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

JEFFREY HENDRICKSON,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

LANDWATCH LANE COUNTY,
Intervenor-Respondent.

LUBA No. 2021-117

FINAL OPINION
AND ORDER

Appeal from Lane County.

Bill Kloos filed the petition for review and reply brief and argued on behalf of petitioner.

No appearance by Lane County.

Sean T. Malone filed the response brief and argued on behalf of intervenor-respondent.

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

REVERSED 04/11/2022

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals a county hearings official decision denying their application for a temporary hardship dwelling.

MOTION TO INTERVENE

Landwatch Lane County (intervenor) moves to intervene on the side of the county. The motion is unopposed and allowed.

BACKGROUND

The subject property is five acres in size, zoned Exclusive Farm Use 40-acre minimum (E-40), designated as Major Big Game Range, and developed with a single-family dwelling. Petitioner applied for approval of a temporary hardship dwelling. The planning director approved the application, and intervenor appealed the planning director's decision to the hearings official. The hearings official held a hearing on and denied the application, and petitioner sought reconsideration of the hearings official's decision. The hearings official granted the reconsideration request and again denied the application. This appeal followed.

ASSIGNMENT OF ERROR

We start by setting out the applicable legal framework. As noted, the subject property is zoned E-40, a zone that implements Statewide Planning Goal 3 (Agricultural Lands), which is "[t]o preserve and maintain agricultural lands." ORS 215.203 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 sets out the uses that are allowed in EFU zones in marginal lands counties such as the county, including temporary hardship dwellings.[1] ORS 215.213(1)(i).[2]

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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. 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) provides, in part:

> "In counties that have adopted marginal lands provisions under ORS 197.247 (1991 Edition), the following uses may be established in any area zoned for exclusive farm use:

The legislature has delegated to the Land Conservation and Development Commission (LCDC) broad policy-making and regulatory authority under ORS chapter 197, including responsibility for adopting and implementing statewide planning goals. Pursuant to that authority, LCDC adopted rules at OAR chapter 660, division 33, which implement Goal 3. OAR 660-033-0120 provides a table of uses that are allowed on agricultural lands and, where applicable, the standards to which those uses are subject. Under that table, temporary hardship dwellings are allowed on agricultural lands subject to the standards at OAR 660-033-0130(5), (10), and (30).[3]

"* * * * *

"(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."

[3] OAR 660-033-0130(5) requires the applicant to demonstrate and the county to find that the temporary hardship dwelling will not force a significant change in or significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use. *See also* ORS 215.296 (setting out the farm impacts test as applicable to the uses allowed under ORS 215.213(2)

Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) is "[t]o protect natural resources and conserve scenic and historic areas and open spaces." In order to implement Goal 5, local governments are required to "adopt programs that will protect natural resources." The county's program to protect natural resources was acknowledged by LCDC as complying with Goal 5 in 1984 and includes a map and inventory of big game habitat, which designates the subject property as Major Big Game Range. The hearings official denied the temporary hardship dwelling application based solely on Rural Comprehensive Plan (RCP) Goal 5, Flora and Fauna Policy 11 (Policy 11), a county comprehensive plan policy concerning big game habitat.

Policy 11 is one component of the county's acknowledged Goal 5 program and provides:

> "Oregon Department of Fish and Wildlife [(ODFW)] recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County. Any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000. The County

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and (11)). OAR 660-033-0130(10) describes qualifying hardships, permissible types and locations of temporary hardship dwellings, and removal requirements after the hardship has ceased. OAR 660-033-0130(30) requires the landowner to

> "sign and record in the deed records for the county a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under ORS 30.936 or 30.937."

> shall work with [ODFW] officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program."

The ODFW recommendations referenced in Policy 11 consist of an overall residential density standard of one dwelling per 80 acres in Major Big Game Range and one dwelling per 40 acres in Peripheral Big Game Range.

In *Landwatch Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No 2020-030, Jan 21, 2021) (*Nimpkish*), the petitioner appealed a hearings official decision approving an application for a forest template dwelling. We held that the county must apply Policy 11 to review of a forest template dwelling application in designated big game habitat where the proposed density exceeds the ODFW recommendations by resolving any conflicts through application of the Goal 5 rule. In *King v. Lane County*, ___ Or LUBA ___ (LUBA Nos 2021-047/052, Oct 15, 2021), *aff'd*, 317 Or App 136, 501 P3d 1058 (2022) (*King*), the petitioners appealed two hearings official decisions denying applications for forest template dwellings based on Policy 11 under the reasoning that we adopted in *Nimpkish*. At LUBA, the petitioners argued that *Nimpkish* was wrongly decided and presented additional legislative and administrative history for Policy 11. We adhered to our holding in *Nimpkish* and affirmed the denials.

The subject five-acre property is developed with a single-family dwelling. Because the residential density with the proposed temporary hardship dwelling exceeds the ODFW recommendation of one dwelling per 80 acres in Major Big Game Range, the hearings official concluded that, under Policy 11, as construed

by LUBA in *Nimpkish* and *King*, petitioner was required to resolve any conflicts through application of the Goal 5 rule, which would require analysis of the economic, social, environmental, and energy consequences of allowing the conflicting residential use. Because petitioner did not do that, the hearings official concluded that the application violated Policy 11 and denied the application. That Policy 11 violation is the sole basis for the denial.

In a single assignment of error, petitioner argues that the hearings official erred in applying Policy 11 to the application for the temporary hardship dwelling. Petitioner argues that the hearings official "[i]mproperly construed the applicable law" and that the hearings official's decision is "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." ORS 197.835(9)(a)(D); ORS 197.835(10)(a)(A).

Petitioner asserts that Policy 11 is a local criterion that is more restrictive than ORS 215.213(1)(i) and may not be applied under *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995). In *Brentmar*, the Supreme Court held that the uses listed in ORS 215.213(1) (subsection (1) uses) are "uses 'as of right,' which may not be subjected to additional local criteria." 321 Or at 496. A temporary hardship dwelling is a subsection (1) use in Lane County. Thus, the county may not subject an application for a temporary hardship dwelling to local criteria that are more restrictive than state statute or administrative rule, and the hearings official erred in concluding otherwise.

The hearings official reasoned:

"[T]he Hearings Official [agrees] with [intervenor] that Policy 11 is not a local criterion imposed by the County of the nature or type that is prohibited under *Brentmar*. It is a requirement that was imposed at the time of acknowledgment in order to satisfy * * * Goal 5. But for Policy 11, temporary hardship dwellings could not be allowed at all in the farm or forest zones in Lane County. The Hearings Official adopts [intervenor's] explanation:

> "'The requirement to limit residential density to the density levels recommended by ODFW was a requirement acknowledged by LCDC. To not abide by that requirement "would be to allow the county to fail to perform an action that it assured LCDC it would perform in order to obtain acknowledgment of its Goal 5 program, and it would have the effect of eliminating the Goal 5 protections for Big Game Range that LCDC understood were in place when it acknowledged the program." Indeed, as noted in *King*, [the Department of Land Conservation and Development (DLCD)] had an "expectation that, while additional measures were necessary to ensure full compliance with Goal 5, the ODFW density standards embodies in Policy 11 would continue to play a role in evaluating development proposals." The density standards required of Policy 11 were essentially conditions that DLCD placed on acknowledgment of Lane County's comprehensive plan. As such, the requirement is not so much a County requirement but rather a requirement imposed by DLCD and LCDC as a condition of acknowledgment. Therefore, the Hearings Official's imposition of the agency's condition is valid and ensures compliance with Goal 5. Without that requirement, Lane County's comprehensive plan cannot be considered 'acknowledged' and would be in conflict with Goal 5.'" Record 10-11 (quoting *Nimpkish*, ___ Or LUBA at ___ (slip op at 12-13); *King*, ___ Or LUBA at ___ (slip op at 7 n 4)).

Intervenor responds that the hearings official correctly found that the density requirement in Policy 11 is not an additional requirement imposed by the

county; rather, it is akin to an LCDC administrative rule and, thus, is a permissible regulation of a subsection (1) use. Intervenor relies on *Lane County v. LCDC*, 325 Or 569, 942 P2d 278 (1997). That case concerned the county's challenge to the LCDC administrative rules implementing Goal 3—OAR chapter 660, division 33—which restrict or prohibit some uses on high-value farmland that may be established on EFU land under ORS 215.213(1). The county argued that those rules conflict with ORS 215.213(1) and exceed LCDC's authority. The Supreme Court held that LCDC is delegated authority to adopt administrative rules applicable to subsection (1) uses that are more restrictive than state statute. The court explained that LCDC's authority is distinct from and greater than county authority in this area.

In sum, under the court's decisions in *Brentmar* and *Lane County*, the county may not subject temporary hardship dwellings to local criteria that are more restrictive than state statute. However, LCDC may adopt administrative rules regulating temporary hardship dwellings, and it has done so in OAR 660-033-0120 and OAR 660-033-0130(5), (10), and (30). See n 3. For the reasons explained below, we agree with petitioner that the hearings official erred in applying Policy 11 to the application.

Intervenor argues that, although Policy 11 was adopted by the county, it is "inextricably bound" to two sets of LCDC administrative rules: (1) the Goal 5 rule and (2) the additional requirements in OAR 660-033-0120 and OAR 660-033-0130(5), (10), and (30). Response Brief 11. Intervenor argues that Policy 11

was required in order for LCDC to acknowledge the county's Goal 5 program. Therefore, intervenor argues, the county must apply Policy 11 to the application in order to comply with Goal 5. We understand intervenor to argue that the county may apply Policy 11 because that policy was acknowledged by LCDC in acknowledging the county's Goal 5 program.

We disagree with intervenor that LCDC's acknowledging Policy 11 as complying with Goal 5 is the same as or akin to LCDC adopting Policy 11 itself. If that were the case, then, as petitioner points out, every acknowledged county comprehensive plan provision and land use regulation could be applied to deny applications for the uses listed at ORS 215.213(1), in contravention of *Brentmar*.

Intervenor expressly "does not ask that LUBA overturn *Brentmar*, and Intervenor acknowledges that LUBA does not have the authority to overturn *Brentmar*." Response Brief 10. Intervenor explains that counties may not apply comprehensive plan provisions to the uses listed at ORS 215.213(1) merely because LCDC determined that they were *consistent* with the statewide planning goals. Instead, intervenor argues that counties may only apply comprehensive plan provisions to the uses listed at ORS 215.213(1) if they were *necessary* for LCDC to acknowledge the county's comprehensive plan. The main problem with that reasoning is that *Lane County* stands for the proposition that, while *LCDC* may adopt standards that are more restrictive than ORS 215.213(1), *counties* may not adopt such standards. Although Policy 11 was acknowledged by LCDC as complying with Goal 5, it was undisputedly adopted by the county, not LCDC.

Intervenor argues that it is not possible for the county to comply with the residential density limitations in Policy 11 without applying Policy 11 to deny temporary hardship dwelling applications. That appears true. However, as petitioner correctly observes, LCDC could adopt administrative rules requiring counties to apply their Goal 5 programs to temporary hardship dwelling applications. LCDC could include such a provision in the Goal 5 rule itself. Alternatively, or in addition, LCDC could make those uses subject to counties' Goal 5 programs through OAR 660-033-0120 and OAR 660-033-0130. LCDC has done none of the above.[4]

That LCDC acknowledged Policy 11 as complying with Goal 5, and that Policy 11 may have been necessary for that acknowledgment, does not elevate Policy 11 to an LCDC regulation that may be used to limit or deny a subsection (1) use. We agree with petitioner that to hold otherwise would be inconsistent with *Brentmar* and *Lane County*.

The second set of LCDC administrative rules with which intervenor argues Policy 11 is "inextricably bound" is OAR 660-033-0120 and OAR 660-033-0130(5), (10), and (30). Again, OAR 660-033-0120 provides a table of uses that are allowed on agricultural lands and, where applicable, the standards to which

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[4] We note that OAR 660-033-0130(5) requires a farm impacts test for a temporary hardship dwelling under ORS 215.213(1), even though, by its terms, the farm impacts statute, ORS 215.296, applies to the uses allowed under ORS 215.213(2). See n 3. This demonstrates that LCDC knows how to import additional criteria for subsection (1) uses.

those uses are subject. Under that table, temporary hardship dwellings are allowed on agricultural lands subject to review under the standards at OAR 660-033-0130(5), (10), and (30). See n 3. The fact that LCDC has adopted additional criteria for temporary hardship dwellings at OAR 660-033-0130(5), (10), and (30) does not mean that LCDC has thereby authorized counties to subject those uses to unspecified other standards, including Policy 11.

Intervenor also repeatedly asserts that Policy 11 is applicable under OAR 660-033-0120 itself. Response Brief While that argument is undeveloped, we understand intervenor to argue that LCDC authorized the county to apply its own additional limitations to temporary hardship dwellings by designating that use as an "R" use in the table. OAR 660-033-0120 provides, in part:

> "The abbreviations used within the table shall have the following meanings:
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> "* * * * *
>
> "(2) 'R' Use may be allowed, after required review. The use requires notice and the opportunity for a hearing. Minimum standards for uses in the table that include a numerical reference are specified in OAR 660-033-0130. *Counties may prescribe additional limitations and requirements to meet local concerns*." (Emphasis added.)

We understand intervenor to argue that Policy 11 imposes "additional limitations and requirements" that are authorized by LCDC by way of OAR 660-033-0120. Intervenor emphasizes that petitioner does not dispute that OAR 660-033-0120

applies. That is true. However, there are at least three problems with intervenor's response.

First, to the extent that we understand the response, it is undeveloped for our review. Second, the hearings official did not conclude that Policy 11 is an applicable *county* approval criterion permitted under OAR 660-033-0120, despite intervenor arguing for that resolution below.[5] Instead, the hearing official adopted intervenor's reasoning that Policy 11 is akin to an *LCDC* regulation. Accordingly, intervenor's argument that OAR 660-033-0120 allows the county to apply additional conditions to a temporary hardship dwelling is essentially a right-for-the-wrong-reason argument that intervenor could have raised in a contingent cross-assignment of error as a basis for remand but that otherwise provides no basis for us to affirm the hearings official's decision. Third, and finally, we do not believe that OAR 660-033-0120 can be read to mean that LCDC has subdelegated to counties its legislatively delegated authority to prescribe

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[5] The hearings official explained:

> "LandWatch counters that the administrative rule that implements ORS 215.213 (OAR 660-033-0120) contains a table that indicates that temporary hardship dwellings are 'subject to review' by the County and that additional criteria, such as are found in Policy 11, are appropriate. Perhaps more to the point, LandWatch also argues that the requirements imposed by Policy 11 are not additional requirements imposed by the County, but rather were required by LCDC as a part of acknowledgment of the plan and land use regulations and therefore not prohibited by the holding in *Brentmar*." Record 7.

additional criteria for subsection (1) uses as of right. That conclusion would be in direct conflict with *Brentmar* and *Lane County*.

We conclude that Policy 11 is a local criterion that is more restrictive than ORS 215.213(1)(i). Accordingly, we agree with petitioner that the hearings official erred in applying Policy 11 to petitioner's application for a temporary hardship dwelling.

The assignment of error is sustained.

DISPOSITION

Petitioner asks LUBA to reverse the county's decision and order the county to approve the application. ORS 197.835(10)(a).[6] The hearings official denied petitioner's application on a basis that is barred by the Supreme Court's decision in *Brentmar* because the application is for a temporary hardship dwelling under ORS 215.213(1) and the hearings official applied Policy 11, a local criterion that is more restrictive than state statute. The hearings official's decision was therefore "outside the range of discretion allowed the local government under its

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[6] ORS 197.835(10)(a) provides, in part:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
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> "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

comprehensive plan and implementing ordinances." The proper disposition of this appeal is therefore reversal and an order instructing the county to grant approval of the application. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37, 57 (2014).

The county's decision is reversed. The county is ordered to approve petitioner's application.