

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

3
4 PAMELA J. RANDALL
5 and JOHN F. COOK,
6 *Petitioners,*

7
8 vs.

9
10 KLAMATH COUNTY,
11 *Respondent,*

12
13 and

14
15 WILLIAM J. ARBLASTER,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2004-158

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Klamath County.

24
25 Pamela J. Randall and John F. Cook, Merrill, filed a petition for review.

26
27 No appearance by Klamath County.

28
29 William J. Arblaster, Denver, Colorado, represented himself.

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

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34 REMANDED 12/22/2004

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

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NATURE OF THE DECISION

Petitioners appeal a county decision that grants conditional use approval to construct two dwellings on Forestry zoned parcels.

MOTION TO INTERVENE

William J. Arblaster moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

The applicants in this matter are the prospective purchasers of two, adjacent 19.55-acre parcels in the county’s Forestry zone. Intervenor has owned those lots for approximately 30 years. Petitioners are nearby property owners.

The county’s Forestry zone was adopted to implement Statewide Planning Goal 4 (Forest Lands). ORS 215.700 and 215.705 allow what are referred to as “Lot or Parcel of Record Dwellings” in farm and forest zones. The county has adopted local legislation, consistent with these statutory authorities, that allows parcel of record dwellings. Klamath County Land Development Code (LDC) 55.070.¹ One of the statutory and LDC requirements for a parcel of record dwelling is that the property owner must have acquired the property before January 1, 1985. Intervenor satisfies that requirement.

The county hearings officer issued a decision that authorizes construction of a dwelling on each of the 19.55-acre parcels, subject to a number of conditions. That decision was appealed to the board of county commissioners. The board of county commissioners affirmed the hearings officer’s decision. This appeal followed.

¹ The LDC standards that petitioners cite duplicate the statutory standards and, in some instances, impose requirements that go beyond the statutory standards. We set out the relevant text of LDC 55.070 and other LDC standards that apply to forest dwellings later in this opinion.

1 **FIRST ASSIGNMENT OF ERROR**

2 LDC 11.030 provides the following definition of the term “tract:”

3 “One or more contiguous lots or parcels in the same ownership. Contiguous
4 means connected in such a manner as to form a single block of land.”²

5 LDC 55.070(B) sets out the review criteria for lot of record dwellings in the Forestry zone
6 and LDC 55.070(C) sets out approval conditions. As relevant, LDC 55.070(B) provides:

7 “REVIEW CRITERIA - In addition to the criteria enumerated in [LDC]
8 55.060, all applications for Lot of Record dwellings will be reviewed against
9 the following criteria. The County may allow the establishment of a single-
10 family dwelling on a lot or parcel in a Forestry zone if the following criteria
11 are met:

12 “* * *

13 “3. The tract on which the proposed dwelling will be sited does not
14 already contain a dwelling, and *no other dwellings have already been*
15 *permitted for lots or parcels in that tract[.]*” (Emphasis added.)

16 As relevant, LDC 55.070(C)(1) provides:

17 “If the lot or parcel on which the proposed dwelling will be sited is part of a
18 tract, *the remaining lots or parcels in the tract are consolidated into a single*
19 *lot or parcel.*” (Emphasis added.)

20 LDC 55.070(B), quoted above, requires that an application for a dwelling in a Forestry zone
21 comply with the criteria in LDC 55.060. As relevant, LDC 55.060(B) requires:

22 “*The tract on which the proposed dwelling will be sited does not contain a*
23 *dwelling and no other dwelling has been approved for other lots or parcels in*
24 *the tract, * * **. A tract is defined as one or more contiguous lots or parcels in
25 the same ownership. Contiguous means connected in such a manner as to form
26 a single block of land[.]” (Emphasis added.)

27 Citing LDC 55.070(B)(3), 55.070(B)(C)(1) and 55.060(B), petitioners contend that
28 intervenor’s two 19.55-acre *parcels* constitute a single *tract*, and that under the cited LDC
29 provisions only one dwelling may be authorized on that tract. Petitioners are correct. Once

² ORS 215.010(2) provides a nearly identical statutory definition of the term.

1 the county authorized a dwelling on one of the 19.55-acre parcels, approval of a second
2 dwelling for the remaining 19.55-acre parcel was prohibited under these LDC provisions and
3 the statutes they implement.

4 Petitioners' first assignment of error is sustained.³

5 **SECOND ASSIGNMENT OF ERROR**

6 In their second assignment of error, petitioners contend that the county failed to
7 demonstrate that LDC road access requirements are satisfied. As relevant, LDC 55.060(C)
8 requires that:

9 "Approval of the dwelling will not exceed the facilities and service
10 capabilities of the area. The proposed dwelling site:

11 "* * * * *

12 "2. will be adequately served by road access. Roads must meet the fire
13 protection standards of Article 69. * * * [.]"

14 LDC 55.070(B)(5) requires that a lot of record dwelling must be "located within 1,500 feet of
15 a public road * * * that provides or will provide access to the subject tract." LDC
16 55.070(B)(5) also requires that the access road must "be maintained and either paved or
17 surfaced with rock." Petitioners contend that the subject parcels are located "approximately
18 4000 feet beyond the end of a maintained gravel road." Petition for Review 5. Petitioners
19 argue the county failed to demonstrate that the requirements of LDC 55.060(C) and LDC
20 55.070(B)(5) are met.

21 Petitioners are correct. Neither the hearings officer's decision nor the board of
22 country commissioners' decision includes any findings that address the applicable approval

³ Our resolution of the first assignment of error arguably requires that the county's decision be reversed. However there was a proposal during the board of county commissioners' deliberations that the application be approved but limited to a single dwelling. The LDC provisions cited in the first assignment of error would not appear to preclude approval of one dwelling, if the LDC requirements that petitioners cite in their remaining assignments of error are satisfied. We therefore address those assignments of error as well.

1 criteria. Because there are no findings addressing these criteria, we have no way of knowing
2 why the county believes the disputed application satisfies these criteria.

3 The second assignment of error is sustained.

4 **THIRD ASSIGNMENT OF ERROR**

5 LDC 55.060(C)(3) requires that “the parcel upon which the proposed dwelling is to be
6 located shall be within a rural fire protection district or the proposed resident must provide
7 proof of a contract for residential fire protection.” Petitioners contend that they offered
8 evidence that the requirement of LDC 55.060(C) cannot be met, and the board of county
9 commissioners refused to consider that evidence.

10 Although petitioners do not assign error to the board of county commissioners’
11 decision to reject their offered evidence on this issue, petitioners do argue that the county
12 adopted no findings addressing this requirement and that there is no evidence in the record
13 that this criterion is or can be satisfied.

14 Without any findings addressing LDC 55.060(C) or any assistance from the county or
15 intervenor in locating evidence that might establish that the requirement of LDC 55.060(C) is
16 met, we must sustain the third assignment of error.

17 **FOURTH ASSIGNMENT OF ERROR**

18 LDC 55.060(F) requires that the county find that “[a]pproval of the dwelling will not
19 materially alter the stability of the overall land use pattern in the area when considering the
20 cumulative impact of dwellings on other lots or parcels in the area[.]”⁴

⁴ Petitioners also cite “Section 44.003 of the KC Plan.” Petition for Review 14. There is no Section 44.003 in our copy of the Klamath County Comprehensive Plan or in the LDC. If petitioners meant to cite LDC 44.030(C), they inaccurately quote that provision and make no attempt to explain why that general conditional use permit provision applies here. LDC 55.050 provides that for conditional uses in the Forestry zone, the criteria set out in that section apply in place of the general conditional use criteria at 44.030. We do not consider petitioners’ arguments concerning “Section 44.003 of the KC Plan” further.

1 As petitioners correctly point out, the county adopted no findings addressing LDC
2 55.060(F). We therefore have no way of knowing why the county believes the application
3 satisfies that criterion. The fourth assignment of error is sustained.

4 **FIFTH ASSIGNMENT OF ERROR**

5 Petitioners’ fifth assignment of error is not clear. We quote it below:

6 “The county erred by allowing transfer of a CUP for ‘grandfathered’,
7 nonconforming Lots of Record [as] a condition of sale.” Petition for Review
8 15.

9 We do not understand petitioners’ assignment of error. Looking at the assignment of
10 error itself, it appears that petitioners are challenging county authorization of an action that is
11 not anticipated—future transfer of the conditional use permit. The applicants for the
12 conditional use approval in this case are the potential purchasers and the conditional use
13 approval was granted to those potential purchasers. As far as we can tell, no “transfer” of the
14 conditional use permits is anticipated, and the county certainly did not authorize transfer of
15 the disputed conditional use permit.

16 The arguments that follow petitioners’ fifth assignment of error seem to pursue
17 another argument—that a lot of record “ceases to be a Lot of Record when [a deed
18 transferring the Lot of Record] is recorded * * *.” Petition for Review 15. That argument is
19 no doubt correct, but petitioners do not develop that argument into a cognizable basis for
20 reversal or remand of the challenged decision. We could speculate that petitioners believe
21 that a person who qualifies for a lot of record dwelling should not be permitted to take
22 actions that could be viewed as having the effect of transferring that right to a purchaser who
23 would not otherwise qualify for a lot of record dwelling. However, petitioners simply do not
24 adequately develop that argument, and there is at least some authority that seems inconsistent
25 with such a broadly stated position. ORS 215.705.⁵

⁵ ORS 215.705(7) provides:

1 Because petitioners' fifth assignment of error is not clearly stated and petitioners do
2 not adequately develop their arguments under the fifth assignment of error, the assignment of
3 error is denied.

4 The county's decision is remanded.

“When a local government approves an application for a single-family dwelling under the provisions of this section, the application may be transferred by a person who has qualified under this section to any other person after the effective date of the land use decision.”