LUBA Case Summaries
February 2024

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● ***Ivanov et al v. Marion County*** **(LUBA No 2023-076, Feb 1, 2024)**
(Opinion by Rudd, Board Member)

Petitioners appealed a board of commissioners decision denying their application for a primary farm dwelling. Held: The county's interpretation of Marion County Code (MCC) 17.110.680, to require denial of land use applications where the property is being used in violation of state law, is plausible and not inconsistent with ORS 215.416(8), which requires that denial of a permit application be based on standards and criteria set forth in the county's ordinances. Further, MCC 17.110.680 is clear and objective as required by *former* ORS 197.307(4) (2022), *renumbered as* ORS 197A.400(1) (2023), where the record evidences, and it was undisputed, that the applicants have used the property in violation of state law. Affirmed.

● ***Saige Timber, LLC v. Linn County*** **(LUBA No 2023-075, Feb 2, 2024)**
(Opinion by Zamudio, Board Member)

Petitioner appealed a board of commissioners decision affirming a planning commission decision approving two property line adjustments (PLAs). Held: Petitioner did not establish any prejudice to a substantial right where the planning commission issued its decision after holding a *de novo* hearing and the board of commissioners affirmed the planning commission decision without holding a second *de novo* hearing. ORS 197.835(9)(a)(B). The county did not err in concluding that ORS 215.750(5)(g) does not apply to the PLAs. ORS 215.750(5)(g) prohibits a county from allowing a forest template dwelling if any PLA after January 1, 2019, had the effect of qualifying the lot or parcel for a dwelling under ORS 215.750. The text and context of ORS 215.750 demonstrates that the legislature intended the restrictions therein to apply to dwellings and not to applications for PLAs that would change the configuration of a lot or parcel on which a dwelling was previously allowed. Affirmed.

● ***Central Oregon Landwatch v. Deschutes County*** **(LUBA No 2023-073, Feb 2, 2024)**
(Opinion by Ryan, Board Chair)

Petitioner appealed a board of commissioners order declining review of a hearings officer's decision approving development of a guest ranch. Held: LUBA lacked jurisdiction over the appeal under ORS 197.015(10)(e)(B) because, prior to the board of commissioners' adoption of

the order, the applicant filed a petition for writ of mandamus pursuant to ORS 215.429 and ORS 34.130 in the circuit court. Transferred.

● ***Widmer et al v. City of Troutdale*** **(LUBA No 2023-044, Feb 6, 2024)**
(Opinion by Ryan, Board Chair)

Petitioners appealed a city council decision denying their application for a retail marijuana store in the city's General Commercial zone. Held: Petitioners did not establish that the evidence in the record demonstrated as a matter of law compliance with a city standard requiring that the proposed use will not cause or result in the creation of a public nuisance. The city's decision was supported by substantial evidence. Affirmed.

● ***Akiyama et al v. Tillamook County*** **(LUBA No 2023-044, Feb 9, 2024)**
(Opinion by Ryan, Board Chair)

Petitioners appealed a county ordinance amending the county's short-term rental ordinance. Held: LUBA lacked jurisdiction over the challenged decision because it was not a statutory land use decision under ORS 197.015(10)(a). Petitioners did not establish that the county's short-term rental ordinance was a "land use regulation" as defined in ORS 197.015(11) or that the ordinance amendment was a "new land use regulation" as defined in ORS 197.015(17). The challenged decision was also not a "significant impacts" land use decision because the ordinance would not have any bearing on the land use status quo of petitioners' dwellings. Dismissed.

● ***Marquart v. City of Shaniko*** **(LUBA No 2023-036, Feb 9, 2024)**
(Opinion by Zamudio, Board Member)

Petitioner appealed a city council decision denying petitioner's single-family dwelling site plan application. Held: Stating in a denial that there is "not enough detail" in the site plan and it is "not on our form" did not satisfy the city's statutory obligations to "notify the applicant in writing of exactly what information is missing" and to identify and apply only clear and objective standards, conditions, and procedures to petitioner's application for the development of housing allowed outright in the zone. ORS 227.178(2); *former* ORS 197.307(4) (2022), *renumbered as* ORS 197A.400(1) (2023). The city's denial was not supported by substantial evidence in the whole record where the city found that there are "no setbacks," but petitioner's submitted site plan depicted setbacks. Remanded.

● ***Meyer v. City of King City*** **(LUBA No 2023-059, Feb 14, 2024)**
(Opinion by Rudd, Board Member)

Petitioner appealed a city council decision adopting the Kingston Terrace Master Plan and incorporating the master plan into the city's comprehensive plan. Held: The city did not misconstrue a condition imposed in a Metro decision approving a concept plan for the subject planning area requiring that the city work with a conservation easement holder to protect the easement area "to the maximum extent possible," by concluding that some measurable impact on the easement area is permissible, subject to working with the easement holder to minimize impacts. The city's findings regarding its decision to select an alternative road alignment that

would protect the conservation easement area to the maximum extent possible were adequate and supported by an adequate factual base. The city's decision did not allow new uses that could be conflicting uses with any Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) resources and, therefore, the application of Goal 5 was not required. OAR 660-023-0250(3)(b). Petitioner did not address relevant city council findings and did not adequately develop its argument that the approved master plan does not comply with a comprehensive plan policy requiring the city to coordinate with other jurisdictional entities to protect fish and wildlife habitats to the maximum extent possible. Affirmed.

● ***Central Oregon Landwatch v. Deschutes County*** **(LUBA No 2023-049, Feb 15, 2024)**
(Opinion by Ryan, Board Chair)

Petitioner appealed a board of commissioners decision approving a post-acknowledgment plan amendment (PAPA) that changed the comprehensive plan designation of a 59-acre property from Agriculture (AG) to Rural Residential Exception Area (RREA) and the zoning from Exclusive Farm Use – Tumalo-Redmond-Bend Subzone (EFU-TRB) to Multiple Use Agricultural 10 Acre Minimum (MUA-10). Held: Articulating a "central theme" during the proceedings below is insufficient to raise specific issues under each of the seven factors provided in OAR 660-033-0020(l)(a)(B) that govern whether land is suitable as "agricultural land." ORS 197.797(1). Petitioner did not establish that photographic evidence of crops growing on a property is conclusive evidence that the property is "suitable for farm use," given that the definition of farm use includes farm activities undertaken "for the primary purpose of obtaining a profit," where other evidence demonstrated that growing crops did not generate a profit. OAR 660-033-0020(1)(a)(B); ORS 215.203(2)(a). Evidence in the record that, even with 36 acres of irrigated land, past farming activity failed to result in a profit was evidence a reasonable person would rely on. Expert testimony that additional fertilization and irrigation could still not support a farm use on the subject property was evidence a reasonable person would rely on, even in light of countervailing evidence in the record. Petitioner's argument that the application failed to comply with Goal 14 (Urbanization) provided no basis for remand because petitioner did not challenge relevant county findings that the dwelling density allowed in the MUA-10 zone is not an urban level of density. Affirmed.

● ***Windlinx Ranch Trust v. Deschutes County*** **(LUBA No 2023-079, Feb 29, 2024)**
(Opinion by Ryan, Board Chair)

Petitioner appealed a hearings officer decision approving, on remand, a forest template dwelling application. Held: The narrow issue on remand was whether certain lots in the template are lawfully created parcels. *See* ORS 215.750 (outlining forest template dwelling criteria); ORS 215.010(1) (defining lawfully created parcel). Issues that could have been but were not raised in a prior appeal are not reviewable by LUBA in an appeal after remand. *Mill Creek Glen Protec. Assn. v. Umatilla County*, 15 Or LUBA 563, *aff'd*, 88 Or App 522, 746 P2d 728 (1987); *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). Petitioner could have, but did not, raise in the initial appeal the issue that certain lots should not be included in the template. Thus, petitioner was precluded from doing so in this second appeal. Similarly, petitioners could have, but did not, raise in the initial appeal the issue of whether a modified application was required. Affirmed.

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