BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MERILYN B. REEVES and JIM LUDWICK,
Petitioners,

and

FRIENDS OF YAMHILL COUNTY,
Intervenor-Petitioner,

vs.

YAMHILL COUNTY,
Respondent,

and

LINDA SEILER and CHARMA VAAGE,
Intervenor-Respondents.

LUBA No. 2006-081 and 2006-082

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Marianne Dugan, Eugene, filed the petition for review and argued on behalf of petitioners and intervenor-petitioner.

Fredric Sanai, Assistant County Counsel, McMinnville, filed a joint response brief on behalf of respondent. With him on the brief were Catherine A. Wright and Drabkin, Tankersley and Wright, LLC.

Catherine A. Wright, McMinnville, filed a joint brief on behalf of intervenor-respondents. With her on the brief were Fredric Sanai and Drabkin, Tankersley and Wright, LLC. Thomas C. Tankersley, McMinnville, argued on behalf of intervenor-respondents.

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

REVERSED 11/13/2006

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

Petitioners appeal two county decisions that approve forest template dwellings.

FACTS

The county approved what are referred to as forest template dwellings for two lots located in the county's Commercial Forestry zone.[1] The history of the creation of the two lots and other nearby lots that were a factor in the county's decision to approve the forest template dwellings is somewhat complicated. But the facts necessary to understand the county's decisions and the parties' arguments and to resolve this case are relatively straightforward.

In approving the two forest template dwellings, the county was required to apply "a 160-acre template to each of the lots. Under the relevant statute, the county was then required to count the number of "lots or parcels," which "existed on January 1, 1993," that lie within that 160-acre template. ORS 215.750(1)(c).[2] If there are at least 11 such lots or parcels within the 160-acre template, in addition to the subject parcel, and at least three of

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[1] The challenged decisions concern similarly sized and situated lots. The challenged decisions are nearly identical and are supported by separate but nearly identical records. The parties make no effort to distinguish between the two lots or decisions in their legal arguments. As far as we can tell the parties are in agreement that if we sustain petitioners' assignment of error both county decisions should be reversed, and if we reject petitioners' assignment of error both decisions should be affirmed.

[2] As relevant, ORS 215.750(1) provides:

> "In western Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if [the applicable forest template dwelling standard is met]."

The applicable forest template dwelling standard is set out at ORS 215.750(1)(c) and requires that the county make the following findings:

> "(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."

those other 11 lots or parcels were improved with dwellings in 1993, the subject lots qualify for a forest template dwelling. ORS 215.750(1)(c)(A) and (B).

The two lots for which the forest template dwellings were approved and at least some of the required "11 lots or parcels" that were counted by the county to approve the disputed forest template dwellings are part of what the parties refer to as Eagle Point Subdivision or Eagle Point Ranch. Eagle Point Ranch was the subject of the Oregon Supreme Court's decision in *Yamhill County v. Ludwick*, 294 Or 778, 663 P2d 398 (1983) (*Ludwick*). As the Supreme Court explained in *Ludwick*, it was undisputed that the lots in Eagle Point Ranch "were sold in 1972" without the benefit of final subdivision approval by the county and the subdivider thus "violated former ORS 92.016" in transferring those lots.[3] 294 Or at 786. For purposes of this opinion we will refer to these lots as unlawfully created lots or unlawful lots. The legal question presented in this consolidated appeal is whether the county may count unlawfully created lots in approving a forest template dwelling. The county concluded that it may, and petitioners assign error to that finding.

ASSIGNMENT OF ERROR

A. *Maxwell v. Lane County*

Citing the Oregon Court of Appeals' decision in *McKay Creek Valley Assn v. Washington County*, 118 Or App 543, 848 P2d 624, *rev den* 317 Or 272, 858 P2d 1314 (1993), LUBA's decision in *Maxwell v. Lane County*, 39 Or LUBA 556 (2001), and the lack of any express requirement in ORS 215.750(1) that the lots or parcels referenced in that statute must be lawfully created, the county concluded it did not have to be concerned with whether the relevant "lots or parcels" were *lawfully* created.

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[3] At the time the disputed lots in *Ludwick* were created, ORS 92.016 provided:

> "No person shall dispose of, transfer, sell or agree, offer or negotiate to sell any lot or parcel in any subdivision or division of land with respect to which approval is required by any ordinance or regulation adopted under ORS 92.046 and 92.048 until such approval is obtained."

As all parties now recognize, the county's reliance on *McKay Creek* and LUBA's decision in *Maxwell* was misplaced, because LUBA's decision in *Maxwell* was reversed. *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), *adhered to as modified* 179 Or App 409, 40 P3d 532 (2002). In reversing LUBA's decision in *Maxwell*, the Court of Appeals significantly limited the holding in *McKay Creek*.

Although *Maxwell* was also a factually complicated case, the central legal question in *Maxwell* was relatively straightforward. Under a county comprehensive plan policy (Policy 11), whether a request to rezone property from a zone that imposed a 10-acre minimum parcel size to a zone that imposed a 5-acre minimum parcel size depended on whether the average parcel size in the exception area that included the property exceeded 7.5 acres per parcel. If it did, under Policy 11, the requested rezoning could be approved. But a threshold question arose regarding whether, in computing average parcel size, the county was required to ensure that its computation of average parcel size was based only on *legally created* parcels. The Court of Appeals described LUBA's answer to that question as follows:

> "LUBA * * * determined, consistently with *McKay Creek* * * *, that where the applicable county ordinance relating to rezoning—the county's Policy 11—'does not expressly require determination of the legal status of tax lots 905A and 905B, that question need not be considered in connection with the county's proceedings under Policy 11.' *Maxwell*, 39 Or LUBA at 565-69. * * *" *Maxwell*, 178 Or App at 215.

On appeal to the Court of Appeals, the issue was whether LUBA's answer to the above question was correct.

The Court of Appeals' holding in *Maxwell* represents a clarification of the legal principle that underlies three appellate court decisions: (1) *Ludwick*, (2) *Marshall v. City of Yachats*, 158 Or App 151, 973 P2d 374, *rev den* 328 Or 594, 987 P2d 515 (1999) and (3) *McKay Creek*. The Court of Appeals' holding and reasoning is set out below:

> "Reduced to their essence, the [three] cases establish that a local government entity must determine the legal status of a lot or parcel 'in connection with' a current proceeding involving the parcel if required to do so by 'applicable legislation.' *See McKay Creek*, 118 Or App at 548. That much is clear, and

> we do not revisit that basic holding. Nevertheless, we believe that the cases lack clarity as to two important subsidiary principles. First, although the Supreme Court in *Ludwick* based its decision on the fact that the ordinance in that case expressly required a legal lot, and we in *McKay Creek* and *Marshall* pointed to the *absence* of an express requirement, *Ludwick* did not hold that an inquiry into the legality of a lot can be triggered *only* by an express requirement to that effect.
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> "Second, and equally significantly, none of the described cases provides a satisfactory answer to the question of what legislation properly is deemed 'applicable.' Again, in *Ludwick*, the particular county ordinance governing the particular proceeding at issue expressly required consideration of the parcel's legal status; accordingly, the court was not called upon to look further afield. In *McKay Creek*, although other local ordinances may have (and, for the dissent, did) shed light on the question, we apparently based our analysis entirely on the ordinance governing dwelling permit proceedings. *See McKay Creek*, 118 Or App at 545. In *Marshall*, relying on *McKay Creek*, we also addressed only the ordinance governing the particular proceeding at issue. *Marshall*, 158 Or App at 153, 157.
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> "Our (at least implicitly) narrow definition and identification of 'applicable' legislation in *McKay Creek* antedated *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993). * * * Given *PGE*, it is unremarkable that, in determining whether a local government must consider the legal status of a parcel 'in connection with' a current proceeding involving the parcel, the local government must consider not only the particular ordinance that governs the current proceeding, but also must identify and construe the ordinance in light of any other relevant, applicable legislative enactment. Also consistently with *PGE*, even if the text of a local ordinance does not explicitly and unambiguously require the local government to consider the parcel's legal status, such a requirement may, if sufficiently supported, be derived from the 'text in context.'" 178 Or App at 220-22 (footnote omitted; emphases in original).

Summarizing the Court of Appeals' holding in *Maxwell*, if the directly applicable legislation expressly requires that the analysis of lots or parcels must be limited to an analysis of *legally created* lots or parcels, then it easily follows that only lawfully created lots or parcels can be considered. However, even if the directly applicable legislation does not expressly require that lots or parcels have been legally created, that requirement may be found in related enactments and the legislative context in which the directly applicable legislation appears.

Here, as in *Maxwell*, the question is whether the "applicable legislation" requires that the county limit its analysis of "lots or parcels" under ORS 215.750(1) to lots or parcels that were lawfully established. The Court of Appeals' decision in *Maxwell* sets out the analysis that we must apply to answer that question. Turning first to ORS 215.750(1), as the county correctly noted, that statute does not expressly require that the referenced "lots or parcels" must have been lawfully created. *See* n 2.

We next consider the relevant statutory definitions of the key operative terms in ORS 215.750(1), "lots or parcels," to determine whether those definitions lead to a conclusion that the "lots or parcels" referenced in ORS 215.750 must be lawfully created lots or parcels. The statutory definition of "parcel" is provided by ORS 215.010(1).[4] Under ORS 215.010(1)(a)(A), which references ORS 92.010, parcels are created when an existing unit of land is divided "to create two or three" units of land within a calendar year.[5] However, ORS

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[4] As relevant, ORS 215.010 provides:

> "As used in [ORS chapter 215]:
>
> "(1) The terms defined in ORS 92.010 shall have the meanings given therein, except that 'parcel':
>
> "(a) Includes a unit of land created:
>
> "(A) By partitioning land as defined in ORS 92.010;
>
> "(B) In compliance with all applicable planning, zoning and partitioning ordinances and regulations; or
>
> "(C) By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances or regulations.
>
> "(b) Does not include a unit of land created solely to establish a separate tax account."

[5] The relevant definitions in ORS 92.010 that have some bearing on the meaning of the term "parcel" are set out below:

> "(5) 'Parcel' means a single unit of land that is created by a partition of land.
>
> "(6) 'Partition' means either an act of partitioning land or an area or tract of land partitioned.

215.010(1)(a)(B) and (C) go further. If there are "applicable planning, zoning or partitioning ordinances or regulations," the partition must comply with those laws. Simply stated, under the ORS 215.010(1), when the word "parcel" is used in ORS chapter 215, the parcel must be a lawfully created parcel, in the sense the parcel's date of creation either predated any applicable laws governing partitions or the parcel was created in compliance with those laws.[6]

Intervenor-respondents (intervenors) contend that the two "lots" where the disputed forest template dwelling would be sited and the relevant eleven "lots" that the county identified in approving each of the disputed forest template dwellings are "lots" rather than "parcels." For purposes of this opinion, we accept that argument and turn to the relevant statutes. While ORS 215.010(1) supplements the ORS 92.010(5) definition of "parcel," it does not supplement the ORS 92.010(3) definition of "lot." Under ORS 92.010(3) a "lot" is "a single unit of land that created by a subdivision of land." Under ORS 92.010(16), "'[s]ubdivision' means either an act of subdividing land or an area or a tract of land subdivided." Under ORS 92.010(15), "'[s]ubdivide land' means to divide land to create four or more lots within a calendar year." When those definitions are read together with the parallel definitions of "parcel," "partition" and "partition land" in ORS 92.010(5), (6) and (7), *see* n 5, whether a division of land creates "parcels" or "lots" depends the number units of land that one or more divisions of land in a single year produce. If the division or divisions produce four or more units of land, they are lots; if they produce three of fewer, they are parcels.

> "(7) 'Partition land' means to divide land to create two or three parcels of land within a calendar year[.]"

[6] Intervenor suggests that the way ORS 215.010(1) is worded it identifies what a parcel "includes" but does not foreclose the possibility that there may be other ways to create parcels. We understand intervenor to suggest that even though ORS 215.010(1) expressly provides that the term parcel *includes* lawfully created parcels, the listing does not purport to be exhaustive and ORS 215.010(1) could also *include* unlawfully created parcels. We reject the suggestion.

The 67 Eagle Point Ranch lots apparently were created by recording separate deeds for each of the 67 lots. As we noted earlier, the developer of Eagle Point Ranch did so without first securing the county final subdivision plat approval that was required at the time and without recording a subdivision plat.[7] For lack of a better way to describe the 67 Eagle Point Ranch lots, we will refer to them as lots, since those lots were not created three at a time in different years.

We now turn to intervenors' key contention. Because neither ORS 215.750(1) nor the ORS 92.010(3) definition of "lot" expressly require that a lot must have been lawfully created, intervenors contend the county did not err by counting the admittedly unlawfully created Eagle Point Ranch lots in approving the disputed forest template dwellings. Under intervenors' interpretation of the statutes, the county would be obligated to ensure than any *parcels* it counted in approving a forest template dwelling are lawfully created parcels, but it need not ensure that any *lots* were lawfully created lots. Intervenors reach this interpretive conclusion because while ORS 215.010(1) clearly requires that any parcels be lawfully created, the definitions in ORS 92.010(3), (15) and (16) do not clearly require that lots be lawfully created lots, in the sense that any required approvals are secured before deeds are prepared and recorded to convey new lots.

We are not sure why the legislature adopted ORS 215.010(1) to make it clear that when ORS chapter 215 refers to parcels, they must be lawfully created parcels but failed to make it clear that lots must also be lawfully created lots. Whatever the reason for the legislature's failure to specifically address lots as well, the legislature's action in adopting ORS 215.010(1)(a) is relevant context. Intervenors' reading of the statutes is simply

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[7] ORS 92.018(1) provides the following remedy to buyers of improperly created lots:

> "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."

implausible. There is absolutely no reason to believe the legislature adopted ORS 215.010(1)(a) to make it clear that, in ORS chapter 215, while *parcels* must be lawfully created parcels, *lots* need not be lawfully created lots.

We believe it is far more likely that the legislature for some reason did not believe a similar clarification was needed to make it clear that in ORS chapter 215, a reference to lots does not include unlawfully created lots. That may be because persons who create subdivisions generally seek required approvals for subdivision plats and record those plats before they begin transferring lots. ORS 92.012 provides that "[n]o land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.190. ORS 92.025(1) provides that "[a] person may not sell a lot in a subdivision * * * until the plat of the subdivision * * * has been acknowledged and recorded with the recording officer of the county in which the lot or parcel is situated." And as we have already noted, ORS 92.018(1) provides a legal remedy to buyers of lots that were created without required city or county approval. *See* n 7. Applying the contextual analysis that is required by *Maxwell*, we conclude that even though ORS 215.750(1) does not expressly state that the references in that statute to lots are limited to lawfully created lots, and even though the relevant definitions in ORS 92.010 do not expressly require that a lot must be a lawfully created lot, if those statutes are read in context with ORS 92.012, 92.018(1), 92.025(1) and ORS 215.010(1)(a), it is sufficiently clear that when the legislature used the term "lot" in ORS 215.750(1) it did not mean to include unlawfully created lots. We reject the county's interpretation of the statute to the contrary.

The county's decision and the parties' arguments assign a fair amount of significance to the following definition in Yamhill County Zoning Ordinance § 202:

> "PARCEL (or LOT): A unit of land created by an authorized subdivision or partitioning of land *or that was created by deed or land sale contract on or prior to October 3, 1975*. A lot or parcel does not include a unit of land created on or after October 4, 1975 solely to establish a separate tax account or to obtain financing for construction or other purposes." (Emphasis added.)

Even if we assume that the emphasized language in the above county definition can be interpreted to allow the county to recognize lots that were unlawfully created by deed or land sale contract before 1975 for some purposes under local law, the county may not recognize such lots for purposes of approving forest template dwellings. The county's authority to approve forest template dwellings derives from ORS 215.750(1). In exercising the authority granted by ORS 215.750(1), the county may not apply a county definition of "PARCEL (or LOT)" to recognize lots that could not be recognized under ORS 215.750(1). The county may not set a lower standard for approving forest template dwellings under county legislation than the standard that is set by ORS 215.750. *See Kenagy v. Benton County*, 112 Or App 17, 20 n 2; 826 P2d 1047 (1992) ("Counties may enact more restrictive criteria than" the statutes impose in EFU zones, but "they may not apply criteria that are inconsistent with or less restrictive than the statutory standards.")

Intervenors also assign significance to the fact that in some cases statutes and county legislation expressly require that lots or parcels must have been lawfully created and in the present case neither the relevant statutes nor the corresponding county legislation expressly impose that requirement.[8] Intervenors argue this shows the county and legislature know how to require that lots be lawfully created lots when they want to. A similar argument was presented and rejected in *Maxwell*. *See* 178 Or App at 227-28 (the fact that the county code defines and uses the term "legal lot" does not mean that the term "parcel" in the code must be interpreted to include unlawfully created parcels). We reject the argument here for the same reason. We have already concluded that the term "lot" in ORS 215.750(1), when viewed in context with the definitions in ORS 92.010 and 215.010(1) and other contextual statutes,

[8] For example, ORS 215.705 authorizes what are referred to as lot or parcel of record dwellings, and ORS 215.705(1)(a) specifically requires that "[t]he lot or parcel on which the dwelling will be sited was lawfully created[.]"

encompasses only lawfully created lots. The fact that some other statutes expressly require that lots must be "lawfully created" does not alter that result.

Petitioners' assignment of error is sustained.

We do not understand any party to argue that, if the analysis required by ORS 215.750(1) must be limited to lawfully created lots, the subject lots were lawfully created or that the requisite number of lawfully created lots are present to allow approval of a forest template dwelling under the statute. Accordingly, the county's decisions are reversed.