BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER
NO: 17-05-02-03

In the Matter of Electing Whether or Not to Hear Appeals of a Decision Affirmed by the Hearings Official Approving a Replacement Dwelling in the Exclusive Farm Use Zone pursuant to Lane Code 16.212(5)(b); Assessor's Map 18-11-08, Tax Lot 200 (File No. 509-PA16-05629/King)

WHEREAS, the Lane County Hearings Official has made a decision to affirm, with modifications, a Planning Director approval of a replacement dwelling application as described in Department File No. 509-PA16-05629; and

WHEREAS, the Lane County Planning Director has appeals of the Hearings Official's decision to the Board of County Commissioners ("Board") pursuant to LC 14.515(3)(f)(ii); and

WHEREAS, the Lane County Hearings Official has affirmed his decision on the application after reviewing the appeals; and

WHEREAS, Lane Code 14.600 provides the procedure and criteria which the Board of follows in deciding whether or not to conduct an on the record hearing for an appeal of a decision by the Hearings Official; and

WHEREAS, the Board has reviewed this matter at a public meeting of the Board.

NOW, THEREFORE, the Board finds and **ORDERS** as follows:

1. That the appeals do not satisfy the criteria of Lane Code 14.600(3); arguments on the appeals should therefore not be considered. Findings in support of this decision are attached as Exhibit "A."

2. That the Lane County Hearings Official decision dated March 10, 2017 and the letter affirming the decision dated March 27, 2017 attached as Exhibit "B," that found relevant approval criteria are met are affirmed and adopted by the Board as the County's final decision.

ADOPTED this 2nd day of May, 2017.

Pat Farr, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM
Date 4-24-17 Lane County
OFFICE OF LEGAL COUNSEL

ORDER EXHIBIT "A"

FINDINGS IN SUPPORT OF THE ORDER

1. The subject property, hereinafter referred to as "property," is located on Tax Lot 200 of Assessor's Map 18–11–08. It is located approximately 2.5 miles northeast of the Florence Urban Growth Boundary and fronts the North Fork Siuslaw Road along its south boundary. The property is approximately 101 acres in size, is vacant except for a structure that appears to serve an agricultural purpose, and does not have a site address.

2. The property is designated by the Lane County Rural Comprehensive Plan as Agriculture and is zoned Exclusive Farm Use (EFU, E–25) consistent with the designation. Abutting properties to the west, north, and east are zoned EFU with the same minimum acreage requirement applicable to the creation of new parcels (E–25) with the exception of one, Rural Public Facility-zoned property that is a half-acre in size. Forest–zoned land extends beyond the properties beyond those zoned EFU on the north side of the road. Farm, forest, and residentially-zoned lands are directly south of the property across the road.

3. County GIS data show the property as within the 100-year floodplain—a special flood hazard area (SFHA), show the property as surrounded by a Class 1 Stream with the exception of its south perimeter, and show wetlands within and encompassing the property. The wetlands as mapped on County GIS are consistent with the National Wetland Inventory.

4. The Oregon Department of State Lands (DSL) reviewed the property for the presence of wetlands and discussed the applicability of requirements for developing in wetland areas based on the request. As depicted on the site plan, development is proposed to occur on a terrace and thus appears outside the wetland boundaries as mapped by DSL. Requirements for development on properties containing wetlands apply to certain development within the delineated boundaries of the actual wetland(s) as opposed to the entire property.

5. On August 2, 2016, the Applicant submitted one of three requests to the Lane County Land Management Division (LMD) for Planning Director approval of a replacement dwelling on the property pursuant to the criteria of approval at LC 16.212(5)(b). The application materials state that the proposed dwelling will replace one dwelling that formerly existed on the property which is of the same configuration at the time of the former dwelling's demolition, will be located on high ground adjacent to waterways, and will be located within 500 feet of an existing barn. The site plan depicts a 150–foot by 150–foot area within which development is proposed to occur and which is approximately 344 feet from the nearest property line. The replacement site is near the middle of the property on a terrace that is adjacent to the natural boundary comprised of wetlands on the western portion of the property and near an existing access road.

6. The dwelling proposed for replacement was a two–story building constructed during the 1950s and was demolished in 1997 through a demolition permit (file 7126–97). The former dwelling is depicted as House #3 on Exhibit C of the application. Prior to its demolition, the dwelling was located along the south perimeter of the subject property. To address one criterion of approval at LC 16.212(5)(b)(ii), a 1996 appraisal report indicated that that the dwelling proposed for replacement had intact exterior walls and roof structure, indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system, interior wiring for interior lighting, and a heating system.

7. The LMD deemed the application incomplete on August 29, 2016. Staff reviewed additional materials submitted by the Applicant thereafter and sent notice of a complete application on September 26, 2016. On January 6, 2017, the Planning Director issued a determination that the request complied with the applicable decision criteria and mailed notice of the

determination to surrounding property owners. LandWatch Lane County and Robert Emmons ("Appellants") submitted a timely appeal of the Planning Director's decision on January 17, 2017. Notice of public hearing on the appeal was mailed on January 19, 2017.

8. On February 9, 2017, the Lane County Hearings Official conducted a public hearing. The written record remained open until February 16, 2017, with opportunity for rebuttal on February 23, 2017 and the Applicant's final written argument by March 2, 2017. On March 10, 2017, the Lane County Hearings Official issued a decision approving the request and affirming the Planning Director's decision with modifications to Conditions of Approval 1 and 3, and notice of the Hearings Official's decision was mailed to the all parties of record.

9. On March 22, 2017, the Appellants and Applicant filed timely appeals of the Hearings Official's decision. Both parties requested that the Board not conduct a hearing on the appeals and deem the Hearings Official decision the final decision of the County pursuant to LC 14.515(3)(f)(ii).

10. Two themes encompass the various assignments of error initially raised by the Appellants upon appeal of the Planning Director's decision to the Hearings Official that remain open on appeal. In summary, these assignments of error address: (1) whether the Applicant can lawfully replace a dwelling that no longer exists; and, (2) the timeline specified by Condition of Approval 1 to construct an approved replacement dwelling. The Applicant also appealed Condition of Approval 1 upon the Hearing's Official's modification of the condition.

11. On March 27, 2017, the Hearings Official reviewed the appeals and affirmed his decision without further consideration pursuant to LC 14.535(1).

12. In order for the Board to hear arguments on the appeals, Lane Code 14.600(3) requires one or more of the following criteria to be found by the Board to apply to the appeals:
    - The issue is of Countywide significance.
    - The issue will reoccur with frequency and there is a need for policy guidance.
    - The issue involves a unique environmental resource.
    - The Planning Director or Hearings Official recommends review.

13. As of April 6, 2017, Lane County contained 5,655 EFU-zoned properties that comprise 193,296 acres. As a whole, the County contained 151,720 properties with a total acreage of 2,875,838 acres. In relative terms, approximately 7% of the County is zoned EFU based on acreage; this percentage decreases to approximately 4% when calculating the composition of the County based on the number of properties. Moreover, not all EFU-zoned properties will qualify for replacement dwellings under the current provisions. If the LMD receives future requests for replacement dwellings under LC 16.212(5)(b) for different properties, the likely effect of development on the County will not be a significant change, as the proposed dwellings are limited to replacement dwellings. The Planning Director concludes that the implications of the decision are not of countywide significance.

14. Applications for Planning Director approval of replacement dwellings in the EFU Zone pursuant to LC 16.212(5)(b) are less commonly submitted applications to the LMD as compared to Forest Template Dwelling applications. As of April 5, 2017, this request is one of 19 applications submitted to the LMD under LC 16.212(5)(b) within the last five years. As previously noted, three of these requests (16%) involve the Applicant and the subject property. The LMD received at least 190 Template Dwelling applications within this five-year timeframe. This matter is the first instance of the Board considering whether or not to hear an appeal regarding a request to replace a dwelling that no longer exists in the EFU Zone.

    The Hearings Official reviewed the allegations of error in the appeals and found that his March 10, 2017 decision adequately addressed the allegations, which resulted in his determination that reconsideration by the Hearings Official is unwarranted.

Regarding the first general issue on appeal, the Hearings Official's decision presented a reasonable interpretation of the applicable State laws to address LC 16.212(5)(b) and establishes precedent where guidance may be required in the event that a comparable proposal and fact pattern comes before the LMD. However, the Appellants appealed the Planning Director's decision and subsequently appealed the Hearing's Official's decisions on the grounds that while the request may comply with the LC as written, a question remains as to whether the LC is consistent with State law. Accordingly, an interpretation of the applicable statutes and rules at the State level is required on how ORS 215.213(1)(q), OAR 660-33-0130(8), and the Act apply to the request.

Regarding the second issue on appeal, the Appellants' initial appeal to the Hearings Official as incorporated by the appeal statement in response to the Hearings Official's decision, asserted that Condition of Approval 1 erred in stating that the approval does not expire. The Hearings Official modified the condition in his March 10, 2017 decision. An appeal by the Applicant of the modified condition followed. LC 14.015 and 14.700(2) and (4) do not leave ambiguity for the interpretation of County policy, as this section specifies that the Hearings Official has authority to establish timelines.

These distinctions notwithstanding, the Temporary Provisions under the Act as implemented by ORS 215.213(1)(q) will sunset on January 2, 2024. Moreover, both parties requested that the Board not conduct a hearing on the appeals and deem the Hearings Official's decision the County's final decision. Accordingly, the Planning Director finds that policy guidance from the Board on the matter is not required.

15. The matter before the Board does not involve a unique environmental resource. To the extent that vegetated areas of EFU-zoned property and wetlands constitute unique environmental resources, the provisions of LC 16.212(5) implement the intent of EFU-zoned and Agriculturally-designated land per the Rural Comprehensive Plan. As previously noted, the property contains mapped wetlands, which include the North Fork Siuslaw River that borders the property and wetlands extending from the bank of the River. The proposed replacement dwelling as depicted on the Site Plan is located on an upland terrace that appears outside the mapped wetland areas.

16. The Hearings Official has not recommended review of the appeals on the record.

17. The Planning Director does not recommend review of the appeals on the record for the reasons cited above.

18. To meet the requirements of Lane Code 14.600(2)(b), the Board is required to adopt a written decision and Order electing to have a hearing on the record for the appeals or declining to further review the appeals.

19. The Board has reviewed this matter at its May 2, 2017 meeting and finds that the appeals do not comply with the criteria of Lane Code Chapter 14.600(3), declines further review, and elects not to hold an on the record hearing for the appeals.

20. The Board affirms and adopts the Hearings Official's March 10, 2017 decision, affirmed by the Hearings Official on March 27, 2017, as the County's final decision in this matter.

Attachment 2:
Exhibit B to the Board Order

LCOG
WorkingTogether
FOR OUR COMMUNITY

March 27, 2017

Ms. Lydia McKinney, Manager
Land Management Division
3050 N. Delta Highway
Eugene, OR 97408

Re: *Appeal of Hearings Official decision affirming the Planning Director's approval, with modifications, of the King request (PA 16–05629) for a replacement dwelling on tax lot 200, assessor's map 18–11–08.*

Dear Ms. McKinney:

On March 10, 2017, I affirmed the Planning Director's approval, with modifications, of the King request (PA 16–05629) for a replacement dwelling on tax lot 200, assessor's map 18–11–08. On March 22, 2017 LandWatch Lane County and the Applicant appealed my decision. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in that decision and that a reconsideration is not warranted.

In specific, the Applicant has argued that a permit for a deferred replacement dwelling does not expire. I agree. However, the Applicant's did not apply for a deferred replacement dwelling with Lane County nor did her application qualify for a deferred replacement dwelling under Chapter 462, Oregon Laws 2013, Section 2(7)(a)(A), as explained in the decision. Further, the Applicant's assertion that the Lane County cannot be more rigorous than the statute is incorrect. Uses allowed under ORS 215.213(1) are discretionary with the County as the statute provides that "they may be established."

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my March 10, 2017 decision without further consideration. Please advise interested parties of this decision.

Sincerely,

Gary L. Darnielle
Lane County Hearings Official

cc: Monica Witzig (file)

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DO NOT SEPARATE PACKET

CERTIFICATE OF MAILING

509-PA16-05629
KING/KLOOS/LANDWATCH
3/10/2017

This is to certify that I, Lisa Lansbery, mailed Notification of

Hearings Official's Decision

To the person(s) shown on the attached copy of mailing label &/or attached letter & delivered said information to the authorized for the US Post Office in Springfield, Oregon on

Date Mailed: 3/10/17

End of Comment Period:

Appeal Deadline: 3/22/17

Hearing Date:

Lisa Lansbery

LISA LANSBERY

NOTE: Surrounding property owners listed are "the owners of record of all property on the most recent property tax assessment rolls" on RLID as per Lane Code 14.300(3)(d). If a tax lot appears on the notice list & there are no corresponding addresses than the tax records have not been updated; therefore, these property owners were not notified.

March 10, 2017

Ms. Lydia McKinney, Division Manager
Land Management Division
3050 N. Delta Highway
Eugene, OR 97408

Re: Appeal of a Planning Director approval of the King requests (PA 16–05629, PA 16–05630 and PA 16–05778) for replacement dwellings in an EFU District.

Dear Ms. McKinney:

Please find the Lane County Hearings Official's decision affirming the Planning Director's approval, with modifications to Conditions of Approval #1 and #3, of the King requests (PA 16–05629, PA 16–05630 and PA 16–05778) for replacement dwellings in the EFU District.

Sincerely,

Gary L. Darnielle
Lane County Hearings Official

cc: Monica Witzig (file)

LANE COUNTY HEARINGS OFFICIAL
APPEAL OF A PLANNING DIRECTOR APPROVAL OF A REPLACEMENT DWELLING IN AN EXCLUSIVE FARM USE DISTRICT

Application Summary

On August 2, 2016, an application for a special use permit to allow the replacement of a dwelling within an exclusive farm use district (E–25) was submitted to Lane County Land Management. On September 26, 2016, at the request of the Applicant, staff deemed the application complete and on January 6, 2017, the Director issued a determination that the subject property complied with the applicable standards and criteria pursuant to LC 16.212(5)(b). Notice of the determination was mailed to surrounding property owners. On January 17, 2017, a timely appeal was submitted by LandWatch Lane County.

Parties of Record

Kay King	LandWatch Lane County	Kim O'Dea
Sean Malone	Robert Emmons	

Application History

Hearing Date: February 9, 2017
(Record Held Open Until March 2, 2017)

Decision Date: March 10, 2017

Appeal Deadline

An appeal must be filed within 12 days of the issuance of this decision, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

Statement of Criteria

Lane Code 16.212(5)(b)
Chapter 462, Oregon Laws 2013 (Formerly HB 2746)
OAR 660–033–0130(8)
ORS 215.213(1)(q) and (9)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," is located on tax lot 200, assessor's map 18–11–08. It is located approximately two and a half miles northeast of the Florence Urban Growth

Boundary, fronting the North Fork Siuslaw Road along its south boundary. The parcel is approximately 101 acres in size, is vacant except for a structure that appears to serve an agricultural purpose, and does not have a site address. The property is designated by the Lane County Rural Comprehensive Plan as Agriculture and is zoned E–25 consistent with the designation. Abutting properties to the west, north, and east are zoned EFU with the same minimum acreage requirement applicable to the creation of new parcels (E–25) with the exception of one, half–acre property that is zoned Rural Public Facility. Forest–zoned land extends beyond the properties beyond those zoned EFU on the north side of the road. Farm, forest, and residentially-zoned lands are directly south of the property across the road.

2. County GIS data show the property as within the 100-year floodplain—a special flood hazard area (SFHA), show the property as surrounded by a Class 1 Stream with the exception of its south perimeter, and show various wetlands within and encompassing the property. The wetlands as mapped on County GIS are consistent with the National Wetland Inventory (NWI) and DSL comments.

   Division of State Land (DSL) staff have reviewed the property for the presence of wetlands and discussed the applicability of requirements for developing in wetland areas based on the County's WLUN sent on September 28, 2016 for 509–PA16–05630. DSL limited their comments to the request associated with 509–PA16–05630, as both requests involve the same property. DSL staff noted that the property contains a terrace in the center of the property with elevations higher than the property's perimeter where wetlands are located. As depicted on the site plan, development is proposed to occur on the terrace and thus outside of the wetland boundaries as mapped by DSL. Requirements for development on properties containing wetlands apply to certain development within the delineated boundaries of the actual wetland(s) as opposed to the entire property.

3. The Applicant requests a special use permit to replace a dwelling on the subject property. The dwelling was a two–story building constructed during the 1940s but was demolished in 1997 through BP 7126–97. It can be identified as House #3 on Exhibit C of the application, which prior to its demolition was located along the southern border of the subject property. A 1996 appraisal report indicated that that the dwelling proposed for replacement had intact exterior walls and roof structure, indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system, interior wiring for interior lighting, and a heating system.

   The application materials state that the proposed dwelling will replace the dwelling that formerly existed on the same property—a property which is of the same configuration at the time of the former dwelling's demolition, will be located on high ground adjacent to waterways, and will be located within 500 feet of an existing barn. The site plan depicts a 150–ft. by 150–ft. area within which

development is proposed to occur and which is approximately 344 feet from the nearest property line. The replacement site is near the middle of the subject property on the upland terrace, adjacent to the natural boundary with the wetlands on the western portion of the property and near an existing access roadway.

Decision

THE PLANNING DIRECTOR'S DECISION APPROVING THE REQUEST (PA 16–05629) BY KAY KING FOR A SPECIAL USE PERMIT FOR A REPLACEMENT DWELLING ON TAX LOT 200, ASSESSOR'S MAP 18–11–08 IS AFFIRMED, WITH THE FOLLOWING MODIFICATIONS TO THE CONDITIONS OF APPROVAL #1 AND #3:

1. Condition of Approval #1 is replaced with the following:

   "The request associated with 509–PA 16–05778 is subject to the two–year expiration requirements of LC 14.700(4) and the provisions in OAR 660–033–0140 regarding the extension of this permit."

2. Condition of Approval #3 is deleted.

Justification for the Decision (Conclusion)

To address the allegations of error, it is important to start with a clear idea of which approval standards apply. Chapter 462, Oregon Laws 2013 (the Act) has primacy as it has essentially defined the nature of replacement dwellings allowed under ORS 215.213(1)(q). OAR 660–033–0130(8) clarifies a portion of the Act and Lane Code 16.212(5) is an attempt to implement the Act and the administrative rule through the Code. It is therefore important to know how Chapter 462, Oregon Laws 2013 operates.

Under Section 2 of the Act, a dwelling may be "*altered, restored or replaced*" if it (1) "*has, or formerly had*" five listed structural features and (2) either proof of appropriate property tax assessment data or proof that the structure was destroyed or demolished. Subsection 2(4) of the Act requires that the dwelling to be replaced be "*removed, demolished or converted*" within one year of the replacement dwelling being certified for occupancy. This section allows the replacement dwelling to be sited on any part of the same lot or parcel and requires that it comply with applicable siting standards.

However, Subsection 2(5) of the Act substitutes more rigorous siting standards than Subsection 2(4)((b) if the dwelling to be replaced "*formerly had*" the structural features described in Subsection 2(2)(a). Finally, Subsection 2(7) of the Act allows for a deferred replacement permit. Under this subsection, the dwelling to be replaced must be removed within three months of when the deferred replacement permit is issued. In addition, the

Subsection 2(7)(b) requires compliance with applicable siting standards as well as building and sanitation codes.

In summary, a replacement dwelling permit may be issued under Section 2 of the Act to an existing dwelling or one that previously existed. If the latter, more complex siting standards are required by Subsection 2(5). I believe that the language of Subsection 2(5) implies that a deferred replacement permit can only be issued for the replacement of existing dwellings that otherwise satisfy the requirements of Subsection 2(2) and 2(4).

The application for this permit, which relies upon a supporting narrative, does not specifically state that it is for a "deferred" replacement dwelling permit and it was not processed under the provisions of Lane Code 16.212(5)(a), which arguably allow the issuance of a deferred permit. In attempting to address the allegations of error, I have encountered several instances where the Code does not accurately replicate the Act or the administrative rule and in those situations the Act or the administrative rule has been applied directly to the application.

The Appellant has raised a number of allegations of error. These allegations are addressed below:

1. ***Condition #1 violates Chapter 462, Oregon Laws 2013, Subsection (7) because it grants a "does not expire" permit without the required qualifiers: dwelling must be removed within 3 months of permit issuance and may not be transferred except to spouse or children.***

   This allegation of error is moot because this application does not qualify as a deferred replacement dwelling permit. However, Condition #1 in the Director's decision must be revised to reflect the correct duration of the permit, which is governed by LC 14.700(4) and the provisions in OAR 660–033–0140.

   This allegation of error is dismissed.

2. ***Condition of Approval #3 violates ORS 215.213(9) because it grants final approval.***

   ORS 215.213(1)(q) allows the replacement of lawfully established dwellings and ORS 215.213(9) states that: "*No final approval of a nonfarm use under this section shall be given unless any additional taxes imposed upon the change in use have been paid.*" The history of the parcel does not indicate there ever was a situation where the loss of an agricultural tax deferral, and resulting penalties, were ever relevant. Nevertheless, the Appellant was correct that the Planning Director did not make findings that addressed whether any taxes on the subject property are owed. However, the Applicant has supplemented the record to show that no taxes are owned on the subject property. Condition of Approval #3 has been deleted by this decision.

This allegation of error is dismissed.

3. ***Lane Code 16.212(5) does not accurately replicate statute (Chapter 462, Oregon Laws 2013, Subsection 2(7) or administrative Rule (OAR 660–033–0130(8)(a).***

The Appellant argues that the "deferred replacement" dwelling permits are intended to apply to existing structures that are intended for replacement. I agree. While there are several provisions of Lane Code 16.212(5)(a) that are not fully consistent with the Act, this application was processed under Lane Code 16.212(5)(b).

As explained above in the preface to the allegations of error, the implication of Subsection 2(5) of the Act is that dwellings that no longer exist but which formerly had the features outlined in Subsection 2(2)(a) of the Act, have more rigorous siting standards applied to their replacement dwellings than dwellings that are currently in existence. The lesser siting standards of Subsection 2(7)b) of the Act are much more similar to those of Subsection 2(4)(b) than those of Subsection 2(5)(b).

Where the Lane Code has been found to be inconsistent with the statutory or administrative rule language, the latter must prevail. For the reasons explained elsewhere in this decision, I conclude that the application for the replacement dwelling has satisfied Section 2(2) of the Act because the dwelling to be replaced formerly had the characteristics outlined in subsection 2(2)(a) and because I interpret the phrase "*demolition in the case of restoration*" to simply mean that the dwelling was demolished to allow for replacement. (See the discussion under Allegation of Error #5.)

Because the dwelling to be replaced "*formerly*" had the features described in subsection 2(2) of the Act, the siting restrictions of subsection 2(5)(b) of the Act are applicable. Subsection 2(5)(b) of the Act requires that the replacement dwelling be sited on the same lot or parcel and:

"(A) Using all or part of the footprint of the replaced dwelling or near a road, ditch, river, property line, forest boundary or another natural boundary of the lot or parcel; and

(B) If possible, for the purpose of minimizing the adverse impacts on resource use of land in the area, within a concentration or cluster of structures or within 500 yards of another structure."

The proposed development site is near the middle of the subject property on the upland terrace, adjacent to the natural boundary with the wetlands on the western portion of the property and near an existing access roadway. The location of the

replacement dwelling, as conditioned, is consistent with subsection 2(5)(b) of the Act and Lane Code 16.212(5)(b)(v), which replicates these standards.

This allegation of error, as it relates to the Director's impermissible treatment of the application as a deferred dwelling replacement permit, is affirmed.

4. The Applicant must comply with subsection 2(2)(b)(A) of the Act.

I'm not sure that I understand the Appellant's argument on this issue. Subsection 2(2)(b) of the Act requires that the permitting authority:

"Finds that the dwelling was assessed as a dwelling for purposes of ad valorem taxation for the lesser of:

(A) The previous five property tax years unless the value of the dwelling was eliminated as a result of the destruction, or demolition in the case of restoration, of the dwelling; or

(B) From the time when the dwelling was erected upon or affixed to the land and became subject to assessment as described in ORS 307.010 unless the value of the dwelling was eliminated as a result of the destruction, or demolition in the case of restoration, of the dwelling."

The Appellant argues that subsection 2(2)(b) of the Act requires a finding the lesser of the two ad valorem options and that the five year period of (A) is "lesser" than the period of time between when the dwelling was erected and became subject to assessment, sometime in the 1940's, and until its value was eliminated.

The Appellant points out that even though the former was "the lesser" of the two periods of time, the Applicant addressed the latter. The implication of this argument is that (1) the Applicant must comply with subsection 2(2)(b)(A) of the Act, (2) the Applicant can't comply with that provision because the dwelling was not assessed during the past five property tax years, and (3) therefore the application must be denied.

I believe this argument fails for two reasons. First, the administrative rule clarifies the intent of the Act in regard to this issue. Thus, OAR 660–033–0130(8)(a)(C) rephrases the "*lesser of*" language as follows:

"(B) The dwelling was assessed as a dwelling for purposes of ad valorem taxation for the previous five property tax years, or, if the dwelling has existed for less than five years, from that time.

(C) Notwithstanding paragraph (B), if the value of the dwelling was eliminated as a result of either of the following circumstances, the dwelling was assessed as a dwelling until such time as the value of the dwelling was eliminated:"

Under the Rule, the Applicant need only show that the dwelling was assessed as a dwelling unit up until the time that it was eliminated. This is consistent with Lane Code 16.212(5)(b)(i)(bb).

Second, the Appellant ignores the second phrase in subsections 2(2)(b)(A) and (B) of the Act, which eliminates the need for an evidentiary showing of property taxes where the value of the dwelling was destroyed or demolished. The language of the Act requiring that the value of the dwelling was eliminated as a result of "*demolition in the case of restoration*" is addressed below under Allegation of Error #5 and given a broader meaning than that suggested by the Appellant and which is consistent with Lane Code 16.212(5)(b(i)(bb).

The Applicant has demonstrated that the dwelling to be replaced was lawfully established and was assessed at the time that it was eliminated and therefore the application complies with both the Act and the administrative rule on this issue.

This allegation of error is dismissed.

5. The dwelling to be replaced must have been either destroyed by fire or natural hazard or demolished in the case of restoration.

Lane Code 16.212(5)(b)(iii) allows the replacement of a dwelling on non–high value farmland if the dwelling was "*removed, demolished, or converted*" within a certain timeframe. The Appellant argues, however, that this language is too broad and that Section (2)(b) of Chapter 462, Oregon Laws 2013 requires either a finding regarding proof of ad valorem property tax assessment or, in its absence, proof that the dwelling was either destroyed by natural causes or demolished for purposes of restoration. The Appellant argues that because subsections 2(1) and 2(2) of the Act state that a lawfully established dwelling may be "*altered, restored or replaced*," the use of the phrase "*demolition in the case of restoration*" has a specific meaning that is different that the term "*replacement*."

In support of its argument, the Appellant points out that the record reflects that the dwelling was demolished 20 years ago and that this excessive timeframe precludes a finding that the dwelling was demolished for purposes of restoration. I believe that the Appellant's definition, if it were to be differentiated from the term "*replacement*," also implies that the term "*restoration*" means that the replacement dwelling must be substantially similar or identical to the dwelling that it replaces.

The Director made a finding that the dwelling was assessed at the time that it was eliminated in 1997 and that it was lawfully established.[1] This finding is consistent

[1] Lane County did not prohibit multiple dwellings on a single lot until 1979.

with OAR 660–033–0130(8)(a)(C). The Director further found that the dwelling was legally demolished through building permit approval.

Since the dwelling was not destroyed by natural causes, the question remains as to whether the Appellant's restrictive definition of "*restoration*" is applicable. The Applicant suggests that the term "*restoration*" is used in its broader more generic definition, as suggested by its dictionary definition:

"*The act or process of returning something to its original condition by repairing it, cleaning it, etc.; the act of bringing back something that existed before; the act of returning something that was stolen or taken; the action of returning something to a former owner, place, or condition. "the restoration of Andrew's sight." Syn. ***repair, fixing, mending, rebuilding, reconstruction, redevelopment.*"[2]

A requirement to show that there was an intent to restore the dwelling at the time of its destruction is a slippery slope and not one where either the Act or the administrative rule suggest is necessary. Nevertheless, the Applicant has stated that the dwelling was demolished with the intent that it be replaced at a later date although there are no reasons given why it has taken 20 years to begin that process.

The term "restoration" is not defined by statute or administrative rule and the interpretations provided by the Appellant and the Applicant are both reasonable. Where a provision is capable of more than one rational interpretation, the context and purpose of its statutory framework is relevant in determining its meaning. Further, absent evidence of contrary legislative intent, it must be interpreted consistent with its plain and ordinary meaning.[3]

The above–quoted dictionary definition of "restoration" is broad and can be used in a manner synonymous with alteration and replacement. In terms of statutory context, a narrow interpretation of the word would seem to limit the broader intent expressed by both the statute, the Act and the administrative order that lawfully established dwellings on EFU–zoned land can be altered, restored and replaced. The phrase "*alteration, restoration or replacement*" is used repeatedly by ORS 215.213(1)(q), Chapter 462, Oregon Laws 2013 and OAR 660–033–0130(8). In specific, subsection 2(2) of the Act allows that a dwelling may be "*altered, restored or replaced*" if, after finding compliance with subsection 2(2)(a), recent ad valorem tax information is available or the dwelling was destroyed or demolished. The restrictive interpretation of the phrase "*demolition in the case of restoration*" would seem to unnecessarily narrow the practical intent of the mandate to allow replacement dwellings and there is nothing in the legislative history to suggest that there was any difference or importance to whether a

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[2] Webster's Third New International Dictionary of the English Language, Unabridged, Copyright 1981, Principal Copyright 1961, Pg.

[3] *State v. Langley*, 314 Or. 247, 256, 939 P.2d 692 (1992)

dwelling was demolished for purposes of restoration or replacement or how long the period was before the replacement dwelling was constructed. Indeed, the Act places no restriction upon when the dwelling must be replaced and is instead focused upon the period of time within which the dwelling must be removed from the property.

Subsection 2(2)(b) of the Act requires tax assessment data unless the dwelling was eliminated as a result of its destruction or demolition. Destruction implies that the dwelling was eliminated by natural causes; which suggest a circumstance outside of the intent of the owner. In this context, the term restoration can be reasonably understood to address situations where the elimination of the dwelling was intentional. Where a provision has several possible interpretations, one of which is not consistent with a clear statutory intent, the interpretation that is consistent with that intent must be given effect. Thus, the term "*restoration*" must be used in its broadest sense to mean that the dwelling was eliminated intentionally by the owner.

This allegation of error is dismissed.

6. The dwelling to be replaced must currently be in existence.

This issue was addressed under Allegation of Error #3, above. In a sense, both parties are correct.

The Appellant argues that the legislative history of Chapter 462, Oregon Laws 2013 suggests that the Act was intended to apply to dwellings that were existing. The Applicant counters that the language of Section 2(2)(a) of the Act also explicitly provides for the replacement of structures that were formerly in existence. Section 2(2)(a) of the Act allows the replacement of a dwelling when the permitting authority:

"Finds to the satisfaction of the permitting authority that the dwelling to be altered, restored or replaced has, or formerly had:
(A) Intact exterior walls and roof structure;
(B) Indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;
(C) Interior wiring for interior lights; and
(D) *A heating system; and ...."*

In addition, Section 2(5)(a)(A) of the Act also differentiates between existing dwellings that have the features described in subsection 2(2) of the Act and those that "*formerly*" had those features.

The term "*formerly in existence*" refers to the list of structural characteristics, not the dwelling itself. Nevertheless, there is nothing in Subsections 2(2)(a) or 2(5)(a)

of the Act that would preclude the replacement of a demolished dwelling that formerly had all of those structural characteristics. Indeed, the language of Subsection (2)(b)(A) and (B) of the Act and OAR 660–033–0130(8)(a)(C) contemplate situations where property taxation was interrupted by the destruction of the dwelling. While the legislative history of the Act is replete with the testimony of farmers wanting the ability to replace existing dwellings, the language of the Act is not that restrictive. Indeed, during the February 21, 2013 hearing on HB 2746, Dave Hunnicutt of Oregonians In Action (OIA) noted that amendments to the bill address situations where a dwelling was destroyed or demolished by the owner for rebuilding. In the present case, the record reflects that the dwelling to be replaced formerly had all of the structural characteristics of Section 2(2)(a) of the Act.

ORS 215.213(1)(q) applies to the "*alteration, restoration, or replacement*" of a "*lawfully established dwelling*." Section 2(1) of Chapter 462, Oregon Laws 2013 provides that "*A lawfully established dwelling may be altered, restored or replaced under ORS 215.213(1)(q) …*" as does OAR 660–033–0130(8)(a). I believe the threshold for whether a dwelling may be replaced is determined by whether it was lawfully established not by whether it currently is in existence.

A replacement dwelling may either be in existence at the time the replacement permit was requested or, if not, it must have formerly had the structural features outlined in Subsection 2(2)(a) of the Act and Lane Code 16.212(5)(b)(ii). However, it is my reading of the Act that a deferred dwelling replacement permit can only be issued if the dwelling to be replaced is still in existence.

This allegation of error is dismissed.

Summary

I have found that the provisions of Lane Code 16.212(5) to be confusing and, in several particulars, inconsistent with Chapter 462, Oregon Laws 2013. For this reason I have applied the Act, and to a lesser degree OAR 660–033–0130(8), directly to the application. Both parties have suggested that this approach may be necessary although they may not agree with my application of the Act and the rule to the request for a replacement dwelling.

Respectfully Submitted,

Gary Darnielle
Lane County Hearings Official