

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON 01/18/18 PM 3:22 (LUBA)

3
4 DAVID HOLMBERG and MADELINE HOLMBERG,
5 *Petitioners,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent.*

11
12 LUBA No. 2017-082

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Deschutes County.

18
19 Will Van Vactor, Bend, filed the petition for review and argued on
20 behalf of petitioners. With him on the brief was Van Vactor Law LLC.

21
22 D. Adam Smith, Deschutes County Assistant Legal Counsel, Bend, filed
23 a response brief.

24
25 HOLSTUN Board Member; RYAN, Board Chair; BASSHAM, Board
26 Member, participated in the decision.

27
28 REMANDED 01/18/2018

29
30 You are entitled to judicial review of this Order. Judicial review is
31 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county hearings officer decision that approves a temporary hardship dwelling on land zoned for exclusive farm use (EFU).

FACTS

The subject EFU-zoned, 20-acre property is several miles north of Bend, and a short distance east of Highway 97 and Deschutes Market Road. Findlay Lane in vicinity of the subject property runs roughly north and south, and the subject 20-acre property is located on the west side of Findlay Lane, across from petitioners' property, which lies on the east side of Findlay Lane. The subject property is improved with several detached agricultural structures and a single-family dwelling that is occupied by the property owners. Several acres of the property are used for irrigated pasture. The balance of the property is not irrigated and is Class VII soils, which have very limited value for farm use.¹

The applicant for the temporary hardship dwelling is the mother of one of the property owners. According to a letter in the record from the applicant's doctor, the applicant is under the doctor's care "for [an] ongoing chronic

¹ The Natural Resources Conservation Service classifies soil types according to their capability for uses such as agriculture and grazing. Class VII soils are defined as having very severe limitations that make them unsuited for cultivation and that restrict their use mainly to grazing, forest land, or for wildlife habitat.

1 medical condition and it is necessary for her to live close to her daughter on her
2 property * * *.” Record 229.

3 The existing dwelling is located in the approximate middle of the
4 property, near the existing agricultural structures and the irrigated pasture. The
5 applicant proposed to site the temporary hardship dwelling approximately 750
6 feet south of the existing dwelling, immediately west of Findlay Road, and
7 directly across Findlay Lane from petitioners’ residence. The proposed
8 temporary hardship dwelling is separated from the existing dwelling on the
9 subject property by “a large rock ridge with slopes over 35 degrees.” Petition
10 for Review 5. Due to that rock ridge, the temporary hardship dwelling would
11 not be visible from the existing dwelling. While the direct line distance
12 between the existing house and temporary hardship dwelling (across the
13 intervening rock ridge) is approximately 750 feet, traveling from the existing
14 dwelling via its driveway to Findlay Lane and from there to the proposed new
15 driveway and on to the temporary hardship dwelling covers a distance of
16 approximately 1,000 feet. Record 65-66.

17 During the proceedings before the hearings officer, petitioners identified
18 four alternative sites to the proposed site, all of which are much closer to the
19 existing dwelling and its driveway, as well as the existing agricultural
20 structures and irrigated pasture. Record 68. Petitioners took the position that
21 the alternative sites were less suitable for farm use than the approved site, and
22 therefore more appropriate for development.

1 The hearings officer approved the temporary hardship dwelling at the
2 location proposed by the applicant, and petitioners appealed that decision to the
3 board of county commissioners, which declined review. This appeal followed.

4 **INTRODUCTION**

5 Temporary hardship dwellings are authorized by statute in the EFU zone.
6 ORS 215.283(2)(L).² Deschutes County Code (DCC) 18.16.030(D) parallels
7 the statute and authorizes temporary hardship dwellings in the county’s EFU
8 zone.³ DCC 18.16.040(A)(3) imposes an additional limitation on temporary
9 hardship dwellings in Deschutes County that the statute does not impose—

² ORS 215.283(2) authorizes uses that “may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use subject to ORS 215.296[.]” ORS 215.283(2)(L) authorizes:

“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. * * *”

³ DCC 18.16.030(D) authorizes:

“A hardship dwelling, which can include one manufactured dwelling or recreational vehicle, 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.”

1 “[t]hat the actual site on which the use is to be located is the least suitable for
2 the production of farm crops or livestock.”

3 Under both ORS 215.283(2)(L) and DCC 18.16.030(D), a temporary
4 hardship dwelling must be “in conjunction with an existing dwelling as a
5 temporary use for the term of a hardship suffered by the existing resident or a
6 relative of the resident.” In their first assignment of error, petitioners contend
7 the approved temporary hardship dwelling does not qualify as a temporary
8 hardship dwelling that is “in conjunction with an existing dwelling” because it
9 will be located far from the existing dwelling and will require its own
10 driveway, its own well, as well as its own septic tank, drain field, electrical
11 service lines, and other utilities. In their second assignment of error,
12 petitioners contend the approved temporary hardship dwelling site does not
13 satisfy the DCC 18.16.040(A)(3) requirement that the site must be “the least
14 suitable [site on the subject property] for the production of farm crops or
15 livestock.” For the reasons that follow, we sustain petitioners’ first assignment
16 of error and do not reach their second assignment of error.

17 **FIRST ASSIGNMENT OF ERROR**

18 Before the hearings officer, petitioners argued that the applicant’s
19 proposal—to locate a temporary hardship dwelling at a site that will require the
20 applicant to make an approximately 1,000-foot trip by car or foot from
21 residence to her mother’s temporary hardship dwelling—is inconsistent with
22 the DCC and statutory requirement that the temporary hardship dwelling be “in

1 conjunction with” the existing dwelling. In rejecting petitioners’ arguments,
2 the hearings officer provided the following explanation:

3 “The appellants argue that the proposed hardship dwelling does
4 not meet the ‘used in conjunction with’ requirement because it is
5 approximately 900 [feet] from the existing dwelling. They contend
6 this is too far away for the [property owners] to provide effective
7 care. The dwellings will not be visible to each other and will share
8 essentially no common infrastructure. As a practical matter,
9 therefore, the two dwellings are separate and not ‘in conjunction’
10 with each other. They cite dictionary definitions suggesting that
11 ‘in conjunction with’ requires physical proximity. * * * They
12 question whether the distance between the two dwellings serves
13 the need for the applicant to ‘live close to her daughter’ on the
14 property.

15 “The applicant counters that ‘in conjunction with’ means ‘in
16 combination with, together with.’ It focuses on the function of the
17 two dwellings rather than physical proximity. The applicant
18 submitted a May 15, 2017 ‘clarification’ from her doctor stating
19 that he did not intend his earlier letter to suggest any particular
20 distance or specific proximity. Instead the applicant needs
21 oversight, assistance with structure, medication compliance and
22 coordination of her activities of daily living and care while
23 maintaining ‘limited independence.’ [The applicant’s daughter]
24 states that she works from home and can provide care on a daily
25 basis, including walking to the dwelling in under 90 seconds. It
26 was noted that technology, such as monitors, may be used if
27 needed for visual or aural connection.

28 “Both sides note that the [DCC] does not define ‘in conjunction
29 with,’ nor are there any court decisions in the context of a hardship
30 dwelling. There are, however, cases interpreting this term in the
31 other contexts. I found no cases concluding that physical
32 proximity is required or even a significant consideration. Rather,
33 the emphasis is on how the structures function and how the
34 proposed structure furthers the statutory purpose for it being
35 allowed. In other words, the key is the functional relationship

1 between the structures or uses. Do the two dwellings work
2 together to serve the applicant's medical needs? * * *

3 “* * * * *

4 “The Board of Commissioners did not insert a proximity
5 requirement into the [DCC] in this regard and I cannot insert what
6 has been omitted. It certainly is possible that a proposed distance
7 could be so great as to make the hardship dwelling non-functional
8 for the particular needs of the applicant as described by her
9 medical professional, but that is not the case here.” Record 20.

10 Because the ORS 215.283(2)(L) requirement—that a temporary hardship
11 dwelling must be “in conjunction with” an existing dwelling on the EFU-zoned
12 property—is a “statutory” requirement, the intended meaning of “in
13 conjunction with” is a question of the state legislature’s intent rather than a
14 question of the board of county commissioners’ intent in enacting DCC
15 18.16.030(D), which simply parrots the statute. *Gilmour v. Linn County*, 279
16 Or App 584, 589, 379 P3d 833 (2016); *Kenagy v. Benton County*, 112 Or App
17 17, 20 n2, 826 P2d 1047, *rev den* 315 Or 271 (1992).

18 In the context presented here, the statutory and DCC requirement that the
19 temporary hardship dwelling must be “in conjunction with” the existing
20 dwelling is somewhat ambiguous. Stated differently, “in conjunction with”
21 does not clearly require that the dwelling that must be “in conjunction with”
22 another dwelling must be physically proximate to that dwelling. But the term
23 “in conjunction with” is a term of ordinary usage, as is the word “conjunction.”
24 It is therefore appropriate to consult dictionary definitions to assist in
25 determining the legislature’s intent. *State v. Gaines*, 346 Or 160, 175, 206 P3d

1 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859
2 P2d 1143 (1993).

3 Webster's Third New International Dictionary definition of
4 "conjunction" is set out in part below:

5 "con·junc·tion * * * **1** : the act of conjoining or state of being
6 conjoined : UNION, ASSOCIATION, COMBINATION * * * **2** :
7 an instance of conjoining or coming together : UNION,
8 ASSOCIATION * * * **3** : occurrence together : concurrence esp.
9 of events or routes<from the state line route 17 proceeds in ~ with
10 route 6 for a few miles>[.]” *Webster’s Third New Int’l Dictionary*
11 480 (unabridged ed 2002).

12 While not conclusive, the above dictionary definition of “conjunction”
13 suggests a close spatial relationship, contrary to the hearings officer’s almost
14 exclusive focus on whether “the two dwellings work together to serve the
15 applicant’s medical needs.” Record 20. To be clear, we agree with the hearings
16 officer that the occupant of the existing dwelling must in fact be needed to
17 provide, and in fact must provide, medical assistance to the occupant of the
18 proposed temporary hardship dwelling. Our disagreement with the hearings
19 officer is with his conclusion that the practicality of providing medical
20 assistance is effectively the *only* inquiry such that physical proximity of the
21 existing and temporary hardship dwellings becomes essentially irrelevant,
22 unless the distance is so great that it makes providing the required medical
23 assistance effectively impractical.

24 When interpreting statutes that govern the scope of non-farm uses in
25 EFU zones, it is appropriate to interpret such statutes “to the extent possible, as

1 being consistent with the overriding policy of preventing ‘agricultural land
2 from being diverted to non-agricultural use.’” *McCaw Communications, Inc. v.*
3 *Marion County*, 96 Or App 552, 555, 773 P2d 779 (1989) (quoting *Hopper v.*
4 *Clackamas County*, 87 Or App 167, 172, 741 P2d 921 (1987), *rev den* 304 Or
5 680, 748 P2d 142 (1988)). We agree with petitioners that interpreting “in
6 conjunction with” to require that the existing and temporary hardship dwellings
7 to be located in close proximity, and thus minimizing the need for new
8 driveways and other infrastructure, is more consistent with the overriding
9 policy of preventing agricultural land from being diverted to other uses. Under
10 the hearings officer’s decision, citing the new dwelling 750 feet from the
11 existing dwelling will require completely new supporting infrastructure,
12 including a new driveway, a new well, a new septic system and drain field and
13 new electrical service. And as petitioners point out, all of that infrastructure
14 potentially could remain after the temporary hardship dwelling is removed.

15 We agree with petitioners that interpreting the relevant statutory
16 language to allow siting the temporary hardship dwelling in a manner that
17 would require such duplicative supporting infrastructure on farm land would
18 not be interpreting the statutes “to the extent possible, as being consistent with
19 the overriding policy of preventing ‘agricultural land from being diverted to
20 non-agricultural use.’” *McCaw Communications, Inc.*, 96 Or App at 555. Siting
21 a temporary hardship dwelling so that existing infrastructure such as the needed

1 driveway and non-sewer utilities will be duplicated unnecessarily diverts EFU-
2 zoned land to non-agricultural use.

3 In determining the intended meaning of the undefined term “in
4 conjunction with” it is also appropriate to look to context. *PGE*, 317 Or at 611.
5 While the meaning of ORS 215.283(2)(L) is a question of legislative intent, the
6 Oregon Land Conservation and Development Commission (LCDC) also plays
7 a significant role in establishing the rules that govern use of farm lands. *Lane*
8 *County v. LCDC*, 325 Or 569, 582-83, 942 P2d 278 (1997). OAR 660-033-
9 0130(10) requires that temporary hardship dwellings use the same septic
10 system as the existing dwelling unless that existing septic system is inadequate,
11 and DCC 18.16.050(H)(1)(d) imposes an identical requirement.⁴ Although the
12 county found the existing septic system is inadequate to serve both the existing
13 and temporary hardship dwellings, the statutory requirement—that a temporary
14 hardship dwelling use the existing dwelling’s septic system if it is adequate—is
15 at least some indication that LCDC is concerned with discouraging applicants
16 from siting temporary hardship dwellings where unnecessary duplicative new
17 supporting infrastructure would be required.

⁴ OAR 660-033-0130(10) provides, in part:

“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.”

1 While we agree with the hearings officer that the undefined term “in
2 conjunction with” does not necessarily require that things must be physically
3 proximate to be “in conjunction with” each other, the dictionary definition of
4 “conjunction” and LCDC’s requirement that a temporary hardship dwelling use
5 the existing dwelling’s septic system if possible lead us to the opposite
6 conclusion reached by the hearings officer regarding the meaning of “in
7 conjunction with.” We conclude that in requiring that a temporary hardship
8 dwelling be “in conjunction with” an existing dwelling on EFU-zoned
9 property, the legislature was not *solely* concerned with whether the person
10 living in one such dwelling could provide or receive medical assistance to or
11 from the existing dwelling. Because the legislature is concerned with non-farm
12 uses on EFU zoned land unnecessarily removing farm land from farm use, the
13 legislature intended that the temporary hardship dwelling be located in
14 reasonably close proximity to the existing dwelling to take advantage of any
15 existing infrastructure if possible so that such residential use infrastructure
16 need not be duplicated. And even in cases like this where some of the existing
17 infrastructure is inadequate to serve the temporary hardship dwelling, the
18 statutory requirement that a temporary hardship dwelling may only be
19 established “in conjunction with” an existing dwelling requires that those
20 dwellings must be in reasonably close physical proximity to the existing
21 dwelling.

1 Finally, we recognize requiring that a temporary hardship dwelling must
2 be in reasonably close physical proximity to the existing dwelling is somewhat
3 subjective, and with different facts, it might be debatable whether a proposed
4 temporary hardship dwelling is in reasonably close physical proximity. But
5 this is not such a case. Petitioners identified four alternative sites that all
6 appear to be in reasonably close physical proximity to the existing dwelling.
7 The approved site, over 750 feet from the existing dwelling, is clearly not in
8 reasonably close physical proximity to the existing dwelling. On remand, the
9 county must limit its consideration to sites that are in reasonably close physical
10 proximity to the existing dwelling.

11 The first assignment of error is sustained.

12 Because we conclude a dwelling at the approved site would not qualify
13 as a temporary hardship dwelling that is “in conjunction with” the existing
14 dwelling, within the meaning of ORS 215.283(2)(L), no purpose would be
15 served by determining whether the approved site complies with DCC
16 18.16.040(A)(3), *i.e.*, that it “is the least suitable [site] for the production of
17 farm crops or livestock,” as compared to other possible sites on the subject
18 property for the temporary hardship dwelling. We therefore need not reach that
19 issue in this appeal.

20 The county’s decision is remanded.