

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

4  
5 ANGELINE ARMSTRONG  
6 and MARY HOKE,  
7 *Petitioners,*

8  
9 vs.

10  
11 JACKSON COUNTY,  
12 *Respondent.*

02/21/19 AM 10:38 LUBA

13  
14 LUBA No. 2018-120

15  
16 FINAL OPINION  
17 AND ORDER

18  
19 Appeal from Jackson County.

20  
21 Ross Day, Portland, filed the petition for review and argued on behalf of  
22 petitioners. With him on the brief was Day Law & Associates, P.C.

23  
24 Devin D. Huseby, County Counsel, Medford, filed the response brief and  
25 argued on behalf of respondent.

26  
27 ZAMUDIO, Board Member; RYAN, Board Chair, participated in the  
28 decision.

29  
30 BASSHAM, Board Member, did not participate in the decision.

31  
32 REMANDED

02/21/2019

33  
34 You are entitled to judicial review of this Order. Judicial review is  
35 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a county hearings officer’s decision denying petitioners’ application for nonconforming use verification for medical marijuana production on property zoned rural residential.

**FACTS**

Medical marijuana production has been legal under state law since 1998. Ballot Measure 67 (1998). Recreational marijuana production became legal under state law in 2015. Ballot Measure 91 (2014). Marijuana production is regulated under state law. ORS 475B.005 to 475B.968. Counties may impose reasonable regulations on medical marijuana production sites. ORS 475B.928. In March 2016, Jackson County (the county) amended its Land Development Ordinance (LDO) to prohibit marijuana production above certain amounts on land zoned rural residential (RR).<sup>1</sup> There is no dispute in this case that medical marijuana production was an allowed use in the RR zone under county ordinances prior to March 2016.

Pursuant to ORS 215.130(5): “The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued.” Such uses are referred to as lawful nonconforming

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<sup>1</sup> The county’s ordinance prohibiting marijuana production above certain amounts on land zoned RR was challenged and upheld in *Diesel v. Jackson County*, 74 Or LUBA 286 (2016), *aff’d*, 284 Or App 301, 391 P3d 973 (2017).

1 uses. LDO Chapter 11 implements ORS 215.130(5). LDO 11.8 governs  
2 nonconforming use verification, which is the process by which the county  
3 formally recognizes a right to continue lawful nonconforming uses.

4 The subject property is comprised of 17.34 acres and is zoned RR.  
5 Petitioners seek verification of nonconforming use for indoor and outdoor  
6 production of marijuana including an approximately 15,600-square-foot, fenced  
7 outdoor production area, where petitioners grow marijuana plants in above-  
8 ground containers, and structures associated with production of marijuana  
9 including two 320-square-foot shipping containers, two 150-square-foot buildings,  
10 and one 100-square-foot building. Record 4, 30, 34. Petitioners contend that the  
11 subject property and structures have been used for medical marijuana production  
12 since 2005. Record 27.

13 The northern boundary of the subject property abuts Highway 238.  
14 Poormans Creek transects the property in an approximate east-west orientation.  
15 All of the subject property north of Poormans Creek, what appears to be  
16 approximately a quarter of the property, is within the special flood hazard area,  
17 an area “identified by the Federal Emergency Management Agency in its Flood  
18 Insurance Study (FIS) for Jackson County[.]” LDO 7.2.2(A); Record 34, 115–  
19 16. In this opinion, we refer to the special flood hazard area as the floodplain.  
20 The “floodway,” within the floodplain, is generally the stream channel and the  
21 floodplain adjoining the stream channel. These areas are defined by the “base  
22 flood,” which is “[t]he flood having a one percent (1%) chance of being equaled

1 or exceeded in any given year, i.e., the 100-year flood.” LDO 13.3(105)(h). In  
2 turn, the “base flood elevation” is the “water surface elevation during the base  
3 flood” relative to a specified measurement point. LDO 13.3(105)(i). The outdoor  
4 production area and the structures associated with petitioners’ marijuana  
5 production are situated north of Poormans Creek and within the floodplain where  
6 the base flood elevation and the floodway have not been determined, and  
7 petitioners would need to obtain a floodplain survey to establish the precise  
8 floodway and floodplain boundaries. Record 9, 115–16.<sup>2</sup>

9 County planning staff denied the application. Petitioners appealed to the  
10 hearings officer, who, after a public hearing, denied the application. This appeal  
11 followed.

## 12 **ASSIGNMENT OF ERROR**

13 Any development in the special flood hazard area requires a floodplain  
14 development permit prior to initiating development. LDO 7.2.2(C); LDO  
15 7.2.13(F) (“Fencing and walls located in the special flood hazard area require a  
16 floodplain development permit.”). The hearings officer found that the  
17 improvements for which petitioners sought nonconforming use verification are  
18 “development” within the floodplain that required floodplain development  
19 permits. Record 11. Specifically, the hearings officer determined that the fence,

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<sup>2</sup> The portion of the property situated south of Poormans Creek appears to be forested and undeveloped. Record 181.

1 growing containers, and structures constitute development as defined in the  
2 LDO.<sup>3</sup> Record 12. It is undisputed that petitioners have not obtained a floodplain  
3 development permit for the fence, growing containers, and structures involved in  
4 their marijuana production activities. Record 11–12, 34.

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<sup>3</sup> The hearings officer quoted the general LDO definition of “development” in LDO 13.3(70), which provides:

“DEVELOPMENT: Any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials.” (Capitalization and underscoring in original.)

The LDO definition specific to floodplain development provides:

“Development: Any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials located within the area of special flood hazard.

“Development does not include<sup>2</sup>:

“(i) Signs, markers, aids, etc. placed by a public agency to serve the public.

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“<sup>2</sup> Work exempt from Oregon Residential Specialty Code requires a Floodplain Development Permit unless specifically exempted by definition in this ordinance.” LDO 13.3(105)(o) (underscoring in original).

1           Petitioners argued to the hearings officer that LDO 7.2.2(E)(1) “provides  
2 an exemption for agriculture and grazing activities and practices within the  
3 floodplain boundaries as long as they are movable structures and uses that can be  
4 removed and can be assured of removal by fall or prior to the rainy season.”  
5 Record 32. LDO 7.2.2(E)(1) provides:

6           “E)    ***Exemptions***

7           “Finding 2, Policy B) of the Natural Hazards Element of the  
8 Comprehensive Plan states: ‘In order to assure maximum usefulness  
9 of flood prone areas, regulations should allow for seasonal  
10 variations in use. Temporary, removable structures should be  
11 allowed during drier months if their removal can be assured by late  
12 fall.’ A floodplain development permit is not required for the  
13 following uses:

14           “1)    Agriculture and grazing, or managing, growing, and  
15           harvesting of timber and other forest products[.]” (Boldface  
16           and italics in original.)

17           Petitioners testified that the growing containers are movable, and it is their  
18 practice to remove the containers in late fall after the harvest. Petitioners asserted  
19 that the structures are portable. Petitioners also asserted that, depending on the  
20 outcome of a future floodplain survey, the existing fence and structures will be  
21 relocated outside the floodplain. Petitioners speculated that the fence would no  
22 longer require a floodplain development permit because, after the floodplain  
23 boundary was determined and the fence moved, the future fence would be located  
24 outside of the floodplain. Petitioners requested that the hearings officer verify the  
25 nonconforming use and condition the approval on relocating all structures outside

1 of the floodplain and removing the growing containers after harvest in late fall.  
2 Record 32–33. Petitioners explained that they preferred verifying the nature and  
3 extent of their lawful nonconforming use before incurring the expense for a  
4 floodplain survey and permit. Record 13.

5 The hearings officer did not address whether the application satisfied the  
6 nonconforming use verification criteria. Instead, the hearings officer concluded  
7 that the nonconforming use application must be denied pursuant to LDO  
8 1.8.2(A), which provides that when a violation of the LDO “is documented to  
9 exist on a property, the County will deny any and all development permits, unless  
10 such application addresses the remedy for the violation, or the violation has  
11 otherwise been corrected.” The hearings officer concluded that the record  
12 demonstrated that petitioners had violated LDO 7.2.2(C)(2)(a) by placing  
13 improvements in the floodplain without a floodplain development permit.  
14 Record 11. Because the nonconforming use application was not accompanied by  
15 a floodplain development permit application, and the record contained no  
16 evidence that the improvements had been removed from the floodplain, the  
17 hearings officer concluded that the application did not “address[] the remedy for  
18 the violation.” LDO 1.8.2(A).

19 With respect to LDO 7.2.2(E), the hearings officer reasoned:

20 “The Hearings Officer finds and concludes there is insufficient  
21 evidence in the Record to determine, ultimately, where the  
22 boundaries of the base flood elevation and the floodway will be  
23 placed on the Property. In fact, the Record is clear that those

1 determinations can only be made with the assistance and work  
2 products of an engineer and a surveyor, and that information is not  
3 currently available to the Hearings Officer. [Petitioners'] assurances  
4 \* \* \* that the wooden fence and other structures will be moved  
5 outside the boundaries of the newly-determined floodway and/or  
6 100-year floodplain are missing the point, because the current  
7 Record cannot support a conclusion that there is any usable portion  
8 of the Property that is outside where those newly-determined  
9 boundaries will be placed." Record 14.

10 Petitioners do not dispute that the fence, growing containers, and structures  
11 for which petitioners sought nonconforming use verification constitute  
12 development within the floodplain for which floodplain development permits are  
13 required, absent an exemption. In their sole assignment of error, petitioners argue  
14 that the hearings officer erred in denying the application because, according to  
15 petitioners, they were not required to obtain a floodplain development permit for  
16 any of the development. Petitioners argue that growing marijuana is an exempt  
17 agricultural use, and that the associated structures are temporary and removable,  
18 and thus also exempt from floodplain development permit requirements pursuant  
19 to LDO 7.2.2(E). Petitioners argue that the hearings officer failed to address  
20 whether the nonconforming uses were exempt under LDO 7.2.2(E) and request a  
21 remand for the county to decide that question.

22 The county responds that petitioners never argued before the hearings  
23 officer that the structures in the floodplain are exempt from floodplain  
24 development permitting requirements. Respondent's Brief 5. However, the  
25 county does not argue in its brief that the issue of the applicability of LDO

1 7.2.2(E) was waived under ORS 197.835(3) and ORS 197.763.<sup>4</sup> We conclude  
2 that the issue was sufficiently raised in the local proceeding for purposes of our  
3 review. *See DLCD v. Tillamook County*, 34 Or LUBA 586, *aff'd*, 157 Or App 11,  
4 967 P2d 898 (1998) (waiver restrictions apply to issues and not to individual  
5 arguments regarding those issues). The issue is whether the fence, growing  
6 containers, and structures are exempt from floodplain development permitting  
7 requirements under LDO 7.2.2(E).<sup>5</sup>

8 The hearings officer did not decide whether the fence, growing containers,  
9 and structures are exempt from floodplain development permit requirements.

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<sup>4</sup> ORS 197.835(3) provides: “Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

<sup>5</sup> We note that petitioners did not assign error to the hearings officer’s implicit interpretation of LDO 1.8.2(A) that a violation may be “documented to exist on a property” by evidence in the record of the proceeding on the application. Because that issue is not before us, we express no opinion on the correctness of the hearings officer’s application of LDO 1.8.2(A) to deny the application. *See Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301, 310–11 (2016) (reserving ruling on a similar issue).

1 Instead, the hearings officer appears to have *assumed* (1) that LDO 7.2.2(E)  
2 provides an exemption and (2) that the fence, growing containers, and structures  
3 are portable and could be removed from the floodplain. The hearings officer  
4 decided that any exemption in LDO 7.2.2(E) is limited to circumstances where  
5 the record demonstrates that temporary, removable structures could be moved to  
6 an area outside of the floodplain and on the subject property. Because the record  
7 did not include any evidence that the subject property contained a usable area  
8 outside the floodplain, the hearings officer decided that any exemption in LDO  
9 7.2.2(E) could not practicably be effectuated and, thus, the asserted exemption  
10 could not be applied. Record 14.

11 The hearings officer erred in deciding that LDO 7.2.2(E) could not be  
12 applied. The LDO provides: “Temporary, removable structures should be  
13 allowed during drier months if their removal can be assured by late fall.” LDO  
14 7.2.2(E) (quoting Finding 2, Policy B) of the Natural Hazards Element of the  
15 Comprehensive Plan). The LDO does not expressly require temporary structures  
16 that are removed from the floodplain be moved to, or stored on, the subject  
17 property. We agree with petitioners that the hearings officer’s failure to address  
18 and interpret LDO 7.2.2(E) requires remand.

19 We will not interpret and apply LDO 7.2.2(E) in the first instance and,  
20 instead, remand to the hearings officer with instructions to interpret and apply  
21 that provision. *See Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101,  
22 122 (1995) (it is the local government’s responsibility to interpret its own

1 comprehensive plan and land use regulations in the first instance); *Opp v. City of*  
2 *Portland*, 153 Or App 10, 14, 955 P2d 768, *rev den*, 327 Or 620 (1998) (LUBA  
3 may remand the decision to the local government “to provide any essential  
4 interpretation that the decision omits”). While we do not interpret the code in the  
5 first instance in this decision, we make two observations that may assist the  
6 hearings officer on remand.

7 First, we observe that LDO regulations are more restrictive for  
8 development in the floodplain than development outside the floodplain.  
9 Development that is exempt from the Oregon Residential Specialty Code  
10 nevertheless requires a floodplain development permit, unless specifically  
11 exempted by the LDO. LDO 13.3(105)(o); see n 3. Agricultural buildings within  
12 the floodplain that are exempt from the state structural specialty code  
13 nevertheless require a floodplain development permit. LDO 13.3(8)(c) (defining  
14 “exempt agricultural building” as “[a] structure located on a farm outside any  
15 floodplain \* \* \*” (emphasis added)); *see also Gross v. Jackson County*, 74 Or  
16 LUBA 563, 569–70 (2016), *aff’d*, 284 Or App 673, 393 P3d 1201 (2017)  
17 (explaining the agricultural building exemption contained in ORS 455.315(1) is  
18 an exemption from the obligation to obtain building permits that are otherwise  
19 required by the state structural specialty code, but not an exemption from  
20 otherwise applicable land use regulations). Similarly, fences are generally not  
21 regulated by the LDO, but fences in the floodplain require a floodplain  
22 development permit. *Compare* LDO 13.3(268) (defining “structure” as “not

1 including minor improvements such as *fences*, utility poles, flagpoles, or  
2 irrigation system components *that are not customarily regulated through zoning*  
3 *ordinances*” (emphases added)) with LDO 7.2.13(F) (“Fencing and walls located  
4 in the special flood hazard area require a floodplain development permit.”).  
5 Storage of equipment or materials within the floodplain requires a floodplain  
6 development permit. LDO 13.3(105)(o); see n 3. This more restrictive regulation  
7 of development in the floodplain is likely because fences, structures, equipment,  
8 or materials located in the floodplain during the wet season could potentially raise  
9 flood levels, create backwaters, and possibly lead to water and soil  
10 contamination. *See* LDO 13.3(105)(d) (defining the “annual period of flood risk”  
11 as “[l]ate October to May”); LDO 13.3(105)(c) (defining adequate fence  
12 openings as “openings in the fence that allow flood waters to pass without  
13 creating a backwater condition”).

14         Second, we observe that LDO 7.2.2(E) is ambiguous. That is, it is not clear  
15 to us whether the phrase “[t]emporary, removable structures should be allowed  
16 during drier months if their removal can be assured by late fall” provides a  
17 floodplain development permit exemption for temporary, removable structures  
18 located in the floodplain.<sup>6</sup> That phrase is a direct quote from a comprehensive

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<sup>6</sup> On appeal, the county takes the position that “[t]emporary, removable structures” for agricultural use are allowed without a floodplain development permit “if their removable can be assured by late fall.” Respondent’s Brief 5. The county concedes that the “only evidence in the record is that the subject structures are portable,” but argues that the structures were not actually moved out of the

1 plan policy that “regulations should allow for seasonal variations.” “Should  
2 allow” and “should be allowed” are hortatory, not mandatory, phrases. The  
3 comprehensive plan policy appears to contemplate that the county would enact  
4 “regulations” that allow temporary, removeable structures to be sited in the  
5 floodplain during drier months. It is difficult to imagine how the county could  
6 “assure” removal of temporary, removable structures located in the floodplain by  
7 late fall if those structures do not require county floodplain development permits.  
8 If the county had intended to exempt all “[t]emporary, removable structures,”  
9 from floodplain development permitting requirements, the county could have  
10 omitted temporary, removable structures from the definition of “development” in  
11 LDO 13.3(105)(o) or included temporary, removable structures in the  
12 enumerated list of uses for which a floodplain development permit is not required  
13 in LDO 7.2.2(E).<sup>7</sup> The hearings officer may address those issues on remand.

14 The assignment of error is sustained.

15 The county’s decision is remanded.

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floodway and, thus, the exemption does not apply. Respondent’s Brief 5. The county’s interpretation and application of LDO 7.2.2(E) offered on appeal is not expressed in the hearings officer’s decision and we express no opinion on the county’s argument. *Munkhoff v. City of Cascade Locks*, 54 Or LUBA 660 (2007) (interpretations of a local code provision offered for the first time in a response brief at LUBA are not interpretations made by the local government).

<sup>7</sup> It may be that there are other regulations that exempt agricultural accessory structures from floodplain regulation, but none have been cited to us in this appeal.