BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOSEPH L. SMITH,
Petitioner,

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 99-140

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Joseph L. Smith, Central Point, filed a petition for review and appeared on his own behalf.

No appearance by respondent.

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

AFFIRMED 03/14/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals the county's denial of a dwelling on forest land.

FACTS

The subject property is a 40-acre parcel zoned Woodland Resource (WR). On February 22, 1999, petitioner applied to the county for a "forest capability dwelling" under the provisions of the Jackson County Land Development Ordinance (LDO) 210.090(1)(B)(i).[1] LDO 210.090 implements ORS 215.750(1)(a) in allowing a dwelling to be sited on forest land if (1) soils on the lot or parcel are capable of producing 0 to 49 cubic feet per acre per year of wood fiber; (2) all or part of at least three other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the subject property; and (3) at least three other dwellings existed on January 1, 1993, on those lots or parcels.[2]

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[1]LDO 210.090(1) provides in relevant part:

> "Forest capability dwellings as permitted under [LDO] 210.040(3) may be approved subject to the following:
>
> "A) The tract upon which the dwelling will be sited does not include a dwelling.
>
> "B) The lot or parcel on which the dwelling will be sited is predominantly composed of soils that are:
>
> "i) Capable of producing 0 to 49 cubic feet per acre per year of wood fiber and all or part of at least three other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract; and at least three dwellings existed on January 1, 1993, on the other lots or parcels; * * *"

[2]ORS 215.750(1) provides in relevant part:

> "In western Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:
>
> "(a) Capable of producing 0 to 49 cubic feet per acre per year of wood fiber if:
>
> "(A) All or part of at least three other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract; and

In support of his application, petitioner submitted evidence that all or part of six other parcels existed within the 160-acre template, including tax lots 300 and 400. Only one parcel, tax lot 300, contains a dwelling that existed on January 1, 1993. However, petitioner submitted evidence that tax lot 400 is part of a tract with three other parcels: tax lots 401, 500 and 600.[3] Tax lots 401, 500 and 600 lie wholly outside the 160-acre template and tax lots 401 and 500 each contain a dwelling that existed prior to January 1, 1993. Petitioner argued to the county that the four-parcel tract should be considered a single consolidated "parcel" for purposes of LDO 210.090(1), and thus the dwellings on tax lots 401 and 500 should be counted to satisfy the requirement that at least three qualified dwellings exist on lots or parcels all or part of which are within the template.

A county hearings officer conducted a hearing on petitioner's application on July 26, 1999, and, on August 4, 1999, denied that application because petitioner had not demonstrated that three qualified dwellings exist on lots or parcels all or part of which are within the template. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer erred in finding that petitioner failed to demonstrate compliance with LDO 210.090(1) and ORS 215.750(1).[4] Petitioner contends that, as a matter of law, a parcel lying outside the template required by the code and statute must be considered as one of the parcels within the template if it is part of a tract that lies

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> "(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels; * * *"

[3]The tract comprised of tax lots 400, 401, 500 and 600 is owned by a person who is not a party to this appeal.

[4]Because LDO 210.090(1) implements the statute, the code provision is identical to the statute in all material ways, and the legal issues presented here are those of statutory interpretation, we refer to the statute in our discussion rather than the county analog.

partially within the template.[5] In the alternative, petitioner argues that the hearings officer failed to address his contention that in 1995 tax lots 400, 401, 500, and 600 had been consolidated by means of a county code process for consolidating parcels in common ownership.

A. ORS 215.750(1)

The hearings officer rejected petitioner's argument that, as a matter of law, tax lots 401 and 500 must be considered for purposes of ORS 215.750(1) because they are part of a "tract" that lies partially within the template:

> "After carefully reviewing the ordinance as well as the provisions of Oregon state law upon which the ordinance is based, * * * the Hearings Officer concludes that the county may not count the dwelling which lies on a parcel outside the template in deciding whether the 3 required dwellings are present. The ordinance and rules are clear in distinguishing between lots, parcels and tracts. Had it been intended that a parcel lying outside the template but containing a dwelling could be counted because it is part of a tract lying partially within the template, it would have been easy for the rule and ordinance to so provide. * * *" Record 13-14.

Petitioner disagrees with the hearings officer's interpretation, noting that, as LDO 210.020 and ORS 215.010(2) define the term "tract," a tract can include "one or more" parcels and thus a single parcel can constitute a "tract." *See* n 5. Therefore, petitioner argues, the reverse is also true: a tract of commonly owned contiguous parcels can and should be considered a single parcel. In support of this view, petitioner argues that ORS 215.750 appears to use the terms "tract" and "parcel" interchangeably. For example, petitioner notes that ORS 215.750(1) refers to a "dwelling on a lot or parcel" while ORS 215.750(4)(d) refers to "the tract on which the dwelling will be sited."[6] We understand

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[5]Both LDO 210.020 and ORS 215.010(2) define the term "tract" as "one or more contiguous lots or parcels under the same ownership."

[6]ORS 215.750(4) provides in relevant part:

> "A proposed dwelling under this subsection is not allowed:

petitioner to argue that, if the statute refers interchangeably to the property on which the dwelling will be sited as either a "tract" or a "lot or parcel," then a similar scope of meaning

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"* * * * *

"(d) If the tract on which the dwelling will be sited includes a dwelling."

should be inferred when the statute refers to the properties within the template that qualify the subject property for a forest template dwelling.

However, we disagree with petitioner that a tract consisting of multiple parcels can or must be considered a single parcel for purposes of determining the number of qualifying parcels or dwellings under ORS 215.750. We also disagree that the statute uses the terms "tract" and "lot or parcel" interchangeably; on the contrary, we agree with the hearings officer that the choice of language is deliberate. The reference to "tract" in ORS 215.750(4)(d) functions to prevent placement of a dwelling on a lot or parcel that is part of a tract owned by the applicant when a dwelling already exists on another lot or parcel within that tract. That function plays no role when considering whether the requisite number of qualifying lots or parcels are within the template pursuant to ORS 215.750(1)(a). We agree with the hearings officer that the references in ORS 215.750(1)(a) to "lots or parcels" do not include parcels that are wholly outside the template, even if those parcels are part of a tract that lies partially within the template.

This subassignment of error is denied.

B. LDO 15.020(4)

In the alternative, petitioner argues that the hearings officer failed to address whether tax lots 400, 401, 500 and 600 had been consolidated into a single parcel by virtue of LDO 15.020(4). If those parcels had been consolidated, petitioner argues, then the resulting single parcel lies partially within the template and therefore the dwellings on those parcels should be counted for purposes of qualifying the template dwelling on the subject property.

LDO 15.020(4) provides:

> "Tracts of land, lots or parcels which were lawfully divided *but were conveyed by one deed and were subsequently consolidated,* or otherwise altered after that date, may be recreated for development purposes:
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> "A) When consistent with the current requirements for a division in the district in which they are now located; or

> "B) When consistent with an approved land division pursuant to requirements then in effect as specified in [LDO 15.020(2)] above; or
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> "C) As otherwise allowed under [LDO] chapter 258 pertaining to nonconforming lots and parcels, or previous official actions." (Emphasis added.)

Petitioner explains that in 1995 tax lots 400, 401, 500 and 600 were conveyed in a single deed that described each parcel. According to petitioner, the emphasized language in LDO 15.020(4) has the effect of automatically consolidating all parcels that are conveyed on a single deed. Further, petitioner contends that, since the 1980 adoption of the LDO, the county has "historically and consistently applied [LDO 15.020(4)] in an effort to consolidate contiguous ownerships into a single unit of land when said parcels or tracts were described on a single deed." Petition for Review 6. Petitioner argues that the county must apply LDO 15.020(4) consistently with its historic practice and thus deem tax lots 400, 401, 500 and 600 a single consolidated parcel.

ORS 92.017 provides that "[a] lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law." Petitioner acknowledges that ORS 92.017 is applicable in the present circumstances, but argues that the statute does not prohibit the county from adopting a specific process for vacating lot and parcel lines, and that the county has in fact done so in LDO 15.020(4). *See Kishpaugh v. Clackamas County*, 24 Or LUBA 164, 172 (1992) (the purpose of ORS 92.017 is to prevent local governments from refusing to recognize lawful divisions of land and to establish that property lines so created remain inviolate, absent employment of a specific process to vacate such property lines).

Where petitioners raise a legitimate issue below regarding compliance with an approval criterion, the local government must adopt findings responding to that issue. *Rouse v. Tillamook County*, 34 Or LUBA 530, 536 (1998); *Thomas v. Wasco County*, 30 Or LUBA 302, 310 (1996). Petitioner raised before the hearings officer the issue of whether tax lots

400, 401, 500 and 600 had been consolidated by virtue of LDO 15.020(4), thus allowing petitioner to count the qualifying dwellings on those parcels for purposes of satisfying ORS 215.750(1)(a). Petitioner is correct that the hearings officer did not adopt findings addressing that issue. Nonetheless, we see no purpose in remanding the decision for the hearings officer to do so in this case. The issue is a matter of legal interpretation: whether LDO 15.020(4) is a "specific process" whereby the county takes action to vacate property lines, as contemplated by ORS 92.017. Where the decision lacks an essential interpretation of a local provision, LUBA may interpret the provision in the first instance or remand for an interpretation. ORS 197.829(2); *Opp v. City of Portland*, 153 Or App 10, 14, 955 P2d 768, *rev den* 327 Or 620 (1998). Petitioner's proffered interpretation of LDO 15.020(4) is so at odds with its language that we exercise our discretion under ORS 197.829(2) and interpret that provision in the first instance to the extent necessary to reject petitioner's interpretation.

By its terms, LDO 15.020(4) prescribes a process for *recreating* land divisions that have been consolidated. LDO 15.020(4) does not itself set forth a process for vacating property lines or consolidating parcels.[7] Petitioner apparently interprets the following language in LDO 15.020(4), that "lots or parcels which were lawfully divided but were conveyed by one deed and were subsequently consolidated * * * may be recreated * * *" to mean that lots and parcels that are conveyed by one deed are *thereby* consolidated. However, LDO 15.020(4) does not so provide. It states that lots or parcels that were conveyed by one deed *and* were *subsequently* consolidated may be recreated. The reference to a subsequent process clearly indicates that LDO 15.020(4) does not itself prescribe a process for consolidating parcels.

Petitioner's contention that the county has, in other cases, applied LDO 15.020(4) to

[7]Some such process may exist in the county's code, but petitioner has not identified it. We note that LDO 20.090 provides for replatting "as allowed under ORS 92.180 through 92.190," while LDO 20.110 provides for modification or vacation of subdivisions "according to procedures established by State Law[.]"

consolidate parcels that were conveyed in a single deed does not assist petitioner. First, petitioner has not cited to any evidence in the record showing that the county has in fact done so. Second, we determine above that LDO 15.020(4) does not itself set forth a process for consolidating parcels. Third, even if the county has in fact applied LDO 15.020(4) to consolidate parcels in other cases, and even assuming that such application was consistent with ORS 92.017, a similar application of LDO 15.020(4) in this case would not assist petitioner. According to petitioner, tax lots 400, 401, 500 and 600 were conveyed on a single deed in 1995, which, petitioner contends, created a new single parcel. If so, then that "parcel" was created in 1995 and did not exist on January 1, 1993. In order to count as a qualifying dwelling under ORS 215.750(1)(a), the dwelling must exist on January 1, 1993, *and* must be located on a lot or parcel that existed on January 1, 1993. Any dwelling located on a parcel created in 1995 is not a qualifying dwelling for purposes of ORS 215.750(1)(a). Thus, even if petitioner is correct regarding the effect of the county's application of LDO 15.020(4), the dwellings on tax lots 401 and 500 would nevertheless not be qualifying dwellings.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under this assignment of error, petitioner argues that he has demonstrated compliance with each of the other approval criteria at LDO 20.090 as a matter of law.

To support denial of a permit, the local government need only establish the existence of one adequate basis for denial. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, 635 (1995). We concluded in our discussion of the first assignment of error that the hearings officer correctly denied the application for failure to comply with the code provision implementing ORS 215.750(1)(a). Accordingly, petitioner's arguments that he has satisfied the other requirements of the code do not provide a basis for reversal or remand.

The second assignment of error is denied.

The county's decision is affirmed.