BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRENT TREADWAY and GARY ZUBER,
Petitioners,

vs.

JEFFERSON COUNTY,
Respondent,

and

JAMES V. BACHMAN and JULIE C. BACHMAN,
Intervenors-Respondents.

LUBA No. 2015-029

FINAL OPINION
AND ORDER

Appeal from Jefferson County.

Timothy R. Gassner, Madras, filed the petition for review and argued on behalf of petitioners. With him on the brief was Glenn, Reeder, Gassner & Carl LLP.

No appearance by Jefferson County.

David C. Allen, Madras, filed the response brief and argued on behalf of intervenors-respondents.

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

AFFIRMED 09/10/2015

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the board of county commissioners approving an application for a replacement dwelling on land zoned exclusive farm use.

MOTION TO INTERVENE

James Bachman and Julie Bachman (intervenors), the applicants below, move to intervene on the side of the respondent. The motion is granted.

FACTS

The subject property is an 80-acre parcel zoned exclusive farm use (EFU). A 1963 single-wide mobile home is located on the property. The existing single-wide mobile home was placed on the property in 1987 after the county approved its placement as a temporary medical hardship dwelling. Record 121-125. At some time prior to the date the temporary medical hardship dwelling was approved, the property also included a double-wide mobile home. At some point, that double-wide mobile home was removed from the property, and the single-wide mobile home remained on the property. The medical hardship need expired at some point after 1987, and the single-wide mobile home has not been used as a residence for several years.

In October 2014, intervenors applied to replace the single-wide mobile home with a new double-wide manufactured dwelling. The planning director approved the application, and petitioners appealed the decision to the planning commission. The planning commission reversed the planning director's decision and denied the application. Intervenors appealed the decision to the board of commissioners, which reversed the planning commission and approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Jefferson County Zoning Ordinance (JCZO) 301.6(J)

Jefferson County Zoning Ordinance (JCZO) 301.6(J) provides standards and criteria for a replacement dwelling in the EFU zone. As relevant here, JCZO 301.6(J)(4) provides that one of the standards is that:

> "The dwelling being replaced shall not have been established as a temporary medical hardship dwelling. However, at such time as the hardship ends, the temporary dwelling may replace the permanent dwelling, provided the permanent dwelling is removed, demolished or converted to an allowable nonresidential use as required by [JCZO 301.6(J)](2)."[1]

Initially, we note that there is no dispute between the parties that the dwelling to be replaced, the single-wide mobile home, was "established as a temporary medical hardship dwelling" within the meaning of the first sentence of JCZO 301.6(J)(4), and the first sentence of JCZO 301.6(J)(4), standing alone, would prohibit replacing the existing single-wide mobile home with the new double-wide manufactured dwelling. But the second sentence appears to provide an exception to the prohibition in the first sentence and allows a temporary medical hardship dwelling to replace, and thereby become, a permanent dwelling on the property under certain conditions. JCZO 301.6(J)(4) allows the temporary medical hardship dwelling to replace a permanent dwelling "at such time as the hardship ends" and "as required by [JCZO 301.6(J)](2)." JCZO 301.6(J)(2) in turn provides that the dwelling to be replaced must be "removed, demolished or converted to an allowable use *within three months of* the completion of the replacement dwelling." (Emphasis added.) Read

[1] Temporary medical hardship dwellings are allowed in the EFU zone pursuant to JCZO 301.06(L) and ORS 215.283(2)(L).

together, the language in JCZO 301.6(J)(4) and JCZO 301.6(J)(2) suggests a temporal nexus that requires that the permanent dwelling must exist on the property "at such time as" (or "when") "the hardship ends" and that the permanent dwelling must be removed within three months *after* the hardship ends. If both of those actions occur, the temporary medical hardship dwelling replaces the permanent dwelling and JCZO 301.6(J)(4) would not preclude replacing the now permanent dwelling with a replacement dwelling.

B. The County's Decision

The board of county commissioners approved the application, finding:

> "According to County records, the existing single-wide dwelling was established as a temporary medical hardship dwelling but when the hardship [dwelling] was no longer needed, the primary double-wide mobile home was removed from the property, which then made the single-wide the primary dwelling. Only one home remains on this parcel and is in compliance with this language. The temporary medical hardship dwelling became the primary dwelling when the primary dwelling, a double-wide manufactured home, was removed from the property. No application for conversion from a temporary dwelling to primary dwelling was required. The conversion occurred by operation of law at JCZO 301.6(J)(4)." Record 4-5.

The board of county commissioners' decision assumes the double-wide mobile home was present on the property when the temporary medical hardship dwelling was approved and placed on the property in 1987. The above-quoted findings take the position that: (1) sometime after the medical hardship ended, that double-wide mobile home was removed from the property; and (2) after the double-wide mobile home was removed from the property, the temporary medical hardship dwelling became the permanent dwelling by operation of JCZO 301.6(J)(4), and no additional county approval was needed for that transformation to occur.

In their first assignment of error, we understand petitioners to argue first that evidence in the record establishes that the double-wide mobile home was not present on the property when the temporary medical hardship dwelling was approved and placed on the property and accordingly that the county's decision is not supported by substantial evidence in the whole record.[2] Consequently, we understand petitioners to argue, the single-wide mobile home continues to be a temporary medical hardship dwelling, which under the first sentence of JCZO 301.6(J)(4) is not eligible for a replacement dwelling.

The substantial evidence portion of petitioners' first assignment of error is difficult to understand, due to the absence of any citations to the record in the petition for review to support it.[3] In their response brief, intervenors point to evidence in the record to support the board of county commissioners' conclusions. First, intervenors point to a copy of the 1987 permit approving placement of the temporary medical hardship dwelling, that included a

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[2] ORS 197.835(9)(a)(C) provides in relevant part that the Board shall reverse or remand a land use decision if it is not "supported by substantial evidence in the whole record."

[3] At oral argument, petitioners provided citations to record pages that petitioners maintain provide evidence that undermines the board of county commissioners' conclusions that a double-wide mobile home was present on the property in 1987 when the temporary medical hardship dwelling was approved. That evidence is a letter from one of the petitioners that takes the position that the 1977 tax assessor's records demonstrate that the double-wide mobile home was not present on the property in 1977, and an undated photograph of a young girl that shows open space in the background that one of the petitioners estimated during a public hearing was taken sometime during the 1960s. Record 87-88, 69. We have some sympathy for intervenors in attempting to respond in the response brief to petitioners' substantial evidence challenge that is not supported by any citations to the record in the petition for review to support their argument.

condition that required connection to the existing septic system, and posit that the existence of a septic system already on the property is some evidence of the contemporary existence of a dwelling on the property. Record 123. Intervenors also point out that the county could not likely have approved placement of the temporary medical hardship dwelling without the existence of a dwelling on the property already, because at the time the temporary medical hardship dwelling was approved the JCZO governed placement of mobile homes as "accessory farm dwellings," suggesting that a primary dwelling must have existed on the property.

We have reviewed petitioners' evidence, which, as noted, was not identified to intervenors or the Board by citations to the record until oral argument, and we agree with intervenors that the 1987 permit is substantial evidence in the record to support the board of county commissioners' conclusion that the double-wide mobile home was present on the property when the single-wide mobile home was placed on it. While that evidence is based on rather weak inferences, petitioners have not cited to countervailing evidence that would undermine the county's conclusion that a permanent dwelling existed on the property when the temporary hardship dwelling was approved.

We also understand petitioners to argue that even if a double-wide mobile home was located on the property when the temporary medical hardship dwelling was approved and placed on the property, and thereafter was removed, the board of county commissioners improperly construed JCZO 301.6(J)(4) as not requiring a subsequent county decision to authorize substituting the temporary medical hardship dwelling for the permanent

dwelling, and that JCZO 301.6(J)(4) is not self-executing.[4] Intervenors respond that petitioners have failed to point to any JCZO provision or statutory provision that requires any additional approval in order for the temporary medical hardship dwelling to become a permanent dwelling where the permanent dwelling "is removed, demolished or converted to an allowable nonresidential use" under JCZO 301.6(J)(4).

Petitioners bear the burden of demonstrating reversible error in the challenged decision. While petitioners disagree with the county commissioners' apparent interpretation of JCZO 301.6(J)(4), to the effect that when the primary dwelling was removed or demolished the temporary hardship dwelling became the primary dwelling by operation of law, petitioners provide no developed argument or analysis demonstrating that the county commissioners erred in so concluding. Petitioners do not attempt to

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[4] Petitioners' entire argument is set out below:

> "The second issue with the proposition argued by Respondent-Intervenors is that even if the previous primary dwelling had been on the property at the time the medical hardship dwelling was approved there is no operation of law for the medical hardship dwelling to become the primary dwelling once the use of the medical hardship dwelling ceases. Respondent-Intervenors argument that effectively, replacement of one dwelling is as good as the other and meets the intent of JCZO 301.6(J)(4). This argument assumes a change in status which has not been legally established. Without the necessary change in status the current decision to approve the replacement dwelling application is a clear violation of JCZO 301.6(J)(4). Respondent-Intervenors interpretation of the ordinance would allow for anyone who replaced a prior dwelling with a medical hardship dwelling to escape the intent of the ordinance. The plain language of the ordinance should be upheld." Petition for Review 7.

demonstrate, for example, that the commissioners' interpretation is inconsistent with the express language of JCZO 301.6(J)(4), its purpose, or its underlying policy. ORS 197.829(1)(a)-(c). Nor do petitioners attempt to demonstrate that the commissioners' interpretation is contrary to any statute, goal, or administrative rule that JCZO 301.6(J)(4) implements. The commissioners' view that a temporary hardship dwelling may automatically change status to a different type of permanent dwelling, without any county review, might well be contrary to the statutes, goals, and rules that govern EFU zones. However, absent a developed argument, petitioners' argument under the first assignment of error provides no basis for reversal or remand of the decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ORS 215.283(1)(p) provides that alteration, restoration or replacement of a lawfully established dwelling is allowed "[s]ubject to section 2, chapter 462, Oregon Laws 2013[.]" Oregon Laws 2013, chapter 462, section 2 and OAR 660-033-0130(8)(a)(B) and (C), which implement the 2013 legislation, both provide in relevant provide that:

> "A lawfully established dwelling may be altered, restored or replaced under ORS 215.213(1)(q) or 215.283(1)(p) if, when an application for a permit is submitted, the permitting authority finds to its satisfaction, based on substantial evidence that:
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> " * * * * *
>
> "(B) The dwelling was assessed as a dwelling for purposes of ad valorem taxation for the previous five property tax years, or, if the dwelling has existed for less than five years, from that time; and
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> "(C) Notwithstanding paragraph (B), if the value of the dwelling was eliminated as a result of either of the following

circumstances, the dwelling was assessed as a dwelling until such time as the value of the dwelling was eliminated:

> "(i) The destruction (i.e. by fire or natural hazard), or demolition in the case of restoration, of the dwelling; or
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> "(ii) The applicant establishes to the satisfaction of the permitting authority that the dwelling was improperly removed from the tax roll by a person other than the current owner. "Improperly removed" means that *the dwelling has taxable value in its present state*, or had taxable value when the dwelling was first removed from the tax roll or was destroyed by fire or natural hazard, and the county stopped assessing the dwelling even though the current or former owner did not request removal of the dwelling from the tax roll." (Emphasis added.)

The county concluded that the single-wide mobile home was removed from the tax roll in 2006 by the county assessor and that the former owner of the property did not request removal of the dwelling from the tax roll. Record 3-4. The county also concluded that the single-wide mobile home "has taxable value in its present state" within the meaning of the rule, based on 2013 and 2014 tax assessor's reports, found at Record 51-52. Those tax assessor's reports show an "assessed value" for the single-wide mobile home of approximately $1,000, and also list as attributes of the mobile home two bedrooms and one bathroom. Accordingly, the county concluded that the mobile home is a dwelling that was "improperly removed" from the tax roll under OAR 660-033-0130(8)(a)(C)(ii). Record 3-4.

In their second assignment of error, as far as we can understand it, petitioners argue that the county's conclusion that OAR 660-033-0130(8)(a)(C)(ii) is satisfied is not supported by substantial evidence in the

record and improperly construes the phrase "taxable value" used in the rule.[5] We understand petitioners to argue that although the 2013 and 2014 assessor's reports show an approximate assessed value of $1,000 for the mobile home, that $1,000 value is insufficient evidence to establish that the mobile home was "assessed as a dwelling" within the meaning of the rule, because $1,000 of assessed value is too low for the mobile home to be considered "assessed as a dwelling."

Intervenors respond that the 2013 and 2014 assessor's reports that show an assessed value of approximately $1,000 for the mobile home is substantial evidence to support the county's conclusion that the mobile home has "taxable value" within the meaning of the rule. Intervenors also respond that the assessor's reports refer to the mobile home as having two bedrooms and one bath, and that is evidence that the mobile home was "assessed as a dwelling" within the meaning of the rule.

For purposes of this opinion we assume without deciding the exception to OAR 660-033-0130(8)(a)(B) that is set out at OAR 660-033-0130(8)(a)(C)(ii) requires that the dwelling must have been assessed as a dwelling at the time value of the dwelling was eliminated.[6] We agree with intervenors that the 2013 and 2014 assessor's reports support the county's conclusion that the mobile home was "assessed as a dwelling" that has "taxable value" within the meaning of the rule. A 1963 single-wide mobile home in an

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[5] ORS 197.835(9)(a)(D) provides in relevant part that LUBA may reverse or remand a decision where the local government "[i]mproperly construed the applicable law[.]"

[6] That likely was the intent of the drafter of OAR 660-033-0130(8)(a)(C), but the rule is awkwardly worded.

acknowledged state of disrepair may not have much value. However, the 2013 and 2014 assessments describe it has having two bedrooms and one bathroom, and the county could reasonably conclude based on those features that it is a dwelling. The assessor also assigned an assessed value of approximately $1,000 to the mobile home, and presumably the property's owners are subject to payment of taxes based on that assessed value. Absent any language in the statute or rule assigning a minimum threshold for whether a dwelling has "taxable value," we agree with intervenors that the county's decision is supported by substantial evidence, where the evidence shows that the assessor assigned a $1,000 assessed value to the mobile home and the mobile home has two bedrooms and one bathroom.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As noted, ORS 215.283(1)(p) was amended in 2013 by Oregon Laws 2013, section 2, chapter 462. Oregon Laws 2013, chapter 462, section 2 and OAR 660-033-0130(8)(a)(A)(i) – (iv), which implement the new legislation, both provide in relevant part:

> "A lawfully established dwelling may be altered, restored or replaced under ORS 215.213(1)(q) or 215.283(1)(p) if, when an application for a permit is submitted, the permitting authority finds to its satisfaction, based on substantial evidence that:
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> "(A) The dwelling to be altered, restored or replaced has, **or formerly had**:
>
> "(i) Intact exterior walls and roof structure;
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> "(ii) Indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;

"(iii) Interior wiring for interior lights; and

"(iv) A heating system[.]" (Emphasis added.)

The main statutory change was to add the language emphasized above "or formerly had" to the statute, and the rule includes that language as well.

The county concluded that OAR 660-033-0130(8)(a)(A)(ii) was satisfied. Record 3. In their third assignment of error, we understand petitioners to argue that the county's decision is not supported by substantial evidence in the record. That is so, petitioners argue, because according to testimony from one of the petitioners, in 1987 at the time the single-wide mobile home was placed on the property for use as a temporary medical hardship dwelling it was served by an outhouse and an outdoor faucet. Record 88.

Intervenors respond that the issue presented in the third assignment of error was not raised prior to the close of the initial evidentiary hearing and is waived. ORS 197.763(1) and ORS 197.835(3). At oral argument, petitioners responded that the issue raised in the third assignment of error was raised at Record 88. We agree with petitioners that the issue was raised.

Intervenors also respond that the county's decision is supported by substantial evidence that the single-wide mobile home currently "has" the indoor plumbing required by OAR 660-033-0130(8)(a)(A)(ii). Intervenors cite to photographs in the record showing indoor plumbing at Record 109-115, and to a letter from the water district that provides water to the property. Record 115. Intervenors respond that the photographs and water district letter that the county relied on are substantial evidence that the dwelling "has" indoor plumbing as required by OAR 660-033-0130(8)(a)(A)(ii).

Finally, intervenors respond that petitioner's argument provides no basis for reversal or remand of the decision because the rule does not require intervenors to demonstrate that the requisite indoor plumbing was provided to the property at the time the dwelling was placed on the property, since intervenors are relying on the "has" section of the rule and not the "or formerly had" section of the rule. We agree with intervenors that nothing in the rule requires intervenors to demonstrate both that the dwelling "has" indoor plumbing *and* that it "formerly had" indoor plumbing, or to demonstrate that at the time the single-wide mobile home was placed on the property it had indoor plumbing. The statute and rule's requirements are disjunctive and intervenors have satisfied one of the two requirements by demonstrating that the mobile home "has" indoor plumbing.

The third assignment of error is denied.

The county's decision is affirmed.