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

FEDOSIY IVANOV and FIONYA IVANOV,
Petitioners,

vs.

MARION COUNTY,
Respondent.

LUBA No. 2023-076

FINAL OPINION
AND ORDER

Appeal from Marion County.

Jamie D. Howsley filed the petition for review and reply brief and argued on behalf of petitioners. Also on the briefs were Ezra L. Hammer and Jordan Ramis PC.

Cody W. Walterman filed the respondent's brief and argued on behalf of respondent.

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

AFFIRMED 02/01/2024

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

Petitioners appeal the county board of commissioners' denial of their application for a primary farm dwelling.

BACKGROUND

The 17.5-acre subject property "is located on the eastern side of Boones Ferry Rd NE, approximately 0.52 miles south of the intersection of Broadacres Rd NE. The property contains an agricultural building, related driveway improvements and strawberry fields, the parcel is otherwise vacant." Record 7. The subject property is zoned Exclusive Farm Use (EFU). Pursuant to ORS 215.283(1)(e), uses permitted on land zoned EFU include, "[s]ubject to ORS 215.279, primary or accessory dwellings and other buildings customarily provided in conjunction with farm use."[1] Marion County Code (MCC)

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[1] ORS 215.279 provides:

> "In any rule adopted by the Land Conservation and Development Commission that establishes a farm income standard to determine whether a dwelling is customarily provided in conjunction with farm use on a tract, the commission shall allow a farm operator to satisfy the income standard by earning the required amount or more of farm income on the tract:
>
> "(1) In at least three of the last five years;
>
> "(2) In each of the last two years; or
>
> "(3) Based on the average farm income earned on the tract in the best three of the last five years."

17.136.030(A)(1) implements statute and administrative rules and provides that a single-family dwelling will be considered customarily provided in conjunction with farm use where:

> "1. It is located on high-value farmland as defined in MCC 17.136.140(D) and satisfies the following standards:
>
> "a. There is no dwelling on the subject farm operation on lands zoned EFU, SA or FT other than seasonal farm worker housing. The term 'farm operation' means all lots or parcels of land in the same ownership that are used by the farm operator for farm use;
>
> "b. The farm operator earned on the subject tract in the last two years, three of the last five years, or the average of the best three of the last five years at least $80,000 in gross annual income from the sale of farm products, not including marijuana. In determining gross annual income from the sale of farm products, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract. Only gross income from land owned, not leased or rented, shall be counted;

OAR 660-033-135(4) provides, in part:

> "On land identified as high-value farmland, a dwelling may be considered customarily provided in conjunction with farm use if:
>
> "(a) The subject tract is currently employed for the farm use, as defined in ORS 215.203, on which the farm operator earned at least $80,000 in gross annual income from the sale of farm products in each of the last two years or three of the last five years, or in an average of three of the last five years[.]"

"c. The subject tract is currently employed for the farm use that produced the income required in subsection (A)(1)(b) of this section;

"d. The proposed dwelling will be occupied by a person or persons who produced the commodities which generated the income in subsection (A)(1)(b) of this section [.]"

Petitioners applied for approval of a primary farm dwelling on the subject property based on compliance with MCC 17.136.030(A)(1).

County staff concluded that the application met the criteria for a primary farm dwelling set out in MCC 17.136.030(A)(1) but did not comply with MCC 17.110.680, which provides, in part:

> "No permit for the use of land or structures or for the alteration or construction of any structure shall be issued and no land use approval shall be granted if the land for which the permit or approval is sought is being used in violation of any condition of approval of any land use action, is in violation of local, state or federal law, except federal laws related to marijuana, or is being used or has been divided in violation of the provisions of this title, unless issuance of the permit or land use approval would correct the violation."

Staff concluded that MCC 17.110.680 was not met because there was an outstanding violation of statutes and administrative rules related to water used to irrigate strawberries on the subject property.[2]

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[2] Staff found that the application violated MCC 17.110.680 because:

> "While this application meets the criteria outlined in the [MCC] for the establishment of a primary farm dwelling, staff received information from OWRD (Oregon Water Resources Department) detailing a notice of violation of [ORS] 537.535 (1) and (2), unlawful use or appropriation of groundwater on the subject

Petitioners appealed the staff decision to the county hearings officer. On July 20, 2023, the hearings officer held a public hearing on the application. On September 8, 2023, the hearings officer issued their written decision denying petitioners' application for the same reason as identified by staff. The hearings officer found:

"While this application meets the criteria outlined in the [MCC] for

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property. ORS 540.045(1)(a) authorizes the Water Master to regulate the distribution of water among uses in accordance with existing water rights of record. The first notice of violation, dated September 4[,] 2020, states 'observed appropriation of groundwater from a well (L-131243) for irrigation purposes without the benefit of a water right.' The notice goes on to state that the property owner has 10 days to correct the violation. [Petitioners] first purchased this property on April 17, 2019[,] and has been responsible for farming and watering activity since. OWRD has not been able to gain compliance with the applicant in regard to the watering and served a letter to them on May 5[,] 2023, via hand delivery while on a site inspection with Marion County Code Enforcement. This letter requested that a water measuring device be connected to the well as allowed by ORS 537.777 - 537.780 and [OAR] 690-215-0080 and 690-250-0060. This would allow the OWRD to monitor irrigation levels to determine if the watering has stopped. No such device has been installed at this time. This new information raises several issues. The strawberry crop used to qualify this property for a dwelling using farm income was grown in violation of [the s]tatues detailed above.

"* * * * *

"The application initially would have remedied a code enforcement issue where the applicant was living in an agriculturally exempt structure on the property. Now, the application is unable to resolve the violations with state law and must be denied." Record 187-88.

the establishment of a primary farm dwelling, Staff received information from OWRD (Oregon Water Resources Department) that provided notice of violation of [ORS] 537.535(1) and (2), unlawful use or appropriation of groundwater of the subject property. ORS 540.045(1)(a) authorizes the Water Master to regulate the distribution of water among uses in accordance with existing water rights of record. The first notice of violation, dated September 4, 2020, states that the violation is 'the observed appropriation of groundwater from a well (L-131243) for irrigation purposes without the benefit of a water right.'

"* * * OWRD has not been able to gain compliance with [petitioners] in regard to watering and served a letter to them on May 5, 2023, via hand delivery while on a site inspection with Marion County Code Enforcement. This letter requested that a water measuring device be connected to the well as allowed by ORS 537.777 - 537.780 and [OAR] 690-215-0080 and 690-250-0060. This would allow the OWRD to monitor irrigation levels to determine if the watering has stopped. No such device had been installed at the time of the hearing.

"Testimony submitted by neighbors indicates that [petitioners] have been irrigating on the subject property since 2019 to grow their crops." Record 12-13.

The hearings officer concluded:

"It is hereby found that although [petitioners] have met the burden of proving the applicable standards and criteria for approval of the Administrative Review Application to place a primary farm dwelling on a 17.50 acre parcel * * * in the EFU zone by providing proof that requisite annual income from the sale of farm products was earned on the subject tract, the income from the sale of the farm products was produced in violation of ORS 537.535(1) and (2). MCC 17.110.680 precludes approval of the Application for placement of a primary farm dwelling because the land has been used in violation of state law. The Administrative Review

Application is DENIED."[3] Record 16.

Petitioners appealed the hearings officer's decision to the county board of commissioners (the board). "On October 11, 2023, the [b]oard considered the appeal, application and findings[,]" and denied the appeal. Record 5. The board's October 12, 2023, order denied petitioners' appeal, affirmed the hearings officer's decision and attached the hearings officer's decision to the board order as Exhibit A. This appeal followed.

SECOND ASSIGNMENT OF ERROR

ORS 215.416(8)(a) provides:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

Petitioners' second assignment of error is that the decision violates ORS 215.416(8)(a).

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[3] The hearings officer found:

> "[Petitioners] have submitted a copy of their schedule F tax filings. These documents indicate that the farm operation earned a gross income of $93,863 in 2021 and a gross income of $82,141 in 2022, both from the sale of strawberries grown on the subject property. A review of aerial imagery and a site visit indicate that the subject property is planted with strawberries, a farm product. The criterion is met on its face." Record 12.

Petitioners emphasize that ORS 215.416(8)(a) provides that the approval or denial of a permit shall be based on standards and criteria "which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county[.]" Petition for Review 14 (boldface omitted). Petitioners maintain:

> "All of the standards for a primary farm dwelling, including a farm income test dwelling, are included in the county zoning code for the EFU zone, MCC 17.136.030(A), titled *Primary Farm Dwellings.* That code is reproduced in full [in the appendix to the petition]. MCC 17.110.680 is reproduced in full [in the appendix to the petition]. Neither of these two zoning code provisions identifies, references, or incorporates ORS [c]hapters 537 and 540, ORS 537.535(1)-(2), ORS 540.045(1)(a), or any OWRD administrative rules into the EFU zoning code. The [d]ecision does not find that those provisions are identified, referenced, or incorporated into the zoning code." Petition for Review 15-16 (emphasis in original).

Petitioners acknowledge that both MCC 17.136.030(A) and MCC 17.110.680 are "zoning code provisions" and the parties agree that petitioners' application complied with MCC 17.136.030(A). Petition for Review 15-16; Respondent's Brief 1. The board found, however, that the application did not comply with the provision in MCC 17.110.680, "Administration of the title," providing that a land use permit will not be issued if the land is being used in violation of state law. Petitioners direct our attention to portions of the findings

identifying the state law violated on the subject property.[4] Petitioners assert that the board improperly

> "interpreted MCC 17.110.680 to mean that state water laws and OWRD administrative rules apply to an application for a farm income test dwelling under MCC 17.136.030(A)(1). It did so despite the lack of any citation to those state laws and administrative rules in the EFU zoning code. In so doing, the [d]ecision simply ignored ORS 215.416(8)(a)." Petition for Review 20.

Petitioners argue that "[a] vague and general reference to other bodies of law is inadequate to incorporate them into the zoning code, or otherwise transform them into approval criteria." Petition for Review 18. We understand petitioners to argue that criteria applicable to a primary farm dwelling are in MCC 17.136.030 and that although MCC 17.110.680 is part of the zoning code, the board erred in interpreting it to import unspecified state laws as approval criteria.

We will reverse or remand a local government decision if we determine that the local government improperly construed the applicable law. ORS 197.835(9)(a)(D). ORS 197.829(1) provides that

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the [B]oard determines that the local government's interpretation:
>
> > "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

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[4] For example, petitioners point to the statement in the findings that the income from the sale of farm products was produced in violation of ORS 537.535(1) and (2). Petition for Review 14-15.

> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

Deference is owed under ORS 197.829(1) when (1) a governing body of a local government; (2) makes an interpretation of its own land use policies; (3) that is plausible and not inconsistent with the standards set out in the statute. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). We agree with the county that contrary to petitioners' argument, the board's interpretation is not inconsistent with the express language in MCC17.110.680 and is not inconsistent with ORS 215.416(8).

Petitioners rely on *Lee v. City of Portland*, 57 Or App 798, 646 P2d 662 (1982). In *Lee*, the petitioner argued that cited city ordinances did not provide sufficient standards to meet the requirements of ORS 227.173(1).[5] The court explained:

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[5] ORS 227.173(1) is the counterpart to ORS 215.416(8)(a) applicable to cities and provides:

> "Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development

> "Reduced to its essentials, ORS 227.173(1) requires that development ordinances set forth reasonably clear standards for discretionary permit applications. The intent of the statute is to insure [*sic*] that these standards be the sole basis for determining whether a discretionary permit application is approved.
>
> "* * * * *
>
> "In summary, ORS 227.173(1) does not require perfect standards, but only standards that are clear enough for an applicant to know what he must show during the application process. Although the standards governing the grant of the conditional use here may not have been perfect, they did inform interested parties of the basis on which the application would be granted or denied." *Lee*, 57 Or App at 801-803 (internal citation omitted).

Although MCC 17.110.680 does not identify specific provisions of state law that an applicant will be required to address during an application process, we agree with the county that MCC 17.110.680 is specific enough to inform interested parties that the application would be denied if the subject property was found to be in violation of state law.

Petitioners also cite *Ashley Manor Care Centers v. City of Grants Pass*, for the proposition that a denial based on factors not set forth as approval standards violates the statutory requirement to decide an application based on code standards. 38 Or LUBA 308, 317 (2000). This case is unlike *Ashley Manor Care Centers*, where the petitioner argued that the city council's interpretation of its code violated the requirement in ORS 227.173(1) that permit approval criteria be

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> would occur and to the development ordinance and comprehensive plan for the city as a whole."

set forth in the development ordinance. The code applicable to property line vacations provided that the city council "may, by ordinance, vacate the property lines unless the resultant property configuration would create a substandard condition relative to the requirements of this Code, such as plac[ing] two single family dwellings on one lot where only one single family dwelling per lot is allowed." *Ashley Manor Care Centers*, 38 Or LUBA at 310 n 1 (quoting Grants Pass Development Code 17.112 (emphasis omitted)). We explained:

> "The city council interpreted the word 'may' in [the city's code] to allow the city to consider factors other than those that are expressly stated in that provision in approving or denying property line vacations. The council then turned to the development code and determined that [another section of the code] contained factors that the city should consider in deciding whether to approve or deny petitioner's property line vacation application.
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> "* * * * *
>
> "[T]here is a difference between applying a mandatory but vague code standard, and interpreting [the code] to require compliance with 'factors' or 'considerations' not identified in or reasonably suggested by [the code]. Here, it is clear that the city interpreted its code to allow the subject application to be denied based on testimony directed at 'factors' that are not set forth as standards or criteria. As a result, the city's application of its interpretation violates ORS 227.173(1)." 38 Or LUBA at 312-17 (internal footnotes omitted).

The facts in this case are distinguishable from those in *Ashley Manor Care Centers*. The board identified provisions of state water law in a section of the findings labeled "relevant criteria" and concluded:

> "[MCC] 17.110.680, in relevant part, provides that no permit for the

> use of land or structures shall be issued if the land for which the permit or approval is sought is being used in violation of local, state, or federal law. 'Shall' is mandatory and not directory. MCC 17.110.005(D). While 'violation of local, state, or federal law' is broad, it is not ambiguous. If the land for which the permit or approval is sought is being used in violation of local, state, or federal law, the hearings officer is mandated to deny the Application.
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> "* * * * *
>
> "[Petitioners] argue that requiring compliance with respect to local, state, and federal law is a 'general concept' and questions how the county decides with which laws it will require compliance. It is agreed that it would be unreasonable and overstepping for the [c]ounty to actively confirm compliance with all local, state, and federal laws. *However, in this case, public comments were sought, and the [c]ounty was provided with evidence of violation of state law on the subject property.* The violation of state law (unlawful appropriation of ground water) allowed [petitioners] to meet the criteria for a primary farm dwelling in MCC 17.136.030(A)." Record 14-15 (emphasis added).[6]

As we explained in *Ashley Manor Care Centers*, there is a difference between applying a mandatory but arguably vague provision and requiring compliance with provisions not specified in the code. The broad provision at issue here is use of the land in compliance with state law, and the board explained the basis for its determination that the subject property was not used in

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[6] Petitioners argue that *Legacy Development Group v. City of the Dalles* is instructive. Petition for Review 17 (citing ___ Or LUBA ___, ___ (LUBA No 2020-099, Feb 24, 2021) (slip op at 13-14)). *Legacy* did not address ORS 227.173, the city counterpart to ORS 215.416(8), and it does not assist our review of the second assignment of error. We discuss that case in our analysis under the first assignment of error.

compliance with state law. The county responds, and we agree, that it did not apply state water law to deny the application but rather, "found that the property was in violation of state law as demonstrated by the record [and that p]etitioners did not present evidence to the contrary and conceded the violation of state law." Respondent's Brief 11 (citing Record 173).

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Former ORS 197.307(4) (2022), *renumbered as* ORS 197A.400(1) (2023), provides:

> "Except as provided in subsection (3) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:
>
> "(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.
>
> "(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

Petitioners' first assignment of error is that the board's decision violates *former* ORS 197.307(4) (2022) because MCC 17.110.680 is not clear and objective to an application for housing. Petition for Review 4. Petitioners maintain that "MCC 17.110.680 is inherently ambiguous because it does not identify, reference, or incorporate any particular law, including state water law, into the zoning code." Petition for Review 10. Petitioners argue MCC 17.110.680

may not be applied to the application "because it provides the decision maker with discretion and authority to plausibly interpret it in a manner that requires compliance with unidentified laws outside the zoning code, or plausibly interpret it in a manner that does not." Petition for Review 11. Petitioners argue that the decision interprets and applies MCC 17.110.680 to mandate compliance with the "spirit of the zoning code" and that is a value-laden and subjective exercise.[7] Petition for Review 12 (citing Record 37).

The county responds, and we agree, that MCC 17.110.680 is clear and objective. In *Legacy Development Group v. City of the Dalles*, the city considered a code requirement providing that "[t]he [c]ity may deny, approve, or approve a proposal with conditions necessary to meet operational and safety standards; provide the necessary right-of-way improvements; and to require construction of improvements to ensure consistency with the future planned transportation system." ___ Or LUBA ___, ___ (LUBA No. 2020-099, Feb 24, 2021) (slip op at 11). The city concluded that certain Oregon Department of Transportation (ODOT) standards set out in the city's transportation system plan provided applicable standards and then denied the application based on the application's failure to satisfy those standards. We reversed the city's denial because we

[7] Petitioners do not identify an interpretation of the code and we conclude that the board did not interpret its code. Rather, the board opined on the operation of MCC 17.110.680 and concluded that it would be unreasonable for the county to affirmatively search for violations of state law but when there is evidence in the record of a state law violation, denial of the permit is appropriate.

concluded that the code provision did not incorporate the ODOT standards into the code as applicable standards, and that the provision was not clear and objective for purposes of *former* ORS 197.307(4) (2022).

The court has explained that an objective standard exists independent of mind and does not impose subjective, value laden analysis balancing or mitigating the impact or development and that a clear standard is understood without obscurity or ambiguity. *Roberts v. City of Cannon Beach*, 316 Or App 305, 311-12 (2021), *rev den*, 370 Or 56 (2022). The county responds that MCC 17.110.680 is both clear and objective when undisputed evidence is received into the record regarding the property being used in violation of state law. Although the findings include a statement about complying with the spirit of MCC 17.110.680, we agree with the county that whether or not a state law has been violated is an objective standard existing independent of mind and easily understood without ambiguity, where the state agency charged with enforcing an administrative rule has issued a notice that its administrative rule has been violated.[8]

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[8] The county also responds that *former* ORS 197.307(4) (2022) does not apply to an application for a primary farm dwelling located on land zoned EFU and cites our decision in *Landwatch Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No 2023-037, Aug 29, 2023), *aff'd*, 330 Or App 468, ___ P3d ___ (2024). In *Landwatch*, the applicant applied for approval of a relative farm help dwelling and petitioner argued that the applicant did not comply with criteria in OAR 660-033-0130 and the county code. We determined that "the legislative history tends to support petitioner's construction of [*former*] ORS 197.307(4)

The first assignment of error is denied.

The decision is affirmed.

(2017) as not applying to an application for a relative farm help dwelling in the EFU zone." *Id.* at ___ (slip op at 19). We then concluded "that [*former*] ORS 197.307(4) (2017) does not limit the county's application of [code provisions] that implement ORS 215.213 and the LCDC rules at OAR 660-033-0130(9) to intervenor's application for a relative farm help dwelling." *Id.* at ___ (slip op at 23). MCC 17.110.680 does not implement state law but rather provides that the county will not issue a permit where state law is violated and our holding in *Landwatch* is not applicable or instructive in this case.