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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

KIM O'DEA,
Intervenor-Respondent.

LUBA No. 2024-019

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone represented petitioner.

Tiffany A. Johnson represented respondent.

Gregory S. Hathaway represented intervenor-respondent.

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

DISMISSED 07/10/2024

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a 2015 county planning director decision approving a forest template dwelling on property zoned Impacted Forest Lands (F-2).

BACKGROUND

On February 9, 2015, the county planning director decision approving "a residence in the Impacted Forest Lands (F-2) zone in accordance with the 'Template Dwelling' provisions of Lane Code 16.211(5) and (8)" became final (the 2015 Decision). Record 3, 5. On March 23, 2024, petitioner appealed the planning director's decision, citing House Bill (HB) 3362 (2023), Oregon Laws 2023, chapter 543, section 4(1). That legislation provides:

> "On or before April 1, 2024, notwithstanding the standing requirements of ORS 197.830(2) or the deadlines imposed by ORS 12.140 or 197.830(9), any person may file with the Land Use Board of Appeals a notice of intent to appeal a land use decision made by the county if:
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> "(a) The challenged decision approved an application for a template dwelling pursuant to ORS 215.750, a legal lot verification under ORS 92.176, or a property line adjustment under ORS 92.192;
>
> "(b) *The approval of the challenged decision was based on deeds or documents that were forged*;
>
> "(c) The applicant whose application is described in paragraph (a) of this subsection is excluded from the definition of 'innocent purchaser' based on the criteria in section (2)(4)(a), (b), or (c) of this 2023 Act; and

"(d) The applicant described in paragraph (c) of this subsection owned the property that was the subject of the challenged land use decision on January 1, 2023."[1] (Emphasis added.)

MOTION TO DISMISS

On May 24, 2024, intervenor-respondent (intervenor), who was the applicant for the 2015 Decision, filed their motion to dismiss the appeal on a variety of grounds, including that the 2015 Decision is not appealable pursuant to HB 3362 because it does not meet criteria in HB 3362 Section 4(1)(a) or (b).[2] The criteria in HB 3362 Section 4 are cumulative. Thus, failure to satisfy any one of the criteria removes the challenged decision from the exception provided in HB 3362 and, thus, prevents LUBA review.

Intervenor first argues that the approval of the forest template dwelling was under Lane Code (LC) 16.211(5) (2014), not ORS 215.750, and the approval is therefore not subject to HB 3362. Petitioner responds, and we agree, that LC 16.211(5) (2014) implements ORS 215.750. The 2015 Decision satisfies HB

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[1] ORS 197.830(2), 12.140 and 197.830(9) provide for different time periods for appealing certain decisions than are provided in HB 3362.

[2] Intervenor additionally argues that the appeal does not satisfy HB 3362 Section (4)(1)(d) because intervenor only held a partial ownership of the property on January 1, 2023, and intervenor's spouse owned part of the property on that date. Intervenor also argues that the appeal should be dismissed because petitioner failed to exhaust administrative remedies as required by ORS 197.825(2)(a). We do not resolve or express any opinion regarding those alternative, additional arguments.

3362 Section (4)(1)(a)'s requirement that the application was for a template dwelling pursuant to ORS 215.750.

Intervenor also argues that the appeal should be dismissed because the 2015 Decision was not "based on" and did not rely on "deeds or documents that were forged" as required by HB 3362 Section (4)(1)(b). Rather, intervenor explains, the 2015 Decision relied on a February 13, 2012 planning director decision approving intervenor's application for a legal lot verification for three parcels on a 56.1-acre subject property (2012 Decision).

Petitioner responds that the 2015 Decision was based on "deeds or documents that were forged" that were part of the record in the county's 2012 Decision. *See Landwatch Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No 2024-017, July 2, 2024) (dismissing appeal of the 2012 Decision).

In the 2015 Decision, the planning director made the following findings regarding the 11 parcels required under the template test:

> "The subject property must pass the template test (LC 16.211(5)(c)). This test requires that a 160 acre template be centered on the subject property and that there must be at least 11 parcels and three dwellings that existed on January 1, 1993, and that are partially or wholly located within the 160 acre template. A 160-acre square template centered on the subject property was used for the parcel and dwelling count. The submitted materials document that there are clearly at least 18 parcels in the template area that was centered on the subject property[.] * * *
>
> "These parcels appear to be lawful parcels created prior to January 1, 1993, *based on approved partitions, legal lot verifications and deeds*. Staff's verification of the status of the 18 parcels referenced

above is preliminary and does not constitute a determination of legal status." Record 4.

The planning director then found:

> "The subject property must be a lawfully created parcel or lot (LC 16.211(5)(b)). The information provided by the applicant and in the Land Management Division file *includes a copy of [the 2012 Decision] the Final Legal Lot Verification (PA11-05854) for three parcels within Map and Tax Lot 16-02-14/01100, including the subject property as Parcel 2.* The current configuration of the subject property was approved through a Serial Property Line Adjustment (PA13-05566). The Property Line Adjustment deed for this action was recorded on November 7, 2014." Record 4 (emphasis added).

The planning director therefore concluded that a forest template dwelling could be approved, in part, because 11 lots, including three lots proved to exist based upon the 2012 Decision, existed within the 160-acre template required by LC 16.211(5)(c) (2014). Petitioner argues that both the property that is the subject of the 2015 Decision approving the forest template dwelling, and some of the 11 lots determined to be within the template, were considered lawfully created based upon the 2012 Decision, and that the 2012 Decision was based on "deeds or documents that were forged" within the meaning of HB 3362.

Petitioner directs our attention to legislative history supporting petitioner's argument that HB 3362 was enacted specifically to provide the potential to appeal a series of land use approvals obtained by intervenor, including the 2015 Decision challenged in this appeal. Petitioner urges us to give effect to the intent of the legislature determining whether the appeal satisfies the requirements in HB 3362.

In *State v. Gaines*, the court reiterated that the first step of statutory interpretation requires "an examination of the text and context," that primary weight must be given to text and context, and concluded that "nothing in * * * ORS 174.020 purports to require the courts to retreat from that long-standing recognition." 346 Or 160, 171, 206 P3d 1042 (2009). The court explained: "a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis. However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine." *Id.* at 172 (footnote omitted). The court continued:

> "With regard to this changed methodology, we clarify that a party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it. Legislative history may be used to confirm seemingly plain meaning and even to illuminate it; a party also may use legislative history to attempt to convince a court that superficially clear language actually is not so plain at all – that is, that there is a kind of latent ambiguity in the statute. For those or similar purposes, whether the court will conclude that the particular legislative history on which a party relies is of assistance in determining legislative intent will depend on the substance and probative quality of the legislative history itself. * * * *When the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests – or even confirms – that legislators intended something different*." *Id.* at 172-73 (emphasis added; footnotes omitted).

We agree with petitioner that the legislative history supports its assertion that HB 3362 was intended to allow late appeals to LUBA of a series of land use approvals

obtained by intervenor. That legislative history is not, however, capable of supporting petitioner's desired interpretation of the legislation because the legislation's text is unambiguous and capable of having only one meaning.

ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

ORS 174.010 provides that we may not insert what has been omitted. Petitioner's proposed interpretation of HB 3362 Section 4(1)(b) requires that after "[t]he approval of the challenged decision was *based on* deeds or documents that were forged," we in effect insert "*or* the approval of the challenged decision was based on a different decision that was based on deeds or documents that were forged." We will not insert what has been omitted. *See also Ooten v Clackamas County*, 70 Or LUBA 338, 343, 357 (2014) (where an LCDC rule used the word "and," the correct interpretation was that it was conjunctive, and Bassham, T. concurring that even if LCDC may not have intended to use the word "and," LCDC was the correct body to fix any mistake in drafting the rule), *aff'd*, 270 Or App 214, 346 P3d 1305 (2015).

Petitioner argues that there is no dispute that the deeds included in the 2012 legal lot verification application were forged. Intervenor replies that they had no involvement in the alteration of the deeds or a county property description card

maintained by the county and consistent with the altered deeds. We need not and do not decide in this decision whether the approval of the 2012 legal lot verification was based on deeds and documents that were forged.

Webster's dictionary defines "base" to include "foundation" or a "fundamental part of something." *Webster's Third New Int'l Dictionary* 180 (unabridged ed 2002). Thus, for a decision to be "based on" "deeds or documents that are forged," the forged deeds or documents must be a fundamental part of the decision or the foundation of the decision.

In the 2012 Decision, the planning director verified the lawful creation of three parcels. The planning director then based their 2015 Decision approving the forest template dwelling on the 2012 Decision. The planning director did not base their 2015 Decision on the documents that were part of the record for the 2012 Decision. Those documents were not before the planning director and therefore those documents could not have been fundamental to or the foundation of their 2015 Decision. Accordingly, the 2015 Decision was not "based on deeds or documents that were forged."

Petitioner's appeal of the 2015 Decision does not satisfy the requirements in HB 3362 Section (4)(1)(b) and is therefore untimely. ORS 197.830(9).

The motion to dismiss is granted.

The appeal is dismissed.