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

ERLING YONTZ,)
)
Petitioner,)
)
vs.)
)
MULTNOMAH COUNTY,)
)
Respondent,)
)
and)
)
ARNOLD ROCHLIN,)
)
Intervenor-Respondent.)

LUBA No. 97-116
FINAL OPINION
AND ORDER

Appeal from Multnomah County.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioner.

Sandra N. Duffy, Multnomah County Counsel, Portland, filed the response brief and argued on behalf of respondent.

Arnold Rochlin, Portland, intervenor-respondent filed a response brief and argued on his own behalf.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

AFFIRMED 04/27/98

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

1 Per Curiam.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of his application
4 for a conditional use permit for a nonforest dwelling.

5 **MOTION TO INTERVENE**

6 Arnold Rochlin (intervenor) moves to intervene on the
7 side of the county. There is no opposition to the motion, and
8 it is allowed.

9 **FACTS**

10 The subject property is a 4.68-acre parcel zoned
11 Commercial Forest Use (CFU). On July 5, 1996, petitioner
12 applied to the county to site a nonforest dwelling. A county
13 hearings officer denied the application because it did not
14 comply with the county's nonforest dwelling criteria, which
15 require that five dwellings exist on nearby parcels within a
16 160-acre square template centered on the subject parcel and
17 aligned with section lines.

18 Petitioner appealed to the county board of commissioners
19 (commissioners), which affirmed the hearings officer's
20 decision, amending it to include separate findings for state
21 and county nonforest dwelling criteria and to adopt additional
22 findings.

23 This appeal followed.

24 **FIRST ASSIGNMENT OF ERROR**

25 Petitioner argues that the county cannot apply its more
26 restrictive nonforest template dwelling standards at Multnomah

1 County Code (MCC) 11.15.2052(A)(3)(c),¹ but must apply instead
2 the criteria at ORS 215.750(1),² which are less restrictive
3 than the local provisions.³

¹MCC 11.15.2052(A)(3)(c), in relevant part, permits a nonforest dwelling where the lot is:

"* * * composed primarily of soils which are capable of producing above 85 cf/ac/yr of Douglas Fir timber; and

"(i) The lot and at least all or part of 11 other lots exist within a 160-acre square when centered on the center of the subject lot parallel and perpendicular to section lines; and

"(ii) Five dwellings exist within the 160-acre square."

²ORS 215.750(1) provides in relevant part:

"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 acre 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."

³ORS 215.750 is more permissive than MCC 11.15.2052(A) in three respects: the statute and rule permit a nonforest template dwelling when three other dwellings are located on at least 11 nearby parcels within a 160-acre template centered on the subject parcel, while MCC 11.15.2052(A) requires that five other dwellings exist within the template. Further, OAR 660-06-027, the administrative rule implementing ORS 215.750(1), allows the 160-acre square template to be rotated, and does not require that the three other dwellings be located within the template, as long as the parcels on which they are sited are within the template. MCC 11.15.2052(A) requires the template to align with section lines, and requires each of the five dwellings to be located within the template. Finally, ORS 215.750(5) permits use of an alternative rectangular template when the subject property is located along a county-maintained road, while MCC 11.15.2052(A) does not permit use of a rectangular template. In the present case, it is undisputed that petitioner's application complies with each of the criteria imposed by ORS 215.750 and OAR 660-06-027, but fails to comply with MCC

1 Petitioner's argument is identical to those we rejected,
2 on similar facts, in Evans v. Multnomah County, ___ Or LUBA
3 ___ (LUBA No. 96-198, October 7, 1997) and Miller v. Multnomah
4 County, ___ Or LUBA ___ (LUBA No. 97-105, November 5, 1997),
5 aff'd 153 Or App 30, ___ P2d ___ (1998). In Evans, we held
6 that the permissive terms of ORS 215.750 did not prohibit the
7 county from applying its more restrictive forest template
8 dwelling criteria in addition to the less restrictive
9 statutory standard. We reached a similar conclusion in
10 Miller. In affirming Miller, the Court of Appeals interpreted
11 the permissive terms of ORS 215.750 to set out a minimum
12 statutory standard rather than a mandatory ceiling
13 inconsistent with more restrictive local legislation. Because
14 the county's more restrictive standards ensure that dwellings
15 approved would meet the minimum statutory standards, the Court
16 of Appeals held that ORS 215.750 does not disallow
17 supplemental and more restrictive local standards. Miller,
18 153 Or App at 40.⁴
19

11.15.2052(A) because only three dwellings exist within the 160-acre template aligned with section lines.

⁴In reaching its conclusion, the Court of Appeals in Miller relied also on the terms of ORS 215.750(4)(a), which provides that:

"A proposed dwelling under this [section] is not allowed:
"(a) If it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan or acknowledged land use regulations or other provisions of law."

1 Petitioner offers no argument in the first assignment of
2 error that is not resolved adversely to petitioner by Evans
3 and Miller.

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioner argues that the county erred in failing to
7 apply the alternative rectangular template permitted by ORS
8 215.750(5).⁵ Petitioner contends that, even if the county can
9 apply more restrictive criteria with respect to the square
10 template, the statutory rectangular template has no
11 counterpart in the county's regulations, and is thus a new
12 area of law the county has not previously regulated.
13 Accordingly, petitioner concludes that the county is required
14 to apply the alternative rectangular template test.

15 The Court of Appeals' opinion in Miller did not address
16 the alternative rectangular template test, but its reasoning
17 regarding the square template applies with equal or greater
18 force to the alternative template. Miller rejected the
19 argument that ORS 215.750 precluded supplemental and more
20 restrictive local legislation, relying in part on the use of
21 the permissive term "may" in ORS 215.750(1). The court stated

⁵ORS 215.750(5) provides in relevant part:

"* * * if the tract under subsection (1) or (2) of this section abuts a road that existed on January 1, 1993, the measurement may be made by creating a 160-acre rectangle that is one mile long and one-fourth mile wide centered on the center of the subject tract and that is to the maximum extent possible, aligned with the road."

1 that "ORS 215.750 makes the allowance of the uses it describes
2 permissive on the part of the governing body." 153 Or App at
3 39.

4 In other words, the county is not obligated by ORS
5 215.750(1) to allow the establishment of nonforest dwellings
6 at all. If the county chooses to allow nonforest dwellings,
7 ORS 215.750(1) sets out the minimal conditions under which the
8 county can allow them. Because the county can decline to
9 allow nonforest dwellings at all, it follows that the county
10 is not required to allow nonforest dwellings under the
11 alternative template test.

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 Petitioner argues that the county's decision violates the
15 equal privileges and immunities clause of the Oregon
16 Constitution, Article I, Section 20, and the equal protection
17 clause of the United States Constitution. Petitioner contends
18 that the county's decision denies petitioner the same rights
19 enjoyed by citizens of other counties that have conformed
20 their nonforest dwelling regulations to the state standard.

21 Both the county and intervenor contest the merits of
22 petitioner's argument. As a preliminary matter, intervenor
23 responds that petitioner failed to raise the issue of
24 violation of Article 1, Section 20 and the federal equal
25 protection clause, and has thus waived that issue.

1 ORS 197.763(1).⁶ Intervenor notes that petitioner made only a
2 glancing mention of "equal protection" below, without
3 reference to Article 1, Section 20 or any specific argument
4 directed at whether application of the county's standards
5 would violate either the state or federal provision.⁷
6 Petitioner does not identify any other place in the record
7 where anyone raised the issue of violation of the state equal

⁶ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

⁷Intervenor cites to the following statement made by petitioner's counsel before the commissioners:

"We have to understand as a society, as a people, why a person who owns property in Multnomah County has fewer rights than a person who owns property in some other county, maybe a neighboring county. I mean, this is a county of laws. It's a country of equal protection. And until the local government comes forth and says there's an honest and real reason for doing this that is different from the state as a whole, I think we're all citizens of this state first.

"I know that local governments -- there's this local control argument that goes through all of these decisions, but that local control argument should not be foisted upon the shoulders of individuals whose rights are being somehow whipped. You, if you own property that crosses both Multnomah County and a neighboring county's lines, somehow you get treated differently depending on whether you build across one -- across artificial county lines. That's -- that's what it gets to, and supplement conflict, whether you use the Dilworth case, they're all coming back to the same issue, and that is why should Multnomah County have a more severe standard than the State? And I don't know.

"I've read through your standards, and I don't know. Is it something special about Multnomah County? Maybe it is. But it's you as elected officials whose responsibility it is to tell us why it is different. A tree is different in Multnomah County than it is in Yamhill County? Well, maybe so. Maybe it's closer to the mills. I don't know." Transcript Supp. Record 26-27 (emphasis added).

1 privileges and immunities clause or the federal equal
2 protection clause.

3 We agree with intervenor that the statement cited from
4 the record and quoted in the footnote is not "accompanied by
5 statements or evidence sufficient to afford the governing body
6 * * * and the parties an adequate opportunity to respond to
7 each issue." ORS 197.763(1). The thrust of the statement
8 cited is that the county should, as a matter of policy,
9 conform its nonforest dwelling standards to the state
10 standards. The passage gives little or no hint that
11 application of the county's standards would violate the state
12 equal privileges and immunities clause or the federal equal
13 protection clause. The bare reference to "equal protection"
14 is not sufficient, given its context, to inform the local
15 government and the parties that petitioner intended to raise
16 the issue of whether the state and federal clauses prohibit
17 the county from applying standards to its residents that are
18 different than standards other counties apply to their
19 residents.

20 The third assignment of error is denied.

21 The county's decision is affirmed.