

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

3
4 FERGUSON CREEK INVESTMENT, LLC,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 LANDWATCH LANE COUNTY,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2022-099

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Lane County.

23
24 Zack P. Mittge filed the petition for review and reply brief and argued on
25 behalf of petitioner. Also on the brief was Hutchinson Cox.

26
27 No appearance by Lane County.

28
29 Sean T. Malone filed the intervenor-respondent's brief and argued on
30 behalf of intervenor-respondent.

31
32 RUDD, Board Member; ZAMUDIO, Board Member, participated in the
33 decision.

34
35 RYAN, Board Chair, did not participate in the decision.

36
37 REMANDED

06/09/2023

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

2 **NATURE OF THE DECISION**

3 Petitioner appeals a hearings officer's decision denying a request for
4 verification of the nonconforming use status of a structure as a dwelling.

5 **BACKGROUND**

6 Petitioner owns an 82-acre property (the property) designated tax lot 400
7 and zoned Exclusive Farm Use (E-40). The property is generally flat to mildly
8 sloping, with field grasses and some landscaping, and contains two structures
9 described by petitioner as dwellings; one constructed without proper approvals
10 in the early 2000s and the other a smaller structure built in the late 1940s.

11 Zoning was applied to the property in 1980. ORS 215.130(5) provides, in
12 part, that "[t]he lawful use of any building, structure or land at the time of the
13 enactment or amendment of any zoning ordinance or regulation may be
14 continued." We refer to "[t]he lawful use of any building, structure or land at the
15 time of enactment or amendment of any zoning ordinance or regulation" that may
16 be continued as a "nonconforming use." The term "nonconforming use" is not
17 defined in ORS 215.130 or elsewhere in ORS chapter 215. The Court of Appeals
18 has explained:

19 "Generally, '[a] lawful nonconforming use of land is one that is
20 contrary to a land use ordinance but that nonetheless is allowed to
21 continue because the use lawfully existed prior to the enactment of
22 the ordinance.' *Rogue Advocates v. Board of Comm. of Jackson*
23 *County*, 277 Or App 651, 654, 372 P3d 587 (2016), *rev dismissed*,
24 362 Or 269 (2017) (internal quotation marks omitted); ORS
25 215.130(5). To summarily prohibit a lawfully established use of

1 land ‘would constitute a taking without compensation.’ *Bergford v.*
2 *Clack. Co./Trans. Serv.*, 15 Or App 362, 367, 515 P2d 1345 (1973).
3 ‘Under state and local law, a nonconforming use can continue until
4 abandoned, but alterations or replacements of the use are regulated.’
5 *VanSpeybroeck v. Tillamook County*, 221 Or App 677, 681, 191 P3d
6 712 (2008).” *Morgan v. Jackson County*, 290 Or App 111, 114, 414
7 P3d 917, *rev den*, 362 Or 860 (2018).¹

8 Those principles are expressed in ORS 215.130. The county implements

9 ORS 215.130(5) in Lane County Code (LC) 16.251 which provides in part:

10 “Except as is hereinafter provided in this Chapter, *the lawful use of*
11 *a building or structure or of any land or premises lawfully existing*
12 *at the time of the effective date of this Chapter or at the time of a*
13 *change in the official zoning maps may be continued* although such
14 use does not conform with the provisions of this Chapter.

15 “(1) Verification of Nonconforming Use. *The verification of a*
16 *nonconforming use may be obtained subject to Type II*
17 *procedures of LC Chapter 14. Verification of a*
18 *nonconforming use is required prior to requesting approval*
19 *to increase, restore, alter or repair a nonconforming use.*
20 When evaluating a request for verification, the following
21 criteria shall apply:

22 “(a) To be valid, a nonconforming use must have been
23 lawfully established prior to the enactment of an
24 ordinance restricting or prohibiting the use.

25 “(b) The use must have been in actual existence prior to the
26 enactment of an ordinance restricting or prohibiting the

¹ Where a lawfully established existing use would require local government approval of a variance or conditional use permit if the use were built under current regulations, that existing use is a nonconforming use. *Miller v. City of Dunes City*, 18 Or LUBA 515, 519-21 (1989); *Morse Bros., Inc. v. Clackamas County*, 18 Or LUBA 188, 194-96 (1989).

1 use or have proceeded so far toward completion that a
2 right to complete and maintain the use is deemed to
3 have vested in the landowner.

4 “(c) The nonuse of a nonconforming use of a structure or
5 property for a period in excess of two years will
6 prohibit the resumption of the nonconforming use. The
7 burden of proof for the verification of a nonconforming
8 use is upon the applicant.” (Emphases added,
9 underscoring omitted.)

10 Petitioner applied to the county for “[v]erification of 25367 Ferguson Road
11 as [a] lawful nonconforming use on EFU land.” Record 545. Petitioner stated in
12 its application to verify the 1940s structure that “[i]n addition to the home being
13 verified, the property includes 2 outbuildings and a second dwelling unit to the
14 north. No structure is proposed for removal or demolition.” Record 546.

15 The planning director denied petitioner’s application based on their
16 determination that “the [petitioner] failed to establish that there was a lawful
17 residential use in existence at the time that any of the zoning regulations that
18 might have made that use nonconforming went into effect.” Record 4 n 3.
19 Petitioner appealed the planning director’s decision to the hearings officer. The
20 hearings officer denied petitioner’s request for verification of a nonconforming
21 use on a different basis than the planning director, concluding that “[a]n existing,
22 lawfully established dwelling is a conforming use, is therefore not a
23 nonconforming use, and the Planning Director was correct in denying the subject
24 application for verification of a nonconforming use.” Record 6. This appeal
25 followed.

1 **ASSIGNMENT OF ERROR**

2 Uses allowed on land zoned EFU within marginal land counties are set out
3 in ORS 215.213 and the county has adopted regulations implementing state law.
4 ORS 215.213(1)(q) provides that uses permitted on EFU land include
5 “[a]lteration, restoration or replacement of a lawfully established dwelling, as
6 described in ORS 215.291.” LC Table 16.212-1 identifies “alteration, restoration,
7 or replacement of a lawfully established dwelling” as a use allowed outright or
8 permitted subject to standards on EFU land.

9 The hearings officer found that the county “has adopted an interpretation,
10 with regard to forest lands *and* EFU lands, that the replacement provisions and
11 nonconforming use provisions are mutually exclusive. That is, an existing
12 dwelling in the forest zone is not to be considered nonconforming.” Record 5
13 (emphasis in original). The hearings officer concluded:

14 “The authorization to replace an existing dwelling in the EFU zone
15 is exclusively through the provision in Table 16.21[2]-1 that
16 authorizes alteration, repair or replacement of an existing dwelling.
17 Table 16.212-1-2.7. *An existing, lawfully established dwelling is a*
18 *conforming use, is therefore not a nonconforming use,* and the
19 Planning Director was correct in denying the subject application for
20 verification of a nonconforming use. The Planning Director’s
21 decision is affirmed.” Record 6 (emphasis added).

22 Petitioner’s assignment of error is that the hearings officer misinterpreted the law,
23 applied standards that are not in the law, and made inadequate findings.

24 Local code may not be interpreted inconsistently with the state law that it
25 implements. *Johnson v. Jefferson County*, 56 Or LUBA 72, 91, *aff’d* 221 Or App

1 156, 189 P3d 30 (2008), *rev dismissed*, 347 Or 259 (2009). Our review of the
2 hearings officer’s interpretation of state law is subject to ORS 197.835(9)(a)(D)
3 and we will reverse or remand the land use decision if the hearings officer
4 improperly construed applicable law. In construing the law, we will consider the
5 text, context and, if pertinent, legislative history of the law at issue in order to
6 determine the intent of the enacting legislature. *State v. Gaines*, 346 Or 160, 171-
7 172, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606,
8 610-12, 859 P2d 1143 (1993).

9 **A. Text and Context**

10 As stated above, ORS 215.130(5) provides in part, “[*t*]he lawful use of any
11 building, *structure* or land at the time of the enactment or amendment of any
12 zoning ordinance or regulation *may be continued*” and ORS 215.213(1)(q)
13 authorizes “[a]lteration, restoration or replacement of a lawfully established
14 dwelling, as described in ORS 215.291.”² (Emphases added.) ORS 215.291(1)
15 provides:

² ORS 215.291(2) through (4) provide:

“(2) For replacement of a lawfully established dwelling under this section:

“(a) The dwelling to be replaced must be removed, demolished or converted to an allowable nonresidential use within three months after the date the replacement dwelling is certified for occupancy pursuant to ORS 455.055.

“(b) The replacement dwelling:

-
- “(A) May be sited on any part of the same lot or parcel.
- “(B) Must comply with applicable siting standards. However, the standards may not be applied in a manner that prohibits the siting of the replacement dwelling.
- “(c) As a condition of approval, if the dwelling to be replaced is located on a portion of the lot or parcel that is not zoned for exclusive farm use, the applicant shall execute and cause to be recorded in the deed records of the county in which the property is located a deed restriction prohibiting the siting of another dwelling on that portion of the lot or parcel. The restriction imposed is irrevocable unless the county planning director, or the director’s designee, places a statement of release in the deed records of the county to the effect that the provisions of this section and either ORS 215.213 or 215.283 regarding replacement dwellings have changed to allow the lawful siting of another dwelling.
- “(3) The county planning director, or the director’s designee, shall maintain a record of the lots and parcels that do not qualify for the siting of a new dwelling under subsection (2) of this section, including a copy of the deed restrictions filed under subsection (2)(c) of this section.
- “(4) If an applicant is granted a deferred replacement permit under this section:
- “(a) The deferred replacement permit:
- “(A) Does not expire but the permit becomes void unless the dwelling to be replaced is removed or demolished within three months after the deferred replacement permit is issued; and
- “(B) May not be transferred, by sale or otherwise, except by the applicant to the spouse or a child of the applicant.

1 “(1) A lawfully established dwelling may be altered, restored or
2 replaced under ORS 215.213(1)(q) or 215.283(1)(p) if the county
3 determines that the dwelling to be altered, restored or replaced has:

4 “(a) Intact exterior walls and roof structure;

5 “(b) Indoor plumbing consisting of a kitchen sink, toilet and
6 bathing facilities connected to a sanitary waste disposal
7 system;

8 “(c) Interior wiring for interior lights; and

9 “(d) A heating system.”

10 *Webster’s Third Int’l Dictionary* provides the following definitions:

- 11 • Continue: “to be permanent or durable : remain in existence.” 493
12 (unabridged ed 2002).
- 13 • Alter: “to cause to become different in some particular
14 characteristic (as measure, dimension, course, arrangement, or
15 inclination) without changing into something else.” *Id.* 63.
- 16 • Restore: “to put or bring back (as into existence or use)[.]” *Id.* at
17 1936.
- 18 • Replace: “to put in place of : provide a substitute or successor for.”
19 *Id.* at 1925.

20 Petitioner did not request permission to alter, restore or replace the
21 structure as provided in ORS 215.213(1)(q) but rather sought verification of the

“(b) The replacement dwelling must comply with applicable building codes, plumbing codes, sanitation codes and other requirements relating to health and safety or to siting at the time of construction. However, the standards may not be applied in a manner that prohibits the siting of the replacement dwelling.”

1 use, that is, the verification of the right to continue the use as provided in ORS
2 215.130(5).

3 ORS 215.130(5) provides that that the lawful use of a structure may be
4 *continued*. It also provides that alteration of the lawful use of a structure *may* be
5 permitted.³ The legislature therefore distinguished between continuation of a use
6 and its alteration. To “continue” is “to remain in existence” and, unlike “alter,”
7 or “restore” or “replace,” does not reflect any change in the use. *Webster’s* at 493.

8 ORS 174.010 provides:

9 “In the construction of a statute, the office of the judge is simply to
10 ascertain and declare what is, in terms or in substance, contained
11 therein, not to insert what has been omitted, or to omit what has been
12 inserted; and where there are several provisions or particulars such
13 construction is, if possible, to be adopted as will give effect to all.”

³ ORS 215.130(5) provides in full:

“The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. *Alteration of any such use may be permitted subject to subsection (9) of this section.* Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.” (Emphasis added.)

LC 16.251(1) also distinguishes between verification of a use and its alteration, providing that “[v]erification of a nonconforming use is required prior to requesting approval to increase, restore, alter or repair a nonconforming use.”

1 The hearings officer’s conclusion that “the replacement provisions and
2 nonconforming use provisions are mutually exclusive” is inconsistent with the
3 text of ORS 215.130(5), ORS 215.213(1)(q), and ORS 215.291(1). Record 5.
4 Verification of a nonconforming dwelling on EFU-zoned land and the
5 “continued” use of a lawfully established dwelling are not governed by ORS
6 215.213(1)(q) or ORS 215.291(1).⁴ Nothing cited to us in the text of those statutes
7 indicates that the legislature intended to remove the right of verifying
8 nonconforming use status as a means of continuing the lawful use of a
9 nonconforming structure.

10 In reaching their conclusion that the 1940s structure is a conforming use
11 and therefore not eligible for a nonconforming use verification, the hearings
12 officer relied in part on *Heceta Water District v. Lane County*, 24 Or LUBA 402
13 (1993). Our decision in *Heceta* predates the legislature’s adoption of ORS
14 215.291, which applies to replacement dwellings on agricultural land. *Heceta*
15 concerned a challenge to the county’s decision approving a building permit for a
16 replacement dwelling on land designated Forest Land. In *Heceta* we
17 acknowledged legislative history of *former* OAR 660-06-025(3)(p) (1993),
18 *renumbered as* OAR 660-006-0025(3)(o) (2016), specifically a memorandum by

⁴ Petitioner did not seek county approval to alter the dwelling. Accordingly, we need not and do not express any opinion as to whether an alteration of a verified nonconforming dwelling on resource land is governed by ORS 215.130(9) or ORS 215.291.

1 the Department of Land Conservation and Development “director addressing the
2 question of how the [Statewide Planning Goal 4 (Forest Land)] rules should treat
3 replacement dwellings in forest zones[.]” *Heceta Water District*, 24 Or LUBA at
4 422. The memo “discusses the problems local governments experience in treating
5 existing dwellings as nonconforming uses” and includes the sentiment that
6 “existing dwellings should be given conforming status by listing their repair,
7 maintenance, alteration and replacement as outright [permitted] use, thus
8 exempting these activities from ORS 215.130.” *Id.* (brackets in original, internal
9 quotation marks omitted).

10 The local code referred to in *Heceta* allowed “maintenance, repair or
11 replacement of existing dwellings” as a permitted use in the Impacted Forest
12 Lands (F-2) zone. *Former* LC 16.211(2)(r) (1993). To “maintain” is defined in
13 part as “to persevere in: carry on: keep up: CONTINUE[.]” *Websters* at 1362.
14 Notably, ORS 215.213(1)(q) does not refer to “maintenance” of a dwelling. *See*
15 *Heceta Water District*, 24 Or LUBA at 413; LC Table 16.212-1 (Use Table for
16 EFU zones lists “alteration, restoration, or replacement of a lawfully established
17 dwelling” as an outright permitted use). Similarly, OAR 660-033-0120 lists as
18 allowed uses on farm lands the “[a]lteration, restoration, or replacement of a
19 lawfully established dwelling.” Those regulations do not refer to or govern
20 continued use of a dwelling.

21 Petitioner contends, and we agree, that *Bradley v. Washington County* is
22 more instructive than *Heceta*. 44 Or LUBA 36, 187 Or App 502, 68 P3d 274

1 (2003). In *Bradley*, the petitioner requested approval of a replacement dwelling
2 in an EFU zone. Former ORS 215.213(1)(t) (2003), renumbered as ORS
3 215.213(1)(q) (2009) allowed alteration, restoration, or replacement of a lawfully
4 established dwelling as permitted use if the statutory requirements were met. *Id.*
5 at 37.⁵ The hearings officer concluded that the petitioner did not qualify to replace
6 a dwelling because the structure at issue lacked intact exterior walls required by
7 ORS 215.213(1)(t). We stated that: “The parties cite legislative history that
8 makes it clear that ORS 215.213(1)(t) [the provision that allows as permitted
9 outright replacement of existing dwellings] was adopted as an alternative to the
10 much more limited rights that a property owner enjoys under ORS 215.130(5) to
11 continue and alter a nonconforming use.” *Id.* at 42.

12 We also addressed this issue in *Hegele v. Crook County*, concluding:

13 “As we explained in *Bradley v. Washington County*, 44 Or LUBA
14 36, 42-43 (2003), the legislature in authorizing replacement
15 dwellings in EFU zones intended to allow property owner more
16 flexibility in restoring or replacing dwellings than would be the case
17 under ORS 215.130(5) restrictions on restoring or altering
18 nonconforming uses.” 56 Or LUBA 156, 164 (2008).

19 The hearings officer did not believe that our statement in *Bradley* answered
20 the question and opined that “it may be that the legislative history cited supports
21 that the replacement provisions of ORS 215.213(1)(t) were intended as an

⁵ ORS 215.213(1)(q) has been subsequently amended. Or Laws 2013, ch 462, §§ 2, 4; Or Laws 2021, ch 369, § 9. These amendments do not affect our analysis.

1 exclusive, less restrictive, *alternative* to the nonconforming use provisions,
2 meaning that an applicant could not choose.” Record 5 (emphasis in original).
3 We need not return to the legislative history to resolve this appeal. We agree with
4 petitioner that the hearings officer misconstrued ORS 215.130, ORS
5 215.213(1)(q), and ORS 215.291 when they determined that ORS 215.213(1)(q)
6 makes existing dwellings conforming uses eligible exclusively for alteration,
7 restoration, or replacement under ORS 215.291 and therefore ineligible for a
8 nonconforming use determination. On remand, the county should decide whether
9 the subject structure is a nonconforming use.

10 The decision is remanded.