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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2021-053

FINAL OPINION
AND ORDER

Appeal from Lane County.

Charles W. Woodward IV filed the petition for review and reply brief and argued on behalf of petitioner.

H. Andrew Clark filed the response brief. Also on the brief was Sara L. Chinske. Sara L. Chinske argued on behalf of respondent.

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

ZAMUDIO, Board Chair, dissenting.

REMANDED 11/09/2021

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer decision approving a temporary hardship dwelling.

BACKGROUND

Statewide Planning Goal 3 (Agricultural Lands) is "[t]o preserve and maintain agricultural lands." ORS 215.203 implements Goal 3 and provides that land may be zoned for exclusive farm use (EFU) and that lands within EFU zones shall be used exclusively for farm use except as provided in ORS 215.213, ORS 215.283, or ORS 215.284.

ORS 215.213(1) sets out the uses that are allowed in EFU zones in marginal lands counties.[1] Those uses include:

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[1] We have explained:

> "In 1983, the legislature authorized [the Land Conservation and Development Commission] to promulgate administrative rules to allow counties to designate 'marginal lands,' if those lands met certain criteria set out in the 1983 legislation. Lane County is one of two Oregon counties that designated some of its lands as marginal lands (hereafter marginal lands counties). The other 34 Oregon counties (hereafter non-marginal lands counties) did not designate any lands as marginal lands under the 1983 legislation before the legislature repealed that authorization in 1993.
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> "* * * [T]he uses authorized on EFU-zoned lands in marginal lands counties are generally set out in subsections of ORS 215.213, whereas the uses authorized on EFU-zoned lands in non-marginal lands counties are generally set out in subsections of ORS 215.283.

"(d) A dwelling on real property used for farm use if the dwelling is occupied by a relative of the farm operator or the farm operator's spouse * * *, if the farm operator does or will require the assistance of the relative in the management of the farm use and the dwelling is located on the same lot or parcel as the dwelling of the farm operator.

"* * * * *

"(f) * * * [P]rimary or accessory dwellings customarily provided in conjunction with farm use. * * *

"* * * * *

"(i) One manufactured dwelling or recreational vehicle, or the temporary residential use of an existing building, in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or a relative of the resident. Within three months of the end of the hardship, the manufactured dwelling or recreational vehicle shall be removed or demolished or, in the case of an existing building, the building shall be removed, demolished or returned to an allowed nonresidential use. The governing body or its designee shall provide for periodic review of the hardship claimed under this paragraph. A temporary residence approved under this paragraph is not eligible for replacement under paragraph (q) of this subsection."[2]

The regulation of dwellings under ORS 215.213 was intended to be slightly more restrictive than under ORS 215.283, as the *quid pro quo* for more liberal allowance for dwellings on designated marginal lands under ORS 215.317." *Landwatch Lane County v. Lane County*, 70 Or LUBA 325, 329 (2014) (footnotes omitted) (citing Or Laws 1983, ch 826, §§ 2, 16; Edward Sullivan & Ronald Eber, *The Long and Winding Road: Farmland Protection in Oregon 1961-2009*, 18 San Joaquin Agric L Rev 22, 32 (2009)).

[2] ORS 215.213(1)(q) authorizes the "[a]lteration, restoration or replacement of a lawfully established dwelling, as described in ORS 215.291."

The seven-acre subject property is zoned Exclusive Farm Use 40-acre minimum (E-40), a zone which implements Goal 3. Three households currently occupy the subject property, which we refer to below as MD1, MD2, and the RV.

MD1 is the primary dwelling on the subject property. It is a manufactured home, and it has existed in some form on the property since at least 1984. MD2 is also a manufactured home, and it was placed on the property in 1984 as a temporary hardship dwelling. In 1990, the county approved conversion of MD2 from a temporary hardship dwelling to a permanent relative farm help dwelling. The subject property is not currently in farm use, and MD2 is not currently occupied by farm help. MD1 and MD2 are now occupied by tenants. The subject property is owned by a trust whose trustees have lived on the property in some manner since 1984.[3] Between 2003 and 2007, the trustees occupied MD1 full time. In 2007, the trustees moved into the RV, a recreational vehicle. "Between 2007 and 2010, the [trustees] spent winters in Mexico, but otherwise lived in the RV on the property. Between 2010 and two years ago, they wintered in Arizona. For the past two years, the [trustees] have lived continuously in the RV on the property." Record 3.

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[3] Steven and Joyce Ray are the trustees of the Ray Family Trust, owner of the subject property. Steven and Joyce Ray and Joyce Ray's mother purchased the property in 1984. MD2 was initially utilized for the care of Joyce Ray's father. The primary dwelling burned down in 2003 and was replaced with the manufactured home referred to herein as MD1. Record 3.

On July 1, 2020, the county issued an enforcement letter advising the trustees that their full-time occupancy of the RV was in violation of the county code and directing them to cease their on-site occupancy of the RV. In response to the enforcement letter, the trustees applied for approval of the RV as a temporary hardship dwelling pursuant to ORS 215.213(1)(i) and the county's implementation of that statute at Lane Code (LC) 16.212(8)(c), with one of the trustees to receive medical assistance from a tenant occupying MD2.[4] On January 21, 2021, the planning director approved the application. On February 2, 2021, petitioner appealed the planning director approval. On February 25, 2021, the hearings officer held a hearing on the appeal. On April 5, 2021, the hearings officer issued their decision approving the occupancy of the RV as a temporary hardship dwelling.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

LC 16.212(8)(c) implements ORS 215.213(1)(i) and authorizes the use of one recreational vehicle "in conjunction with an existing dwelling as a temporary use for the term of the hardship suffered by the existing resident or relative."[5]

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[4] The hearings officer's decision refers to the approval of a "temporary medical hardship dwelling" and we refer to the approved residence as a "temporary hardship dwelling" in the majority opinion.

[5] LC 16.212(8)(c) provides:

"(i) One manufactured dwelling, or one recreational vehicle, or the temporary residential use of an existing building may be allowed in conjunction with an existing dwelling as a temporary use for the term of the hardship suffered by the existing resident or relative, subject to the following:

"(aa) The hardship dwelling must use the same subsurface sewage disposal system used by the existing dwelling, if that disposal system is adequate to accommodate the additional dwelling. If the hardship dwelling will use a public sanitary sewer system, such condition will not be required;

"(bb) Approval of a temporary hardship dwelling is valid until December 31st of the year following the year the original permit approval. The county shall review the permit authorizing such hardship dwelling every two years; and

"(cc) Within 90 days of the end of the hardship, the manufactured dwelling or recreational vehicle must be removed or demolished. In the case of an existing building, the building must be removed, demolished, or returned to an allowed nonresidential use.

"(ii) A temporary residence approved under this Section is not eligible for replacement under Section (6). Department of Environmental Quality review and removal requirements also apply.

"(iii) As used in this Section 'hardship' means a medical hardship or hardship for the care of an aged or infirm person or persons."

Petitioner's first assignment of error is that the hearings officer's interpretation of LC 16.212(8)(c) is inadequate for review or, if adequate for review, is incorrect.

We will reverse or remand a decision that improperly construes the law. ORS 197.835(9)(a)(D). Because LC 16.212(8)(c) implements state law, we review the hearings officer's interpretation for legal correctness. *Jordan v. Columbia County*, 42 Or LUBA 341, 344-45 (2002) (citing *Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241 (1992)). In construing the law, we will consider the text and context of the law at issue to determine the intent of the enacting legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). We are required to correctly interpret the legislature's intent, independently of the parties' arguments. *See* ORS 197.805 (providing the legislative directive that LUBA "decisions be made consistently with sound principles governing judicial review"); *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) ("In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties.").

A. First Subassignment of Error

LC 16.212(8)(c), ORS 215.213(1)(i), and OAR 660-033-0130(10) contain similar language governing temporary hardship dwellings on EFU land.[6] The hearings officer found:

> "Neither the code language, the statute, nor the administrative rule make clear whether the 'resident' requirement refers to a resident of the subject property, subject tract, or of the 'existing dwelling' in conjunction with which the temporary dwelling will be approved. Admittedly, a strict reading of the code could support the requirement that the person with the medical hardship must be a resident of the existing permanent dwelling. Such a reading, the Hearings Official believes, although reasonable, would be unreasonably restrictive, especially in this case. The [trustees] own the property, they have lived on the property since 1984, and in the RV since 2007. The record supports that they use the permanent dwelling address (93678 Dorsey Lane) as their permanent mailing address. The [trustees] have testified that they also use the 93678 address. The subject application is an attempt to rectify a noncompliant situation, and an overly strict reading of the code in this regard would preclude the [trustees] from coming into compliance. For these reasons, the Hearings Official believes that

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[6] OAR 660-033-130(10) provides, in part:

> "Temporary residence for the term of the hardship suffered by the existing resident or relative as defined in ORS chapter 215. As used in this section 'hardship' means a medical hardship or hardship for the care of an aged or infirm person or persons. 'Hardship' also includes a natural hazard event that has destroyed homes, caused residential evacuations, or both, and resulted in an Executive Order issued by the Governor declaring an emergency for all or parts of Oregon pursuant to ORS 401.165, et seq. A temporary residence approved under this section is not eligible for replacement under ORS 215.213(1)(q) or 215.283(1)(p)."

the 'resident' requirement is satisfied."[7] Record 5-6 (citation omitted).

Petitioner first argues that the hearings officer's interpretation is inadequate for review. In evaluating whether the trustee who was identified as the party to receive medical assistance was an "existing resident," the hearings officer relied on the dictionary definitions of "resident" as "one who resides in a place" and "one who dwells in a place for a period of some duration." Record 5. According to petitioner, a future applicant is unable to discern from the decision what, if any, constraints exist on the location and duration of the required residency.

A hearings officer's interpretation is inadequate for review where the hearings officer does not explain why the application is or is not consistent with applicable law. The hearings officer found that the trustee had lived on the property for many years and for various amounts of time each year, and the hearings officer clearly interpreted that as sufficient to establish residency.[8] Nothing in the hearings officer's interpretation indicates that they believed a

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[7] The hearings officer correctly noted that the plain language of the governing regulations do not expressly state where "the existing resident" must reside. Based upon the record, we believe the hearings officer intended to find that the trustees use both MD1 and MD2 as mailing addresses.

[8] As we have explained, LC 16.212(8)(c) implements ORS 215.213(1)(i). That statute does not specify the length of the required residency, and the hearings officer was not required to impose a time restriction.

minimum term of residency applied. That interpretation is adequate for review with respect to petitioner's challenges as to the length of the required residency.

As to the location of the required residency, the hearings officer found that the trustee's occupancy of the RV established the trustee as an "existing resident." The hearings officer concluded that the occupancy of the RV was adequate because the trustee lived in the RV on the subject property, regardless of whether that occupancy complied with the county code. The interpretation is clear, it is not conclusory, and it is adequate for review.

The first subassignment of error is denied.

B. Second Subassignment of Error

Petitioner next argues that the hearings officer's interpretation, if adequate for review, is incorrect. We address the components of petitioner's challenges to the hearings officer's interpretation below.

1. Relationship Between Caregiver and Care Receiver

Petitioner argues that LC 16.212(8)(c) requires that the caregiver and the person suffering the hardship be related to each other. Petition for Review 14. First, that proffered interpretation is not supported by the language of LC 16.212(8)(c) or the statute that it implements, ORS 215.213(1)(i). A temporary hardship dwelling may be established on EFU land as a temporary use for the term of a hardship suffered by the existing resident or a relative of the resident. That is, the person suffering the hardship must be either an existing resident or a relative of a resident. Nothing in the language of the temporary hardship dwelling

provisions requires that the caregiver and the person receiving care be related to each other. For example, LC 16.212(8)(c) does not prevent the existing resident's relative, who is suffering a hardship, from living in an existing dwelling with the existing resident and receiving care from a nonrelative resident of the temporary hardship dwelling. Rather, the plain language of the code provision leaves the existing resident with the flexibility to determine how to utilize the temporary hardship dwelling to address the hardship. Accordingly, the hearings officer did not misconstrue the code provision in concluding that the nonrelative resident of MD2 may be the caregiver.

According to petitioner,

> "LC 11.120(2), which enumerates the criteria for permits of recreational vehicles that are used as temporary medical hardship dwellings, provides that the 'temporary [recreational vehicle] may be used by the family member providing the care and the person receiving the care may reside in the principal dwelling.' Taken in conjunction with LC 16.212(8)(c), the Code clearly only contemplates two scenarios as qualifying for a temporary medical hardship dwelling: 1) the resident of an existing dwelling suffers a medical hardship and a family member is going to inhabit the temporary dwelling; or 2) a relative of a resident of an existing dwelling suffers a medical hardship and will inhabit the temporary dwelling so that the resident of the existing dwelling may administer care." Petition for Review 13 (quoting LC 11.120(2)(f) (brackets in Petition for Review)).

Because temporary hardship dwellings are allowed pursuant to ORS 215.213(1), the county may not impose greater restrictions than those found in state law.[9] *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995) (counties may not subject uses allowed outright on EFU-zoned property under state statute to local criteria that are more stringent than those set forth in state law). Petitioner has not identified a source of authority in state law for applying LC 11.120(2) to recreational vehicles.[10] In addition, although LC 11.120(2) is titled "Temporary Manufactured Home or Recreational Vehicle," it does not actually purport to regulate recreational vehicles.[11] LC 11.120(2) provides:

> "Upon receiving satisfactory evidence that a hardship exists within a family in that a family member is suffering either physical or mental impairment, infirmity, or is otherwise disabled and must be near another family member to receive adequate care, a Temporary Manufactured Home Permit may be issued, subject to the following.
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> "(a) All initial permits will expire on December 31 of the year following original Permit issuance. Permit renewals will be valid for a two-year period or until the hardship ceases, whichever occurs first.

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[9] In non-marginal lands counties, temporary hardship dwellings are allowed pursuant to ORS 215.283(2), and non-marginal lands counties may therefore impose restrictions above and beyond those established by the state.

[10] We note, however, that some elements of LC 11.120(2) mirror restrictions on *manufactured homes* found in OAR 660-033-0130(10).

[11] LC 1.005.030 provides that "[t]he titles of the several sections of this Code are intended as descriptions to indicate the contents of the section and shall not be deemed as a part of the section."

"(b) The manufactured home must be connected to a sewage system serving an existing dwelling or manufactured home on the same lot, said system to meet requirements of DEQ for personal hardship connections.

"(c) Satisfactory evidence of family member disability must be in the form of a written communication from the disabled person's physician, therapist, or other professional counselor.

"(d) For the purposes of issuing a Temporary Permit, the location of a manufactured home on a lot will not be considered a separate dwelling site and the lot area, frontage, and access requirements of LC Chapters 10, 13, and 15 will not apply. Setbacks must be in accordance with LC 15.095, 'Building Setback Line Chart.'

"(e) Temporary manufactured home hardship permits will, in addition to the requirements of this subsection, be subject to all regulations set forth in LC Chapter 11(1)(b)(c)(d)(e).

"(f) *For the purpose of this subsection, the temporary manufactured home may be used by the family member providing care and the person receiving care may reside in the principal dwelling.* (Emphasis added.)

By its terms, the language that petitioner references to support a familial relationship requirement relates to manufactured homes. LC 11.035 defines "manufactured home" as "[a] structure constructed for movement on the public highway that has sleeping, cooking and plumbing facilities, is intended for residential purposes, and is identified by the manufacturer as a manufactured home and *not as a recreational vehicle*."[12] (Emphasis added.) Furthermore, LC

[12] LC 11.035 defines "recreational vehicle" "[a]s defined in ORS 174.101 and for purposes of this section, a structure designed to be mounted upon a vehicle,

11.120 provides, in part, "Recreational vehicles must be used only for temporary recreational, medical hardship, or emergency use, in accordance with provisions of LC 11.120(3)," rather than LC 11.120(2).[13] The language cited by petitioner is not applicable.

2. Former Approval of MD2 as a Relative Farm Help Dwelling

Petitioner also argues that, because MD2 was previously approved as a relative farm help dwelling, it may not be occupied by the caregiver. The hearings officer found:

> "The applicable statute, and [LC] provision, that authorized the farm help dwelling did not contain a provision that required that the dwelling be occupied forever as a farm help dwelling. Once the demonstration was made that a farm help dwelling was justified, the dwelling was constructed, and there is no continuing obligation that the occupant always be for the housing of farm help or of a relative of the main dwelling." Record 6.

LC 16.212(8)(c)(i)(cc) and ORS 215.213(1)(i) require the removal or repurposing of a temporary hardship dwelling within three months of the end of

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which may or may not be permanently attached thereto." ORS 174.101(3) defines "recreational vehicle" as "a vehicle with or without motive power that is designed for use as temporary living quarters and as further defined by rule by the Director of Transportation."

[13] Petitioner's only references to LC 11.120(3) state (1) that that subsection, which "outlines the requirements for Recreational Vehicle Permits, * * * fails to identify or characterize the inhabitant as a 'resident'" and (2) that "the [trustees] never applied for an emergency permit" under that subsection. Petition for Review 12 n 4, 20.

the hardship, so the legislature knows how to enact such a requirement when that is its intent. *See State v. Bailey*, 346 Or 551, 562, 213 P3d 1240 (2009) ("Generally, when the legislature includes an express provision in one statute and omits the provision from another related statute, we assume that the omission was deliberate."). We agree with the hearings officer that the applicable code provision and statute do not require the removal of a relative farm help dwelling or restrict its use or occupancy once it is sited.

3. Occupancy of the RV to Establish Residency

Again, ORS 215.213(1)(i) authorizes on EFU land the placement of "[o]ne manufactured dwelling or recreational vehicle, or the temporary residential use of an existing building, in conjunction with an existing dwelling as a temporary use for the *term of the hardship suffered by the existing resident or a relative of the resident*."[14] (Emphasis added.) The hearings officer explained that they could interpret the statute narrowly to require that the trustee reside in one of the

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[14] For purposes of ORS chapter 215, "'[r]ecreational vehicle' means a vehicle with or without motive power that is designed for use as temporary living quarters and as further defined by rule by the Director of Transportation." ORS 174.101(3); ORS 215.010(5); ORS 446.007(9). For purposes of ORS chapter 215, a "manufactured dwelling" means "a residential trailer, mobile home or manufactured home" and "[d]oes not include any building or structure constructed to conform to the State of Oregon Structural Specialty Code or the Low-Rise Residential Dwelling Code adopted pursuant to ORS 455.100 to 455.450 and 455.610 to 455.630 *or any unit identified as a recreational vehicle by the manufacturer*." ORS 446.007(3) (emphasis added). In sum, a recreational vehicle is not a type of manufactured dwelling.

existing dwellings (*i.e.*, MD1 or MD2), as opposed to the RV, but that doing so would prevent the trustees from solving their land use dilemma and, therefore, be unreasonably restrictive. The hearings officer went on to opine that it would be particularly unreasonable in this case, given the trustees' ownership and historic use of the property.

We must interpret statutes governing the scope of non-farm uses allowed in EFU zones, "to the extent possible, as being consistent with the overriding policy of preventing 'agricultural land from being diverted to non-agricultural use.'" *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 555, 773 P2d 779 (1989) (quoting *Hopper v. Clackamas County*, 87 Or App 167, 172, 741 P2d 921 (1987), *rev den*, 304 Or 680 (1988)). ORS 215.213(1)(i) requires that the hardship be "suffered by the *existing* resident" or their relative. (Emphasis added.) We agree with petitioner that the relevant residency is that which exists at the time of the application review and that the trustee's past occupancy MD1 is not relevant for purposes of this analysis. Moreover, we agree with petitioner that the applicable criteria do not include avoiding restrictions that the hearings officer concludes are "unreasonable" or facilitating the resolution of code violations.

The dictionary defines "resident" to include "one who *resides in a place* **:** one who dwells in a place for a period of some duration – often distinguished from *inhabitant*." *Webster's Third New Int'l Dictionary* 1931 (unabridged ed

2002) (first emphasis added; second emphasis in original).[15] We must therefore determine the meaning of both "reside" and "place" for purposes of ORS 215.213(1)(i).

We begin with identifying the required "place." The operative code provision and statute do not expressly specify *where* "the existing resident" must reside. The hearings officer observed that "[n]either the code language, the statute, nor the administrative rule make clear whether the 'resident' requirement refers to a resident of the subject property, subject tract, or of the 'existing dwelling' in conjunction with which the temporary dwelling will be approved." Record 5. The hearings officer concluded that it was sufficient that the trustees occupy the RV on the subject property. We disagree. We conclude that, to qualify as an "existing resident" for purposes of the temporary hardship dwelling provisions, a person must reside in an existing dwelling as opposed to simply occupying the subject property in a recreational vehicle.

Petitioner argues that other accessory dwellings permitted in LC 16.212(8)(a) and (b) provide context supporting the conclusion that a person must

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[15] LC 16.090 provides, in part:

> "Terms not defined in this section will have their ordinary accepted meanings within the context in which they are used. Webster's Third New International Dictionary of the English Language, Unabridged, Copyright 1981, Principal Copyright 1961, will be considered a standard reference for defining the meanings of terms not defined in this section or elsewhere in [the LC]."

live in an existing dwelling to qualify as an "existing resident." *PGE*, 317 Or at 611 ("[T]he context of the statutory provision at issue * * * includes other provisions of the same statute and other related statutes." (Citing *Southern Pacific Trans. Co. v. Dept. of Rev.*, 316 Or 495, 498, 852 P2d 197 (1993); *Sanders v. Oregon Pacific States Ins. Co.*, 314 Or 521, 527, 840 P2d 87 (1992).)). Because the local provisions must be interpreted in a manner consistent with state law, and because the county may not impose restrictions that are more stringent than those the state has established for ORS 215.213(1) uses, we direct our attention to the corresponding sections of state law.

LC 16.212(8)(a) implements ORS 215.213(1)(f), ORS 215.278, and OAR 660-033-0130(24). Those provisions apply to accessory farm dwellings established for farmworkers whose assistance is needed by the farm operator on a "farm unit," that is, "the contiguous and noncontiguous tracts in common ownership used by the farm operator for farm use as defined in ORS 215.203." ORS 215.278(2)(a). OAR 660-033-0130(24)(a)(B) sets out the required locational relationship between the accessory farm dwelling and the primary farm dwelling.

LC 16.212(8)(b) implements ORS 215.213(1)(d) and OAR 660-033-0130(9). Those provisions apply to relative farm help dwellings for farmworkers who are related to and whose assistance is needed by the farm operator. They also identify the required locational relationship between the relative farm help

dwelling and the farm operator dwelling: both must be "located on the same lot or parcel." ORS 215.213(1)(d); OAR 660-033-0130(9)(b).

ORS 215.213(1)(f), ORS 215.213(1)(d), and related provisions govern two types of accessory dwellings on EFU land and identify the locations in which those dwellings are allowed relative to other dwellings and the underlying lot or parcel. Conversely, ORS 215.213(1)(i) and OAR 660-033-0130(1), which apply to temporary hardship dwellings, do not specify a particular lot or parcel. Rather, the statute allows "[*o*]*ne* manufactured dwelling or *recreational vehicle*, or the temporary residential use of an existing building, *in conjunction with an existing dwelling* as a temporary use *for the term of a hardship suffered by the existing resident or a relative of the resident*." (Emphases added.)

When construing a statute, we are directed 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 inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." ORS 174.010. Despite the legislature's clear ability to expressly state when an accessory dwelling must be sited *on the same lot or parcel* as the primary dwelling—as it did in the relative farm help dwelling provision at ORS 215.213(1)(d)—the legislature did not do so in the temporary hardship dwelling provision at ORS 215.213(1)(i). Nothing in the text of the statute references the underlying lot or parcel, and the hearings officer improperly inserted what had been omitted when they determined that living on the subject property is

sufficient for someone to qualify as "the existing resident." The only place that is *required* to exist at the time of the application for a temporary hardship dwelling is "an existing dwelling." We conclude that, giving effect to all the provisions, a person must reside in "an existing dwelling" to qualify as "the existing resident." It is notable that the phrase "the existing resident" in the temporary hardship dwelling provision parallels the phrase "an existing dwelling." This further indicates that "the existing resident" is the resident of the *dwelling* with which the temporary hardship dwelling must be used in conjunction.

The county does not argue that the RV is "an existing dwelling," and we conclude that it is not.[16] For purposes of ORS chapter 215, a "unit identified as a

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[16] We are not cited to a definition of "dwelling" in the Oregon Revised Statutes. LC 16.090(71) defines "dwelling" as

> "[a] building or portion thereof which is occupied as a residence or sleeping place, either permanently or temporarily, *but excluding* hotels, motels, auto courts, guest houses, and *camping vehicles*. Where the term, 'dwelling,' is used in [LC] Chapter 16, it shall mean a single-family dwelling or manufactured home unless otherwise noted." (Emphases added.)

OAR 660-033-0130(24)(e) provides that, for purposes of that rule "'accessory farm dwelling' includes all types of residential structures allowed by the applicable state building code." The state building code governs

> "the construction, reconstruction, alteration and repair of buildings and other structures and the installation of mechanical devices and equipment therein * * *. The state building code shall establish uniform performance standards providing reasonable safeguards for

recreational vehicle by the manufacturer" is not a "manufactured dwelling" but, rather, a "manufactured structure." ORS 446.007(3), (4).

The dictionary defines "resident" as "one who resides" and "reside," in part, as "to have an abiding place." *Webster's* at 1931. "Abiding" is defined as "continuing or persisting in the same state without changing or diminishing : CONTINUING, ENDURING." *Id.* at 3. ORS 215.213(2)(e) provides that marginal lands counties may conditionally allow private campgrounds on EFU land. "A campground is an area devoted to overnight temporary use for vacation, recreational or emergency purposes, but not for residential purposes." OAR 660-033-0130(19)(a). "Overnight temporary use in the same campground by a camper or camper's vehicle shall not exceed a total of 30 days during any consecutive six-month period. *Campsites may be occupied by a tent, travel trailer, yurt or recreational vehicle.*" OAR 660-033-0130(19)(b) (emphasis added). "Emergency campgrounds may be authorized when a wildfire identified in an Executive Order issued by the Governor in accordance with the Emergency Conflagration Act, ORS 476.510 through 476.610, has destroyed homes or caused residential evacuations, or both within the county or an adjacent county." OAR 660-033-0130(19)(c).

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health, safety, welfare, comfort and security of the residents of this state who are occupants and users of buildings, and will provide for the use of modern methods, devices, materials, techniques and practicable maximum energy conservation." ORS 455.020(1).

As an ORS 215.213(2) use, the county may place restrictions on private campgrounds in EFU zones beyond those set out by the state. LC chapter 11 restricts the duration of occupancy of a recreational vehicle:

> "Unless otherwise exempted by this subchapter, an approved building permit must be issued for every permanent or temporary manufactured home or recreational vehicle being used for residential purposes in Lane County. * * * [V]ehicles being occupied without a permit as required by this section will be abated, and violators and owners of property allowing such use thereon will be subject to penalties provided by LC 11.990[.]" LC 11.110.

The trustees' extended occupancy of the RV on the EFU-zoned property was not allowed under state or county law, and it did not establish residency on the subject property for purposes of ORS 215.213(1)(i).

Again, OAR 660-033-0130(10) sets out some of the rules applicable to temporary hardship dwellings, and it provides that a recreational vehicle may serve as *the temporary residence* established for the term of a hardship. It does not provide that "the existing resident" for purposes of ORS 215.213(1)(i) may be an individual camping on the property in violation of ORS 215.213(2)(e) and OAR 660-033-0130(19). We conclude that the trustees are not "existing residents" for purposes of ORS 215.213(1)(i) because they are, at best, camping on the property in violation of the restrictions on the duration of occupancy of a recreational vehicle set forth in LC chapter 11. The trustees live in the RV. They are not residents of "an existing dwelling," and the hearings officer

misinterpreted the statute by finding that occupying the property is sufficient to qualify a person as "the existing resident."

The second subassignment of error is sustained, in part.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

ORS 215.213(1)(i) and LC 16.212(8)(c) require that the hardship be suffered by an existing resident or a relative of an existing resident. Here, the hardship is being suffered by one of the trustees. The hearings officer interpreted the term "existing resident" to include the trustees because the trustees own the subject property and have lived in the RV on it for some time[17]:

> "In 2007, the [trustees] moved into the RV on the property. They then rented out both permanent dwellings on the property. [Petitioner] asserts that the [trustees] cannot be considered 'residents' because RVs are not considered dwellings, and 'one cannot be a resident if living temporarily in an RV.'
>
> "The facts, however, do not support [petitioner's] theory or assertion that the [trustees] were living temporarily in the RV. The [trustees] have lived in the RV since 2007, apart from their winters in Mexico an Arizona until two years ago. Certainly, they did not consider this a temporary situation. Their residence in the RV for all of those years may have violated the County's code requirements, but that does not alter the conclusion that the [trustees] have lived/resided on the property, in the RV, for the past 14 years." Record 5.

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[17] As established above, the property is owned by the trust and the applicants are trustees of the trust.

Petitioner argues that the hearings officer's findings of compliance with LC 16.212(8)(c) are inadequate and not supported by substantial evidence. Findings must identify the relevant criteria, identify the evidence relied upon, and explain why the evidence leads to the conclusion that the criteria are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Substantial evidence is evidence a reasonable person would rely upon to reach a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) (citing ORS 183.482(8)(c); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988)).

According to petitioner, under the correct reading of the temporary hardship dwelling provision, substantial evidence in the record must establish one of two things: (1) a resident of an existing dwelling is suffering a medical hardship and a family member is going to inhabit the temporary hardship dwelling or (2) a relative of a resident of an existing dwelling is suffering a medical hardship and will inhabit the temporary hardship dwelling for purposes of receiving care. For the reasons discussed in our resolution of the second subassignment of error under the first assignment of error, we do not agree that a family member must occupy the temporary hardship dwelling, and evidence to that effect is not required; however, we agree that "the existing resident" who is suffering the hardship (or whose relative is suffering the hardship) must reside in "an existing dwelling," not a recreational vehicle. There is not substantial evidence in the record that that standard is met.

The second assignment of error is sustained.

The county's decision is remanded.

Zamudio, Board Chair, dissenting.

I respectfully dissent from the Board's decision because I am not convinced that ORS 215.213(1)(i) requires that "the existing resident" reside in "an existing dwelling" to qualify the RV for a temporary hardship residence. As the majority correctly observes, the issue at the heart of this appeal is the meaning of "the existing resident" in ORS 215.213(1)(i). In interpreting ORS 215.213(1)(i), we examine the statutory text, context, and legislative history with the goal of discerning the enacting legislature's intent. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). We are independently responsible for correctly construing statutes and administrative rules. *See* ORS 197.805 (providing the legislative directive that LUBA "decisions be made consistently with sound principles governing judicial review"); *Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012) ("In construing statutes and administrative rules, we are obliged to determine the correct interpretation, regardless of the nature of the parties' arguments or the quality of the information that they supply to the court." (Citing *Dept. of Human Services v. J. R. F.*, 351 Or 570, 579, 273 P3d 87 (2012); *Stull*, 326 Or at 77.)).

A. Text

Starting with the text, ORS 215.213(1)(i) authorizes on EFU land "[o]ne manufactured dwelling or recreational vehicle, or the temporary residential use

of an existing building, in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or a relative of the resident." The hearings officer correctly observed that ORS 215.213(1)(i) and OAR 660-033-0130(10) do not "make clear whether the 'resident' requirement refers to a resident of the subject property, subject tract, or of the 'existing dwelling' in conjunction with which the temporary dwelling will be approved." Record 5. Nothing in the text itself requires that "the existing resident" be a resident of "an existing dwelling." The text requires that the temporary hardship residence, here the RV, be used "in conjunction with an existing dwelling" and that the person suffering the qualifying hardship be an "existing resident" or a relative of an existing resident.

The majority reasons that the term "dwelling" means a structure such as a building or manufactured home and that a recreational vehicle is not a "dwelling." See n 16 (citing LC 16.090(71); OAR 660-033-0130(24)(e); ORS 455.020(1)). However, nothing in the text of ORS 215.213(1)(i) or OAR 660-033-0130(10) so restricts the term "dwelling." More importantly, even if the term "dwelling" were restricted to structures and excluded recreational vehicles, nothing in the text itself ties the term "resident" to the term "dwelling." In my view, whether a recreational vehicle is or is not a "dwelling" has no bearing on the correct interpretation of "the existing resident."

The dictionary definition of "resident" includes: "**1 :** one who resides in a place **:** one who dwells in a place for a period of some duration." *Webster's* at

1931. The dictionary definition of "residence" includes "**1 a** * * * **:** an act of making one's home in a place" and "**2 a** * * * (2) **:** a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit." *Id.* Some people occupy mobile homes, recreational vehicles, and other types of vehicles and shelters as their primary residence due to hardship, personal preference, or both. In my view, and under the plain meaning of the term "resident," a person need not occupy a stick-built structure or manufactured home in order to be a "resident."

B. Context

In this marginal lands county, a temporary hardship residence is an ORS 215.213(1) use, which the county may not subject to local criteria that are more stringent than those set forth by statue or implementing administrative rules. *Brentmar*, 321 Or at 496; *Nichols v. Clackamas County*, 146 Or App 25, 932 P2d 1185, *rev den*, 326 Or 233 (1997). Thus, in my opinion, the county code provides no useful context for our review of the county's interpretation of the statutory phrase "the existing resident."

The majority points out that other provisions in ORS 215.213, which do constitute context, specify that certain accessory dwellings must be sited on the same lot or parcel as the primary dwelling. The majority then reasons that, because the legislature did not specify the subject lot or parcel as the place of residence for purposes of the phrase "the existing resident," the legislature

intended the place of residence to be an existing, permanent dwelling on the subject lot or parcel.

In my view, the legislature's *omission* of text specifying a place of residence is not a particularly strong interpretive tool in this case. In general, the absence of text supports an inference when there is reason to believe that the legislature would have said something otherwise. The majority decision does not persuade me that the legislature would have specified the subject lot or parcel as the place of residence for the existing resident if that is what the legislature intended. In my opinion, it is just as likely that the legislature would have expressly specified the place of residence as "an existing dwelling" if that is what the legislature intended.

Other context in ORS 215.213 and OAR 660-033-0130(10) leads me to believe that the term "resident" may refer to one who resides in a place of occupancy—*i.e.*, a residence—that is not a permanent dwelling. ORS 215.213(1)(i) authorizes the "temporary residential use of an existing building," and does not require that the "building" be a dwelling. Instead, that subsection specifies that the building may be "returned to an allowed nonresidential use." Similarly, OAR 660-033-0130(10) provides that "the temporary residence may include a * * * recreational vehicle," but it does not specify that the residence of "the existing resident" must be an existing dwelling. In my view, the term "resident" can refer to the occupant of a recreational vehicle, and the legislature

did not limit the phrase "the existing resident" to the occupant of an existing dwelling.

While I see a public policy reason for requiring that "the existing resident" be a lawful occupant of the property, I do not think that the legislature intended that requirement. The legislature did not provide that "the existing resident" must be a lawful occupant of the subject property. In other provisions in ORS chapter 215, the legislature specifies when lawful use of land is a prerequisite to approval. *See, e.g.*, ORS 215.213(2)(h) ("A personal-use airport *lawfully existing* as of September 13, 1975, shall continue to be allowed subject to any applicable rules of the Oregon Department of Aviation."); ORS 215.291(1) ("A *lawfully established* dwelling may be altered, restored or replaced * * *."); ORS 215.457(2) ("A youth camp may be authorized under this subsection only on a *lawfully established* unit of land * * *."). Given the purpose of ORS 215.213(1)(i)—to provide temporary relief from hardship—and the absence of an express lawful residency requirement, I conclude that the legislature intended to allow counties to approve temporary hardship residences that remedy unlawful residential occupancy of EFU land.

C. Legislative History

The legislative history of ORS 215.213(1)(i), while not particularly illuminating on the issue presented in this appeal, does not contradict the county's interpretation that "the existing resident" need not reside in an existing dwelling. The temporary hardship dwelling provision was enacted in Senate Bill (SB) 237

(1983). Or Laws 1983, ch 826, § 6. That bill created the marginal lands provisions of Oregon land use law. See n 1. The marginal lands provisions were highly controversial, and most of the legislative testimony and deliberations concerned them rather than the temporary hardship residence provision.

The temporary hardship residence provision originally enacted in 1983 was numbered as ORS 215.213(1)(j), and it allowed on EFU land "[o]ne mobile home in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or a relative of the resident." Or Laws 1983, ch 826, § 6. SB 237 was presented to the legislature by a group known as Agriculture for Oregon. Its two most prominent representatives were former State Senator Hector Macpherson, a Linn County dairy farmer and a primary author of SB 100 (1973), which established statewide land use planning regulation, and Lois Kenagy, a Benton County strawberry farmer. During the first public hearing on SB 237, Kenagy made the following remarks:

> "Now, most of us thought that [the temporary hardship dwelling provision] was already in the EFU law, because it is in most county ordinances and most counties are functioning as if it is there. Apparently, it is not, but you may want to put it in the EFU statute because it is, in fact, being practiced, I believe, by most counties, and we thought it was appropriate to put that into the marginal land language, also." Tape Recording, Senate Committee on Energy and Environment, SB 237, Apr 11, 1983, Tape 71, Side A (statement of Agriculture for Oregon representative Lois Kenagy).

Thus, in enacting the temporary hardship dwelling provision in SB 237, the legislature made a technical fix reflecting and authorizing existing practices.

The legislature debated whether attorney fees should be awarded in enforcement cases (*e.g.*, when the property owner begins renting out the dwelling after the hardship has ended) and discussed who should define what constitutes a "hardship" (the Land Conservation and Development Commission or counties). The legislative history does not reveal any debate about whether "the existing resident" must reside in "an existing dwelling" or whether they must legally reside on the subject property. The legislative history does not weigh against the county's interpretation.

D. Purpose

"[W]e are to construe statutory language in a manner that is consistent with its purposes." *State v. Mayes*, 220 Or App 385, 395, 186 P3d 293 (2008). The purpose of the temporary hardship residence provision is to provide temporary relief to a resident or a relative of a resident of EFU zoned property who is experiencing a qualifying hardship. That relief is in the form of allowing temporary residential use of a manufactured dwelling, recreational vehicle, or existing building in conjunction with an existing dwelling on a unit of property zoned EFU. As the legislative history reveals, this practice was ongoing prior to the legislature's specific approval of those residential uses on agricultural land. While the legislature may not have contemplated the specific scenario at issue in this appeal, the text of ORS 215.213(1)(i) is broad enough to encompass it, and the residential use of the RV can be approved as a temporary hardship residence, as the county concluded. Based on the text, context, and legislative history of

ORS 215.213(1)(i), I conclude that, had it considered the issue, the legislature would have intended the broad interpretation of "resident" that the county reached. *See, e.g., Carlson v. Meyers*, 327 Or 213, 225, 959 P2d 31 (1998) (we may "attempt to determine how the legislature would have intended the statute be applied, had it considered the issue").

In terms of interpreting ORS 215.213(1)(i), "to the extent possible, as being consistent with the overriding policy of preventing 'agricultural land from being diverted to non-agricultural use,'" the majority's interpretation of "the existing resident" does not necessarily prevent any agricultural land from being diverted to non-agricultural use. *McCaw Communications*, 96 Or App at 555. As the county explains, hypothetically, the trustee with the hardship could move into one of the two manufactured dwellings on the property and a caregiver could occupy a recreational vehicle on the subject property for the term of the hardship. That residential shuffle would comport with the majority's interpretation of "the existing resident," but it would not reduce the number of residences or residents occupying the property.

After review of the text, context, and legislative history of ORS 215.213(1)(i), I conclude that the legislature did not intend that "the existing resident" must reside in "an existing dwelling" in order for the county to approve a temporary hardship residence. Therefore, I would affirm the county's decision.