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

JACQUES I. BLONDEAU,)
)
Petitioner,)
)
vs.)
)
CLACKAMAS COUNTY,)
)
Respondent.)

LUBA No. 94-222

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

David B. Smith, Tigard, filed the petition for review and argued on behalf of petitioner.

Michael E. Judd, Chief Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

SHERTON, Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 03/21/95

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county hearings officer's decision
4 denying his application to establish a nonfarm dwelling on
5 an existing parcel.

6 **FACTS**

7 The subject parcel is undeveloped and 2.54 acres in
8 size. It is designated Agricultural in the Clackamas County
9 Comprehensive Plan (plan) and is zoned General Agricultural
10 District (GAD), an exclusive farm use zone. The subject
11 parcel contains Class III soils.

12 On July 1, 1994, petitioner, the owner of the subject
13 parcel, filed an application for a nonfarm dwelling.
14 Petitioner appealed the planning department's denial of his
15 application to the county hearings officer. After a public
16 hearing, the hearings officer adopted the challenged
17 decision denying petitioner's application.

18 **INTRODUCTION**

19 Prior to changes adopted by the 1993 Legislature,
20 counties could approve a nonfarm dwelling in an exclusive
21 farm use zone only if the dwelling:

22 "(a) Is compatible with farm uses described in
23 ORS 215.203(2) and is consistent with the
24 intent and purposes set forth in ORS 215.243;

25 "(b) Does not interfere seriously with accepted
26 farming practices * * * on adjacent land
27 devoted to farm use;

28 "(c) Does not materially alter the stability of

1 the overall land use pattern of the area;

2 "(d) Is situated upon generally unsuitable land
3 for the production of farm crops and
4 livestock, considering [certain factors]; and

5 "(e) Complies with such other conditions as the
6 governing body or its designate considers
7 necessary." ORS 215.283(3) (1991).

8 The county's comprehensive plan and land use
9 regulations have been acknowledged by the Land Conservation
10 and Development Commission (LCDC) under ORS 197.251.
11 Clackamas County Zoning and Development Ordinance
12 (ZDO) 402.05A includes approval standards for nonfarm
13 dwellings in the GAD zone equivalent to the statutory
14 standards quoted above. In addition, ZDO 402.05A(5)
15 requires that a nonfarm dwelling in the GAD zone "[w]ill not
16 be in conflict with the Comprehensive Plan or detrimental to
17 surrounding property."

18 The 1993 Legislature adopted Oregon Laws 1993,
19 chapter 792 (hereafter HB 3661), which took effect
20 November 4, 1993. HB 3661 amended the above quoted
21 provisions of ORS 215.283(3) (since renumbered as
22 ORS 215.284) to provide that in the Willamette Valley, a
23 nonfarm dwelling may be established on land zoned for
24 exclusive farm use if the following standards are met:

25 "(a) The dwelling or activities associated with
26 the dwelling will not force a significant
27 change in or significantly increase the cost
28 of accepted farming or forest practices on
29 nearby land devoted to farm or forest use;

1 "(b) The dwelling will be sited on a lot or parcel
2 that is predominantly composed of Class IV
3 through Class VIII soils * * *;

4 "(c) The dwelling will be sited on a lot or parcel
5 created before January 1, 1993;

6 "(d) The dwelling will not materially alter the
7 stability of the overall land use pattern of
8 the area; and

9 "(e) The dwelling complies with such other
10 conditions as the governing body or its
11 designate considers necessary."
12 ORS 215.284(1).

13 In addition, HB 3661 added to ORS chapter 215 an
14 alternative basis on which counties may allow nonfarm
15 dwellings in their exclusive farm use zones, generally
16 referred to as the "lot of record" dwelling provision. As
17 relevant here, the lot of record dwelling provision
18 (ORS 215.705) states:

19 "(1) A governing body of a county or its designate
20 may allow the establishment of a
21 single-family dwelling on a lot or parcel
22 located within a farm * * * zone as set forth
23 in this section * * *. A dwelling under this
24 section may be allowed if:

25 "(a) The lot or parcel on which the dwelling
26 will be sited was lawfully created and
27 was acquired by the present owner:

28 "(A) Prior to January 1, 1985; or

29 "(B) By devise or by intestate succession
30 from a person who acquired the lot
31 or parcel prior to January 1, 1985.

32 "(b) The tract on which the dwelling will be
33 sited does not include a dwelling.

34 "(c) The proposed dwelling is not prohibited

1 by, and will comply with, the
2 requirements of the acknowledged
3 comprehensive plan and land use
4 regulations and other provisions of law.

5 "(d) The lot or parcel on which the dwelling
6 will be sited, if zoned for farm use, is
7 not on that high-value farmland
8 described in ORS 215.710, except as
9 provided in subsections (2) and (3) of
10 this section.^[1]

11 * * * * *

12 "(5) A county may, by application of criteria
13 adopted by ordinance, deny approval of a
14 dwelling allowed under this section in any
15 area where the county determines that
16 approval of the dwelling would:

17 "(a) Exceed the facilities and service
18 capabilities of the area;

19 "(b) Materially alter the stability of the
20 overall land use pattern in the area; or

21 "(c) Create conditions or circumstances that
22 the county determines would be contrary
23 to the purposes or intent of its
24 acknowledged comprehensive plan or land
25 use regulations.

26 * * * * *

27 Effective March 1, 1994, LCDC adopted administrative
28 rules implementing the above quoted 1993 statutory

¹As we understand it, the subject parcel is high-value farmland, as identified in ORS 215.710(3)(a), because it is composed of Class IIIe Nekia soils. However, the parties agree that the subject parcel satisfies the requirements of ORS 215.705(3) and, therefore, despite being high-value farmland, is eligible for a lot of record dwelling if the other applicable requirements of ORS 215.705 are met.

1 provisions.² The ORS 215.284 standards for nonfarm
2 dwellings are set out in OAR 660-33-130(4). The ORS 215.705
3 standards for lot of record dwellings are set out in
4 OAR 660-33-130(3). However, at the time the subject
5 application was filed, the county had not amended its plan
6 or ZDO to reflect the 1993 statutory or 1994 administrative
7 rule provisions.

8 **ASSIGNMENT OF ERROR**

9 In the challenged decision, the county concludes that
10 pursuant to ORS 197.646(3),³ the provisions of ORS 215.705
11 and OAR 660-33-130 are directly applicable to county land
12 use decisions on applications filed after March 1, 1994.⁴
13 Record 2. However, the challenged decision determines the
14 subject application fails to satisfy the requirement of
15 ORS 215.705(1)(c) and OAR 660-33-130(3)(a)(C) that the

²Subsequent amendments to OAR 660-33-130, which became effective June 3, 1994, do not affect our disposition of this appeal.

³ORS 197.646(1) requires a local government to amend its comprehensive plan and land use regulations to implement new or amended land use statutes, statewide planning goals and LCDC administrative rules, when such statutes, goals or rules become applicable to the jurisdiction. ORS 197.646(3) states:

"When a local government does not adopt comprehensive plan or land use regulation amendments as required by [ORS 197.646(1)], the new or amended goal, rule or statute shall be directly applicable to the local government's land use decisions. * * *"

⁴The county and petitioner are in agreement on this point. We also note that no party contends the proposed dwelling could satisfy the alternative standards of ORS 215.284 and OAR 660-33-130(4), presumably because those provisions require that the subject parcel be composed of predominantly Class IV through VIII soils.

1 proposed dwelling comply with the county plan and ZDO.

2 The challenged decision also concludes relevant
3 approval criteria set out in the plan and ZDO are applicable
4 to the proposed nonfarm dwelling under ORS 197.175(2)(d),
5 which requires the county to make land use decisions in
6 compliance with its acknowledged plan and regulations,
7 regardless of ORS 215.705(1)(c) and OAR 660-33-130(3)(a)(C).
8 According to the county, neither HB 3661 nor OAR
9 Chapter 660, Division 33, repeals the provisions of the
10 county plan or ZDO. The county further argues there is no
11 unresolvable conflict between the standards of the plan and
12 ZDO and those of ORS 215.705 and OAR 660-33-130(3), and that
13 the county is entitled to regulate nonfarm uses in its
14 exclusive farm use zones more stringently than is required
15 by ORS chapter 215. Brentmar v. Jackson County, 130 Or App
16 438, 440-41, ___ P2d ___, rev allowed 320 Or 453 (1994);
17 Kenagy v. Benton County, 115 Or App 131, 136 n 3, 838 P2d
18 1076, rev den 315 Or 271 (1992).

19 The decision determines the proposed dwelling fails to
20 satisfy the requirement of ZDO 402.05A(4) that it be
21 situated on land generally unsuitable for the production of
22 crops and livestock. Record 5. The decision also
23 determines the proposed dwelling fails to satisfy the
24 requirement of ZDO 402.05A(5) that it comply with the plan,
25 because the proposed dwelling conflicts "with applicable
26 [plan] Goals to preserve agricultural lands and to protect

1 agricultural lands from conflicting uses."⁵ Record 6.

2 Petitioner contends the county misconstrued
3 ORS 215.705(1)(c) as allowing application of the county's
4 previously adopted nonfarm dwelling standards to a lot of
5 record dwelling determination under the statute.⁶ According
6 to petitioner, ORS 215.705(5) permits a county to apply such
7 prohibitions against nonfarm dwellings on soils suitable for
8 farm use to lot of record dwellings, but only if the county
9 specifically adopts by ordinance provisions implementing
10 ORS 215.705(5). Petitioner contends ORS 215.705 was adopted
11 to provide counties a means of allowing nonfarm dwellings on
12 soils suitable for farm use, as opposed to the prior
13 ORS 215.283(3) and current ORS 215.284 nonfarm dwelling
14 provisions, which do not allow dwellings on soils suitable
15 for farm use. Petitioner argues ORS 215.705 should not be
16 interpreted to allow counties to deny lot of record
17 dwellings based on previously adopted county plan and code
18 provisions implementing ORS 215.283(3)(d) (1991), because

⁵Specifically, the decision finds the proposed dwelling conflicts with (1) plan Agricultural Goal 1 (to preserve agricultural land) because the subject parcel is composed of Class I-IV soils; and (2) plan Agricultural Goal 2 (to protect agricultural land from conflicting uses) because the use of the subject property would change from a farm use to a nonfarm use. Record 6-7.

⁶Petitioner casts his argument in terms of the county having "exceeded its jurisdiction," as that phrase is used in ORS 197.835(7)(a)(A). However, there is no dispute the county has jurisdiction to act on an application for a dwelling in the GAD zone. We believe the error alleged by petitioner is actually one of "improperly constru[ing] the applicable law," as set out in ORS 197.835(7)(a)(D).

1 such an interpretation would make ORS 217.705 ineffective.
2 See Vaughn v. Pacific Northwest Bell Telephone, 289 Or 73,
3 83, 611 P2d 281 (1980) (court will avoid statutory
4 construction which creates conflict between two statutes on
5 makes one statute ineffective).

6 Petitioner further argues the legislative history of
7 ORS 215.705 shows that lot of record dwellings under this
8 section were not intended to be subjected to such nonfarm
9 dwelling approval criteria without adoption of the
10 restrictions under ORS 215.705(5). Petitioner points to a
11 document used during the House of Representatives floor
12 debate on whether to concur in amendments to HB 3661 adopted
13 by the Senate (the "Bunn to Bunn" interrogatory). The
14 document includes questions and answers regarding the proper
15 interpretation of various HB 3661 provisions adopted by the
16 Senate, including the following dialogue:

17 "Q. Provisions in this bill that allow for a [lot
18 of record] dwelling require compliance with
19 acknowledged comprehensive plans and land use
20 regulations. Does this require the counties
21 to amend their comprehensive plans and
22 ordinances prior to implementing the
23 provisions of this measure? [See
24 Section 2(1)(c) * * *.]^[7]

25 "A. NO. Counties may implement the provisions of
26 this measure immediately upon its adoption,
27 subject to unrelated comprehensive plan or
28 ordinance requirements such as floodplain
29 regulations or GOAL 5 restrictions."

⁷This section of HB 3661 was what is now codified at ORS 215.705(1)(c).

1 Record 72.

2 Petitioner also argues the minutes of a July 30, 1993
3 hearing on HB 3661 before the Senate Agriculture & Natural
4 Resources Committee include the following discussion of what
5 is now ORS 215.705 by an attorney representing house Speaker
6 Larry Campbell:

7 " * * * There was a concern that if the proposed
8 [lot of record] dwelling had to comply with the
9 acknowledged comprehensive plan and if the
10 acknowledged comprehensive plan did not have these
11 [lot of record dwelling] provisions in it, which
12 it will not for quite some time, there would be
13 inconsistency. We discussed putting in some
14 language like 'except as otherwise allowed by this
15 section.' The intent would be that you would have
16 to comply with all the other provisions of the
17 plan, Goal 5 issues and that sort of thing.
18 * * *" Record 75.

19 According to petitioner, the minutes indicate
20 ORS 215.705(1)(c) is in its present form because of
21 editorial concerns and because the participants believed the
22 legislative history would be clear that it "wasn't the
23 intent by adding [ORS 205.705(1)(c) that] it would add an
24 additional requirement inconsistent with this act itself."
25 Id.

26 Under ORS 197.746(3) and several appellate court
27 decisions, it is clear the provisions of ORS 215.705 are
28 directly applicable to the challenged decision, and the
29 county cannot apply plan or code criteria that are
30 inconsistent with, or less restrictive than, applicable
31 statutory standards. Kenagy v. Benton County, supra, 115

1 Or App at 134; Newcomer v. Clackamas County, 92 Or App 174,
2 186, 758 P2d 450, modified 94 Or App 33 (1988); see Foland
3 v. Jackson County, 311 Or 167, 180 n 10, 807 P2d 801 (1991).

4 As an initial point, we note both parties agree that
5 because ORS 215.705 says counties "may" allow lot of record
6 dwellings as set out in that section, a county can choose
7 not to allow lot of record dwellings, in its exclusive farm
8 use zones, at all.⁸ However, both parties also agree, and
9 we concur, that Clackamas County has not made such a choice,
10 but rather applies ORS 215.705 in the challenged decision.
11 Therefore, what we must determine here is whether it is
12 consistent with ORS 215.705 to deny a lot of record dwelling
13 because of noncompliance with a ZDO standard previously
14 adopted to implement ORS 215.283(3)(d) (1991) or previously
15 adopted plan policies generally requiring protection of
16 agricultural land.

17 With regard to dwellings on certain lots of record,
18 ORS 215.705 provides an alternative to the nonfarm dwelling
19 provisions of ORS 215.284, which prohibit dwellings on lots
20 or parcels that are not composed of predominantly Class IV
21 to VIII soils. In contrast, ORS 215.705 is intended to
22 allow, in certain circumstances, dwellings on lots of record
23 that are composed of even the best classes of agricultural
24 soils.

⁸We do not determine in this opinion whether the parties' understanding on this point is correct.

1 ORS 215.705(1)(c) does not explicitly limit the
2 acknowledged plan and land use regulation provisions with
3 which lot of record dwellings must comply. However,
4 ORS 215.705(1)(c) must be interpreted together with
5 ORS 215.705(5), which allows a county to adopt by ordinance
6 certain standards that would allow it to deny a lot of
7 record dwelling otherwise approvable under other provisions
8 of ORS 215.705. The standards a county may adopt pursuant
9 to ORS 215.705(5) specifically include one of the former
10 statutory standards for nonfarm dwellings in an exclusive
11 farm use zone, ORS 215.283(3)(c) (1991) (does not materially
12 alter the stability of the overall land use pattern of the
13 area). ORS 215.705(5)(b). There would be no need to
14 specifically authorize the adoption of such standards under
15 ORS 215.705 if, under ORS 215.705(1)(c), a county could deny
16 a proposed lot of record dwelling because it failed to
17 comply with regulations previously adopted to implement
18 ORS 215.283(3) (1991).

19 In addition, the legislative history of HB 3661 cited
20 by petitioner indicates a legislative intent that lot of
21 record dwellings not be required to comply with plan and
22 code provisions inherently inconsistent with the act's
23 intent to allow dwellings on certain lots of record, even
24 those lots composed of good agricultural soils. Prior to
25 the enactment of ORS 215.705, counties' acknowledged plans
26 and regulations included provisions implementing the

1 requirement of ORS 215.283(3)(d) (1991) that nonfarm
2 dwellings not be allowed on land suitable for the production
3 of farm crops and livestock, and many included provisions
4 generally requiring the protection of agricultural soils.
5 If ORS 215.705(1)(c) requires lot of record dwellings to
6 comply with such criteria, then no lot of record dwellings
7 could be approved until counties amend their plans and
8 regulations to reflect the provisions of ORS 215.705.

9 However, the legislative history of HB 3661 also
10 indicates a legislative intent to allow counties to approve
11 lot of record dwellings under what is now ORS 215.705
12 without first requiring amendments to their plans and
13 regulations. This would be impossible if ORS 215.705(1)(c)
14 requires lot of record dwellings to comply with plan and
15 regulation provisions previously adopted to implement
16 ORS 215.283(3) (1991) and to protect agricultural soils. We
17 therefore agree with petitioner that ORS 215.705(1)(c) does
18 not allow a county to deny a lot of record dwelling because
19 it fails to comply with code provisions previously adopted
20 to implement ORS 215.283(3) (1991) or with comprehensive
21 plan provisions generally requiring protection of
22 agricultural land.⁹

⁹This conclusion is not inconsistent with past appellate court decisions that local governments may, in certain instances, regulate nonfarm uses in their exclusive farm use zones more stringently than is required by statute. Brentmar v. Jackson County, *supra*; Kenagy, *supra*, 115 Or App at 136 n 3; Von Lubken v. Hood River County, 104 Or App 683, 687, 803 P2d 750 (1990), adhered to 106 Or App 226, rev den 311 Or 349 (1991); Kola Tepee,

1 Petitioner's assignment of error is sustained.

2 Petitioner contends the challenged decision should be
3 reversed, because "[t]he county's decision makes clear that,
4 given reversal of the decision applying [ZDO] 402.05A[(4)
5 and (5)], the application meets all of the criteria for
6 approval of a lot of record dwelling." Petition for
7 Review 12.

8 The challenged decision does not specifically address
9 applicable requirements of ORS 215.705 and
10 OAR 660-33-130(3), other than ORS 215.705(1)(c) and
11 OAR 660-33-130(3)(a)(C), but rather states:

12 "This record includes substantial evidence
13 sufficient to establish that the proposed use
14 does, or, with appropriate conditions of approval,
15 could be made to satisfy each of the approval
16 criteria set forth in ORS 215.705 and
17 OAR 660-33-130(3), except for the requirement
18 under ORS 215.705(1)(c) and
19 OAR 660-33-130(3)(a)(C) that the dwelling comply
20 with the requirements of the County's acknowledged
21 plan and ZDO. * * * (Emphasis added.) Record
22 6-7.

23 The above emphasized provision indicates the county did not
24 determine the proposed lot of record dwelling complies with

Inc. v. Marion County, 99 Or App 481, 782 P2d 955 (1989), rev den 309 Or 441 (1990). These appellate court decisions all concern nonfarm uses allowed under ORS 215.213 or 215.283, prior to the 1993 enactment of HB 3661, and did not purport to apply to all nonfarm uses allowed in exclusive farm use zones under ORS ch 215. With regard to lot of record dwellings under ORS 215.705, a somewhat different conclusion must be reached because ORS 215.705 itself allows counties to apply additional criteria to the approval of lot of record dwellings only if such criteria are adopted pursuant to ORS 215.705(5), which is not the case here.

1 all other applicable approval standards.¹⁰ Consequently, we
2 must remand the challenged decision to the county.

3 The county's decision is remanded.

¹⁰It is also unclear whether, under ORS 215.705(1)(c) and ZDO 402.05A(5), the county considered all applicable plan provisions, or rather limited its consideration to a determination of noncompliance with the plan Agricultural Goals. As explained above, ORS 215.705(1)(c) allows counties to apply applicable provisions of their acknowledged plans to proposed lot of record dwellings, except for plan provisions inconsistent with the intent of ORS 215.705 to allow dwellings on agricultural soils in certain circumstances.