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

FRANCIS PARSONS,)
)
Petitioner,)
)
vs.)
) LUBA Nos. 96-039, 96-040
CLACKAMAS COUNTY,) and 96-041
)
Respondent,) FINAL OPINION
) AND ORDER
and)
)
REDLAND/VIOLA/FISCHER'S MILL)
COMMUNITY PLANNING ORGANIZATION,)
)
Intervenor-Respondent.)

Appeal from Clackamas County.

P. Stephen Russell III, Portland, filed the petition for review and argued on behalf petitioner. With him on the brief was Copeland, Landye, Bennett and Wolf.

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

Jacqueline A. Tommas, Estacada, filed a response brief and argued on behalf of intervenor-respondent.

GUSTAFSON, Referee; HANNA, Chief Referee, participated in the decision.

REVERSED 10/30/96

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of two of three
4 requests for dwellings on three contiguous parcels under the
5 forest template dwelling provisions of ORS 215.750.

6 **MOTION TO INTERVENE**

7 The Redland/Viola/Fischer's Mill Community Planning
8 Organization (intervenors) move to intervene on the side of
9 respondent. There is no opposition to the motion, and it is
10 allowed.

11 **FACTS**

12 In 1989, petitioner acquired three contiguous parcels
13 of forest land. In January 1995, intervenor applied to the
14 county to site a dwelling on each of the three parcels under
15 the template dwelling test set forth in ORS 215.750(1) and
16 OAR 660-06-027(1)(d).¹

17 During the pendency of the application, the county
18 hearings officer invited parties to address the requirement

¹Petitioner provides a "simple translation" of the statutory template test as follows:

"[T]he Template Test Rules permit a dwelling on a parcel if, after placing a rectangular grid or template covering 160 acres centered over the subject parcel, one finds within the template a certain number of parcels lawfully created before January 1, 1993, and, in addition, a certain number of legal dwellings existing on those parcels before January 1, 1993, with the number of required parcels and dwellings varying according to the forest productivity of the subject lot or parcel."
Petition for Review 9.

1 of OAR 660-06-027(4)(d) and (5), which provide that if there
2 is more than one contiguous parcel under the same ownership,
3 those parcels are considered a "tract," and an applicant is
4 entitled only to one dwelling per tract, rather than one
5 dwelling per parcel. As petitioner explains,

6 "[i]n response to the hearings officer's
7 invitation and suggestions from Respondent's
8 planning department staff * * *, and given the
9 possibility that two of the three applications
10 would be denied on the grounds that the three
11 parcels would be combined into a single tract thus
12 entitling the applicant to only one dwelling, one
13 of the three parcels was conveyed to the applicant
14 and his spouse; one of the three parcels was
15 conveyed to the applicant's spouse alone; and the
16 third parcel was conveyed to the applicant alone."
17 Petition for Review 5.

18 Although the three parcels were then technically in
19 three different ownerships, the hearings officer nonetheless
20 permitted a total of only one dwelling on the three parcels,
21 finding as follows:

22 "The applicant's efforts to convey portions of the
23 subject tract to other family members during the
24 pendency of this application, so that separate
25 parcels might be eligible for separate dwellings,
26 are without practical or legal effect.
27 Conveyances of portions of a tract after the
28 effective date of [OAR 660-06-005(4)] cannot have
29 the effect of creating separate parcels for
30 dwellings, as such a construction of the rule
31 would leave it meaningless. Furthermore, such a
32 construction would conflict with the purpose of
33 Goal 4 and OAR 660, Division 6 to protect forest
34 lands. LCDC appears to have recognized these
35 realities when it adopted OAR 660-06-005(4) as
36 part of its implementation of Chapter 792, Oregon
37 Laws 1993 and ORS 215.700 through 215.750. OAR
38 660-06-005(4) provides that when a lot, parcel or

1 tract is reconfigured after November 4, 1993 (the
2 effective date of Chapter 792 and ORS 215.700
3 through 215.750), the effect of which is to
4 qualify a lot, parcel or tract for the siting of a
5 dwelling, the date of the reconfiguration becomes
6 the date of existence. This rule has the direct
7 effect of precluding approval of a second dwelling
8 on a "lot of record" tract under OAR 660-06-
9 027(1)(a) or (b) (ORS 215.720) where a conveyance
10 of a portion of the tract occurs after November 4,
11 1993, since the conveyance would reconfigure the
12 tract and the date of creation of the parcels
13 would therefore be after January 1, 1985. Nothing
14 in OAR 660, Division 6 evinces a reason that a
15 similar result should not occur after a conveyance
16 of a portion of a tract under OAR 660-06-
17 027(1)(d). Record 7.

18 Thus, the hearings officer concluded that petitioner's
19 conveyances, which place the parcels in separate ownership
20 after November 4, 1993, could not have the effect of
21 qualifying those parcels for template dwellings.² He
22 therefore concluded that only one dwelling could be allowed
23 on the three contiguous parcels.³

24 Petitioner appeals the hearings officer's decisions.

²The hearings officer excused the fact that petitioner conveyed the three parcels during the pendency of the application, finding:

"Although this application must be judged on the law in effect at the time of application, and that law requires that the contiguous parcels be combined, the technical problem of a conveyance after the date of this application should not preclude review on the merits. It would serve no purpose to require a new application to be filed simply so that the conveyances of portions of the subject property would have occurred prior to the date of the application." Record 7.

³It is undisputed that the three subject parcels otherwise satisfy the requirements for the siting of one dwelling each under the template test.

1 **ASSIGNMENT OF ERROR**

2 The essential issue here is whether the transfer of
3 contiguous parcels into separate ownerships after November
4 4, 1993 precludes the siting of a forest dwelling on each
5 parcel, each of which otherwise meets all of the
6 requirements of the siting of dwellings under the forest
7 template dwelling test. Petitioner contends the hearings
8 officer's conclusion that the three subject parcels did not
9 each qualify for template dwellings misconstrues the
10 requirements of the template dwelling statute and OAR 660-
11 06-005(4).

12 OAR 215.750(4) lists the restrictions of the
13 qualification of parcels under the template dwelling test of
14 ORS 215.750(1). ORS 215.750(4)(c) states:

15 "(4) A proposed dwelling under this subsection is
16 not allowed:

17 * * * * *

18 "(c) Unless no dwellings are allowed on other
19 lots or parcels that make up the tract
20 and deed restrictions established under
21 ORS 215.740(3) for the other lots or
22 parcels that make up the tract are met."⁴

23 OAR 660-06-027(5)(a) defines "tract" as "one or more
24 contiguous lots or parcels in the same ownership."
25 Therefore, as the hearings officer correctly recognized,
26 contiguous parcels that would otherwise qualify for template

⁴OAR 660-06-027(4)(c) contains language nearly identical to that of the statute.

1 dwellings may qualify for only one dwelling if those parcels
2 are part of a tract.

3 In evaluating the subject applications, the hearings
4 officer recognized that the three parcels that would
5 otherwise make up a tract under OAR 660-06-027(5)(a) had
6 been conveyed so as to avoid the tract limitation. The
7 hearings officer determined those conveyances to be
8 ineffective for purposes of qualifying the parcels for
9 dwellings under ORS 215.750 because they occurred after
10 November 3, 1993. The hearings officer relied on OAR 660-
11 06-005(4) to support his conclusion. That rule provides:

12 "'Date of Creation and Existence'. When a lot,
13 parcel or tract is reconfigured pursuant to
14 applicable law after November 4, 1993, the effect
15 of which is to qualify a lot, parcel or tract for
16 the siting of a dwelling, the date of the
17 reconfiguration is the date of creation or
18 existence. Reconfigured means any change in the
19 boundary of the lot, parcel, or tract."

20 The problem with the hearings officer's analysis is
21 that neither ORS 215.750(4)(c) nor its implementing rule
22 relate the ability to qualify for a dwelling to the date of
23 creation or existence of the affected parcels. The county
24 refers to the absence of any such relationship to be an
25 "obvious hole" in the statute, and argues "[g]iven this
26 obvious hole in the statute, it is reasonable to assume that
27 LCDC intended that OAR 660-06-005(4) apply to this
28 situation." Respondent's Brief 3.

29 Petitioner disputes the applicability of OAR 660-06-

1 005(4), arguing that the conveyance of the three parcels
2 does not reconfigure their boundaries. The county contends
3 that the rule applies because the conveyance of the parcels
4 reconfigures the boundaries of the tract. We agree with
5 petitioner that the conveyance does not reconfigure any
6 parcel boundaries. We need not decide, however, whether
7 conveyance of the parcels that formerly made up a tract
8 constitutes a reconfiguration of the tract for purposes of
9 OAR 660-06-005(4), because whether the tract has been
10 reconfigured does not determine whether the three parcels
11 qualify for template dwellings. OAR 660-06-005(4) merely
12 defines the date of creation or existence of a parcel; it
13 does not address the significance of that date as applied to
14 any particular statute. Thus, regardless of whether OAR
15 660-06-005(4) applies to these applications, that rule does
16 not patch any "obvious hole" in the statute.

17 The hearings officer explains the significance of OAR
18 660-06-005(4) as it applies to applications for
19 lot-of-record dwellings under ORS 215.705 and .720, and
20 attempts to impart a similar significance to applications
21 for template dwellings, concluding that "nothing in OAR 660,
22 Division 6 evinces a reason that a similar result should not
23 occur after a conveyance of a portion of a tract under OAR
24 660-06-027(1)(d)." Record 7. The hearings officer's
25 conclusion ignores a fundamental difference in the statutory
26 bases for lot-of-record and template dwellings.

1 In evaluating requests for lot-of-record dwellings, ORS
2 215.705 specifies that a parcel for which a lot-of-record
3 dwelling is proposed must have been created prior to January
4 1, 1985. Thus, the date of creation of the parcel is
5 crucial to the evaluation. Unlike the lot-of-record
6 statutes, however, ORS 215.750 specifies no date by which
7 parcels qualifying for template dwellings must have been
8 created.⁵ Thus, we find no foundation upon which the
9 hearings officer could find that the significance of OAR
10 660-06-005(4) as it applies to lot-of-record dwelling
11 applications should be imparted to template dwelling
12 applications.⁶

13 The county argues that a qualifying date must be read
14 into the statute in order to avoid rendering the tract
15 limitation in ORS 215.750(4)(c) and OAR 660-06-27(4)(c)
16 meaningless. The county argues that "under petitioner's
17 theory, * * * that limitation could always be subverted by
18 the simple expedient of the type of conveyance we see here
19 (or perhaps a temporary conveyance to a 'straw man'.)"
20 Respondent's Brief 3. We agree that, as the statute is

⁵The only date to which ORS 215.750 refers is January 1, 1993. That date, however, does not establish a qualifying date of creation for the parcel on which a dwelling is proposed. Rather, it is the qualifying date for determining the number of dwellings and the number of lots or parcels within the template area.

⁶In addition, even if a qualifying date of creation or existence could be read into the template dwelling statute, there is nothing in OAR 660-06-005(4) that would compel what that date should be.

1 written, an applicant with contiguous parcels that would
2 otherwise qualify for only one dwelling under the tract
3 limitation, can potentially qualify for additional dwellings
4 by conveying the parcels that make up the tract. While the
5 statute's language may minimize the utility or effectiveness
6 of the tract limitation as a means to restrict the number of
7 template dwellings, we cannot say that, as a matter of law,
8 this effect renders the limitation meaningless. Moreover,
9 to the extent the language of the statute may somehow
10 frustrate its purpose, it is for the legislature to amend
11 the language. It is not the province of the county or this
12 Board to read into the statute language that is not there.

13 ORS 215.750(4)(c) and OAR 660-06-027(4)(c) do not
14 restrict the date upon which a parcel is created for
15 purposes of qualifying for a template dwelling. The
16 hearings officer misconstrued the statute by reading into
17 the statute a qualifying date of November 4, 1993. We find
18 that the hearings officer's treatment of the three
19 contiguous parcels as a single tract, rather than three
20 separate parcels, to be incorrect as a matter of law. Given
21 that the three parcels each otherwise qualify for a template
22 dwelling, the county's finding that the parcels qualify for
23 only one, instead of three dwellings, is reversible error.

24 The assignment of error is sustained.

25 The county's decision is reversed.