BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

10/04/18 PM 3:37 LUBA

and

DAVID ZIEGLER,
Intervenor-Respondent.

LUBA No. 2018-046

FINAL OPINION
AND ORDER

Appeal from Lane County.

Andrew Mulkey, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by Lane County.

Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

REMANDED 10/04/2018

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision approving an art studio as an accessory structure to an existing dwelling on land zoned for forest uses.

FACTS

The subject property is 31 acres in size and zoned Impacted Forest Lands (F-2). It is developed with a single-family dwelling, located in the southern center portion of the parcel. Intervenor-respondent (intervenor) applied for county approval of a two-story, hexagonal-shaped structure with an approximate 1,500-square-foot footprint, to be constructed somewhere within a 100 by 100 foot development area several hundred feet from the dwelling. The proposed development area is located in the southeast portion of the parcel, and would be connected to the dwelling's septic system. The application initially characterized the structure as an "accessory dwelling and art studio." Record 260.

The planning director approved the structure as a "guest house," which is defined in the county code as an accessory structure that can be used for sleeping, but which does not have kitchen or cooking facilities. Petitioner appealed the planning director's approval to the hearings officer, arguing among other things that a "guest house" is still a type of dwelling, and the F-2 zone does not allow an accessory dwelling of any kind. On appeal, intervenor modified the application to remove the "guest house" characterization. As

modified, the application sought approval for an accessory structure to be used as an art studio, which would provide no sleeping or cooking facilities, and hence was not a dwelling. After conducting a hearing, the hearings officer approved the accessory structure, subject to conditions that prohibit kitchen facilities, sleeping accommodations, or 220-volt electrical connections, and that further prohibit use of the structure for cooking or sleeping. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The county approved the application under Lane County Code (LC) 16.211(2)(o), which allows in the F-2 zone "uses and development accessory to existing uses and development," subject to three standards.[1] LC 16.211(2)(o)

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[1] As presently codified, LC 16.211(2)(o) authorizes in the F-2 zone:

> "Uses and development accessory to existing uses and development, subject to the following:
>
> "(i) 'Same Site' development area is defined as a square with dimensions of 200 square feet which is centered on the footprint of the primary structure to which the proposed use or development is accessory.
>
> "(ii) If the proposed accessory development is located partially or entirely within the 'same site' development area, the accessory development is subject to the following clear and objective siting standards: LC 16.211(8)(a)(iv) & (v), (c)(i)(aa), and (c)(iii); or
>
> "(iii) If the proposed accessory development is located outside of the 'same site' development area, the accessory development is subject to the following discretionary siting

was originally adopted in 2014, as part of Ordinance 14-09, and it included three provisions, including subsection (iii), which requires that accessory development located outside the 'same site' as the primary use must be approved under discretionary approval standards. Petitioner appealed Ordinance 14-09 to LUBA, challenging among other things the definition of "same site" in LC 16.211(2)(o)(i). *Landwatch Lane County v. Lane County*, __ Or LUBA __ (LUBA No. 2015-007, May 5, 2015). The parties agreed to a voluntary remand. However, the county never conducted any hearings on remand, and Ordinance 14-09 apparently was never re-enacted.

Instead, in 2016, the county adopted Ordinance 16-01, which attempted to address the issues raised by petitioner in the appeal of Ordinance 14-09. In relevant part, Ordinance 16-01 adopted the same language that is presently codified as LC 16.211(2)(o), but modified the definition of "same site" in *former* LC 16.211(2)(o)(i), defining "same site" as a square with dimensions of 200 feet centered on the footprint of the primary structure. Ordinance 16-01 did not purport to modify the language of *former* LC 16.211(2)(o)(iii), which remained the same as the version originally adopted in Ordinance 14-09. In the present case, the county approved the proposed art studio structure under discretionary approval standards, as required by LC 16.211(2)(o)(iii) as adopted in Ordinance 16-01.

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standards: LC 16.211(8)(a), (b), (c)(i)(aa), (c)(iii), and (e).
* * *"

However, petitioner argues that Ordinance 16-01 did not in fact adopt LC 16.211(2)(o)(iii), and that LC 16.211(2)(o)(iii) has never been adopted or re-adopted after the remand of Ordinance 14-09. According to petitioner, Ordinance 16-01 in relevant part adopted only the modification to the definition of "same site" that was made to *former* LC 16.211(2)(o)(i). As evidence for this assertion, petitioner cites to the legislative format of Ordinance 16-01, which shows deleted text in ~~strikethrough~~ and added text in **bold**.[2] Because the legislative format of Ordinance 16-01 did not depict the text of LC 16.211(2)(o)(iii) in **bold**, denoting added language, petitioner argues

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[2] In relevant part, the legislative format for Ordinance 16-01 shows the following, with strikethrough representing deleted text originally adopted in Ordinance 14-09, and bolded text representing replacement language for the deleted text:

> "(i) 'Same Site' development area is defined as **a square with dimensions of 200 square feet which is centered on the footprint** ~~the area within 250 feet from the perimeter~~ of the primary structure to which the proposed use or development is accessory.
>
> "(ii) If the proposed accessory development is located partially or entirely within the 'same site' development area, the accessory development is subject to the following clear and objective siting standards: LC 16.211(8)(a)(iv) & (v), (c)(i)(aa), and (c)(iii); or
>
> "(iii) If the proposed accessory development is located outside of the 'same site' development area, the accessory development is subject to the following discretionary siting standards: LC 16.211(8)(a), (b), (c)(i)(aa), (c)(iii), and (e). * * *" Record 84.

that Ordinance 16-01 did not have the effect of re-adopting the text of *former* LC 16.211(2)(o)(iii), which therefore still remains in legislative limbo after the remand of Ordinance 14-09.

Intervenor responds, and we agree, that the text that Ordinance 14-09 adopted is determined by Ordinance 14-09 itself, not the legislative format that simply illustrated for the Lane County Commissioners and other interested parties the differences between the text of LC 16.211 as adopted by Ordinance 14-09 and the text of LC 16.211 as adopted by Ordinance 16-01. Petitioner does not dispute that Ordinance 16-01 was intended to re-adopt LC 16.211 as originally adopted in Ordinance 14-09, with certain modifications such as those made to the text of LC 16.211(o)(i). *See* Record 78 (text of Ordinance 16-01 indicating that, among other code sections, the former version LC 16.211 is removed and a new LC 16.211 is inserted its entirety). The commissioners clearly did not intend to adopt only the additions in bold, because that bolded language cannot exist in isolation from the text in which it is embedded. Because Ordinance 16-01 was clearly intended to replace previously adopted versions of LC 16.211 with a new, modified version, petitioner's arguments under this assignment of error do not provide a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends under the second assignment of error that a detached accessory structure for an "art studio" is not a permissible accessory structure

allowed in the F-2 zone. According to petitioner, the only permissible accessory structures allowed in a forest zone are those structures that are essential to the primary structure, or that are typically or customarily provided with the primary structure. Because an art studio is not essential to or customarily provided with a dwelling, petitioner argues that the county erred in approving the art studio structure.

Petitioner's argument is based on an expansive misreading of our decision in *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008), which concerned whether certain accessory elements to a proposed non-farm dwelling on land zoned for exclusive farm use, such as a garage and a septic drainfield, must be located along with the non-farm dwelling on portions of the property that are "generally unsuitable" for farm use. LUBA concluded that in the context of the statutes governing uses in exclusive farm zones that such accessory structures or elements must also be located on portions of the property that are generally unsuitable for farm use. However, petitioner cites to nothing in the Lane Code, or in state statutes or administrative rules governing forest lands, suggesting any similar limitations on accessory structures to a primary dwelling that is allowed on forest lands under several statutes and administrative rules.[3] As far as petitioner has demonstrated, the holding in *Wetherell* has no bearing on the present circumstances.

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[3] As intervenor notes, although the statutes and administrative rules that govern dwellings in forest zones do not expressly refer to accessory structures

Petitioner also argues that by failing to cluster the art studio structure with the existing dwelling the county failed to comply with OAR 660-006-0029(1)(c), which is a siting standard for development on forest lands requiring that "[t]he amount of forest lands used to site access roads, service corridors, the dwelling and structures is minimized[.]" The county has implemented OAR 660-006-0029(1)(c) in LC 16.211(8)(b), which requires a finding that "[t]he amount of forest lands used to site access roads, service corridors and structures shall be minimized." The planning director's decision found that the application complied with LC 16.211(8)(b), and the hearings officer noted that petitioner had not challenged that finding. Record 26.[4] Nonetheless, on appeal, petitioner argues that locating the art studio several hundred feet from the existing dwelling instead of adjacent to the dwelling and within its existing fire break commits land to development that could otherwise be used for growing timber, contrary to OAR 660-006-0029(1)(c).

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to a dwelling use, at least one rule, OAR 660-006-0050(3) refers to "[d]wellings and related structures" in the context of development on lands zoned for mixed agricultural-forest where the land use is predominantly forestry rather than agriculture. OAR 660-006-0050(3) provides that approval of such "[d]wellings and related structures" are subject to the standards that apply to approval of dwellings in OAR 660-006-0027 and -0035. OAR 660-006-0050(3) is some indication that the Land Conservation and Development Commission was aware that dwellings allowed in forest zones may have "related structures."

[4] The hearings officer's decision quotes the text of LC 16.211(8)(b), but mistakenly cites it as LC 16.211(8)(a), which as discussed below is a somewhat similar siting requirement.

> "The proposed accessory structure is located approximately 300 feet east of the primary structure, adjacent to an existing driveway that extends to the proposed development site. The application indicates that the existing driveway is able to accommodate necessary utilities. Because the development site will be served by an existing driveway, the site minimizes the amount of forest land used to site access roads. As evidenced by Finding 3 above, the proposed development site minimizes intrusion into the forested portion of the property to the north. Staff finds that the proposed development site complies with this criterion while also balancing the siting requirements of LC 16.211(8)(a) above." Record 235.

LC 16.211(8)(a), referenced in the above-quoted finding, provides in relevant part that dwellings and structures should be sited "near existing roads, on the most level part of the tract, on the least suitable portion of the tract for forest use[.]" The planning director found that the proposed accessory structure would be located near an existing road, on a level part of the tract, and that no portion of the property is less suitable for forest use, given the relatively poor soils and scrub growth at the preferred location. Record 234.

Petitioner does not acknowledge, much less challenge, the foregoing findings of the planning director, which the hearings officer affirmed. Contrary to petitioner's argument, nothing cited to us in OAR 660-006-0029 or LC 16.211(8) requires that an accessory structure be clustered with the primary structure. Petitioner's argument that the decision violates OAR 660-006-0029(1)(c) because it fails to cluster the art studio with the dwelling does not provide a basis for reversal or remand.

Finally, petitioner argues that the proposed art studio structure is, in reality, an "accessory dwelling" on the property, and that nothing in state law

or the Lane Code authorizes an "accessory dwelling" in a forest zone. However, the premise for that argument is that the proposed art studio is a "dwelling," an issue that is discussed and rejected in the following third assignment of error. Because the county concluded, and we agree, that the proposed art studio, as conditioned, is not a "dwelling" of any kind, petitioner's argument that it is in reality an impermissible "accessory dwelling" does not provide a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As noted, the hearings officer imposed several conditions intended to ensure that the art studio would not be used as a dwelling. The conditions include a requirement that the county building inspector verify that the completed structure does not contain kitchen or cooking facilities or sleeping accommodations. Record 22.

Under this assignment of error, petitioner contends that the county's conditions are unenforceable. According to petitioner, nothing would prevent intervenor, after the required building inspection, from converting a room in the structure to a bedroom or installing a hot plate or microwave, and thus converting the structure to an impermissible residential use.

Intervenor responds, and we agree, that petitioner's speculation that intervenor might violate one or more conditions of approval provides no basis for reversal or remand. The county code includes enforcement provisions, and

petitioner offers no reason to believe that if the county received a complaint regarding the structure that an appropriate enforcement proceeding is not available, or that the conditions cannot be effectively enforced under such a proceeding. The county is not obligated to adopt conditions of approval that are self-enforcing or that are incapable of being violated.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

LC 16.211(8) implements OAR 660-006-0035(3) in requiring that dwellings and structures in forest zones maintain a primary fuel-free break surrounding all structures, and a secondary fuel-free break on land surrounding a dwelling that is owned or controlled by the owner, in according with Oregon Department of Forestry fire siting standards.

The primary safety zone is a fire break extending a minimum of 30 feet in all directions around all structures. The primary safety zone must be extended beyond 30 feet depending on the percent of downslope, as reflected in a table at LC 16.211(8)(c)(i)(aa). For example, if the percentage of downslope is between 10 and 20 percent, the primary safety zone must extend 50 feet down the slope from the structure. LC 16.211(8)(c)(i)(bb) requires a secondary fuel break that is limited to dwellings, and is not required for structures that are not dwellings.

The 100 by 100 foot development area is located with its southern boundary 30 feet from the southern property line of the subject property.

Petitioner argued to the hearings officer, based on an annotated topographic map that itself was based on a topographic map provided by intervenor, that the slope between the development area and the southern property line exceeds 10 percent (and may exceed 20 percent), and thus at least a 50-foot primary safety zone is required. Petitioner argued that the primary safety zone must be provided on the subject property, and that because there is only 30 feet between the development area and the southern property line the applicant has not demonstrated that the proposed structure complies with LC 16.211(8)(c)(i)(aa).

The hearings officer rejected that argument, finding in relevant part that "[t]he development area is no closer than 30 feet from the southern property line and would conform to Lane Code 16.211(8)(c)(i)(aa) as the area is flat and only 30 feet of primary safety zone is required." Record 25-26. Petitioner contends on appeal that the finding that the land between the development area and the southern property line is "flat" is not supported by substantial evidence, and that the best evidence in the record on this point, the topographic map prepared by intervenor and the annotated version submitted by petitioner, both indicate to the contrary that the slope in that area exceeds 10 percent.

Petitioner is correct that the topographic map submitted by intervenor and the annotated version submitted by petitioner both appear to show in the pertinent area that there is a drop in elevation of 20 feet between the 800-foot and 780-foot elevation lines over a horizontal run of less than 100 feet. Record

310, 221. Simple math based on that rise over run suggests an average slope in excess of 10 percent, and perhaps in excess of 20 percent.

Intervenor does not dispute that the topographic maps appear to show an average slope in excess of 10 percent in this area of the property. However, intervenor argues that the hearings officer's finding that this area is "flat" is based on other evidence that constitutes substantial evidence, namely intervenor's assertion in his application materials that "[s]lope within 30 feet of the property is less than 3 [percent]." Record 296.

We agree with petitioner that the hearings officer's finding that the slope between the development area and the southern border is "flat" is not supported by substantial evidence. Based on the evidence in the whole record, including the two topographic maps, a reasonable person would not have relied upon the applicant's bare assertion that all slopes within 30 feet of the development area are less than three percent. It may be that there are some areas adjacent to the development area that are three percent in slope, but if the average slope in the area is in excess of 10 percent that would suggest that other areas near or adjacent to the development area are correspondingly steeper than the average. It also may be that the topographic maps are not sufficiently detailed to allow a precise determination of slope in the particular area south of the development area that is in question. Nonetheless, the topographic maps are sufficiently detailed to undermine the hearings officer's conclusion that the land between the development area south to the property line is "flat." As noted, the

topographic maps appear to indicate an average slope in this area that exceeds 10 percent.

We conclude that remand is necessary for the hearings officer to reconsider the evidence on this point, including any new evidence the hearings officer decides to accept on remand, and to adopt new findings addressing compliance with LC 16.211(8)(c)(i)(aa).

The fourth assignment of error is sustained.

The county's decision is remanded.