

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

3
4 WILLIAM J. CRAVEN,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 94-244
10 JACKSON COUNTY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 HELEN D. MAHIN,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from Jackson County.

22
23 Sandra Smith Gangle, Salem, filed the petition for
24 review and argued on behalf of petitioner. With her on the
25 brief was Depenbrock, Gangle, Greer & Laird.

26
27 No appearance by respondent.

28
29 Michael C. Robinson, Portland, filed the response brief
30 and argued on behalf of intervenor-respondent. With him on
31 the brief was Stoel Rives Boley Jones & Grey.

32
33 SHERTON, Referee; HOLSTUN, Chief Referee, participated
34 in the decision.

35
36 AFFIRMED 03/27/95

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 Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county hearings officer order
4 approving applications for a "lot of record" dwelling in the
5 Exclusive Farm Use (EFU) zone.¹

6 **MOTION TO INTERVENE**

7 Helen D. Mahin, the applicant below, moves to intervene
8 in this proceeding on the side of respondent. There is no
9 objection to the motion, and it is allowed.

10 **FACTS**

11 In 1969, intervenor acquired a 24-acre property
12 bordered by Jensen Lane to the north. That property
13 included four separate lots, approved by a prior
14 subdivision. In 1981, the county approved a lot line
15 adjustment resulting in (1) a 1.75-acre parcel in the
16 northwest corner of the property containing an existing
17 dwelling (Tax Lot 1900); (2) an undeveloped 1.75-acre parcel
18 directly to the south (Tax Lot 1801); (3) an undeveloped
19 5.65-acre parcel in the northeast corner of the property
20 (Tax Lot 2000); and (4) an undeveloped 15-acre parcel (Tax
21 Lot 1800). A portion of Tax Lot 1800 separates Tax Lots

¹The order also approves a reduction in the "fuelbreak" required by the Jackson County Land Development Ordinance (LDO), from 100 feet to 30 feet, on the north and west sides of the proposed dwelling. Petitioner does not specifically challenge the approval of the fuelbreak reduction. However, as we understand it, the fuelbreak reduction is dependent on the challenged county decision approving the proposed dwelling and will stand or fall with that decision.

1 1900 and 2000. Record 64, 66-70.

2 On June 2, 1994, by warranty deed, intervenor sold the
3 15-acre Tax Lot 1800 to her grandson. The deed includes the
4 following reservation:

5 "Seller or her estate shall have first right of
6 refusal should property be sold during the term on
7 Note and Trust Deed owed Seller, at a price and
8 terms acceptable to seller." Record 21.

9 On June 8, 1994, intervenor filed an application for a lot
10 of record dwelling on the 5.65-acre Tax Lot 2000. On
11 November 14, 1994, after a public hearing, the county
12 hearings officer adopted the challenged decision approving
13 intervenor's application.

14 **PRELIMINARY ISSUES**

15 Intervenor asks the Board to disregard references made
16 in the petition for review to documents that are neither in
17 the record nor subject to official notice. The references
18 in question are listed at Intervenor-Respondent's Brief 3.

19 Items a and b are references to minutes of meetings of
20 the board of county commissioners that are not in the
21 record. We shall disregard these references. Item c is a
22 reference to a county ordinance. We cannot take official
23 notice of that ordinance, because we have not been provided
24 a copy of the ordinance. Therefore, we shall disregard the
25 reference to that ordinance in the petition for review.
26 Item d is a reference to Jackson County Ordinance No. 94-8.
27 A copy of that ordinance has been provided as Exhibit B to

1 the Petition for Review. Therefore, we shall take official
2 notice of Ordinance No. 94-8.

3 Item e consists of references to the legislative
4 history of Oregon Laws 1993, chapter 792 (HB 3661). Some
5 references are in the form of verbatim quotes from cited
6 legislative history materials, whereas others simply
7 describe or summarize items of legislative history.
8 Intervenor does not contend the quotes from legislative
9 history documents set out in the petition for review are
10 inaccurate. Therefore, we shall take official notice of the
11 portions of the legislative history of HB 3661 quoted
12 verbatim in the petition for review. We shall disregard any
13 references to legislative history that are supported neither
14 by verbatim quotes nor by submission of the documents in
15 question.

16 Intervenor also moves to strike the map included at
17 page 4(a) of the petition for review, because that map is
18 not in the record. The map at Petition for Review 4(a) is a
19 copy of a county assessor's map at Record 64, to which
20 certain information has been added by petitioner.
21 Petitioner has labeled certain parcels on the map as
22 "Petitioner's Property," "Lot of Record Application,"
23 "[Applicant's] Grandson," and "Applicant's Existing Home."
24 Intervenor does not contend the parcels have been
25 incorrectly labeled. Neither does intervenor contend the
26 information petitioner has indicated on the map is not in

1 the record. Consequently, we accept the disputed map as
2 part of petitioner's argument. Intervenor's motion to
3 strike is denied.

4 **FIRST ASSIGNMENT OF ERROR**

5 LDO 218.090(6) allows "lot of record" dwellings on
6 EFU-zoned land, as follows:

7 "A dwelling on a lot or parcel that the current
8 owner acquired before January 1, 1985, or acquired
9 by devise or intestate succession from an owner
10 who acquired the property before January 1,
11 1985[,] may be allowed subject to the following:

12 "(A) For purposes of this provision, owner
13 includes the wife, husband, son, daughter,
14 mother, father, brother, brother-in-law,
15 sister, sister-in-law, son-in-law,
16 daughter-in-law, mother-in-law,
17 father-in-law, aunt, uncle, niece, nephew,
18 stepparent, stepchild, grandparent,
19 grandchild, of the owner or a business entity
20 owned by any one or combination of these
21 family members."

22 "(B) The lot or parcel on which the dwelling will
23 be sited was lawfully created.

24 "(C) The tract on which the dwelling will be sited
25 does not include a dwelling.

26 "* * * * *"2 (Emphases added.)

²The parties agree that the provisions of LDO 218.090(6) quoted in the text are intended to implement the following provisions of HB 3661, now codified at ORS 215.705:

"(1) [A lot of record] dwelling under this section may be allowed if:

"(a) The lot or parcel on which the dwelling will be sited was lawfully created and was acquired by the present owner:

1 In addition, LDO 218.025 (Definitions) defines "tract" as
2 "[o]ne or more contiguous lots or parcels under the same
3 ownership."³

4 Petitioner concedes Tax Lot 2000 was lawfully created
5 and was acquired by intervenor prior to January 1, 1985.
6 However, petitioner contends a lot of record dwelling cannot
7 be approved on Tax Lot 2000 because, contrary to
8 LDO 218.090(6)(C), Tax Lot 2000 is part of a "tract" that
9 already includes a dwelling. Petitioner argues that Tax
10 Lots 1800, 1900 (which has an existing dwelling), and 2000
11 are all part of the same "tract."

12 First, petitioner argues these parcels are part of the
13 same "tract," as that term is used in LDO 218.090(6)(C),

"(A) Prior to January 1, 1985; or

"(B) By devise or by intestate succession from a
person who acquired the lot or parcel prior
to January 1, 1985.

"(b) The tract on which the dwelling will be sited does
not include a dwelling.

* * * * *

* * * * *

"(6) For purposes of subsection (1)(a) of this section,
'owner' includes the wife, husband, son, daughter,
mother, father, brother, brother-in-law, sister,
sister-in-law, son-in-law, daughter-in-law,
mother-in-law, father-in-law, aunt, uncle, niece, nephew,
stepparent, stepchild, grandparent, grandchild, of the
owner or a business entity owned by any one or
combination of these family members." (Emphasis added.)

³The same definition of "tract" is used in ORS ch 215. ORS 215.010(2).

1 either because the parcels were under the same ownership on
2 January 1, 1985, or because they are under the same
3 ownership now, in that LDO 218.090(6)(A) defines "owner" to
4 include the owner's grandchild. According to petitioner,
5 although intervenor's Tax Lots 1900 and 2000 are separated
6 by Tax Lot 1800, owned by intervenor's grandson, all three
7 parcels have the same "owner," and therefore are part of one
8 "tract."

9 Second, petitioner argues the purported conveyance of
10 Tax Lot 1800 to intervenor's grandson failed to alter
11 intervenor's ownership of Tax Lot 1800 because it was a
12 sham. According to petitioner, because intervenor retained
13 for herself the right to buy Tax Lot 1800 back, at a price
14 acceptable to intervenor, intervenor should be considered
15 the constructive owner of Tax Lot 1800.

16 Both LDO 218.090 and ORS 215.705 state that the owner
17 of the property subject to a lot of record dwelling
18 application must have acquired that property prior to
19 January 1, 1985. However, there is nothing in either
20 LDO 218.090(6) or ORS 215.705 indicating the "tract" on
21 which a lot of record dwelling is proposed to be sited is
22 determined by the ownership of the subject and contiguous
23 property as of January 1, 1985, or as of the date the LDO or
24 statutory provision became effective. Consequently, the
25 county did not err by relying on the current ownership of
26 the subject and contiguous parcels in determining whether

1 the proposed dwelling is located on a "tract" that does not
2 include a dwelling.

3 The expansive definition of "owner" in ORS 215.705(6)
4 explicitly states it applies only to ORS 215.705(1)(a),
5 which refers to when the subject lot or parcel "was acquired
6 by the present owner." (Emphasis added.) The
7 ORS 215.705(6) definition of "owner" does not apply to the
8 term "tract," as used in ORS 215.705(1)(b), or to the term
9 "ownership," as used in the ORS 215.010(2) definition of
10 "tract."

11 The equivalent LDO 218.090(6)(A) definition of "owner"
12 states that it applies "for purposes of this provision."
13 Thus, LDO 218.090(6)(A) is not as explicit as ORS 215.705(6)
14 with regard to where it applies. However, LDO 218.090(6)
15 implements ORS 215.705, and no party argues that
16 LDO 218.090(6) is intended to be stricter than ORS 215.705.⁴
17 Therefore, it is reasonable and correct to interpret the
18 LDO 218.090(6)(A) definition of "owner" to apply only to
19 identifying when the "current owner" acquired the property
20 proposed as the site of a lot of record dwelling, as
21 required by LDO 218.090(6), and not to identifying the
22 "tract" referred to in LDO 218.090(6)(C).⁵

⁴We note that section 1.2 of Ordinance No. 94-8, which adopted LDO 218.090(6), states the proposed amendments to LDO chapter 218 "are consistent with the requirements of House Bill 3661 * * *."

⁵Under Gage v. City of Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994), and Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d

1 Thus, if Tax Lot 1800 is owned by intervenor's
2 grandson, Tax Lots 1900 and 2000 are not contiguous lots
3 under the same ownership and, therefore, are not part of the
4 same "tract." In the challenged decision, the county
5 concluded this to be the case:

6 "Tax Lot 2000 is not part of a tract, meaning one
7 or more contiguous lots or parcels under the same
8 ownership. The Hearings Officer rejects
9 [petitioner's] contention that he should hold the
10 deed from [intervenor] to her grandson invalid and
11 not in 'good faith.'

12 "The 'right of first refusal' language which
13 appears in the deed [to Tax Lot 1800] is unusual
14 and perhaps unenforceable. Nevertheless,
15 [intervenor's] grandson has significant ownership
16 rights in the property. The grandson may use the
17 property for any lawfully permitted use, may apply
18 for a nonfarm dwelling, may pay-off the [note],
19 etc. The only obvious limitation on the
20 grandson's ownership is that he cannot sell the
21 property to a third person without triggering
22 [intervenor's] (or her estate's) first right of
23 refusal. * * * For purposes of this [lot of
24 record dwelling application], Tax Lots 1800 and
25 2000 are not under the 'same ownership.'" Record
26 15-16.

27 The above findings are adequate to explain the county's
28 conclusion that Tax Lot 1800 is owned by intervenor's
29 grandson and, therefore, is not under common ownership with
30 Tax Lot 2000. Further, that determination is supported by

1309, rev den 320 Or 407 (1994), we are not required to defer to interpretations of local enactments by a decision maker other than the local governing body. Our review of a hearings officer's interpretation of a local enactment is to determine whether the interpretation is reasonable and correct. McCoy v. Linn County, 90 Or App 271, 275-76, 752 P2d 323 (1988); Ellison v. Clackamas County, ___ Or LUBA ___ (LUBA No. 94-138, January 13, 1995), slip op 4.

1 substantial evidence in the record. Record 21-22.

2 The first assignment of error is denied.

3 **SECOND ASSIGNMENT OF ERROR**

4 Petitioner contends the challenged decision violates
5 the Equal Privileges and Immunities Clause of Article I,
6 section 20, of the Oregon Constitution and the Equal
7 Protection clause of the Fourteenth Amendment to the United
8 States Constitution.

9 Intervenor argues petitioner failed to raise the issue
10 of violation of the above mentioned state and federal
11 constitutional provisions during the county proceeding.
12 Therefore, intervenor contends petitioner is precluded from
13 raising these issues before this Board. ORS 197.763(1);
14 197.835(2).

15 Petitioner replies that these constitutional issues
16 were sufficiently raised by petitioner's testimony at the
17 November 7, 1994 hearing before the hearings officer:

18 " * * * I purchased my property in the winter of
19 1986. I own six tax lots and each one of those
20 tax lots [is] equal to or greater in size than
21 [the subject parcel], and yet I can't build on
22 each one of those tax lots. * * * I think that
23 would treat me unfairly. If [intervenor] has a
24 home on a tract and she wants to build on the
25 other tax lots, it would seem to me that it would
26 be treating me unfairly because I can't build on
27 my other tax lots. * * *" Petition for Review
28 App-7.

29 In Boldt v. Clackamas County, 107 Or App 619, 813 P2d
30 1078 (1991), the Court of Appeals made it clear that the
31 purpose of ORS 197.763(1) and 197.835(2) is to prevent

1 unfair surprise, and that an issue is waived where the issue
2 is not sufficiently raised below to enable a reasonable
3 decision maker to understand the nature of the issue. ODOT
4 v. Clackamas County, 23 Or LUBA 370, 375 (1992). We are not
5 cited to any portion of the record of the county proceedings
6 where any party referred to the Equal Privileges and
7 Immunities Clause of Article I, section 20, of the Oregon
8 Constitution, or the Equal Protection Clause of the
9 Fourteenth Amendment to the United States Constitution, by
10 name, article and section or amendment number, or their
11 operative terms. We do not believe a reasonable decision
12 maker would have understood, merely from references to
13 "unfair treatment," that violation of either of these
14 constitutional provisions was raised as an issue.
15 Consequently, we agree with intervenor that the issue of
16 violations of these constitutional provisions was waived,
17 and we do not consider it further.

18 The second assignment of error is denied.

19 The county's decision is affirmed.