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

SKIP TARR and RUTH TARR,
Petitioners,

vs.

MULTNOMAH COUNTY,
Respondent,

and

MASJID IBRAHIM, AHMED OMER,
and ARSHAD ASHFAQ,
Intervenors-Respondents.

LUBA No. 2019-097

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Gregory S. Hathaway and Sara Brennan, Portland, filed the petition for review and a reply brief, and argued on behalf of petitioners. With them on the brief was Hathaway Larson LLP.

Katherine Thomas, Assistant County Counsel, Portland, filed a response brief and argued on behalf of respondent.

Wendie L. Kellington, Lake Oswego, filed a response brief and argued on behalf of intervenors-respondents. With her on the brief was Kellington Law Group, PC.

RYAN, Board Member; RUDD, Board Chair, participated in the decision.

ZAMUDIO, Board Member, did not participate in the decision.

AFFIRMED 3/16/2020

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 hearings officer's decision approving a mosque as a conditional use in the county's Multiple Use Agriculture (MUA-20) zone.

FACTS

The subject property is a 2.2-acre parcel zoned MUA-20, located at the intersection of NW Springville Road and NW Springville Lane. Surrounding properties are also zoned MUA-20 and generally developed with single-family homes on large lots. West and south of the subject property is the Metro Urban Growth Boundary (UGB) and urban development.

The MUA-20 zone allows "community service uses" as conditional uses, subject to the provisions of Multnomah County Code (MCC) 39.7500 through 39.7810. MCC 39.4320(A). Pursuant to MCC 39.7520(A)(1), the county may approve a "church" or "other nonresidential place of worship" as a community service use.[1] All Community Service Uses are subject to approval standards set

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[1] MCC 39.7520(A) provides, in relevant part:

> "Except as otherwise limited in the EFU, all CFU and OR base zones, the following Community Service Uses[,] and those of a similar nature, may be permitted in any base zone when approved at a public hearing by the approval authority. * * *
>
> "(1) Church, or other nonresidential place of worship, including the following activities customarily associated with the practices of the religious activity:

out at MCC 39.7515. One of the conditional use approval standards, and the only approval standard at issue in this appeal, is MCC 39.7515(A), which requires the applicant for a community service use to demonstrate that the proposed use is

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"(a) Worship services;

"(b) Religion classes;

"(c) Weddings;

"(d) Funerals;

"(e) Meal programs;

"(f) Childcare, but not including private or parochial school education for prekindergarten through grade 12 or higher education; and

"(g) Providing housing or space for housing in a building that is detached from the place of worship [subject to a number of restrictions]."

"consistent with the character of the area[.]"[2] We follow the parties in referring to MCC 39.7515(A) as the "MCC 39.7515(A) Compatibility Standard."[3]

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[2] MCC 39.7515 provides, in relevant part:

> "APPROVAL CRITERIA. In approving a Community Service use, the approval authority shall find that the proposal meets the following approval criteria * * *[:]
>
> "(A) Is consistent with the character of the area;
>
> "(B) Will not adversely affect natural resources;
>
> "(C) The use will not: (1) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; nor (2) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
>
> "(D) Will not require public services other than those existing or programmed for the area;
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> "(E) Will be located outside a big game winter habitat area as defined by the Oregon Department of Fish and Wildlife or that agency has certified that the impacts will be acceptable;
>
> "(F) Will not create hazardous conditions;
>
> "(G) Will satisfy the applicable policies of the Comprehensive Plan;
>
> "(H) Will satisfy such other applicable approval criteria as are stated in this Section."

[3] As the parties note, the MUA-20 purpose statement at MCC 39.4300 describes one purpose of the zone to be to allow conditional uses that are "shown to be compatible with," among other things, "the character of the area." For

Intervenors-respondents (intervenors) applied for conditional use and design review approval for a mosque.[4] The proposed mosque is two stories in height, with a building envelope of 8,715 square feet and a total of 14,000 square feet in interior space. Intervenors proposed to limit occupancy to a maximum of 300 persons, and to provide 67 permanent parking spaces, with an additional 15 overflow parking spaces. Vehicular access to the site would be from NW Springville Lane. Intervenors described operational details regarding how the proposed mosque would be used by its members, a membership consisting of approximately 150 families living within a 2-3 mile radius of the subject property.[5]

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purposes of the relevant MCC provisions, "consistency" and "compatibility" appear to be synonyms.

[4] As we understand it, "masjid" is the most accurate transliteration of the Arabic term for an Islamic place of worship. The hearings officer's findings use the term "masjid." However, because the relevant statutes and MCC provisions use the term "mosque," we will follow the parties in referring to the proposed place of worship as a "mosque."

[5] Intervenors provided the following operational details:

1. Five prayers performed daily starting at 4:40 a.m. through 11:00 p.m.

2. Friday prayer services occurring between noon and 2:00 p.m. with typical attendance between 60 to 70 persons.

3. Special religious services occurring 9-10 times per year typically the first Saturday of each month.

Petitioners, who reside adjacent to the subject property, opposed the application, submitting evidence and argument to the hearings officer that the proposed mosque is not consistent with the character of the area, and therefore does not comply with the MCC 39.7515(A) Compatibility Standard. In their application, intervenors took the position that a statute, ORS 215.441, precludes the county from applying the MCC 39.7515(A) Compatibility Standard to the proposed mosque. In the alternative, intervenors submitted evidence and argument that the proposed mosque is consistent with the character of the "area," which intervenors defined to include the surrounding rural properties zoned MUA-20.

As discussed below, ORS 215.441(1) provides that, where a county allows churches or other nonresidential place of worship, the county must also allow activities customarily associated with such places of worship, such as weddings or funerals. ORS 215.441(2) provides that a county may subject a proposed church or nonresidential place of worship to "reasonable regulations, including site review or design review, concerning the physical characteristics of the uses

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4. Special services for members on weekend evenings between 6:00 and 8:00 p.m.

5. Celebrations during the month of Ramadan, including evening prayers.

6. Religious classes for children during the academic year, held between 5:00 p.m. and 7:30 p.m. Petition for Review App at 73-76.

authorized." The hearings officer agreed with intervenors that, read in context, ORS 215.441(1) and (2) impliedly preclude the county from applying conditional use approval standards, such as the MCC 39.7515(A) Compatibility Standard, that are not concerned with the physical characteristics of the proposed place of worship. In the alternative, the hearings officer applied the MCC 39.7515(A) Compatibility Standard to approve the proposed mosque, citing intervenors' evidence concerning the character of the surrounding properties zoned MUA-20. However, the hearings officer also concluded that MCC 39.7515(A) does not limit the "area" under consideration to the surrounding rural properties. Because the subject property is located near urban development within the urban growth boundary (UGB), the hearings officer also considered whether the proposed mosque is consistent with a larger "area" that includes nearby portions of the UGB, and answered that question in the affirmative.

The hearings officer issued the county's final decision on September 10, 2019. This appeal followed.

INTRODUCTION

In the first assignment of error, petitioners challenge the hearings officer's interpretation of ORS 215.441, to preclude the county from applying the MCC 39.7515(A) Compatibility Standard to the proposed mosque. In the second and third assignments of error, petitioners challenge the hearings officer's alternative findings that the proposed mosque satisfies the MCC 39.7515(A) Compatibility

Standard. In the fourth assignment of error, petitioners challenge a condition that was imposed to ensure compliance with the Compatibility Standard.

As explained below, we agree with petitioners that the text, context and legislative history of ORS 215.441(2) do not support the hearings officer's interpretation that the legislature intended the statute to preclude approving or denying a place of worship under standards like the MCC 39.7515(A) Compatibility Standard. Accordingly, we sustain the first assignment of error, and address the three contingent assignments of error that follow.

FIRST ASSIGNMENT OF ERROR

A. ORS 215.441

In 2001, the legislature adopted Senate Bill (SB) 470, codified as ORS 215.441 (applicable to counties) and ORS 227.500 (applicable to cities). The legislature significantly amended the structure of ORS 215.441 and ORS 227.500 in 2017, and amended them both again in 2019, but in ways that are not material to this appeal. In this opinion, we will generally quote and cite the statute as codified in 2017, which is the version that the hearings officer applied to the proposed mosque. However, the substantive provisions of the statute applicable to this appeal stem from SB 470, adopted in 2001.

Section 2, subsection (1) of SB 470, codified as ORS 215.441(1) (2017), provides in relevant part that in zones where a county allows a place of worship, the county "shall allow the reasonable use of the real property for activities customarily associated with the practices of the religious activity[,]" including a

list of seven specific associated activities.[6] The county has amended its land use code to implement ORS 215.441(1) in substantially identical terms. MCC 39.7520(A)(1).

Subsection (2) of SB 470, Section 2, codified as ORS 215.441(2), provides:

> "A county may:
>
> "(a) Subject real property described in subsection (1) of this section to reasonable regulations, including site review or

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[6] ORS 215.441(1) (2017) provides, in relevant part:

> "If a church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship is allowed on real property under state law and rules and local zoning ordinances and regulations, a county shall allow the reasonable use of the real property for activities customarily associated with the practices of the religious activity, including:
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> "(a) Worship services.
>
> "(b) Religion classes.
>
> "(c) Weddings.
>
> "(d) Funerals.
>
> "(e) Meal programs.
>
> "(f) Childcare, but not including private or parochial school education for prekindergarten through grade 12 or higher education.
>
> "(g) Providing housing or space for housing in a building that is detached from the place of worship [subject to limitations]."

design review, concerning the physical characteristics of the uses authorized under subsection (1) of this section; or

"(b) Prohibit or restrict the use of real property by a place of worship described in subsection (1) of this section if the county finds that the level of service of public facilities, including transportation, water supply, sewer and storm drain systems is not adequate to serve the place of worship described in subsection (1) of this section."

While the county adopted MCC 39.7520 to implement ORS 215.441(1), the county has not adopted MCC provisions expressly intended to implement either ORS 215.441(2)(a) or (b). Instead, the county has continued to review churches and other community service uses, including intervenors' application for a mosque, as conditional uses, subject to conditional use standards as well as design review standards.

B. The Hearings Officer's Decision

As noted, intervenors argued to the hearings officer that, read in context, ORS 215.441(2)(a) precludes the county from applying conditional use approval standards such as the MCC 39.7515(A) Compatibility Standard to the application for the proposed mosque. Petitioners argued to the contrary that because ORS 215.441(2)(a) provides that the county "may" apply design review and similar standards, ORS 215.441(2)(a) operates only as a grant of discretionary authority rather than a mandate or a prohibition, and the statute therefore does not impliedly prohibit the county from applying conditional use permit standards such as the MCC 39.7515(A) Compatibility Standard.

The hearings officer agreed with intervenors' reading of the statute, and rejected petitioners' contrary interpretation.[7] The hearings officer reasoned that

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[7] The hearings officer found:

> "The hearings officer finds, based on the plain language of the Code, that ORS 215.441(1) authorizes the County to allow or prohibit places of worship in any zone. If the County chooses to allow places of worship, the County must allow the uses listed in ORS 215.441(1)(a)-(g) as a matter [of] right. ORS 215.441(2) authorizes the County to regulate such uses to a limited extent, regulating the physical characteristics of the uses (2)(a) and prohibiting or restricting such uses if public facilities are inadequate to serve the use (2)[(b]).
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> "Absent section (2), if the County allowed places of worship in a particular zone the County would have no authority to regulate such uses. Section (1) provides that the County 'shall allow' such uses. As the applicant notes in Exhibit I.3, the County has the authority to limit or prohibit uses where public facilities are inadequate to serve a proposed use. Therefore, unless Section (2)(b) is necessary to modify Section (1), Section (2)(b) is redundant and meaningless. The statute must be construed to give effect to all provisions. ORS 42.230. In addition, there is a presumption that the legislature did not intend to enact a meaningless statute. * * * This interpretation is consistent with the legislative history of this statute * * *.
>
> "[Petitioners'] interpretation, that Section (2) is optional is non-sensical. The County clearly has the authority to regulate the design of most developments. [Absent Section (2) t]he County may limit such review to physical characteristics of the use or expand the review to require compatibility with the character of the area or similar standards. In addition, the County has the authority to prohibit uses where public facilities are inadequate. Therefore, [petitioners'] interpretation renders Section (2) superfluous." Record 43-44 (citations omitted).

ORS 215.441(1) effectively made places of worship uses allowed by right in those zones where they are allowed. In that context, the hearings officer found that ORS 215.441(2) is properly understood to limit the universe of approval standards that counties may apply to such uses. The hearings officer noted that, even in the absence of ORS 215.441(2), counties have long possessed the authority to apply design review and similar standards to places of worship, and to deny such development if public facilities are inadequate to serve the use. The hearings officer therefore rejected petitioners' view—that ORS 215.441(2) operates only as a discretionary grant of authority to do something counties already have the authority to do—because, he reasoned, that view would render ORS 215.441(2) redundant and meaningless.

C. Arguments on Appeal

On appeal, petitioners repeat their argument that the term "may" typically denotes a grant of discretion rather than a mandate or prohibition. According to petitioners, the legislature's choice to use the term "may" instead of explicit mandatory or prohibitive terms indicates that the legislature did not intend ORS 215.441(2) to impliedly eliminate counties' authority to apply conditional use approval standards such as the MCC 39.7515(A) Compatibility Standard to places of worship described in ORS 215.441(1). Petitioners note that, in contrast, the legislature chose to use the mandatory term "shall" in ORS 215.441(1) to require counties to allow all activities customarily associated with a place of worship, in approving a place of worship.

Petitioners argue that, contrary to the hearings officer's characterization, their view of ORS 215.441(2) as a discretionary grant of authority does not render that statute entirely redundant or meaningless. According to petitioners, the legislature deliberately structured ORS 215.441 so that counties have the option of either (1) continuing to apply conditional use and similar standards to places of worship, or (2) amending their land use codes to limit applicable approval standards to design review and other standards described in ORS 215.441(2). Petitioners contend that the county in the present case apparently shares this understanding of ORS 215.441(2), because the county chose to amend the MCC to implement the mandatory elements of ORS 215.441(1), but chose not to exercise its option under ORS 215.441(2) to amend the MCC to limit the approval standards that can be applied to places of worship.

Further, petitioners dispute the hearings officer's view of the relationship between ORS 215.441(1) and (2). As noted, the hearings officer understood ORS 215.441(1) to require that, if a county chooses to allow places of worship, the county "must allow the uses listed in ORS 215.441(1)(a)-(g) as a matter [of] right[.]" Record 43-44. If such activities must be allowed as a "matter of right," the hearing officer reasoned, that suggests that the legislature did not intend that counties could approve or deny such activities under discretionary conditional use standards such as the MCC 39.7515(A) Compatibility Standard. However, petitioners argue that ORS 215.441(1) does not treat the listed activities as a "matter of right," but rather provides that counties must allow "the *reasonable*

use of the real property for activities customarily associated with the practices of the religious activity[.]" (Emphasis added.) Petitioners contend that the qualifier "reasonable" suggests, if anything, that the legislature intended that counties retain their traditional authority to evaluate proposed places of worship under subjective or discretionary standards that are designed to mitigate adverse impacts on surrounding properties.

With respect to legislative history, petitioners argue that the legislative history in the record does not support the hearings officer's view that ORS 215.441(2) is intended to impliedly limit counties' authority to impose conditional use standards such as the MCC 39.7515(A) Compatibility Standard. While the introduced and early drafts of SB 470 included provisions that expressly restricted local governments' authority to apply conditional use standards to places of worship, petitioners argue that the *final* conference version of SB 470 that was adopted by the legislature removed all the express restrictions on county authority, apparently in response to strong opposition offered by cities, counties, the Department of Land Conservation and Development (DLCD), and land use program stakeholders such as League of Oregon Cities, 1000 Friends of Oregon, and League of Women Voters of Oregon, as well as some cities. Record 1000-1009.

The county responds that the hearings officer correctly concluded that ORS 215.441(2), read in context with ORS 215.441(1), prohibits the county from applying the MCC 39.7515(A) Compatibility Standard to the proposed mosque.

The county agrees with the hearings officer that, based on the language of ORS 215.441(1), the legislature intended to make religious uses and associated activities more-or-less "matters of right" in zones where such uses are allowed, and that ORS 215.441(2) would have no function if it did not operate to modify the effect of ORS 215.441(1). The county also argues that the legislative history in the record, particularly the testimony regarding the introduced and Senate-passed versions of SB 470, indicate that proponents and opponents both understood that SB 470 would severely restrict local governments' ability to apply conditional use standards to proposed places of worship to mitigate adverse effects.

Intervenors similarly argue that the hearings officer correctly understood ORS 215.441(1) to broadly sweep away existing county authority to impose conditional use approval standards on places of worship, and that ORS 215.441(2) operates to restore *some* of that lost authority - to allow counties to impose only a limited set of design review and similar standards and to prohibit places of worship only if public services are inadequate. Intervenors note that ORS 174.010 provides that statutes with multiple parts shall be construed, if possible, to give effect to all parts.[8] According to intervenors, petitioners'

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[8] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been

interpretation of ORS 215.441(2) would give that provision no independent effect.

As an additional contextual indication that the legislature intended ORS 215.441(1) to broadly sweep away counties' authority to impose conditional use standards, intervenors note that ORS 215.441(1)(f)(2017) excludes from the protection of that provision "private and parochial schools," which are instead subject to ORS 215.441(3). ORS 215.441(3) provides that:

> "Notwithstanding any other provision of this section, a county may allow a private or parochial school for prekindergarten through grade 12 or higher education to be sited under applicable state law and rules and local zoning ordinances and regulations."

In ORS 215.441(3), intervenors argue, the legislature provided that, notwithstanding the protections of ORS 215.441(1), schools customarily associated with a religious use are subject to applicable standards, presumably including conditional use standards, that would otherwise apply to the siting of schools. Intervenors argue that this context indicates that the legislature intended ORS 215.441(1) to completely exempt the religious uses and activities listed in ORS 215.441(1) from otherwise applicable land use regulations. In turn, intervenors argue, this context highlights the role that ORS 215.441(2) plays in *restoring* county authority to apply a limited set of land use standards, such as design review standards, that the broad scope of ORS 215.441(1) would

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> inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

otherwise prohibit the county from applying. Intervenors argue that the broad prohibitory character of ORS 215.441(1) is made clear by reading that provision together with ORS 215.441(2), which describes a limited set of land use standards that the legislature has deemed acceptable to apply to places of worship.

D. Statutory Analysis

Our task in determining the meaning of the applicable statutes is governed by the familiar three-step process described in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). The overriding objective of statutory construction is to determine the intent of the legislature. ORS 174.020(1)(a). The first step under *PGE* and *Gaines* is to examine the text and context of the statute, which are considered the best evidence of legislative intent. The second step is to examine relevant legislative history. *Gaines*, 345 Or at 171-72. If analysis of text, context and legislative history fails to resolve the statutory ambiguity, courts may resort to applicable canons of statutory construction. *PGE*, 317 Or at 612.

In our view, the legislature's intent regarding the existing authority of counties to impose conditional use and similar standards to places of worship when the statute was enacted is not clear from the text of ORS 215.441. Nothing in ORS 215.441(1) or (2), or elsewhere, expressly or unambiguously states that counties cannot, after enactment of the statute, apply conditional use or similar standards to approve or deny places of worship. The text of ORS 215.441(1)

simply states that if counties choose to allow nonresidential places of worship in some zones, counties shall also allow "the reasonable use of the real property for activities customarily associated with the practices of the religious activity," including seven listed activities. ORS 215.441(1)(2017) does not provide, at least expressly, that either places of worship or the seven listed activities are allowed outright, or that places of worship or associated activities are no longer subject to county authority to regulate under conditional use standards that are designed to prevent or mitigate adverse impacts on other land uses.

Similarly, ORS 215.441(2)(2017) states only that counties *may* (1) apply to places of worship and the seven listed activities reasonable regulations, *including* site or design review, concerning the physical characteristics of the use, or (2) prohibit or restrict places of worship if public services are inadequate to support the use. In ordinary usage, "shall" as used in a statute creates a mandatory duty, while "may" creates only authority to act. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Com'n*, 346 Or 415, 426-27, 212 P3d 1243 (2009). Nothing in ORS 215.441(2) states, at least expressly, that counties are prohibited from applying *other* approval standards.

In effect, the hearings officer, as well as the county and intervenor (together, respondents) read ORS 215.441(2) to include a significant, but implicit, qualifier: that counties may *only* apply the types of standards listed in section 2. Reading "only" into the text of ORS 215.441(2) arguably runs afoul of the statutory injunction "not to insert what has been omitted[.]" ORS 174.010.

In addition, there is nothing in the language of ORS 215.441(2) that suggests that in using the word "including," the legislature intended to limit the universe of regulations that the county "may" apply to places of worship to only the listed types of reviews, site review or design review, or similar. *See State v. Walker*, 192 Or App 535, 539-40, 86 P3d 690, *rev den*, 337 Or 327 (2004) (principle of *ejusdem generis* does not apply where a "list" included two general items stated in the disjunctive).

Granted, a literal reading of the text of ORS 215.441(2) arguably bumps up against another statutory injunction in ORS 174.010: to give effect, if possible, to all provisions of a statute. No party disputes that prior to the adoption of SB 470, counties and cities had the authority to apply conditional use and similar approval standards to places of worship, including subjective or discretionary standards such as the MCC 39.7515(A) Compatibility Standard. If ORS 215.441(2) has only the limited role of "re-authorizing" counties to apply to places of worship two types of regulations that counties already had the authority to apply, and has no other function, then it is not clear what independent effect can be given to ORS 215.441(2).

As respondents argue, ORS 215.441(1) and (2) must be read together, and in context with other related statutory provisions. Reading ORS 215.441(1) and (2) together strengthens the impression, already implicit in ORS 215.441(2), that the types of regulations identified in that code provision are intended to be the only types of land use regulations that counties are authorized to apply to places

of worship. The restrictive intent that is implicit in ORS 215.441(1) and (2) is further strengthened by the context offered by ORS 215.441(3). As intervenors argue, the legislature exempted private and parochial schools from the list of activities customarily associated with places of worship from the protections of ORS 215.441(1), and provided that private and parochial schools may be approved under whatever standards would otherwise apply to schools. ORS 215.441(3) suggests that the legislature intended that, where ORS 215.441(1) applies, county authority to regulate places of worship and associated activities is restricted in some way.

In sum, an analysis limited to the ambiguous text of ORS 215.441(1) and (2) could support the inference that the hearings officer found in the statute - that the legislature intended to eliminate county authority to apply land use regulations to places of worship (other than the regulations identified in ORS 215.441(2)).

However, in our view, the legislative history does not support respondents' interpretation of the relevant statutory provisions. Most of the legislative history that was introduced into the record and cited and relied on by the hearings officer and by respondents stems from the initial hearings before the Senate Natural Resources, Agriculture, Salmon and Water Committee, which considered the introduced version of SB 470. SB 470 *as introduced* broadly and expressly prohibited local governments from restricting the use of real property for

religious uses, with the exception of site review and design review standards. As introduced, SB 470, section 2 provided, in relevant part:

> "(2) Notwithstanding any statewide planning goals adopted under ORS chapters 195, 196 or 197 that are inconsistent with this section and except as provided in subsection (3) of this section, *a local government may not prohibit or restrict the use of real property for religious or educational purposes* if the real property is owned or leased by a governmental unit, a religious organization or a nonprofit educational organization.
>
> "(3) A local government may subject real property described in subsection (2) of this section to reasonable regulations concerning the physical characteristics of the authorized uses including, but limited to, site review and design review." (Emphasis added.)

In SB 470, as introduced, it is crystal clear that the proponents intended to eliminate all county authority to apply county land use regulations to the use of real property for religious purposes, with the exception of the authority to regulate the physical characteristics of the use.

However, as noted, there was considerable opposition to SB 470 as introduced, and the Senate committee ultimately replaced the entirety of SB 470, as introduced with a somewhat watered down version, based on the SB 470, - 9 Amendments (May 9, 2001). The Senate Committee on Natural Resources, Agriculture, Salmon and Water then adopted further amendments, which led to section 2, of SB 470, A-Engrossed (May 21, 2001), which provided:

"(1) If a church is allowed on real property under state law and rules and local zoning ordinances and regulations, a county may not:

"(a) Prohibit or unreasonably restrict the use of the real property for church buildings and facilities;

"(b) Prohibit or unreasonably restrict the use of the real property for activities customarily associated with a church, including worship services, religion classes, weddings, funerals, child care or meal programs, but not including private or parochial school education for prekindergarten through grade 12 or higher education; or

"(c) Impose approval standards, special conditions or procedures that have the effect, either in themselves or cumulatively, of discouraging the use of the real property for a church or activities customarily associated with a church.

"(2) A county may:

"(a) Subject real property described in subsection (1) of this section to reasonable regulations, including site review or design review, concerning the physical characteristics of the uses authorized under subsection (1) of this section; or

"(b) Prohibit or restrict the use of real property by a church if the county finds that the level of service of public facilities, including transportation, water supply, sewer and storm drain systems is not adequate to serve the church.

"(3) Subject to subsection (2) of this section and unless prohibited by state law or rule, if a church is not allowed outright under clear and objective criteria, *a county shall allow the church as a conditional use if the use will not have a significant adverse impact on the surrounding area.*" (Emphasis added.)

SB 470, A-Engrossed no longer eliminated all county authority to apply land use regulations to religious uses, with the exception of site and design review, but it severely restricted the types of land use standards counties could apply. The only conditional use standard expressly condoned by SB 470, A-Engrossed was a standard that required approval as long as the proposed church "will not have a significant adverse impact on the surrounding area." SB 470, A-Engrossed, section 2, subsection (3). The language that ultimately became ORS 215.441(2) (2001) first appeared in its current form in SB 470, A-Engrossed, section 2, subsection (3). In that context, that language appears to serve the function of granting back to counties authority to apply certain land use standards related to the physical characteristics of the use, such as site and design review, that might otherwise be restricted by other provisions of SB 470, A-Engrossed.

SB 470, A-Engrossed was referred to the House Rules, Redistricting and Public Affairs Committee. The House Committee report recommended the adoption of SB 470 A-Engrossed, which included with its -11 Amendment the addition of what is now ORS 215.441(3), concerning private and parochial schools.

A June 7, 2001 minority report proposed its own -12 amendments to SB 470, A-Engrossed, which became the Minority Report SB 470, B-Engrossed (June 7, 2001). These amendments were not, initially, included in the SB 470, B-Engrossed version adopted by the majority. Those amendments found their way into the final bill that emerged from the conference process. These minority

report amendments broadened the scope of the places of worship from "church" to the current language, which refers to "church, synagogue, temple, mosque, chapel or other nonresidential place of worship[.]" SB 470, Minority Report, B-Engrossed (June 7, 2001). In addition, the minority report's amendments appear to be the source of the language that replaced SB 470, B-Engrossed, section 2, subsection (1), and that was adopted in the final bill and codified at ORS 215.441(1) (2001). *Id.*

The measure then headed for the conference committee of the House and Senate, where it was significantly amended. The June 26, 2001 proposed conference committee (-13) amendments removed from the bill the only two subsections that expressly limited county authority to impose land use regulations on places of worship. Specifically, the conference committee eliminated the entirety of SB 470-B Engrossed Section 2, subsection (1), which explicitly limited county authority to impose certain land use standards on churches, and replaced it with the current language of ORS 215.441(1), which as noted above includes no express limitations on county authority to apply land use regulations and expanded the definition of places of worship, beyond churches. Further, the conference committee eliminated SB 470 B-Engrossed, Section 2, subsection (3), which as noted expressly required the county to allow a church as a conditional use if the church "will not have a significant adverse impact on the surrounding area." In other words, under SB 470 B-Engrossed, section 2, subsection (3), the county would have been required to allow a church as a conditional use unless

the county determined that the church would have a significant impact on the surrounding area, in which circumstance the county would not have been required to allow the church as a conditional use.

The legislative record does not include, and our research could not find, much legislative history of the conference amendments that so significantly changed the final version of SB 470.[9] But for whatever reason, it is clear that in adopting the final version of SB 470, the legislature chose not to adopt the only provisions in the proposed bill that proposed to *expressly limit* existing county authority to apply conditional use standards such as the MCC 39.7515(A) Compatibility Standard, to places of worship, and to replace that deleted language with provisions that include no such express prohibitions or restrictions on county authority to apply conditional use standards (or any land use regulations for that matter), to places of worship.

In our view, the foregoing legislative history undermines the hearings officer's interpretation of ORS 215.441, which is based on an inference, drawn

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[9] There are clues in (1) the July 2, 2001 staff measure summary for the SB 470-B* Conference Committee that describes the "Issues Discussed" in part as "Discussions with Governor's Office," and (2) the brief July 2, 2001 minutes of the conference committee, in which Senator Atkinson, a proponent of the original bill, advised the committee that he and Senator Shields had "worked with the Governor's office on the language of the amendment." Record 1042. Given those clues, it seems probable that discussions with the Governor's office resulted in the proposed conference committee (-13) amendments that substantially changed SB 470.

from ambiguous text and context, that the legislature intended to completely eliminate county authority to apply any land use regulations (other than those specified in ORS 215.441(2)) to places of worship. If we impute that inference to the legislature, it would effectively restore prohibitions and limitations on existing county authority that it is clear that the legislature, for whatever reason, deliberately eliminated from the final adopted version of SB 470. Indeed, so sweeping would be the effect of that imputed implication, it would not only restore the *partial* prohibitions and restrictions that were present in SB 470, B-Engrossed before those provisions' eventual elimination, but it would also effectively restore the *comprehensive* restrictions on county authority that were the main feature of SB 470, as introduced—comprehensive prohibitions that did not even survive the initial Senate hearings. We decline to read into the ambiguous terms of a statute a sweeping implication that would effectively restore express and comprehensive prohibitions and restrictions on county land use authority that, the legislative history makes clear, the legislature deliberately chose to remove from the final adopted version of the bill.

For the foregoing reasons, we conclude that the hearings officer misconstrued ORS 215.441 in concluding that the statute eliminates county authority to impose on places of worship land use regulations such as the MCC 39.7515(A) Compatibility Standard. The express language of ORS 215.441 does not compel that interpretation and, as explained, any inference to that effect that can be read into the text is fatally undermined by the legislative history.

The contrary interpretation—that ORS 215.441 does not impliedly restrict county authority to apply land use regulations to places of worship—is consistent with the express language of the statute, and consistent with the legislative history available to us. That interpretation does mean that ORS 215.441(2) has the effect that its plain language states: counties may apply to places of worship standards related to the physical characteristics of the use such as site review and design review, and may prohibit or restrict such uses if public services are inadequate. But our construction does not mean that the legislature intended ORS 215.441(2) to be "meaningless surplusage." *See State v. Clemente-Perez*, 357 Or 745, 755, 359 P3d 232 (2015) (observing that courts will generally assume that the legislature "did not intend any portion of its enactments to be meaningless surplusage"). Rather, giving effect to that language as written does not change, but rather memorializes the status quo, because counties generally have had and continue to have the authority to apply site design, design review and public service adequacy standards to places of worship. But for whatever reason, the legislature chose to retain section 2, subsection (2) of SB 470 in the final legislation, even though the legislature also chose to eliminate all the substantive prohibitions that, in earlier versions of the bill, gave Section 2, subsection (2) its only apparent independent function. The exact reasons for those legislative choices are not apparent from the available legislative history, but there seems little doubt that the legislature so chose.

To sum up, we agree with petitioners that the hearings officer erred in interpreting ORS 215.441(1) to impliedly eliminate all existing county authority to impose land use regulations on places of worship, other than the regulations identified in ORS 215.441(2).[10] While an implication to that effect could be inferred from the ambiguous language of ORS 215.441(1) and (2), that implication is not compelled by the language of the statute, and the available legislative history strongly indicates that, in the final bill, the legislature made deliberate choices to remove all language present in the introduced version of the bill that expressly prohibited existing county authority to apply land use regulations to places of worship. Properly interpreted to give effect to its express language, and in light of the legislative history, ORS 215.441(1) and (2) do not deprive the county of authority to apply the MCC 39.7515(A) Compatibility Standard to the proposed mosque.

The first assignment of error is sustained.

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[10] We disagree with petitioners' argument that counties have the option of either (1) continuing to apply conditional use and similar standards to places of worship, or (2) amending their land use codes to limit applicable approval standards to design review and other standards described in ORS 215.441(2). In our view, counties may continue to apply conditional use standards to places of worship and may also continue, without amending their land use codes, to limit applicable approval standards to standards that regulate the physical characteristics of the site, pursuant to ORS 215.441(2).

SECOND ASSIGNMENT OF ERROR

As noted, the hearings officer adopted alternative findings addressing the Compatibility Standard, and found, based on intervenors' analysis of the rural area surrounding the subject property zoned MUA-20, that the proposed mosque is consistent with the character of that rural area.[11] Additionally, the hearings

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[11] The hearings officer's findings state:

> "The applicant's findings (pages 46 through 64 of the applicant's narrative, Exhibits A.20 through A.23) include an analysis for the purpose of comparing the proposed development to residential developments in the surrounding rural area. The rural area surrounding the subject property consists of rural residences and small farms. The comparison provided by the applicant includes dwelling sizes and surrounding developed or cleared areas such as driveways and parking areas. Other lots are similarly sized with structures with a similar developed footprints. The comparison also shows similarity between the proposed masjid and the large dwelling neighboring the property to the west, which is over 5,900 square feet with the attached garage (Exhibit B.7). As discussed in the applicant's narrative, the site could be developed with a single-family residence that is larger than the proposed masjid structure. The parking area is similar to the extensive driveways, parking areas, and patios developed on other residential properties.
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> "In addition, as the applicant noted, religious buildings are often located in residential areas and are not *per se* incompatible. As noted in the legislative history of ORS 215.441, '[i]n Oregon, most churches are located in residential areas…religious institutions by their nature are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood.' P.4 of Exhibit 25. The fact that there are no existing religious buildings in the area does not make the proposed use incompatible. Such an interpretation would limit religious facilities to

officer found that the proposed mosque is also consistent with a larger area that includes urban development within the UGB to the south and west of the subject property.[12]

On appeal, petitioners argue that the hearings officer misconstrued the applicable law, and made a decision not supported by substantial evidence, in expanding the scope of the "area" evaluated under the Compatibility Standard to include urban areas within the UGB. Petitioners argue that, as a matter of law, the scope of the "area" that the hearings officer must evaluate is the "area" set out in the application materials, and the hearings officer has no authority to expand the scope of that area during the post-application proceedings. Petitioners

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neighborhoods where they already exist and prohibit them in neighborhoods where they do not. Any religious facility will generate more traffic, noise, and activity, etc., than a single-family residence. But that is true for the majority of conditional uses allowed in the MUA-20 zone. To limit the definition of 'compatible' to uses that have no more impact than a single-family residence would preclude the majority of conditional uses listed in MCC 39.370." Record 119-20.

[12] The hearings officer's findings continue:

"In addition, the plain language of the Code does not limit the 'area' to the surrounding rural zoned properties. The site is not located in an isolated rural area. As shown in Exhibit A.22, the site is in close proximity to the UGB, which contains a variety of more intensive uses, including two schools directly south of the site and another school to the northwest. Therefore, the hearings officer finds [the] proposed [mosque] is consistent with the character of the surrounding area." Record 120.

also argue that the hearings officer's legal error is not harmless, because the hearings officer's primary finding of consistency with the surrounding rural area is not supported by substantial evidence, and therefore the hearings officer's ultimate finding of compliance with the MCC 39.7515(A) Compatibility Standard rests solely on his erroneous expansion of the "area" to include urban lands within the UGB.

Respondents dispute, initially, that petitioners raised any issue regarding the size or scope of the study area during the proceedings below, and thus the issue raised in the second assignment of error is waived. ORS 197.763(1).[13] According to respondents, the application included information about both the rural lands immediately surrounding the subject property, and a larger area that included urban lands within the UGB. Respondents argue that petitioners could have objected to any consideration of the larger study area, but failed to do so during the proceedings below, and thus any objection is waived. Petitioners respond that the hearings officer's misconstruction of law did not become evident

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[13] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] 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."

until the final decision, when in his findings the hearings officer elected to evaluate both the rural study area and the larger study area including lands within the UGB. We agree with petitioners that, because the hearings officer apparently did not elect to evaluate both study areas until the final decision, petitioners had no reasonable notice of the alleged misconstruction of law during the proceedings below, and therefore have not waived the issue presented in this assignment of error.

On the merits, we reject petitioners' argument that, as a matter of law, the scope of "area" for purposes of the MCC 39.7515(A) Compatibility Standard is limited to the study area described in the application. As the hearings officer noted, and petitioners do not dispute, nothing in the MCC defines or prescribes the relevant study area for purposes of the MCC 39.7515(A) Compatibility Standard. If the hearings officer believes that the study area the applicant proposes for evaluation is insufficient in size or misleading regarding the actual character of the area, the hearings officer can explain why that is the case and articulate a different area for analysis. In that event, the hearings officer might risk procedural error if he failed to provide the parties an opportunity to present evidence and argument regarding consistency with the character of the study area the hearings officer selects for evaluation. However, in the present case, petitioners do not argue that the hearings officer committed procedural error, or argue that they had insufficient opportunity to address the evidence the hearings officer cited regarding the larger study area.

Finally, even if the hearings officer committed procedural or other error by adopting an alternative study area that includes nearby urban lands within the UGB, we agree with respondents that any such error is harmless, as long as the hearings officer's primary findings of compliance with the MCC 39.7515(A) Compatibility Standard, based on analysis of the rural lands immediately surrounding the subject property, are adequate and supported by substantial evidence. As discussed below under the third assignment of error, we reject petitioners' only focused challenges to the hearings officer's primary findings of compliance with the MCC 39.7515(A) Compatibility Standard, based on analysis of the rural area immediately surrounding the subject property.

Accordingly, petitioners' arguments under the second assignment of error do not provide a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The hearings officer adopted specific findings addressing traffic and noise generation, and concluded that, as conditioned, neither traffic nor noise impacts on nearby residential uses renders the proposed mosque inconsistent with the character of the area.[14] In prefatory findings quoted above at n 11, the hearings officer observed that:

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[14] The hearings officer's findings include:

"Any religious facility will generate more traffic, noise, and activity, etc., than a single-family residence. But that is true for the majority of conditional uses allowed in the MUA-20 zone. To limit the definition of 'compatible' to uses that have no more impact than a single-family residence would preclude the majority of conditional uses listed in MCC 39.370." Record 120.

On appeal, petitioners argue that in the above-quoted finding the hearings officer misconstrued the MCC 39.7515(A) Compatibility Standard, to reject any comparison of the traffic and noise impacts generated by the proposed mosque with that of impacts generated by residential uses. We understand petitioners to argue that the MCC 39.7515(A) Compatibility Standard requires a comparison

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"The hearings officer adopts the following additional findings regarding the specific impacts noted by the opponents:

"Noise
"The proposed [mosque] will not generate significant noise. With the exception of vehicle parking, all activities will take place inside a fully enclosed building. The use does not include any playgrounds, courtyards, or other outdoor gathering places. The use will generate some noise from vehicles maneuvering on the site, opening and closing of car doors, and people walking between their vehicles and the building. But such noise impacts do not make the use incompatible.

"Traffic
"The [mosque] will generate additional traffic on area roads. However, as discussed in Section 11.0 below, that traffic will not exceed the capacity of area streets or create a hazard. The applicant's traffic analysis was based on a worst case scenario that assumed one person per vehicle. Even if the [mosque] generated double the amount of traffic assumed in the applicant's analysis, the affected intersections would continue to operate a Level of Service (LOS) B or better (Exhibit J.6)." Record 120.

of the traffic and noise impacts of the proposed conditional use with the traffic and noise impacts generated by a single-family dwelling, and that the standard is not met if the record shows that the proposed use will generate significantly more traffic or noise impacts compared to a single-family dwelling.

Petitioners concede that they did not raise their interpretation of the MCC 39.7515(A) Compatibility Standard as an issue during the proceedings below, but argue that the "issue" of the hearings officer's alleged misconstruction of law did not appear until the final decision, and thus petitioners have not waived their ability to challenge that alleged misconstruction of law on appeal. The county and intervenors respond that petitioners' failure below to raise their "impact comparison" theory to the hearings officer means that they waived the right to advance that theory as an issue on appeal, pursuant to ORS 197.763(1). Respondents note that in the application intervenors presented a multi-factor analysis explaining their position that the proposed mosque is consistent with the character of the area. Record 490. The hearings officer applied a similar, multi-factor approach that considered, among other things, traffic and noise generation. Respondents contend that had petitioners argued below for a different test, focused on a rigorous "impact comparison" between the impacts generated by a mosque and a typical single-family dwelling, the hearings officer and other parties would have had the opportunity to address that theory during the proceedings below and in the findings.

We agree with respondents that ORS 197.763(1) obligated petitioners to raise their theory of compliance below, in order to preserve that issue on appeal. The text of the MCC 39.7515(A) Compatibility Standard does not compel any particular approach, and if petitioners believed that their "impact comparison" approach is the only way to establish compliance with the MCC 39.7515(A) Compatibility Standard, it was incumbent on petitioners to raise that approach as an issue during the proceedings below, so the hearings officer and the parties could respond to it.

Even if the issue were not waived, and an interpretational challenge to the above-quoted finding can be raised in this appeal, we agree with respondents that the hearings officer did not err in rejecting any application of the MCC 39.7515(A) Compatibility Standard that would deny a religious facility or other community service use on the sole grounds that the use generates more traffic or noise than a typical single-family residence. As the hearings officer observed, almost any religious facility or community service use allowed as a conditional use in the MUA-20 zone will generate more traffic and traffic-related noise than a typical single-family dwelling. Therefore, an application of the MCC 39.7515(A) Compatibility Standard that would determine compliance based solely or primarily on whether such impacts of community service uses exceed those generated by a single-family dwelling, or other use predominant in the relevant area, would make it very difficult for any community service use to gain approval. The county governing body, in adopting the MUA-20 zone and the

MCC 39.7515(A) Compatibility Standard, was presumably aware that community service uses typically and ordinarily generate more traffic and similar impacts than residential uses. It is doubtful that the governing body intended to categorically exclude otherwise typical and ordinary community service uses from the MUA-20 zone.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The hearings officer addressed parking issues under the MCC 39.7515(A) Compatibility Standard, as well as under MCC 39.7515(F), which requires a finding that the proposed use "[w]ill not create hazardous conditions." *See* n 2. The hearings officer found that the proposed 67 permanent parking spaces, plus an additional 17 grass surface "overflow" parking spaces, would accommodate all anticipated parking demands, including special events. The findings identify two conditions of approval intended to ensure that the use does not exceed parking demand. The first is Condition 15, limiting attendance to a maximum of 300 persons. The second is Condition 14, which states:

> "In the event vehicle parking [demand] on the site exceeds the available capacity, the applicant shall deploy flaggers at the intersection of NW Springville Road and NW Springville Lane to inform attendees that parking is unavailable and deny them entry to the site." Record 32.

In support of that condition, the hearings officer found:

> "[I]n the unlikely event that parking demand exceeds supply, the applicant can be required to utilize flaggers to inform attendees that

> the site is at capacity and turn them away before they turn onto NW Springville Road. As conditioned, parking on site will not create conflicts with the character of the area." Record 46.

Similarly, under MCC 39.7515(F), the hearings officer found:

> "Opponents argued that the proposed parking supply is inadequate to accommodate actual demand. Therefore, vehicle traffic will back up onto NW Springville Lane and NW Springville Road, creating a hazard. However, * * * the hearings officer finds that adequate parking will be provided to serve the site. In addition, the applicant proposed to utilize traffic flaggers at the site entrance to prohibit right turns onto NW Springville Lane, limiting traffic on the underimproved section of this road. In the unlikely event the parking lot is full, the same flaggers can inform drivers of that fact and turn them away before they enter the parking lot or even turn onto NW Springville Lane. A condition of approval is warranted to that effect." Record 50.

In their fourth assignment of error, petitioners argue there is no evidence or findings in the record establishing that Condition 14 is a feasible means of ensuring that parking demand does not exceed on-site capacity. Petitioners argue that utilizing flaggers requires more than stationing individuals to turn away traffic, but rather flaggers require a certified professional license with permits from the county and appropriate training, which Condition 14 does not require. In addition, petitioners argue that there is no evidence in the record that there is sufficient turning room at the intersection of NW Springville Road and NW Springville Lane, for vehicles turned away from the site to turn around.

Respondents respond, initially, that petitioners raised no objections below to the applicant's proposals to use flaggers to manage traffic and parking issues, and therefore petitioners have not preserved the right to challenge Condition 14.

We disagree with respondents. Petitioners raised below various issues regarding parking and traffic hazards, but are not required to anticipate exactly what conditions or mitigations the hearings officer would impose to address those issues, in order to preserve the ability to challenge the wording or feasibility of the conditions imposed. *Fernandez v. City of Portland*, 73 Or LUBA 107, 113, *aff'd*, 278 Or App 873 (2016).

On the merits, however, we agree with respondents that petitioners have not demonstrated any insufficiency in the record or findings supporting Condition 14. Petitioners speculate that flaggers require special training and permits, but cite no evidence or authority to that effect. Even if we assume that training and permits are required by other laws, petitioners have not established that Condition 14 must duplicate those legal requirements, in order to adequately ensure compliance with the applicable standards.

Petitioners also speculate that some vehicles informed that no parking is available will attempt to turn around within the intersection of NW Springville Road and NW Springville Lane, which petitioners speculate may be an unsafe or inconvenient maneuver. However, petitioners cite no evidence to support those speculations. We disagree with petitioners that the record and findings are insufficient because there is no evidence in the record to disprove a speculative adverse possibility for which there is, in turn, no evidence in the record.

The fourth assignment of error is denied.

The county's decision is affirmed.