BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RONALD J. WALZ, Petitioner, vs. POLK COUNTY, Respondent.	LUBA No. 95-241
	FINAL OPINION AND ORDER

Appeal from Polk County.

Christine M. Cook, Portland, filed the petition for review and argued on behalf of petitioner.

David Doyle, County Counsel, filed the response brief and argued on behalf of respondent.

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

REVERSED 07/12/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a decision of the county planning director approving a lot-of-record dwelling on approximately 1.1 acres of high-value farm land in the county's exclusive farm use (EFU) zone.

FACTS

The facts are simple and are not disputed.[1] On April 24, 1995, Neoma Reynolds Robertson (Reynolds) and Gary L. McCool and his wife (the McCools) filed a request with the county planning division for a lot-of-record determination.[2] The request was signed by Reynolds and the McCools. On August 7, 1995, the county planning director approved the request, subject to conditions.

Reynolds acquired the subject property on November 20, 1959. In 1988 she sold the property to the McCools, using a common form real estate contract. The contract provides, among other things, that the buyer will retain full possession of the premises unless the buyer defaults. The

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[1]Some of the facts stated here are derived from materials attached to the petition for review to support petitioner's contention he has standing. We will consider materials outside the record to determine if a petitioner has standing. ORS 197.835(2)(b). Since the county does not object that an evidentiary hearing is required, we consider the materials without requiring the hearing. See Horizon Construction, Inc. v. City of Newberg, 25 Or LUBA 656, 662 (1993).

[2]The subject property now belongs to just Gary L. McCool, who is referred to as "McCool."

record contains no evidence that there has been a default.

Petitioner's property adjoins the subject property. The deeds reflecting petitioner's ownership in his property were recorded in the land records of Polk County on April 3, 1995. However, as explained by a county planner, "Apparently Tax Assessor records linked to our GIS system were not updated and our office provided notice of the decision to [the previous owners of petitioner's property] on August 7, 1995." Record 10.

On October 16, 1995, petitioner observed people on the subject property who identified themselves as prospective purchasers. On October 23, 1995, petitioner reviewed the planning director's decision to approve the lot-of-record dwelling. Eight days later, on October 31, 1995, petitioner filed an appeal to the board of county commissioners. Petitioner's local appeal was rejected as untimely on November 7, 1995, and this appeal followed.

PETITIONER'S STANDING TO APPEAL

A. Introduction

It is for petitioner to establish standing to appeal to LUBA. Strauss v. Jackson County, 28 Or LUBA 56, 57 (1994). The county contends petitioner lacks standing because his local appeal was untimely. The county relies on ORS 197.830(3), which provides:

> "If a local government makes a land use decision without providing a hearing or the local government makes a land use decision which is

> different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to [LUBA] under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."[3]

The county contends that while notice of the planning director's decision was required by ORS 215.416(11)(a), bringing this case within the purview of ORS 197.830(3)(a), petitioner was not among those entitled to such notice.

ORS 215.416(11)(a) provides, in relevant part:

> "The hearings officer, or such other person as the governing body designates, may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for appeal of the decision to <u>those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision</u>. Notice of the decision shall be given in the same manner as required by ORS 197.763 * * *." (Emphasis added.)

ORS 197.763(3) describes the manner of giving the notice mentioned in ORS 215.416(11)(a). It outlines in detail the required content of the notice and the time

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[3]In its response brief, the county specifies and quotes ORS 197.830(<u>4</u>), which addresses notice of limited land use decisions. Since no one contends the challenged decision is a limited land use decision, we assume the county means ORS 197.830(<u>3</u>).

limits for mailing. ORS 197.763(2) describes who is entitled to notice of a hearing if a hearing is scheduled:

> "(a) Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:
>
> "* * * * *
>
> "(C) Within 500 feet of the property which is the subject of the notice where the subject property is within a farm or forest zone."

Petitioner contends he was entitled to notice on two bases: (1) as a person who would have had a right to notice if a hearing had been scheduled; and (2) as a person who was adversely affected or aggrieved by the decision. Petitioner argues that the 500-foot limitation on notice imposed by ORS 197.763(2)(a)(C) applies only to notice required on the first basis.

The county responds in essence that ORS 215.416(11)(a) describes the same group twice, and that those to whom notice must be given is limited by ORS 197.763(2)(a). The county contends that under ORS 197.763(2)(a), petitioner was entitled to notice only if he was an owner of record of property on the most recent property tax assessment roll.

We are required by ORS 174.010 to interpret ORS 215.416(11)(a) to give effect, if possible, to all provisions or particulars of the statute. To interpret the statute as the county suggests would give no effect to the

phrase "or who are adversely affected or aggrieved by the decision." Therefore, we read ORS 215.416(11)(a) to establish two categories of people to whom notice must be given in the manner described in ORS 197.763(3): (1) those persons who would have had a right to notice if a hearing had been scheduled; and (2) those persons who are adversely affected or aggrieved by the decision.[4]

B. Right to Notice Based on Tax Assessment Rolls

The county maintains that the county property tax assessment rolls are updated once annually, in September of each year. The county contends petitioner's acquisition of his property in April, 1995, was not reflected on those tax rolls in August, 1995, when notice of the challenged decision was given under ORS 197.763(2). The county argues that since petitioner's property ownership was not reflected on the "most recent county property tax assessment roll," the county had no obligation to give petitioner notice under ORS 197.763(2).

Petitioner states in an affidavit attached to the petition for review that both the county counsel and the county tax assessor informed him or his partner that the county records reflected his property ownership within two weeks to one month of the date the deeds were recorded.

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[4]We interpret "or" in ORS 215.416(11)(a) to separate the phrases in an alternate relationship, indicating that either may be employed without the other. See 1A Sutherland, Statutory Construction § 21.14 (5th ed 1993).

Petitioner argues the county cannot rely on a list of property owners and their addresses that is updated only once each year when it has an equally accessible list that is more or less current.

The dispute between the county and petitioner is over what ORS 197.763(2)(a) means by "the most recent property tax assessment roll." ORS Title 29 contains the statutes governing revenue and taxation. ORS 308.210 provides, in relevant part:

> "(1) The assessor shall proceed each year to assess the value of all taxable property within the county, except property that by law is to be otherwise assessed. The assessor shall maintain a full and complete record of the assessment of the taxable property for each year on July 1 of such year, at 1:00 a.m. in the manner set forth in ORS 208.215. Such record shall constitute the assessment roll of the county for the year.
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> "(2) * * * [T]he ownership and description of all real property * * * shall be shown on the assessment roll as of July 1 of such year or as it may subsequently be changed by divisions, transfers or other recorded changes. This subsection is intended to permit the assessor to reflect on the assessment roll the divisions of property or the combining of properties after July 1 so as to reflect the changes in ownership of that property and to keep current the descriptions of property. <u>The assessor shall also have authority to change the ownership of record after July 1 of a given year so that the assessment roll will reflect as nearly as possible the current ownership of that property</u>.

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

ORS 308.212(1) requires any person who owns real property located in a county to notify the county assessor of that owner's current address and of any change of address. ORS 308.212(3) states:

> "The county assessor of each county shall maintain records showing the information required to be submitted to the assessor under this section. The assessor shall note any property owner's change of address on the tax rolls." (Emphasis added.)

The county's brief does not identify the authority upon which the county relies to justify updating its tax roll only once a year, in September. The county may be confusing the annual printout of the tax roll required by ORS 308.219(1) with the tax roll itself. While ORS 308.219(1) requires a printout be made of the tax roll "as prepared on September 20, with all corrections, changes and additions to the roll which have occurred to the date the roll is delivered to the tax collector pursuant to ORS 311.115"; and ORS 311.115 requires the assessor to deliver the tax roll to the tax collector "at such time as [they] agree is necessary to enable the mailing of tax statements on or before October 25," neither statute excuses the county from complying with ORS 308.210(2) and 308.212(3).

Updating the tax rolls as soon as possible is particularly important where notice of land use decisions under ORS 197.763 is concerned. In view of the emphasized language in ORS 308.210(2) and 308.212(3), we do not believe

the county can rely on its failure to update its tax rolls for changes of property ownership and owner's address to defeat the purpose of the notice requirement stated in ORS 197.763.[5]

The "most recent county property tax assessment roll" is the property tax assessment roll that shows, as nearly as possible, the current ownership of each property in the county and that notes any property owner's change of address. That tax assessment roll may or may not be printed out. Therefore, the county was required by ORS 197.763(2)(a) to give notice of the challenged decision to petitioner on the basis that he would have been entitled to notice had a hearing been scheduled.

C. Right to Notice As an Adversely Affected or Aggrieved Party

The county was also required to give notice to petitioner on the basis that he is among those "adversely affected or aggrieved" by the challenged decision. It is well-established that someone whose property is within sight and sound of a property is presumptively considered "adversely affected or aggrieved" by land use decisions affecting it. Franklin v. Deschutes County, 30 Or LUBA 33, 41, aff'd 139 Or App 1 (1995); Kamppi v. City of Salem, 21

[5]The statement of the associate planner, quoted above, that "[a]pparently Tax Assessor records linked to our GIS system were not updated" suggests the county's failure to update the tax assessment roll with respect to petitioner's property was unusual.

Or LUBA 498, 501 (1991); Stephens v. Josephine County, 14 Or LUBA 133, 135 (1985); Stephens v. Josephine County, 11 Or LUBA 154, 156 (1984); Worcester v. City of Cannon Beach, 9 Or LUBA 307, 311-12 (1983). Since petitioner's property is adjacent to the subject property, he certainly qualifies.

D. Conclusion on Standing

Because the county did not provide petitioner the notice of the challenged decision to which he was entitled, petitioner was entitled to a local appeal under ORS 215.416(11)(a). Tarjoto v. Lane County, 137 Or App 305, 310, ___ P2d ___ (1995). See also League of Women Voters v. Coos County, 82 Or App 673, 729 P2d 588 (1986). Since the county denied him the hearing to which he was entitled, petitioner has standing under ORS 197.830(3) to bring this appeal of the county's lot-of-record decision.

FIRST ASSIGNMENT OF ERROR

A. Violations of Statutes, Administrative Rules and Polk County Zoning Ordinance (PCZO)

In the first subassignment of error, petitioner contends the county's lot of record decision violates ORS 215.705(1)(a) and 215.705(3); the implementing state regulations, OAR 660-33-130(3)(d)(A) and 660-33-130(3)(a)(A)(i); and the implementing provisions in the county's zoning ordinance. Because the question presented concerns state law and, alternatively, because the challenged decision was made by the county planning director

rather than its governing body, we owe no deference to the county's interpretation of the lot-of-record provisions.

ORS 215.705 authorizes counties to approve applications for lot-of-record dwellings in limited, specified circumstances. It provides, in relevant part:

> "(1) 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 farm or forest zone as set forth in this section and ORS 215.710 * * * after notifying the county assessor that the governing body intends to allow the dwelling. A dwelling under this section may be allowed if:
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> "(a) The lot or parcel on which the dwelling will be sited was lawfully created and was acquired by the present owner:
>
> "(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.
>
> "* * * * *"

There is no dispute that ORS 215.705(1) applies to the subject property. Petitioner and the county dispute who is the "present owner" of the subject property, as that term is used in ORS 215.705(1)(a). Petitioner contends the present owner is the contract purchaser, McCool, who acquired the property in 1988, after the January 1, 1985 cutoff date stated in ORS 215.705(1)(a)(A). The county contends the present owner may include the contract seller, Reynolds, who acquired the property in 1959, prior to the cutoff date.

The term "present owner" is not specifically defined in the statute in a way which is useful to resolving this dispute.[6]

In interpreting a statute, our task is to discern the intent of the legislature. The first level of analysis is to consider the text of the statutory provision itself and its relationship to other provisions and other related statutes. PGE v. Bureau of Labor and Industries, 317 Or 606, 610-11, 859 P2d 1143 (1993). Only if the intent of the legislature is not clear from the text and context inquiry do we consider legislative history. Id.

The word "owner" standing alone, as applied to land, has no fixed and inflexible meaning. See Harder v. City of Springfield, 192 Or 676, 685, 236 P2d 432 (1951). "Owner" and "ownership" have been interpreted differently by the courts in the context of land sale contracts, depending on what right is at stake.

A land sale contract is primarily a security device which is used as an alternative to mortgages and trust

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[6]ORS 215.705(6) provides:

> "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 or grandchild of the owner or a business entity owned by any one or combination of these family members."

Although ORS 215.705(6) expands the category of persons who should be considered an owner under ORS 215.705(1)(a) to include relatives of the actual owner and certain related business entities, it does not clarify who the actual owner is.

deeds. Each of the three security devices, with differing rights and interests, has its place in the vendor-financed transaction. Braunstein v. Trottier, 54 Or App 687, 689, 635 P2d 1379 (1981), rev den 292 Or 568 (1982). After the parties have signed the contract, the vendor, although still the legal title holder of the property, holds an encumbered title charged with the equitable interest of the vendee. Id. at 691; Panushka v. Panushka, 221 Or 145, 349 P2d 450 (1960). However, the vendor does retain a real property interest delimited by the contract. For example, the vendor's interest in the land is mortgagable to third parties. Pederson v. Barkhurst, 139 Or 483, 10 P2d 347 (1932). The right to receive payments under an executory land sale contract, unless that right is properly severed, is part of the vendor's real property interest.

> "Although it is possible to separate the right to receive contract payments from the right to repossess the property, it is inherent in the nature of the land sale contract, itself, that the right to receive contract payments and the legal title to the property go hand in hand." Bedortha v. Sunridge Land Co., Inc., 312 Or 307, 822 P2d 694 (1991).

Under a land sale contract, a seller retains the right to possession before the price is finally paid. Id. at 311.

As a general rule,

> "[u]ntil the purchaser has paid the full amount under the contract, the vendor continues to have a real property interest in the land. The value of the vendor's interest decreases with each payment, but the character of the interest does not change

until the contract is completed." Id. at 314; Security Bank v. Chiapuzio, 304 Or 438, 441 n 1, 747 P2d 335 (1987); May v. Emerson, 52 Or 262, 96 P 454, 96 P 1065 (1908).

Clearly then, when the rights at stake in connection with land sale contracts are financial, the courts tend to emphasize the ownership interest of the contract vendor. However, when the focus is on who benefits from the use of the property, the reverse is true. In Harder the issue was whether the contract purchasers had the right as "owners" to vote for or against an improvement district. The court considered who the "property owner benefited" was by looking at who would be the beneficiaries of the improvements, as well as the only parties to a land sale contract required to bear the cost of the benefit. 192 Or at 685. The court quoted from 2 Pomeroy, Equity Jurisprudence § 368 (5th ed) 21, as follows:

> "The vendee is looked upon and treated as the owner of the land; an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed, having a lien on the land, even if in the possession of the vendee, as security for any unpaid portion of the purchase-money. The consequences of this doctrine are all followed out. As the vendee has acquired the full equitable estate, -- although still wanting the confirmation of the legal title for purposes of security against third persons, -- he may convey or encumber it; may devise it by will; on his death intestate, it descends to his heirs, and not to his administrators; in this country, his wife

> is entitled to dower in it; a specific performance is, after his death, enforced by his heirs; in short, all the incidents of a real ownership belong to it." (Italics in court's quotation.) 192 Or at 686-87.

In Reynolds Aluminum v. Multnomah Co., 206 Or 602, 287 P2d 921 (1956), cert den 350 US 970 (1957), where the issue was the contract vendee's liability for property taxes, the court said,

> "Under an executory contract of sale and purchase of land the vendee is treated in all respects as the owner of the property, although he has an equitable interest only. Until the contract is fully performed and the vendee is entitled to a conveyance of the real title, the vendor retains the legal title simply as security for performance by the vendee." 206 Or at 617. (Emphasis added.)

See also City of Reedsport v. Hubbard, 202 Or 370, 390, 247 P2d 248 (1954).

Since the right to build a lot-of-record dwelling pertains to the beneficial use of the subject property, we conclude "present owner," as the term is used in ORS 215.705(1)(a), refers to the contract vendee, McCool, rather than to the contract vendor, Reynolds. If recourse to legislative history is necessary at all, it only buttresses that conclusion.[7]

The legislative history leaves no doubt the lot-of-

[7]Petitioner has attached transcripts of senate floor debates and committee hearings to its brief. The county does not object to the accuracy of the transcripts, and we therefore take official notice of them. Craven v. Jackson County, 29 Or LUBA 125, 128, aff'd 135 Or App 250, rev den 321 Or 512 (1995).

record provisions were meant to provide only limited opportunities for development, and were justified on the basis of fairness to those who were owners of real property prior to 1985, the first year when all counties had acknowledged comprehensive plans. As explained by then-Senator Jim Bunn:

> "We tried to find a date that would cover what was the main concern and that was did the land owner have a reasonable expectation of a right to build a home. By 1985, all counties had acknowledged plans, and we felt that that was the date certain where the owners should have had the knowledge of the restrictions that existed. But before that there was a legitimate argument that they did not know that they did not have a right to build." Tape Recording, Senate Floor Debate, August 2, 1993, Tapes 201 and 203.

The county does not argue that McCool, who acquired the subject property as a contract vendee in 1988, had a reasonable expectation he could construct a dwelling, in view of the land use regulations in place at that time.

This subassignment of error is sustained.

B. Application of PCZO 110.425

In the second subassignment of error, petitioner contends the county improperly applied PCZO 110.425 which defines "owner" as:

> "The owner of record of real property as shown on the latest tax rolls or deed records of the county, or a person who is purchasing a parcel of property under written contract."

The record contains no information concerning McCool's interest in the subject property, but only shows him as an

agent for Reynolds on the tax roll. Record 13, 24.

Assuming the county planning director knew of McCool's interest as contract purchaser in the subject property, we agree with petitioner the county planning director misconstrued PCZO 110.425 in failing to consider that interest when finding the present owner to be Reynolds.[8]

This subassignment of error is sustained.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

The second assignment of error restates petitioner's arguments with respect to standing, and it is sustained.

The county's decision is reversed.

[8]It is not clear the planning director knew of McCool's interest when he made his decision.