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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).<sup>1</sup>

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

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<sup>1</sup>Petitioner 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.<sup>2</sup> He  
22 therefore concluded that only one dwelling could be allowed  
23 on the three contiguous parcels.<sup>3</sup>

24 Petitioner appeals the hearings officer's decisions.

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<sup>2</sup>The 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.

<sup>3</sup>It 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."<sup>4</sup>

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

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<sup>4</sup>OAR 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.<sup>5</sup> 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.<sup>6</sup>

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

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<sup>5</sup>The 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.

<sup>6</sup>In 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.