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

GARY SHERMAN,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

NEW CINGULAR WIRELESS PCS, LLC,
Intervenor-Respondent.

LUBA No. 2022-027

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Daniel Kearns filed the petition for review and argued on behalf of petitioner.

No appearance by Deschutes County.

Richard J. Busch filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent.

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

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

AFFIRMED 07/15/2022

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 officer's decision approving a wireless communication facility.

FACTS

The subject property is zoned for exclusive farm use (EFU) with a Landscape Management (LM) overlay. The LM overlay is part of the county's Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) program for protecting inventoried scenic resources, including a scenic view corridor along a segment of Highway 20. The property is located within the right-of-way for Highway 20 and approximately 80 feet away from the highway driving surface.[1]

The wireless communication facility is comprised of a 150-foot monopole topped with a 5-foot lightning rod, associated antennas, an equipment cabinet, and generator, all surrounded by a six-foot-tall chain link fence. Intervenor-respondent (intervenor) applied to the county for approval to site the facility in a 50-by-50-foot area on the subject property. The hearings officer approved the

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[1] The Oregon Department of Transportation (ODOT) acquired the subject property as an uneconomic remnant when the agency acquired the right-of-way. During the local proceeding, petitioner disputed that the subject property is within the right-of-way. Intervenor submitted evidence in the form of an email from an ODOT regional manager stating that ODOT considers the property to be included in the right-of-way. Record 715-16. The hearings officer found that the property is within the right-of-way. Petitioner does not challenge that finding on appeal.

application after a public hearing. Petitioner appealed. The board of county commissioners declined to hear the appeal. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Statewide Planning Goal 3 (Agricultural Lands) is "[t]o preserve and maintain agricultural lands." State law restricts the uses that are allowed on agricultural land to farm uses and specified nonfarm uses. *See* ORS 215.203(1) (generally requiring that land within EFU zones be used exclusively for farm use); ORS 215.283 (identifying permitted uses on EFU land). ORS 215.283 provides that utilities may be established in an area zoned EFU in two provisions. A "utility facility necessary for public service," including wireless communication facilities, may be established in an area zoned EFU as provided in ORS 215.275. ORS 215.283(1)(c)(A). A utility facility may also be allowed in the EFU zone, and the hearings officer concluded that the facility is allowed, as a "right-of-way utility" under ORS 215.283(1)(i), which allows in EFU zones:

> "Reconstruction or modification of public roads and highways, including the placement of utility facilities overhead and in the subsurface of public roads and highways along the public right of way, but not including the addition of travel lanes, where no removal or displacement of buildings would occur, or no new land parcels result."

Petitioner argues that the hearings officer misinterpreted ORS 215.283(1)(i). According to petitioner, a right-of-way utility may only be approved in conjunction with "[r]econstruction or modification of public roads and highways." ORS 215.283(1)(i). Petitioner argues that the hearings officer

erred in approving the facility because the facility will be located some 80 feet away from the driving surface of Highway 20 and will be constructed independent of any reconstruction or modification of the driving surface or shoulder area of Highway 20. Thus, according to petitioner, there is no basis to allow the facility as a right-of-way utility.

In support of that argument, petitioner cites *Friends of Parrett Mountain v. Northwest Natural Gas Co.*, 336 Or 93, 79 P3d 869 (2003) (*Parrett Mountain*). In *Parrett Mountain*, a community organization and county farm bureau sought review of decision of the Oregon Energy Facility Siting Council (EFSC), which authorized natural gas company construction of underground pipeline within EFU zones within rights-of-way. The petitioners argued that locating a pipeline within the "subsurface" of a public road or highway right-of-way necessitated, as a matter of law, placing it directly under the hard surface of the road. EFSC rejected that interpretation and the court agreed with EFSC. The court concluded that the phrase "public roads and highways" in ORS 215.283(1)(i) "means the entire right-of-way within which those thoroughfares are constructed, not just the hard surface upon which traffic travels." *Parrett Mountain*, 336 Or at 113. The court held that the gas company was entitled to install pipeline adjacent to roads in EFU zones under ORS 215.283(1)(i), so long as the pipeline was within rights-of-way. Accordingly, the gas company could site the pipeline under ORS 215.283(1)(i) by burying the pipeline "alongside a hard road surface, so long as it remained within the thoroughfare's right-of-way." *Id.* Petitioner contends that

Parrett Mountain supports petitioner's assertion that a right-of-way utility may only be approved in conjunction with reconstruction or modification of Highway 20.

Intervenor responds, and we agree, that *Parrett Mountain* does not support petitioner's proffered interpretation of ORS 215.283(1)(i). The issue in *Parrett Mountain* was whether the pipeline must be buried beneath the road surface. The court held that it did not. Nothing in the facts or analysis of the *Parrett Mountain* case demonstrate that the court's conclusion relied in any way on "reconstruction or modification" of a thoroughfare contemporaneously with the installation of the gas pipeline. To the extent that *Parrett Mountain* is instructive at all in this appeal, the court's reasoning in that case supports the hearings officer's reasoning in this case that a utility may be approved pursuant to ORS 215.283(1)(i), so long as it is sited within the right-of-way. However, the *Parrett Mountain* court did not address the specific interpretive issue that petitioner raises, which is whether a right-of-way utility facility is allowed when the installation of the facility does not involve "reconstruction or modification" of the highway driving surface or shoulder area.

Petitioner's argument requires us to interpret ORS 215.283(1)(i). In interpreting a statute, 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. *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 v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997).)).

We start with the text. Petitioner argues that "the placement of utility facilities" is an activity that is separate from, but that must occur in conjunction with, "[r]econstruction or modification of public roads and highways." That interpretation is not supported by the text and ignores the term "including." The provision allows "[r]econstruction or modification of public roads and highways, *including* the placement of utility facilities overhead and in the subsurface of public roads and highways along the public right of way." ORS 215.283(1)(i) (emphasis added). Read as a whole sentence, placement of utility facilities along the public right of way is an activity that can constitute "[r]econstruction or modification of public roads and highways." *Id.* Accordingly, the text does not support petitioner's assertion that placement of a utility facility is a distinct act that may only be done in conjunction with the physical modification of the hard surface or shoulder of a public road or highway.

Context includes statutes covering the same general subject. *State v. Carr*, 319 Or 408, 411-12, 877 P2d 1192 (1994). As explained above, a "utility facility necessary for public service," including wireless communication facilities, may be established in an area zoned EFU as provided in ORS 215.275. ORS 215.283(1)(c)(A). To demonstrate that a utility facility is "necessary," an applicant for approval under ORS 215.283(1)(c)(A) "must show that reasonable alternatives have been considered and that the facility must be sited in an [EFU] zone." ORS 215.275(2). One of the statutory alternative factors is "[a]vailability of existing rights of way." ORS 215.275(2)(d). This context supports the conclusion that, in developing the statutory framework that allows utility facilities on EFU land, the legislature intended to favor siting such facilities within rights-of-way. That is, ORS 215.283(1)(i) and ORS 215.275(2)(d) express a legislative policy decision that public road and highway rights-of-way are preferred locations for siting utility facilities in EFU zones. That context supports the interpretation of ORS 215.283(1)(i) that allows utility facilities to be sited on EFU land, so long as the site is within the right-of-way. This interpretation also consistent with the overarching policy of preserving agricultural land for agricultural uses. Favoring siting of utility facilities within existing rights-of-way concentrates utility development in areas that are already impacted and committed to transportation uses and thereby reduces undesirable fragmentation of agricultural land.

Petitioner emphasizes the peculiar history of the subject property as an uneconomic remnant that is located 80 feet from the highway driving surface. However, as we explain above, petitioner does not challenge on appeal the hearings officer's conclusion that the subject property is within the right-of-way. As construed by the court in *Parrett Mountain*, the phrase "public roads and highways" means the entire right-of-way. There is no dispute that the facility here will be entirely located in the right-of-way.

We conclude that the hearings officer did not improperly construe ORS 215.283(1)(i).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The hearings officer interpreted Deschutes County Code (DCC) 18.84.050(A) and concluded that the facility is exempt from the LM Overlay because the facility does not require a building permit.

Because the facility will be constructed in a public right-of-way, no building permit is required pursuant to the Oregon Structural Specialty Code (OSSC). OSSC 101.2.2.1(19). Petitioner does not dispute that the facility does not require a building permit. Instead, petitioner argues that the facility is subject to site plan review because the facility is a new structure visible from a designated scenic corridor road.

Petitioner argues that the hearings officer misconstrued DCC 18.84.050(A). In interpreting a local code provision, we apply the same inquiry

for interpreting statutes and administrative rules. We examine the statutory text, context, and legislative history with the goal of discerning the enacting governing body's intent.

Again, we begin with the text. DCC 18.84.050 provides use limitations for structures within an LM overlay zone and provides:

> "A. Any new structure or substantial exterior alteration of a structure requiring a building permit or an agricultural structure within an LM Zone shall obtain site plan approval in accordance with DCC 18.84 prior to construction. As used in DCC 18.84 substantial exterior alteration consists of an alteration which exceeds 25 percent in the size or 25 percent of the assessed value of the structure.
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> "B. Structures which are not visible from the designated roadway, river or stream and which are assured of remaining not visible because of vegetation, topography or existing development are exempt from the provisions of DCC 18.84.080 (Design Review Standards) and DCC 18.84.090 (Setbacks). An applicant for site plan review in the LM Zone shall conform with the provisions of DCC 18.84, or may submit evidence that the proposed structure will not be visible from the designated road, river or stream. Structures not visible from the designated road, river or stream must meet setback standards of the underlying zone."

Petitioner argued to the hearings officer that DCC 18.84.050(A) requires that any "new structure" within the LM overlay that is visible from a designated roadway requires site plan review even if the structure does not require a building permit. Intervenor argued and the hearings officer agreed that the phrase "requiring a building permit" modifies both "new structure" and "substantial exterior alteration of a structure." The hearings officer explained:

"The express language of the Code refers to three types of development: (1) new structures, (2) substantial exterior alterations of a structure, and (3) agricultural structures. Opposing testimony argues that the use of the word 'or' between each of those types of development is significant, and that the Code should be read as applying to: (1) any new structures, or (2) substantial exterior alterations of a structure requiring a building permit, or (3) any agricultural structures. That construction, however, is not consistent with how the Code connects items in a list with the conjunctive 'or.' DCC 18.84.010, for example, connects three items where it describes the purpose of the LM Zone in part as maintaining scenic resources 'as seen from designated roads, rivers, **or** streams.' (Emphasis added). In contrast, where the Code lists only two items that are connected, it uses no commas with the conjunctive 'or.' DCC 18.84.020, for example, states 'The distance specified above shall be measured horizontally from the center line of designated landscape management roadways **or** from the nearest ordinary high water mark of a designated landscape management river or stream.' (Emphasis added).

"If the County had intended DCC 18.84.050(A) to be a list of three distinct items, that Code provision would have been structured differently and more like DCC 18.84.010, with commas separating the three categories of development and with no need for the use of 'or' twice in the sentence, as follows: 'Any new structure**,** ~~**or**~~ substantial exterior alteration of a structure requiring a building permit**,** or an agricultural structure within an LM Zone shall obtain site plan approval.' As drafted, however, without commas and the use of 'or' twice, the Code is more appropriately interpreted as addressing two items: (1) 'Any new structure or substantial exterior alteration of a structure requiring a building permit' or (2) 'an agricultural structure.'

"Further, the interpretation offered in opposition to the Application creates an odd redundancy. If 'Any new structure' applies to all structures, whether or not they need building permits, there would be no need for this Code provision to include 'agricultural structure' as a third category, because that category would already be covered by the language 'Any new structure.' In contrast, the Applicant's

> interpretation gives meaning to that language. Specifically, the record reveals that agricultural structures are generally exempt from the requirement to obtain a building permit. The only reason to separately list such structures, then, is because they are not already covered by the language 'Any new structure or substantial exterior alteration of a structure requiring a building permit,' which is the case only if 'Any new structure' is also modified by 'requiring a building permit.'
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> "Based on the foregoing, I find that the Facility does not require site plan approval as long as the Facility does not also require a building permit." Record 124 (underscoring and boldface in original).

The hearings officer concluded that the facility does not require a building permit and petitioner does not challenge that finding on appeal. The hearings officer therefore concluded that the facility is not subject to setbacks and design review under the LM overlay regulations in DCC 18.84.

Petitioner argues that the hearings officer's construction violates the grammatical rule of the last antecedent, which limits the reach of a modifying phrase.

> "'Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." Thus, a proviso usually is construed to apply to the provision or clause immediately preceding it. * * *
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> "'Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.'"

State v. Webb, 324 Or 380, 386, 927 P2d 79 (1996) (quoting Norman J. Singer, 2A Sutherland Statutory Construction § 47.33, at 270 (5th ed 1992) (footnotes omitted)).

Here, we are concerned with the reach back of the phrase "requiring a building permit" and whether that phrase applies to modify "any new structure." Petitioner argues that, because the two items that precede the phrase "requiring a building permit" are not set off by commas, the rule of the last antecedent applies so that the phrase "requiring a building permit" modifies only the last antecedent, "substantial exterior alteration of a structure." Petitioner also argues that interpretation is more consistent with the legislative history of DCC 18.84.050(A) and the underlying purpose of the scenic protection policy.

With respect to the text and grammatical construction of DCC 18.84.050(A), intervenor responds that the hearings officer correctly concluded that the code interpretation advanced by petitioner would have required the code to have been structured differently, with commas separating the three categories of development and with no need for the use of 'or' twice in the sentence.

We conclude that the grammatical construction of the disputed sentence is ambiguous and the parties' grammar-based arguments are equally valid. Because of the ambiguity in the grammatical construction, the last antecedent rule does not aid the interpretation, let alone control it.

We are persuaded by the hearings officer's reasoning that the interpretation offered by petitioner would result in redundancy. As a general rule, we construe

a regulation in a manner that gives effect, if possible, to all its provisions. ORS 174.010; *Crystal Communications, Inc. v. Dept. of Rev.*, 353 Or 300, 311, 297 P3d 1256 (2013); *Northwest Natural Gas Co. v. Dept. of Rev.*, 347 Or 536, 556, 226 P3d 28 (2010). As a corollary to that rule, we assume that an enacting body "did not intend any portion of its enactments to be meaningless surplusage." *State v. Stamper*, 197 Or App 413, 418, 106 P3d 172, *rev den*, 339 Or 230 (2005). If "any new structure" means all structures, regardless of whether they require a building permit, then there would be no need for DCC 18.84.050(A) to expressly include agricultural structures as a third category of structures that require site plan review. Agricultural structures are not subject to building permit requirements under the OSSC. ORS 455.315; OSSC 105.2(7). Under petitioner's interpretation, the agricultural structure category would already be covered by the language "any new structure" at the beginning of the sentence. Because agricultural structures are generally exempt from the requirement to obtain a building permit, the only reason to separately list agricultural structures is because they are not already covered by the preceding language "[a]ny new structure or substantial exterior alteration of a structure requiring a building permit." In other words, agricultural structures need to be specifically listed as requiring site plan review, even though not requiring a building permit, only if the phrase "requiring a building permit" applies to "any new structure."

We conclude that the hearings officer did not err in construing DCC 18.84.050(A) as requiring site plan approval for "new structures" only when those structures require building permits.

We resolve this dispute on the text and context and do not address petitioner's policy and legislative history arguments. Text is the primary interpretive consideration. *Gaines*, 346 Or at 173; *see also Suchi v. SAIF*, 238 Or App 48, 55, 241 P3d 1174 (2010), *rev den*, 238 Or 231, 253 P3d 1080 (2011) ("Even assuming that the legislative history supported claimant's interpretation, we are required not to construe a statute in a way that is inconsistent with its plain text."); *State v. Elvig*, 230 Or App 57, 61, 213 P3d 851 (2009) (rejecting an argument based on legislative history because the argument "has no basis in the statute's text").

The second assignment of error is denied.

The county's decision is affirmed.