any replacement of existing cabins required application of the statutory NCU analysis and requirements. This argument was specifically rejected by LUBA, however. Existing structures are permitted in the CSVR zone and are not NCUs. This is a red herring—a groundless tactic used by opponents to delay or prevent development of a permitted use in the commercial CSVR zone." Record 3, note 1.

[20] The county's decision states:

> "The changes proposed to the original application by the applicant only alter the proposal as necessary to address the issue remanded by LUBA, or specifically address concerns raised by opponents. Opponents argued that the applicant has substantially changed the site plan, and that any changes in the plan require a new application and hearing process. We find that the changes are limited to the issues remanded by LUBA and concerns raised by opponents, and therefore do not represent a material departure from the original application, such that due process would require a new application, notice and hearing. The [JCZO] has no requirement or definition related to the amendment of applications. The original notice was sufficient to put interested persons on notice of the general plan of owner use and total buildable calculation. The amendments merely affect amounts and calculations, not the fundamental provisions of the plan. Therefore, the we find that a new application would be unnecessary and duplicative, particularly where the proposal is an expansion of a permitted use in the CSVR zone." Record 2-3.

Respondents argue, and we agree, that whatever the scope of the modifications approved by the remand decision, petitioners identify no requirement under the county's code or elsewhere that mandates a new application when the applicant proposes modifications to an approved site plan during remand proceedings. As long as the county offers all parties the opportunity to submit testimony and evidence with respect to the proposed modifications, we perceive no error in expanding the scope of the hearing to include proposed modifications to the approved site plan. The county was not obligated to require a new application.

B. Modified Site Plan

However, it is not clear that the county in fact considered testimony and evidence submitted by petitioners with respect to the proposed modifications. The findings quoted at n 19 state that the remand proceedings are limited to the two bases for remand and that "[a]ny other evidence" is considered irrelevant, and "therefore was not considered." Record 3. As far as the county's decision reflects, the county did not consider the issues petitioners raised regarding the proposed modifications, at Record 143-151, other than to reject petitioners' argument that the proposed modifications require a new application.

For that matter, it is unclear what modifications were proposed or approved. As noted earlier, the "conceptual site plan" dated April 28, 2004 is not in the record, and the county apparently did not consider it, despite considerable testimony on that subject. *See* Record 103-07 (letter from the applicant's architect responding to petitioners' arguments regarding the conceptual site plan); Record 111 (letter from the applicant's architect summarizing proposed modifications reflected in the conceptual site plan). Both of the foregoing documents seem to suggest that the changes reflected on the conceptual site plan are the modifications for which intervenors sought approval during the remand proceedings. Respondents argue that the proposed and approved modifications can be discerned by comparing an August 30, 2003 "project description" and an April 28, 2004 "project description," found at App 15 and 16, respectively, of petitioners' petition

for review. However, as far as we can tell, the county's decision does not explicitly discuss or approve the April 28, 2004 project description or any of the modifications described therein.

Remand is necessary for the county to (1) identify what site plan modifications are approved, (2) consider issues raised and testimony offered regarding those modifications, and (3), adopt findings, if necessary, explaining why the approved modifications are consistent with applicable criteria.

B. Nonconforming Use

Following remand in *Friends I*, the county apparently granted permits to repair or replace some of the existing cabins at the Lake Creek Lodge, pursuant to the approved site plan. During the remand proceedings, petitioners attempted to raise these permits as an issue, arguing that following remand of the county's original decision the permits were unlawful alterations to a nonconforming use, granted without compliance with the statutory procedural and substantive requirements for nonconforming uses. In findings quoted above at n 19, the county declined to consider that issue, finding that the issue was resolved in *Friends I* and beyond the scope of the remand proceedings.

In the county's original decision reviewed in *Friends I*, the county found that use of the existing cabins as tourist rental cabins was a conforming permitted use in the CSVR zone, although the *structures* were nonconforming because they are located within a setback from Lake Creek adopted in 1997. The county's original decision approved repairs to and replacement of some of the existing cabins, under a local code provision that allows a nonconforming structure that conforms with respect to use to be altered or replaced if the alteration or replacement does not cause the structure to deviate further from applicable code standards. We affirmed the county's findings on that point, and rejected petitioners' arguments that the county must review and approve the existing dwellings and the proposed repair/replacements as nonconforming uses prior to approving the site plan application. 46 Or LUBA at 525-26. Those resolved issues cannot be revived on remand. *Beck v. Tillamook County*, 313 Or 148, 831 P2d 678 (1992). In the present appeal, petitioners

assign error to the county's failure to "consider Petitioners' issue that permits issued and construction started after the remand in [*Friends I*] amounted to an alteration of a nonconforming use without compliance with the statutory procedural and substantive requirements for nonconforming uses." Petition for Review 34. However, the issue of whether the proposed repair/replacement of existing structures must be approved as nonconforming uses was resolved in *Friends I*.[21]

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

FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR (INTERVENOR-PETITIONER)

Intervenor-petitioner argues under the first assignment of error that no amount of owner-occupancy is consistent with the status of the cabins as "tourist rental cabins," and that the proposed dwellings must be regulated as "single family dwellings." Under his second assignment of error, intervenor-petitioner argues that the county justified extended owner-occupancy based in part on various economic considerations, including improving the tourist economy, but failed to consider whether allowing owners to occupy dwellings for up to 60 days in the middle of the summer tourist season makes economic sense. Under the third assignment of error, intervenor argues that the county erred in failing to apply the five-acre minimum parcel size applicable to single family dwellings.

We implicitly rejected intervenor-petitioner's first and third assignments of error in resolving petitioners' first assignment of error, in holding that a *de minimis* amount of owner-occupancy is consistent with the status of the proposed dwellings as "tourist rental cabins." Intervenor-petitioner's first and third assignments of error are accordingly denied.

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[21] Petitioners also alleged that some of the repair/replacement permits "were issued for development at different locations from the original use, and not in compliance with the proposed site plan." Petition for Review 34. That issue or sub-issue was not resolved in *Friends I*. However, resolution of that issue would seem to turn on what site plan modifications were approved on remand. Because we remand the county's decision to determine what modifications were approved, and to consider issues raised regarding those modifications, the county should consider petitioners' argument that the repair/replacement permits are not consistent with the approved site plan.

With respect to the second assignment of error, while the county's findings discuss various economic considerations in defending the proposed condominium ownership structure, as far as we can tell that discussion has little to do with the principal issue on remand: whether the proposed dwellings constitute tourist rental cabins or residential dwellings. To the extent the county erred in failing to consider the effect on the tourist economy in allowing 60 days of owner-occupancy during the summer tourist season, that error is at most harmless error. Intervenor-petitioner's second assignment of error does not provide a basis for reversal or remand.

The first , second and third assignments of error (intervenor-petitioner) are denied.

FOURTH ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)

Under the fourth assignment of error, intervenor-petitioner argues that to JCZO 1001 requires the county to apply the more restrictive requirements applicable to single family dwellings. We declined to resolve an identical argument, under petitioner's first assignment of error, and similarly decline to resolve that argument here.

We do not reach intervenor-petitioner's fourth assignment of error.

The county's decision is remanded.

Holstun, Board Chair, concurring.

JCZO 3.342(F)(2) requires that "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 ratio." (Emphasis added.) I agree with the majority that the reasoning the county provides for not counting uncovered decks as "buildable space" includes some arguable inconsistencies. For example, on its face, it is not obvious to me why the space that is occupied by an uncovered deck that is 35 inches in height is treated as buildable space while the space that is occupied by an uncovered deck that is less than 30 inches in height is not. However, I believe the appropriate starting point is to recognize that the underlying purpose for the 2,800-square foot limitation on "buildable space" is unclear and the undefined key term "buildable space" is ambiguous. Buildable space arguably could include any space that will be

occupied by anything that is built, including driveways, sidewalks, fences, birdbaths, a child's playhouse or a doghouse. Unless we are prepared to say the most extreme interpretation of that that term is required, some line drawing must be permissible to exclude space that while it may be occupied by something that in a literal sense is "built," that space need not be included within the JCZO 3.342(F)(2) 2,800 square foot limitation on "buildable space." I do not see anything reversibly wrong with the county drawing that line so that space that will be occupied by covered decks and covered porches counts as buildable space, but the space that will be covered by uncovered decks does not count as buildable space. I also see nothing wrong with the county pointing to JCZO 503, under which decks that are less than 30 inches tall are not subject to side yard setbacks, as contextual support for drawing the line where the county did. JCZO 503 may serve a somewhat different purpose than JCZO 3.342(F)(2) does. However, I believe the county's point was that while the space that will be occupied by an uncovered deck can literally be considered buildable space, if that deck is not significant enough to be included within the improvements that are subject to a side yard setback, it is not significant enough to require that the space that is occupied by such a deck must be considered "buildable space" under JCZO 3.342(F)(2). I consider that to be a reasonable interpretation and certainly one that is not reversibly wrong under ORS 197.829(1).