

1                               BEFORE THE LAND USE BOARD OF APPEALS  
2                               OF THE STATE OF OREGON  
3

4 JOHN D. DILWORTH and JEANETTA    )  
5 DILWORTH,                            )  
6                                        )  
7                    Petitioners,        )               LUBA No. 95-115  
8                                        )  
9                vs.                        )               FINAL OPINION  
10                                        )                AND ORDER  
11 CLACKAMAS COUNTY,                    )  
12                                        )  
13                    Respondent.        )

14  
15  
16                Appeal from Clackamas County.  
17

18                Paul D. Schultz and Steven M. Carpenter, Oregon City,  
19 filed the petition for review. With them on the brief was  
20 Hibbard, Caldwell & Schultz. Steven M. Carpenter argued on  
21 behalf of petitioners.  
22

23                Michael E. Judd, Chief Assistant County Counsel, Oregon  
24 City, filed the response brief and argued on behalf of  
25 respondent.  
26

27                HANNA, Referee; GUSTAFSON, Referee, participated in the  
28 decision.  
29

30                               AFFIRMED                               01/04/96  
31

32                You are entitled to judicial review of this Order.  
33 Judicial review is governed by the provisions of ORS  
34 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the county's hearings  
4 officer denying their application to build a non-forest  
5 dwelling on land zoned for mixed agricultural and forest  
6 uses.

7 **FACTS**

8 The subject property is a 20-acre parcel located in an  
9 area capable of producing 150 cubic feet of wood fiber per  
10 year. The planning department denied an application of the  
11 original applicant to build a dwelling, because the  
12 applicant did not meet the requirements of the Clackamas  
13 County Zoning and Development Ordinance (ZDO)  
14 407.05(B)(2)(b).<sup>1, 2</sup> As a result of a lot line adjustment

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<sup>1</sup>The original applicant agreed to purchase the subject property. After the initial application was denied, the planned purchase was abandoned and an appeal was pursued by petitioners, who are owners of the property.

<sup>2</sup>ZDO 407.05(B)(2) provides in relevant part:

"If a lot or parcel does not qualify under #1 above [Lot of Record Dwelling], the Planning Director may allow a dwelling \* \* \* when \* \* \* a.-g. below are met:

\*\* \* \* \* \*

"b. The parcel on which the dwelling would be located is composed primarily of soils which are:

\*\* \* \* \* \*

3. Capable of above 85 cf/ac/yr and where at least part of eleven (11) other parcels lawfully created prior to January 1, 1993 exist within a 160-acre square area, when centered on the center of the

1 after January 1, 1993, but before the application was filed,  
2 one of the six parcels with a dwelling that was within the  
3 160-acre square on January 1, 1993, was not within the 160-  
4 acre square on the date of the application.

5 Petitioners appealed the decision to the county  
6 hearings officer. The county hearings officer denied the  
7 appeal on May 23, 1995, affirming the planning department's  
8 determination that the applicant did not meet the  
9 requirements of ZDO 407.05(B)(2)(b), in that there were not  
10 at least six parcels with dwellings within a 160-acre square  
11 on the date of the application.

12 **ASSIGNMENT OF ERROR**

13 Petitioners contest the county's requirement that "in  
14 order to qualify as an 'other parcel,' a parcel must be both  
15 lawfully created prior to January 1, 1993, and \* \* \* fall  
16 within the template as of the date of application."  
17 Petition for Review 7. Petitioners contend that ZDO  
18 407.05(B)(2)(b) is in conflict with ORS 215.750, because the  
19 statutory provision does not require that the other parcels  
20 with dwellings exist on the date of application but only on  
21 January 1, 1993.<sup>3</sup> Petitioner acknowledges that ZDO

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subject tract. The 160-acre square must remain in  
a fixed position during this test. And at least  
six (6) permanent dwellings legally existed on  
January 1, 1993 on the other parcels;

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

<sup>3</sup>ORS 215.750(1) provides in relevant part:

1 407.05(B)(2)(b) is more stringent than ORS 215.750, because  
2 it requires six dwellings rather than the three required by  
3 ORS 215.750. Petitioner accepts that the county has  
4 authority to set standards more stringent than those in the  
5 statute, such as the requirement for six dwellings instead  
6 of three. However, petitioner argues that the county may  
7 not supplement the statutory requirement that the lots or  
8 parcels existed on a specific date, January 1, 1993, with  
9 the additional requirement that the lots or parcels exist on  
10 the date of application.

11 The county responds that the ZDO is consistent with the  
12 statute and that nothing in ORS 215.750 precludes additional  
13 county restrictions. The county explains that while the  
14 statute requires the existence of the requisite number of  
15 parcels with dwellings on January 1, 1993, the present tense  
16 of "exist" in ZDO 407.05(B)(2)(b)(3) requires that the

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"In western Oregon, a governing body of a county or its  
designate may allow the establishment of a single-family  
dwelling on a lot or parcel located within a forest zone if the  
lot or parcel is predominantly composed of soils that are:

\*\* \* \* \* \*

"(c) Capable of producing more than 85 cubic feet per year of  
wood fiber if:

"(A) All or part of at least 11 other lots or parcels  
that existed on January 1, 1993, are within a 160-  
acre square centered on the center of the subject  
tract; and

"(B) At least three dwellings existed on January 1, 1993,  
on the other lots or parcels." (Emphasis added).

1 requisite number of parcels with dwellings exist on the date  
2 of application as well. The county then concludes that the  
3 required six dwellings must be located on parcels that were  
4 created before January 1, 1993 and which continued to exist  
5 in the 160-acre square at the time of application.

6 Our acceptance or rejection of a local hearings  
7 officer's interpretation of a local ordinance is determined  
8 by whether we believe that interpretation to be reasonable  
9 and correct. We consider the local government's  
10 interpretation in our review, and give some weight to it if  
11 it is not contrary to the express language and intent of the  
12 enactment. See McCoy v. Linn County, 90 Or App 271, 752 P2d  
13 323 (1988).

14 We agree with the county that it is not precluded from  
15 regulating the establishment of dwellings more stringently  
16 than is required under ORS 215.750. The county's  
17 interpretation of ZDO 407.05(B)(2)(b) is both reasonable and  
18 correct and not contrary to the express language and intent  
19 of the enactment.

20 The county's decision is affirmed.