BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

DIETER MEES,
Intervenor-Respondent.

LUBA No. 2006-098

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Paul D. Dewey, Bend, filed the petition for review on behalf of petitioner.

No appearance by Deschutes County.

Peter Livingston, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Schwabe, Williamson and Wyatt, PC.

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

REVERSED 09/25/2006

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

Petitioner appeals a county decision approving a permanent logging equipment storage building in the Forest Use (F-1) zone.

FACTS

The subject property is a 260-acre parcel zoned F-1 and located approximately two miles from the City of Bend urban growth boundary. The property is forested and undeveloped, although the county has approved a large-parcel dwelling permit for a dwelling to be located in the northwestern portion of the parcel.

Apparently as part of the process for obtaining the large parcel dwelling permit, intervenor hired a consulting forester to develop an Oregon Forest Stewardship Plan. The plan's purpose is to provide a comprehensive review of the key natural and cultural resources on the property and to provide for their "use, protection, enhancement and management direction for the next 20-30 years or longer." Record 285. The plan states that the forest management of the property will require more active measures than would normally be required on other forest lands, due to relatively poor growing conditions and the proximity of the parcel to the City of Bend. The record includes evidence that, although the property is fenced, trespassers have broken through the fence in the past and vandalized construction equipment on the property.

At some point in 2005 intervenor constructed a 50 foot by 100 foot metal storage building in the approximate middle of the property. The building is 22 feet high and has a permanent foundation. The purpose of the building is to store and protect from fire and vandals equipment that is to be used for forest management of the property under the Stewardship Plan, including chain saws, a log skidder and/or tractor, pickup truck with plow, fire suppression equipment and road maintenance equipment. The building may also be used to grow pine seedlings.

After a code compliance compliant was filed, intervenor applied to the county for a determination that the storage building is authorized as an "accessory use" to forest practices. Staff administratively approved the application. Petitioner appealed the staff determination to the county hearings officer, who conducted a *de novo* hearing and denied the application, concluding that the building was not a permitted accessory use in the F-1 zone. Intervenor appealed the hearings officer's decision to the county board of commissioners, who reversed the hearings officer and approved the building as an accessory use to forest practices. This appeal followed.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Under the first and second assignments of error, petitioner argues that (1) the county erred in approving a use that is not allowed in the F-1 zone, and (2) the county's interpretation of its code to allow a permanent logging equipment storage building as an accessory to an outright permitted use is inconsistent with OAR 660-006-0025, the administrative rule that the F-1 zone implements. Under the third assignment of error, petitioner challenges the county's alternative finding that the disputed storage building is a "temporary on-site structure" that is "auxiliary to and used during the term of a particular forest operation" and therefore a permitted use under the rule and implementing local provisions.

A. OAR 660-006-0025 and DCC 18.36

An overview of the administrative rule and county code is useful in understanding the parties' arguments. The Land Conservation and Development Commission (LCDC) adopted OAR chapter 660, Division 006 to implement Statewide Planning Goal 4 (Forest Lands). OAR 660-006-0025 sets out the "Uses Authorized in Forest Zones" such as the county's F-1 zone. The rule generally divides the universe of permissible uses into three categories: (1) uses that counties *must* allow in forest zones as outright permitted uses (Category 1), (2) uses that counties *may* allow in forest zones as an outright permitted use (Category 2), and (3)

uses that counties *may* allow in forest zones (Category 3), subject to standards set out in OAR 660-006-0025.[1] For ease of reference, we refer to Category 1 uses (including Category 2 uses that the county has chosen to permit outright) as "permitted" uses, and Category 3 uses (including Category 2 uses that the county has chosen to permit conditionally rather than outright) as "conditional" uses.

OAR 660-006-0025(2) sets out the "Category 1" list of outright "permitted" uses in forest zones, the first of which is "[f]orest operations or forest practices."[2] The second

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[1] OAR 660-006-0025(5) provides:

> "A use authorized by section (4) of this rule may be allowed provided the following requirements or their equivalent are met. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands:
>
> "(a) The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands;
>
> "(b) The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and
>
> "(c) A written statement recorded with the deed or written contract with the county or its equivalent is obtained from the land owner which recognizes the rights of adjacent and nearby land owners to conduct forest operations consistent with the Forest Practices Act and Rules for uses authorized in subsections (4)(e), (m), (s), (t) and (w) of this rule."

[2] OAR 660-006-0025(2) provides, in full:

> "The following uses pursuant to the Forest Practices Act (ORS Chapter 527) and Goal 4 shall be allowed in forest zones:
>
> "(a) Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals, and disposal of slash;
>
> "(b) Temporary on-site structures which are auxiliary to and used during the term of a particular forest operation;
>
> "(c) Physical alterations to the land auxiliary to forest practices including, but not limited to, those made for purposes of exploration, mining, commercial gravel extraction and processing, landfills, dams, reservoirs, road construction or recreational facilities; and

permitted use is "[t]emporary on-site structures which are auxiliary to and used during the term of a particular forest operation[.]" OAR 660-006-0025(2)(d) explains that an "auxiliary structure" is one that is "temporary in nature, and * * * not designed to remain for the forest's entire growth cycle from planning to harvesting." Auxiliary structures must be removed when the particular forest practice it supports has concluded.

OAR 660-006-0025(3) sets out a list of uses that a county is not required to allow, but may allow outright on forest lands.[3] Although not clearly stated, it is implicit in OAR 660-006-0025(3) that counties may choose to allow some of the listed uses as permitted uses, and allow others only as "conditional" uses subject to the standards in OAR 660-006-0025(5).

OAR 660-006-0025(4) sets out the "Category 3" list of conditional uses allowed in forest zones subject to the standards at OAR 660-006-0025(5), including "permanent facility for the primary processing of forest products," and especially relevant in the present case, "[p]ermanent logging equipment repair and storage."[4] Several uses listed in OAR 660-006-

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> "(d) For the purposes of section (2) of this rule 'auxiliary' means a use or alteration of a structure or land which provides help or is directly associated with the conduct of a particular forest practice. An auxiliary structure is located on site, temporary in nature, and is not designed to remain for the forest's entire growth cycle from planting to harvesting. An auxiliary use is removed when a particular forest practice has concluded."

[3] OAR 660-006-0025(3) states that "[t]he following uses may be allowed outright on forest lands," followed by a list too lengthy to set out here. However, it is worth noting that in implementing OAR 660-006-0025(3), the county chose to allow some of the listed uses as permitted uses, and others as conditional uses. One particular use allowed at OAR 660-006-0025(3)(n), destination resorts, is not listed under the F-1 zone as either a permitted or conditional use. Instead, the county has a second forest zone, F-2, that explicitly allows destination resorts as a conditional use. DCC 18.40.030(D). The F-1 and F-2 zones appear to be otherwise identical.

[4] OAR 660-004-0025(4) provides, in relevant part:

> "The following uses may be allowed on forest lands subject to the review standards in section (5) of this rule:
>
> "(a) Permanent facility for the primary processing of forest products;
>
> "(b) Permanent logging equipment repair and storage;
>
> "(c) Log scaling and weigh stations;

0025(4) explicitly state that the listed use may be accompanied by "accessory" uses or allowed as an accessory use.

The county implemented OAR 660-006-0025(2)—(5) by adopting DCC 18.036.020 through 18.036.040. DCC 18.036.020 lists the Category 1 uses and those Category 2 uses that the county chose to allow as outright permitted uses.[5] DCC 18.036.030 lists Category 3

"* * * * *

"(p) Private seasonal accommodations for fee hunting operations may be allowed subject to section (5) of this rule, OAR 660-006-0029, and 660-006-0035 and the following requirements:

"* * * * *

(B) Only minor incidental and accessory retail sales are permitted;

"* * * * *

"* * * * *

(r) Temporary asphalt and concrete batch plants as accessory uses to specific highway projects;

"* * * * *

(w) Private accommodations for fishing occupied on a temporary basis may be allowed subject to section (5) of this rule, OAR 600-060-0029, and 660-006-0035 and the following requirements:

"* * * * *

"(B) Only minor incidental and accessory retail sales are permitted;

"* * * * *

(x) Forest management research and experimentation facilities as defined by ORS 526.215 or where accessory to forest operations."

[5] DCC 18.36.020 provides, in relevant part:

"The following uses and their accessory uses are permitted outright, subject to applicable siting criteria set forth in DCC 18.36 and any other applicable provisions of DCC Title 18.

"A. Forest operations or forest practices including, but not limited to, reforestation of forest land, road construction and maintenance, harvesting of a forest tree species, application of chemicals and disposal of slash.

uses and those Category 2 uses that the county chose to allow only as conditional uses, subject to the standards at OAR 660-006-0025(5), which the county implemented at DCC 18.036.040. Significantly, the list of uses set out in DCC 18.036.030 do not include all of the uses conditionally allowed under OAR 660-006-0025(3) and (4). Specifically, DCC 18.036.040 does not list "permanent facility for the primary processing of forest products," "permanent logging equipment repair and storage," or "firearm training center," uses that counties may choose to allow (or not) under OAR 660-006-0025(4)(a), (b) and (n). Those uses are not listed anywhere in DCC 18.036 and, as far as we are informed, no other code provision operates to explicitly allow those uses in the F-1 zone.[6]

The first sentence of DCC 18.036.020 states that "[t]he following uses *and their accessory uses* are permitted outright * * *." Similarly, the first sentence of DCC 18.036.030 states that "[t]he following uses *and their accessory uses* may be allowed * * *."[7] In specifically referring to "accessory uses," the first sentences of DCC 18.036.020 and DCC 18.036.030 differ from the analogous first sentences in subsections (2), (3) and (4) of OAR 660-006-0025, which do not refer to accessory uses. *See* ns 2 and 4.

> "B. Temporary on-site structures, which are auxiliary to and used during the term of a particular forest operation. As used here, temporary structures are those which are portable and/or not placed on a permanent foundation, and which are removed at the conclusion of the forest operation requiring its use. For the purposes of this section, including DCC 18.36.020(B) and (C) 'auxiliary' means a use or alteration of a structure or land, which provides help or is directly associated with the conduct of a particular forest practice. An auxiliary structure is located on site, temporary in nature, and is not designed to remain for the forest's entire growth cycle from planting to harvesting. An auxiliary use is removed when a particular forest practice has concluded."

[6] DCC 18.36.020(G) allows as a permitted use a "[t]emporary portable facility for the primary processing of forest products" if that facility is not placed on a permanent foundation and is removed at the conclusion of the forest operation requiring its use. DCC 18.36.020(G) implements OAR 660-006-0025(3)(d), which sets out Category 2 uses. Thus, the F-1 zone does not explicitly provide for a "permanent facility for the primary processing of forest products" at all but does allow a temporary facility. As discussed below, the failure to provide for a permanent facility may have been an oversight or a deliberate policy choice.

[7] Presumably, "accessory uses" allowed under DCC 18.36.030 are, like the conditional uses listed under that code provision, subject to the standards at DCC 18.36.040.

DCC 18.04.030 is the definitions section of the code, and in relevant part defines "auxiliary" consistent with the OAR 660-006-0025(2)(d) definition.[8] DCC 18.04.030 also defines the terms "accessory use or accessory structure" to mean "a use or structure incidental and subordinate to the main use of the property, and located on the same lot as the main use."[9] Finally, the county adopted DCC 18.36.040 to implement the OAR 660-006-0025(5) standards for "conditional uses" allowed under DCC 18.36.030.

B. The County's Decision

With that overview of the rule and code, we turn to the county's decision. Intervenor requested that the county approve the disputed storage building as an "accessory use" to a forest operation or forest practice under DCC 18.36.020(1). The county board of commissioners first concluded, and no party disputes, that the main use of the subject property is "forest operations or forest practices." The commissioners then concluded that the logging equipment storage building is "incidental and subordinate" to the main use of the property, and therefore an "accessory use" permitted outright under DCC 18.36.020(1).[10]

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[8] DCC 18.04.030 defines the term "auxiliary" as follows:

> "[A]s used in DCC 18.36 and 18.40, 'auxiliary' means a use or alteration of a structure or land which provides help or is directly associated with the conduct of a particular forest practice. An auxiliary structure is located on a site, temporary in nature, and is not designed to remain for the forest's entire growth cycle from planting to harvesting. An auxiliary use is removed when a particular forest practice has concluded."

[9] DCC 18.04.030 defines the term "accessory use or accessory structure" as follows:

> "'Accessory use or accessory structure' means a use or structure incidental and subordinate to the main use of the property, and located on the same lot as the main use. Accessory uses include drilling for, and utilization of, low-temperature geothermal fluid in conjunction with the main use of the property."

[10] The commissioners' decision states, in relevant part:

> "To be an 'accessory' use, a structure must be 'incidental and subordinate' to the main use of the property. DCC 18.04.020. Here, the main use of the property is forest stewardship operations, as outlined in the Plan. The purpose of the proposed structure is to house tools and other items that are needed to implement the management objectives of the Plan, such as chain saws, log skidders, tractors, road maintenance equipment and to provide a location to grow seedlings. The Board finds that the proposed use of this building must be considered

However, the commissioners decided that the county must limit the existence of the structure to the duration of the forest operations it supports, in order not to exceed the scope of a permitted "accessory use." Noting that the Stewardship Plan provides management direction for a period of "20-30 years or longer," the commissioners concluded that the duration of the structure must be tied to the Plan, and imposed a condition of approval requiring "removal of the structure at the conclusion of the forest operation requiring its use as outlined in the Plan."[11] The commissioners went on to adopt alternative findings that the disputed structure is allowed as a "[t]emporary on-site structure" that is "auxiliary to and used during the term of a particular forest operation" under DCC 18.36.020(B), because the structure will be removed when forest operations under the Plan conclude.[12] Record 9.

> 'incidental and subordinate' to the conduct of forest operations under the Plan. Based on this finding and the foregoing analysis, the Board therefore concludes that the proposed structure is an 'accessory use' to forest operations or practices on the subject property. As such, the proposed structure is permitted as an outright use under DCC 18.36.020 A." Record 9.

[11] The decision states, in relevant part:

> "However, while the Board concludes that the proposed structure is allowable as an outright accessory use under DCC 18.36.020 A, the Board also finds that the existence of the proposed structure must be limited in duration to the forest operations at issue. If the duration of the structure is not so limited, it will exceed the scope of a permitted 'accessory' use. Here, the Plan's stated purpose is to provide for the 'use, protection, enhancement and management direction for the next 20-30 years or longer.' Based on this language, the Board finds that the duration of the proposed structure should be tied directly to the implementation of the Plan. As a condition of approval as an accessory use, the Board therefore concludes that the proposed structure must be removed at the conclusion of the forest operation requiring its use as outlined in the Plan." *Id.*

[12] The decision goes on to state:

> "[Petitioner] has asserted that the proposed structure could only be permitted if it were a temporary structure 'auxiliary to and used during the course of a forest operation.' * * * While the Board has considered and approved the structure as an accessory use under DCC 18.36.020 A (as the issue was presented by [intervenor]), the proposed structure also satisfies DCC 18.36.020 B, because the structure must be 'removed when the particular forest practice has concluded.' In light of the condition requiring removal at the conclusion of the forest operation requiring its use, the Board also concludes that approval of the proposed structure is appropriate under DCC 18.36.020 B, which allows, as an outright use, 'temporary on-site structures which are auxiliary to and used during the term of a particular forest operation.'" Record 9.

C. Temporary On-Site Structure

We first address petitioner's challenges to the county's alternative finding that the disputed building is a "temporary on-site structure" that is allowed as an outright permitted use under DCC 18.36.020(B). Petitioner contends that structures allowed under DCC 18.36.020(B) must be "auxiliary to and used during the term of a particular forest operation," which as defined in the code (and rule) means a structure that is "temporary in nature" and "not designed to remain for the forest's entire growth cycle from planting to harvesting." Here, petitioner argues, the disputed structure is a permanent building that is designed to last indefinitely, and to provide support for forest operations involving the entire growth cycle, not a "particular forest operation." According to petitioner, the condition of approval requiring removal of the structure "at the conclusion of the forest operation requiring its use as outlined in the forest plan" is meaningless, because the forest plan provides guidance for multiple operations that will take place over the next 20 to 30 years "or longer." As discussed further below, petitioner contends that the disputed building is clearly a "permanent logging equipment repair and storage" structure as that term is used in OAR 660-006-0025(4)(b) and thus can be allowed only if the county has provided for that use in the DCC, and then only as a conditional use subject to the standards in DCC 18.36.040.

Intervenor responds that the code does not define "temporary" or "temporary in nature," and that the storage building may be accurately viewed as temporary, because it is a prefabricated metal building that may be dismantled and its foundation broken up. We disagree. Almost any structure on a permanent foundation may be removed and the foundation broken up, and thus almost all structures would be "temporary" under intervenor's view. The code and rule define temporary structures in terms that focus on the portability and/or the permanence of the foundation, and whether the structure is designed and intended to support a *particular* forest operation as contrasted with multiple forest

operations spanning the entire growth cycle from planting to harvesting. Here, the structure is not portable, is placed on a permanent foundation, and is plainly not designed or intended to support only a particular forest operation, such as planting or harvesting. The structure is clearly designed and intended to support a broad range of forest operations that, as far as we are shown, will span much if not all of a growth cycle, if not multiple growth cycles.[13] The county's conclusion that the structure is a "temporary on-site structure" as that term is used in the code and rule is not supported by the record.

We also agree with petitioner that, even if the structure were portable or less permanent in nature, the requirement to remove the structure on completion of forest operations contemplated by the Stewardship Plan is not sufficient to ensure that the building qualifies as a "temporary on-site structure." As far as we can tell, the Stewardship Plan in the record contemplates ongoing forest operations with no definite end in sight. It provides "management direction for the next 20-30 years or longer," and is thus open-ended in duration. Record 285. The condition of approval is insufficient to ensure that structure will ever be removed, much less that it will be removed at completion of any particular forest operation or activity.

D. Accessory Use

Petitioner argues that the disputed storage building is clearly a "permanent logging equipment repair and storage" building as that term is used in OAR 660-006-0025(4)(b). Petitioner argues that, for whatever reason, the county failed to explicitly provide for that particular conditional use in the F-1 zone when it implemented OAR 660-006-0025, as either a permitted or conditional use. Because nothing in DCC 18.36 explicitly authorizes a permanent logging equipment repair and storage building, petitioner contends, the county's decision is inconsistent with DCC 18.36.

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[13] Intervenor appears to admit elsewhere that the commercial forest operations on the subject property are "relatively indefinite[.]" Response Brief 14.

Further, petitioner argues that even if DCC 18.36 could be interpreted to indirectly allow a permanent logging equipment repair and storage building as an "accessory use," in order to be consistent with OAR 660-006-0025(4) the county can allow such a structure only as a conditional use, subject to the standards in OAR 660-006-0025(5) and DCC 18.36.040. According to petitioner, the county has no authority to adopt code provisions that provide for uses in forest zones not allowed under OAR Chapter 660, division 006, and no authority to remove restrictions or standards that the rule requires be applied to specific uses. In petitioner's words, the "general rule is that a local jurisdiction may be more restrictive on uses than state law but may not be more permissive." Petition for Review 6 (citing *Miller v. Multnomah County*, 33 Or LUBA 644 (1997), *aff'd* 153 Or App 30, 956 P2d 209 (1998) and *Yontz v. Multnomah County*, 34 Or LUBA 367, 369-70 (1998). Thus, petitioner argues, the county erred in interpreting DCC 18.36.020 to allow as an outright permitted "accessory use" a use that the rule specifies can be allowed only as a conditional use.

Intervenor disputes petitioner's premise that the county may not be more permissive than state law with respect to what uses are allowed in forest zones. According to intervenor, the county may be less restrictive than state law and may allow the disputed structure as an outright permitted "accessory use" notwithstanding that the administrative rule only allows such structures as conditional uses, subject to the standards in OAR 660-006-0025(5). However, intervenor cites no authority for the proposition that counties may (1) be less restrictive than state law in allowing uses in forest zones and (2) adopt regulations that effectively waive or ignore restrictions required by the administrative rule.

In *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995), the Oregon Supreme Court held that counties have no authority to enact and apply legislative criteria that are more restrictive than those found in ORS 215.213(1) and 215.283(1), statutes that set out farm-related and nonfarm uses that are allowed outright in farm zones. *See also Westfair Associates Partnership v. Lane County*, 25 Or LUBA 729, 732 (1993) (Goal 4 requirements

are "minimum" standards, and counties may regulate Goal 4 uses more restrictively than provided under the goal). A reasonable inference from those holdings is that counties have no inherent authority to allow uses in resource zones free of restrictions imposed by the statutes or administrative rules, at least absent some indication that the statute or rule grants that authority.

We are cited to nothing in OAR chapter 660, division 006 that purports to grant the county the authority to treat Category 3 conditional uses as Category 1 outright permitted uses.[14] On the contrary, the rule's careful division of the universe of uses allowed on forest lands into three categories indicates that LCDC was concerned with how uses were categorized and the circumstances under which they may be permitted. Similarly, the rule is at pains to state and limit the kind of "auxiliary" and "accessory" uses that may be allowed as listed uses or as part of listed uses. *See* ns 2 and 4. We believe that it would be inconsistent with the rule for a county to allow as an outright permitted "accessory" use a use or structure that the rule expressly categorizes as a listed conditional use.

Although not stated in this way, intervenor's argument may be that DCC 18.36.020 explicitly allows as outright permitted uses unspecified uses that are "accessory" to uses that are listed in DCC 18.36.020, and because DCC 18.36.020 is acknowledged to comply with

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[14] Intervenor cites to ORS 527.722(2) for the proposition that local governments have statutory authority to allow structures in forest zones other than "temporary on-site structures." ORS 527.722(1) prohibits local governments from adopting any regulations that "prohibit, limit, regulate, subject to approval or in any other way affect forest practices on forestlands located outside of an acknowledged urban growth boundary." ORS 527.722(2)(c) states that nothing in ORS 527.722(1) prohibits local governments from adopting regulations that allow, prohibit or regulate the establishment of "structures other than temporary on-site structures which are auxiliary to and used during the term of a particular forest operation."

Intervenor is correct that ORS 527.722(2)(c) appears to lift any restrictions placed by the broad prohibition in ORS 527.722(1) on the county's authority to adopt regulations that allow for structures other than "temporary on-site structures." However, ORS 527.722 does not authorize local governments to allow structures in forest zones that the applicable administrative rule prohibits. Neither does ORS 527.722 authorize local governments to allow structures as outright permitted uses that the applicable rule subjects to conditional use standards. *See generally Lane County v. LCDC*, 325 Or 569, 583, 942 P2d 278 (1997) (legislature did not intend that a county's statutory authority to allow certain nonfarm uses as permitted uses should be superior to LCDC's authority to adopt administrative rules that restrict such uses).

Goal 4 and the Goal 4 rule, any inconsistency between the rule and the code cannot be challenged in this appeal.

That argument would be relatively easy to agree with if DCC 18.36.020 explicitly categorized a "permanent logging equipment repair and storage" structure as an outright permitted use, and thus not subject to the standards in DCC 18.36.040. While such an explicit provision would clearly conflict with OAR 660-006-0025(4), the acknowledged status of the code would preclude reversing or remanding a permit decision that applied the code provision based on arguments that the code and the rule are inconsistent. ORS 197.175(2)(d); *see Friends of Neabeack Hill v. City of Philomath*, 139 Or App. 39, 46, 911 P2d 350, *rev den* 323 Or 136, 916 P2d 311 (1996) (after a local government's legislation has been acknowledged, its land use decisions are to be made in compliance with its acknowledged plan and regulations, and the goals cease to apply to the decisions directly).

The effect of the acknowledged status of DCC 18.36.020 is less clear where the code does not explicitly allow what the rule prohibits, or vice versa, and some interpretation is required to determine whether the code allows the use. The scope of uses potentially allowed as "accessory uses" is unspecified. We understand the county to have applied a broad view of that scope in the present case, to the effect that any use is allowable in the F-1 zone as an accessory use, as long as it meets the code definition of accessory use, *i.e.*, a use incidental and subordinate to a permitted use of the property that is its main use. Under that view, intervenor argues, there is no real dispute that the proposed logging equipment storage building is "accessory" to the forest operation on the property. Because DCC 18.36.020 allows "accessory uses" as outright permitted uses and the building is an accessory use or structure, intervenor contends that the building is therefore an outright permitted use under the code, and any inconsistency with the rule is not a basis to reverse or remand the challenged decision.

This argument presents a much closer question. LUBA must reverse an interpretation of an acknowledged land use regulation that is contrary to the statute, goal or rule that the regulation implements. ORS 197.829(1)(d);[15]; *see also Dowrie v. Benton County*, 38 Or LUBA 93, 97 (2000) (the county's discretion to interpret local code provisions that implement statutory standards is constrained, and any interpretation must be consistent with the statute implemented); and *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617, 623 (1994) (where a local code provision must be interpreted, and there is a reasonable interpretation that is consistent with the statute, goal or rule that the provision implements, that interpretation may not be rejected for one that is inconsistent with the statute, goal or rule). Thus, the county's ability to interpret the scope and meaning of DCC 18.36 may be constrained by ORS 197.829(1)(d), notwithstanding the acknowledged status of that code provision.

However, ORS 197.829(1)(d) must be read together with ORS 197.175(2)(d), which requires the local government to apply acknowledged code provisions, rather than the goals

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[15] ORS 197.829 provides:

> "(1) [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;
> >
> > "(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*.
>
> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct." (Emphasis added).

that the code implements. In *Opus Development Corp. v. City of Eugene*, 141 Or App 249, 255-56, 918 P2d 116 (1996), the Court of Appeals characterized its holding in *Friends of Neabeack Hill* to require that, in the review of a local land use decision to which an acknowledged comprehensive plan or regulatory provision is applicable, ORS 197.829(1)(d) does not enable LUBA or the Court to consider a goal consistency challenge to a local interpretation of the provision where:

> (1) "[T]he local government's interpretation is a correct statement of the meaning of the provision,"
>
> (2) "[T]he "challenge depends in substance on a showing that the acknowledged provision itself, as distinct from the interpretation of it, is contrary to a goal," and
>
> (3) "[A] direct assertion that the acknowledged provision is inconsistent with the goal would not be cognizable" under the statutes setting out LUBA's scope of review.

See also State ex rel Butler v. City of Bandon, 204 Or App 690, 702-03, 131 P3d 855 (2006) (applying *Friends of Neabeack Hill* to reject an argument that a permit decision allowing a use permitted by an acknowledged ordinance is inconsistent with a statewide planning goal, as a collateral attack on the acknowledged ordinance).

As the Court in *Friends of Neabeack Hill* candidly admitted, "the line between an interpretation and the provision it interprets will not always be sharp," and the principle described in that case will sometimes "prove difficult to apply." 139 Or App at 49. It seems to us that the present case is one where it is difficult to determine whether ORS 197.829(1)(d) or *Friends of Neabeack Hill* provides the controlling principle. As we understand it, which principle applies depends on whether and the extent to which the pertinent code language is ambiguous. If the code language is subject to at least two reasonable interpretations, one of which is consistent with the applicable goal or rule, and the other not, the local government cannot choose the interpretation that is inconsistent with the

goal or rule language the code implements. *Historical Development Advocates*, 27 Or LUBA at 623.

As noted above, determining which principle applies would be much easier if DCC 18.36.020 explicitly provided that "permanent logging equipment repair and storage" is an outright permitted use in the F-1 zone. Application of such an unambiguous provision clearly could not be challenged in the present appeal, under *Friends of Neabeack Hill*, no matter how contrary that provision might be to the rule it implements. Towards the opposite end of the spectrum, if DCC 18.36.030 explicitly provided that "permanent logging equipment repair and storage" is a *conditional* use (consistent with the rule), determining whether the same use could also be allowed as an outright permitted "accessory use" under DCC 18.36.030 would certainly require interpretation, and it would by no means be clear the use could be allowed as an "accessory use." In that circumstance, there would be an interpretation consistent with the rule (the use is allowed only as a conditional use) and an interpretation that is inconsistent with the rule (the use is also allowed as an outright permitted accessory use). It seems relatively clear in that circumstance that ORS 197.829(1)(d) would apply and would require LUBA to reverse the county's choice of the interpretation inconsistent with the rule, notwithstanding the code's acknowledged status.

The present case is somewhere in between those two ends of the spectrum, but in our view resembles the latter circumstance more than the former. The scope of uses allowed as "accessory uses" is not defined, and it is not clear whether a use that could have been authorized as a conditional use, but was not, can be considered as an outright permitted accessory use under the code's scheme. Considered in isolation, the DCC 18.36.020 provision for "accessory uses" and the definition of "accessory use" at DCC 18.04.020, the county's apparent view that any use that falls within the definition of "accessory use" is allowed as an outright permitted use seems a reasonable interpretation of those provisions.

However, the meaning of those provisions is not so clear when the context and structure of the DCC 18.36 is considered as a whole.

We noted earlier that, in implementing OAR 660-006-0025(4), the county failed to provide for three conditional uses that the rule authorizes the county to allow in forest zones, including "permanent logging equipment repair and storage." Those omissions may have been a simple oversight, or a deliberate policy choice.[16] If an oversight, then the county presumably did not intend that the provision for outright permitted "accessory uses" to include the omitted conditional uses. If that omission was a deliberate choice, then there are two possibilities. First, the county may have chosen as a policy matter not to allow the three omitted uses in the F-1 zone at all, and allow them only in other zones. We note in this respect that the county Rural Industrial zone explicitly allows permanent forest product processing facilities and storage and repair of equipment associated with logging activities. In that case, again, the county presumably did not intend to allow such uses as outright permitted accessory uses. The other possibility is that the county deliberately omitted the three conditional uses because it intended that such uses would instead be allowed as outright permitted "accessory uses," if they fell within the definition of that term, notwithstanding the obvious conflict with OAR 660-006-0025(4). That is essentially the interpretation that the county applied in the present case. However, we are cited to no legislative history or other evidence that the county made a deliberate choice to allow those conditional uses as outright permitted accessory uses. Nothing in the text of DCC 18.36 indicates that the county made such a choice, and in fact the text and structure of DCC 18.36 suggest otherwise.

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[16] The county planning director stated during the proceedings below that "the last time we did an update we missed this thing. It wasn't deliberate, not a deliberate policy choice." Record 35. The commissioners directed staff to initiate code amendments to conform the code to the rule. *Id.* The planning director's recollection may be correct, but we note that since at least 1994 (the oldest copy of the administrative rules available to LUBA), the Goal 4 rule has authorized counties to provide for those same three uses as conditional uses. It seems likely that when the county initially implemented the rule it did not provide for those three conditional uses, either as an oversight or as a deliberate policy choice. Then, when the county performed subsequent code updates, that initial omission or choice was not noticed or changed.

The general structure of DCC 18.36 (and the rule) is that certain uses or facilities are allowed as outright permitted uses, sometimes subject to restrictions to reduce impacts inconsistent with Goal 4 (*e.g.*, temporary, auxiliary), while other more intensive or permanent uses or facilities are allowed only as conditional uses. In implementing the rule, the county provided for "temporary on-site structures" auxiliary to a forest operation as a permitted use in the F-1 zone under DCC 18.36.020(B), but did not provide at all for "permanent logging equipment repair and storage" in the F-1 zone. It seems relatively clear under the rule that "permanent logging equipment repair and storage" and "temporary on-site structures" auxiliary to a forest operation are closely related uses, and in fact the permanent structure is simply a permanent and more intensive and specific version of the temporary and auxiliary structure.[17] In implementing the rule, the county went even further than the rule in restricting "temporary on-site structures," by imposing additional qualifications. Yet, under the county's interpretation, those restrictions are easily evaded and the provision for a "temporary on-site structure" becomes almost meaningless. The county's interpretation allows as an outright permitted use a permanent, more intensive variant of the temporary and auxiliary use allowed, with restrictions, under DCC 18.36.020(B).[18] That interpretation is so inconsistent with the structure of the code that we question whether it would be affirmable under ORS 197.829(1)(a)—(c).

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[17] An even clearer example of a similar relationship under the rule is "[p]ermanent facility for the primary processing of forest products" allowed a conditional use, and a less intensive version of that use, "[t]emporary portable facility for the primary processing of forest products," which may but need not be allowed as an outright permitted use. OAR 660-006-0025(3)(d). As noted, in implementing the rule, the county omitted any provision for a "permanent facility for the primary processing of forest products" in the F-1 zone. However, it provides for a "[t]emporary portable facility for the primary processing of forest products," subject to additional restrictions requiring that the facility not be placed on a permanent foundation and be removed at the conclusion of the forest operation requiring its use. DCC 18.36.020(G). Given the relationship between those two uses, it seems highly unlikely that the county intended to allow the permanent, more intensive version of that use as an outright permitted accessory use, free of the restrictions imposed under the code and rule. Any interpretation to that effect would almost certainly be reversible under ORS 197.829(1)(a)-(c), if not (d). [0]

[18] As discussed above, the county's characterization of the disputed building as a "temporary on-site structure" is inconsistent with DCC 18.36.020(B) and not supported by the record.

Whether that is so or not, for present purposes it is clear that considering text and context the scope of uses allowed as accessory uses under DCC 18.36.020 is ambiguous and requires interpretation. It is not at all clear that the county's interpretation is a "correct statement of the meaning" of the relevant code provisions. Accordingly, our review of that interpretation is governed by ORS 197.829(1)(d) and not the principle in *Neabeack Hill*. The county's interpretation is plainly contrary to the rule the code implements. Accordingly, we conclude that ORS 197.829(1)(d) applies and compels us to reverse the county's choice of an interpretation that is contrary to the rule.

E. ORS 197.830(11)(b)

Finally, intervenor argues that any error in allowing the disputed structure without applying the conditional use standards at DCC 18.36.040 is harmless error, because the county applied substantively similar siting criteria at DCC 18.36.060 and 18.36.070.[19] Intervenor argues that notwithstanding the absence of findings addressing the conditional use

[19] DCC 18.36.060 implements the general siting standards at OAR 660-006-0029, and DCC 18.36.070 appears to implement the specific fire siting standards at OAR 660-006-0035. We quote in full DCC 18.36.060:

> "All new dwellings and structures approved pursuant to DCC 18.36.030 or permitted under DCC 18.36.020 shall be sited in accordance with DCC 18.36.060 and DCC 18.36.070. Relevant physical and locational factors including, but not limited to, topography, prevailing winds, access, surrounding land use and source of domestic water shall be used to identify a site which:
>
> "A. Has the least impact on nearby or adjacent lands zoned for forest or agricultural use;
>
> "B. Ensures that forest operations and accepted farming practices will not be curtailed or impeded;
>
> "C. Minimizes the amount of forest lands used for the building site, road access and service corridors; and
>
> "D. Consistent with the applicable provisions of DCC 18.36.070, minimizes the risks associated with wildfire."

criteria at DCC 18.36.040, LUBA may affirm the county's decision pursuant to ORS 197.835(11)(b).[20]

Intervenor appears to be correct that compliance with the siting standards at DCC 18.36.060 and 18.36.070 might well also suffice to demonstrate compliance with the "conditional use" standards at DCC 18.36.040. If we were remanding the county's decision solely for failure to adopt findings addressing DCC 18.36.040, we might well agree with intervenor that that failure was harmless error, or that the findings addressing DCC 18.36.060 and 18.36.070 provided a basis to affirm the decision under ORS 197.835(11)(b). However, the underlying premise to intervenor's argument is that a "permanent logging equipment repair and storage" structure is allowable as a conditional use under DCC 18.36.030, notwithstanding that that code provision fails to provide for that use. OAR 660-004-0025(4) states that "[t]he following uses *may be* allowed * * *," which suggests that the county has the option of *not* allowing conditional uses listed in OAR 660-004-0025(4). As discussed above, the omission of "permanent logging equipment repair and storage" from the lists of uses allowed in the F-1 zone may have been an oversight, or it may have been a deliberate policy choice. Even if we assume it was an oversight, however, we question whether we can affirm a decision under the harmless error doctrine or ORS 197.835(11)(b) if that decision approves a use that is not listed or authorized in the applicable zoning regulations.

The first, second and third assignments of error are sustained.

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[20] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, [LUBA] shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

FOURTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioner challenges Condition of Approval 4, which requires that the disputed structure "be removed at the conclusion of the forest operation requiring its use as outlined in the [Stewardship Plan]."

For the reasons expressed above, we tend to agree with petitioner that this condition is insufficient to ensure that the structure qualifies as a "temporary on-site structure" for purposes of DCC 18.36.020(B). The county also imposed this condition to ensure that the structure did not exceed the duration of the forest operations it supports and thus would not exceed the permissible scope of an "accessory use." We understand intervenor to argue that Condition of Approval 4 was unnecessary for that purpose, and any error in adopting the condition does not provide a basis for reversal or remand if the county's determination that the structure is allowable as an accessory use is affirmed.

We rejected above both of the county's alternative bases to approve the disputed structure under DCC 18.36. As we understand the applicable land use regulations, DCC 18.36 does not authorize the disputed building. Accordingly, the county's decision "violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c). Therefore, we must reverse rather than remand the county's decision, and there is no point in resolving the parties' arguments regarding Condition of Approval 4.

We do not reach the fourth assignment of error

The county's decision is reversed.