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

FERGUSON CREEK INVESTMENT, LLC,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

LANDWATCH LANE COUNTY,
Intervenor-Respondent.

LUBA No. 2023-087

FINAL OPINION
AND ORDER

Appeal on remand from the Court of Appeals.

Zack P. Mittge represented petitioner.

No appearance by Lane County.

Sean T. Malone represented intervenor-respondent.

BASSHAM, Board Member; ZAMUDIO, Board Chair; WILSON, Board Member, participated in the decision.

AFFIRMED 05/01/2025

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

Opinion by Bassham.

NATURE OF THE CASE

Petitioner appeals a hearings official's decision denying an application for nonconforming use verification of a dwelling on an 82-acre property zoned Exclusive Farm Use-40 (EFU-40).

INTRODUCTION

This is the third time we have reviewed a county decision relative to petitioner's application for nonconforming use verification of a dwelling. We briefly summarize the facts and appeal history below.

The subject property is located at 25367 Ferguson Road. In 1947, while the property was part of a larger parent parcel, the subject property was improved with a farmhouse (the 1947 farmhouse). In 1980, the county applied zoning to the subject property that for the first time regulated dwellings on agricultural land. In 1985, the larger parent parcel was partitioned to create the subject property in its current configuration. Petitioner's principal acquired the subject property in 1988.

Fast forward to 2022, when petitioner applied to the county for nonconforming use verification for a small dwelling or cabin on the subject property. The subject property is currently developed with two dwellings, including a larger one that was constructed sometime in the late 1990s or early 2000s, and for which no land use approvals or permits were obtained. The larger dwelling is not in dispute in this appeal, and we discuss it no further. The present

appeal concerns only the smaller dwelling or cabin. The cabin was also constructed sometime in the late 1990s or early 2000s, also without obtaining any land use approvals or permits. The cabin was built near the location of the 1947 farmhouse, which no longer exists.

ORS 215.130(5) provides, in part: "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." ORS 215.130 is incorporated, in part, in Lane Code (LC) 16.251, which provides that a nonconforming use is "the lawful use of a building or structure or of any land or premises lawfully existing at the time of the effective date of [the zoning ordinance] or at the time of a change in the official zoning maps" that "may be continued although such use does not conform with the provisions of [the zoning ordinance]."

In its application for nonconforming use verification, petitioner argued that the 1947 farmhouse was a lawful nonconforming use, because it was built and occupied before the county's application of zoning to the subject property in 1980. Petitioner also took the position that residential use of the property continued uninterrupted from 1980 through 2021, when it filed its application to verify the cabin as a lawful nonconforming use. To support that application, petitioner submitted evidence that the cabin had been occupied since at least 2001, which is 20 years prior to its date of application. As discussed below, a state statute, ORS 215.30(11), generally requires an applicant for nonconforming

use verification to submit evidence of continual use, among other things, only for a 20-year period preceding the date of application.[1]

The county initially denied petitioner's application on the theory that because the cabin potentially qualified as a "replacement" dwelling for the 1947 farmhouse, the cabin could not be verified as a nonconforming use. In *Ferguson Creek Investment, LLC v. Lane County*, LUBA No 2022-099 (Jun 9, 2023) (*Ferguson I*), we rejected the county's theory that petitioner could not seek nonconforming use verification and remanded that decision to the county to process petitioner's application.

On remand, the county denied the verification application, based in part on evaluation of evidence from the 1980s and 1990s, prior to the ORS 215.130(11) 20-year look-back period. In *Ferguson Creek Investment, LLC v. Lane County*, LUBA No 2023-087 (Apr 29, 2024) (*Ferguson II*), we agreed with petitioner that the hearings official had, contrary to ORS 215.130(11), improperly considered facts that occurred more than 20 years before the date of the nonconforming use verification application. Because our remand required the hearings official to adopt new findings and a new analysis, we did not resolve petitioner's evidentiary challenges to several findings under the third and fourth assignments of error.

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[1] ORS 215.130(11) provides: "For purposes of verifying a use under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application."

Opponents appealed *Ferguson II* to the Court of Appeals, which reversed and remanded. *Ferguson Creek Investment v. Lane County*, 335 Or App 277, 558 P3d 431 (2024) (*Fergusion III*). The Court of Appeals held that the 20-year look back restriction in ORS 215.130(11) did not bar the hearings official from considering evidence prior to the beginning of the 20-year look-back period that the 1947 farmhouse, the legal nonconforming use, was replaced with an entirely different dwelling, without required approvals.[2] The Court of Appeals reasoned:

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[2] In a footnote, the court in *Ferguson III* stated: "If the applicant *actually* followed a lawful procedure to achieve the new dwelling—which could perhaps include alteration under ORS 215.130(5), as suggested by LUBA—then the situation would be factually and legally different. We speak here only of theoretical procedures that were not actually followed." 335 Or App at 288 n 10 (emphasis in original).

The statute cited, ORS 215.130(5), provides, in relevant part:

> "Alteration of any [legal nonconforming 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."

ORS 215.130(9) provides:

> "As used in this section, 'alteration' of a nonconforming use includes:

"[A] residential use, at least on farmland, is tied to a particular building, specifically a particular dwelling. * * *

"Because a residential 'use' on farmland refers to a specific dwelling, that use necessarily ceases to exist when the specific dwelling ceases to exist. If a new dwelling is built, it is a new residential use. That is important, because it means that an applicant seeking to establish that the current dwelling was lawfully established before zoning went into effect cannot do so by showing that a *different* dwelling was lawfully established before zoning went into effect—regardless of whether a lawful procedure might have existed by which, in theory, the applicant (or prior owner) could have potentially achieved the new dwelling without violating land use laws. It is still a different use, because it is a different dwelling, and the applicant will have failed to show that the current use—that is, the current dwelling—was lawful when established." *Ferguson III*, 335 Or App at 287-88 (emphasis in original; footnotes omitted).

"(a) A change in the use of no greater adverse impact to the neighborhood; and

"(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

ORS 215.130(6) provides:

"Restoration or replacement of any use described in subsection (5) of this section may be permitted when the restoration or replacement is made necessary by fire, other casualty or natural disaster. Restoration or replacement must be commenced within one year from the occurrence of the fire, casualty or natural disaster. If restoration or replacement is necessary under this subsection, restoration or replacement must be done in compliance with ORS 195.260(1)(c)."

Thus, as we understand the court's reasoning, an applicant for a nonconforming use verification of a dwelling on agricultural land must demonstrate that the dwelling for which verification is sought is the same dwelling that was established as a lawful nonconforming use, or at least that it was altered or replaced pursuant to the appropriate permit approvals, even if that demonstration requires examining evidence that is older than the ORS 215.130(11) 20-year look-back period.

The Court of Appeals noted that petitioner had challenged the evidence supporting the hearings official's findings that the 1947 farmhouse had been abandoned at some point, and that the cabin built later was not the same dwelling as the 1947 farmhouse, but that LUBA had not addressed challenges to those findings. Therefore, the court remanded to LUBA, instructing that "LUBA will need to address respondent's factual challenge on remand because it did not reach it previously." *Ferguson III*, 335 Or App at 286.

FIRST AND PORTION OF SECOND ASSIGNMENT OF ERROR

The Court of Appeals' decision does not require that we revisit our denial of the first and part of the second assignment of error, assignments that related to our decision in *Ferguson I*.

For the reasons set out in the Court of Appeals' decision in *Ferguson III*, we deny the portion of petitioner's second assignment of error asserting that the county misconstrued ORS 215.130(11). We address the remainder of petitioner's second assignment of error below.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

Petitioner's third assignment of error is that the hearings official misconstrued the law in denying a nonconforming use verification for the cabin based on the alleged abandonment of the 1947 farmhouse more than 20 years preceding the date of the application. Petition for Review at 21. Relatedly, under the fourth assignment of error, petitioner argues that the hearings official's finding of abandonment is not supported by substantial evidence, because the hearings official relied on evidence prior to the 20-year look-back period. Further, petitioner argues that the hearings official erred by relying, in part, on "unsupported statements in a staff report and opponent's letter" to critique evidence petitioner submitted from an electric utility, stating that electricity had been supplied continuously to the property since 1947. *Id.* at 27-28.

Petitioner's misconstruction of law arguments under ORS 215.130(11) are woven throughout the third and fourth assignments of error. However, as explained above, the Court of Appeals held that, at least as it relates to dwellings on EFU land, ORS 215.130(11) does not prohibit consideration of whether the dwelling for which verification is sought is the same dwelling that qualified as a legal nonconforming dwelling when contrary zoning was first applied, even if that consideration requires evaluating evidence that predates the 20-year look-back period. In the present case, that means the county did not err in evaluating whether residential use of the 1947 farmhouse, which the county found ceased to exist as a habitable structure sometime in the 1980s, was discontinued or

abandoned prior to the beginning of the 20-year look-back period. Petitioner's misconstruction of law arguments to the contrary provide no basis for reversal or remand.

We turn then to petitioner's challenges to the county's findings that the 1947 farmhouse was abandoned sometime in the early 1980s and, consequently, that the cabin built sometime later is not the same dwelling as the 1947 farmhouse. Generally, adequate findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Substantial evidence is evidence that a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

LC 16.251(1) provides, in part, that "[t]he burden of proof for the verification of a nonconforming use is upon the applicant."[3] In findings adopted

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[3] LC 16.251(1) provides, in part, that when evaluating a request for verification of a nonconforming use, the following criteria apply:

> "(a) To be valid, a nonconforming use must have been lawfully established prior to the enactment of an ordinance restricting or prohibiting the use.
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> "(b) The use must have been in actual existence prior to the enactment of an ordinance restricting or prohibiting the use or have proceeded so far toward completion that a right to complete and maintain the use is deemed to have vested in the landowner.

by the hearings official, staff described the evidence that petitioner submitted to meet that burden:

> "The applicant's supporting documentation includes aerial photos, a single photo of the existing dwelling exterior, a statement from the electric company, and an affidavit from the property owner attesting to the presence of the existing dwelling when purchased in 1987 and that it has been rented continuously since that time." Record 275.[4]

In addition to evaluating the submitted evidence, county staff examined public records, including a 1983 partition application, which became final in 1985. Based on those public records, staff concluded in findings that the hearings official adopted:

> "The application materials and other available records indicate that the [1947 farmhouse] was unoccupied and considered to have been abandoned when the former property owners applied to partition the property in February of 1983, but physically remained in some form until sometime after County Assessment & Taxation appraisal staff conducted a site inspection in February of 1992 and determined the former farmhouse residence to be a miscellaneous building having only salvage value." Record 256.

Similarly, staff and the hearings official found:

> "(c) The nonuse of a nonconforming use of a structure or property for a period in excess of two years will prohibit the resumption of the nonconforming use. *The burden of proof for the verification of a nonconforming use is upon the applicant.*" (Emphasis added.)

[4] The record in this appeal includes the record in *Ferguson I*, which we refer to as "Record," and the record on remand, which we refer to as "Remand Record."

> "Partition records from 1983 to 1985 indicate all residential use of the subject property had been abandoned prior to the 1983 partition application. These records also appear to indicate that the 'old abandoned house' was not served by septic or water during this period or recognized as a dwelling that was habitable or could be made habitable for residential use in the future." Record 257.

In staff findings adopted by the hearings official, staff also critiqued the evidence that petitioner submitted to meet its burden of proof:

> "Staff does not find the applicant's evidence concerning the status of the dwelling and residential use under their ownership to be particularly supportive of the fact that the subject dwelling existed and was in residential use. The application materials appear to acknowledge that the location of the dwelling shifted slightly over time and is askew from the surveyed location depicted on the final partition map and previous aerial photos. It is unclear from the aerial photo evidence that [the] dwelling existed in any form between final partition approval and 2000 (Ex[h]ibit F and G) [Record 285-90]. Certainly, the aerial photos do not establish that any such structure was standing or fit for occupancy as a dwelling. Moreover, it is evident from the 1994 and 1995 aerials that any vehicle access leading to the dwelling location was not established or in regular use, which is indicative that the only structure that might still have existed at that time was the structure Assessment & Taxation staff determined to be a one residential structure with salvage value upon their 1992 inspection of the property. * * *." Record 275.

To counter the staff critique of its evidence, petitioner emphasized before the county and on appeal that an electric utility had submitted a statement that

"Service to [a] Residential House" had been established in 1947 and that there had been "continuous" electrical use "to [the] present date."[5]

In response, staff submitted a memorandum that critiqued the evidentiary value of the utility note, which the hearings official subsequently adopted as findings:

> "The writer [of the note] does not clarify the question that was asked of them, describe any meter locations, specify which house on the property to which they refer, or provide electric usage details. Staff would note that the LUBA record for this matter documents that the subject property and parent property have been developed with outbuildings over time, were in farm use by the previous property owner and leased for such purposes in the early 1980s * * *. The record also documents that a domestic well, which could be expected to include a pump and electric service, was installed on the subject property in September of 1984 and that at least one dwelling was constructed without permits on the property in the early 2000s.
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> "Given the format and context of the [electrical service provider] letter, it seems highly unlikely to staff that the writer was asked to confirm or intended to confirm service use connections beyond the service pole or meter, specifically that a service connection beyond the meter was made to the dwelling itself in 1947 and continuously maintained as opposed to the connections beyond the meter that

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[5] Petitioner submitted a handwritten note dated October 31, 2013, signed by an employee of the utility, which stated:

> "Re: 25367 Ferguson
> "Pole Location R92-2L-3R
> "Service to Residential House
> "Originally installed 1947
> "Continuous use to present date
> "Questions? Call [phone number]" Record 561.

> would have been provided to the well pump or other dwellings and structures on the property. Much more likely would be that the writer was asked when electric service was first provided to the old house said to be on the property and whether that service was ever interrupted. In staff's view, the letter is sufficient to establish that continuous electric service has been provided to the property since 1947 via the same electric pole and possibly the same meter, but is not meant to indicate other details concerning the electric service that might lend further support for the dwelling's continued existence at a time it might have been a nonconforming use or later been made a nonconforming use." Remand Record 41-42.

Intervenor also submitted a critique of the note, agreeing with staff that electrical usage on the property after the 1947 farmhouse was abandoned could be explained by service to outbuildings, the well, pumps, etc. Remand Record 21. The hearings official also adopted intervenor's letter as part of the county's findings.[6]

On appeal, under the fourth assignment of error, petitioner argues that the critiques offered by staff and intervenor were mere speculation, and that there is no evidence in the record that electrical service to the property during the relevant period was exclusively for non-residential uses. Given the lack of evidence on that point, we understand petitioner to argue that the electrical service provider's note is conclusive evidence demonstrating that electrical service was provided for residential use on the property continuously since 1947, fatally undermining

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[6] The hearings official's decision incorporates by reference the September 1, 2022 staff report, the September 22, 2022 open record memorandum, the October 13, 2023 staff memo on petitioner's electrical utility letter, and intervenor's October 20, 2023 letter. Remand Record 4-5.

the hearing official's conclusion that the 1947 farmhouse had been abandoned for more than two years sometime in the 1980s.

As noted, under LC 16.251(1), petitioner bears the burden of providing evidence demonstrating all elements of a nonconforming use verification. In the present circumstances, and under the Court of Appeals' interpretation of ORS 215.130(11), that means petitioner is required to provide substantial evidence on which the county could conclude that the cabin for which petitioner seeks verification is, essentially, the same dwelling as the 1947 farmhouse. But the county's decision, and our review of that decision, is based on the evidence in the whole record, not just petitioner's submittals. Under the Court of Appeals' decision, the hearings official did not err in also considering and weighing evidence from the partition application, aerial photos, assessor's report, etc., all of which support a conclusion that the 1947 farmhouse had been abandoned as a residential use by the early 1980s, and had functionally ceased to exist by the early 1990s. That evidence is substantial evidence that 1947 farmhouse had been abandoned, and therefore that the cabin constructed sometime between 1998 and 2004 is *not* the same dwelling as the 1947 farmhouse.

To countervail that evidence, petitioner relies primarily on the note from the electrical service provider. But that note is, at best, ambiguous. Petitioner understands the note to imply that electricity continuously supplied to the property since 1947 served residential uses throughout all relevant periods. But it also could be read, as staff did, to state only that electricity had been supplied

continuously to the property, to the pole or meter, and not that the utility employee who signed the note knew what uses, if any, the electricity served beyond the meter. Different inferences can reasonably be drawn from the note.

The staff critique of the note was just that—a critique of evidence in the record, which the hearings official subsequently adopted as findings. Staff explained why the inference that petitioner promoted was not the only inference that could be drawn from the note. Further, staff pointed out that petitioner's inference has almost no support in the record, while the inference staff identified is more consistent with the relevant evidence. A staff report that critiques a party's inferences based on evidence on the record, and pointing out that that evidence supports other inferences, is an appropriate function for planning staff advising a land use decision-maker. Such a critique and evaluation of evidence in the record is not itself "evidence" for purposes of our substantial evidence review. Intervenor's letter, which the hearings official also adopted as findings, merely echoes the staff critique on this point.[7]

LUBA may reverse or remand a land use decision that is not supported by substantial evidence. ORS 197.835(9)(a)(C). The substantial evidence standard is a deferential standard. Where a reasonable person could reach the decision

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[7] Under the fourth assignment of error, petitioner challenges other statements in intervenor's letter, addressing tax statements, the quality of certain aerial photographs, and other issues that have no bearing on the electrical service issue, or any other live issue in this appeal, as far as we can tell. Petitioner's challenges to statements in intervenor's letter provide no basis for reversal or remand.

reached by a local government, viewing the evidence in the whole record, LUBA will defer to the local government's choice between conflicting evidence, notwithstanding that reasonable people could draw different conclusions from the evidence. *Younger v. City of Portland*, 305 Or 356, 360, 752 P2d 262 (1988); *Adler v. City of Portland*, 25 Or LUBA 546, 554 (1993). Our substantial evidence standard of review is even more rigorous and deferential when it involves a denied application. To reverse a denial of an application on evidentiary grounds, LUBA must conclude that the applicant sustained his burden of proof as a matter of law. *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979).

In the present case, as framed by *Ferguson III*, the question before us is whether a reasonable person could conclude, as the county did, based on the whole record, that petitioner had not met its burden of establishing that the cabin is the same structure as the 1947 farmhouse. The answer to that question is easily yes. Even if the evidence petitioner submitted on that point is also deemed substantial, the record viewed as a whole would allow a reasonable person to conclude that the 1947 farmhouse had been abandoned for more than two years sometime in the early 1980s, and that the 1947 farmhouse and the cabin built sometime later on the subject property are not the same dwelling. Even without the additional burden of overcoming a denial based on evidentiary grounds, petitioner has failed to demonstrate that the county's decision is not supported by

substantial evidence, *i.e.*, evidence that a reasonable person could rely upon to reach the conclusion the county did.

Petitioner's third and fourth assignments of error are denied.

REMAINDER OF SECOND ASSIGNMENT OF ERROR

The second assignment of error includes arguments challenging findings regarding the legal and factual status of the 1947 farmhouse prior to adoption of contrary zoning in 1980, and findings addressing the legal and factual status of the cabin at the beginning of the 20-year look-back period. This portion of the second assignment of error, like much of the petition for review, includes misconstruction of law arguments based on ORS 215.130(11) that are now largely moot under *Ferguson III*.

For the reasons set out above, the hearings official made adequate findings supported by substantial evidence that petitioner did not meet its burden of proof to establish that the farmhouse and the cabin are the same dwelling. "[A] decision denying an application must be affirmed if there is at least one valid basis for denial[.]" *Stafford Investments, LP v. Clackamas County,* 78 Or LUBA 320, 325 (2018). Because we have affirmed the county's primary basis for denial, it is unnecessary to us to address petitioner's challenges to other possible bases for denial in the county's decision.

The county's decision is affirmed.