

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.

25
26 Michael E. Judd, Chief Assistant County Counsel, Oregon
27 City, filed a response brief and argued on behalf of
28 respondent.

29
30 Mary Lebert, intervenor-respondent, Canby, filed a
31 response brief and argued on her own behalf.

32
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[.]"¹

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

¹For 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.²
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[.]"³

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

²There 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.

³As 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),⁴ 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

⁴In 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).⁵ 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.

⁵ORS 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.