BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES HEGELE,
Petitioner,

vs.

CROOK COUNTY,
Respondent,

and

TOM STRAND and CAROL STRAND,
Intervenor-Respondents.

LUBA No. 2007-167

FINAL OPINION
AND ORDER

Appeal from Cook County.

Bruce W. White, Bend, filed the petition for review and argued on behalf of petitioner.

David M. Gordon, County Counsel, Prineville, filed a joint response brief on behalf of respondent. With him on the brief were Daniel Kearns and Reeve Kearns, PC.

Daniel Kearns, Portland, filed a joint response brief and argued on behalf of intervenor-respondents. With him on the brief were David M. Gordon, and Reeve Kearns, PC.

HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member, participated in the decision.

AFFIRMED 02/19/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a decision that approves a replacement dwelling in an exclusive farm use (EFU) zone.

MOTION TO INTERVENE

Tom Strand and Carol Strand, the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

In an EFU zone, a lawfully existing dwelling may be altered, restored or replaced. To qualify for alteration, restoration or replacement, the existing dwelling must have an intact roof, intact exterior walls and indoor plumbing. ORS 215.283(1)(s).[1]

Intervenors filed a site plan review application on January 26, 2007, seeking approval for a replacement dwelling. That application was deemed incomplete by the county on February 26, 2007, because the application did not include proof that the existing dwelling "was habitable per ORS 215.283(1)(s)." Record 10. Four days later, on March 2, 2007, intervenors provided photographs of the existing dwelling to demonstrate that the dwelling

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[1] In the EFU zone, ORS 215.283(1)(s) authorizes:

> "Alteration, restoration or replacement of a lawfully established dwelling that:
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> "(A) Has intact exterior walls and roof structure;
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> "(B) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;
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> "(C) Has interior wiring for interior lights;
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> "(D) Has a heating system; and
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> "(E) In the case of replacement:
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> "(i) Is removed, demolished or converted to an allowable nonresidential use within three months of the completion of the replacement dwelling. * * *"

qualified for replacement under ORS 215.283(1)(s). The same day the planning department conditionally approved the application.[2] The planning department's March 2, 2007 decision included no notice that the decision was subject to a local appeal to the planning commission, and from all appearances the March 2, 2007 decision was a final county decision. The applicant began to remove the existing dwelling on March 5, 2007 and the previously existing dwelling is now gone.

Petitioner owns nearby property. When petitioner saw the dwelling was being removed, he sought and received a copy of the March 2, 2007 decision. Petitioner initially appealed the March 2, 2007 decision to LUBA. However, the county granted petitioner a local appeal.[3] After petitioner filed a local appeal with the county on March 12, 2007, he dismissed that LUBA appeal. The planning commission held an evidentiary hearing on petitioner's appeal on April 11, 2007 and issued a decision upholding the planning department's decision on May 16, 2007. Petitioner appealed that decision to the county court, which approved the disputed replacement dwelling on July 25, 2007. The county's July 25, 2007 decision is the subject of this appeal.

INTRODUCTION

But for the removal of the dwelling on March 7, 2007, this is a relatively straightforward case. In his first four assignments of error, petitioner argues that given the nature and wording of the ORS 215.283(1)(s) criteria, once the existing dwelling was removed on March 7, 2007, it became legally impossible for the county to approve the

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[2] One of the conditions of approval required that the existing dwelling be removed no more than 30 days after the replacement dwelling received its final inspection. Record 11.

[3] Petitioner took the position below that application of the ORS 215.283(1)(s) standards required the exercise of discretion and that the resulting decision qualified as a "permit," within the meaning of ORS 215.402(2). Under ORS 215.416(11)(a)(A), the county may approve a statutory permit decision without a prior public hearing, but the county is required to provide notice of such a permit decision to nearby property owners and must provide an opportunity for a local appeal. The county's legal counsel advised the county that it should provide a local appeal in this case.

replacement dwelling. Petitioner contends the county erred by concluding otherwise. In his fifth and sixth assignments of error, petitioner argues that even if the March 7, 2007 removal of the dwelling is not considered, intervenors failed to demonstrate that the dwelling that existed on the property until March 7, 2007 complied with the ORS 215.283(1)(s) criteria. We turn to petitioner's fifth and sixth assignments of error first.

FIFTH ASSIGNMENT OF ERROR

ORS 215.283(1)(s)(A) requires that the dwelling that is to be replaced must have intact walls and an intact roof. In his fifth assignment of error, petitioner first alleges that the county's findings that the wall and roof are intact are inadequate and that those findings are not supported by substantial evidence.

Petitioner faults the county for not adopting findings that specifically address his arguments that the photographs of the dwelling are of poor quality, are from some distance away and do not show all sides of dwelling. Although cast as a findings challenge, we consider petitioner's findings challenge to be a substantial evidence challenge. The county was not obligated to adopt findings to specifically address petitioner's criticism of the nature and quality of the evidence.

The record includes photographs of the dwelling. Record 166, 191. The photographs that appear at Record 166 are photocopies of original photographs that are separately included in the record. If the front of the house faces south, one of those original photographs shows a partially obstructed view of the south-facing front of the dwelling and an unobstructed view of the west wall and west half of the roof from a distance of approximately 100 yards. The other original photograph shows a partially obstructed view of the south-facing front, the east wall and the east half of the roof from a distance of approximately 75 yards. The third picture is from the county assessor's records. Record 191. It is a black and white photocopy of a photograph that shows the front of the house from a distance of approximately 25 yards away. The record also includes testimony from

intervenors and a neighbor. Record 73-76, 89, 126-33. Intervenors testified that the photographs were taken in 2007 and testified that the dwelling, while certainly not in perfect condition, is habitable and has been used in recent years for seasonal worker housing and for garden club meetings.

Substantial evidence is evidence a reasonable person would believe. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Although the photographs do not show the rear of the dwelling, and the east wall and east half of the roof are partially obscured, we agree with intervenors that the photographs together with the testimony the county received constitute substantial evidence that the dwelling has an intact roof and walls, as ORS 215.283(1)(s)(A) requires. A reasonable person could infer that the rear of the dwelling and the partially obscured wall and half of the roof are in similar condition to the rest of the dwelling and qualify as intact walls and an intact roof.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

ORS 215.283(1)(s)(B) requires that the dwelling that is to be replaced must have "indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system." The record includes photographs of a water pump, tub and shower, kitchen sink and toilet. The county found that the dwelling complied with ORS 215.283(1)(s)(B):

> "The existence of indoor plumbing is evidenced by photos submitted by [intervenors] that depict a kitchen sink, toilet, bathtub and water pump. Applicant provided testimony establishing that indoor plumbing included flushing toilets as part of the sanitary waste system, stating that 'as long as I have been there the toilets drained well…as everyone knows the dwelling was constructed sometime before perk tests and drain field standards. It is likely that the building was attached to a barrel with a perforated drain line. I'm not sure what is there because it's worked, I've never had to pump it, and there's no odor in the area of the dwelling' Testimony was also provided that after the removal of the house, some plumbing pipes and water lines had not been removed, which is also indicative of a 'sanitary was disposal system.' The Court finds that the presence of a working, flushing toilet, along with

> accompanying testimony and photographs provide substantial evidence in the record of plumbing which included a sanitary waste disposal system." Record 15-16.

Petitioner contends the county incorrectly interpreted the ORS 215.283(1)(s)(B) requirement for connection to a sanitary waste system to be satisfied by connecting indoor plumbing fixtures to a pipe that exits the house and enters the ground. Petitioner contends that interpretation is erroneous, leaving the county's findings that the dwelling satisfied ORS 215.283(1)(s)(B) inadequate and unsupported by substantial evidence. According to petitioner:

> "A more definitive interpretation is gleaned from the statutes that regulate onsite sewage disposal systems, under ORS Chapter 454. ORS 454.605(13) provides a specific definition of 'subsurface sewage disposal system,' which provides guidance to the meaning of the term. As a statute regulating sewage disposal systems in the State of Oregon, it provides contextual support under the [*PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993)] analysis to divine the meaning of what is meant by 'sanitary waste disposal system.' The ORS 454.605(13) definition of 'subsurface sewage disposal system' means 'a cesspool or the combination of a septic tank or other treatment unit and effluent sewer and absorption facility.' Similarly, this definition indicates that something more than a single pipe leading from a house is involved. The County's apparent definition of a sanitary waste disposal system as a pipe leading away from the house is not consistent with any reasonable definition of a 'sanitary waste disposal system.'" Petition for Review 16-17.

We do not find petitioner's reliance on the current statutory definition of "subsurface sewage disposal system" to be a persuasive indication of what the legislature had in mind when it enacted the ORS 215.283(1)(s)(B) requirement that the dwelling that is to be replaced must have "indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system." We think it is far more likely that the legislature intended to distinguish between houses that had indoor plumbing and houses that did not. The county relied on testimony that the kitchen sink, toilet and bathing facilities drain into a pipe that carries the effluent out of the house and then underground into a holding and dispersal facility of some sort that allows the effluent to percolate into the soil in

a manner that does not create aesthetic or health problems. That the precise nature of that underground facility is unknown and that it likely does not meet the current statutory definition of "subsurface sewage disposal system" is not important. We agree with intervenors, that the county's findings that the replaced dwelling was connected to a "sanitary waste disposal system," as required by ORS 215.283(1)(s)(B), are supported by substantial evidence.

The sixth assignment of error is denied.

FIRST THROUGH FOURTH ASSIGNMENTS OF ERROR

The county appears to have found that under ORS 215.427(3), the county is required to apply the standards that were in effect at the time the application is filed to the facts as they existed on the date the application is filed.[4] As petitioner correctly points out, as a general proposition, that is an incorrect interpretation of ORS 215.427(3).[5]

ORS 215.427(3)(a) is commonly referred to as the fixed goalpost rule and it shields a permit application from changes in law. However, the evidentiary basis for a permit

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[4] The county adopted the following findings:

> "The dwelling in question was removed upon the Planning Department staff approval of the permit, but prior to expiration of an opportunity to appeal. Since the structure no longer exists, the evidence submitted is from the time of approval of the application. * * * Appellant argued that 'nothing in the wording of [ORS 215.427(3)(a)] freezes the facts in place as they were at the time the application was made.' However, Appellant provided no authority that convinces this Court to infer that while the criteria and standards that applied at the time of the application are 'frozen,' the dwelling's ability to fit into those criteria should fall under any different standard as the matter progresses. The Crook County Court therefore finds that the term 'has,' pursuant to ORS 215.283(1)(s) applies to the dwelling at least no later than the time of application, notwithstanding the fact that the dwelling was subsequently removed from the property. * * *" Record 13 (citations omitted).

[5] ORS 215.427(3)(a) provides:

> "If the application [for a permit] was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the *standards and criteria* that were applicable at the time the application was first submitted." (Emphasis added.)

application almost always includes evidence that both predates and postdates the application. ORS 215.427(3)(a) does not shield permit applications from changes in the facts. *Tarjoto v. Lane County*, 36 Or LUBA 646, 664-65 (1999). In approving a permit, a local government is required to provide a prior hearing or the opportunity for a local appeal with a *de novo* hearing.[6] The relevant facts on the date of the application almost always change as evidence is submitted pursuant to the evidentiary hearing that is required by ORS 215.416(3) or the *de novo* appeal hearing that is required by ORS 215.416(11). Under the county's interpretation of ORS 215.427(3)(a), changes in the facts that postdate the application would be irrelevant. As a general proposition, that is an erroneous interpretation of ORS 215.427(3)(a). We agree with petitioner that to the extent the challenged decision relies on a general interpretation of ORS 215.427(3)(a) to fix both the facts and the applicable approval standards as they existed on the date the application for a permit is filed, that general interpretation is incorrect. ORS 215.427(3)(a) fixes the standards, but it does not fix the facts.

However, it is also possible to read the county's decision in this case to be based more on an interpretation of ORS 215.283(1)(s)(A) and (B) as applied to the facts of this case than a general interpretation of ORS 215.427(3)(a).

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[6] ORS 215.416(3) provides:

> "Except as provided in subsection (11) of [ORS 214.416], the hearings officer shall hold at least one public hearing on [an] application [for permit approval]."

ORS 215.416(11)(a)(A) provides:

> "The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal."

Under ORS 215.416(11)(a)(D)

> "An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a *de novo* hearing."

Under ORS 215.283(1)(s)(A) and (B), the county may approve a replacement dwelling only if the dwelling that is to be replaced "[h]as intact walls and roof structure" and "[h]as indoor plumbing." As petitioner correctly points out, the statute is written in the present tense. When ORS 215.283(1)(s)(A) and (B) is read together with ORS 215.416(9) it is certainly possible to interpret those statutes to require that in all cases a dwelling that is to be replaced under ORS 215.283(1)(s) *must* survive intact until the date the local government's decision to approve the replacement dwelling becomes final.[7] We turn to the question of whether the relevant statutes *must* be interpreted in that manner, in the circumstances presented in this case.

In the case of replacement dwellings, the dwelling that is being replaced *must* be removed. ORS 215.283(1)(s)(E)(i). *See* n 1. It is this requirement that the dwelling that is to be replaced must be removed that makes the disputed permit somewhat unusual. As we explained in *Bradley v. Washington County*, 44 Or LUBA 36, 42-43 (2003), the legislature in authorizing replacement dwellings in EFU zones intended to allow property owners more flexibility in restoring or replacing dwellings than would be the case under the ORS 215.130(5) restrictions on restoring or altering nonconforming uses. So long as the existing dwelling meets the statutory requirements to ensure that the dwelling that is being replaced is a habitable dwelling, it may be removed and a new dwelling can be constructed.

In this case we have already rejected petitioner's challenge to the county's findings that the now-removed dwelling met the ORS 215.283(1)(s) standards on the date the dwelling was removed. On the date the dwelling was removed, the applicant reasonably believed the county had issued a final decision that granted him authority to build a new

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[7] ORS 215.416(9) provides:

> "Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

dwelling if the existing dwelling was removed. Pursuant to that decision, he removed the existing dwelling. Following the county's discovery that the county should have provided notice of its decision and an opportunity for a local appeal, the county provided that opportunity. It is undisputed that on July 25, 2007, when the county court rendered its final decision in this matter after the local appeal was complete, the dwelling that the approved dwelling will replace was gone and therefore did not have an intact roof, intact walls or indoor plumbing on that date. Nevertheless we conclude that the county did not err in interpreting ORS 215.283(1)(s)(A) and (B) not to require that the dwelling (which must be removed in any event as a condition of building the new dwelling) must survive intact until July 25, 2007, in the circumstances presented in this case.

We recognize petitioner's argument that the county's mistake and intervenors' removal of the dwelling on March 5, 2007 has the effect of making "it impossible to now verify by independent observation the intact nature of the walls and roof structure of the dwelling." Petition for Review 11. That is a potentially compelling argument. If there were some reason to believe that such independent observation would lead to a different conclusion regarding whether the dwelling complied with ORS 215.283(1)(s)(A) and (B) on the date the dwelling was removed, reversal might be required. However, that does not appear to be the case, based on our review of the record.

Petitioner also points out that in different contexts a failure to recognize changes in facts could produce results that the legislature clearly would not have intended. We agree. The example petitioner gives is an approval standard that requires access to develop property, where the bridge that is needed to provide access exists on the date the application is filed but washes away before the permit is approved. In that case the continued existence of the bridge is required to provide the access that is required by the statute. In this case, however, the continued existence of the dwelling that is to be replaced is not needed to satisfy any approval standard. In fact, removal of the previously existing dwelling is legally

required. The only issue is the required timing of that removal. In our view, the fact that the statute is worded in the present tense is not sufficient to require that the dwelling must survive until the local appeal was complete, in the somewhat unusual circumstances presented in this appeal.

The first through fourth assignments of error are denied.

The county's decision is affirmed.