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

LORI RYLAND,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

JENNIFER KAPNEK and TERRY EIDSMOE,
Intervenors-Respondents.

LUBA No. 2025-064

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Lori Ryland filed the petition for review and argued on behalf of themselves.

Caleb Huegel filed a joint respondent's and intervenor-respondent's brief and argued on behalf of respondent. Also on the brief were Andrew H. Stamp and VF Law.

Andrew H. Stamp filed a joint respondent's and intervenor-respondent's brief. Also on the brief were Caleb Huegel and VF Law. Spencer Petrauski argued on behalf of intervenors-respondents.

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

AFFIRMED 02/18/2026

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 DECISION

Petitioner appeals a hearings officer's decision that approves a non-conforming use verification and alterations for a single-family dwelling located within a rural residential zone.

FACTS

The subject property consists of lots 17 and 18 in the platted Cedar Creek Park subdivision. The two lots are developed with a single-family dwelling built sometime around 1930, prior to the adoption of county zoning or land use regulations. As built, the eastern portion of the house encroaches approximately 2-3 feet on a platted but undeveloped right-of-way named Cedar Creek Lane. On the south, the house encroaches approximately five feet into a platted, unnamed and undeveloped right-of-way. The dwelling is built on a slope that leads down to Cedar Creek to the west. Portions of the property are mapped as being within the county River and Stream Conservation Area, which generally restricts development within 100 feet of the relevant water body's mean high-water line.

In 1967, the county first applied zoning regulations to the subject property, zoning that allowed dwellings as a permitted use, but required among other things that new dwellings be set back at least 30 feet from the front property lines. The property is currently zoned Rural Residential Farm-Forest 5-Acre (RRFF-5), which continues to permit dwellings and to require 30-foot minimum front yard

setbacks. Because the property is on a "corner" between two platted rights-of-way, there are two front yard setbacks.

Cedar Creek Lane was dedicated to the county in 1927, and later developed as a narrow, graveled road that generally is located within the 30-foot right-of-way as platted. However, in the area of the subject property the platted alignment runs over and along steep slopes. Presumably for that reason, the original developer of the subdivision constructed the "as-driven" portion of Cedar Creek Lane in this area to the east of the platted alignment, on or adjacent to petitioner's property. The triangular area between the eastern border of the platted alignment and the centerline of the "as-driven" portion of the road is sometimes referred to the record as the "Triangle." *See* Figure 1. The Triangle is sometimes used as a vehicular turnaround. Ownership of the Triangle is disputed.

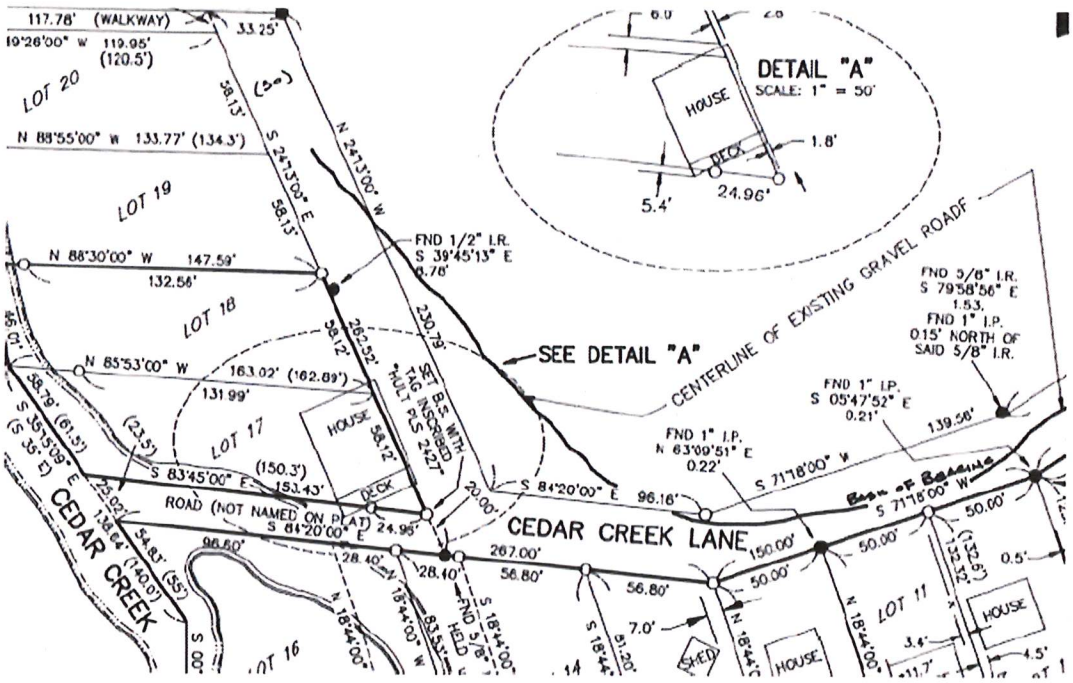

Figure 1, Record 17.

Intervenors purchased the subject property in 2024. The property had been in probate for several years, and the house was dilapidated, needing among other things a new roof and associated structural support. Intervenors applied to the county for a nonconforming use verification with respect to the two front-yard setbacks, and for alteration of the nonconforming structure to replace the roof, raise the roof height by 5 feet, and construct new structural supports. Meanwhile, intervenors obtained from the county a revocable encroachment permit, which authorizes the existing dwelling to encroach into the two undeveloped rights-of-way dedicated to the county.

The applicable criteria for a nonconforming use verification and alteration are codified in Clackamas County Zoning and Development Ordinance (ZDO) 1206. Under ZDO Table 1307-1, an application for nonconforming use verification or alteration is processed as a "Type II" land use permit, providing for notice to neighbors and opportunity to comment, followed by an initial decision by the planning director, with opportunity to request a *de novo* hearing before the county hearings officer.

On July 14, 2025, the planning director issued a decision concluding that the dwelling itself is a permitted use in the RRFF-5 zone and does not require nonconforming use verification. Because the dwelling was constructed in 1930 prior to adoption of the regulations governing front-yard setbacks, the planning director concluded that the dwelling's constructed location partially within the 30-foot front-yard setback is nonconforming, and verified the nonconforming

structure as lawful under ZDO 1206. The planning director also approved the requested alterations for roof replacement and structural support.

On July 21, 2025, petitioner filed an appeal of the planning director's decision, on a form provided by the county. The form included a box entitled "reason(s) for appeal," in which petitioner handwrote "ZDO sections 202, 316, 406, 1206 & 1307 does not comply." Record 770. Later, on August 7, 11, and 13, 2025, petitioner submitted a number of documents raising a number of issues regarding access, safety and ownership of the Triangle.

On August 14, 2025, the hearings officer conducted a *de novo* evidentiary hearing on the appeal. At the close of the hearing, the hearings officer kept the record open in a "7-7-7" format, meaning an initial open-record period of seven days to submit additional evidence and testimony, followed by a second period of seven days to submit rebuttals to evidence and testimony submitted in the first period, then a final period of seven days for the applicant to submit final written arguments. *See* ORS 197.797(6) (providing requirements for an open record period in a local quasi-judicial land use hearing). Petitioner submitted additional evidence and testimony during the first and second periods. On the last day of the second period, intervenors submitted evidence and argument rebutting petitioner's submittals. Intervenors then submitted their final written argument in the third seven-day period.

On October 14, 2025, the hearings officer issued the county's final decision approving the requested nonconforming use verification and alteration. This appeal followed.

WAIVER

As discussed below, petitioner's first through eighth assignments of error raise a number of issues that do not involve application of the ZDO nonconforming use verification and alteration standards. Initially, intervenors argue that all the issues discussed in the first through eighth assignments of error are waived under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), *rev den*, 336 Or 615 (2004). The waiver principle articulated in *Miles* is sometimes described as "exhaustion/waiver" because it combines traditional waiver concepts embodied in ORS 197.797(1) and ORS 197.835(3), with the obligation at ORS 197.825(2)(a) that a petitioner at LUBA must exhaust local administrative remedies before appealing to LUBA.[1]

---

[1] ORS 197.825(2)(a) provides that LUBA's jurisdiction is "limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]" ORS 197.835(3) limits LUBA's scope of review to "issues raised by any participant before the local hearings body" as provided, *inter alia*, under ORS 197.797. In turn, ORS 197.797(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning

In *Miles*, the planning commission conducted an initial evidentiary hearing on a conditional use permit application and then approved the permit. The petitioners appealed the planning commission decision to the city council, as provided under the city code. The code required that the local appeal must include a statement of the "specific errors, if any, made in the decision of the [planning commission] and the grounds therefore." 190 Or App at 503. The appeal statement listed four reasons for appeal. The city council affirmed the planning commission decision. On appeal to LUBA, the petitioner did not assign error based on any of the four reasons listed in the local appeal statement. Instead, in relevant part, the petitioner assigned error based on a different alleged error that the petitioner had raised during the proceedings below, but not in the appeal statement. LUBA concluded that the issue had been raised below consistently with the requirements of ORS 197.797(1) [then codified at ORS 197.763(1)] and ultimately sustained the assignment of error. However, on appeal, the Court of Appeals held that, in addition to raising the issue during the proceedings below, it was incumbent on the petitioner to also exhaust the issue as required by ORS 197.825(2)(a), by listing it in the local appeal statement required by the city's code. Because the petitioner failed to do so, the court held that LUBA lacked jurisdiction to review the issue.

---

commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

In the present case, intervenors argue that ZDO 1307.14(B) requires that appeals be made on a form prescribed by the planning director, and further that in the form the appellant must state "[t]he nature of the decision being appealed and the grounds for appeal."[2] As noted, the county appeal form includes a box

---

[2] ZDO 1307.14 provides, in relevant part:

> "A. Filing an Appeal: An appeal shall be in writing and must be received by the Planning Director within 12 days of the date of mailing of the notice of decision * * *.
>
> "B. Notice of Appeal: Notice of appeal shall be made on a form prescribed by the Planning Director and shall be accompanied by the appeal fee. The notice of appeal shall contain:
>
> "1. Identification of the decision sought to be appealed, including its assigned file number, the name of the applicant, and the decision date;
>
> "2. The name, mailing address, and telephone number of the appellant;
>
> "3. The nature of the decision being appealed and the grounds for appeal; and
>
> "4. Signature(s) of the appellant(s) * * *.
>
> "C. Proper Filing of Notice of Appeal: The failure to file a timely and complete notice of appeal is a jurisdictional defect, and the Planning Director shall not accept a notice of appeal that does not comply with Subsections 1307.14(A) and (B). The Planning Director's determination that an appellant has failed to comply with Subsections 1307.14(A) and (B) shall be final.
>
> "D. Appeal Procedures; Scope: Appeals are subject to the following procedures:

labeled "reasons for appeal" in which petitioner wrote "ZDO sections 202, 316, 406, 1206 & 1307 does not comply." Record 770. However, intervenors argue that the arguments written in that box fail to satisfy ZDO 1307.14(C), which provides that "[t]he failure to file a timely and complete notice of appeal is a jurisdictional defect and the Planning Director shall not accept a notice of appeal that does not comply with Subsections 1307.14(A) and (B)." The planning director did not reject petitioner's local appeal as untimely or incomplete, but we understand intervenors to argue that petitioner failed to provide "complete" arguments in the appeal form and, therefore, under the reasoning in *Miles* petitioner failed to "exhaust" any issues in the local appeal, including the issues raised in the first through eighth assignments of error.

Petitioner does not respond to intervenors' arguments under *Miles*. However, regardless of the state of the pleadings we have an independent obligation to correctly apply the statutes governing our jurisdiction and scope of review, at ORS 197.825(2) and ORS 197.835(3). For the following reasons, we

---

> "1. De Novo Review: Appeals shall be de novo. In a de novo review, all issues of law and fact are heard anew, and no issue of law or fact decided by the lower-level review authority is binding on the parties in the hearing. New parties may participate, and any party may present new evidence and legal argument by written or oral testimony. The record of the initial proceeding shall be made a part of the record of the appeal. * * *"

disagree with intervenors that the holding in *Miles* applies to the present circumstances.

As the hearings officer notes, the present case involves an initial permit decision made without a hearing, followed by a *de novo* initial evidentiary hearing to the hearings officer, pursuant to ZDO 1307.09 and ORS 215.416(11). Record 15. ORS 215.416(11)(a) authorizes counties to render an initial decision on a permit application without conducting a hearing, as long as counties provide an opportunity to appeal the initial decision to the *de novo* evidentiary hearing otherwise required by ORS 215.416(3). ORS 215.416(11)(a)(E) specifies that:

> "The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.797 as the basis for an appeal to [LUBA]. At the de novo hearing:
>
> "(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;
>
> "(ii) *The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal*; and
>
> "(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing." (Emphasis added).

Consistent with ORS 215.416(11)(a)(E) and ZDO 1307.14(D)(1), the hearings officer noted that at the evidentiary hearing "new issues may be raised." Record 15. In compliance with the statute and code, the hearings officer did not limit his review to the issues raised in the notice of appeal.

As noted, *Miles* involved an appeal of a permit decision made *after* the city planning commission had provided the initial evidentiary hearing required by ORS 227.175(3), the cognate to ORS 215.416(3) applicable to cities. The appeal process at issue in *Miles* was not subject to statutes governing permit decisions made without a hearing, under ORS 227.175(10) and ORS 215.416(11). Intervenors cite no authority extending the holding in *Miles* to local appeals of permit decisions made without a hearing under to ORS 227.175(10) and ORS 215.416(11). The caselaw we find is to the contrary. *Oregon Shores Conservation Coalition v. Coos County*, 49 Or LUBA 1, 7, n 4 (2005) ("We agree with petitioners that the reasoning in *Miles* does not apply where, as here, a local appeal is made from a decision on a 'permit' made without a hearing under ORS 215.416 or 227.175.").

Further, that ZDO 1307.14(C) authorizes the planning director to reject a local appeal that is incomplete does not assist intervenors' argument. The planning director did not reject the local appeal and made no determination that the local appeal was incomplete.[3] Even had the director done so, we have held that a county cannot impose a "jurisdictional" bar to obtaining the initial evidentiary hearing required by ORS 215.416(3) and (11), based on the adequacy

---

[3] Intervenors did not raise any objection during the local appeal and do not cross-assign error to the hearings officer considering and resolving issues beyond those raised in the county appeal form. *See* OAR 661-010-0030(7) (providing for cross-petitions and contingent cross-assignments of error).

or sufficiency of issues specified in a notice of local appeal of a permit decision made without a hearing. *Landwatch Lane County v. Lane County*, 79 Or LUBA 96, 103 (2019).

Accordingly, we disagree with intervenors that the reasoning in *Miles* extends to the present circumstances. Under ORS 215.416(11)(a)(E)(ii) and (iii), the issues that may be raised during the initial evidentiary hearing and, if raised, must be considered, are not limited to the issues stated in the notice of local appeal of a permit decision made without a hearing. That statutory command would be undermined if the issues that can be raised before LUBA, on appeal of the final decision made under ORS 215.416(11), are limited to the issues raised in the notice of local appeal.

ORGANIZATION OF THIS OPINION

We first address petitioner's ninth assignment of error, which alleges procedural error. If that assignment of error were sustained, we would likely remand to the county to correct the procedural error, and adopt a new decision likely supported by new or additional findings, in which case it may be premature to the address the merits of challenges to the current decision.

For the reasons set out below, we deny the procedural ninth assignment of error, and therefore proceed to address the remaining assignments of error on the merits. We address the first, sixth and seventh assignments of error, which all cite to some applicable or arguably applicable ZDO standard. Finally, we collectively

address the second, third, fourth, fifth, and eighth assignments of error, which fail to identify any applicable approval standards.

NINTH ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer committed prejudicial procedural error and violated due process in accepting new evidence and arguments from the intervenors, the applicants, after the close of the evidentiary record. Petitioner cites no standard of review or applicable law under this assignment of error, but presumably relies on ORS 197.835(9)(a)(B), which provides that LUBA shall remand if we find that the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner."

Petitioner alleges two procedural errors. The first involves rebuttal argument and evidence that the intervenors submitted on August 28, 2025, at the end of the second open-record period. Record 47-63. Petitioner contends that the documents at Record 47 to 63 were untimely submitted after the close of the evidentiary record. The second involves the intervenors' final written argument, submitted on September 4, 2025, pursuant to the "7-7-7" post-hearing schedule established by the hearings officer. Petitioner objects that the final written argument includes attacks on petitioner's character and credibility.

Intervenors initially argue that petitioner failed to preserve the right to assign error based on the alleged procedural errors, because petitioner failed to object during the proceedings below, despite opportunity to lodge objections with

the hearings officer. *Torgeson v. City of Canby*, 19 Or LUBA 511, 519 (1990). Intervenors argue that the hearings officer did not issue the final decision until October 14, 2025, over a month after the alleged procedural errors, and petitioner could easily have preserved her objections, by submitting a written request that the hearings officer either strike the offending documents or re-open the record to allow petitioner an opportunity to respond. Intervenors note that on September 4, 2025, they submitted an objection to petitioner's rebuttal submission, which is found at Record 45 to 46. While the hearings officer did not act on intervenors' objection, intervenors argue that the hearings officer clearly accepted the objection, thus preserving the objection for purposes of appeal to LUBA. According to intervenors, that the hearings officer accepted their objection demonstrates there was a similar opportunity for petitioner to submit objections to alleged procedural errors, an opportunity that petitioner failed to take.

Petitioner does not respond to intervenors' arguments regarding petitioner's failure to object to the alleged procedural errors during the proceedings below. We agree with intervenors that petitioner failed to preserve the right to assign error to the alleged procedural errors, by failing to object during the proceedings below, despite opportunity to do so.

We also agree with intervenors' arguments on the merits, that petitioner has not demonstrated either that the hearings officer committed procedural error, or that any error was prejudicial to petitioner. The documents at Record 46 to 63 were timely submitted prior to the end of the second open-record period.

Petitioner does not argue that the documents submitted do not qualify as "rebuttal" of evidence and arguments submitted during the first open-record period, or cite any basis for her apparent belief that she was entitled to respond to the rebuttal documents intervenors submitted August 28, 2025, under the 7-7-7 framework the hearings officer established, or the statutory framework for post-hearing submissions set out in ORS 197.797(6) and (7).

As to the final written argument submitted September 4, 2025, petitioner complains that it includes personal attacks on her credibility and character. That unfortunately appears to be true. Petitioner argues that these personal attacks are irrelevant to the approval criteria, and that is also true. However, what is missing is citation to evidence, or even well-supported argument, that the hearings officer relied upon any irrelevant or prejudicial assertions in the final written argument, in determining whether intervenors had established compliance with the applicable approval standards. Petitioner cites to no findings that rely upon anything in the final written argument, much less on any challenges to petitioner's credibility or character made in the final written argument. Assuming without deciding that accepting into the record irrelevant or prejudicial personal attacks on a party could constitute procedural error, without establishing that the hearings officer relied upon such personal attacks in rendering the challenged decision, petitioners have not established that any procedural error was prejudicial to petitioner.

The ninth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer erred in framing the nonconforming use verification analysis around the 30-foot front yard setbacks, and instead should have focused the analysis on the encroachment onto the county-owned rights-of-way. Petitioner contends that, as a matter of law, a structure that was illegally sited at the time of construction—by being built across a recorded plat boundary line—cannot later be verified as a lawful nonconforming use or structure, or be lawfully approved for alteration, under the applicable ZDO provisions.

Intervenors respond that petitioner's argument is not supported by Oregon law. According to intervenors, verifying whether a use or structure was lawfully created or established at the time depends exclusively on whether the use or structure violated some zoning or other land use regulation in effect at the time. Intervenors argue that no zoning or other land use regulation was in effect when the house was constructed, sometime around 1930. Therefore, intervenors argue, it is impossible to conclude that the construction or location of the house violated any zoning restriction or land use regulation, because none then existed.

Intervenors cite to several cases for the proposition that a use or structure that was built or used in alleged contravention to some law that is *not* a zoning or land use regulation has no bearing on whether the use was a "lawful use" for

purposes of nonconforming use verification under ORS 215.130(5).[4] *Morgan v. Jackson County*, 290 Or App 111, 118, 414 P3d 917, *rev den*, 362 Or 860, 418 P3d 758 (2018) (auto yard operated without state dealer license required by state law); *Coonse v. Crook County*, 22 Or LUBA 138, 144-45 (1991) (noncompliance with fire and building codes); *Rogue Advocates v. Jackson County*, 69 Or LUBA 271, 278-79 (2014) (operation of asphalt plant without DEQ air quality permit).

We agree with intervenors that petitioner has not identified any "law" that was violated when the dwelling was constructed partially across lot boundaries on a recorded subdivision plat, much less established that any law that might have been violated is accurately characterized as a zoning or land use law for purposes of nonconforming use verification. Under the reasoning in *Morgan*, *Coonse* and *Rogue Advocates*, only noncompliance with applicable zoning or other land use laws is relevant for determining whether a nonconforming use is lawful. Noncompliance with other types of law is not determinative regarding whether the use was lawfully established or otherwise lawful at the relevant point in time.

The first assignment of error is denied.

---

[4] ORS 215.130(5) provides, in relevant 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. Alteration of any such use may be permitted subject to subsection (9) of this section. * * *"

SIXTH ASSIGNMENT OF ERROR

The sixth assignment of error concerns impacts of the dwelling on the Cedar Creek floodplain and related concerns regarding flood risk, erosion, slope stability, and site safety. Petitioner notes that the county's River and Stream Conservation Area (RSCA) regulations at ZDO 704 provide for a 100-foot setback from the mean high-water line of large streams such as Cedar Creek. The hearings officer recited a staff determination that the dwelling meets this 100-foot setback.[5] The hearings officer also noted that, even if the dwelling were within the 100-foot setback, the RSCA regulations at ZDO 704.05(A)(2) provide

---

[5] The findings state, in relevant part:

> "The property contains floodplain and is within the mapped River and Stream Corridor Area (RSCA) for Cedar Creek. Cedar Creek is classified as a Large stream and requires a 100-foot setback from the mean highwater line. Staff report [concluded] the dwelling meets the 100-foot setback requirement. Regardless, if the dwelling is verified as a [nonconforming use], then the setback exceptions stated in ZDO 704.05(A)(2) apply. The applicant provided an Elevation Certificate showing the subject dwelling is above the Base Flood Elevation and therefore is not subject to the Floodplain Development Standards in Section 703 of the ZDO. The Department of State Lands also provided comments in response to this application stating the proposed development 'appears[s] to avoid impacts to Cedar Creek and associated wetlands.'" Record 16.

an exception for alteration of existing buildings, as long as the alteration does not increase the encroachment into the setback.[6] *Id.*

On appeal, petitioner faults the hearings officer for failing to require or conduct a study to determine the location of the mean high-water line, and hence whether the dwelling is within the setback and subject to associated restrictions. Petitioner also argues that the hearings officer failed to evaluate "creek proximity impacts," a phrase that petitioner apparently uses to refer to a grab-bag of concerns, including flood risks, erosion, slope stability, and site safety.

Intervenors respond that petitioner does not acknowledge, or challenge, the hearings officer's finding that the dwelling is not located within the RSCA 100-foot setback. Intervenors also note the hearings officer's finding that, even if it were located within the setback, ZDO 704.05(A)(2) expressly exempts alterations to existing structures that do not encroach further into the setback. Intervenors argue that petitioner does not assert or cite to any evidence that any proposed alteration would extend the dwelling toward the creek. In any event,

---

[6] ZDO 704.05(A)(2) exempts from the minimum setback standards of ZDO 704.04:

> "Repairs, additions, alterations to, or replacement of structures, roadways, driveways, or other development, which is located closer to a river or stream than permitted by the setback requirements of Subsection 704.04, provided that such development does not encroach into the setback any more than the existing structures, roadways, driveways, or other development[.]"

intervenors argue, because the dwelling was constructed long before the county imposed RSCA restrictions, even if RSCA regulations applied to the dwelling, the dwelling would be a nonconforming development and hence not subject to any RSCA regulations for that additional reason.

We agree with intervenors that petitioner has not demonstrated that the hearings officer erred in concluding that the proposed alterations are not subject to RSCA regulations. Petitioner presents no focused challenge to the hearings officer's finding that the dwelling is not within the 100-foot setback, or the alternative finding that, even if were within the setback, the exception at ZDO 704.05(A)(2) would apply. Accordingly, petitioner's arguments provide no basis for reversal or remand.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner's seventh assignment of error alleges that:

> "The Hearings Officer erred by assuming lawful residential use based solely on the structure's physical footprint while excluding extensive evidence of abandonment, unsafe conditions, and potential contamination." Petition for Review 33.

The argument under the seventh assignment of error consists of a single paragraph:

> "The record includes extensive probate evidence establishing that the structure was abandoned, deteriorated, and effectively a tear-down. Prolonged roof failure, water intrusion, mold, rot, and contaminated plumbing were documented. By reducing residential

use to physical existence alone, the decision avoided required analysis of habitability, safety, and discontinuance." *Id.* at 34.

Although it is not entirely clear, we understand petitioner to argue, based on probate evidence in the record, that following the death of the former owner residential use of the dwelling was discontinued for more than two years, and therefore that any lawful nonconforming use of the dwelling had been discontinued or abandoned.[7] The hearings officer rejected similar arguments petitioner made below, explaining:

> "The portion of the property with the dwelling is zoned RRFF-5 and detached single-family dwellings are identified as a primary allowed use in this zone. See Table 316-1. In other words, residential use of the property is a *conforming* use allowed outright in the RRFF-5 zone and is not a *nonconforming* use subject to verification or the principles of *abandonment* or *discontinuation*. Therefore, no application is required of the owners of this property for the residential use of the existing dwelling on their property. Thus, the appellant's arguments asserting that residential use of the dwelling on the property was discontinued *are not relevant* to this application. The [nonconforming use] verification is only needed to determine whether the nonconforming front setbacks of this existing structure meet the standards in ZDO Section 1206." Record 16 (emphases in original).

---

[7] Although petitioner does not cite it, we note that ZDO 1206.04(A) provides:

> "If a nonconforming use is discontinued for a period of more than 24 consecutive months, the use shall not be resumed unless the resumed use conforms to the requirements of this Ordinance and other regulations applicable at the time of the proposed resumption."

Relatedly, the hearings officer found that the encroachments into the front-yard setbacks had not been discontinued for a period exceeding 24 consecutive months. Record 21.

On appeal, petitioner does not acknowledge, much less challenge, the foregoing findings. We agree with intervenors that petitioner has not established that the hearings officer erred in concluding that the relevant nonconforming aspect of the dwelling is its physical intrusion into the front-yard setbacks, and that residential use of the dwelling itself is a conforming use in the RRFF-5 zone. Petitioner cites no authority for the proposition that *conforming* residential use of a dwelling can be lost if the dwelling is unoccupied for some period, simply because part of the physical structure of the dwelling is nonconforming with respect to code standards governing setbacks, height or similar dimensional or locational standards.[8]

---

[8] We note that ZDO 202 includes definitions that distinguish between "nonconforming development" and "nonconforming use." ZDO 202 provides the following two definitions:

> "NONCONFORMING DEVELOPMENT: An element of development, such as landscaping, parking, height, signage, or setbacks that was created in conformance with development regulations which, due to a change in the zone or zoning regulations, is no longer in conformance with the current applicable regulations."
>
> "NONCONFORMING USE: A use of any building, structure or land allowed by right when established or that obtained a required land use approval when established but, due to a change in the zone or zoning regulations, is now prohibited in the zone."

We understand petitioner to suggest that the dilapidated condition of some portions of the dwelling, particularly the roof, means that the dwelling structure itself was unsafe and uninhabitable and therefore the structure itself, as opposed to its residential use, had been "abandoned." However, nothing cited to us in ZDO 1206, or elsewhere, supports that suggestion that discontinuance or abandonment of a nonconforming structure is determined by safety or habitability concerns. Absent a more developed argument, petitioner's arguments on this point do not provide a basis for reversal or remand.

The seventh assignment of error is denied.

SECOND, THIRD, FOURTH, FIFTH, AND EIGHTH ASSIGNMENTS OF ERROR

As intervenors argue, the second, third, fourth, fifth, sixth and eighth assignments of error are not based on ZDO 1206 or any applicable land use regulations that the hearings officer was required to apply in approving the requested nonconforming use verification and alteration. For the following

---

The present case appears to involve "nonconforming development" rather than "nonconforming use," under the ZDO definitions. Nonetheless, we also note that the ZDO 1206 regulations governing nonconforming uses refer only to "nonconforming uses" and do not separately refer to "nonconforming development." The phrase "nonconforming development" does not occur in ZDO 1206. The hearings officer applied the standards at ZDO 1206 to verify the dwelling as a lawfully nonconforming structure with respect to setbacks, and no party disputes that approach. Like the parties, we assume that "nonconforming development" is subject to verification and alteration under ZDO 1206, in the same manner as a nonconforming use.

reasons, we agree with intervenors that the arguments under these assignments of error are directed at matters that the hearings officer was not required to address in approving the requested nonconforming use verification and alteration. Accordingly, those arguments provide no basis for reversal or remand.

Under the second assignment of error, petitioner argues that the hearings officer failed to determine that the dwelling has lawful vehicular access to the developed portion of Cedar Creek Lane. However, petitioner cites no land use regulation or other legal standard that requires the hearings officer to determine, in this proceeding on intervenors' application for nonconforming use verification and alteration, that the dwelling has legal vehicular access. The hearings officer found that the issue of legal access is "outside the scope of" the nonconforming use application. Record 16. Petitioner acknowledges that finding but makes no effort to demonstrate that it is erroneous. Without some focused challenge to that conclusion, petitioner offers no basis for LUBA to reverse or remand the decision.

Similarly, under the third assignment of error, petitioner argues that the hearings officer erred in failing to address whether the subject property has a functioning septic disposal system. Petitioner notes testimony that in 1986 there had been some reported violation with the existing septic system, and a more recent complaint that county septic staff apparently dismissed for lack of evidence. Petitioner contends that the foregoing history compels evaluation of

the septic system, and that the hearings officer improperly deferred evaluation of the existing septic system to future building permit review.[9]

However, as with the legal access issue, petitioner identifies no standards in ZDO 1206, or elsewhere, that requires an evaluation of the septic system in the course of approving an application for nonconforming use verification and alteration. The hearings officer found that under the county code the adequacy of the septic system will be addressed at the time of building permit review, and petitioner has neither established any error in that finding or that the hearings officer improperly deferred a finding of compliance with any approval criteria applicable to the request for nonconforming use verification and alteration.

Arguments under the fourth assignment of error suffer from the same flaw. Petitioner contends that the hearings officer erred in failing to address the question of water availability for the dwelling. Again, petitioner identifies no applicable approval standard that requires a finding that the dwelling is served by a water supply, or requires the hearings officer to sort out the issues petitioner raised below regarding the availability of water. The hearings officer found that water availability was not a relevant issue under the applicable criteria. Record 17. Petitioner offers no challenge to that finding.

---

[9] The hearings officer noted on this issue that "[t]he applicant will be required to work with septic staff as part of permit review process and any issues identified through the building permit review will be required to be resolved." Record 26.

The fifth assignment of error fares no better. Petitioner faults the hearings officer for failing to address issues raised regarding the adequacy of Cedar Creek Lane with respect to fire and emergency vehicle access, adequacy of turn-arounds, etc. No approval standard cited to us requires the hearings officer to address such issues in approving the requested nonconforming use verification and alteration.

Finally, under the eighth assignment of error, petitioner faults the hearings officer for failing to require county staff to conduct site visits, in order to gather information and evaluate issues petitioner raised below regarding legal access, fire safety, septic feasibility, flood risk, and the habitability of the dwelling, all issues addressed under other assignments of error. Without site visits by county staff, petitioner argues, the hearings officer was in no position to adopt any findings regarding the above issues. However, as explained above, the cited issues are not within the scope of the application that was before the hearings officer. Even if they were, petitioner identifies no applicable standard that requires county staff to conduct site visits or pursue any particular means of evaluating the application.

The second, third, fourth, fifth and eighth assignments of error are denied.

The county's decision is affirmed.