BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TOM BRUGGERE and KELLEY BRUGGERE,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

TRAVIS J. VEENKER,
Intervenor-Respondent.

LUBA No. 99-091

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Michael R. Campbell, Portland, Robert D. VanBrocklin, Portland and Michael C. Robinson, Portland, filed the petition for review. With them on the brief was Stoel Rives LLP. Michael C. Robinson argued on behalf of petitioners.

No appearance by respondent.

Allison P. Hensey, Portland and Jeff H. Bachrach, Portland, filed the response brief. With them on the brief was Ramis Crew Corrigan & Bachrach LLP. Jeff H. Bachrach argued on behalf of intervenor-respondent.

Roger A. Alfred, Assistant Attorney General, Salem, filed a State Agency Brief on behalf of Department of Land Conservation and Development. With him on the brief were Hardy Myers, Attorney General and Michael D. Reynolds, Solicitor General.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REVERSED 01/27/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a decision by a county hearings officer to approve an application for a lot-of-record dwelling located in an Exclusive Farm Use (EFU) zone.

MOTION TO INTERVENE

Travis J. Veenker, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Tax lot 400 is a 4.95-acre parcel located in the county's EFU zone. It is a narrow parcel, with a relatively flat plateau on the northern portion of the site. The property is transversed by an escarpment in the center of the parcel. The southern portion of the parcel is approximately 100 feet lower in elevation than the northern portion, and at places the slope between the northern and the southern portions is 70 percent. The parcel is accessed by an easement over adjacent parcels to the south and west. The dwelling is proposed to be sited on the northern portion of the parcel, with a driveway across the southern portion of the parcel to access the southern access easement. Petitioners own a 62-acre parcel located to the east of the subject property.

During the 1970s and early 1980s, Charlotte and Gerald Veenker, Travis J. Veenker's parents, owned several parcels in the area of the subject property. The Veenkers acquired tax lot 400 from the county through a land sale contract executed in 1981. In March 1994, Gerald Veenker conveyed his interest in tax lot 400 to his wife. In April 1998, Travis J. Veenker (intervenor) acquired the subject property from his mother.

An adjacent parcel, tax lot 1300, is currently owned by Charlotte Veenker. It was conveyed from Gerald Veenker and Charlotte Veenker to Charlotte Veenker in 1991. Charlotte Veenker conveyed it back to Gerald Veenker and Charlotte Veenker in a deed recorded on November 1, 1993. Thus, in November 1993, both tax lot 400 and tax lot 1300

were owned by Gerald and Charlotte Veenker. Tax lot 1300 has had a dwelling on it since 1978.

In December 1998, intervenor applied for a lot-of-record dwelling on tax lot 400. The planning director denied the application because on November 4, 1993, the subject parcel was part of a tract that contained a dwelling on it. Clackamas County Zoning and Development Ordinance (ZDO) 401.05(B)(3) requires that the tract on which the dwelling will be sited not include an existing dwelling. The planning director noted that the subject parcel did not contain a dwelling and that, as of the date the application was filed, it was not part of a tract for purposes of the ordinance. However, the planning director denied the application because OAR 660-033-0130(3)(a)(C) provides that the relevant date for determining the ownership of a "tract" for purposes of approving a lot-of-record dwelling is November 4, 1993. The planning director denied the application, because on that date, tax lot 400 was under the same ownership as an adjacent tax lot that contained a dwelling on it.

Intervenor appealed the planning director's decision to the county hearings officer. The county hearings officer decided that, in promulgating OAR 660-033-0130(3)(a)(C), the Land Conservation and Development Commission (LCDC) exceeded its regulatory authority because the administrative rule was inconsistent with ORS 215.705(1)(b), the statute that authorizes lot-of-record dwellings. The hearings officer determined that the administrative rule impermissibly limited lot-of-record dwellings, in contravention of the statutory scheme that permitted them. Therefore, the hearings officer concluded that the rule was invalid and that intervenor had met all relevant criteria in the local ordinance.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county erred in concluding that OAR 660-033-0130(3)(a)(C) is invalid. Petitioners argue that LCDC has the authority to adopt rules to clarify the ambiguity in the statute regarding the relevant date for determining ownership

within a tract for the purposes of satisfying ORS 215.705(1)(b).[1] Petitioners contend that on November 4, 1993, the subject property was part of a tract that contained a dwelling and that, as a matter of law, the application must be denied.

OAR 660-033-0130(3)(a) provides:

"A [lot-of-record] dwelling may be approved if:

"(A) The lot or parcel on which the dwelling will be sited was lawfully created and was acquired and owned continuously by the present owner * * *:

"(i) Since prior to January 1, 1985; * * *

"* * * * *

"(B) The tract on which the dwelling will be sited does not include a dwelling;

"(C) *The * * * parcel on which the dwelling will be sited was part of a tract on November 4, 1993, no dwelling exists on another * * * parcel that was part of that tract;*

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[1]ORS 215.705(1) provides:

"A governing body of a county or its designate may allow the establishment of a single-family dwelling on a * * * parcel located within a farm * * * zone * * *. A dwelling under this section may be allowed if:

"(a) The * * * parcel on which the dwelling will be sited was lawfully created and was acquired by the present owner:

"(A) Prior to January 1, 1985; * * *

"* * * * *

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

"(c) The proposed dwelling is not prohibited by, and will comply with, the requirements of the acknowledged comprehensive plan and land use regulations and other provisions of law.

"* * * * *"

ORS 215.010(2) and OAR 660-033-0020(10) both define "tract" as "one or more contiguous * * * parcels under the same ownership."

> "(D) The proposed dwelling is not prohibited by, and will comply with, the requirements of the acknowledged comprehensive plan and land use regulations and other provisions of law;
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> "* * * * *" (Emphasis added.)

Intervenor responds that the hearings officer correctly determined that the administrative rule conflicts with the statutory requirements for lot-of-record dwellings, because the rule takes away a right expressly granted by the legislature. By adopting the rule, intervenor argues, LCDC exceeded its statutory authority to promulgate rules consistent with its authorizing statutes. Intervenor argues that if the rule is valid, persons otherwise entitled to a lot-of-record dwelling under the statutes would be denied that entitlement. Intervenor relies on *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997), for the proposition that ORS 215.705(1)(b) is unambiguous, and therefore, there is no need for LCDC to adopt rules to "clarify" the statutory provisions.

At issue in *DeBates* was whether OAR 660-033-0020(4) modified the date of creation, for purposes of a lot-of-record dwelling approved under ORS 215.705.[2] In *DeBates,* the applicant owned three adjacent lots. Before the applicant applied for a lot-of-record dwelling on one of the lots, he sold the other two lots to separate third parties. The county approved a dwelling on the applicant's lot, without considering whether OAR 660-033-0020(4) was relevant to the date of creation. Relying on the Court of Appeals' holding in *Lane County v. LCDC,* 138 Or App 635, 910 P2d 414, *modified* 140 Or App 368, 914 P2d 1114 (1996) (*Lane County I*), LUBA concluded that the statutory lot-of-record framework was comprehensive and unambiguous and that the rule cannot be reinterpreted to prohibit what the statute allows. Further, we stated that the statute "cannot be interpreted or

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[2] OAR 660-033-0020(4) provides:

> "'Date of Creation and Existence'. When a lot, parcel or tract is reconfigured pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling, the date of reconfiguration is the date of creation or existence. Reconfigured means any change in the boundary of the lot, parcel or tract."

supplemented by agency rule to provide that the reconfiguration of the tract through the sale of one or more lots extinguishes the right to build a dwelling on at least one of the lots-of-record within the original tract." *DeBates*, 32 Or LUBA at 284. In doing so, we acknowledged that the statute provided an opportunity for applicants to avoid the statutory consolidation requirement by breaking up a tract before, rather than after, applying for a lot-of-record dwelling on one of the lots included in the tract. However, we stated that if that result was an unintended consequence of the legislation, it was up to the legislature to correct the error. *Id.* at 284 n 9.

LCDC may not adopt rules that are inconsistent with statutes; however, LCDC has broad policy powers to implement the statewide planning goals, including Goal 3 (Agricultural Lands). *LCDC v. Lane County*, 325 Or 569, 942 P2d 278 (1997) (*Lane County II*). Contrary to our holding in *DeBates*, and the Court of Appeals' holding in *Lane County I* on which we relied, LCDC's powers include the authority to adopt supplemental criteria for allowed uses in EFU zones, even if those supplemental criteria have the effect of prohibiting some uses that otherwise are allowed under the statute. *Lane County II*, 325 Or at 582-83.

In *Lane County I*, the county challenged LCDC's authority to promulgate rules that either limited or prohibited uses on high-value farmland. The county argued that ORS 215.203(1) authorized the siting of certain uses as of right on farmland, and that LCDC could not adopt rules that limited or prohibited those uses. The Court of Appeals determined that the fundamental principle of administrative law–that agencies are not empowered to adopt rules inconsistent with their statutory authority–limited LCDC's ability to regulate uses on high-value farmland. The court invalidated the rules because, according to the court, the rules clearly contradicted the statutory scheme.

The court distinguished the situation in *Lane County I* from its analysis in *Newcomer v. Clackamas County*, 92 Or App 174, 758 P2d 369, *modified* 94 Or App 33, 764 P2d 927 (1988). In *Newcomer*, the court determined that LCDC's rules construed an ambiguous

statutory term, and that in adopting the clarifying rules, LCDC properly exercised its authority to supplement incomplete legislation or fill legislative gaps.

However, the Supreme Court in *Lane County II* rejected the Court of Appeals' reasoning in *Lane County I.* In *Lane County II*, the Supreme Court determined that LCDC, as the agency designated by the legislature with the special duty to protect farmland, had the authority to promulgate rules to protect high-value farmland, even if the result was to prohibit uses on some farmland that the legislature would otherwise allow on the broader range of land designated EFU. The court then held that LCDC's rules were valid.

In reaching its conclusion, the Supreme Court distinguished the authority of the counties under the statute to limit uses listed in ORS 215.203(1) from the authority of LCDC to adopt rules to further the aims of Goal 3. The court found that, in adopting the statutory provisions for allowed uses on EFU land, the legislature intended to limit the authority of the *counties*, and not LCDC, to regulate uses on agricultural lands.

Lane County II makes it clear that LCDC has the authority to adopt regulations that limit nonfarm uses on agricultural lands in order to further the policies to protect agricultural land under Goal 3. Exercise of that authority is not inconsistent with ORS 215.705(1). ORS 215.705(1) is permissive; it allows even the counties to adopt rules regarding lot-of-record dwellings that are more restrictive than those provided by statute. *Blondeau v. Clackamas County*, 29 Or LUBA 115, 122-23 (1995). It is unlikely that the legislature would grant to the counties the authority to limit development of lot-of-record dwellings on EFU-designated land, and not accord LCDC the same authority.

Our conclusion is supported by ORS 215.705(1)(c), which provides:

> "The proposed dwelling is not prohibited by, and will comply with, the requirements of the acknowledged comprehensive plan and land use regulations *and other provisions of law*." (Emphasis added.)

From the text and context of the statute, it is evident that the legislature contemplated the adoption of rules to limit the establishment of lot-of-record dwellings in some circumstances.

LCDC has the authority to adopt rules that have the effect of limiting the siting of lot-of-record dwellings. Therefore, the hearings officer erred in declaring OAR 660-033-0130(3)(a)(C) invalid.

Our resolution of the first assignment of error means the hearings officer's decision is erroneous as a matter of law. It is undisputed that if OAR 660-033-0130(3)(a)(C) is valid, intervenor's application for a lot-of-record dwelling has not satisfied all applicable criteria. Accordingly the county's decision must be reversed rather than remanded. OAR 661-010-0071(1)(c); *DLCD v. Wallowa County*, 28 Or LUBA 452, 457 (1994).

The first assignment of error is sustained.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

In the second, third and fourth assignments of error, petitioners argue that, during the administrative review by the planning director, they raised issues regarding compliance with various siting provisions of the ZDO. According to petitioners, the topography of the parcel makes it unlikely that the applicant would be able to demonstrate that the construction of the driveway accessing the proposed dwelling would satisfy the relevant siting standards (ZDO 1001.03; 1002.03; 1002.06). They also argue that the proposed development requires an engineering geologic study, design review for development on slopes and compliance with regulations regarding wildlife habitat, distinctive resource areas and wetlands (ZDO 1008.02; state regulations regarding wetlands). Petitioners allege that when they attempted to raise the issue of compliance with these provisions during the hearing before the hearings officer, the hearings officer declined to address those issues, because it was the applicant, and not petitioners, who appealed the planning director's administrative decision. Petitioners argue that the hearing, which was a hearing authorized pursuant to ORS 215.416(11), should have been a *de novo* hearing. At such a *de novo* hearing, persons who appeared at the hearing should have been allowed to present testimony directed at the application of relevant criteria, whether they were the appealing party or not.

Because we reverse the county's decision based on the first assignment of error, we do not address petitioners' remaining assignments of error.[3]

The county's decision is reversed.

[3]*But see Johnson v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 98-216, October 20, 1999) slip op 5 ("[w]e believe the *de novo* hearing under ORS 215.416(11)(a) requires that the applicant and other parties * * * be given the same chance to present evidence as they would if the county had provided a hearing before the initial decision under ORS 215.416(3)."); *Lawrence v. Clackamas County*, ___ Or App ___, ___ P2d ___ (December 22, 1999) slip op 8 (remand is appropriate where hearings officer applied incorrect legal standard during a *de novo* hearing).