

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION)

5 AND DEVELOPMENT,)

6)
7 Petitioner,)

8)
9 vs.)

10) LUBA No. 96-191
11 YAMHILL COUNTY,)

12) FINAL OPINION
13 Respondent,) AND ORDER

14)
15 and)

16)
17 JOAN MILLAY,)

18)
19 Intervenor-Respondent.)

20
21
22 Appeal from Yamhill County.

23
24 Celeste J. Doyle, Assistant Attorney General, Salem,
25 filed the petition for review and argued on behalf of
26 petitioner. With her on the brief was Theodore R.
27 Kulongoski, Attorney General, Thomas A. Balmer, Deputy
28 Attorney General, and Virginia L. Linder, Solicitor General.

29
30 John C. Pinkstaff, Assistant County Counsel,
31 McMinnville, filed a response brief and argued on behalf of
32 respondent.

33
34 Michael C. Robinson, Portland, filed a response brief
35 and argued on behalf of intervenor-respondent. With him on
36 the brief was Stoel Rives.

37
38 HANNA, Chief Referee; LIVINGSTON, Referee, participated
39 in the decision.

40
41 AFFIRMED 07/15/97

- 42
43
44 1. **EFU Statute/Ordinances - Statutory Policy.**
45 **EFU Statute/Ordinances - Lot of Record Dwellings.**

1 The legislative intent of ORS 215.705 lot-of-record provisions should
2 be interpreted to protect the reasonable expectation in 1985 of a property
3 owners right to build a dwelling on that property.

4
5 **2. EFU Statute/Ordinances - Lot of Record Dwellings.**

6 An inter vivos transfer of the subject parcel from the present owner
7 who held the property prior to January 1, 1985 to a family member as
8 defined in ORS 215.705(6) will preserve the expectation of the right to
9 site a lot of record dwelling on the parcel as provided under ORS
10 215.705(1)(a).

11
12 **3. Agricultural Lands/ Goal 3 Rule - Generally.**

13 The protection of a property owners expectation to build a dwelling
14 on the subject property created prior to January 1, 1985 as provided under
15 ORS 215.705(1)(a) is not defeated by the general agricultural land use
16 policy of ORS 215.243.

17
18

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's approval of a lot of
4 record dwelling in an exclusive farm use zone.¹

5 **MOTION TO INTERVENE**

6 Joan Millay (intervenor) moves to intervene on the side
7 of respondent. There is no opposition to the motion, and it
8 is allowed.

9 **FACTS**

10 The subject property is a 4.9 acre lot created in 1908
11 as a part of the Eola Walnut Groves Subdivision located in
12 the county's EFU zone. Donald and Sarah Duncan acquired the
13 property in 1973, and Sarah Duncan sold the property to her
14 son, Robert Duncan, on April 18, 1996. Robert Duncan filed
15 the application for a lot of record dwelling on the property
16 on April 25, 1996.

17 The planning director denied the application,
18 concluding that the applicant was not an "owner" for
19 purposes of the lot of record provisions in Yamhill County
20 Zoning Ordinance (YCZO) 402.03(F) and ORS 215.705. The
21 applicant filed an appeal with the board of commissioners,
22 who reversed the planning director's decision. The board of
23 commissioners concluded that the applicant was an "owner"

¹Although the term "lot of record" does not appear in the statute, that term is commonly used to refer to those lots which meet the requirements of 215.705.

1 for purposes of YCZO 402.03(F) and ORS 215.705, and approved
2 the application for a lot of record dwelling on the subject
3 property.

4 This appeal followed.

5 **ASSIGNMENT OF ERROR**

6 Petitioner contends that the county misconstrued
7 applicable law when it concluded that the applicant is an
8 "owner" who qualifies for a dwelling under YCZO 402.03(F)
9 and ORS 215.705.² ORS 215.705(1)(a) allows a dwelling on a
10 lot or parcel in farm and forest zones if:

11 "The lot or parcel on which the dwelling will be
12 sited was lawfully created and was acquired by the
13 present owner:

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

15 "(B) By devise or intestate succession from a
16 person who acquired the lot or parcel prior
17 to January 1, 1985.

18 ORS 215.705(6) provides, in relevant part:

19 "For purposes of subsection (1)(a) of this
20 section, 'owner' includes the wife, husband, son,
21 daughter, mother, father, brother, brother-in-law,
22 sister, sister-in-law, son-in-law, daughter-in-
23 law, mother-in-law, father-in-law, aunt, uncle,
24 niece, nephew, stepparent, stepchild, grandparent
25 or grandchild of the owner * * *."

²Although the county has incorporated the pertinent statutory language from ORS 215.705 into its code verbatim, the county is bound by the statute. Accordingly, the county is not entitled to the interpretive discretion it would otherwise have under ORS 197.829 and Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992). DeBates v. Yamhill County, ___ Or LUBA ___ (LUBA No. 96-100, January 3, 1997), slip op 3 n1; Holshiemer v. Columbia County, 28 Or LUBA 279, 282 (1994).

1 The county concluded that the subject parcel was
2 created prior to 1985, and that the applicant was within the
3 pool of persons who qualify as an "owner" under ORS
4 215.705(6) and was therefore entitled to site a lot of
5 record dwelling on the parcel. Petitioner argues that the
6 county's interpretation of ORS 215.705 is too broad:

7 "The County's interpretation of the statute
8 affords a limitless group of people the
9 opportunity to build dwellings in resource zones,
10 compromising the legislative policies to protect
11 resource lands and to prevent uncoordinated
12 development. In DLCD's view, ORS 215.705(1)(a)
13 should be interpreted as allowing an individual
14 the right to build a dwelling on a lot or parcel
15 if that person owned that lot or parcel before
16 January 1, 1985. ORS 215.705(6) should be read as
17 a limitation on who may build a dwelling on a lot
18 of record after inheriting the property by devise
19 or intestate succession as provided in ORS
20 215.705(1)(a)(B). In other words, DLCD believes
21 that the statutory provisions should be read to
22 mean that an individual can qualify as an "owner"
23 of a lot of record in only one of two ways: (1)
24 The individual personally owned the lot of record
25 since before January 1, 1985 (ORS
26 215.705(1)(a)(A)); or (2) The individual is
27 related in one of the ways listed in ORS
28 215.705(6) to someone who so owned the lot of
29 record, and inherited the lot of record by devise
30 or intestate succession from that person."
31 Petition for Review 7-8.

32 Essentially, petitioner contends that ORS 215.705(6)
33 should not be read as an expansion of ORS 215.705(1)(a), but
34 as a limitation that sets forth the specific types of family
35 relations who are entitled to site a dwelling after
36 inheriting the lot of record from a relative who owned the
37 property prior to January 1, 1985. Thus, in petitioner's

1 view, the statute should not be read to allow a lot of
2 record dwelling to be sited by a family member who came into
3 ownership of the property as the result of an inter vivos
4 transfer, as is the case in this appeal.

5 Petitioner further argues that ORS 215.705 is ambiguous
6 because the definition of "owner" in ORS 215.705(6) is
7 circular in that it defines a present owner for purposes of
8 ORS 215.705(1)(a) by using the term "owner," creating an
9 endless list of owners "because all the family members are
10 owners, and anyone that in turn is related to that group in
11 one of the ways listed is also an owner." Petition for
12 Review 8-9. Petitioner contends that this ambiguity on the
13 face of the statute warrants LUBA's consideration of
14 legislative history.

15 In determining the meaning of a statute, our task is to
16 discern the intent of the legislature, looking first to the
17 text and context of the statute. PGE v. Bureau of Labor and
18 Industries, 317 Or 606, 610, 859 P2d 1143 (1993). ORS
19 215.705(1)(a) allows a lot of record dwelling to be sited on
20 a legally created lot that was "acquired by the present
21 owner" either: (A) prior to January 1, 1985, or (B) by
22 inheritance from a person who acquired the lot prior to
23 January 1, 1985. However, ORS 215.705(6) goes on to define
24 "owner" for purposes of ORS 215.705(1)(a) to include a
25 lengthy list of relatives of the actual owner. Giving the
26 word "present" its customary meaning, a "present owner" for

1 purposes of ORS 215.705(1)(a) must be one who currently
2 holds title to the property. However, whenever such
3 property is transferred by the owner to another person,
4 including a family member listed under ORS 215.705(6), there
5 is a new "present owner." Assuming that this transfer
6 occurs after January 1, 1985, as in the present case, then,
7 since the property was not acquired by the "present owner"
8 prior to the date required by ORS 215.705(1)(a)(A), the
9 present owner does not meet the requirements to site a lot
10 of record dwelling under the statute, and ORS 215.705(6) is
11 rendered meaningless.

12 In determining the meaning of a statute, LUBA cannot
13 insert what has been omitted, or omit what has been
14 inserted. ORS 174.010; PGE, 317 Or at 611. Thus, we cannot
15 ignore the legislature's use of the word "present" to
16 qualify the word "owner" in ORS 215.705(1)(a), nor can we
17 insert the word "present" into ORS 215.705(6) where the
18 legislature chose to leave it out. However, we must assume
19 that the legislature did not intend ORS 215.705(6) to be
20 meaningless. We conclude that ORS 215.705(1)(a) cannot be
21 read together with ORS 215.705(6) without creating an
22 ambiguity, and the intent of the legislature is unclear from
23 the text and context of the statute.

24 The county and intervenor argue that ORS 215.705 is
25 clear and unambiguous, citing Craven v. Jackson County, 135
26 Or App 250, 898 P2d 809 (1995), and DeBates v. Yamhill Co.,

1 ____ Or LUBA ____ (LUBA No. 96-100, January 3, 1997).
2 However, our opinion in DeBates involved the application of
3 ORS 215.705(1) and (3) only, and did not apply ORS
4 215.705(6). In Craven, the court held that the definition
5 of "owner" in ORS 215.705(6) unambiguously applies only to
6 ORS 215.705(1)(a), and not to other statutory provision.
7 The facts in Craven did not require a direct application of
8 ORS 197.205(6) to ORS 197.205(1). Debates and Craven do not
9 dictate the result in this case. Having determined that the
10 intent of the legislature is not clear from the text and
11 context inquiry, our analysis moves to consideration of
12 legislative history to inform our inquiry into legislative
13 intent. PGE, 317 Or at 611-612.

14 **1** ORS 215.705 is a portion of the codified version of
15 Oregon Laws 1993, chapter 792 (hereafter HB 3661). The lot
16 of record dwelling enacted by HB 3661 were included to meet
17 some property owners' expectations at the time they
18 purchased property that they would be able to build a
19 dwelling on that property. Minutes, Senate Committee on
20 Agriculture and Natural Resources, Work Session on HB 3661,
21 July 20, 1993, 8-9. Regarding the question of who would be
22 considered an "owner," Senator Bunn explained:

23 "I think the general sense was that the ownership
24 should be continuous ownership within a family.
25 And I don't know how we define family. But I
26 think there was a feeling it should not be one
27 particular individual or you shouldn't have to
28 inherit -- the original version, I believe, you
29 had to inherit, you couldn't even buy from your

1 parents and that seemed rather rigid in that
2 expanding it to the family a little broader would
3 be appropriate." Id. at 8.

4 The committee discussion reflects that the intent of
5 ORS 215.705(6) was to allow inter vivos transfers between
6 family members without the loss of the right to build a
7 dwelling. Senator Bunn's comments in the committee's work
8 session also illustrate the balance sought by the
9 legislature:

10 "[W]e have to find limits and the goal of the lot
11 of record is not to provide more land for
12 development. It is to take people that bought a
13 parcel with the legitimate belief that they could
14 build on that. We have changed the rules since
15 and we're going back and saying, out of fairness,
16 we'll give you that opportunity. We've got to
17 draw the line somewhere. And either the
18 individual that owned it is one way, and the
19 simplest way. Or saying, if it's within a family,
20 that's acceptable too." Id.

21 Following passage by the Senate, when HB 3661 was
22 considered and passed by the House of Representatives, the
23 following exchange occurred during the August 3, 1993 floor
24 discussion:

25 Representative Dell inquiring of the carrier of
26 the bill: "What is the intent of section 2(6)
27 concerning the meaning of 'owner?'"

28 Representative Baum, responding: "This section
29 applies only to the requirement that, in order to
30 qualify as a lot of record under House Bill 3661,
31 the lot or parcel must have been created and
32 acquired by the present owner. The intent is to
33 allow property owners who did acquire their
34 property prior to 1985 to subsequently transfer
35 the lot to a family member or business entity that
36 they or other family members may own without

1 losing the allowance for a dwelling. In other
2 words, under subsection (6), a child who was given
3 property in 1989 that has been owned since 1984 by
4 a parent would be viewed as the same owner who had
5 held the property since 1984 and would therefore
6 get a lot of record dwelling."

7 **2, 3** We find that these comments exemplify the legislative
8 discussions regarding ORS 215.705(1)(a) and (6), and
9 indicate the legislative intent behind those two provisions
10 was to allow the inter vivos transfer of property between
11 certain specified family members without disqualifying the
12 new owner from siting a lot of record dwelling under the
13 statute. The general policy of ORS 215.243 does not
14 overcome the language of ORS 215.705 (1)(a) and (6) as
15 intended by the legislature.

16 As applied to the subject property, the applicant is
17 the son of a former owner of the subject property who held
18 the property before January 1, 1985. As such, under ORS
19 215.705(6) the son qualifies as an owner of the subject
20 property prior to January 1, 1985 as a result of the
21 transfer, and is entitled to site a dwelling under ORS
22 215.705(1)(a).

23 The county's decision is affirmed.