

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 GARY L. HARRIS,
5 *Petitioner,*

6
7 vs.

8
9 JEFFERSON COUNTY,
10 *Respondent,*

11 and

12
13
14 TIMOTHY FORESTER and
15 SUSAN FORESTER,
16 *Intervenors-Respondent.*

17
18 LUBA No. 2002-171

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Jefferson County.

24
25 Matthew B. McFarland, Portland, filed the petition for review and argued on behalf
26 of petitioner.

27
28 No appearance by respondent.

29
30 Timothy Forester and Susan Forester, Eugene, filed the response brief and argued on
31 their own behalf.

32
33 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
34 participated in the decision.

35
36 REVERSED

03/12/2003

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county approval for a nonfarm dwelling on a 74-acre parcel zoned Exclusive Farm Use – Range Land (EFU – RL).

MOTION TO INTERVENE

Timothy Forester and Susan Forester (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

REPLY BRIEF

Petitioner moves to file a two-page reply brief to respond to intervenors’ challenge to his standing to appear before LUBA. There is no opposition to the motion and it is allowed.

FACTS

The subject parcel is one of two parcels that were created by partition in March 1993. A nonfarm dwelling was approved on the adjacent parcel at the same time as the land division. On April 20, 2002, intervenors applied for a nonfarm dwelling on the subject parcel. One of the applicable approval criteria is Jefferson County Zoning Ordinance 302(B)(24), which adopts by reference the standards set out ORS 215.284(2). ORS 215.284(2)(c) permits the siting of a nonfarm dwelling in an EFU zone, provided the parcel on which the dwelling is to be placed was created prior to January 1, 1993. The planning commission denied the application, because the subject parcel was created after January 1, 1993.

Intervenors appealed the planning commission decision to the board of commissioners. Intervenors conceded that the subject parcel was created after January 1, 1993. However, intervenors pointed out that a nonfarm dwelling was approved on the adjacent parcel that was created by the March 1993 partition. Intervenors also presented evidence to the board of commissioners that the county had approved other nonfarm

1 dwellings on parcels created after January 1, 1993.¹ Intervenor argued that, as a matter of
2 fairness, they were entitled to a nonfarm dwelling as well, provided they demonstrated that
3 they satisfied all other relevant criteria.

4 The board of commissioners agreed with intervenors, and approved their nonfarm
5 dwelling application. This appeal followed.

6 **STANDING**

7 Intervenor challenge petitioner's standing. According to intervenors, petitioner did
8 not participate in the proceedings before the board of commissioners. Intervenor argue that
9 because petitioner did not appear before the governing body, petitioner may not appeal the
10 challenged decision to LUBA.

11 In his reply brief, petitioner cites to pages in the county record that establish that he
12 appeared before the planning commission, in opposition to intervenors' application.
13 According to petitioner, because he appeared at the initial hearing that led to the county's
14 decision, he has standing to challenge the board of commissioner's decision at LUBA.

15 A petitioner has standing to appeal a local land use decision to LUBA, provided the
16 petitioner demonstrates that the petitioner (1) appeared before the local government in person
17 or in writing; and (2) filed a timely notice of intent to appeal at LUBA. ORS 197.830(2)(b).
18 In *Warren v. Lane County*, 297 Or 290, 297-298, 686 P2d 316 (1984), the Oregon Supreme
19 Court held that

20 "where a local governing body bases its land use decision, in whole or in part,
21 on the record obtained in a prior proceeding before a planning commission
22 * * * then an appearance on the record before [the planning commission] is an
23 appearance before the local governing body."

¹ Intervenor do not indicate whether the parcels were created pursuant to statutes that allow nonfarm dwellings on parcels created after January 1, 1993, such as ORS 215.284(7) or its predecessor, ORS 215.284(3)(1999).

1 Here, the board of commissioners based its decision in part on the record of the
2 planning commission. Intervenor do not dispute that petitioner appeared before the planning
3 commission. Accordingly, petitioner has standing to appeal the county’s final decision to
4 LUBA.

5 **FIRST ASSIGNMENT OF ERROR**

6 ORS 215.284(2) provides, in relevant part, that

7 “* * * a single-family residential dwelling not provided in conjunction with
8 farm use may be established, * * * in any area zoned for exclusive farm use
9 upon a finding that:

10 “* * * * *

11 “(c) The dwelling will be sited on a lot or parcel created before January 1,
12 1993[.]”

13 Petitioner argues that the county erred in approving the nonfarm dwelling permit despite a
14 finding that ORS 215.284(2)(c) is not met.²

15 Intervenor concede that ORS 215.284(2)(c) is not met; however, intervenor argue
16 that the county’s decision should be affirmed because the county approved a nonfarm
17 dwelling in May 1993 for the other parcel created by the 1993 partition. Intervenor argue
18 that it is clear from the 1993 application for partition that the resulting parcels were to be
19 developed as large-acreage nonfarm dwelling sites. Intervenor also contend that before they
20 purchased the subject parcel, county employees assured them that a nonfarm dwelling

² The county’s decision states, in relevant part:

“The Board of Commissioners find[s] that the lot where the dwelling is proposed to be constructed was created after January 1, 1993. The partition that created this subject parcel was approved by Jefferson County after the January 1, 1993 date. However, Jefferson County permitted a non farm dwelling to be built on the parcel that comprises the other half of this partition after * * * January 1, 1993 * * *. The Foresters purchased the subject property under the good faith belief [that] they would be able to construct a non farm dwelling on this property. The Board of Commissioners find[s] that based on the specific facts of this application the intent of [ORS 215.284(2)(c)] is met in this case.” Record 7-9.

1 application would be approved for the parcel. Intervenor's contend that the county's decision
2 "rectified [an] injustice." Respondent's Brief 2.

3 ORS 215.284(2)(c) is unambiguous. A nonfarm dwelling may not be permitted
4 pursuant to ORS 215.284(2) unless the parcel on which the dwelling is to be sited was
5 created prior to January 1, 1993. It does not allow for exceptions due to the purchasers'
6 expectations based on conversations with county employees. Nor does ORS 215.284(2)(c)
7 allow the county to ignore it in order to remedy what it perceives to be an injustice. Once the
8 county found that the subject parcel was created after January 1, 1993, it could *not* approve a
9 nonfarm dwelling on the parcel pursuant to ORS 215.284(2).³

10 The first assignment of error is sustained.

11 **CONCLUSION**

12 OAR 661-010-0071(1)(c) provides that we must reverse a land use decision when the
13 "decision violates a provision of applicable law and is prohibited as a matter of law." We
14 agree with petitioner that the county could not approve intervenor's application under ORS
15 215.284(2) because, as a matter of law, intervenor did not satisfy ORS 215.284(2)(c).
16 Therefore, we must reverse the challenged decision. Accordingly, it is not necessary for us to
17 address petitioner's remaining assignments of error.

18 The county's decision is reversed.

³ We express no opinion regarding whether intervenor could obtain approval for a nonfarm dwelling on the subject property pursuant to other statutes.