

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

3
4 DAVID BRANNON,
5 *Petitioner,*

6
7 vs.

8
9 MULTNOMAH COUNTY,
10 *Respondent.*

11
12 LUBA No. 2017-117

03/22/18 11:03 LUBA

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Multnomah County.

18
19 Christopher P. Koback, Portland, filed the petition for review and argued
20 on behalf of petitioner. With him on the brief was Hathaway Larson LLP.

21
22 Katherine Thomas and Jed Tompkins, Assistant County Counsels,
23 Portland, filed a response brief and argued on behalf of respondent.

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

27
28 AFFIRMED

03/22/2018

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

Petitioner appeals a county hearings officer decision that denies his request for after-the-fact approval of an addition to a single-family dwelling.

FACTS

The subject 9.6-acre parcel is in a heavily wooded area that lies between NW Cornell Road, NW Thompson Road and NW Skyline Road, near Forest Park just outside the City of Portland, in Multnomah County. The parcel is now zoned Commercial Forest Use (CFU-2) and is subject to several overlay zones (Significant Environmental Concern for Wildlife Habitat, Significant Environmental Concern for Wildlife Streams, and Hillside Development and Erosion Control). The property is located approximately one-quarter mile west of NW Thompson Road, between that road's intersections with NW 53rd Drive and NW Cornell Road. A shared driveway that connects with NW Thompson Road serves the subject property and a neighboring property.

The subject property is improved with a detached single-family dwelling. There are maps in the record that show the location of the L-shaped subject property and the location of the house on the subject property in the bottom part of the "L," and there is a 2010 survey that accurately depicts the proximity of the house to the southern property line. Record 131-33; 159. A portion of the survey is reproduced on the following page.

TAX LOT 200

N 68°14'23" E 162.13'

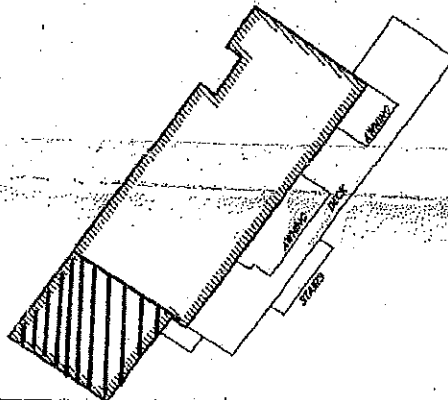
1/8" IRON ROD
YELLOW PLASTIC CAP
DIED "RPLS 1910"

FD 5/8" IRON ROD
W/ YELLOW PLASTIC CAP
STAMPED "RPLS 1910"

N

W

E



CAP
"LS 757"

HOUSE CORNER 0.21' NORTH
OF PROPERTY LINE

S

1

2 One of petitioner's predecessors constructed a house on the property
3 sometime between 1968 and 1970 (the original house). In 1995, another of
4 petitioner's predecessors constructed a paved recreational vehicle parking pad
5 roughly in the area shown on the reproduction of the 2010 survey in
6 crosshatch. A driveway that travels along the west side of the original house
7 provides access to the parking pad from a shared driveway. The plan that the
8 prior owner submitted to the county in seeking approval for the parking pad
9 incorrectly indicated the pad was located approximately 33 feet north of the

1 southern property line that separates the subject parcel from the adjacent parcel
2 to the south. Sometime after the pad was approved in 1995, in the approximate
3 area of the paved parking pad, an addition to the original house was
4 constructed without permits (post-1995 addition).¹ Petitioner later acquired the
5 property, with the original house and post-1995 addition, in 2000.

6 Petitioner was advised by the county in 2012 that the post-1995 addition
7 was constructed without required county permits. As indicated earlier, the
8 2010 survey disclosed that the original house was located only 18 feet from the
9 adjacent southern property line and that the post-1995 addition is .21 feet
10 (approximately two and one-half inches) from the southern property line.² The
11 county took the position that although the original house that was constructed
12 pursuant to permits between 1968 and 1970 violated a general 30-foot setback
13 that existed at the time and violates a later-enacted 30-foot Forest Practices
14 Setback and Fire Safety Zone, which we discuss at length below, the county
15 would pursue no enforcement action regarding the original house. However,
16 the county did pursue enforcement action regarding the unpermitted post-1995
17 addition. The application that led to the hearings officer decision that is before

¹ Although it is sometimes referred to as an accessory structure, the accessory structure is more accurately described as an addition to the original house that is integrated into the original house. The addition included both a garage and added living area.

² The existing house on the adjacent parcel to the south is approximately 500 feet from the original house and post-1995 addition on the subject property.

1 us in this appeal was petitioner’s effort to secure after-the-fact approval for the
2 post-1995 addition that is located entirely within a 30-foot Forest Practices
3 Setback and the required 30-foot Fire Safety Zone.

4 Finally, although it has no material bearing on the issues presented in
5 this appeal, it appears from the record that petitioner was unaware that the
6 original house and the post-1995 addition encroached into a 30-foot Forest
7 Practices Setback and a 30-foot Fire Safety Zone, until the county initiated the
8 enforcement action against him in 2012.

9 **FIRST ASSIGNMENT OF ERROR**

10 As already noted, this application seeks after-the-fact approval for the
11 post-1995 addition that was constructed without required permits. Staff took
12 the position that for purposes of applying applicable Forest Development and
13 variance standards, those standards must be applied as though the post-1995
14 addition had not yet been constructed.³ The Multnomah County Code (MCC)
15 imposes Forest Practices Setbacks to avoid interference with forest practices on

³ That position was stated both when applying the Forest Practices Setback and Primary Fire Safety Zone and when applying variance standards:

“[W]e must review the proposal as if the addition is not there and being proposed today.” Record 26.

“[T]he variance criteria must be applied as if the addition does not exist because it received no permits or approvals. In other words, the applicant must meet the variance criteria as if he were applying to construct the addition, not to legalize it.” Record 30.

1 adjoining properties.⁴ The MCC also imposes Fire Safety Zones to provide a
 2 buffer to protect structures from fire. A portion of a table that sets out Forest
 3 Practices Setbacks and Fire Safety Zone requirements in the CFU-2 zone is
 4 reproduced in relevant part below.
 5

Use	Forest Practices Setback			Fire Safety Zones
	Nonconforming Setbacks	Front Property Line Adjacent to County Maintained Road (feet)	All Other Setbacks	Fire Safety Zone Requirements
Replaced or restored dwelling in same location &/or less than 400 sq. ft. additional ground coverage; Alteration and maintenance of dwelling	May maintain current nonconforming setback(s) if less than 30 ft. to property line	30	30	Property owner is encouraged to establish Primary to the extent possible.
Replaced or restored dwelling in same location & greater than 400 sw. ft. additional ground coverage; Alteration and maintenance of dwelling	May maintain current nonconforming setback(s) if less than 30 ft. to property lines	30	30	Primary is required to the extent possible within the existing setbacks

⁴ The MCC and the parties sometimes refer to the Forest Practices Setbacks in the singular, Forest Practice Setbacks. All references in this opinion use the plural.

***	***	***	***	***
Addition to an existing structure	May maintain current nonconforming setback(s) if less than 30 ft. to property lines	30	30	Primary is required to the extent possible within the existing setbacks

1

2 Under MCC 33.2256, required Forest Practices Setbacks range from 30
3 feet to 130 feet, depending on the proposed use and the circumstances. Under
4 MCC 33.2256(A), variances may be approved to reduce the required Forest
5 Practices Setbacks.⁵

6 Under MCC 33.2256(D)(1), a minimum Primary Fire Safety Zone of 30
7 feet is required, and a larger Primary Fire Safety Zone is required on steep
8 slopes. Under MCC 33.2256(D)(2), a Secondary Fire Safety Zone is required
9 in some circumstances. Under MCC 33.2256(B), exceptions may be granted to
10 reduce the required Secondary Fire Safety Zones, but variances to reduce
11 Primary Fire Safety Zones are prohibited.⁶ In this case it is not disputed that the

⁵ MCC 33.2256(A) provides:

“Reductions to a Forest Practices Setback dimension shall only be allowed pursuant to approval of an adjustment or variance.”

⁶ MCC 33.2256(B) provides:

“Exception to the Secondary Fire Safety Zone shall be pursuant to MCC 33.2310 only. No reduction is permitted for a required Primary Fire Safety Zone through a nonconforming, adjustment or variance process.”

1 applicable Forest Practices Setback is 30 feet, as is the Primary Fire Safety
2 Zone, and no Secondary Fire Safety Zone is required.

3 The relevant issue below was whether the disputed post-1995 addition
4 can be approved as located .21 feet from the south property line,
5 notwithstanding the 30-foot Forest Practices Setback and 30-foot Primary Fire
6 Safety Zone. The hearings officer applied the row in the table for “[r]eplaced or
7 restored dwelling in same location & greater than 400 sq. ft. additional ground
8 coverage” (the second row).⁷ The row for an “[a]ddition to an existing
9 structure” (the last row) seems at least as applicable here. However, it seems to
10 impose the same standards as the row the hearings officer applied, and in any
11 event, no party questions the hearings officer’s selection of the second row of
12 the table. The hearings officer concluded the original house, located 18 feet
13 from the south property line, established a nonconforming setback. The
14 hearings officer found that approval of the post-1995 addition (which
15 encroached further into that 18-foot nonconforming Forest Practices Setback)
16 therefore required a variance to the Forest Practices Setback requirement,
17 which the hearings officer approved. Petitioner does not challenge that part of
18 the hearings officer’s decision.

19 Regarding the 30-foot Primary Fire Safety Zone, the hearings officer also
20 found petitioner must maintain the existing 18-foot substandard Primary Fire

⁷ The post-1995 addition is approximately 624 square feet in size.

1 Safety Zone, since that is the Primary Fire Safety Zone that is “to the extent
2 possible within the existing” southern setback. However, the hearings officer
3 concluded that because a variance may not be approved under MCC
4 33.2256(B), after-the-fact approval for construction of the post-1995 addition
5 within that substandard 18-foot Primary Fire Safety Zone could not be granted.

6 To set the second row of the CF-2 zone table in context, we note that the
7 “[m]ay maintain current nonconforming setback(s),” and “[p]rimary is required
8 to the extent possible within the existing setbacks” language only applies in
9 circumstances where an existing structure is being altered in some way.
10 Outside those circumstances, the Forest Practices Setbacks and Primary and/or
11 Secondary Fire Safety Zones are simply required, subject only to the possibility
12 of a variance from the Forest Practices Setbacks and Secondary Fire Safety
13 Zones.⁸

14 **1. Hearings Officer’s Failure to Interpret**

15 As noted, the language in the second row of the table concerning the
16 Forest Practices Setbacks (“[m]ay maintain current nonconforming setbacks if
17 less than 30 ft. to property lines”) is different from the subsequent language in
18 that line concerning Fire Safety Zones (“[p]rimary is required to the extent

⁸ We also note that when an existing dwelling is being replaced or restored in the same location with less than 400 additional square feet (first row of the table), the applicant is merely “encouraged” to establish a Primary Fire Safety Zone. Neither the Forest Practices Setback nor the Primary Fire Safety Zone is “required” in that circumstance.

1 possible within the existing setbacks”). Petitioner first argues that the hearings
2 officer concluded that the existing setback of 18 feet must be maintained for
3 purposes of both the Forest Practices Setback and the Fire Safety Zone and
4 failed to squarely address and interpret the different language of the Forest
5 Practices Setback and the Fire Safety Zone in a manner that gives effect to
6 both. In particular, petitioner argues that the hearings officer failed to give
7 independent effect to the language “to the extent possible within the existing
8 setback.”

9 Most of the hearings officer’s decision addresses petitioner’s arguments
10 regarding the 30-foot Forest Practices Setback. Petitioner argued below that
11 because MC 33.2256 states that the Forest Practices Setbacks, like the Fire
12 Safety Zones, are “based upon existing conditions,” the post-1995 addition
13 established both the “current nonconforming” Forest Practices Setback *and* the
14 Primary Fire Safety Zone that is “possible within existing setbacks.” The
15 hearings officer rejected that argument, concluding that the reference to
16 “existing conditions” did not extend to structures built without required
17 permits. However, the hearings officer did not adopt an interpretation, at least
18 an express interpretation, of what he understands the phrase “to the extent
19 possible within the existing setback” to mean.

20 We do not believe the absence of an express interpretation by the
21 hearings officer that articulates the hearings officer’s understanding of the
22 phrase “to the extent possible within the existing setback” is a basis for reversal

1 or remand. To the extent the hearings officer’s interpretation of the relevant
2 MCC language is inadequately explained, we agree with the county’s
3 explanation in its response brief of the meaning of that language, set out below,
4 and reject petitioner’s interpretation.⁹

5 **2. Petitioner’s Interpretation**

6 Petitioner begins with his agreement with the hearing officer’s
7 interpretation that the existing 18-foot nonconforming Forest Practices
8 Setback, which is “less than 30 ft. to [the] property line,” must be maintained
9 and for that reason required a variance. But petitioner argues that the
10 differently worded Fire Safety Zone language (“Primary [Fire Safety Zone] is
11 required to the extent possible within the existing setbacks”) presumably does
12 not have the same meaning. Petitioner contends the hearings officer’s
13 conclusion—that that different language also requires that the 18-foot Fire
14 Safety Zone that existed south of the original house be maintained—fails to
15 give effect to that different language and is inconsistent with the requirement to
16 give different effect where different words are used in a statute. ORS
17 174.010.¹⁰ Instead, petitioner argues a 30-foot Primary Fire Safety Zone is

⁹ Since the decision on review was rendered by a county hearings officer rather than the board of county commissioners, our standard of review is set out at ORS 197.835(9)(a)(D) under which LUBA must reverse or remand a local government decision if it “[i]mproperly construed the applicable law[.]”

¹⁰ ORS 174.010 provides, in part, “where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

1 only required “to the extent possible within the existing setbacks,” and since
2 the full 30-foot setback is not possible within the existing 18-foot setback from
3 the south property line, the post-1995 addition provides the required Primary
4 Fire Safety Zone, so long as it is located somewhere “within” the previously
5 existing 18-foot setback: “[f]or an addition, an applicant can establish
6 compliance with a proposed Fire Safety Zone that is less than, but somewhere
7 within the existing setbacks.” Petition for Review 19. We understand
8 petitioner to contend the hearings officer failed to give any effect to the words
9 “to the extent possible within the existing setbacks.”

10 **3. The County’s Interpretation**

11 The county’s response brief explains why the result reached by the
12 hearings officer gives effect to the different language regarding Forest
13 Practices Setbacks and Fire Safety Zones and results in a far better
14 interpretation of the table language. We cannot improve on the county’s
15 explanation, and it is set out below:

16 “The Forest Practices Setback, like many other setback
17 requirements, is a ‘dimensional setback’ that ‘provides for
18 separation between structures and property lines.’ See MCC
19 33.0005 (defining ‘Setback’ and ‘Forest Practices Setback’). As
20 with setbacks in general, the Forest Practices Setback promotes the
21 public welfare, but does so by serving a particular purpose: it
22 ensures that the placement of structures will not interfere with
23 forestry practices on adjacent property. MCC 33.0005 (defining
24 Forest Practices Setback as assuring that ‘accepted forestry
25 practices can occur on adjacent properties without the adjacent
26 property owner needing to alter those practices due to the close
27 proximity of a dwelling or structure’). Thus, the primary focus of

1 the Forest Practices Setback is protecting forestry practices, not
2 structures or people.

3 “Consistent with that purpose, and similar to other dimensional
4 standards, a Forest Practices Setback can be varied or adjusted if,
5 among other things, the public welfare will be protected. *See*
6 MCC 33.7606(A), (B) (listing ‘[d]imensional standards that may
7 be modified’ to include ‘forest practices setbacks’); MCC
8 33.7611(B) (requiring that ‘[a]ny impacts resulting from the
9 adjustment are mitigated to the extent practical’); MCC
10 33.7616(D) (requiring that the variance ‘will not be materially
11 detrimental to the public welfare’).

12 “In contrast, and as the name implies, a Primary Fire Safety Zone
13 promotes public safety by establishing ‘a fire break extending a
14 minimum of 30 feet in all directions around a dwelling or
15 structure.’ MCC 33.2256(D)(1)(a); *see also* (Rec. 27) (concluding
16 in Hearings Officer Decision that [Fire Safety Zone] ‘clearly is a
17 public safety standard’). Of note, unlike a setback, which requires
18 a structure to be a certain distance from the property line, the
19 Primary [Fire Safety Zone] requires a buffer to extend out from the
20 structure, with requirements for spacing, pruning, and height of
21 trees and other vegetation. *Id.* In some instances, a Secondary
22 Fire Safety Zone is required, which is ‘a fire break extending a
23 minimum of 100 feet in all directions around the primary fire
24 safety zone.’ MCC 33.2256(D)(2). Like the Primary [Fire Safety
25 Zone], the Secondary [Fire Safety Zone] also focuses on public
26 safety, specifically by ‘reduc[ing] fuels so that the overall intensity
27 of any wildfire is lessened.’ *Id.*

28 “In strict promotion of that public safety purpose, and in stark
29 contrast to the Forest Practices Setback, the County Code prohibits
30 reduction of the Primary [Fire Safety Zone] through a
31 nonconforming, adjustment, or variance process. MCC 33.2256(B)
32 (so stating). The Code is more lenient with respect to the
33 Secondary [Fire Safety Zone], but, even there, reductions are
34 allowed only in limited circumstances and are subject to the robust
35 standards provided in MCC 33.2310. *See* MCC 33.2256(B) (so
36 stating).

1 “That said, the Code demonstrates recognition of the fact that
2 development occurred prior to the adoption of the current
3 framework for the Forest Practices Setbacks and Fire Safety Zones
4 in MCC 33.2256 and, in limited circumstances, makes allowances
5 for reductions to each.

6 “In relevant part, for the development at issue in this case, an
7 existing nonconforming setback of less than 30 feet may be
8 ‘maintained’ and need not be increased to the full 30 feet. In
9 coordination with this allowance for nonconforming setbacks, the
10 Primary [Fire Safety Zone] is required, but only ‘to the extent
11 possible within the existing setbacks.’ MCC 33.2256, Table 1.
12 Thus, despite the general prohibition on reducing the Primary [Fire
13 Safety Zone], in this instance the Code allows for reduction of the
14 Primary [Fire Safety Zone] in order to conform to a pre-existing,
15 nonconforming setback. However, the Code does not allow for
16 reduction beyond that because the Primary [Fire Safety Zone] must
17 extend ‘to the extent possible’ in light of the nonconforming
18 setback.

19 “Petitioner, however, asserts that the Code goes one step further:
20 it not only allows the Primary [Fire Safety Zone] to be reduced *to*
21 the extent of the nonconforming setback, but also allows the
22 Primary [Fire Safety Zone] to be reduced *further* than the
23 nonconforming setback. Petitioner asserts that this is the case
24 because any other interpretation requires the [Fire Safety Zone]
25 phrase ‘to the extent possible’ to be read as equivalent to the
26 setback term ‘maintain,’ which would not be given independent
27 meaning to those two different phrasings.

28 “* * * * *

29 “Contrary to Petitioner’s assertion that the Hearings Officer’s
30 interpretation impermissibly equates the phrase ‘to the extent
31 possible’ in the Primary [Fire Safety Zone] standard with the term
32 ‘maintain’ in the setback standard, the County’s interpretation
33 gives full effect to the meaning of the phrase ‘to the extent
34 possible within the existing setbacks.’

1 “As explained above, Forest Practices Setbacks are dimensional
2 standards for the siting of structures that may be reduced through
3 nonconforming, adjustment, and variance processes. MCC 33.2256
4 Table 1; MCC 33.2256(A). In fact, Table 1 of MCC 33.2256
5 includes a column that specifically addresses how nonconforming
6 setbacks operate. In development situations like the one in this
7 case, the drafters chose to allow nonconforming Forest Practices
8 Setbacks of less than 30 feet by providing that an applicant ‘may
9 maintain’ those setbacks, rather than increase them to the full 30
10 feet. MCC 33.2256, Table 1. In other words, the drafters used the
11 phrase ‘may maintain’ to establish that applicants would not have
12 to *increase* their nonconforming setbacks, not to suggest that they
13 could not *decrease* their setbacks through an adjustment or
14 variance process. Indeed, as Petitioner did here, an applicant
15 could further decrease a nonconforming setback through the
16 adjustment or variance process. *See* MCC 33.2256(A) (providing
17 that Forest Practices Setbacks can be reduced only through
18 adjustment or variance).

19 “In contrast, the phrase ‘may maintain’ was not appropriate for the
20 corresponding Primary [Fire Safety Zone] because the drafters
21 wanted to do more than establish that applicants were not required
22 to increase the Primary [Fire Safety Zone] to the full 30 feet where
23 there was a nonconforming setback; the drafters wanted to make
24 clear that applicants could not further decrease the [Fire Safety
25 Zone] either. The phrase ‘to the extent possible’ achieved that
26 goal because it both (1) established that the full 30-foot Primary
27 [Fire Safety Zone] was not required in the case of a
28 nonconforming setback, while also (2) limiting the extent of the
29 reduction by requiring the Primary [Fire Safety Zone] ‘to the
30 extent possible’ given the reduced setback. *See* MCC 33.2256,
31 Table 1 (‘Primary is required *to the extent possible* within the
32 existing setbacks.’ * * *

33 “In sum, although a reduction in the Primary [Fire Safety Zone]
34 was necessary to accommodate existing nonconforming setbacks
35 of less than 30 feet, the drafters used different text to refer to the
36 different standards for good reason: while the nonconforming
37 Forest Practices Setback did not have to be increased (‘may
38 maintain’), the Primary [Fire Safety Zone] could not be further

1 decreased ('required to the extent possible'). Rather than equating
2 those different phrasings, the County's interpretation gives full
3 effect to the text of each provision." Respondent's Brief 12-17
4 (footnote omitted; emphases in original).

5 We agree with the county's explanation that any apparent anomaly of
6 interpreting the table's language to allow an applicant to seek and receive a
7 variance to the 30-foot Forest Practices Setback (or an existing nonconforming
8 Forest Practices Setback), while strictly adhering to the 30-foot Primary Fire
9 Safety Zone and not allowing a variance, is likely explained by the different
10 purposes served by the Forest Practices Setbacks and Primary Fire Safety Zone.
11 More importantly, although the different language concerning Forest Practices
12 Setbacks and Fire Safety Zones both require that the house remain setback 18
13 feet from the south property line, that similar result is not inconsistent with the
14 different language and does not fail to give effect to the adopted language, for
15 the reasons stated by the county.

16 We also agree with the county that under petitioner's construction of the
17 table's language, a variance to the Forest Practices Setback would operate "as a
18 de facto Primary [Fire Safety Zone] variance, contrary to [MCC 33.2256(B)]."
19 Respondent's Brief 20. As the county further notes:

20 "Moreover, Petitioner's interpretation conflicts with the
21 framework within which these setbacks and [Fire Safety Zones]
22 operate in that it allows for unfettered reduction of the Primary
23 [Fire Safety Zone] (*i.e., anywhere* within a setback) in the *least*
24 safe situations (*i.e., nonconforming* situations), while *no* reduction
25 is allowed in more safe situations [*i.e., conforming* situations].
26 * * *." Respondent's Brief 21 (emphasis in original).

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 In 1997, the owners of the adjacent property to the south of the subject
4 property granted petitioner's predecessor a 70-foot by 60-foot easement for
5 construction, access to and maintenance of a septic system drain field. Record
6 156-57. Petitioner argued to the county that the 60-foot wide easement over
7 the parcel to the south for the septic drain field should be considered adequate
8 to satisfy the requirement for a 30-foot Primary Fire Safety Zone.

9 MCC 33.2256(D)(4) provides:

10 "Required Primary and Secondary Fire Safety Zones shall be
11 established *within the subject tract* as required by Table 1 above."
12 (Italics and underlining added.)

13 In relevant part, "tract" is defined as "[o]ne or more contiguous Lots of Record
14 in the same ownership." MCC 33.2210. The adjacent parcel to the south and
15 the subject parcel are different tracts. Because relying on the easement across
16 the tract to the south would not result in a Primary Fire Safety Zone "within the
17 subject tract," the hearings officer denied petitioner's argument that the
18 easement over the parcel to the south could be relied on to comply with the 30-
19 foot Primary Fire Safety Zone.

20 Petitioner argues that the text underlined above, "as required by Table
21 1," implicates the table text requiring a 30-foot Primary Fire Safety Zone only
22 "to the extent possible within setbacks" and means petitioner may establish a

1 Primary Fire Safety Zone that is not entirely on the subject tract because it is
2 not possible within existing setbacks.

3 The county responds: “the reference to Table 1 in MCC 33.2256(D)(4) is
4 not intended to alter the requirement that Fire Safety Zones must be established
5 on the tract, but, instead, serves to identify which Fire Safety Zones must be
6 established on the subject tract in different development circumstances.”

7 Respondent’s Brief 25. We agree with the county.

8 The second assignment of error is denied.

9 The county’s decision is affirmed.