

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

3  
4 JIM GEISELMAN,                   )  
5                                    )  
6                   Petitioner,        )  
7                                    )  
8                   vs.                    )  
9                                    )                   LUBA No. 93-145  
10 CLACKAMAS COUNTY,                )  
11                                    )                   FINAL OPINION  
12                   Respondent,        )                   AND ORDER  
13                                    )  
14                   and                    )  
15                                    )  
16 MARY LEBERT,                    )  
17                                    )  
18                   Intervenor-Respondent.                    )

19  
20  
21                   Appeal from Clackamas County.

22  
23                   David B. Smith, Tigard, filed the petition for review  
24 and argued on behalf of petitioner.

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26                   Michael E. Judd, Chief Assistant County Counsel, Oregon  
27 City, filed a response brief and argued on behalf of  
28 respondent.

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30                   Mary Lebert, intervenor-respondent, Canby, filed a  
31 response brief and argued on her own behalf.

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33                   KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,  
34 Referee, participated in the decision.

35  
36                   AFFIRMED                                   12/15/93

37  
38                   You are entitled to judicial review of this Order.  
39 Judicial review is governed by the provisions of ORS  
40 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order denying an application for  
4 a "homestead lot division" to create a two acre "homestead  
5 lot" for nonfarm dwelling use.

6 **MOTION TO INTERVENE**

7 Mary Lebert filed a motion to intervene on the side of  
8 the respondent in this appeal proceeding. There is no  
9 objection to the motion, and it is allowed.

10 **FACTS**

11 The subject property is a 79.40 acre parcel zoned  
12 Exclusive Farm Use (EFU-20). The property is currently  
13 planted in Christmas trees and is developed with a dwelling.  
14 Petitioner submitted an application for a "homestead lot  
15 division" to create a two acre homestead lot for the  
16 existing dwelling. The planning director approved the  
17 application. The planning director's decision was appealed  
18 to the hearings officer. After a public hearing, the  
19 hearings officer reversed the decision of the planning  
20 director and denied the application. This appeal followed.

21 **ASSIGNMENT OF ERROR**

22 "The respondent exceeded its jurisdiction when it  
23 concluded that its construction of the ambiguous  
24 statute, ORS 215.283(3)(d), overruled the clear,  
25 unambiguous, and explicit approval standards of  
26 its own acknowledged land use regulation,  
27 [Clackamas County Zoning and Development Ordinance  
28 (ZDO)] 401.09(D) and 401.05(A)."

29 The ZDO authorizes creation of a "homestead lot" from a

1 farm parcel, for the purpose of making an existing dwelling  
2 a nonfarm use, provided certain standards are met. As  
3 relevant here, those standards are ZDO 401.09(D)(5) and  
4 ZDO 401.05(A)(4). ZDO 401.09(D)(5) provides that a  
5 homestead lot division may be approved for an existing,  
6 principal dwelling if:

7 "The proposed division of land satisfies nonfarm  
8 use criteria nos. 1-5 under [ZDO] 401.05(A). For  
9 purposes of this provision, [ZDO 401.05(A)(4)]  
10 shall apply to the land area included with the  
11 homestead and not to the land under the dwelling  
12 or other preexisting improvements on the  
13 property."

14 ZDO 401.05(A)(4) requires a finding that the dwelling:

15 "Is situated upon generally unsuitable land for  
16 production of farm crops and livestock,  
17 considering the terrain, adverse soil or land  
18 conditions, drainage and flooding, vegetation,  
19 location and size of the tract[.]"<sup>1</sup>

20 The hearings officer determined the proposal complies  
21 with ZDO 401.09(D)(5) and ZDO 401.05(A)(4) concerning the  
22 suitability for farm use of the proposed "homestead lot."  
23 Further, there is no dispute that the proposed two acre  
24 "homestead lot" is generally unsuitable for farm use.

25 The issue in this appeal centers on the hearings  
26 officer's determination that ORS 215.283(3)(d) applies  
27 independently to the proposal and requires that the entire

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<sup>1</sup>For simplicity, in this context, we refer to this standard as requiring the relevant portion of an EFU zoned parcel be "generally unsuitable" for farm use.

1 79.40 acre parcel be "generally unsuitable" for farm use.<sup>2</sup>  
2 In this regard, there is no dispute that the entire 79.40  
3 acre parcel, if considered as a whole, is generally suitable  
4 for farm use. Petitioner's sole challenge in this appeal is  
5 that the hearings officer erroneously denied the proposal on  
6 the basis of ORS 215.283(3)(d).

7 ORS 215.283(3) provides, in relevant part, as follows:

8 "[S]ingle family residential dwellings not  
9 provided in conjunction with farm use, may be  
10 established, subject to approval of the governing  
11 body or its designate, in any area zoned for  
12 exclusive farm use upon a finding that each such  
13 proposed dwelling:

14 \* \* \* \* \*

15 "(d) Is situated upon generally unsuitable land  
16 for the production of farm crops and  
17 livestock, considering the terrain, adverse  
18 soil and land conditions, drainage and  
19 flooding, vegetation, location and size of  
20 tract[.]"<sup>3</sup>

21 Petitioner argues the hearings officer erred in  
22 determining ORS 215.283(3)(d) requires the entire 79.40 acre  
23 parcel be generally unsuitable for farm use. Petitioner  
24 contends that although ORS 215.283(3)(d) is ambiguous, the  
25 ZDO is not. Petitioner claims the ZDO provisions applicable

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<sup>2</sup>There is no dispute that ORS 215.283(3)(d) applies to the proposal.  
ORS 215.263(4). The issue is what ORS 215.283(3)(d) requires in the  
context of the subject property and proposal.

<sup>3</sup>As above, for simplicity, we refer to this standard as requiring the  
relevant portion of an EFU zoned parcel be "generally unsuitable" for farm  
use.

1 here clearly require only a determination of the  
2 agricultural suitability of the land underlying the proposed  
3 "homestead lot." Petitioner maintains that in these  
4 circumstances, the specific provisions of the ZDO should  
5 control over the ambiguous provisions of ORS 215.283(3)(d).  
6 According to petitioner, because the ZDO implements the  
7 ambiguous provisions of ORS 215.283(3)(d), under Smith v.  
8 Clackamas County, 313 Or 519, 836 P2d 716 (1992),<sup>4</sup> and Clark  
9 v. Jackson County, 313 Or 508, 836 P2d 710 (1992), the  
10 county is required to apply its independent interpretation  
11 of related, specifically worded ZDO provisions rather than  
12 legal interpretations of ambiguous provisions in ORS  
13 215.283(3)(d).

14 We agree with petitioner that Smith v. Clackamas County  
15 makes it reasonably plain that ORS 215.283(3)(d) is an  
16 ambiguous statute and requires interpretation. However, we  
17 disagree with petitioner about the legal effect of that  
18 ambiguity. The supreme court's decision in Smith v.  
19 Clackamas County is somewhat unclear on the interpretative  
20 point petitioner argues. Nevertheless, the supreme court  
21 left intact the decision of the court of appeals. The  
22 decision of the court of appeals is clear on the

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<sup>4</sup>In Smith v. Clackamas County, supra, only the generally unsuitable standard of ZDO 401.05(A)(4), which is worded identically to ORS 215.283(3)(d), was at issue. There was no issue in Smith concerning the differently worded and more limited provisions of ZDO 401.09(D)(5) relating to homestead lot divisions.

1 interpretative point at issue here. That decision states,  
2 in relevant part:

3       "\* \* \* The county made its decision under a  
4 provision of its zoning ordinance that parallels  
5 ORS 215.283(3)(d) and denied the application on  
6 the basis of its conclusion that the proposed  
7 dwelling would not be situated on land that is  
8 generally unsuitable for the production of farm  
9 crops and livestock. The seven acres upon which  
10 petitioner seeks to locate the dwelling are  
11 unsuitable for farm use, but the remaining 47  
12 acres are suitable. The question is whether the  
13 suitability determination under ORS 215.283(3)(d)  
14 may be based only on the seven acres or whether  
15 the suitability of the parcel as a whole is the  
16 proper consideration. \* \* \*

17       " \* \* \* \* \*

18       "\* \* \* We agree with LUBA that a nonfarm dwelling  
19 is not permissible on any part of a tract that is  
20 generally suitable for farm use." Smith v.  
21 Clackamas County, 103 Or App 370, 372, 375-76, 797  
22 P2d 1058 (1990), aff'd 313 Or 519 (1992).

23       The supreme court's decision in Smith is based on the  
24 local code provision mirroring ORS 215.283(3)(d). The  
25 supreme court stated that because the local code provision  
26 at issue in Smith and the provisions in ORS 215.283(3)(d)  
27 are identically worded, there was no need to consider  
28 "distinctions that may exist between such ordinances and  
29 statutes." Smith v. Clackamas County, supra, 313 Or at 524  
30 n 5. The supreme court simply held that the local code  
31 provisions mirroring ORS 215.283(3)(d) were properly  
32 interpreted to require the entire EFU zoned parcel be found  
33 generally unsuitable for farm use, not just the portion of

1 the parcel upon which a nonfarm dwelling is proposed. We do  
2 not understand the supreme court to have determined that a  
3 local government may make its own interpretation of  
4 ORS 215.283(3)(d), based on related local ordinance  
5 provisions.

6 ORS 215.283(3)(d) must be independently applied to an  
7 application for the division of EFU zoned land.  
8 ORS 215.263(4).<sup>5</sup> See Forster v. Polk County, 115 Or  
9 App 475, 839 P2d 241 (1992). Any ambiguity in  
10 ORS 215.283(3)(d) was specifically resolved by the court of  
11 appeals' decision in Smith v. Clackamas County, supra. ORS  
12 215.283(3)(d) requires the entire EFU zoned parcel must be  
13 found to be generally unsuitable for farm use. Therefore,  
14 the hearings officer correctly determined that even though  
15 the ZDO may impose a more relaxed standard on homestead lot  
16 divisions, and require only that the portion of an EFU zoned  
17 parcel to be included in a homestead lot be generally  
18 unsuitable, that does not relieve the county of the duty to  
19 apply ORS 215.283(3)(d), as that statute has been  
20 interpreted by the decisions of the supreme court and court  
21 of appeals in Smith v. Clackamas County.

22 The assignment of error is denied.

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<sup>5</sup>ORS 215.263(4) provides:

"The governing body of a county may approve a division of land in an exclusive farm use zone for a dwelling not provided in conjunction with farm use only if the dwelling has been approved under \* \* \* ORS 215.283(3) \* \* \*."

1           The county's decision is affirmed.