BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOSEPH WEST and TASHA BOLLERMANN,
Petitioners,

vs.

MULTNOMAH COUNTY,
Respondent.

LUBA No. 2014-048

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioners.

Jed Tompkins, Assistant County Counsel, Portland, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 09/30/2014

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision that denies their application for approval of forest template dwelling.[1]

INTRODUCTION

The legislature first authorized what are commonly referred to as forest template dwellings in 1993. For forest land in western Oregon that is predominantly composed of soils "[c]apable of producing more than 85 cubic feet per acre per year of wood fiber," the 1993 legislation authorized approval of a new single-family dwelling on a tract if in 1993 at least part of 11 other lots or parcels fall within a 160-acre template centered on the tract, and "[a]t least three dwellings existed on January 1, 1993 on the [11] other lots or parcels." Or Laws 1993, ch 792, § 4(6)(a). This aspect of the 1993 legislation has not been amended since 1993 and is currently codified at ORS 215.750(1)(c).

The Land Conservation and Development Commission's (LCDC's) Goal 4 (Forest Lands) administrative rule duplicates the ORS 215.750(1)(c) language, but in addition requires that the three dwellings that existed in 1993 must "continue to exist on the other [11] lots or parcels." OAR 660-006-0027(3)(c)(B). In other words, OAR 660-006-0027(3)(c)(B) adds to the statutory requirements a requirement that the three dwellings not only must have existed in 1993, they must *continue* to exist at the time approval of the forest template dwelling is requested. *See Lane County v. LCDC*, 325 Or 569,

[1] The county also denied petitioners' applications for approval of an accessory use and Significant Environmental Concern review.

583, 942 P2d 278 (1997) (LCDC may regulate ORS 215.203(1) uses more stringently than the statute).

Counties are permitted to regulate forest lands more stringently than required by ORS 215.750(1)(c) or OAR 660-006-0027(3)(c). *Miller v. Multnomah County*, 153 Or App 30, 38-40, 956 P2d 209 (1998). Multnomah County Code (MCC) 33.2240(A)(3)(c) carries forward the OAR 660-006-0027(3)(c)(B) requirement for at least 11 lots or parcels within the 160-acre template area and that the 1993 dwellings must "continue to exist," but increases the number of dwellings necessary to qualify for a template dwelling from three to five.[2]

To summarize, to qualify for a forest template dwelling under MCC 33.2240(A)(3)(c), there must have been at least five dwellings on the required 11 template lots or parcels in 1993 and those dwellings must continue to exist at the time the forest template dwelling is requested.

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[2] MCC 33.2240(A)(3)(c) authorizes approval of a forest template dwelling where:

> "[T]he tract is predominantly composed of soils which are capable of producing above 85 cf/ac/yr of Douglas Fir timber; and
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> "1. The lot upon which the dwelling is proposed to be sited and at least all or part of 11 other lawfully created lots existed on January 1, 1993 within a 160-acre square when centered on the center of the subject tract parallel and perpendicular to section lines; and
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> "2. At least five dwellings lawfully existed on January 1, 1993 within the 160-acre square and those dwellings either continue to exist or have been replaced by lawful replacement dwellings."

FACTS

Petitioners' property is capable of producing more than 85 cubic feet of wood fiber annually. Petitioners' tract satisfies the statutory, LCDC rule and MCC 33.2240(A)(3)(c)(1) requirement for at least 11 lots or parcels in the 160-acre template area. Petitioners contend the record establishes that five dwellings lawfully existed within the relevant 160-acre template in 1993 and those five dwellings "continue to exist" today. The county hearings officer found that one of the five dwellings that petitioners rely on does not qualify as a "dwelling," and does not "continue to exist," within the meaning of MCC 33.2240(A)(3)(c)(2). In their first assignment of error, petitioners assign error to that hearings officer finding.

FIRST ASSIGNMENT OF ERROR

The structure that the hearings officer found does not qualify as a "dwelling[]" and does not "continue to exist," within the meaning of MCC 33.2240(A)(3)(c)(1) and (2) was constructed in 1906. There is no dispute that the 1906 structure is in a "state of significant disrepair." PFR 7. The hearings officer's description of the 1906 structure is set out below:

> "* * * This 1906 structure is not presently occupied – it has been boarded up. Moreover, the building is not structurally intact – one half of the structure has split from the other, a portion of the roof is covered in plastic and another roof area is severely degraded with missing shingles, the windows are without glass and the siding has holes in it. In addition, other than Portland Maps data offered by the applicant that lists this building as a dwelling with a bathroom, the record contains no other evidence that the building has indoor plumbing, cooking facilities, or sanitation or that it is or has been recently inhabited. Lastly, County Assessment and Taxation records indicate the current value of the 1906 building is less than $2,500 and shows a range of values from $1,000 to $2,410 between the years of 1996 to 2013. These values indicate

> that the structure was in a similar, deteriorated and vacant condition for an extended period of time. * * *" Record 11.

Our review of photographs in the record of the 1906 structure confirm the hearings officer's conclusion that the 1906 structure is a severely dilapidated, abandoned and boarded-up structure. Record 135-50. Those photographs support the hearings officer's finding that the 1906 dwelling has not been occupied as a residence for a number of years. The tax records support a conclusion that the structure has been in a dilapidated condition since 1996, or the last 18 years.

Petitioners' and the county's dispute under the first assignment of error turns on the meaning of "dwellings" in MCC 33.2240(A)(3)(c)(2). We understand petitioners to argue that the hearings officer improperly construed the MCC term "dwellings." ORS 197.835(9)(a)(D). Neither the statute, nor LCDC's rule nor the MCC define the key term "dwellings." Typically, dwellings in rural areas will include both modern, currently occupied dwellings and older dwellings, which may or may not be occupied and may or may not be in a condition that would allow them to be occupied as a residence. In some cases a structure may have been constructed decades ago as a residence, and occupied as a residence for some period of time, but then have been abandoned for decades and now is in a state of disrepair that would preclude use of the structure as a residence, without first making significant repairs. ORS 215.750(1)(c), OAR 660-006-0027(3)(c) and MCC 33.2240(A)(3)(c) do not explicitly address or determine whether such a derelict structure qualifies as a "dwelling" in applying the forest template test. That ambiguity in the statute, rule and MCC gives rise to the central issue in this appeal.

Petitioners rely in large part on the MCC 33.0005 definition of "Dwelling (Single Family Detached),"[3] which in relevant part provides that a single family detached dwelling is "[a] detached building designed for one dwelling unit[.]" We understand petitioners to contend there is no dispute that the 1906 dwelling is a detached building that was designed as one dwelling. Petition for Review 10-13. Petitioners focus on the purpose the building was *designed* for ("one dwelling") and contend the current state of disrepair of the 1906 dwelling is irrelevant for purposes of applying MCC 33.2240(A)(3)(c).

The planning director took the position that the 1906 dwelling must qualify as a "habitable dwelling," to qualify as a "dwelling[]" under MCC 33.2240(A)(3)(c).[4] Petitioners pointed out that the MCC 33.0005 definition of "habitable dwelling" operates in conjunction with MCC 33.2220(D) to set out the requirements for altering, maintaining or replacing a habitable dwelling in

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[3] MCC 33.0005 defines "Dwelling (Single Family Detached)" as "[a] detached building *designed* for one dwelling unit including Mobile Homes under the provisions as specified within the district." (Emphasis added.)

[4] MCC 33.0005 set out the following definition of "habitable dwelling:"

"**Habitable Dwelling** – An existing dwelling that:

"(a) Has intact exterior walls and roof structure;

"(b) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;

"(c) Has interior wiring for interior lights;

"(d) Has a heating system; and

"(e) Was lawfully established."

the CFU-2 zone.[5] Record 127-28. The MCC 33.0005 definition of habitable dwelling and MCC 33.2220(D) together replicate the statutory authorization for altering, maintaining and replacing dwellings on forest land at ORS 215.755.[6] Petitioners pointed out that while MCC 33.2220(D) expressly states

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[5] MCC 33.2220(D) authorizes the following in the CFU-2 zone:

> "Alteration, maintenance, replacement or restoration of an existing lawfully established *habitable dwelling* as defined in MCC 33.0005 and located within 100-feet from an existing dwelling.
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> "(1) In the case of a replacement dwelling, the existing dwelling shall be removed, demolished or converted to an allowable non-residential use within three months of the completion or occupancy of the replacement dwelling.
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> "(2) Restoration or replacement due to fire, other casualty or natural disaster shall commence within one year from the occurrence of the fire, casualty or natural disaster." (Italics in original.)

[6] ORS 215.755 provides in part:

> "Subject to the approval of the governing body or its designee, the following dwellings may be established in any area zoned for forest use under a land use planning goal protecting forestland, provided that the requirements of the acknowledged comprehensive plan, land use regulations and other applicable provisions of law are met:
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> "(1) Alteration, restoration or replacement of a lawfully established dwelling that:
>
> "(a) Has intact exterior walls and roof structure;
>
> "(b) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;

that the altered, maintained and replacement dwellings authorized by MCC 33.2220(D) require an existing "habitable dwelling" as a starting point, the forest template dwelling authorized under MCC 33.2240(A)(3)(c) only requires that the five existing dwellings be "dwellings." Petitioners argued it would be error to read in a requirement that the five dwellings required by MCC 33.2240(A)(3)(c) must be "habitable dwellings," as MCC 33.0005 defines that term, since MCC 33.2240(A)(3)(c) requires five "dwellings," not five "habitable dwellings."

The hearings officer's decision, which relies in part on a planning staff report, agrees with petitioners that the MCC 33.0005 definition of "habitable dwellings" does not apply directly in this case. Record 13 ("'habitability' is not an express standard in [MCC 33.2240(A)(3)(c)]"). But the hearings officer disagrees with petitioners that the original *design* of the 1906 structure is the sole determining factor regarding whether the 1906 structure qualifies as a dwelling under MCC 33.2240(A)(3)(c)(2) and disagrees that the 1906 structure's current state of nonuse and disrepair is irrelevant under MCC 33.2240(A)(3)(c)(2).

In its brief, the county argues that petitioners place too much emphasis on the word "designed" in MCC 33.0005 definition of "Dwelling (Single Family)" and give that word determinative significance that it does not deserve

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> "(c) Has interior wiring for interior lights;
>
> "(d) Has a heating system; and
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> "(e) In the case of replacement, is removed, demolished or converted to an allowable nonresidential use within three months of completion of the replacement dwelling."

when viewed in context with the MCC 33.0005 definition of "Dwelling (Duplex or Two-Unit)." MCC 33.0005 defines "Dwelling (Duplex or Two-Unit)" as "[a] detached building *designed* for two dwelling units, whether in separate or single ownership." (Emphasis added.) This context, the county argues, shows the word "designed" is used in the MC 33.0005 definitions simply to distinguish between a single family dwelling and a duplex or two-unit dwelling, based on design, and does not have the determinative significance in understanding the meaning of the word "dwelling" in MCC 33.2240(A)(3)(c)(2) that petitioners argue it does.

Secondly, and just as importantly according to the county, the MCC 33.0005 definition of "Dwelling (Single Family Detached)" describes the product of the design as "one dwelling unit." MCC 33.0005 in turn defines "Dwelling Unit" as follows:

> "Dwelling Unit – A single unit *providing* complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation." (Emphasis added.)

The MCC 33.0005 definition of "dwelling unit," which can be read to say a dwelling unit must currently be "providing complete, independent living facilities," and the MCC 33.2240(A)(3)(c)(2) requirement that the required five dwellings must "continue to exist," convinced the hearings officer that the 1906 dwelling does not qualify as a "dwelling" under MCC 33.2240(A)(3)(c):

> "The [MCC] requires that a dwelling must 'continue to exist' to be considered a dwelling located within the template area. Given the current condition of the 1906 home and yard, it is evident that the dwelling use of the property has been discontinued many years ago and that only a disintegrating shell of a former residence remains. The applicant believes that the mere presence of the shell of a former residence is sufficient for a structure to be a dwelling.

> The hearings officer disagrees. For a structure to be a dwelling it must be used as a residence by some person, as well as be designed to serve that use. The use requirement is implicit in the [MCC] which allows and regulates use, including dwelling uses.
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> "* * *
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> "* * * The term 'complete' is not defined in the [MCC] but has the plain meaning of 'possessing all necessary parts, items, components, or elements[:] not lacking anything necessary [:] brought to an end or final intended condition.' *Webster's Third New Int'l Dictionary* 465 (unabridged ed. 2002).
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> "Lastly, of note, this criterion is set in the present tense. As expressly set forth in [MCC 33.2240(A)(3)(c)(2)], qualifying dwellings must '***continue*** to exist.' In addition, as expressly set forth in the definition of the term 'Dwelling Unit,' that term means a single unit that is '***providing***' (i.e., currently providing) 'complete' living facilities." Record 12 (bold type, underling and italics in original).

The hearings officer's findings can be read to go so far as to disqualify as a "dwelling" a fully functional single family dwelling with all modern conveniences, simply because it is vacant, for example a currently vacant rental or a currently vacant dwelling that is on the market for sale. We need not and do not decide whether such a narrow interpretation of MCC 33.2240(A)(3)(c) and the MCC 33.0005 definitions of "Dwelling (Single Family Detached)" and "Dwelling Unit" could be sustained. However, we have no problem concluding that the hearings officer properly construed MCC 33.2240(A)(3)(c) and the MCC 33.0005 definitions of "Dwelling (Single Family Detached)" and "Dwelling Unit" to exclude the 1906 dwelling, for the reasons given in the hearings officer's decision. The hearings officer's interpretation–that a former dwelling that has been vacant for many years and is in a state of disrepair that would preclude current use as a residence does not

qualify as a "dwelling"—is far more consistent with the likely underlying purpose of MCC 33.2240(A)(3)(c). The county contends that underlying purpose is to authorize limited residential development on forest lands that are parcelized and developed with occupied dwellings because the activities associated with occupied dwellings likely interfere with common forest practices. The county argues the hearings officer's interpretation is far more consistent with that underlying purpose than petitioners' contention that the term "dwellings" in MCC 33.2240(A)(3)(c) must be interpreted to include long abandoned structures, no matter how derelict and uninhabitable the dwelling may be. We agree with the county.

Petitioners cite and rely on our decision in *Matiaco v. Columbia County*, 42 Or LUBA 277, *aff'd* 183 Or App 581, 54 P3d 636 (2002), which petitioners characterize as endorsing "a very low threshold of habitability, occupancy, or structural quality when determining whether a structure in a forest zone qualifies as a 'dwelling.'" Petition for Review 17. Petitioners describe our ruling in *Matiaco* as follows:

> "* * * LUBA stated that the county's definition of dwelling ('a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation') did not necessarily require a particular degree of habitability, as argued by the petitioner, and that the alleged 'shack' cannot be disqualified as a 'dwelling' for density calculation purposes as a matter of law." Petition for Review 19 (footnote omitted).

Petitioners seriously misread our decision in *Matiaco*. While that case involved applications for forest template dwellings, the determinative issue concerned a local big game habitat density limit of "1 dwelling unit per 38 acres with clustering." 42 Or LUBA at 279 n 2. One of the issues in *Matiaco*

was whether three structures, one of which was described as a "shack," qualified as dwellings. The county determined its rural address map was determinative in making the required dwelling count and concluded the three structures did not qualify as dwellings because they were not listed on the county's rural address map. LUBA remanded, concluding that the county could not assign determinative significance to the rural address map and could not refuse to consider other evidence concerning whether the three structures should be counted as dwellings. In doing so we expressly reserved judgment regarding petitioner's arguments that the three structures, including the shack, did not qualify as dwellings. 42 Or LUBA at 289. And in fact, as the county points out in its brief, on remand the county concluded that the three structures, including the shack, did not qualify as dwellings. *CCCOG v. Columbia County*, 44 Or LUBA 438, 446 (2003). *Matiaco* simply does not stand for the principle petitioners cite it for.

Finally, the hearings officer also found that use of the 1906 structure at best was a nonconforming use, and petitioners failed to establish that resumption of such nonconforming use of the 1906 structure was not barred by interruption or abandonment:

> "* * * The structure claimed to be a dwelling was established prior to the implementation of the Statewide land use zoning. It was built without the conditional use approval required to build a dwelling in a forest zone under current law. It, therefore, is a nonconforming use. The dwelling use is forfeited if abandoned or interrupted for a period of over two years.[7] ORS 215.130. In

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[7] ORS 215.130(7)(a) specifies that a nonconforming use "may not be resumed after a period of interruption or abandonment" but does not specify a specific time for loss of a nonconforming use

> this case, as there is evidence in the record that suggests that the structure in question has been unoccupied for a considerable period of time, it was incumbent on the applicant to show that the dwelling use has not been lost due to abandonment for a period of over two years. Absent this evidence, the hearings officer finds that the applicant has failed to meet his burden of proving that the structure is a dwelling." Record 12.

We agree with the hearings officer that, absent circumstances that have not been shown to be present here, continued use of the 1906 structure as a residence would require that such use qualify as a nonconforming use under ORS 215.130 and the county's legislation that implements that statute. If residential use of that 1906 structure was discontinued for two years or more, so that residential use of that dwelling could not be resumed under ORS 215.130(7)(a) and MCC 33.7200(D), we agree with the hearings officer that the 1906 residence would no longer qualify as a "dwelling[]," that "continue[s] to exist" within the meaning of MCC 33.2240(A)(3)(c)(2). The hearings officer found that the record strongly supports a conclusion that such interruption or abandonment has occurred in this case and based her decision in part on petitioners' failure to establish that any right to continue residential use of the 1906 dwelling has not been lost through interruption or abandonment for two years or more. We agree with the hearings officer, and this finding provides a second and independent basis for her finding that the 1906 structure does not qualify as a dwelling that may be counted toward the required five dwellings under the forest template test.

> through interruption or abandonment. MCC 33.7200(D) provides that the right to continue a nonconforming use is lost if the "nonconforming use is abandoned or discontinued for any reason for more than two years[.]"

Petitioners respond to the hearings officer's finding that the 1906 structure would only qualify as a "dwelling" if the right to continue to use the 1906 structure as a nonconforming residential use has not been lost, by citing to LUBA's decision in *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993). Petitioners argue that under *Heceta*, regardless of the condition of the 1906 structure, that structure could be maintained, repaired or replaced under MCC 33.2220(D) without regard to the MCC 33.7200(D) limit on resumption of an abandoned or interrupted nonconforming use. *See* ns 5 and 7.

Heceta concerned county standards governing replacement dwellings in forest zones, not forest template dwellings, a special type of authorized dwelling that is different from a replacement dwelling. And those county standards were adopted pursuant to a LCDC administrative rule that was adopted prior to the adoption of ORS 215.755, which currently sets out statutory standards for altered, restored and replacement dwellings. Under the county standards and LCDC rule that applied in *Heceta*, the structure to be replaced was not required to have "intact exterior walls and roof structure," "indoor plumbing" and "interior wiring for interior lights," as is now required by ORS 215.755. *See* n 6. Any replacement of the 1906 dwelling would now be subject to the ORS 215.755 and MCC 33.2220(D) standards governing replacement dwellings, and it seems questionable whether approval to replace the 1906 dwelling could be granted under ORS 215.755 and MCC 33.2220(D), since both the statute and the MCC require "intact exterior walls and roof structure," both of which appear to be lacking in the 1906 structure.

In any event, even if alteration, restoration or replacement of the 1906 structure could be approved, there has been no application to alter, restore or replace the 1906 structure. Petitioners' speculation that such alteration,

restoration or replacement could be approved, if such an application were to be filed, is not a sufficient answer to the hearings officer's finding that petitioners failed to establish that the right to resume nonconforming use of the 1906 structure as a residence has not been lost through abandonment or interruption for two years or more. In the absence of an approval or at least an application for approval to alter, restore or replace the 1906 structure under MCC 33.2220(D), we see no error in the hearings officer's finding that petitioners were required to establish, and failed to establish, that a right to resume residential use of the 1906 structure as a residence has not been lost due to interruption or abandonment for a period of two years or more. MCC 33.2240(A)(3)(c)(2) expressly requires that the five dwellings must "continue to exist *or have been replaced by lawful replacement dwellings*." (Emphasis added.) To rely on a replacement dwelling for the 1906 dwelling under MCC 33.2240(A)(3)(c)(2), the 1906 structure must have already been "replaced by a lawful replacement dwelling"; speculation that such a replacement dwelling might be approved is not sufficient.

The first assignment of error is denied.

REMAINING ASSIGNMENTS OF ERROR

Petitioners' remaining assignments of error concern forest template dwelling and Significant Environmental Concern siting standards, and petitioners' application to convert the existing 1912 structure on the property to an accessory use. Those assignments of error all assume the county improperly construed and applied the MCC 33.2240(A)(3)(c) forest template dwelling standards and erred by failing to approve the requested forest template dwelling. Because we deny the first assignment of error, with the result that we sustain the county's decision to deny the application for forest template

dwelling approval, resolving the remaining assignments of error would serve no purpose. We therefore do not consider those assignments of error further.

The county's decision is affirmed.