

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH

5 and FRIENDS OF THE METOLIUS,

6 *Petitioners,*

7
8 vs.

9
10 JEFFERSON COUNTY,

11 *Respondent.*

12
13 LUBA No. 2010-080

14
15 MONTGOMERY SHORES PARTNERSHIP,

16 *Petitioner,*

17
18 vs.

19
20 JEFFERSON COUNTY,

21 *Respondent,*

22
23 and

24
25 CENTRAL OREGON LANDWATCH, FRIENDS
26 OF THE METOLIUS and CONFEDERATED TRIBES
27 OF THE WARM SPRINGS RESERVATION OF OREGON,

28 *Intervenors-Respondents.*

29
30 LUBA No. 2010-083

31
32 CONFEDERATED TRIBES OF THE
33 WARM SPRINGS RESERVATION OF OREGON,

34 *Petitioner,*

35
36 vs.

37
38 JEFFERSON COUNTY,

39 *Respondent.*

40
41 LUBA No. 2010-084

42
43 FINAL OPINION
44 AND ORDER
45

1 Appeal from Jefferson County.
2

3 Paul D. Dewey, Bend, filed a petition for review and a response brief and argued on
4 behalf of petitioners/intervenors-respondents, Central Oregon Landwatch and Friends of the
5 Metolius.
6

7 Lisa D.T. Klemp, Redmond, filed a petition for review and argued on behalf of
8 petitioner Montgomery Shores Partnership. With her on the brief was Bryant, Emerson &
9 Fitch, LLP.
10

11 Lauren J. Lester, Bend, filed a petition for review and a response brief and argued on
12 behalf of petitioner/intervenor-respondent Confederated Tribes of the Warm Springs
13 Reservation of Oregon. With her on the brief was Karnopp Petersen, LLP.
14

15 David C. Allen, Madras, filed a response brief and argued on behalf of respondent
16 Jefferson County.
17

18 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
19 participated in the decision.
20

21 REVERSED 01/31/2011
22

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

NATURE OF THE DECISION

The petitioners in these three consolidated appeals challenge a county decision approving “private accommodations for fishing.”

FACTS

The subject property is a 56.7-acre parcel that lies along the Metolius Arm of Lake Billy Chinook. Thirty-five acres of the property is above the ordinary high waterline, while approximately twenty-three acres is submerged and subject to a permanent flowage easement. The property is zoned for Forest Management, and is bordered on the west and south by U.S. Forest Service land and on the north by exception lands zoned Existing Rural Development, which are developed with recreational dwellings. The subject property is within the Metolius Deer Winter Range and Metolius Elk Winter Range and therefore subject to the Wildlife Area overlay zone. In addition, the property is located in an area designated as a “High Fire Risk Area” and rated as an “Extreme Fire Hazard.” Beyond the lake’s waters to the east is the Warm Springs Indian Reservation. A county public road provides access to the subject property.

Petitioner/applicant Montgomery Shores Partnership (Montgomery Shores) purchased the 56.7-acre parcel in the mid-1980s and subsequently apportioned that parcel into 16 separate “sites.” Although the partners have individually developed these 16 sites, all partners have undivided ownership interests in the entire 56.7-acre parcel, and the sites have not been partitioned, subdivided or deeded to individual partners. Over the years, various partners constructed building pads, sheds, decks, docks and other structures on the individual sites, and placed a number of recreational trailers on the property, apparently without obtaining required county approvals. Some of the existing development is located within a riparian setback.

1 In response to county enforcement proceedings against some of the existing
2 development on the property, on March 9, 2009 Montgomery Shores applied to the county,
3 for conditional use approval to maintain some existing structures and to construct new
4 structures as “private accommodations for fishing,” which is a conditional use allowed on
5 forest lands under state and local law. The proposed development is described in the
6 county’s decision:

7 “The applicant proposes to construct private fishing accommodations on the
8 site consisting of 15 cabins. The guest rooms, as proposed by the applicant
9 consist of 15 detached cabins with footprints ranging in size from 400 to
10 1,600 square feet in size. The applicant plans to construct associated storage
11 sheds. The applicant also requests to retain the existing 11 docks on site and
12 requests the ability to propose additional docks in the future. The applicant
13 plans to provide domestic water by drilling a well on site or delivery of water
14 from off-site. Sewage treatment is proposed to be provided through an onsite
15 septic system.” Record 1, App. 1.

16 After the conditional use application was filed, the county notified Montgomery Shores that
17 applications for a variance and site plan review were also required to approve the
18 development as proposed, and Montgomery Shores subsequently submitted a site plan and a
19 an application for a variance to the riparian setback. The consolidated applications were
20 deemed complete on September 29, 2009.

21 The planning commission held a public hearing on the applications on July 8, 2010,
22 and on July 22, 2010 approved the applications, subject to conditions of approval. The
23 county board of commissioners called up the planning commission decision for a *de novo*
24 hearing. The commissioners held a hearing on August 25, 2010, and subsequently voted to
25 approve the applications subject to 33 conditions of approval.

26 As conditioned, the approved development is limited to 15 one-bedroom single-level
27 cabins not to exceed 850 square feet, which may be occupied for a period of six months or
28 less within any continuous 12-month period. Fifteen accessory structures up to 200 square
29 feet in size are also permitted. The county required the cabins and accessory structures to be
30 clustered at the south end of the property near the county road, and required removal of the

1 existing unpermitted trailers and structures located closer to the shoreline, with the exception
2 of the 11 existing docks, which the county conditionally approved. The county denied
3 Montgomery Shores’ application for a variance from road width standards and for a
4 reduction in the county’s 75-foot riparian setback. These appeals followed.

5 **INTRODUCTION**

6 Petitioners Central Oregon Landwatch *et al.* (COLW) filed an appeal and a petition
7 for review challenging the county’s approval. Petitioner the Confederated Tribes of the
8 Warm Springs Reservation (Tribes) filed a separate appeal and petition for review also
9 opposing the decision. The two petitions for review overlap considerably, and for
10 convenience we refer to those parties collectively as “petitioners.” The applicant
11 Montgomery Shores also filed an appeal and its petition for review challenges several
12 conditions of approval and the county’s denial of the requested variances.

13 Petitioners’ initial assignments of error in their respective petitions for review seek
14 reversal of the challenged decision, arguing that the approved development does not qualify
15 as “private accommodations for fishing” under state law. For the reasons set out below, we
16 agree with petitioners that the development as proposed and approved cannot be approved as
17 “private accommodations for fishing,” and ultimately we reverse the county’s decision based
18 on our resolution of those assignments of error. Consequently, we do not address the
19 remaining arguments under petitioners’ petitions for review, or the arguments in
20 Montgomery Shores’ petition for review, which even if sustained would require remand
21 rather than reversal.

22 As framed, the key issues on appeal turn on the administrative rule and the
23 implementing county code provisions that allow “private accommodations for fishing” as a
24 conditional use on forest land. Accordingly, we first discuss those provisions.

1 **A. Private Accommodations for Fishing**

2 OAR 660-006-0025(4) sets out the conditional uses that are allowed in a forest zone,
3 subject to standards at OAR 660-006-0024(5). In particular, OAR 660-006-0025(4)(w)
4 allows “private accommodations for fishing” as a conditional use on forest lands subject to
5 review standards and several specific limitations.¹ In relevant part, the accommodations
6 must consist of no more than 15 “guest rooms,” occupied “temporarily,” for the “purpose of
7 fishing,” during authorized fishing seasons, and further the accommodations must be located
8 no more than one-quarter mile from fish-bearing Class I waters. The principal dispute on
9 appeal is whether the approved development constitutes “private accommodations for
10 fishing” within the meaning of the rule.

11 We briefly note other contextual provisions of the rule that may have some bearing
12 on that issue. OAR 660-006-0025(4)(p), which was adopted in the same rulemaking that
13 adopted the private fishing accommodations provisions of OAR 660-004-0025(4)(w), allows
14 as a conditional use “[p]rivate seasonal accommodations for fee hunting operations,” under
15 standards nearly identical to those that govern private fishing accommodations.² OAR 660-

¹ OAR 660-006-025(4)(w) provides:

“Private accommodations for fishing occupied on a temporary basis may be allowed subject to section (5) of this rule, OAR 600-060-0029 [Siting Standards for Dwellings and Structures in Forest Zones] and 660-006-0035 [Fire-Siting Standards for Dwellings and Structures], and the following requirements:

- “(A) Accommodations limited to no more than 15 guest rooms as the term is defined in the Oregon Structural Specialty Code;
- “(B) Only minor incidental and accessory retail sales are permitted;
- “(C) Accommodations occupied temporarily for the purpose of fishing during fishing seasons authorized by the Oregon Fish and Wildlife Commission;
- “(D) Accommodations must be located within ¼ mile of fish bearing Class I waters;
- “(E) A governing body may impose other appropriate conditions.”

² OAR 660-006-0025(4)(p) provides:

1 006-0025(3)(f) authorizes as a *permitted* use on forest land “[p]rivate hunting and fishing
2 operations without any lodging accommodations[.]” Reading these two provisions together
3 with OAR 660-006-0025(4)(w), it is reasonably clear that there is a connection between the
4 permitted and conditional uses. “[p]rivate accommodations for fishing” allowed as a
5 conditional use under OAR 660-006-0025(4)(w) are similar to the “fishing operations”
6 allowed as a permitted use under OAR 660-006-0025(3)(f), but with the addition of
7 conditionally approved “lodging accommodations,” and a similar relationship exists between
8 permitted “hunting * * * operations” and conditional use “private seasonal accommodations
9 for fee hunting operations.”

10 Somewhat further afield, we note that OAR 660-006-0024(4)(e)(A) allows as a
11 conditional use in a forest zone a somewhat similar recreational use, “[p]rivate parks and
12 campgrounds,” subject to a number of limitations. For example, separate sewer, water or
13 electric service hook-ups to individual camp sites are prohibited, and occupancy is limited to
14 overnight “temporary use” of the campground by a camper or camper’s vehicle not to exceed
15 a total of 30 days during any consecutive six month period. The apparent intent of such
16 restrictions is to ensure that private campgrounds on forest lands remain low intensity
17 recreational uses and not become *de facto* quasi-residential uses. *See Linn County Farm*

“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:

- “(A) Accommodations are limited to no more than 15 guest rooms as that term is defined in the Oregon Structural Specialty Code;
- “(B) Only minor incidental and accessory retail sales are permitted;
- “(C) Accommodations are occupied temporarily for the purpose of hunting during game bird and big game hunting seasons authorized by the Oregon Fish and Wildlife Commission; and
- “(D) A governing body may impose other appropriate conditions.”

1 *Bureau v. Linn County*, __ Or LUBA __ (LUBA No. 2010-006, June 9, 2010), slip op 13-14
2 (discussing limitations on public campgrounds on resource land).

3 The county adopted land use regulations implementing OAR 660-006-0025(4)(w)
4 that, with one minor exception, mirror the terms of the rule. Because the parties dispute the
5 significance of that variation from the rule, we note it here. As explained, OAR 660-006-
6 0025(4)(w)(C) provides that fishing accommodations can be “occupied temporarily for the
7 purpose of fishing during fishing seasons” authorized by the Oregon Department of Fish and
8 Wildlife (ODFW). Jefferson County Zoning Ordinance (JCZO) 303.4(K)(3) provides that
9 fishing accommodations can be “occupied *only* temporarily for the purpose of fishing during
10 fishing seasons” authorized by ODFW. (Emphasis added.)

11 **B. Oregon Structural Specialty Code Definition of “Guest Room”**

12 OAR 660-006-0025(4)(A) limits accommodations to no more than 15 “guest rooms
13 as the term is defined in the Oregon Structural Specialty Code.” As discussed below, the
14 parties dispute what types of accommodations qualify as “guest rooms” and what bearing, if
15 any, the incorporated definition from the Oregon Structural Specialty Code has on that issue.
16 The parties appear to agree that at the time the Land Conservation and Development
17 Commission (LCDC) adopted the rule in 1991, the Oregon Structural Specialty Code
18 (otherwise known as the Uniform Building Code, or UBC) defined a “guest room” as “any
19 room or rooms used or intended to be used by a guest for sleeping purposes. Every 100
20 square feet [] of superficial floor area in a dormitory shall be considered a guest room.”
21 Record 476. The county notes that the current version of the Oregon Structural Specialty
22 Code includes no definition of “guest room,” and questions how to apply the reference in
23 OAR 660-006-0025(4)(A) to a now non-existent definition.

24 The short answer is that the county must apply the definition incorporated by
25 reference as that definition existed at the time the rule was adopted, not as that definition
26 may be subsequently amended (or deleted) by the body that promulgates the Oregon

1 Structural Specialty Code. *See Barnes v. City of Hillsboro*, __ Or LUBA __ (LUBA No.
2 2010-011, June 30, 2010), slip op 17, *aff'd* __Or App __, __ P3d __ (2010) (discussing
3 constitutional limitations on the delegation of legislative authority).

4 **C. Relevant Legislative History**

5 Petitioners included in the record and cite to us portions of the legislative history
6 pertaining to LCDC's adoption of OAR 660-006-0025(4)(p) and (w). While none of it is
7 definitive, we agree with petitioners that the available legislative history indicates that LCDC
8 intended that "private accommodations for fishing" and the similar provision for "private
9 seasonal accommodations for a fee hunting operation" be relatively modest and limited-scale
10 uses, to ensure compatibility with forestry operations.³ Testimony found in that legislative
11 history noted that "[c]onflicts to forest management are posed by the siting of dwellings and
12 related structures on forest lands, and by parcelization." Record 582. Consistent with that
13 intent, dwellings and residential uses are generally limited in forest zones, and subject to
14 different rules than the permitted and conditional uses set out in OAR 660-006-0025. OAR
15 660-006-0027; OAR 660-006-0029.

16 With that overview of the applicable administrative rules, the county zoning
17 ordinance that implements that rule, and the relevant legislative history, we turn to the
18 parties' dispute regarding the meaning and scope of "private accommodations for fishing"
19 allowed under OAR 660-006-0025(4)(w).

³ Petitioners cite to the following passage from a LCDC staff summary of the proposed rules:

"The rule also provides for private seasonal accommodations for fee hunting operations. These kinds of facilities must meet several requirements to assure compatibility with forest operations. For example, accommodations are limited to no more than 15 guest rooms as that term is defined in the Oregon Structural Specialty Code to limit the scale of these uses to not jeopardize forest operations. Commercial uses are similarly limited to only minor incidental and accessory retail sales. Accommodations are seasonally limited to occupancy during game bird and big game hunting seasons authorized by the Oregon Fish and Wildlife Commission. Similar standards are applied to private accommodations for fishing." Record 609.

1 **FIRST AND SECOND ASSIGNMENTS OF ERROR (COLW); FIRST ASSIGNMENT**
2 **OF ERROR (TRIBES)**

3 **A. 15 Dwellings Do Not Constitute 15 Guest Rooms**

4 Petitioners argue first that approval of 15 separate cabins is essentially approval of 15
5 single-family dwellings that exceeds the scope and nature of the “accommodations” or “guest
6 rooms” authorized under OAR 660-006-0025(4)(w). According to petitioners, OAR 660-
7 006-0025(4)(w) contemplates approval of a single building that includes up to 15 “guest
8 rooms,” where guests of the fishing accommodation can stay while fishing in nearby Class I
9 waters—what is essentially a traditional fishing lodge. Petitioners point out that the
10 approved cabins will include full kitchens and sanitary facilities, in addition to living areas
11 and a bedroom, and argue that under any reasonable definition the cabins are more like
12 “dwellings” than “rooms” of any kind.

13 The county responds that OAR 660-006-0025(4)(w) does not expressly require that
14 the “guest rooms” be provided in a single structure, and does not expressly prohibit
15 providing “rooms” that consist of separate cabins or structures. The county also disputes that
16 the approved cabins constitute “dwellings,” arguing that under the county definition of
17 “dwelling” there must be “permanent provisions for living, sleeping, cooking and sanitation,”
18 and that because as conditioned the cabins will not be occupied permanently, they are not
19 “dwellings.” JCZO 105(B).

20 Given the text, context and legislative history of the rule explained above, we agree
21 with petitioners that the drafters of OAR 660-006-0025(4)(w) likely intended to authorize a
22 single fishing lodge with as many as 15 guest rooms. We further agree that 15 separate
23 cabins, each with the permanent provisions for living, sleeping, cooking and sanitation
24 facilities required of a dwelling, do not qualify as the 15 “guest rooms” that are allowed as
25 “private accommodations for fishing” under OAR 660-006-0025(4)(w). While the rule does
26 not explicitly require that the 15 “rooms” be located within a *single* structure, the word
27 “rooms” implies internal private sleeping areas within a larger structure.

1 It may be that a central structure with a single shared kitchen and shared sanitary
2 facilities, surrounded by one-room sleeping cabins, would be the functional equivalent of the
3 “fishing lodge” use envisioned by the rule drafters, notwithstanding that the “rooms” are not
4 enclosed in a single structure. Other structural variations might be possible. However, the
5 further one functionally departs from the 15-guest room “fishing lodge” concept envisioned
6 in the rule, the less likely the resulting use is to constitute the use authorized by OAR 660-
7 006-0025(4)(w).

8 In sum, the county’s broad interpretation of “rooms” to encompass what are
9 essentially self-contained dwellings is not consistent with the text, context or apparent
10 purpose of OAR 660-006-0025(4)(w), which envisions a limited set of accommodations to
11 facilitate seasonal fishing. Under OAR 660-006-0025(4)(w), the county can authorize a
12 private “accommodation” for fishing that includes no more than 15 “guest rooms.” Here, the
13 county has effectively approved 15 separate “accommodations” on the subject property,
14 consisting of 15 multi-room, self-contained dwellings. That is simply not consistent with the
15 rule.

16 Relatedly, we also agree with petitioners that a “dwelling” cannot constitute a “guest
17 room” for purposes of OAR 660-006-0025(4)(w). Under any reasonable definition of
18 “dwelling,” including the county’s definition, the approved cabins constitute dwellings,
19 because they include permanent provisions for living, sleeping, cooking and sanitation. That
20 the dwellings may not be permanently *occupied* does not convert what are functionally 15
21 single family dwellings into 15 “guest rooms,” as that term is used in OAR 660-006-
22 0025(4)(w).

23 **B. Occupancy Limited to “Guests”**

24 Petitioners also argue that, even if the county had approved something like the kind
25 of fishing lodge contemplated by OAR 660-006-0025(4)(w), the county erred in failing to
26 limit use of the “rooms” to “guests.” According to petitioners, the county effectively

1 approved exclusive owner-occupancy of the 15 cabins, which is not consistent with the
2 requirement that the approved accommodations consist of “guest” rooms. Petitioners note
3 that, as defined by the UBC in effect when OAR 660-006-0025(4)(w) was adopted, a “guest”
4 is “any person hiring or occupying a room for living or sleeping purposes,” implying a
5 person who either hires a room or who otherwise occupies the room by permission of the
6 owner. Petitioners also cite to similar contemporary dictionary definitions of “guest.”
7 Petitioners argue that the concept of “guest” as used in OAR 660-006-0025(4)(w) cannot
8 reasonably be understood to include exclusive occupancy of a “room” by its owner.

9 The county responds that nothing in OAR 660-006-0025(4)(w) or elsewhere
10 expressly precludes owner-occupancy of a “guest room” authorized under the rule. In our
11 view, that LCDC specified “guest” rooms rather than simply “rooms” is another indication
12 that the use LCDC envisioned was something like a traditional fishing lodge, where rooms
13 are rented or offered on a temporary basis to visitors, whose primary reason for visiting the
14 property is piscatorial pursuits. It is not clear to us that LCDC necessarily intended to limit
15 occupancy of a guest room to such visitors, or that LCDC necessarily intended to preclude
16 temporary, non-exclusive occupancy by a person who has some kind of ownership interest in
17 the facility. That said, however, we agree with petitioners that the qualifier “guest” must be
18 given some effect, and that occupancy of a “guest room” by its owner seems inconsistent
19 with the intent, if not the terms, of OAR 660-006-0025(4)(w). Because the facility the
20 county actually approved bears no resemblance to the facility authorized by OAR 660-006-
21 0025(4)(w), we need not speculate further about the meaning of “guest” or what limits it
22 implies on occupancy of a “guest room.”

23 The first and second assignments of error (COLW) and the first assignment of error
24 (Tribes) are sustained.

1 **SECOND ASSIGNMENT OF ERROR (TRIBES); THIRD ASSIGNMENT OF**
2 **ERROR (COLW).**

3 As noted, OAR 660-006-0025(4)(w) allows “private accommodations for fishing”
4 that are “occupied on a temporary basis.” More specifically, OAR 660-006-0024(4)(w)(C)
5 authorizes “[a]ccommodations occupied temporarily for the purpose of fishing during fishing
6 seasons authorized by the Oregon Fish and Wildlife Commission[.]” The county concluded
7 that occupancy of the 15 approved cabins for a period of six months within any 12-month
8 period is “temporary.” The apparent source of that six-month period is a code definition at
9 JCZO 105, which defines “temporary” as a “time period of 6 months or less in any 12 month
10 period, unless otherwise specified in this Ordinance.” Further, the county determined that
11 the relevant “fishing season” lasts all year, and therefore allowed the accommodations to be
12 occupied during any part of the year, subject to the six month limitation.

13 **A. Occupied Temporarily**

14 Petitioners argue that authorizing the cabins to be occupied for up to six months
15 within any 12 month period is inconsistent with the requirement that the accommodations be
16 “occupied on a temporary basis” and “occupied temporarily.” According to petitioners, the
17 JCZO definition of “temporary” is not controlling, and the relevant question is what LCDC
18 intended in requiring that guest rooms be “occupied temporarily.” Petitioners cite to
19 dictionary definitions indicating that “temporarily” means a “brief period,” a “limited time.”
20 COLW Petition for Review 16 (citing *Webster’s Third International Dictionary*, 2353 (1986
21 ed.)). Allowing occupancy for up to six months per 12 month period is not a “brief period”
22 or “limited time,” petitioners argue.

23 The county responds that the code definition of “temporary” is part of the county’s
24 acknowledged zoning regulations, and therefore, absent any contrary definition in statute,
25 applicable goal or rule, the county can and should apply its code definition to determine that
26 an occupancy of up to six months per 12 month period is an occupation on a “temporary
27 basis” for purposes of OAR 660-006-0025(4)(w). According to the county, petitioners’

1 arguments that the code definition does not apply is a collateral attack on the acknowledged
2 status of the JCZO.

3 The Goal 4 rule does not define the terms “temporary” or “temporarily,” but we
4 generally agree with petitioners that given the text, context and relevant legislative history
5 cited above, LCDC did not intend that a guest be allowed to occupy a fishing
6 accommodation guest room authorized under OAR 660-006-0025(4)(w) for any significant
7 period of time. For purposes of the rule, occupation of lodging accommodations for up to
8 half a year is not consistent with the character of a “guest room,” and cannot be accurately
9 described as a “temporary” occupation. *See Friends of the Metolius v. Jefferson County*, 48
10 Or LUBA 466, 469, *aff’d* 200 Or App 416, 116 P3d 220 (2005) (rejecting the county’s
11 determination that limiting owner-occupancy to 120 days per year is sufficient to ensure that
12 proposed dwellings qualify as “tourist rental cabins” rather than a dwelling); *Donnelly v.*
13 *Curry County*, 33 Or LUBA 624, 637 (1997) (allowing a campground site to be occupied for
14 up to 180 days is not a “temporary use”).⁴ As noted above, LCDC has determined under
15 OAR 660-006-0025(4)(e) that “temporary use” of a campground site must be limited to 30
16 days within any consecutive six-month period, as part of a set of limitations intended to
17 ensure that campgrounds on forest lands remain “campgrounds” and do not become *de facto*
18 rural residential uses. While that express 30-day limitation does not govern “private
19 accommodations for fishing,” it is an instructive indication of what LCDC believes
20 “temporary” means in an analogous situation. In our view, for purposes of OAR 660-006-
21 0025(4)(w), any continuous occupation of a “guest room” for much longer than 30 days

⁴ In *Donnelly*, we relied in part on distinctions drawn under the Residential Landlord and Tenant Act in ORS chapter 90 between residential “tenants,” and non-residential “transient occupancy” in lodgings, the latter of which is limited to 30 days, to determine that 180 days of occupancy is not a “temporary use” under the campground rule then in effect. LCDC subsequently amended the campground rule to explicitly limit occupancy of a campground or site to 30 days per six month period. OAR 660-006-0025(4)(e).

1 within a given period of time is likely to be inconsistent with the intended character of a
2 “guest room” and the requirement that occupation be “temporary.”

3 The more difficult question is whether the JCZO 105 definition of the term
4 “temporary” compels a different result in the present case. The code definition is located in
5 the general definition section of the JCZO, and the county cites to no indication that that
6 definition was adopted to implement OAR 660-006-0025(4)(w), Goal 4, or any Statewide
7 Planning Goal at all. As noted above, JCZO 303.4(K) repeats the language of OAR 660-
8 006-0025(4)(w) word for word, with one exception discussed below. That does not suggest
9 that in adopting JCZO 303.4(K) and the generally applicable JCZO 105 definition of
10 temporary the county intended to authorize what the rule would prohibit. Indeed, as noted,
11 the only difference between the rule language and JCZO 303.4(K) is that the latter inserts the
12 word “only” between “occupied” and “temporarily.” If anything, that textual difference
13 suggests that the county intended to be more restrictive than the rule with respect to
14 occupancy.

15 Absent some indication that the JCZO 105 definition of “temporary” was intended to
16 implement OAR 660-006-0025(4)(w), Goal 4, or at least some statewide planning goal or
17 rule, we do not believe that the acknowledged status of the JCZO as a whole necessarily
18 means that the code definition controls what occupation of a guest room “on a temporary
19 basis” or “temporarily” means for purposes of applying the JCZO provisions that implement
20 OAR 660-006-0025(4)(w). If there is no controlling acknowledged local definition that is
21 intended to and has the effect of varying from a goal or rule requirement, then the county
22 must interpret the relevant terms in JCZO 303.4(K) consistent with the rule that JCZO
23 303.4(K) was adopted to implement. As explained, we do not believe that LCDC intended in
24 adopting OAR 660-006-0025(4)(w) to permit the guest of a fishing operation to occupy
25 “private accommodations for fishing” for up to six months.

1 **B. During Fishing Seasons Authorized by ODFW**

2 OAR 660-006-0025(4)(w)(C) allows fishing accommodations to be occupied “during
3 fishing seasons authorized by [ODFW].” Thus, in addition to restrictions to temporary
4 occupancy, the rule also restricts occupancy of the facility as a whole to fishing seasons. The
5 fishing season on the Metolius Arm of Lake Billy Chinook, the fish-bearing Class I waters
6 on which the subject property is located, extends from March 1 to October 31. However, the
7 lake is a large reservoir with three separate arms formed by three rivers, and apparently
8 ODFW has adopted different fishing seasons for different portions of the lake, with the result
9 that at any given time of year there is some portion of Lake Billy Chinook that is open for
10 fishing. The county found that because the entire lake can be accessed by boat from the
11 subject property, it is reasonable to permit occupancy of the accommodations to occur at any
12 time of year.

13 Petitioner COLW argues that under the rule the relevant “fishing season” is
14 determined by the fish-bearing Class I waters that the proposed fishing accommodations
15 must be located within one-quarter mile of, under OAR 660-006-0025(4)(w)(D). Therefore,
16 petitioner contends, any fishing accommodations on the subject property can be occupied
17 only from March 1 through October 31.

18 The county responds that the all portions of Lake Billy Chinook are fish-bearing
19 Class I waters, and because the subject property is located on the lake, the relevant fishing
20 seasons for purposes of OAR 661-010-0025(4)(w)(C) are those that apply to the lake as a
21 whole. The county argues that the requirement to be within one-quarter mile of fish-bearing
22 Class I waters in OAR 660-006-0025(4)(w)(D) serves a different purpose than the fishing
23 season restriction in OAR 661-010-0025(4)(w)(C).

24 We generally agree with the county that because the subject property is located on a
25 lake, all parts of which are easily accessible from the property by boat, the relevant “fishing
26 seasons” for purposes of OAR 661-010-0025(4)(w)(C) are those that apply to the lake as a

1 whole. While subsections (C) and (D) of the rule serve similar purposes in ensuring that
2 “private accommodations for fishing” are indeed used as part of a legitimate fishing
3 operation on forest land, those purposes are not identical. Nothing in the rule restricts the
4 relevant “fishing seasons” in OAR 660-006-0025(4)(w)(C) to the particular season that
5 govern the waters within one-quarter mile of the operation, under OAR 661-010-
6 0025(4)(w)(C).

7 The second assignment of error (Tribes) is sustained. The third assignment of error
8 (COLW) is sustained, in part.

9 **THIRD ASSIGNMENT OF ERROR (TRIBES); FOURTH ASSIGNMENT OF**
10 **ERROR (COLW)**

11 As noted, OAR 661-010-0025(4)(w)(C) allows accommodations “occupied
12 temporarily *for the purpose of fishing*” during fishing seasons authorized by ODFW
13 (emphasis added). Petitioners argue that there is no evidence that the proposed
14 accommodations would be used “for the purpose of fishing,” and instead it is clear from the
15 record that the cabins would be used for the same general recreational or vacation purposes
16 as the existing development on the property. According to petitioners, the county made no
17 finding that the accommodations would be used “for the purpose of fishing,” within the
18 meaning of OAR 661-010-0025(4)(w)(C), and no such finding could be made based on the
19 record.

20 In addition, petitioner COLW argues that JCZO 303.4(K)(3) is even more restrictive
21 than OAR 660-006-0025(4)(w)(C) in providing that accommodations can be “occupied *only*
22 temporarily for the purpose of fishing[.]” (Emphasis added.) According to petitioner, the
23 adverb “only” modifies the phrase “for the purpose of fishing.” The county responds that
24 “only” modifies the immediately following word “temporarily,” not subsequent phrases. The
25 county also argues that there is no obligation for the county to adopt a finding that the
26 accommodations will be used “for the purpose of fishing.” To the extent petitioners argue
27 that the county should have applied a condition of approval to that effect, the county states

1 that it is willing to impose such a condition if the decision is remanded. The county also
2 cites to applicant testimony that intervenor’s partners currently engage in fishing from the
3 property and that practice would continue. Record 487. According to the county, that
4 testimony is sufficient to support a finding that the accommodations would be occupied “for
5 the purpose of fishing,” if such a finding is required.

6 We agree with the county that the adverb “only” that the county inserted into JCZO
7 303.4(K)(3) modifies “temporarily” and perhaps “occupied,” but does not modify the
8 subsequent phrase “for the purpose of fishing.” Whether the county is necessarily obligated
9 to adopt a finding supported by substantial evidence that the proposed accommodations are
10 “for the purpose of fishing,” or impose a condition to ensure compliance with that
11 requirement, likely will depend on the particular proposed development. Where the
12 proposed development clearly constitutes “private accommodations for fishing” within the
13 meaning of the rule, that is, a fishing lodge-type operation with associated temporary
14 accommodations in guest rooms, then no particular finding or condition may be required,
15 because the limited nature of the accommodations themselves likely would be sufficient to
16 ensure that fishing is the primary object. We agree with petitioners, however, that given the
17 history of the current development on the property and the potential for the proposed cabins
18 to be used primarily for other purposes, the county is required to evaluate the evidence on
19 that point, adopt any necessary findings, and impose any limitations or conditions necessary
20 to ensure compliance with the rule. As a practical matter, it may be difficult to enforce a
21 nominal condition that simply required that the accommodations be used “for the purpose of
22 fishing.” Depending on circumstances, the county may have to impose more specific
23 limitations or conditions. But, in any case, we agree with petitioners that in the present case
24 the county cannot ignore the requirement in the rule that the accommodations be occupied
25 “for the purpose of fishing.”

1 The third assignment of error (Tribes) and fourth assignment of error (COLW) are
2 sustained.

3 **CONCLUSION**

4 Based on our resolution of the above assignments of error, it is evident that the
5 approved development is not authorized in a forest zone. The development as proposed and
6 approved does not constitute the “private accommodations for fishing” within the meaning of
7 the rule and implementing code provisions. A substantially different application, proposing a
8 substantially different development, would be necessary to approve “private
9 accommodations for fishing” within the meaning of the rule and code. Accordingly, the
10 proper disposition of these appeals based on the above assignments of error is to reverse the
11 county’s decision. OAR 661-010-0071(1)(c) (LUBA shall reverse a land use decision when
12 the decision “violates a provision of applicable law and is prohibited as a matter of law”).

13 Because we determine that the development is prohibited as a matter of law, no
14 purpose is served in addressing the remainder of petitioners’ assignments of error, which
15 advance findings and evidentiary challenges that, if sustained, would warrant only remand,
16 or involve issues particular to the present application. For the same reason, no purpose
17 would be served in addressing the merits of Montgomery Shores’ assignments of error
18 challenging the conditions of approval and denial of the requested variances. Those
19 assignments of error, if sustained, would at most result in remand of the county’s decision,
20 which must be reversed for the reasons explained above.

21 The county’s decision is reversed.