BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KATHLEEN WORMAN,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent.

LUBA No. 2004-080

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Ross Day, Tigard, filed the petition for review and argued on behalf of petitioner. With him on the brief was Oregonians in Action Legal Center.

Christopher Crean, Assistant County Counsel, Portland, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 08/31/2004

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer interpretation of Multnomah County Code (MCC) provisions that govern approval of certain dwellings on forestlands.

FACTS

The facts in this case are relatively straightforward. Petitioner owns a parcel that is zoned Commercial Forest Use-2. Petitioner plans to build a house on that parcel at some time in the future. Petitioner apparently plans to seek county approval for her planned dwelling under MCC 33.2240(A)(3)(c). MCC 33.2240(A)(3)(c) is similar to, but in some regards is also different from, ORS 215.750(1)(c).[1] Both MCC 33.2240(A)(3)(c) and ORS 215.750(1)(c) utilize a 160-acre square template centered on the center of a forest land property to determine whether a new dwelling may be sited on the property. The template is used to count the number of nearby existing parcels and dwellings to determine if the requisite number of existing parcels and existing dwellings are included within the template.[2]

Under the assumed facts in this case, if the 160-acre template is applied to petitioner's parcel, a nearby pre-January 1, 1993 parcel lies partially inside and partially outside the 160-acre template. Additionally, a pre-January 1, 1993 dwelling on that parcel is split by the template, so that part of that dwelling lies inside the 160-acre template area and part of that dwelling lies outside the 160-acre template area. The issue presented in this appeal is whether that dwelling should be counted toward the requisite number of existing nearby dwellings that is needed under MCC 33.2240(A)(3)(c)(2) before a dwelling can be approved on petitioner's property. The county hearings officer concluded that the dwelling that lies partially outside the template would not count and petitioner disputes that conclusion.

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[1] We set out the relevant statutory and MCC text later in this opinion.

[2] Under both the statute and the county code, only lots or parcels and dwellings that existed on January 1, 1993 may be counted.

FIRST ASSIGNMENT OF ERROR

The relevant state statute and county code provisions in this appeal are worded differently. We set out the text of the relevant statutory provisions and county code provisions below and briefly describe those provisions before turning to the parties' interpretive arguments.

A. ORS 215.750(1)(c)(A) and (B).

Under ORS 215.750(1)(c)(A) and (B), there could be no issue about how to count dwellings and parcels where a template line splits an existing dwelling and parcel.[3] Under ORS 215.750(1)(c)(A) and (B) the first inquiry is whether any part of an existing lot or parcel is within the 160-acre template.[4] If it is, and if it existed on January 1, 1993, it counts toward the requisite 11 lots or parcels. If there is a dwelling on any lot or parcel that counts under ORS 215.750(1)(c)(A), and the dwelling existed on January 1, 1993, the dwelling counts toward the requisite three dwellings under ORS 215.750(1)(c)(B), without regard to whether the dwelling is inside the 160-acre template area. This is because ORS 215.750(1)(c)(B) does not require that the entire dwelling or any part of the dwelling be within the 160-acre template area. The dwelling simply must be on a lot or parcel that is at least partially within the 160-acre template area. Under the assumed facts of this case, the split dwelling would count under ORS 215.750(1)(c)(A) and (B). The parties have no dispute about how ORS 215.750(1)(c)(A) and (B) would apply to the assumed facts.

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[3] ORS 215.750(1)(c)(A) and (B) allow a county to approve a single family dwelling in a forest zone, if:

> "(A) All or part of at least 11 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
>
> "(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels."

[4] The "[a]ll or part" language in ORS 215.750(1)(c)(A) makes it clear that if the entire lot or parcel or any part of the lot or parcel is within the 160-acre template area and the lot or parcel existed on January 1, 1993, the lot or parcel counts.

B. MCC 33.2240(A)(3)(c)

Counties may adopt land use regulations that regulate forest template dwellings more stringently than state statutes do. *Miller v. Multnomah County*, 153 Or App 30, 38-40, 956 P2d 209 (1998). As previously noted, MCC 33.2240(A)(3)(c)(1) and (2) parallel ORS 215.750(1)(c)(A) and (B), but are more strict than the statute, in the sense that MCC 33.2240(A)(3)(c)(1) and (2) *would not* allow dwellings in at least some circumstances where ORS 215.750(1)(c)(A) and (B) *would* allow a new dwelling.[5]

Comparing ORS 215.750(1)(c)(A) and MCC 33.2240(A)(3)(c)(1), there is no difference between the statute and the MCC that is material in this case. Under both the statute and the MCC, at least part of 11 other lawfully created lots that existed on January 1, 1993 must fall within the template area.

Comparing ORS 215.750(1)(c)(B) and MCC 33.2240(A)(3)(c)(2), *see* ns 3 and 5, there are two material differences. The first difference is that whereas the statute requires only three existing dwellings, the MCC requires five existing dwellings. The second material difference is that whereas under ORS 215.750(1)(c)(B) the requisite three dwellings need only be located somewhere on one of the qualifying lots or parcels, under MCC 33.2240(A)(3)(c)(2), the five dwelling must be "within the 160-acre square." To emphasize this last difference, under MCC 33.2240(A)(3)(c)(2) it is not sufficient for each of the requisite five dwellings to be on one of the qualifying 11 lots; those five dwellings must also be "within the 160-acre square." This appeal turns on the meaning of that language in MCC 33.2240(A)(3)(c)(2).

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[5] MCC 33.2240(A)(3)(c)(1) and (2) allows the county to approve a dwelling in the CFU-2 zone if:

> "1. The lot upon which the dwelling is proposed to be sited and at least all or part of 11 other lawfully created lots existed on January 1, 1993, within a 160-acre square when centered on the center of the subject tract parallel and perpendicular to section lines; and
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> "2. At least five dwellings lawfully existed on January 1, 1993, within the 160-acre square."

C. Petitioner's Argument

Petitioner first contends that because the statute and MCC 33.2240(A)(3)(c)(1) and (2) use the word "within," "this case turns on the definition of one word: 'within'." Petition for Review 4. To identify the meaning of the word "within" in the statute and the MCC, petitioner contends that it is appropriate to apply the analysis required by *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). Petitioner contends that because neither the statute nor the MCC define the word "within," it is appropriate to look at the Black's Law Dictionary definition of the word:

> "* * * because the term 'within' is legally significant (in fact, dispositive), it is appropriate to refer to Black's Dictionary to define the term. Black's Dictionary defines 'within' to mean 'into' or 'inside the limits of'. *Black's Law Dictionary*, 1852 (3rd Ed. 1933)." Petition for Review 5-6.

Based on the above-quoted definition, petitioner argues that a dwelling split by the 160-acre template protrudes "into" the template or is "inside the limits of" the template and is therefore "within" the template area.[6] Petitioner contends that because the relevant interpretive question can be resolved "at the first level of the analysis under *PGE*, we need not go any further in the *PGE* process." Petition for Review 6.

Petitioner next argues that there is no reason to assign different meanings to the word "within" in MCC 33.2240(A)(3)(c)(1) and (2). Therefore, petitioner argues, if five or more dwellings lawfully existed on January 1, 1993 and those dwellings are located inside or partially inside the 160-acre template, they are "within" the template and therefore count toward the requisite five dwellings under MCC 33.2240(A)(3)(c)(2).

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[6] *Black's Law Dictionary* (8th ed. 2004) does not include a definition of "within." When the word "within" is used as preposition, the first definition provided by Webster's Third New Int'l Dictionary 2627 (unabridged ed. 1981) is "on the inside or on the inner side," the second definition is "* * *a function word to indicate enclosure or containment[.]" The county's interpretation of "within" is consistent with these definitions.

Finally, petitioner cites our decision in *Linker v. Multnomah County*, 38 Or LUBA 84 (2000) as additional authority for her contention that a dwelling that lies partially within the 160-acre template must be counted under MCC 33.2240(A)(3)(c)(2).[7]

D. The Decision and the County's Argument

1. Text and Context

We generally agree with the contrary interpretation of MCC 33.2240(A)(3)(c)(2) that led the county to conclude in its decision that only dwellings that are located entirely inside the 160-acre template are to be counted under MCC 33.2240(A)(3)(c)(2). Petitioner's exclusive focus on the word "within" largely ignores both the statutory and MCC contexts in which that word appears. As we have already noted, under both ORS 215.750(1)(c)(A) and MCC 33.2240(A)(3)(c)(1), whether the word "within," by itself, means "entirely inside" or "at least partially inside" is not particularly important. Under both ORS 215.750(1)(c)(A) and MCC 33.2240(A)(3)(c)(1) the "all or part of" modifying language resolves any possible ambiguity and makes it clear that under both the statute and the MCC a lot counts if the entire lot is inside the template or if part of the lot is inside the template area. That modifying language suggests that petitioner's dictionary definition of the word was not intended in ORS 215.750(1)(c)(A) or MCC 33.2240(A)(3)(c)(1), since the "all or part of" qualifying language would not be necessary under petitioner's understanding of the meaning of the word "within."

Similarly, the use of the word "within" in MCC 33.2240(A)(3)(c)(2) must be viewed in context. The "all or part of" modifying language that is present in MCC 33.2240(A)(3)(c)(1) is not present in MCC 33.2240(A)(3)(c)(2). That supports the county's view that the meaning of the word "within" in MCC 33.2240(A)(3)(c)(2) is not the dictionary definition cited by petitioner but that a more strict meaning is intended, which requires that the entire dwelling must be located within the 160-acre template rather than partially inside and partially outside the template area. The county

[7] We discuss our decision in *Linker* below.

argues its interpretation of MCC 33.2240(A)(3)(c)(2) to this effect is supported, both textually and contextually. We agree with the county.

2. *Linker v. Multnomah County*

Our decision in *Linker v. Multnomah County* required that we evaluate the merits of various methods of locating the center of a flag shaped parcel so that a template could be placed on that center as required by state statute and the county's code. The relevant county template provisions in *Linker* were identical to MCC 33.2240(A)(3)(c)(1) and (2). After we described the applicant's proposed method of finding the center of the irregularly shaped parcel in that case we stated:

> "If the center [of the parcel] is located in this manner, five dwellings are located within the 160-acre square template, including one that straddles the north template line." 38 Or LUBA at 88.

The county hearings officer concluded that the above language was *dicta* and of no precedential value in determining the meaning of the word "within" in MCC 33.2240(A)(3)(c)(2):

> "LUBA was not asked to determine whether a dwelling straddling the line would be included within the 160-acre square template, nor was LUBA asked to specifically interpret the term 'within' in the context of MCC 33.2240(A)(3)(c).
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> "* * * * *
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> "After carefully reviewing the decision LUBA made in *Linker v. Multnomah* County * * *, I do not believe that LUBA decided the question at issue in the instant matter. Accordingly, I do not find that *Linker v. Multnomah County* has precedential value in this case." Record 12.

In *Linker*, no one challenged the applicant's contention that if his method of locating the center of the parcel in that case were selected, the requisite five existing dwellings were located within the template area.[8] Because there was no dispute about whether the split dwelling should be

[8] At most the hearings officer overstates the lack of precedential value that should be attributed to *Linker*. The applicant's proposed method of locating the center point was the *only* method that arguably resulted in five existing houses being located within the template area, and only did so if the split house counted. The decision challenged in this appeal states that the county planning director "indicated that the County has always read the Code to require [that] the dwellings be entirely within the template * * *." Record 12. If that were the case, the

counted, LUBA simply assumed that it would count. If *Linker* has any precedential value in support of petitioner's interpretive argument in this case, it is of extremely limited precedential value. Given the strong contextual argument in favor of the interpretation of the word "within" in MCC 33.2240(A)(3)(c)(2) that the county ultimately adopted in this case, the hearings officer did not err in refusing to give any precedential value to the cited language from our decision in *Linker*.

Finally, we briefly note that both petitioner and the county argue that their interpretation is more consistent with the sound planning policies that underlie the statutory and MCC provisions for forest template dwellings. We do not see that either interpretation has a particularly strong claim in that regard. The county's interpretation of MCC 33.2240(A)(3)(c)(2) may require that the county deny additional forest template dwellings in a limited number of circumstances where dwellings would otherwise be allowed under ORS 215.750(1)(c). That interpretation may reinforce the general disfavor with which dwellings in forest zones are viewed, but it also has the effect of limiting the legislature's apparent intent in adopting the forest template provisions to favor concentrating any new residential development on forest lands in areas where there is existing parcelization and where dwellings already exist. However, as we have already noted, the issue of whether the county may regulate forest template dwellings more stringently than they are regulated under the statute has been decided in the county's favor. *Miller v. Multnomah County*, 153 Or App at 38-39; *Yontz v. Multnomah County*, 34 Or LUBA 367, 370, *aff'd* 155 Or App 644, 967 P2d 532 (1998), *rev den* 328 Or 247 (1999); *Evans v. Multnomah County*, 33 Or LUBA 555, 564-65 (1997). The county's interpretation of the meaning of the word "within" in MCC 33.2240(A)(3)(c)(2) is not likely to have any more of a limiting effect than the county's legislative decision to require five rather than three dwellings and the county's legislative decision not to count dwellings on qualifying lots if those dwellings are outside the template area.

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applicant in *Linker* would not have been entitled to approval of a template dwelling, even if the county had accepted his proposed method of locating the center of the parcel. A lot of time and energy was wasted arguing the finer points of plane geometry if the applicant's method of locating the center would not result in five dwellings being located within the template area.

The county's decision is affirmed.