

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

3
4 TERRY DRAKE and SUSAN DRAKE,)
5)
6 Petitioners,)
7)
8 vs.)
9) LUBA No. 95-116
10 POLK COUNTY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 RICK MULLER,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from Polk County.

22
23 Terry Drake and Susan Drake, Dallas, filed the petition
24 for review and argued on their own behalf.

25
26 No appearance by respondent.

27
28 Wallace W. Lien, Salem, filed the response brief and
29 argued on behalf of intervenor-respondent.

30
31 HANNA, Referee; LIVINGSTON, Chief Referee, participated
32 in the decision.

33
34 REMANDED 11/17/95

35
36 You are entitled to judicial review of this Order.
37 Judicial review is governed by the provisions of ORS
38 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the county commission
4 approving a replacement dwelling.

5 **MOTION TO INTERVENE**

6 Rick Muller moves to intervene in this proceeding on
7 the side of respondent. There is no opposition to the
8 motion, and it is allowed.

9 **FACTS**

10 The subject property comprises 29 acres of largely
11 wooded land in a mixed farm and forest zone. Petitioners'
12 property adjoins the subject property. Access to the
13 subject property is across petitioners' property.

14 In 1989, intervenor, the owner of the subject property,
15 applied for a land use approval for a farm dwelling. The
16 application was reviewed against the criteria for farm
17 dwellings set forth in the Polk County Zoning Ordinance
18 (PCZO) 138.040(B) and approved under decision FD 89-23. In
19 1993 intervenor placed a single-wide mobile home on the
20 property under permit MH 91-16. In 1995, intervenor made
21 application to replace the original dwelling, with a double-
22 wide mobile home. On May 24, 1995 the county board of
23 commissioners adopted an order that allowed the replacement
24 dwelling under ORS 215.283(1)(t) and OAR 660-33-130(8).¹

¹ORS 215.283(1) provides, in relevant part:

1 This appeal followed.

2 **THIRD ASSIGNMENT OF ERROR**

3 Petitioners contend that the county has failed to make
4 adequate findings with respect to PCZO 110.800.²
5 Petitioners argue that PCZO 110.800 establishes a standard
6 for legal access to the subject property, and that the
7 county findings are inadequate to support its finding of
8 legal access.³ Intervenor argues that "legal access is not

"The following uses may be established in any area zoned for
exclusive farm use:

"* * * * *

"(t) Alteration, restoration or replacement of a lawfully
established dwelling that:

"(A) Has intact exterior walls and roof structure;

"(B) Has indoor plumbing consisting of a kitchen sink, toilet
and bathing facilities connected to a sanitary waste
disposal system;

"(C) Has interior wiring for interior lights; and

"(D) Has a heating system.

"* * * * *" (Emphasis added.)

OAR 660-333-130(8) is identical to ORS 215.283(1)(t) in all material
respects.

²The challenged decision incorporates by reference the findings included
in the planning director's initial approval of the replacement dwelling
under ORS 215.283(1)(t). See Record 8, 40-42. The adequacy of these
findings is discussed below under the second assignment of error.

³PCZO 110.800 provides:

"Every dwelling shall have access to a public road or to an
easement. An easement for access to two or more dwelling lots
or two or more dwellings on lots established after the

1 a decisional standard in this case * * *." Intervenor's
2 Brief 14.

3 Findings must (1) identify the relevant approval
4 standards, (2) set out the facts which are believed and
5 relied upon, and (3) explain how those facts lead to the
6 decision on compliance with the approval standards. Heiller
7 v. Josephine County, 23 Or LUBA 551, 556 (1992); Vizina v.
8 Douglas County, 17 Or LUBA 829, 835 (1989). See also
9 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-
10 21, 569 P2d 1063 (1977). Additionally, findings must
11 address and respond to specific issues, raised in the
12 proceedings below, that are relevant to compliance with
13 applicable approval standards. Norvell v. Portland Area
14 LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Skrepetos v.
15 Jackson County, ___ Or LUBA ___ (LUBA No. 94-174, April 25,
16 1995), slip op 22.

17 Petitioners argued to the county that the 50-foot wide
18 legal access required under PCZO 110.800 is an approval
19 standard. The county response in its findings was: "The
20 Board finds that the subject property was legally created as
21 recognized in ORS 215.010, and that the parcel has legal
22 access."⁴ Record 8. The county finding of legal access was
23 made without reference to the PCZO 110.800 standard. The

effective date of this ordinance shall be at least 50 feet
wide."

⁴We do not understand the relevance of ORS 215.010 to the application.
The decision does not explain the reference.

1 county did not state whether legal access is an approval
2 standard before it determined that legal access exists. We
3 cannot determine from the decision if PCZO 110.800 is a
4 mandatory approval standard. Under PCZO 110.800, the county
5 may be required to make a determination of whether legal
6 access must be established before a dwelling may be
7 replaced. The county has not done so.

8 This assignment of error is sustained.

9 **SECOND ASSIGNMENT OF ERROR**

10 Petitioners' arguments are based on the requirement in
11 ORS 215.283(1)(t) and OAR 660-33-130(8) that a property
12 owner demonstrate the dwelling being replaced was lawfully
13 established. Petitioners argue that the original dwelling
14 could not have been lawfully established unless there was
15 legal access to the subject property as required by PCZO
16 110.800. Petitioners argue that under PCZO 110.800, the
17 county should have required a 50-foot wide legal access in
18 1989, when it approved the establishment of a dwelling.
19 Because they reason the 50-foot wide legal access was
20 required in 1989, they contend the original dwelling was not
21 lawfully established. They contend further that the 50-foot
22 wide legal access should be required as part of the decision
23 approving a replacement dwelling.

24 The challenged decision sets forth findings that
25 establish that the requirements of ORS 215.283(1)(t) for a
26 replacement dwelling have been met. Record 8. The county

1 finds that the original dwelling was authorized by county
2 decision, FD 89-23, which determined the dwelling could be
3 lawfully established on the subject property. That decision
4 was not appealed. Petitioners' argument amounts to a
5 collateral attack on the 1989 county decision. It is too
6 late to challenge that decision now. See ONRC v. City of
7 Seaside, 27 Or LUBA 679, 681 (1994), Corbett/Terwilliger
8 Neigh. Assoc. v. City of Portland, 16 Or LUBA 49, 52 (1987).

9 If PCZO 110.800 is a mandatory approval standard,
10 application of that standard should have been addressed
11 before the permit, MH 91-16, was approved. However,
12 application of PCZO 110.800 is not relevant to a
13 determination of whether a dwelling is lawfully established
14 under ORS 215.283(1)(t). See Broderson v. Jackson County,
15 28 Or LUBA 645 (1995), aff'd 134 Or App 414 (1995). The
16 county is not required to find the existence of legal access
17 to grant approval for a replacement dwelling under ORS
18 215.283(1)(t), but only that the original dwelling was
19 lawfully established. The previous land use approval, FD
20 89-23, and the permit, MH 91-16, are sufficient to support
21 the conclusion that the original dwelling was lawfully
22 established.

23 This assignment of error is denied.

24 **FIRST ASSIGNMENT OF ERROR**

25 Because the county's findings are inadequate, no
26 purpose would be served by addressing petitioner's

1 additional allegation that the findings are not supported by
2 substantial evidence. DLCD v. Columbia County, 16 Or LUBA
3 467, 471 (1988); DLCD v. Columbia County, 15 Or LUBA 302,
4 305 (1987); McNulty v. City of Lake Oswego, 14 Or LUBA 366,
5 373 (1986). However, we note that if the county chooses to
6 approve the replacement dwelling on remand, its new findings
7 must identify the facts relied upon and explain how those
8 facts support the findings. Heiller v. Josephine County,
9 supra.

10 The county's decision is remanded.

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