BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAYNE KUKASKA and RUTH KUKASKA,
Petitioners,

vs.

LINN COUNTY,
Respondent,

and

BERNADETTE B. JONES,
Intervenor-Respondent.

LUBA No. 2014-004

FINAL OPINION
AND ORDER

Appeal from Linn County.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioners.

No appearance by Linn County.

David E. Coulombe, Corvallis, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Fewel, Brewer & Coulombe.

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

AFFIRMED 05/14/2014

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county board of commissioners' decision approving a medical hardship dwelling in a rural residential zone.

FACTS

The subject property is a 2.56-acre parcel zoned Rural Residential 5-acre minimum (RR-5), and developed with a single family dwelling, in which intervenor-respondent (intervenor) resides. The property obtains domestic water from a well, and disposes of sanitary waste via a septic system consisting of a septic tank and drainfield. The property has frontage on an adjacent highway, but the only highway access to and from the property is via an easement over petitioners' adjoining property, which is also 2.5 acres in size.

Medical hardship dwellings are allowed as conditional uses in a number of county zones, including the RR-5 zone, pursuant to Linn County Code (LCC) 932.860 and 933.800. Under those provisions, the county may authorize a temporary second dwelling occupied for a caregiver for a resident who qualifies due to "verified medical hardship circumstances or for reason of age." LCC 932.860.[1] LCC 932.870(a) defines "qualifying person" for purposes

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[1] LCC 932.860 states:

"The purpose of LCC 932.860 to 932.895 is:

"(A) to provide for the temporary placement of a manufactured dwelling or the temporary conversion of an existing building under verified medical hardship circumstances or for reason of age,

"(B) to assure the temporary nature of such a placement or conversion, and

of a medical hardship dwelling as a "person who lives on an authorized unit of land and receives daily supervision and care of another" living on the property. Under LCC 932.880(B)(2) and (3), the applicant must provide either (1) a written statement from a physician stating that a medical condition exists and the afflicted person requires daily supervision, care or assistance, or (2) documentation that the qualifying person is 65 years of age or older. [2]

Intervenor applied to the county for a medical hardship dwelling. On the application form, intervenor described the nature of the hardship as: "unable to maintain property myself—66 years old see attached copy of Oregon D/L." Record 170. The application proposes that the medical hardship dwelling will

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"(C) to ascertain the continued validity of the medical hardship."

[2] LCC 932.880 provides in relevant part:

"(A) In addition to the application requirements stated LCC 921.040, the applicant shall also address the matters set forth in subsection (B).

"(B) *Application requirements.*

"(1) Approval from the EHP for connection of the medical hardship dwelling to the sewage treatment system serving the existing residence or a statement from the EHP saying that such connection is not feasible and recommending a possible alternative; and

"(2) A written statement from a licensed, Oregon physician on that physician's letterhead that a medical condition exists and that the afflicted person needs daily supervision, care or assistance.* * *; or

"(3) Documentation satisfactory to the Director that the qualifying person is 65 years of age or older."

be occupied by her son and daughter-in-law. The daughter-in-law submitted testimony that she has medical training and would provide care for her mother-in-law.

The planning director administratively approved the application based on the age qualification at LCC 932.880(B)(3). Petitioners appealed the decision to the planning commission, raising a number of challenges. The planning commission conducted a *de novo* public hearing on the appeal and, on November 12, 2013, issued its decision approving the medical hardship dwelling, with conditions. The notice of decision states that an appeal to the board of county commissioners must be accompanied by a $2,000 appeal fee.

On November 27, 2013, petitioners appealed the planning commission decision to the board of county commissioners, accompanied by a $2,000 appeal fee. On December 18, 2013, the commissioners issued a decision affirming and incorporating the planning commission decision as their own. The decision noted that the 150-day time limit in ORS 215.428 would expire on December 19, 2013, and recited a LCC provision that allows the board to affirm a decision on appeal without conducting further hearings if a time limit will expire before the board may hear the appeal.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county misconstrued the applicable law and adopted inadequate findings not supported by substantial evidence, in concluding that intervenor is a "qualifying person" for purposes of LCC 932.880(B)(3). According to petitioners, intervenor failed to present any evidence regarding a medical condition or infirmity that requires daily care or

supervision, and petitioners contend that as a matter of law age alone cannot qualify a person for a medical hardship dwelling.

According to petitioners, the county's medical hardship dwelling provisions implement ORS 215.283(2)(L), and that as a matter of state law a person who is 65 years or older, but does not suffer from some medical condition or infirmity that requires daily supervision and care, cannot qualify for a medical hardship dwelling under the statute.[3] We also understand petitioners to argue that even if the county code provisions do not implement ORS 215.283(2)(L), the county erred in interpreting the county code provisions to allow age alone to qualify a person for a medical hardship dwelling. Petitioners contend that the text and context of LCC 932.860 *et seq*. and LCC 933.800 compel the conclusion that the qualifying person must demonstrate that they have a medical condition or other infirmity that requires daily supervision and care, and that the county's interpretation that age alone qualifies a person is implausible and not affirmable even under the deferential

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[3] ORS 215.283(2)(L) provides in part that a county may allow in an EFU zone:

> "One manufactured dwelling or recreational vehicle, or the temporary residential use of an existing building, in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or a relative of the resident. Within three months of the end of the hardship, the manufactured dwelling or recreational vehicle shall be removed or demolished or, in the case of an existing building, the building shall be removed, demolished or returned to an allowed nonresidential use. * * *"

standard of review applied to a governing body's code interpretations. ORS 197.829(1).[4]

Intervenor responds that the county correctly rejected petitioners' arguments that the county's medical hardship dwelling provisions, as applied in the RR-5 zone, implement ORS 215.283(2)(L). If the medical hardship dwelling provisions do implement the statute, intervenor contends that the statute and its implementing regulations allow a county to approve a hardship dwelling based on age without an additional showing of infirmity. Intervenor notes that the county's decision cites OAR 660-033-0130(10), which implements ORS 215.283(2)(L) and defines "hardship" as a "medical hardship or hardship for the care of an aged *or* infirm person or persons" (emphasis

[4] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

added).[5] According to intervenor, the administrative rule, like the county's code, allows a person to qualify for a medical hardship dwelling based on age.

With respect to petitioners' alternative argument, that regardless of the statute or administrative rule the county's code must be construed to require a showing of infirmity, intervenor argues that this argument is waived, because it was never raised during the proceedings below. ORS 197.763(1). According to intervenor, on this issue petitioners based their arguments below entirely on the statute, and never argued that the county code should be construed to require that qualifying persons age 65 or over must also demonstrate infirmity.

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[5] OAR 660-033-0130(10) provides:

> "A manufactured dwelling, or recreational vehicle, or the temporary residential use of an existing building allowed under this provision is a temporary use for the term of the hardship suffered by the existing resident or relative as defined in ORS Chapter 215. The manufactured dwelling shall use the same subsurface sewage disposal system used by the existing dwelling, if that disposal system is adequate to accommodate the additional dwelling. If the manufactured home will use a public sanitary sewer system, such condition will not be required. Governing bodies shall review the permit authorizing such manufactured homes every two years. Within three months of the end of the hardship, the manufactured dwelling or recreational vehicle shall be removed or demolished or, in the case of an existing building, the building shall be removed, demolished or returned to an allowed nonresidential use. A temporary residence approved under this section is not eligible for replacement under 215.213(1)(q) or 215.283(1)(p). Department of Environmental Quality review and removal requirements also apply. *As used in this section 'hardship' means a medical hardship or hardship for the care of an aged or infirm person or persons.*" (Emphasis added.)

Finally, intervenor argues that the county did not rely solely on intervenor's age to find that she is a "qualifying person" as defined at LCC 932.870(1), and that that finding is supported by substantial evidence. Intervenor notes that the planning commission "considered the evidence of the applicant's daughter in law, her qualifications and desire to provide medical assistance, the applicant's son and his desire to provide care, along with the Commission's observations made at the public hearing, in finding that the applicant is a 'qualified person' and has satisfied this criterion." Record 16.

We turn first to intervenor's final response, because we deem it dispositive. For purposes of this opinion, we assume without deciding that the county's interpretation of LCC 932.860 *et seq.* and LCC 933.800 to approve a medical hardship dwelling in the RR-5 zone is constrained by ORS 215.283(2)(L) and OAR 660-033-0130(10). We also assume, without deciding, that the statute, rule and code impose essentially the same requirements.[6]

As the findings note, OAR 660-033-0130(10) defines "hardship" in a manner that disjunctively lists persons who are "aged" and persons who are "infirm." Both categories could overlap, of course, but either alone can potentially qualify for a medical hardship dwelling. Therefore, we disagree with petitioners to the extent they argue that an aged person must *also* demonstrate that he or she is "infirm."

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[6] These assumptions make it unnecessary to consider intervenor's argument that petitioners waived all issues regarding the interpretation of LCC 932.800 and LCD 933.860 *et seq*. by focusing arguments below on the interpretation of ORS 215.283(2)(L).

However, petitioners are correct that whether aged or infirm or both, as defined by the administrative rule the person must require "care." OAR 660-033-0130 defines hardship to mean hardship "for the care" of an aged or infirm person. Therefore, the qualifying person must require care due to age or infirmity. Petitioners suggest that such a person must require extensive or "24/7" care in order to qualify; however, the statute, rule and code do not so provide. All that is required is "care" due to age or infirmity.

In the present case, intervenor's application stated that she is no longer able to take care of her property. This implies at least some physical limitations. Intervenor appeared before the planning commission and testified that she is a "qualifying person." As noted, LCC 932.870 defines "qualifying person" as a person who "receives daily supervision and care." Intervenor, however, declined to disclose any specifics regarding her physical condition, citing state and federal privacy rights regarding disclosure of health information, and expressing a desire to maintain that privacy. Intervenor's daughter-in-law testified that she has medical training, and would assist in intervenor's healthcare. Finally, as the findings note, the planning commission had the opportunity to observe intervenor at the hearing, and relied in part on that visual observation to conclude that intervenor is a qualifying person.

A reasonable person could conclude based on that evidence, as the planning commission did, that intervenor is a "qualifying person," *i.e.* requires daily supervision and care due to age or undisclosed physical or medical limitations. Petitioners cite to no evidence to the contrary. Instead, petitioners simply argue that there is no evidence supporting the finding that intervenor is a "qualified person." While there is not much evidence on this point, there is some, and absent some countervailing evidence we conclude that the planning

commission's finding that petitioner is a "qualifying person" is adequate and supported by substantial evidence.

Petitioners also contend that because LCC 933.800 implements ORS 215.283(2)(L), at least as applied in the EFU zone, that the county erred in failing to apply the approval standards applicable to all ORS 215.283(2) uses, at ORS 215.296. The latter statute require findings that the proposed use in an EFU zone will not force a significant change in, or significantly increase the cost of, farming practices. However, because the subject property is not located in an EFU zone, ORS 215.296 does not apply, and the county did not err in so concluding. The remaining arguments under the first assignment of error do not provide a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Because a medical hardship dwelling is a conditional use in the RR-5 zone, the county applied the conditional use standards at LCC 933.200 *et seq.* LCC 933.220(C)(3) requires that the proposed development site have the physical characteristics needed to support the use, including "access."[7] As noted, the property has frontage on a highway, but access is provided via a driveway constructed through an easement over petitioners' adjoining property.

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[7] LCC 933.220(C)(3) provides, in relevant part:

> "The proposed development site has the physical characteristics needed to support the use such as, but not limited to the following:
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> "(a) access;
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> "(b) suitability for on-site, subsurface sewage treatment system;
>
> "(c) an adequate supply of potable water[.]"

Petitioners advise that they have filed an action in circuit court against intervenor to resolve unstated issues regarding the scope of the existing easement, and that that litigation is currently pending.[8] During the land use proceeding, petitioners argued to the county that the current easement is inadequate to serve two dwellings on intervenor's property. The county rejected that argument, concluding that the county road department and fire department had no objection to the proposed access, and citing evidence that the access is adequate to serve two dwellings on intervenors' property. Petitioners also argued that the current easement is impliedly limited to serving only one dwelling, that intervenor has no legal right to use the easement to access a second dwelling on the property, and therefore the proposed use lacks "access" for purposes of LCC 933.220(C)(3). The county summarily rejected that argument, concluding that the proposed dwelling is accessory to the main dwelling on the property, and petitioners' arguments regarding the scope of the existing easement are not related to the county's decision criteria. Record 14.

On appeal, petitioners dispute both conclusions. With respect to the adequacy of access, petitioners argue that simply because the county road department and fire department did not object to the proposal is insufficient to establish that the access is adequate. Petitioners also note that the road department advised that the proposal would require a "driveway review," and petitioners argue that that comment means that the department lacked necessary information to determine the adequacy of the access. Record 189.

[8] The parties advise us that they have reached a settlement, but that no agreement has been executed.

Intervenor responds, and we agree, that the record includes substantial evidence to support the county's finding that the property has the physical characteristics needed to support the use, including "access." Intervenor took the position during the proceedings below that the existing easement and driveway provide adequate width and surface to provide access for both dwellings, and submitted photographs, plans and other evidence in support. Petitioners cite no evidence to the contrary, other than to note that the road department advised that the proposed use will require "driveway review." Petitioners do not explain what "driveway review" entails, and have not established that the requirement to undergo the road department's driveway review means either that the department objected to the proposal or lacked the information necessary to comment.

Next, petitioners argue that the county failed to address their arguments that the easement is limited to serving a single dwelling and intervenor lacks the legal right to use the easement to provide access to two dwellings. Petitioners argue that remand is necessary for the county to determine the scope of the easement and whether the easement is limited to serving a single dwelling, as petitioners contend.

Intervenor responds that LCC 933.220(C)(3) is concerned only with whether the proposed development site has the "physical characteristics" needed to support the use, including "access," and does not require the county to consider and resolve a legal dispute over the terms of the existing easement, or whether the proposed use of that easement is "legal." To the extent the scope of the easement is within the county's review, intervenor argues that the terms of the easement, which is in the record, does not limit use of the easement to serving one dwelling on intervenor's property.

Intervenor is correct that disputes over the terms or scope of the easement can be resolved only in circuit court, and the county lacks jurisdiction to resolve, and is not required to adopt findings to resolve, such a dispute. At most, if applicable approval criteria are met only if a dispute over the legality or scope of an easement is resolved in the applicant's favor, the county may be required to find that access is not precluded as a matter of law and impose any conditions of approval necessary to ensure that legal uncertainty over access is resolved prior to final development approvals or actual development. *Culligan v. Washington County*, 57 Or LUBA 395, 399-400 (2008); *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006).

In the present case, petitioners request remand for the county to resolve a legal issue the county lacks authority to resolve. Petitioners do not request remand for the county to adopt the limited findings and conditions described in *Culligan*, and apparently did not make that request below. However, it is reasonably clear that the county does not believe that access is precluded as a matter of law. Further, we note that the county's decision includes a condition of approval requiring that, prior to issuance of development permits, the applicant shall obtain an access permit from the county road department.[9] It is not clear that that condition was intended to, or has the effect of, ensuring that any legal uncertainty over access is resolved prior to development approvals.

[9] Petitioners contend, in a footnote, that the board of county commissioners did not adopt the conditions attached to the planning commission decision, when the commissioners affirmed and incorporated that decision as the commissioners' own decision. However, that is incorrect. The planning commission decision and conditions are both attached to the commissioners' decision, and identified as Exhibit 1, the decision the commissioners incorporated as their own.

On the other hand, petitioners do not argue otherwise, or articulate any basis for LUBA to reverse or remand under this assignment of error. Absent a more developed challenge to the county's findings and conditions, this assignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

LCC 933.220(C)(1) requires a finding that the proposed conditional use is consistent with the purpose of the applicable zone. The purposes of the RR-5 zone include providing "areas suitable for rural residential development" and preserving and maintaining "the rural character of areas designated for such acreage homesites." LCC 929.610(A). The county found that the medical hardship dwelling is consistent with these purposes, because the dwelling is a temporary accessory use to the existing dwelling, which will be removed when the applicant no longer resides on the property. Record 12.

LCC 933.220(C)(2) requires a finding that the proposed development will have minimal impact on the livability of abutting properties and the surrounding neighborhood, with consideration given to "density," among other considerations.[10] The county concluded that the operating characteristics of a

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[10] LCC 933.220(C)(2) provides:

> "The location, size, design and operating characteristics of the proposed development will be made reasonably compatible with and have minimal impact on the livability and appropriate development of abutting properties and the surrounding neighborhood, with consideration given to
>
> "(a) scale, bulk, coverage and density;
>
> "(b) availability of public facilities and utilities;

medical hardship dwelling are similar to a primary dwelling on the property. With respect to density, the county evaluated the dwelling density within 1000 feet of the subject property, concluding that "the surrounding neighborhood is developed with multiple dwellings, and the addition of a temporary accessory medical hardship dwelling would have a minimal, if not *de minimis*, impact on the surrounding area." Record 13.

Petitioners argue that the county's findings regarding LCC 933.220(C)(1) and (2) are inadequate, because the findings do not explain why increasing the residential density on the subject property will have a minimal impact on the livability of petitioners' abutting property. Petitioners note that the subject property is only 2.5 acres in size, half the minimum five-acre lot size allowed for new parcels in the RR-5 zone. According to petitioners, the decision effectively authorizes a quadrupling of the residential density contemplated for the RR-5 zone, without explaining how that increased density is consistent with the purpose of the RR-5 zone, or addressing the impacts of that increased density on abutting properties. Relatedly, petitioners criticize the county's findings for focusing on the "surrounding neighborhood" and failing to address impacts on petitioners' abutting property.

Later in its decision, the county adopted additional findings to address the issue of density, concluding:

> "The proposed temporary dwelling in its proposed location is reasonably compatible with, and will have minimal impact on, the abutting properties and surrounding neighborhood. No permanent

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> "(c) traffic generation and the capacity of the surrounding road network; and
>
> "(d) other related impacts of the development."

> density is increased. The temporary density is below that of a traditional nuclear family of 4.2 individuals. The Commission found that the surrounding neighborhood consists of multiple residential dwellings and that the temporary siting of this proposed hardship dwelling would have minimal impact on the surrounding area." Record 20.

Intervenor responds, and we agree, that the county's findings regarding LCC 933.220(C)(1) and (2) adequately explain the county's conclusion that the required considerations were considered and that those criteria are met. The findings explain that the dwelling is a temporary, accessory use to the existing dwelling, and together the two dwellings would represent a temporary density below that of a traditional nuclear family. The findings discuss the residential density in the surrounding area, note the existence of multiple dwellings, and conclude that a temporary accessory dwelling is consistent with the purpose of the RR-5 zone and will have only minimal impacts on abutting properties and the surrounding area. The findings do not calculate or view density in the same manner petitioners do, but petitioners have not established that the county erred in viewing density differently than petitioners. As the staff report to the planning commission noted, the RR-5 zone does not limit density to one dwelling per five acres, or impose any limitation on residential density of existing property, but simply provides a minimum five-acre size for the creation of new parcels. Record 140.

With respect to impacts on petitioners' abutting property, petitioners do not identify any impacts to their property, other than increased density, that the county should have addressed. The findings note that the medical hardship dwelling will be located further away from petitioners' property than the existing dwelling, and partially hidden behind that dwelling. Record 20. The findings also note that the operating characteristics of the dwelling will be

identical to the many other dwellings in the area. Absent a more developed argument, petitioners' contention that the county failed to address impacts on their abutting property does not provide a basis for remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend that the county erred in classifying the medical hardship dwelling as an "accessory" structure to the primary dwelling on the property. According to petitioners, an accessory structure must be dependent on a primary structure or use, but a separate dwelling, with its own kitchen, bathroom, etc., is independent of the primary dwelling, and therefore does not qualify as an accessory structure.[11]

The county's code does not include a definition of "accessory," but we agree with intervenor that under the relevant code provisions, a medical hardship dwelling is properly viewed as a use accessory to the principal dwelling occupied by the qualifying person, not a second principal use of the property. The RR-5 zone allows as a principal use one single family dwelling. The zone allows as a conditional use one medical hardship dwelling subject to LCC 932.860 to 932.895. LCC 933.800(4) provides that a medical hardship dwelling must be used in conjunction with an existing dwelling, and temporarily used for the duration of the hardship suffered by the resident of that dwelling. LCC 932.875(A) requires the medical hardship dwelling to be

[11] Petitioners do not explain what significance a determination whether the medical hardship dwelling is an accessory or primary use has to any approval criterion or any basis for reversal or remand. Nothing cited to us in the county's code or elsewhere turns on whether a medical hardship dwelling is characterized as an accessory use.

connected to the septic system serving the existing dwelling. The county did not err in rejecting petitioners' argument that a medical hardship dwelling is an "accessory" use.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

LCC 933.220(C)(3)(c) requires that the site have the physical characteristics needed to support the use, including "an adequate supply of potable water." *See* n 7. The existing dwelling is served by a well. Intervenor recently installed a 1550 gallon water storage tank. In response to arguments below that intervenor had not demonstrated an adequate supply of potable water, the county found:

> "Ms. Jones' application states she lives on the subject site. She has placed into the record a copy of the receipt for, and photos depicting the installation of, a 1550-gallon water storage tank. Additionally, Ms. Jones provided testimony at the public hearing that she lives alone and has lived on the premises for several years. In short, the Commission is persuaded by the evidence, including the strong inference, that there has been historically an adequate supply of potable water to serve Ms. Jones. The Commission also finds that Ms. Jones, to ensure not just an adequate supply but an *abundant* supply, installed a 1550-gallon storage tank. Those facts, testimony at the hearing, and the natural inferences that flow from them—adequate potable water for her personal usage from an existing well and the installation of a large storage tank—are more than sufficient to demonstrate that the development site can support an adequate supply of potable water for the additional two occupants of the proposed hardship dwelling * * *" Record 21.

Nonetheless, the county imposed a condition requiring that, prior to the issuance of development permits, the applicant must demonstrate that the property has an adequate supply of potable water. Record 6.

Petitioners argue that the foregoing findings are inadequate and not supported by substantial evidence. According to petitioners, a demonstration of an adequate supply of potable water requires some evidence, in the form of well logs or analysis under state and federal water quality standards, regarding the quantity and potability of water available to serve the two dwellings. As to the condition imposed by the planning commission, petitioners recognize that the county could find that LCC 933.220(C)(3)(c) is met based on a finding that it is feasible to comply, combined with a condition sufficient to ensure compliance. However, petitioners argue that the county failed to adopt a finding of feasibility. Moreover, petitioners argue, the condition is insufficient because it is unclear that it requires testing of both quantity and quality.[12]

The above-quoted finding of compliance with LCC 933.220(C)(3)(c) is not framed as a finding of feasibility, but it is clear that the county believes it is feasible, at least, for the existing well and storage tank to provide an adequate supply of potable water. Petitioners cite no evidence to the contrary. The county imposed a condition of approval that requires intervenor to demonstrate that the well will provide an adequate supply of potable water, which clearly

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[12] Petitioners note that the notice of decision separately lists "permit conditions" and "Code requirements." Record 5. The obligation to demonstrate that the property has an adequate supply of potable water is listed as the first code "requirement." Petitioners suggest, in a footnote, that the obligations listed as "requirements" cannot be assumed to qualify as "conditions," but must be something different and lesser than conditions of approval. However, petitioners' argument elevates form over substance. Both the conditions and requirements are phrased in the same mandatory manner, and both clearly function as obligations that must be performed in order to obtain further permits and maintain the conditional use permit, *i.e.* as conditions of approval.

requires consideration of both quantity and quality. Petitioners have not established that more is required.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

LCC 933.800(A)(1) requires "[a]pproval from the EHP [Environmental Health Program] for connection of the medical hardship dwelling to the sewage treatment system serving the existing residence or a statement from EHP saying that such connection is not feasible and recommending a possible alternative." Similarly, LCC 932.875 requires that the medical hardship dwelling be connected to the existing "approved septic system."

The existing dwelling is served by an on-site septic system, consisting of a septic tank connected to a drainfield. The proposed dwelling is located downslope of the existing dwelling and septic tank. EHP authorized the connection of the proposed dwelling to the existing sewage disposal system, but notes the possible need for a "minor alteration" to the existing septic system if the dwelling is located as proposed, specifically intervenor would need to install a second septic tank, and a pump to lift waste to the existing septic tank, from whence waste would be distributed to the drainfield.

Petitioners argued below that the second septic tank and pump required by EHP means that LCC 933.800(A)(1) and LCC 932.875 are not met, because the proposed dwelling will not be connected to the "existing" septic system. According to petitioners, the addition of a second septic tank and a pump means that the proposed dwelling will be served by a "new" or separate septic system, one that happens to share a drainfield with the existing system. Petitioners contend that because the dwelling cannot be connected to the existing system without modification, LCC 933.800(A)(1) and LCC 932.875

are met only if EHP states that connection is not feasible and recommends an alternative. However, petitioners argue, EHP did not make the required statement of feasibility.

The county rejected that argument, agreeing with intervenor that modifying the existing septic system does not create a new or separate septic system. On appeal, petitioners repeat their argument that a "system" means the entire system of tank, pump, piping, and drainfield, and adding a second tank and pump to an existing system necessarily results in a second "system." However, petitioners have not established that the county erred in interpreting "existing system" to include a modified system such as that proposed, or explain why those modifications necessarily result in a second "system" for purposes of LCC 933.800(A)(1) and LCC 932.875. Even if petitioners are correct that the modifications mean that the dwelling cannot connect to the "existing system," and compliance is possible only if EHP recommends a feasible alternative, the EHP letter at Record 172 authorizing the modification is fairly read to recommend an alternative that EHP obviously believes is feasible.

Finally, petitioners briefly note that LCC 932.875 requires that the dwelling be connected to the existing "approved" septic system, and observes that the record includes no evidence that the existing system was ever "approved." This one-sentence argument does not explain what petitioners believe is necessary for the existing system to be "approved," but assuming that some kind of "approval" is necessary, we see no reason why the EHP letter at Record 172 is insufficient to demonstrate that the existing system is "approved."

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioners paid the $2,000 fee required by the county to appeal the planning commission decision to the board of commissioners. As noted, the commissioners did not hold a hearing, but summarily affirmed the planning commission decision. Subsequently, the county refunded petitioners' $2,000 fee.[13]

Under the seventh assignment of error, petitioners argue that the $2,000 appeal fee violates ORS 215.422(1)(c), which authorizes counties to charge fees for local appeals to the governing body and provides that those fees "shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript." Petitioners contend that the $2,000 fee exceeds the actual cost of

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[13] Petitioners move to strike Appendix 27-30 to the response brief, which includes documents showing that the county refunded the appeal fee when the hearing was canceled. Petitioners argue that those documents are not in the record, and not the subject of a motion to take evidence outside the record, under OAR 661-010-0045, and therefore cannot be considered in this appeal for any purpose.

The motion is denied. We have long held that we may consider documents outside the record, without proceeding under OAR 661-010-0045, for the limited purpose of resolving disputes over the Board's jurisdiction, including whether an appeal is moot. *Century 21 Properties v. City of Tigard*, 17 Or LUBA 1298, 1302-03 (1989); *1000 Friends of Oregon v. Dept. of Environmental Quality*, 7 Or LUBA 84, 85-86 (1982). Petitioners do not dispute that the county refunded the fees, but do dispute the legal consequences of that action, and whether it moots LUBA's review of the seventh assignment of error. Were it necessary to consider the documents in Appendix 27-30 in order to resolve the parties' dispute over mootness, we could likely do so. However, it is unnecessary to consider those documents, as we dispose of the seventh assignment of error on other grounds.

processing petitioners' appeal or the average cost of processing such appeals in general. Petitioners argue that they raised this issue in their appeal to the board of commissioners, but the commissioners did not address the issue.

Intervenor responds that the commissioners' summarily affirmed the planning commission decision without holding a hearing, and were under no obligation to address petitioners' arguments regarding the appeal fee. Intervenor also suggests in a footnote that any issue regarding the fee is moot, because the fee was refunded and thus no fee was charged. In a reply, petitioners dispute that the issue is moot, arguing that petitioners had to pay the fee initially, as a jurisdictional prerequisite in order to exhaust administrative remedies, and the refund of the fee does not cure the alleged violation of ORS 215.422(1)(c).

There are several problems with petitioners' appeal fee challenge, but we address only one. Petitioners have the initial evidentiary burden during the proceedings before the governing body of demonstrating that the fee to appeal to the governing body violates ORS 215.422(1)(c). *Young v. Crook County*, 56 Or LUBA 704, 717, *aff'd* 224 Or App 1, 197 P3d 48 (2008). Petitioners do not allege that they attempted to meet that initial evidentiary burden, and any attempt would probably have failed, because an appeal to the board of commissioners is limited to the record before the planning commission. LCC 921.250. An as-applied challenge under ORS 215.422(1)(c) can be advanced in a land use proceeding or reviewed on appeal to LUBA—if it can be advanced at all—only if the applicable procedures authorize the local review body to consider, and accept new evidence on, that issue, and the petitioners provide the evidence necessary to meet their initial burden. *See Willamette Oaks, LLC v. City of Eugene*, 245 Or App 47, 56, 261 P3d 85 (2011) (LUBA

erred in remanding to the city planning commission to allow the petitioner to present evidence that the appeal fee violates ORS 227.180(1)(c), the cognate to ORS 215.416(1), because under the city code the planning commission cannot accept new evidence and has no authority to review appeal fee challenges). In the present case, the board of commissioners' proceedings was limited to the record before the planning commission, and petitioners cite nothing in the code that authorizes the board to accept new evidence. Further, the board's proceedings never reached a hearing or other stage where the board could accept new evidence, or address the issue. If there is a venue for resolving petitioners' as-applied challenge to the city's appeal fee, it does not lie with LUBA.

The seventh assignment of error is denied.

The county's decision is affirmed.