BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHRIS N. SKREPETOS and LANE J. BOUMAN, Petitioners, vs. JACKSON COUNTY, Respondent, and HELEN RANKIN and RANDY WARREN, Intervenors-Respondent.	LUBA No. 96-252 FINAL OPINION AND ORDER

Appeal from Jackson County.

Chris N. Skrepetos and Lane J. Bouman, Ashland, filed the petition for review on their own behalf. Chris N. Skrepetos argued on his own behalf.

No appearance by respondent.

Christian E. Hearn, Ashland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Davis, Gilstrap, Harris, Hearn & Welty.

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

REVERSED 09/12/97

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

Petitioners appeal a decision of the county hearings officer approving a lot-of-record dwelling under the county zoning ordinance provision corresponding to ORS 215.705.

MOTION TO INTERVENE

Helen Rankin (intervenor) and Randy Warren, the applicant below and her agent, move to intervene on the side of the respondent. There is no opposition to the motion, and it is allowed.[1]

MOTION FOR LEAVE TO FILE REPLY BRIEF

Petitioners request leave to file a reply brief. Petitioners explain in a memorandum why a reply brief is justified under OAR 661-10-039. There is no objection to the reply brief, and it is allowed.

FACTS

On April 17, 1996, intervenor applied for a lot-of-record dwelling on a 6.67-acre parcel in the county's Exclusive Farm Use (EFU) zone. The subject property was included in a 10-acre parcel, former tax lot 100, created in 1972 by deed to intervenor and intervenor's brother and sister as tenants in common. After intervenor's brother obtained septic approval, drilled a well and constructed a house on the property, he had a survey prepared and filed on

[1]Helen Rankin filed an intervenor-respondent's brief.

April 21, 1974 with the county surveyor for the stated purpose of defining his "undivided interest in the parent tract for mortgage purposes." Record 466. The survey shows the parent 10-acre tract divided into a 6.67-acre portion (the subject property) and a 3.33-acre portion.

On September 1, 1973, prior to the filing of the survey, the county zoning ordinance went into effect. At that time, the parent parcel was zoned Farm Residential (F-5). The zoning ordinance required a minimum five-acre lot size and a 300-foot minimum width in the F-5 zone. It is undisputed that a partition of the parent parcel in the manner shown on the 1974 survey would have violated these requirements of the zoning ordinance.

In October, 1974, intervenor and her siblings retained an attorney to prepare an agreement and two deeds. The agreement provided that the 3.33-acre parcel would be conveyed to intervenor's brother and the balance of the property would be held in common by intervenor and her sister. One deed conveyed the 3.33-acre parcel shown on the 1974 survey from intervenor and her sister to intervenor's brother and his wife. The other deed conveyed the subject property from intervenor's brother and his wife to intervenor and her sister. Neither the agreement nor the deeds were signed until 1987. The deeds were not recorded until March 21, 1989.

In September, 1988, intervenor's attorney approached

the county to request a determination of whether "the division which was intended by the parties in 1974 can be recognized." Record 439. The attorney followed no formal process: no application was filed and no fee was paid. On February 9, 1989, the county planning director sent the attorney a letter in which he stated:

> "This is a kind of problem wherein the circle can be drawn further and further around the solution, but never quite close. At some point it seems prudent and equitable for the Department to say 'enough', and render a decision. Therefore, this letter will serve to notify interested parties that the 3.3-acre parcel described above will be recognized as a preexisting nonconforming parcel. I am [persuaded] by the following points:
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> "1) Our record of the septic approval shows the application in February and final approval of the installed system on September 2, 1973.
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> "2) The lot configuration is evident on the plat plan approved by the sanitarian at that time.
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> "3) The survey filed in May of 1974 is consistent with the plat plan.
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> "4) The home was built and occupied in September 1973, prior to building permit requirements in 1974.
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> "5) All of the other information filed substantiated the intent to divide, and the reasons for the delays in that action.
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> "The five-acre minimum acreage requirements went into effect with countywide zoning on September 1, 1973. However, we were very generous in our administration of those regulations during the first year. That was particularly true of developments that were in process on the effective date of the ordinance. I believe the survey would have been accepted in 1974, under the

> circumstances outlined, and I see no reason not to extend the same recognition today." Record 392-93.

No notice of the planning director's determination (the 1989 determination) was provided to parties who, under ORS 215.416, were entitled to notice of a decision made without a hearing.[2] Following the 1989 determination, intervenor's attorney wrote the planning director that the deeds prepared in 1974 and signed in 1987 had been recorded on March 21, 1989. After March 22, 1989, the partition of former tax lot 100 was recognized by the county.

Since 1989, four applications have been filed that concern the subject property: a lot line adjustment application and three lot-of-record dwelling applications, including the application resulting in the challenged decision. The first two applications were denied and the third was withdrawn. Before denying the lot line adjustment application, the county hearings officer found that the subject parcels, i.e., tax lots 100 and 102, were lawfully created, while declining to express an opinion with respect to the merits of the 1989 determination. The hearings officer explained that he could "find no procedure under which he [was] empowered to disturb an administrative

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[2]Petitioners contend that as the adjacent property owners, they were entitled to notice of the 1989 determination under JCLDO 285.040, which governed notice of hearings at the relevant time and required such notice "to all owners of property within 1,000 feet of the property for which the application has been filed."

determination of the sort involved * * * and he [declined] to do so in the absence of some expressed authority in the ordinance." Record 661. When denying the first lot-of-record application, the hearings officer again declined to express an opinion with respect to the merits of the 1989 determination. Record 671.

The hearings officer denied the first lot-of-record application on the basis that the subject property contained more than 50 percent prime soils. On April 17, 1996, intervenor filed a new application for a lot-of-record dwelling, including a new soils report. On August 2, 1996, the county planning director approved this lot-of-record dwelling application. After a hearing requested by petitioners, the hearings officer approved the application.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners contend approval of a lot-of-record dwelling on the subject property violates JCLDO 218.090(2).[3]

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[3]JCLDO 218.090 is identical in material particulars to ORS 215.705. ORS 215.705(1) provides that a lot-of-record dwelling may be allowed if various criteria are satisfied, including:

> "(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.
>
> "* * * * *"

Petitioners maintain that the subject property is not a lot or parcel lawfully acquired and created prior to January 1, 1985 because, according to petitioners, the subject property did not exist as a lot or parcel at least until it was created by the deeds recorded on March 21, 1989 and recognized as a separate lot or parcel by the county on March 22, 1989. Petitioners also contend the county erred in 1989 in recognizing the subject property as a separate lot or parcel.

Intervenor responds that the 1989 determination found the subject property to be a lot or parcel that was legal when created in 1974 because it pre-existed the county's enforcement of the county's 1973 zoning ordinance. According to intervenor, that determination is final and cannot be collaterally attacked in this proceeding.[4]

Assuming without deciding that the 1989 determination was a land use decision which was not timely appealed and is

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ORS 215.705(6) defines "owner" for purposes of ORS 215.705(1) as including:

> "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."

[4]The parties also argue at length over how the definition of "owner" in ORS 215.705(6), including the "business entity" standard, bears on the challenged decision. Because there does not appear to be any dispute that if the subject property is a parcel lawfully created prior to January 1, 1985, intervenor is an "owner," we do not discuss these arguments further.

therefore now final, we agree with petitioners that, at the earliest, the county recognized the subject property as a separate parcel when the 1989 determination was made.[5] The challenged decision finds, in essence, that the planning director concluded in 1989, based on events from 1974, that the 3.33-acre parcel was lawfully created in 1974. We do not agree with that assessment of the planning director's conclusion. The planning director's March 21, 1989 letter did not find, based on the application of the 1973 zoning ordinance, that the partition of former tax lot 100 and the creation of present tax lot 100 and tax lot 102 were lawful; it instead found that the county was "very generous in [its] administration of [the zoning ordinance] during the first year." In other words, it found that since the county did not require strict compliance with its own land use regulations in 1974, it would extend the same "generosity" to intervenor and her siblings in 1989 with respect to events that occurred in 1974.

We need not decide if the 1989 determination was a final land use decision that now precludes an examination of the circumstances leading to county recognition of the subject property as a separate parcel. At most, as petitioners argue, the 1989 determination had the prospective effect of legalizing by fiat a de facto

[5]We need not decide petitioners' additional contention that the subject property did not exist as a separate lot until the deeds were filed.

partition of the parent parcel, a partition which the county itself did not recognize on the tax assessor's maps until 1989. Even that seems doubtful, because the planning director did little more than acquiesce informally to the desire of intervenor and her siblings to have the parent property recognized as two parcels. See Higgins v. Marion County, 30 Or LUBA 426, aff'd 141 Or App 598, on reconsideration 142 Or App 418 (1996) (informal county acceptance of two tax lots as separate parcels for land use purposes is not a land use decision).

In DLCD v. Douglas County, 28 Or LUBA 242, 249 (1994), we stated:

> "The subject of the 'acquisition' requirement [in ORS 215.705(1)] is a 'lawfully created' 'lot or parcel.' The present owner [as defined in ORS 215.705(6)] must have acquired a 'lawfully created' 'lot or parcel' prior to 1985, or acquired the 'lawfully created' 'lot or parcel' by 'devise or intestate succession' from someone who acquired it prior to 1985. The statute simply does not apply to lots or parcels that were 'illegally created' prior to 1985. Such lots or parcels may be legalized after 1985, and ORS 92.177 facilitates such after-the-fact legalization. However, such after-the-fact legalization of lots or parcels does not mean they were 'lawfully created' before 1985. Such after-the-fact legalized lots or parcels do not qualify for lot-of-record dwellings under ORS 215.705(1)(a)."

The 1974 creation of a 3.33-acre parcel was not permitted by the 1973 zoning ordinance, which established a five-acre minimum parcel size in the F-5 zone. If the subject property became a legal parcel in 1989, it is now an

after-the-fact legalized parcel. The subject property is not a parcel "lawfully created" before January 1, 1985 and, therefore, the county's approval of the lot-of-record dwelling violates ORS 215.705 and JCLDO 218.090.

The first assignment of error is sustained.

Under OAR 661-10-071(1)(c) we must reverse when the challenged decision violates a provision of applicable law and is prohibited as a matter of law. The challenged decision permits a lot-of-record dwelling that is prohibited by ORS 215.705 and JCLDO 218.090 as a matter of law. Because we must reverse on this basis, no purpose would be served by reaching petitioners' other assignments of error.

The county's decision is reversed.