

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 RICHARD GREEN and EMILY GREEN,
5 *Petitioners,*

6
7
8 vs.

9
10 DOUGLAS COUNTY,
11 *Respondent,*

12
13 and

14
15 CHUCK HESTER and SANDY HESTER,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2010-106

19
20 FINAL OPINION
21 AND ORDER

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23 Appeal on remand from the Court of Appeals.

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25 Bill Kloos, Eugene, represented petitioners.

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27 Paul E. Meyer, County Counsel, Roseburg, represented respondent.

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29 Stephen Mountainspring, Roseburg, represented intervenors-respondents.

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

33
34 REMANDED

11/23/2011

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

1 We agreed with both arguments. We first interpreted ORS 215.448(1)(c) to limit the
2 “buildings” that qualifying home occupation activities can be operated “in” to structures that
3 are enclosed by walls. However, the Court of Appeals interpreted ORS 215.448(1)(c) not to
4 include that limitation, and held that “buildings” for purposes of ORS 215.448(1)(c) need not
5 be enclosed structures. The only express limiting factor in ORS 215.448(1)(c) with respect to
6 buildings, the Court held, is whether the building is “normally associated with uses permitted
7 in the zone in which the property is located[.]”

8 With respect to the meaning of “operated substantially” in the dwelling or building,
9 we held that to satisfy that statutory requirement

10 “the events must be carried out in ‘large part,’ ‘in the main,’ or as the ‘main
11 part’ in the dwelling or buildings, compared to the portion that is conducted
12 outside the dwelling or buildings. It is possible that the events authorized by
13 the 2010 CUP could meet that standard, assuming the gazebo and pavilion
14 qualify as buildings for purposes of ORS 215.445(1)(c), but only if
15 conditioned to limit the extent of uses that occur outside qualifying buildings.
16 The 2010 CUP decision does not include any such conditions and, as it stands,
17 the authorized events could be carried out almost entirely outside buildings in
18 the grassy area that is set aside for such events. For that reason alone the 2010
19 CUP Amendment authorizes a home occupation that does not comply with
20 ORS 215.448(1)(c).” *Green I*, slip op 25.

21 The Court of Appeals did not disturb the above-quoted ruling.

22 Accordingly, we modify our disposition of the first assignment of error to reject the
23 first sub-assignment of error and to sustain only the second sub-assignment of error. The
24 first assignment of error is sustained, in part.

25 **FOURTH ASSIGNMENT OF ERROR**

26 The fourth assignment of error concerns Douglas County Land Use Development
27 Ordinance (LUDO) 1.040.2, which provides, in relevant part:

28 “* * * The Director shall not approve a development or use of land that has
29 been previously divided or otherwise developed in violation of this ordinance,
30 regardless of whether the applicant created the violation, unless the violation
31 can be rectified as part of a development proposal.”

1 Petitioners argued below to the county that their allegations of violations of the original 2003
2 CUP required the county to apply LUDO 1.040.2. The county adopted findings rejecting that
3 argument, but those findings did not include an explicit explanation of the meaning of LUDO
4 1.040.2. In *Green I*, LUBA concluded that the county had implicitly interpreted LUDO
5 1.040.2 to apply only when there is evidence of a completed county enforcement action
6 against the property owner, and to determine that LUDO 1.040.2 was not triggered by mere
7 allegations of code violations. Accordingly, we denied the fourth assignment of error.

8 On appeal, the Court concluded that the county had not in fact provided a reviewable
9 interpretation of the meaning of LUDO 1.040.2. Rather than interpret LUDO 1.040.2 in the
10 first instance, or remand to LUBA to do so, the Court concluded that it is appropriate to
11 remand the issue to the county “for an interpretation and potential application of LUDO
12 1.040.2.” *Green II*, 245 Or App at 441.

13 The fourth assignment of error is sustained.

14 The county’s decision is remanded.