BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CURTIS N. PERKINS,
Petitioner,

vs.

UMATILLA COUNTY,
Respondent,

and

KELLY NOBLES,
Intervenor-Respondent.

LUBA No. 2003-098

FINAL OPINION
AND ORDER

Appeal from Umatilla County.

Peggy Hennessy, Portland, filed the petition for review and argued on behalf of petitioner. With her on the brief was Reeves, Kahn & Hennessy.

No appearance by Respondent.

D. Rahn Hostetter, Enterprise, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was D. Rahn Hostetter, PC.

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

REVERSED 10/03/2003

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 a county order legalizing a seven-acre parcel of land zoned Exclusive Farm Use (EFU).

MOTION TO INTERVENE

Kelly Nobles (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

REPLY BRIEF

On September 8, 2003, petitioner filed a response to a jurisdictional challenge in intervenor's brief, along with a precautionary motion to transfer this appeal to circuit court. Petitioner's response has grey front and back covers, and conforms with our rules for reply briefs at OAR 661-010-0039. Although not styled as such, we treat petitioner's response as a reply brief. A reply brief is warranted in response to a jurisdictional challenge, and the proposed reply brief is allowed.

FACTS

In 1984, Anderson, the owner of a 10-acre EFU-zoned parcel, partitioned the parcel into a seven-acre parcel and a three-acre parcel. Anderson did not seek or obtain required partition approval from the county.[1] Anderson subsequently conveyed the three-acre parcel to petitioner. The county assigned petitioner's parcel tax lot number 507, and petitioner duly paid property taxes to the county for that tax lot. Apparently, property taxes were not paid on the seven-acre parcel, and in 1994 the county foreclosed on a tax lien it held against the seven-acre parcel. In 1996, the county sold the seven acre-parcel, identified as tax lot 501, to intervenor at a tax foreclosure sale, by means of a quitclaim deed.

[1] The record does not include any documents or other information related to that 1984 partition, and it is unclear how the 1984 partition was accomplished. We assume it involved one or more deeds. The parties agree, however, that any partition in the EFU zone in 1984 required county review and approval, which was not obtained. The parties further agree that the EFU zone at that time was subject to a 160-acre minimum lot size.

After petitioner denied intervenor access to tax lot 507 to reach tax lot 501, intervenor filed an application with the county for a way of necessity. The county denied the application because, as the county discovered during those proceedings, the 1984 action that purportedly created tax lot 501 was taken without county approval. The county concluded that it could not authorize a way of necessity to permit access to an illegally created parcel. Intervenor then filed an application with the county to legalize tax lot 501. Intervenor argued that the 1994 tax foreclosure had the effect of legalizing tax lot 501, pursuant to ORS 215.263(7).[2]

The county board of commissioners conducted a hearing on the application on May 20, 2003, pursuant to Umatilla County Development Code (UCDC) 152.772. The commissioners accepted testimony and, at the conclusion of that hearing, approved an order that recognized tax lot 501 as a legal lot, pursuant to ORS 215.263(7).[3] This appeal followed.

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[2] ORS 215.263 provides, in relevant part:

> "(1) Any proposed division of land included within an exclusive farm use zone resulting in the creation of one or more parcels of land shall be reviewed and approved or disapproved by the governing body or its designee of the county in which the land is situated. The governing body of a county by ordinance shall require such prior review and approval for such divisions of land within exclusive farm use zones established within the county.
>
> "* * * * *
>
> "(7) This section does not apply to divisions of land resulting from lien foreclosures or divisions of land resulting from foreclosure of recorded contracts for the sale of real property."

[3] The county's order states, in relevant part:

> "2. Pursuant to ORS Chapter 312 Umatilla County foreclosed on Umatilla County Tax Lot 5N27-23-501 for delinquent property taxes, which was subsequently sold and conveyed to [intervenor].
>
> "3. Pursuant to ORS 215.263(7), the Board [of Commissioners] has the authority to legalize Umatilla County Tax Lot 5N27-23-501 for the reason that the creation of such tax lot was not subject to the land division requirement of ORS 215.263.

MOTION TO DISMISS

Intervenor argues that the challenged decision is not a "land use decision" subject to LUBA's jurisdiction, for two reasons. Intervenor argues first that the challenged decision does not concern the application of any statewide planning goal, comprehensive plan provision or land use regulation, and is therefore not a "land use decision" subject to LUBA's jurisdiction under ORS 197.015(10)(a). In the alternative, intervenor contends that the challenged decision was made under land use standards that do not require interpretation or the exercise of policy or judgment, and is therefore excluded from the definition of "land use decision," pursuant to ORS 197.015(10)(b)(A).

A. ORS 197.015(10)(a)

Intervenor notes correctly that, as relevant here, LUBA's jurisdiction is limited to "land use decisions." ORS 197.825(1).[4] ORS 197.015(10)(a)(A) defines "land use decision" in relevant part as

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

> "4. Umatilla County Tax Lot 5N27-23-501 is legalized.
>
> "5. Any violation flag or notation appearing in county records for the tax lot shall be removed and the lot shall not be subject to any such violation notation." Record 2-3.

[4] ORS 197.825(1) provides:

> "Except as provided in ORS 197.320 and subsections (2) and (3) of this section, [LUBA] shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845."

Intervenor argues that the challenged decision is not a "land use decision" as defined at ORS 197.015(10)(a)(A) because it concerns only the application of a state statute, ORS 215.263(7), and does not concern the "adoption, amendment or application" of any statewide planning goals, comprehensive plan provisions or land use regulations.

Petitioner offers several responses, but we address only one. Petitioner notes that ORS 197.646 requires the county to amend its land use regulations to reflect "land use statutes" and if the county fails to do so such statutes are directly applicable to the local government's land use decisions.[5] Petitioner argues that the county has not amended its land use regulations to implement ORS 215.263(7). Had it done so, petitioner argues, there is no dispute that application of the land use regulation that implemented ORS 215.263(7) would render the county's decision in this case a "land use decision." Petitioner contends that the county's failure to comply with ORS 197.646 does not deprive LUBA of jurisdiction.

At oral argument, intervenor responded that ORS 215.263(7) is not the type of "land use statute" that ORS 197.646(1) requires the county to implement in its plan and land use regulations. Intervenor argues that ORS 215.263(7) essentially allows creation of a parcel of land in the EFU zone *without* the county review and approval that would otherwise be required under ORS 215.263(1). Because no county review or approval is required under

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[5] ORS 197.646 provides, in pertinent part:

> "(1) A local government shall amend the comprehensive plan and land use regulations to implement new or amended statewide planning goals, Land Conservation and Development Commission administrative rules and land use statutes when such goals, rules or statutes become applicable to the jurisdiction. Any amendment to incorporate a goal, rule or statute change shall be submitted to the Department of Land Conservation and Development as set forth in ORS 197.610 to 197.625.
>
> "* * * * *
>
> "(3) When a local government does not adopt comprehensive plan or land use regulation amendments as required by subsection (1) of this section, the new or amended goal, rule or statute shall be directly applicable to the local government's land use decisions. * * *"

ORS 215.263(7), intervenor argues, the county is not required to amend the UCDC to implement ORS 215.263(7), and it is not surprising that the county has not done so.

We disagree with intervenor that ORS 215.263(7) is not subject to ORS 197.646(1) and (3). ORS 215.263(7) is part of a comprehensive statutory scheme governing land division in EFU zones, a scheme that the county's land use regulations implement in several places. The fact that ORS 215.263(7) does not require county review or approval does not remove it from that scheme or the requirements of ORS 197.646. It is worth noting in this respect that the county has chosen to implement other "land use statutes" that allow uses that do not require county review or approval. *See* UCDC 152.027 (allowing farm uses in EFU zones without a permit).

Turning to ORS 197.646, we agree with petitioner that that statute makes ORS 215.263(7) directly applicable to the county's land use decisions, and the fact that the county has not chosen to implement ORS 215.263(7) in its land use regulations does not mean we lack jurisdiction. Had the county amended its land use regulations to implement ORS 215.263(7), as ORS 197.646(1) directs, it would have applied those land use regulations in the present case, in which case there would be no question that the resulting county decision was a "land use decision." We do not think the legislature intended that direct application of a "land use statute" under ORS 197.646(3) results in something other than a "land use decision" subject to our review.[6]

B. ORS 197.015(10)(b)(A)

ORS 197.015(10)(b)(A) excludes from the definition of "land use decision" decisions that would otherwise meet the definition at ORS 197.015(10)(b)(A), where the decision is

[6] In addition, although the parties do not discuss it, we note that the county conducted its proceedings below pursuant to UCDC 152.772, the portion of its development code governing land use hearings. UCDC 152.772 is a land use regulation, and therefore the county's decision concerns the application of a land use regulation.

"made under land use standards which do not require interpretation or the exercise of policy or legal judgment."

Intervenor contends that the only "land use standard" the county applied in its decision was ORS 215.263(7). According to intervenor, ORS 215.263(7) unambiguously provides that the county may recognize without review or approval a land division resulting from a lien foreclosure. Under ORS 215.263(7), intervenor argues, the only fact the county was required or authorized to consider was whether or not the county foreclosed against tax lot 501 in 1994. Application of that undisputed fact to the law required no interpretation or exercise of policy or legal judgment, intervenor contends.

We disagree. As our discussion of the merits below indicates, application of ORS 215.263(7) to the present facts required interpretation and exercise of legal judgment.

For the foregoing reasons, intervenor's motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner contends that the county misconstrued ORS 215.263(7) to allow legalization of an existing, illegally created parcel. According to petitioner, ORS 215.263(7) applies as relevant here only to "divisions of land *resulting* from lien foreclosures * * *" (Emphasis added.) Petitioner argues that tax lot 501 is not the result of the 1994 lien foreclosure and was not created by that foreclosure. Instead, petitioner argues, tax lot 501 was created in 1984 by means other than a lien foreclosure. In short, petitioner views ORS 215.263(7) to allow *creation* of a new parcel as a result of a lien foreclosure, but not to allow post-hoc *legalization* of a illegally-created parcel that happens to be subject to foreclosure subsequent to its creation.

Intervenor responds that the 1994 lien foreclosure effected the "division of land" that created tax lot 501. Intervenor argues that the only reason he applied for legalization under ORS 215.263(7) was because the county *did not* recognize the actions taken in 1984 as resulting in a division of land. Under such circumstances, intervenor argues, it is appropriate

under ORS 215.646(7) to view the 1994 lien foreclosure as resulting in a division of land, creating tax lot 501.[7]

The parties' dispute raises two related issues: (1) whether ORS 215.263(7) allows the county to "legalize" a parcel that was previously created without required local government approval; and (2) if not, whether tax lot 501 resulted from, or was created by, the 1994 lien foreclosure rather than the 1984 actions. The county's decision appears to answer the first question in the affirmative. The county did not address the second question. Intervenor appears to argue that even if the county erred in construing ORS 215.263(7) to allow the county to legalize unlawfully formed parcels, tax lot 501 in fact was created in 1994 as a result of the lien foreclosure, and thus is a lawfully created parcel under that statute.

Turning to the first question, we agree with petitioner that ORS 215.263(7) does not authorize the county to "legalize" a parcel formed without requisite local government approval. The relevant text of ORS 215.263(7) simply states that "divisions of land resulting from lien foreclosures" are not subject to the other requirements of ORS 215.263, including the directive in ORS 215.263(1) that all proposed divisions of EFU-zoned land obtain prior county review and approval. The text of ORS 215.263(7) is plainly concerned with the "division of land," not legalization of existing units of land. Similarly, ORS 215.263 as a whole is concerned only with the division of EFU-zoned land, not with legalization of existing lots or parcels.

[7] Returning to his jurisdictional theme, intervenor also argues that if tax lot 501 was created in 1984, then the only effect of the challenged decision was to remove the "violation flag or notation" on the county's records. Intervenor argues that thus changing an internal county record is a "ministerial action" that is outside LUBA's jurisdiction, pursuant to ORS 197.015(10)(b)(A). We disagree with intervenor's premise as well as the related jurisdictional argument. The purpose and substance of the challenged decision was to "legalize" tax lot 501, apparently to allow intervenor to subsequently gain approval for a non-farm dwelling pursuant to ORS 215.284(2) (allowing a nonfarm dwelling on an existing parcel created before January 1, 1993) or ORS 215.284(7) (allowing a nonfarm dwelling on a parcel created after January 1, 1993, pursuant to ORS 215.263(5)). Viewed in that manner, the challenged decision does not simply remove the violation flag or notation in the county's records. We have already concluded that the challenged decision is not properly viewed as a ministerial decision under ORS 197.015(10)(b)(A).

Further contextual support is found in ORS 92.010 to 92.285, which governs subdivisions and partitions as defined in that chapter. ORS 92.010(7) excludes from the definition of "partition land" a "division of land resulting from a lien foreclosure." That language echoes ORS 215.263(7) and its relation to the definition of "partition land" supports the view that ORS 215.263(7) is concerned with the creation or division of land rather than legalization of existing parcels. Moreover, a separate section of ORS chapter 92, ORS 92.177, appears to address the county's authority to remedy lots or parcels that, like tax lot 501, were improperly formed without the approval of the governing body.[8]

In sum, we agree with petitioner that the county erred to the extent it construed ORS 215.263(7) to authorize the county to "legalize" an existing, but illegally-created parcel.

Turning to the second question, we understand intervenor to argue that, notwithstanding language in the county's decision purporting to "legalize" tax lot 501, the import of the decision is to recognize that the 1994 lien foreclosure in fact created or "resulted" in the division of tax lot 501. If the county's decision is viewed in that manner, we understand intervenor to argue, the county's misconstruction of ORS 215.263(7) is harmless error.

Intervenor's argument necessarily disputes petitioner's contention that the 1984 actions created tax lot 501. The parties' dispute on this point raises a metaphysical question regarding the status of lots or parcels that are formed or "created" without the review and approval required by applicable state statutes or local codes. Petitioner's apparent view is that such parcels are "created" as discrete units of land, albeit unlawfully, and can only be

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[8] ORS 92.177 provides:

> "Where application is made to the governing body of a city or county for approval of the creation of lots or parcels which were improperly formed without the approval of the governing body, the governing body of a city or county or its designate shall consider and may approve an application for the creation of lots or parcels notwithstanding that less than all of the owners of the existing legal lot or parcel have applied for the approval."

legalized through formal means such as application of a remedial statute such as ORS 92.177 or an equivalent local regulation. Intervenor, on the other hand, apparently views a parcel formed without required local government approval as not being "created" in any meaningful sense, although the buyer of such a parcel may have various legal and equitable remedies against the seller, pursuant to ORS 92.018.[9] Because such a parcel has not yet been "created," we understand intervenor to argue, it may be "created" if a subsequent lien against the parcel is foreclosed, pursuant to ORS 215.263(7).

The statutes to which we are cited do not provide a clear answer to the parties' dispute. ORS 92.177, quoted at n 8 above, refers to lots or parcels that were "improperly formed without the approval of the governing body," and provides a means whereby the governing body may approve an application for the "creation" of such lots, notwithstanding that less than all of the owners of the "existing legal lot or parcel" are part of the application. ORS 92.177 seems to suggest that such "improperly formed" lots or parcels have not yet been "created" and that the parent lot or parcel continues to exist as a single lot or parcel.[10]

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[9] ORS 92.018 provides:

> "(1) A person who buys a lot or parcel that was created without approval of the appropriate city or county authority may bring an individual action against the seller in an appropriate court to recover damages or to obtain equitable relief. The court may award reasonable attorney fees to the prevailing party in an action under this section.
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> "(2) If the seller of the lot or parcel is a county that involuntarily acquired the lot or parcel by means of foreclosure under ORS chapter 312 of delinquent tax liens, the person who purchases the lot or parcel is not entitled to damages or equitable relief."

[10] ORS 92.177 was adopted in 1993 as a legislative response to *Kilian v. City of West Linn*, 88 Or App 242, 744 P2d 1314 (1987). In *Kilian*, the court affirmed a LUBA decision reversing the city's approval of a partition. The partition involved a parcel that the previous landowners, the Kostas, had unlawfully divided into five lots by means of deed conveyances, without obtaining the requisite city approval. The partition applicant owned two of the lots, and after learning that the lots were illegal and unbuildable obtained from the city a "partition" that recognized three legal parcels, the two owned by the applicant and the remainder, owned by other persons who were not party to the application. The petitioner owned one of the three lots that comprised the remainder. The court held that partition under ORS 92.010 to 92.285 was inappropriate:

On the other hand, ORS 92.018, quoted at n 9, provides legal and equitable remedies for buyers of lots or parcels that were "created without approval of the appropriate city or county authority." Although ORS 92.018 does not directly address the status of such lots or parcels, the term "created" suggests that such lots and parcels are existing, albeit illegal and presumably undevelopable, units of land.

We find it unnecessary to resolve the parties' dispute over when tax lot 501 was created or came into existence. First, the challenged decision does not address that issue, and the county built no record that would support a conclusion one way or the other as to how and when tax lot 501 was created. Intervenor urges us to affirm the county's decision, a decision that must otherwise be reversed, on an alternative ground not considered by the county and for which there is no evidentiary support. We decline to do so.

Second, even assuming the county had addressed that issue and concluded that tax lot 501 had not been created in 1984, and even assuming that that conclusion was legally correct and supported by the record, we disagree with intervenor's premise that ORS 215.263(7) is a potentially applicable means to recognize the "creation" of tax lot 501 in 1994. As stated earlier in this opinion, we do not believe that the legislature intended ORS 215.263(7) to "legalize" units of land that were illegally formed without requisite local government approval. However that statute may apply in other circumstances, we do not believe the legislature intended it to apply in a manner that effectively forces counties to recognize and

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> "Petitioner did not seek to divide land into parcels. It applied, in effect, to have its land, which the Kostas had already unlawfully parcelized, recognized as a parcel independent of the unpartitioned property of which it is a part. Only the concerted action of all of the owners of the original Kosta property may invoke the city's authority to partition that property under the ORS chapter 92 provisions. * * *"

The parties in *Kilian* ultimately obtained a judicial partition of the parent parcel into separate units of land. *State ex rel Kilian v. City of West Linn*, 112 Or App 549, 829 P2d 1029, *rev den* 314 Or 391 (1992). Against this background, the apparent intent of ORS 92.277 is to allow local governments the authority to remedy improperly formed lots or parcels by "creating" lots or parcels, notwithstanding that not all of the "owners of the existing legal lot or parcel" apply for that remedy.

legitimize prior illegal attempts at land division, whether such actions are viewed as actually "creating" a discrete parcel or not. We note that the legislature has provided specific means in ORS 92.177, among other remedies, by which such illegally formed units of land may be approved as legal lots or parcels. We decline to read a similar function into ORS 215.263(7).

The first assignment of error is sustained.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

These assignments of error challenge the adequacy of and the evidentiary support for the county's findings. We concluded, above, that the county's attempt to "legalize" tax lot 501 pursuant to ORS 215.263(7) is not authorized by that statute. Therefore, we see no need to address the findings and evidentiary challenges to the county's decision.

OAR 661-010-0071(1)(c) provides that LUBA must reverse a land use decision if the decision "violates a provision of applicable law and is prohibited as a matter of law." For the foregoing reasons, the county's attempt to legalize tax lot 501 under ORS 215.263(7) is prohibited as a matter of law.

The county's decision is reversed.