BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES T. CHURCH and
PHILLIP L. GERSTNER,
Petitioners,

vs.

GRANT COUNTY,
Respondent.

LUBA No. 2001-112

FINAL OPINION
AND ORDER

Appeal from Grant County.

Robert S. Lovlien, Bend, filed the petition for review. With him on the brief was Bryant, Lovlien and Jarvis. Sharon R. Smith argued on behalf of petitioners.

John M. Junkin, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Bullivant Houser Bailey.

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

REMANDED 10/25/2001

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

Petitioners appeal the county's denial of a permit to place a single-family dwelling on a five-acre parcel zoned Rural Residential 10-acre minimum (RR-10).

FACTS

On November 20, 1997, petitioners applied to partition a 22-acre parcel into three parcels. Parcels 1 and 2 were each five acres in size, while parcel 3 was approximately 12 acres in size. The county administratively approved that partition, notwithstanding that two of the resulting parcels did not conform to the minimum parcel size in the RR-10 zone.

On February 6, 1998, petitioners applied to partition the 12-acre parcel into two smaller parcels, five and seven acres in size. The county administratively approved this partition, notwithstanding that the resulting parcels did not conform to the RR-10 minimum parcel size.

The county subsequently discovered its errors and, on November 25, 1998, adopted an ordinance that allowed it to revoke any final land use decision that the county determines to violate clear and objective code standards. The county then applied that ordinance to revoke both of the above-described partitions. Petitioners appealed that decision to LUBA. We concluded that the county's revocation of the two final partition decisions was prohibited as a matter of law and, accordingly, reversed the county's decision. *Church v. Grant County*, 37 Or LUBA 646 (2000).

Petitioners then submitted the disputed application for administrative approval of a single-family dwelling on tax lot 600, the five-acre parcel created in the 1998 partition. The county planning director exercised an option under the county's code to place the application before the county planning commission. After a hearing on the matter, the planning commission denied the application. Petitioners appealed to the governing body, the county court. The county court conducted two public hearings and, on June 28, 2001, issued its

decision affirming the planning commission's decision, thus denying the application. This appeal followed.

ASSIGNMENT OF ERROR

Grant County Land Development Code (LDC) 67.020(A) allows single-family dwellings in the RR-10 zone, subject to county approval. LDC 67.050(F)(1) establishes a 10-acre minimum lot size for residential uses in the RR-10 zone. Because tax lot 600 does not conform to the applicable minimum lot size, the county treated tax lot 600 as a nonconforming or substandard parcel.[1] Accordingly, the county evaluated petitioners' application under LDC 13.010, which governs nonconforming lots or parcels.

LDC 13.010 provides, in relevant part:

> "A. The minimum area or width requirements shall not apply to an authorized lot as defined by [LDC 11.030(172] of this Code. An authorized lot may be occupied by any use permitted in the applicable Zone subject to all other standards of this Code.
>
> "* * * * *
>
> "D. Lots which were legally created prior to January 1, 1985, and which do not meet the current minimum frontage, lot width or lot sizes required for the Zone, are deemed acceptable for development."

The county court concluded that tax lot 600 was an "authorized lot" for purposes of LDC 13.010(A) and as defined by LDC 11.030(172).[2] Nonetheless, the county court

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[1]Petitioners note that the subject property does not meet the definition of a "nonconforming lot or structure," at LDC 11.030(204) ("A parcel of land or structure which lawfully existed prior to adoption of this Code, but which does not meet the standard for lot area, dimension, setbacks, or other criteria in this Code"). However, petitioners do not develop this observation any further. Petitioners do not dispute that the county properly applied LDC 13.010, governing nonconforming lots or parcels. As discussed below, the parties disagree over which subsection of LDC 13.010 controls the subject application.

[2]LDC 11.030(172) defines "Lot or Parcel, Authorized" as follows:

> "An authorized lot or parcel shall be defined as a separate unit of land created by one of the following:
>
> "A. A parcel of land in a recorded subdivision, legally created under the law in force at the time; (ORS 92.010)

concluded that *development* of tax lot 600 was not permitted under LDC 13.010(D), because the parcel was not legally created prior to January 1, 1985:

> "2. The Church-Gerstner subject parcel is an *authorized lot*, created by land partition in 1998. As such, the lot may retain its current minimum area. The lot is not in size-conformance with the underlying RR-10 zone; it does not meet the minimum lot size required in the RR-10 zone. The subject parcel * * * does not conform to the underlying zone lot size requirement. Tax lot 600 is a 5-acre lot in a 10-acre zone. The subject parcel is nonconforming and substandard.
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> "3. An authorized lot may be *occupied by any use permitted in the applicable Zone, subject to all other standards of the Code*. Tax lot 600 may be occupied by any permitted use allowed in the RR-10 zone, subject to the restriction that all other standards of the Code must be met.
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> "4. [LDC 13.010] states that a nonconforming lot does not necessarily qualify for *development*. In order to qualify for development, the non-conforming lot *must have been legally created prior to January 1, 1985*.
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> "5. A single-family dwelling is a *permitted use* in the RR-10 zone. A single-family dwelling is also considered a *development*. This permitted use (a single-family dwelling) may be restricted, due to the fact that another portion of the Code (development on nonconforming lots) specifies a standard requiring the lot to have been legally created prior to January 1, 1985 in order to allow development.
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> "6. The Church-Gerstner tax lot 600 was created in 1998. As it was created after January 1, 1985, it does not qualify for an outright permitted use that is a development. Therefore, tax lot 600 does not qualify in its current 5-acre configuration, as a stand-alone lot, for a single-family dwelling permit." Record 6-7 (emphases in original).

Petitioners argue that LDC 13.010(A) controls the present case, not LDC 13.010(D),

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> "B. A parcel in an unrecorded subdivision that was filed with the Department of Commerce in accordance with regulations in effect at the time of filing;
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> "C. A parcel created by a land partitioning as defined in ORS 92.010;
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> "D. By deed or land sales contract, if there were no applicable planning, zoning, or partitioning ordinances, codes or regulations;
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> "E. Does not include a unit of land created solely to establish a separate tax account."

and that the county court's contrary interpretation of its code must be reversed as inconsistent with the express language of the pertinent code provisions. ORS 197.829(1);[3] *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). According to petitioners, LDC 13.010(A) clearly provides that minimum area requirements do not apply to an authorized lot, and that authorized lots may be occupied by any permitted use in the zone, subject to all other code standards. A single-family dwelling is one of the permitted uses in the RR-10 zone.[4] Therefore, petitioners argue, LDC 13.010(A) allows development of a single-family dwelling notwithstanding that it does not meet the minimum area requirement of the RR-10 zone.

The county erred, petitioners argue, in reading LDC 13.010(D) to prohibit what LDC 13.010(A) expressly allows. According to petitioners, the county's interpretation of LDC 13.010(D) has the effect of completely nullifying LDC 13.010(A). Further, petitioners argue, LDC 13.010(D) merely specifies that substandard lots created prior to January 1, 1985, are acceptable for development. Petitioners contend that LDC 13.010(D) does not necessarily imply that substandard lots created after January 1, 1985 are *not* acceptable for

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[3]ORS 197.829(1) provides in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

[4]LDC 67.020 sets forth the permitted uses in the RR zones, allowed under the county's Type I review procedure, including a single-family dwelling, farm use, utility facility, public park, other public uses or buildings and residential facilities. LDC 67.030 sets forth other permitted uses, allowed under the county's Type II review procedure, including a day care, home occupation, roadside agricultural stand, horse boarding, and model homes and sales offices. LDC 67.040 sets forth conditional uses allowed in the RR zones, including mining, veterinary clinic or animal kennel, stables, private parks and campgrounds, guest ranch or resort facility, golf course, solid waste disposal facility, and livestock feed yards.

development. For these reasons, petitioners argue, the county's interpretation must be reversed, under ORS 197.829(1) and *Clark*.

The county acknowledges that tax lot 600 is an "authorized lot" as defined by LDC 11.030(172), for purposes of LDC 13.010(A). However, the county argues that the county court's interpretation gives effect to both LDC 13.010(A) and (D), is consistent with the express language of both provisions, and is not reversible under ORS 197.829(1) and *Clark*. The county argues that the rights granted under LDC 13.010(A) are "subject to all other standards of this code," including, presumably, LDC 13.010(D). According to the county, LDC 13.010(A) allows any "use permitted in the applicable Zone" on a substandard lot, while LDC 13.010(D) qualifies that right by specifying that if the permitted use *also* constitutes "development," then such development is allowed only if the lot was legally created prior to January 1, 1985.[5] The county argues that the county court's interpretation to that effect is not clearly wrong and must be sustained.

The meaning of and relationship between LDC 13.010(A) and (D) is certainly unclear. As a preliminary matter, we note that the definition of "authorized lot" at LDC 11.030(172) includes essentially any lawfully created lot, no matter when it was created. *See* n 2. In other words, an "authorized lot" for purposes of LDC 13.010(A) would seem to include the category of lots "which were legally created prior to January 1, 1985" under LDC 13.010(D). Thus, contrary to petitioners' unstated premise, subsections (A) and (D) do not govern mutually exclusive categories of lots. Second, LDC 13.010(A) allows permitted uses on authorized lots that are substandard with respect to "minimum area or width requirements," while LDC 13.010(D) allows development on certain lots "which do

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[5]LDC 11.030(324) defines "use" in relevant part as "[t]he primary or principal activity, structure or facility occurring on a lot or parcel of land."

LDC 11.030(100) defines "development" as "[a]ny alteration of improved or unimproved real estate, including but not limited to a land division, buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations."

not meet the current minimum frontage, lot width or lot sizes required for the Zone." At oral argument, the county took the position that the "minimum area or width requirements" specified in subsection (A) are the same as the "minimum * * * lot width or lot sizes" specified in subsection (D). Petitioners did not dispute that position. However, no party explains why subsection (D) also refers to "frontage" requirements, or the significance of that language.[6] Similarly, no party is able to explain the significance of the January 1, 1985 date in LDC 13.010(D).[7]

Under ORS 197.829(1) and *Clark*, a local government's interpretation must be affirmed unless we can say that "no person could reasonably interpret the provision in the manner the local body did." *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996). Here, the county court's interpretation has two components. First, the specification in LDC 13.010(D) that substandard lots lawfully created *before* January 1, 1985, are acceptable for development carries the implication that substandard lots created *after* January 1, 1985, *are not* acceptable for development. That implication may be fair on its face, but is highly dubious in context, given that it appears to render LDC 13.010(A) completely superfluous.

As discussed above, the category of lots lawfully created prior to January 1, 1985, is a subset of "authorized lots," as defined by LDC 11.030(172). In other words, LDC 13.010(D) seems to operate as an extension or clarification of the general grant of rights in LDC 13.010(A). However, under the implication that the county reads into LDC 13.010(D), that provision appears to govern all categories of lots defined by the term "authorized lots,"

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[6]The LDC provisions governing the RR-10 zone do not impose any frontage requirements. The only such requirements we can find in the county's code are in LDC 63.050(F), which imposes a minimum 50-foot frontage requirement in the Airport Approach zone, and LDC 71.020, which imposes a 25-foot minimum width requirement where the "flagpole" of a flaglot abuts a public road.

[7]Petitioners speculate that January 1, 1985, is the date the code went into effect, but provide no substantiation for that speculation. The record includes no legislative history of LDC 13.010(A) and (D). The parties do not even tell us whether LDC 13.010(A) and (D) were adopted separately or contemporaneously.

and all circumstances that would otherwise be controlled by LDC 13.010(A). Under the county's interpretation, development of substandard lots is completely governed by LDC 13.010(D). The only question in approving proposed development of a substandard lot under the county's interpretation is whether the lot was lawfully created prior to January 1,

1985; the question of whether it is otherwise an "authorized lot" and whether LDC 13.010(A) applies would seldom, if ever, arise.

The county is not saved by the second component of its interpretation, which attempts to give effect to both provisions by interpreting LDC 13.010(A) to govern "uses permitted in the applicable Zone" while LDC 13.010(D) governs "development." That is, under the implication the county reads into LDC 13.010(D), LDC 13.010(A) would apply only where the proposed "use" did not also constitute "development." That distinction has some textual support in the two provisions; however, in context it is clear that the distinction is illusory. Few if any of the "permitted uses" in the RR-10 zone do not fall within the broad definition of "development" at LDC 11.030(100). *See* ns 4 and 5. Further, the definition of "use" at LDC 11.030(324) includes "structure or facility," *i.e.*, development. *See* n 5. In other words, the county's distinction between "use" and "development" is not consistent with the code definition of those terms, and does little to save LDC 13.010(A) from superfluity.

Viewed in isolation, the two components of the county's interpretation might well pass muster under ORS 197.829(1) and *Clark*. However, the county's interpretation as a whole does such violence to the pertinent code provisions, read in context, that we do not believe that interpretation can be sustained. The county reads an implication into one code provision, and uses that implication to prohibit what another code provision expressly allows, in a manner that almost if not entirely eviscerates that other code provision. Under the county's interpretation, LDC 13.010(A) and (D), which on their faces are broad grants of rights to develop lawfully created lots that are now substandard under current regulations, instead prohibit development of any lot that was lawfully created after January 1, 1985, but is now substandard under current regulations. The deference due the county's interpretation of its code provisions does not extend to interpretations that depart so profoundly from the text as to constitute, in practical effect, an amendment to its legislation. *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 218, 843 P2d 992 (1992). The county's

interpretation in the present case is a *de facto* amendment of its legislation "in the guise of interpretation." *Id.*

Although it is a close question, we conclude that no person could reasonably interpret the relevant provisions in the manner the county has in this case. Accordingly, we cannot affirm the county's interpretation under ORS 197.829(1) and *Clark*.

The assignment of error is sustained.

Petitioners request that we reverse the county's denial of their application, presumably because petitioners believe it "violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c). However, while we have rejected the county's adopted interpretation of LDC 13.010(A) and (D) in this case, the meaning of and relationship between those provisions remain unclear. It may be that the county can adopt a sustainable interpretation of LDC 13.010(A) and (D) that would allow the county to deny petitioners' application. We cannot say that the county's denial is "prohibited as a matter of law." Accordingly, we must remand the decision.

The county's decision is remanded.