

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the board of county
4 commissioners approving a lot-of-record dwelling.

5 **MOTION TO INTERVENE**

6 Joe and Clorene Robertson (intervenors) move to
7 intervene on the side of respondent. There is no opposition
8 to the motion, and it is allowed.

9 **FACTS**

10 On April 12, 1996, intervenors' agent applied on their
11 behalf for a lot-of-record dwelling on a five-acre lot
12 (lot 206). Approximately two-thirds of lot 206 is zoned
13 Agriculture/Forestry (AF-20); the remaining one-third is
14 zoned Exclusive Farm Use (EF-40). The agent applied first
15 for a forest template dwelling. However, after staff
16 informed the agent that application of the "more stringent"
17 EF-40 standards would be required, the original application
18 was withdrawn and replaced with a lot of record application.
19 Record 425.¹

20 Lot 206 is part of the Eola Walnut Groves subdivision,
21 platted in 1908. Lot 206 includes soils which qualify it as
22 "high-value farmland," as that term is defined in ORS

¹The record in DeBates v. Yamhill County, ___ Or LUBA ___ (LUBA No. 96-100, January 3, 1997) (DeBates) has been made part of the record in this proceeding. We refer to the record in DeBates as "DeBates Record ___" and the record in this proceeding (apart from the DeBates Record) as "Record ___."

1 215.710. The northwestern corner of lot 206 touches the
2 southeastern corner of lot 182 at a single point.
3 Record 405. In November, 1995, prior to applying for a lot-
4 of-record dwelling, intervenors transferred lot 182 to Perry
5 and Belva Johnson for nominal consideration.² The Johnsons,
6 in turn, transferred lot 163 to intervenors and lot 140 to
7 intervenors' daughter for nominal consideration.

8 After the county planning director approved the
9 application, petitioner appealed to the county board of
10 commissioners, which affirmed the planning director's
11 decision. This appeal to LUBA followed.

12 **FIRST ASSIGNMENT OF ERROR**

13 Petitioner makes the same argument here as in the first
14 assignment of error in DeBates. We reject the argument, as
15 we did in DeBates, slip op 3-11.³

16 The first assignment of error is denied.

²The Johnsons' lot-of-record dwelling application regarding lot 162, which is adjacent to lot 163, is the subject of DeBates. Petitioners contended below that the lot transfers between the Johnsons and the Robertsons are intended to avoid the consolidation requirement in ORS 215.705(1)(g).

³OAR 660-33-020(10) defines "tract" as "one or more contiguous lots or parcels in the same ownership." At oral argument intervenors and the county (respondents) disputed for the first time that lots 206 and 182 are contiguous.

OAR 660-33-020(3) defines contiguous as "connected in such a manner as to form a single block of land." In the absence of any discussion in the briefs, we do not determine if lots 206 and 182 are contiguous. However, we note that if the lots are not contiguous, they never were part of the same tract, and therefore no tract was reconfigured by the sale of lot 182.

1 **THIRD ASSIGNMENT OF ERROR**

2 Although they are not identified as such, petitioner
3 effectively makes two subassignments of error, which we
4 discuss separately.

5 **1. Choice of Zoning Criteria**

6 Petitioner contends the county incorrectly applied the
7 provisions of YCZO chapter 402 (Exclusive Farm Use District)
8 instead of YCZO chapter 403 (Agriculture/Forestry District).

9 The conclusion that YCZO chapter 402 rather than YCZO
10 chapter 403 should be applied was based on (1) a county
11 policy to impose the "more restrictive" of two arguably
12 applicable sets of zoning criteria; and (2) the location of
13 the lot-of-record dwelling itself on the part of the parcel
14 zoned EFU-40. The challenged decision explains:

15 "The Board finds that there are two zoning
16 districts, EF-40 (Exclusive Farm Use) and AF-20
17 (mixed agriculture/forestry), which apply to
18 different portions of this 5 acre parcel, and
19 applies the more restrictive, EF-40 (YCZO
20 Subsection 402.03(G)), zoning criteria to this
21 application. Under OAR 660-06-050(2) the county
22 is required to apply either OAR chapter 660,
23 Division 6 or 33 standards for siting a dwelling
24 in an AF zone based on the predominant use of the
25 tract on January 1, 1993. The predominant use of
26 the tract on January 1, 1993 was forest use, and
27 therefore if the only zone were an AF zone then
28 the application for a forest dwelling would be
29 appropriate. However, the tract is also subject
30 to an EF-40 zone, and the portion of the tract
31 upon which the dwelling is proposed to be sited is
32 zoned EF-40. It is the County's interpretation of
33 the rule that when a parcel is within two zoning
34 districts, then the more restrictive zoning
35 ordinance requirements, which in this case are the

1 EF district requirements, should apply. The
2 applicants originally submitted an application for
3 a forest template dwelling, but were advised by
4 the county that the more restrictive, EF-40
5 district, requirements would be applied, and that
6 forest dwellings are not permitted in the EF
7 district. The original application was
8 subsequently withdrawn, and application was
9 submitted for a lot of record dwelling under the
10 provisions of Section 402.03(G) of the EF district
11 ordinance." Record 4-5. (Emphasis added.)

12 The arguments of the parties focus on the provisions
13 found in YCZO chapter 303 for moving zone boundaries;⁴ the
14 basis in the YCZO for the county's "more restrictive"
15 policy; and which of YCZO chapters 402 and 403 is in fact
16 the more restrictive.⁵ Because we believe ORS 215.705,

⁴YCZO 303.01 establishes rules that apply "[w]here uncertainty exists as to the boundaries of zoning districts or overlay districts, as shown on the Official Zoning Map." YCZO 303.02 provides for corrections of comprehensive plan or zoning map "mistakes" when "the record establishes that the mistake occurred due to a clerical error or mapping error." The parties contend neither that there is uncertainty as to the location on the subject property of the boundary between the EF-40 and AF-20 districts, nor that the location of the boundary was a mistake due to a clerical or mapping error.

The challenged decision finds neither that uncertainty exists as to the location of the common boundary of the EF-40 and AF-20 districts on the subject property, nor that the location of the boundary is due to a clerical error or mapping error.

⁵Which YCZO chapter is perceived to be more restrictive depends upon which standards within the chapters are emphasized. This is shown by the following finding:

"Opponents maintained that the AF (rather than EF) zoning district should have been applied to require the applicants to qualify for a "forest template dwelling" rather than a lot of record dwelling on high value farmland. Opponents contend that the AF zone is a more restrictive zone and should be applied when property straddles two zones should apply majority (AF-20) over minority EF-40) [sic]. The AF zone is not considered more

1 rather than the YCZO, determines which zone applies, we do
2 not discuss these arguments.

3 The challenged decision interprets OAR 660-06-050(2) to
4 mean that "when a parcel is within two zoning districts,
5 then the more restrictive zoning ordinance requirements,
6 which in this case are the EF district requirements, should
7 apply."⁶ Record 4. OAR 660-06-050, which implements ORS
8 215.705(4), addresses uses authorized in
9 agricultural/forest zones, such as the AF-20 zone. We read
10 OAR 660-06-050(2) to require that the determination of which
11 zoning ordinance requirements in an agricultural/forest zone

restrictive than the EF zone insofar as they both permit lot of record dwellings on certain high value farmland under certain circumstances (Compare YCZO 402.03G and 403.03H) and in other respects there are more permitted uses in the AF zone (compare YCZO 402.02 A through M with 403.02 A through X.) In any event, the board finds that the land upon which the dwelling is to be located is zoned EF for farm use and the Board finds that the lot of record provisions in YCZO section 402.03 for certain high value farmland is the appropriate zoning district to apply. The Board is not persuaded that the applicants should not have been allowed to apply for a lot of record based on the argument that this is forestland and therefore a forest template dwelling should have been applied for. ORS 215.705(1) recognizes that a county 'may allow the establishment of a single family dwelling in a farm or forest zone.' The EF zone is an exclusive farm use zone, and the AF zone is a mixed agricultural and forestry zone, both of which are recognized as proper zones for lot of record dwellings." Record 10.

⁶OAR 660-06-050(2) provides:

"Uses authorized in Exclusive Farm Use Zones in ORS Chapter 215, and in OAR 660-06-025 and OAR 660-06-027, subject to the requirements of the applicable section, may be allowed in any agricultural/forest zone. The county shall apply either OAR Chapter 660, Division 6 or 33 standards for siting a dwelling in an agriculture/forest zone based on the predominant use of the tract on January 1, 1993."

1 to apply be based not on which requirements are more
2 restrictive, but on the predominant use of the tract on
3 January 1, 1993. OAR 660-06-050 does not address the
4 situation, presented in this case, where a single lot is
5 divided between two separate zones.

6 ORS 215.705(1) authorizes "* * * the establishment of a
7 single-family dwelling on a lot or parcel located within a
8 farm or forest zone as set forth in this section and ORS
9 215.710, 215.720, 215.740 and 215.750 * * *." (Emphasis
10 added.) The emphasized language is ambiguous. It can be
11 read either (1) to authorize a single-family dwelling only
12 when the lot or parcel is wholly within either a farm zone
13 or a forest zone; or (2) to authorize such a dwelling when
14 it is wholly within either a farm or a forest zone or within
15 a combination of both, including a farm/forest zone.

16 The context of ORS 215.705(1) provides some support for
17 the second interpretation. It is reasonable to conclude
18 that such dwellings should be allowed, just as ORS
19 215.705(4) allows them on lots in farm/forest zones, where
20 the use could be divided between farming and forestry.
21 Nothing suggests that the legislature contemplated
22 prohibiting lots-of-record dwellings located on lots divided
23 between a farm zone and a forest zone.⁷

⁷The legislative history of Oregon Laws 1993, chapter 792, including the language of ORS 215.705, does not show any consideration of lots divided between zones.

1 ORS 215.705(1) sets forth various criteria which must
2 be met before a dwelling may be allowed, including the
3 following:

4 "* * * * *

5 "(d) The lot or parcel on which the dwelling will
6 be sited, if zoned for farm use, is not on
7 that high-value farmland described in ORS
8 215.710 except as provided in subsections (2)
9 and (3) of this section.

10 "(e) The lot or parcel on which the dwelling will
11 be sited, if zoned for forest use, is
12 described in ORS 215.720, 215.740 or 215.750.

13 "* * * * *"

14 The lot-of-record dwelling at issue in this case is to
15 be sited on high-value farmland. The challenged decision
16 finds it is allowed under the tests stated in ORS
17 215.705(3).⁸ By applying the standards stated in ORS

⁸ORS 215.705(3) provides:

"Notwithstanding the requirements of subsection (1)(d) of this section, a single-family dwelling not in conjunction with farm use may be sited on high-value farmland if:

"(a) It meets the other requirements of ORS 215.705 to 215.750.

"(b) The tract on which the dwelling will be sited is:

"(A) Identified in ORS 215.710 (3) or (4);

"(B) Not protected under ORS 215.710 (1); and

"(C) Twenty-one acres or less in size.

"(c) (A) The tract is bordered on at least 67 percent of its perimeter by tracts that are smaller than 21 acres, and at least two such tracts had dwellings on them on January 1, 1993; or

1 215.705(1)(d), as those are elaborated by ORS 215.705(3),
2 the decision authorizes a lot-of-record dwelling on high-
3 value farmland, in part on the basis that the land on which
4 the dwelling itself will be sited is high-value farmland.

5 However, ORS 215.705(1) and (3) speak not of the zoning
6 of the land on which the dwelling will be sited, but instead
7 of the unit of land ("lot or parcel" or "tract") on which it
8 will be sited. The unit of land is treated as indivisible.
9 From the statutory focus on the unit of land, rather than on
10 the land within the unit of land, it appears that if the
11 unit of land lies within more than one zone, it must be
12 decided which zone applies to the entire unit of land.

13 ORS 215.705 allows lot-of-record dwellings in three
14 types of zones. ORS 215.705(1)(d) addresses lots or parcels
15 zoned for farm use. ORS 215.705(1)(e) addresses lots or
16 parcels zoned for forest use. ORS 215.705(4) addresses
17 tracts zoned for both farm and forest uses.

18 ORS 215.705(4) provides:

19 "If land is in a zone that allows both farm and
20 forest uses, is acknowledged to be in compliance
21 with goals relating to both agriculture and
22 forestry and may qualify as an exclusive farm use
23 zone under this chapter, the county may apply the

"(B) The tract is bordered on at least 25 percent of its
perimeter by tracts that are smaller than 21 acres,
and at least four dwellings existed on January 1,
1993, within one-quarter mile of the center of the
subject tract. Up to two of the four dwellings may
lie within the urban growth boundary, but only if
the subject tract abuts an urban growth boundary."

1 standards for siting a dwelling under either
2 subsection (1)(d) of this section [i.e., ORS
3 215.705(1)(d)] or ORS 215.720, 215.740 and 215.750
4 as appropriate for the predominant use of the
5 tract on January 1, 1993."

6 We note that when the legislature considered the
7 possibility of farm and forest uses on the same unit of
8 land, it did not choose to require the application of both
9 the farm and forest lot-of-record standards to that unit,
10 but instead to require an application of the standards
11 appropriate to the predominant use of that unit.

12 It is consistent with this approach to require that
13 when a lot or parcel is divided between two or more zones,
14 the local government apply the standards of the predominant
15 zone to the entire lot or parcel. The "predominant zone
16 test" is both clearer and more objective, and it avoids a
17 fruitless debate over which standards, farm or forest, are
18 more restrictive or stringent in a particular case. Because
19 the majority of the subject property is zoned AF-20, we
20 conclude the entire lot is governed by ORS 215.705(4).

21 ORS 215.705(4) requires a choice of standards for
22 siting a dwelling depending on the predominant use of the
23 tract on January 1, 1993. The challenged decision finds the
24 predominant use of the subject property on January 1, 1993
25 was forest use. Record 4. Therefore, pursuant to ORS
26 215.705(4), the standards of ORS 215.720, 215.740 and
27 215.750 as appropriate, which are incorporated into YCZO
28 chapter 403, must be applied in reviewing the application.

1 This subassignment of error is sustained.

2 **2. Access**

3 Petitioner first contends the county should have
4 applied the "heightened access requirements of [YCZO] Ch.
5 403." Since we conclude that YCZO chapter 403 applies to
6 the proposed development, we agree with petitioner that the
7 access requirements of that chapter must be applied. We
8 therefore do not address the parties' arguments regarding
9 the access requirements in YCZO chapter 402.

10 This subassignment of error is sustained.

11 The third assignment of error is sustained.

12 **SECOND ASSIGNMENT OF ERROR**

13 As did the petitioner in his second assignment of error
14 in DeBates, petitioner contends here that the county did not
15 apply a mandatory policy (hazard policy) found at Yamhill
16 County Comprehensive Plan (YCCP) Section 1 B.1.c., which
17 states:

18 "All proposed rural area development and
19 facilities:

20 "* * * * *

21 "2) Shall not be located in any natural hazard
22 area, such as a floodplain or area of
23 geologic hazard, steep slope, severe drainage
24 problems or soil limitations for building or
25 sub-surface sewage disposal, if relevant;

26 "* * * * *"

27 The decision challenged in this appeal, unlike DeBates,
28 specifically addresses the applicability of YCCP

1 Section 1 B.1.c., but only as it applies to EF-40 zoning.
2 Because we conclude the applicable zone is AF-20, we remand
3 to the county for an interpretation of YCCP Section 1 B.1.c.
4 as it applies to that zone.

5 The second assignment of error is sustained.

6 The county's decision is remanded.