LAND USE
BOARD OF APPEALS

JUN 18 5 28 PM '85

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KATHERINE FUTORNICK and KENNETH FUTORNICK, Petitioners, vs. YAMHILL COUNTY, Respondent.	LUBA Nos. 84-101, 84-102
	FINAL OPINION AND ORDER

Appeal from Yamhill County.

Margaret D. Kirkpatrick, Portland, filed the petition for review and argued the cause on behalf of petitioners. With her on the brief were Stoel, Rives, Boley, Fraser & Wyse.

Daryl Garrettson, McMinnville, filed a response brief and argued the cause on behalf of Respondent County.

KRESSEL, Referee.

BAGG, Chief Referee, Concurring.

DuBAY, Referee, Dissenting.

84-101/DISMISSED 06/18/85

84-102/REMANDED 06/18/85

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

Opinion by Kressel.

NATURE OF DECISION

In consolidated appeals, petitioners seek review of decisions designated by the county as LOR 56-84 and Board Order 84-710. The former represents the county planning director's determination that a vacant, 2.9 acre tax lot (hereinafter TL 3332-104) qualifies under the county zoning ordinance as a "Lot of Record." The latter represents approval by the county governing body of a conditional use permit allowing construction of a non-farm, non-forest dwelling on the lot.

FACTS

The area is designated Agricultural/Forestry Large Holding by the county's acknowledged comprehensive plan and is zoned Agricultural/Forestry (AF-20). TL 3332-104 is one of 16 contiguous tax lots divided from a larger tract between 1968 and 1973. Although a county ordinance required approval of the land divisions creating them, no such approvals were obtained. The lots range from 2.2 to 9.6 acres and are therefore substandard in the AF-20 Zone. Twelve dwellings have been erected on these lots.

TL 3332-104 is irregular in shape. It adjoins three substandard lots on which dwellings, including those of petitioners' and the owner of TL 3332-104 (Wood), have been erected. Another portion of TL 3332-104 abuts a 483 acre farm. The surrounding acreage consists of resource uses in large holdings.

Prior to adoption of Board Order 84-710, two unsuccessful attempts were made to gain final county approval of a dwelling on the lot. In 1979, a variance request by the previous owners of the lot was turned down. Thereafter, Wood purchased the property and was successful in obtaining the relief necessary to permit development. However, after an appeal to this Board was filed by petitioner herein, the parties consented to a remand of the decisions. On remand, the permit application was withdrawn.

In July 1984, prospective purchasers of the property applied to have TL 3332-104 recognized as a buildable lot of record. Respondent's planning director reviewed the application for conformance with Section 1204.02 of the zoning ordinance. That section provides:

> "For purposes of this Ordinance, a lot of record is any lot or parcel of land which was created prior to October 3, 1975 by deed, written land sale, contract or other similar instrument, partitioning or subdivision; or any lot or parcel created thereafter in accordance with ORS Chapter 92 and any ordinance adopted pursuant thereto."

By letter dated July 26, 1984, the planning director approved the application (LOR 56-84). The approval was subject to the following condition:

> "That prior to the issuance of a residential development permit, the applicant shall obtain a conditional use permit to establish a principal dwelling not in conjunction with a farm or forest use consistent with Section 403.07 of the Zoning Ordinance." Record in LUBA No. 84-101 at 1.

After issuance of LOR 56-84, an application was filed for a

conditional use permit to allow a non-farm, non-forest dwelling and a barn on the property. Petitioners appeared[1] before respondent's planning commission in opposition to the permit, but it was approved on October 4, 1984. Petitioners then appealed the approval to the board of county commissioners. On December 5, 1984, the governing body denied the appeal and granted the conditional use permit (Board Order 84-710).

On December 20, 1984 petitioners filed notices of intent to appeal the decisions in LOR 56-84 and Board Order 84-710. Respondent moved to dismiss both appeals. With respect to the appeal of LOR 56-84 respondent argued (1) petitioners had failed to file a notice of intent to appeal within 21 days of the planning director's decision, as required by ORS 197.830(7) and (2) the decision was not a reviewable "land use decision" as defined by ORS 197.015(10). With respect to the appeal of Board Order 84-710, respondent argued its permit approval was also not a reviewable "land use decision."

On April 9, 1985 this Board denied respondent's Motion to Dismiss LUBA No. 84-102 (the conditional use permit). We declined, however, to rule on the motion in LUBA No. 84-101 (the lot of record determination) until after both appeals were briefed and argued. We now take up that motion, concluding LUBA No. 84-101 should be dismissed as moot.

MOOTNESS OF No. 84-101

I As noted, the appeal in LUBA No. 84-101 calls on us to review the planning director's determination that TL 3332-104

constitutes a lot of record under respondent's zoning ordinance. However, in response to the Board's inquiry, the parties agree the correctness of the director's determination could be, and was, challenged in the subsequent conditional use permit proceeding. As the county's brief states:

> "Because Section 1204.02 is nothing more than a definitional section, any lot of record approval granted thereunder is merely a threshold determination of whether a subsequent development permit may be applied for. The question of whether the lot in fact qualifies as a lot of record under Section 1204.02 could still be challenged in an appeal of a subsequent development permit (e.g., conditional use permit) granted by the county. Essentially, the lot of record determination is a prescreening process which precedes the subsequent land use decision." Brief of Respondent at 12.

Consistent with this statement, Board Order 84-710 includes a determination of the status of TL 3332-104 as a lot of record. We note that the determination is attacked by petitioners in LUBA No. 84-102.

Given the foregoing, the appeal in LUBA No. 84-101 must be considered moot. The parties agree the decision sought to be challenged in that appeal was preliminary in nature, and that the final determination on the lot of record issue was made in Board Order 84-710.[2] Since any decision we might render in LUBA No. 84-101 would resolve merely an abstract question, the appeal should be dismissed. See Warren v. Lane County, 297 Or 290, 293, 686 P2d 316 (1984); Carmel Estates, Inc. v. LCDC, 51 Or App 435, 438-39, 625 P2d 1367 (1981), rev den 291 Or 309.

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FORMAT OF OPINION IN 84-102

In responding to the petition in No. 84-102, we first address petitioners' challenges to the county's lot of record determination. Following that discussion, we address the remaining assignments of error, which concern the adequacy of the findings made in support of the conditional use permit. We conclude that (1) the county misconstrued the applicable law in designating TL 3332-104 as a lot of record, and (2) the findings in support of the conditional use permit are inadequate.

STATUS OF TL 3332-104 AS A LOT OF RECORD

Respondent's zoning ordinance establishes no minimum lot size for a non-farm, non-forest dwelling in the AF-20 district. If the governing criteria (discussed infra) are satisfied, a conditional use permit may be issued to establish a dwelling on either a newly created parcel, Section 403.09(B)(1), Yamhill County Zoning Ordinance, or a "pre-existing lot of record." Id at Section 403.09(B)(2). As noted earlier, the county concluded TL 3332-104 constituted a pre-existing lot of record.

Petitioners claim the county's conclusion misconstrues the applicable law. Their attack is based on certain provisions of Section 1204 of the zoning ordinance (relating to lots of record). Although we reject some of petitioners' arguments, we hold that in the circumstances presented the county could not grant lot of record status to TL 3332-104.

Petitioners first direct our attention to Section 1204.02 of the zoning ordinance. It reads as follows:

> "Definition of Lot of Record.
>
> "For purposes of this ordinance, a lot of record is any lot or parcel of land which was created prior to October 3, 1975 by deed, written land sale contract or other similar instrument, partitioning or subdivision; or any lot or parcel created thereafter in accordance with ORS Chapter 92 and any ordinances adopted pursuant thereto." (Emphasis added.)

Petitioners argue the underlined portion of Section 1204.02 should be construed to grant lot of record status to a lot created prior to October 3, 1975 only if it was created lawfully, i.e., in conformance with then-existing land division requirements. TL 3332-104 would not meet such a standard, they add, because it was created without county approval at a time when approval was required by ordinance. The record bears out petitioners' charge that the necessary approval was never obtained.[3]

A literal reading of Section 1204.02 does not warrant the interpretation urged by petitioners. The definition of "Lot of Record" makes no distinction between pre-1975 land divisions approved by the county and those for which approval was required but never obtained. Compare Ludwick v. Yamhill County, 294 Or 778, 663 P2d 398 (1983) (ordinance recognizing only "existing legal lots of record" did not allow recognition of lot divided without required county approval). In support of their claim, however, petitioners point out that the county planning director has read Section 1204.02 to include a

lawfulness requirement. In LOR 56-84, one of the director's findings stated:

> "5. The Zoning Ordinance defines a lot of record as any parcel of land lawfully created prior to October 3, 1975, or in accordance with ORS Chapter 92 thereafter (Section 1204.02, Zoning Ordinance). A warranty deed dated February 8, 1973 and recorded on FV-94, page 1756 of the Yamhill County Deed and Mortgage Records is consistent with this definition." Record at II-3.

Petitioners say we should defer to the director's interpretation of the ordinance. However, we do not consider this a persuasive reason for giving the desired interpretation. The planning director's assessment of the scope of Section 1204.02 does not bind us.[4] Gordon v. Clackamas County, 73 Or App 16, 20-21, ___ P2d ___ (1985); Mason v. Mountain Rivers Estate, 73 Or App 334, 340, ___ P2d ___ (1985). The scope of the ordinance is a question of law, not fact. Moreover, we note the governing body's findings on the same issue do not incorporate the planning director's approach. Those findings, which appear in Board Order 84-710, simply recognize TL 3332-104 as a "legal lot within the definition of the Yamhill County Zoning Ordinance." Record at I-4.

The question remains whether the ordinance must be read to deny lot of record status where, as here, the lot in question was created prior to October 3, 1975 without the required county approval. Although we believe a negative answer is called for when the question is considered in a general

sense,[5] the specific circumstances of this case warrant a different result.

3,4 The definition of the term "lot of record" in the county ordinance is preceded by a statement of the purposes of the various provisions relating to lots of record. See Section 1204.01, Yamhill County Zoning Ordinance. In pertinent part, that statement reads:

> "The purpose of this section is to encourage the combination of non-conforming Lots of Record to create conforming parcels where possible, to encourage the use of non-conforming Lots of Record in the manner which is in keeping with the zoning district in which they are located, and to provide administrative relief in situations where lots of record were purchased in good faith prior to adoption of the zoning regulations." (Emphasis added.)

Petitioners urge us to give effect to the underlined language in our interpretation of Section 1204.02. If this approach is taken, they argue, the county's interpretation of that section must be overturned. The argument is stated in the petition as follows:

> "Applicant Wood purchased the property for $9,000 in 1979 (R. 189), after opposing a prior attempt to develop the property. At the time of the purchase, Applicant Wood was fully aware of the land use restrictions on the property (R. 58, 67, 77). He then attempted to circumvent those restrictions and sell the property for $27,500 (R. 90, 122-25). Applicant Wood is clearly not entitled to administrative relief as 'a purchase[r] in good faith prior to the adoption of zoning regulations.'" Petition at 25-26.

We agree Section 1204.01 serves as a guide in the interpretation of the provisions following it in the ordinance, including the definition of "lot of record." Given the purpose

clause, it seems reasonable to interpret the definition so as to deny lot of record protection to an owner who acquired the lot with actual knowledge it had been created without the necessary approval and was therefore considered illegal. Reading the ordinance as a whole, we believe relief is to be granted only to those who purchased lots created prior to October 3, 1975 in the good faith belief they were lawful. The record provides ample support for petitioners' assertion that the present owner of TL 3332-104 (Wood) is not such a purchaser. Record at 58, 68 and 77. It follows that the county erroneously construed the applicable law when it concluded TL 3332-104 constituted a lot of record under Section 1204.02 of the zoning ordinance.

Petitioners offer two additional reasons why the county's lot of record determination was erroneous. However, we find neither argument persuasive.

Petitioners' first argument arises under the portion of Section 1204.01 stating that a purpose of the lot of record section is "...to encourage the combination of non-conforming parcels where possible..." Petitioners maintain the county's decision is at odds with this proviso because it allows development of TL 3332-104 notwithstanding that the adjacent lot of record is in the same ownership.

We decline to read the cited ordinance in the manner urged by petitioners. As the county points out, another provision of the ordinance contains a specific requirement for the

combination of contiguous, substandard lots of record. That section, which controls over the general language in Section 1204.01, requires lots to be combined only where more than five are in single ownership. See Section 1204.05, Yamhill County Zoning Ordinance. The record does not indicate TL 3332-104 is subject to the combination requirement.

6 Petitioners' final argument arises under Section 1204.04 of the zoning ordinance. This section, like the state law which it parallels,[6] requires issuance of a residential building permit for any lot of record meeting specified prerequisites. In pertinent part, the section provides:

> "Mandatory Issuance of Residential Building Permits on Certain Lots of Record.
>
> "A. The County may not deny a permit for the construction or placement of a principal dwelling on, and the requirements of Section 1204.06 through 1204.09 of this Ordinance shall not be mandatory for, any lot of record which:
>
> * * *
>
> "2. Was lawfully created by or transferred to the present owner by a deed or sales contract executed after December 31, 1964 and before January 1, 1975;...."

Petitioners point out that TL 3332-104 was transferred to the present owner after January 1, 1975. Accordingly, they contend the county erred in granting the lot status as a lot of record.

Petitioners' citation to Section 1204.04 does not assist them because that section was plainly not applicable in the proceedings at issue. As noted earlier, those proceedings involved a conditional use permit for a non-resource dwelling.

In the AF-20 district, status of the property as a lot of record was but one of numerous issues the county was required to address prior to permitting the proposed residence. By contrast, had the provisions of Section 1204.04 been involved, the county would have been obligated by that section to permit the residence if those provisions alone were satisfied.

Based on the foregoing, we sustain petitioners' challenge. The county's decision misconstrues the applicable law and must therefore be remanded.[7] OAR 661-10-070(1)(C)(4).

ADEQUACY OF CONDITIONAL USE PERMIT FINDINGS

Petitioners next challenge the adequacy of the county's findings in connection with two approval criteria in the zoning ordinance. The first requires a finding that a proposed nonfarm dwelling

> "...is timely, considering the adequacy of public facilities and services existing or planned for the area affected by the use." Section 1202.02(E), Yamhill County Zoning Ordinance.

In connection with this criterion, respondent found as follows:

> "The proposed use is timely in that the proposed dwelling will be served by an on-site septic system and will receive services generally available to residences in the immediate area and will constitute only in-fill of a pre-existing development pattern, and will not result in the diminution of the agriculture base of the county." Record at I-2.

Petitioners argue the criterion is not satisfied by a finding that TL 33321-104 will receive the services "generally available in the area." Particularly in this case, they argue, where there is evidence the generally available public services

(e.g., roads and water systems) are substandard, more definitive findings are required.

We sustain this challenge. The challenged finding is ambiguous at best. Under Section 1202.02(E) the critical question is whether the proposal will be timely, i.e., will existing or planned public facilities and services be adequate to serve the area once the use is established? The finding challenged here is simply neutral on this critical question.[8]

[8,9] Petitioners' remaining challenges to the adequacy of respondent's findings direct our attention to the requirement that the proposed dwelling

> "be situated on land generally unsuitable for the production of farm crops and livestock, considering that terrain, adverse soil and land conditions, drainages and flooding, vegetation, location and size of tract." Section 403.07(D), Yamhill County Zoning Ordinance.

In connection with this requirement the county found as follows:

> "The proposed dwelling will be situated on land that is generally unsuitable for the production of farm crops and livestock in that the topography of the property is relatively steep, there is an existing vegetative cover on the property consisting of trees and underbrush, the parcel is bordered on all sides by parcels of under five acres in size and is bordered on three sides by parcels with existing non-farm-related dwellings.
>
> "Given these facts, the Board finds that because of its size, vegetative cover and topography, the parcel is not suitable for the production of crops and livestock in and of itself. The Board further finds that there is no possibility for the lease, sale or other incorporation of the subject parcel into an existing agricultural unit which could utilize the parcel for agricultural purposes. Given the isolation of the site from existing agricultural operation, the steep slopes, and the surrounding non-farm uses, the

> proposed dwelling will be situated on land which is unsuitable for the production of farm crops and livestock, and the Board so finds." Record at I-4.

As we construe the challenged finding, the county's principal position is that the lot in question is unsuitable for farm crop and livestock production because of a combination of factors, viz., its size, vegetative cover, topography and its proximity to residences on small lots.

We accept the idea that the unsuitability criterion can, in theory at least, be satisfied by a combination of factors, no one of which is deemed independently sufficient. The ordinance text supports this view. At the same time, we read the pertinent case law to require the approach to be accompanied by detailed findings explaining what each factor contributes to the conclusion of unsuitability. The cases recognize that allowance of a non-farm dwelling on agricultural land constitutes a deviation, albeit a permissible one, from general state policy favoring preservation of the resource. The approval prerequisites have therefore been described as "stringent." Meyer v. Lord, 37 Or App 59, 70 n. 5, 586 P2d 367 (1979); Miles v. Board of Commissioners of Clackamas County, 48 Or App 951, 956, 618 P2d 986 (1980). Cf Tiffany v. Malheur County, 5 Or LUBA 657, 60-61 (1982) (Goal 3 exception findings must explain in detail why no reasonable resource use of the property is possible). Where, as here, a conclusion of unsuitability is based on an unweighted combination of many factors, our duty is to assure that a sufficient justification

has been presented.

Given the foregoing, we must sustain petitioners' challenge to the county's findings under Section 403.07(D). The reference to parcel size cannot justify a conclusion of unsuitability. Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331 (1977). The added finding that the lot cannot be incorporated into an existing farm operation is pertinent under Rutherford, but the explanation for the finding is deficient. As we construe the finding, incorporation of the lot with other land is "impossible" for the same reasons the lot itself is unsuitable for production, i.e., vegetation, topography, and adjacent uses rule out this use. However, we note the finding concerning vegetation states only that "...there is an existing vegetative cover on the property consisting of trees and underbrush." Record at I-4. The finding is not of assistance in explaining why the site is unsuitable for farm crops and livestock. As petitioners observe, land must ordinarily be cleared before it can be cultivated. The presence of trees and brush will not support a conclusion of unsuitability.

What we have said above applies equally to the county's finding with respect to the topography of the site. Quoted in its entirety, the finding states "...topography of the property is relatively steep...." Record at I-4. Without further elaboration, including an explanation of why the topography contributes to the unsuitability of the land for crop or livestock production, the finding must be considered

inadequate.

Finally, with respect to adjoining uses, the county's finding states "the parcel is bordered on all sides by parcels of under five acres in size and is bordered on three sides by parcels with existing nonfarm related dwellings." Id. The location of a parcel adjacent to nonfarm dwellings can be relevant to the unsuitability issue, just as it would be relevant to a resource goal exception based on commitment of the area to non-farm use. See ORS 197.732(1)(b). However, the finding here is insufficient to support the necessary conclusion. As the Court of Appeals has recently stated in overturning a commitment exception based partly on the existence of adjacent residences:

> "If problems of this sort by themselves justified a finding of commitment, it would be impossible to establish lasting boundaries between agricultural and residential areas anywhere, yet establishing those boundaries is basic to the land use planning process." 1000 Friends of Oregon v. LDCD, 69 Or App 717, 728, 688 P2d 103 (1984).

#10/11 The petition raises one additional objection to the county's findings under Section 403.07(D). The argument is that evidence was presented indicating the property's suitability for production of fruit, grain, hay, pasture and Douglas Fir and that the county's order failed to address this evidence. We agree with respondent that evidence of suitability for timber production is irrelevant under Section 403.07(D). However, the remaining evidence is relevant and should have been addressed. Hillcrest Vineyard v. Board of

Commissioners of Douglas County, 45 Or App 285, 608 P2d 201 (1980).

Based on the foregoing we sustain petitioners' challenge to the county's findings under Section 403.07(D) of the zoning ordinance.

LUBA No. 84-101 is dismissed. The decision challenged in LUBA No. 84-102 is remanded.

BAGG, Concurring.

I concur with the result herein, but I have reservations about the view that Ordinance Section 1204.02 need not be read to require that the "lot" have been created in conformity with the then applicable land partitioning requirements. It is my view that the county's power to enact an ordinance recognizing a lot of record comes from state law and in particular 1981 Oregon Laws, Chapter 884, Section 9 and 13 as amended by 1983 Oregon Laws, Chapter 826, Sections 14 and 15. These laws allow uses of land which might otherwise not be permitted, and I believe their enactment is an expression of statewide policy. I therefore do not find the county has independent authority to establish a separate lot of record ordinance which, when applied, will have the effect of excusing a new and separate class of prior violations of county and state law. See City of Roseburg, et al v. Roseburg City Fire Fighters, 292 Or 266, 274-285, 639 P2d 90 (1981).

At the time the subject parcel was created, state law did not require the county to regulate partitions, but state law did authorize the county to enact such regulations. Further, ORS Chapter 92 made violation of county regulation a violation of state law. Yamhill County enacted regulations controlling creation of lots, including the lot at issue in this review proceeding. I do not believe it is the county's prerogative to excuse violations of prior county ordinance which, at the same time, were violations of state law. Were all of the

regulations purely the county's (and within the county's sole authority to enact), then an amendatory ordinance excusing prior ordinance violations may be appropriate. I do not find such a case exists here.

I would, therefore, reverse the county's decision to grant lot of record status to TL 3332-104.

DuBAY, Dissenting.

I dissent from the majority opinion sustaining petitioners' first assignment of error.

¶13 The majority reads a portion of the prefatory clause, stating the purpose for the lot of record sections of the county zoning ordinance, as a guide in the interpretation of the definition of a lot of record found in Section 1204.02. One of the several purposes stated in Section 1204.02 is to provide administrative relief to those who purchase property in good faith prior to adoption of zoning restrictions. From this language, the majority extrapolates a requirement that a lot of record may be established only if the purchaser had no knowledge of zoning restrictions at the time of purchase.

Although a purpose clause may be helpful in the interpretation of ambiguous ordinance provisions to determine the legislative intent, the affect of the majority opinion is to give provisions in a purpose clause a far different function, viz., the creation of new criteria. Section 1204.02 defines a lot of record without reference to either the lawfulness of the lot's creation (as the opinion points out) or to the state of mind of the purchaser. By adding the requirement that a purchaser of a lot of record must have no knowledge of zoning restrictions in order to qualify for lot of record determination, another criterion has been engrafted onto the definition where none existed before. I do not agree the language of purpose clauses may be extended this far, and

therefore dissent.

However, I agree with the majority that the matter should be remanded for the reasons set forth in the discussion of the second assignment of error.

FOOTNOTES

1

According to an uncontroverted affidavit filed in LUBA No. 84-101, petitioners first received notice of LOR 56-84 when the conditional use proceedings were commenced. They then attempted to appeal LOR 56-84 to the county governing body but were advised by planning officials that no appeal of that decision was permitted.

2

In allowing the conditional use permit for the non-resource dwelling, the county governing body was required by the zoning ordinance to assure the use satisfied "all relevant requirements of the ordinance." Section 1202.02, Yamhill County Zoning Ordinance. One such requirement was that the property was either a lot of record or a newly created parcel. Id at Section 403.09(B). Thus, the ordinance supports our characterization of LOR 56-84 as a preliminary decision on the lot of record question. The conditional aspect of LOR 56-84 (see page 3 of this opinion) is consistent with this characterization.

3

Witnesses in the county's proceedings testified that TL 3332-104 was created by a land sale contract in 1968, that a county ordinance in effect in 1968 required planning commission approval of land divisions creating parcels under ten acres, and that no such approval was obtained. The county does not dispute these facts.

4

We have some doubt as to whether we can consider the director's findings as part of the record, given our disposition of the appeal in LUBA No. 84-101. ORS 197.830(11). However, even if we could properly consider the director's interpretation of Section 1204.02, and even if we considered ourselves bound by the director's interpretation, petitioners' argument would still not be convincing. The quoted finding from LOR 56-84 indicates the director did not interpret the alleged lawfulness requirement in the manner urged by petitioners, i.e., to refer to conformance with pertinent land division requirements. Instead, the finding seems only to say the lot was "lawful" because it was created by warranty deed recorded in the County Deed and Mortgage Records.

5

Petitioners' interpretation of the ordinance would be warranted, as we see it, if (1) the requirement for county approval of the 1968 land division was imposed by state law or (2) recognition of TL 3332-104 as a lot of record would violate present state policy. The county could not define "lot of record" so as to excuse non-compliance with state mandates. LaGrande/Astoria v. PERB, 281 Or 137, 576 P2d 1204, aff'd on rehearing, 284 Or 173, 586 P2d 765 (1978); City of Roseburg v. Roseburg City Fire Fighters, 292 Or 266, 639 P2d 90 (1981).

We conclude that neither of the above circumstances exists. Petitioners make no claim that creation of TL 3332-104 violated any state law. Their sole allegation is based on violation of a local ordinance which state law authorized, but did not require to be adopted. Since whether to regulate land divisions of this sort was a matter of local discretion, we believe the county could subsequently excuse non-compliance with the ordinance.

Nor can we conclude that present state policy would be violated by the county's recognition of TL 3332-104 as a lot of record. As noted in our opinion, recognition of this status did not automatically authorize residential development of the lot. Compare Sections 9-13, Chapter 884, Or Laws 1981 as amended by Sections 14-15, Chapter 826, Or Laws 1983 and Section 1204.04, Yamhill County Zoning Ordinance (mandating issuance of residential building permits on certain lawfully created rural lots). Instead, it set the stage for further review under criteria identical to those in state law governing allowance of non-farm dwellings in exclusive farm use districts. We note also that the criteria employed by the county had been acknowledged by LCDC as in compliance with the statewide planning goals.

In considering state policy issues, we are also aware of the possible applicability of ORS 215.130(5) to this case. By its terms, the statute permits continuation of a use despite nonconformity with present zoning restrictions if the use was lawful when established. See Polk County v. Martin 292 Or 69, 636 P2d 952 (1981). We recognize that TL 3332-104 does not constitute a "use" governed by ORS 215.130(5). See, Columbia Hills Development Co. v. LCDC, 50 Or App 483, 490, 624 P2d 157 (1980), rev den, 291 Or 9 (1981). However, former Chief Judge Schwab has observed that "...a nonconforming use permitted to continue albeit in violation of zoning requirements and a substandard lot permitted to be developed in a manner that violates zoning requirements are quite similar and, in general, the same policies should, therefore, apply to both." Parks v. Tillamook County, 11 Or App 177, 196, 501 P2d 85 (1972), rev

den (1973).

We are reluctant to read the lawfulness requirement of ORS 215.130(5) as a direct limitation on the scope of Section 1204.02 of the county ordinance. However, we believe Parks implicitly supports our decision to read that section in concert with the purpose clause appearing in Section 1204.01 so as to uphold petitioners' challenge. As the court noted in Parks:

> "...provisions for the continuation of nonconforming uses are strictly construed against continuation of the use, and, conversely, provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible." 11 Or App at 197. (Citations omitted).

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6 See Sections 9 to 13, Chapter 884, Or Laws 1981, as amended by Sections 14 and 15, Chapter 826, Or Laws 1983.

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7 Petitioners also contend the county's lot of record determination is unsupported by substantial evidence because the record discloses the lot was not created in conformance with the applicable land division requirements. Our holding, however, is that the county's determination is at odds with the "good faith" proviso in Section 1204.01 of the zoning ordinance. There is substantial evidence in the record for this holding.

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8 The county's response to this challenge makes the point that the facilities and services of concern to petitioners are not publicly financed but are instead the private responsibilities of the affected landowners. The argument seems to be that Section 1202.02(E) is not implicated in a circumstance where private, not public resources will be taxed. Respondent's brief states:

> "Petitioners maintain that the water supply and the road are presently inadequate and that the addition of occupancy of this parcel to the area would be unduly burdensome. Petitioners fail to take into consideration the fact that Section 1202.02(E) relates not to private facilities and services but to public facilities and services. The road is not a county

road, but a public road and must therefore be maintained by the landowners instead of the county. ORS 368.031. There is no evidence that any public agency intends to improve the road. Water is provided by a private cooperative, not a public facility. (R. 23). The only public facilities to be provided to the property are police and fire services which are presently provided to the other dwellings located in the area. Thus, the proposed use does not conflict or burden public facilities." Brief of Respondent at 16-17.

We reject this argument. First, we believe it represents an overly narrow reading of the criterion in Section 1202.02(E). Second, even if the county's interpretation is accepted, the challenged finding remains inadequate. It provides no explanation of what present or future public expenditures might be anticipated by allowance of further development of lots in this already overburdened area. No other finding in the county's order addresses the issue.