BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SUSAN LENOX,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

MARIE MARSHALL GARSJO,
Intervenor-Respondent.

LUBA No. 2007-168

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Roger Lee Clark, Eugene, filed the petition for review on behalf of petitioner.

No appearance by Jackson County.

Mark S. Bartholomew, Medford, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Hornecker, Cowling, Hassen & Heysell, LLP.

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

AFFIRMED 01/11/2008

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the hearings officer approving an application for an ownership of record dwelling.

MOTION TO INTERVENE

Marie Marshall Garsjo moves to intervene on the side of respondent in the appeal. There is no opposition to the motion and it is granted.

FACTS

The present appeal is an appeal of the hearings officer's decision on remand in *Lenox v. Jackson County*, 54 Or LUBA 272 (2007) (*Lenox I*). In *Lenox I*, we remanded the hearings officer's decision approving an ownership of record dwelling on the subject property (Tax Lot 700), because his conclusion that it was feasible that the proposed driveway accessing Tax Lot 700 could be constructed in a way that complies with the provisions of Jackson County Land Development Ordinance (LDO) 9.5.4(A)(4) was not supported by substantial evidence in the record.[1] In particular, we found that the evidence that the applicant had submitted from Jensen, a registered professional engineer, regarding the feasibility of constructing the proposed driveway had been rebutted by evidence submitted on behalf of petitioner from Hammond, also an engineer. As rebutted, we found a reasonable person would no longer rely on Jensen's testimony to reach the conclusion the hearings officer reached.[2]

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[1] LDO 9.5.4(A)(4) provides:

> "Maximum finished grade can be no greater than 15 percent. The grade may increase to 18 percent for intervals of up to 100 feet provided there are no more than three 100 foot sections of over 15 percent grade per 1,000 feet. The finished grade may not exceed 15 percent on curves with a centerline radius of less than 150 feet. The approach from a public road or private road cannot exceed 10 percent for a distance of 40 feet."

[2] We held in relevant part:

The county held a hearing on remand, and intervenor and petitioner presented additional evidence regarding whether it is feasible to construct the driveway in compliance with LDO 9.5.4(A)(4). The hearings officer again found that it was feasible that the driveway could be constructed in compliance with the requirements of LDO 9.5.4(A)(4) and approved the application. That finding is not challenged in the present appeal.

During the remand hearing, petitioner also raised an issue regarding intervenor's ownership of the parcel adjoining Tax Lot 700 (Tax Lot 600). Intervenor acquired Tax Lot 600 by devise sometime after she filed the original application for an ownership of record dwelling on Tax Lot 700. Intervenor subsequently transferred ownership of Tax Lot 600 to intervenor and her husband jointly. Record 14. During the hearing on remand, petitioner argued that intervenor's ownership of Tax Lot 600 meant that the two parcels must be considered together as a "tract," and that the county must require that restrictive language be placed in the legal description of Tax Lot 600 as a condition of approval, pursuant to LDO 4.3.6(D)(9) and (10).

The hearings officer found that he was not required to consider the issue because the only issue on which the decision was remanded concerned the access requirements of LDO 9.5.4(A)(4). In the alternative, the hearings officer also found that Tax Lot 600 and Tax Lot

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> "The contrasting expert opinions of Jensen and Hammond are the principal sources of evidence regarding the feasibility of compliance with LDO 9.5.4(A)(4), and the only expert testimony properly considered as such by the hearings officer. We agree with petitioner that, considering the record as a whole, a reasonable decision maker would not have relied upon Jensen's letter to conclude that it is feasible to construct an access road that complies with LDO 9.5.4(A)(4). There appears to be no dispute that the original access road proposed on the site plan would not conform to LDO 9.5.4(A)(4). Jensen's letter asserts but does not explain why the alternate alignment suggested in his letter (starting at the southeastern corner, curving southwest and then north) is likely to meet the applicable grade standards. Hammond's letter evaluates an apparently similar alignment that clearly does not meet those standards. Hammond opines, based on the alternatives he examined, that it is not feasible to construct access that complies with the applicable grade standards, given the topography of the site. While there may be alternative alignments that neither Hammond nor Jensen evaluated that are likely to meet the grade standards, perhaps one of the alignments suggested in Moore's letter, the evidence properly considered by the hearings officer is not sufficient to establish that. * * *" *Lenox I* at 279-80.

700 were not in common ownership and therefore were not a "tract." The hearings officer approved the application, and this appeal followed.

ASSIGNMENT OF ERROR

In her assignment of error, petitioner challenges the hearings officer's decision that the issue raised by petitioner regarding intervenor's ownership of Tax Lot 600 was beyond the required scope of the proceedings on remand. Petitioner argues that because intervenor's ownership interest in Tax Lot 600 first occurred while the appeal to LUBA in *Lenox I* was pending, she could not have raised the issue below and should not be prevented from raising it during the proceedings on remand. Petitioner also argues that the notice of the remand hearing stated that testimony, arguments and evidence must be directed toward applicable approval criteria, and that neither state law nor LDO 2.7.6(E)(6) limits the testimony, arguments, or evidence that may be introduced on remand. Intervenor responds that the hearings officer did not err in limiting the scope of the remand hearing to the single basis for LUBA's remand of the decision in *Lenox I*, compliance with LDO 9.5.4(A)(4), and that the hearings officer was not required to expand the scope of the remand hearing to address petitioner's arguments regarding ownership of Tax Lot 600.[3]

We need not decide whether the hearings officer was correct about the scope of review on remand, because we agree with intervenor that the hearings officer correctly concluded that Tax Lots 600 and 700 are not a "tract," as defined in ORS 215.010(2) and OAR 660-033-0020.[4] Petitioner argues that Tax Lots 600 and 700 are a "tract" because intervenor owns an interest in both parcels. Consequently, petitioner argues, LDO

[3] The LDO provision cited by petitioner in the petition for review, LDO 2.7.6(E)(6), sets forth the requirements for notice of a quasi-judicial hearing. It does not contain any reference to the conduct of remand hearings or the issues that may be raised on remand.

[4] ORS 215.010(2) defines "tract" as "one or more contiguous lots or parcels under the same ownership." OAR 660-033-0020(10) and LDO 13.268 contain virtually identical definitions.

4.3.6(D)(9) and (10) require that the parcels be consolidated and a restrictive covenant placed on the deed to Tax Lot 600 limiting the tract to one dwelling.[5]

Petitioner cites LDO 4.3.6(D)(2) in support of her argument that the parcels are a "tract."[6] LDO 4.3.6(D) allows ownership of record dwellings and provides in relevant part:

"A dwelling may be approved if:

> "1) The lot or parcel on which the dwelling will be sited was lawfully created and was acquired and owned continuously by the present owner as defined in subsection (2) below:
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> " * * * * *
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> "2) *For purposes of this subsection*, "owner" includes the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent or grandchild of the owner or a business entity owned by any one or combination of these family members[.]" (Emphasis added).

Intervenor responds first that the hearings officer's conclusion that Tax Lots 600 and 700 are not a "tract" was correct because those parcels are not in "the same ownership," since Tax Lot 600 is owned jointly by intervenor and her husband and Tax Lot 700 is owned solely by intervenor. Intervenor also disputes petitioner's argument that LDO 4.3.6(D)(2)

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[5] LDO 4.3.6(D)(9) and (10) provide in relevant part:

> "9) When the lot or parcel where the dwelling is to be sited is part of a tract, the remaining portions of the tract shall be consolidated into a single lot or parcel. Consolidation prior to the issuance of a building permit shall be a condition of approval.
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> "10) No dwellings will be allowed on the remaining portion of the tract that is consolidated into a single lot or parcel. Irrevocable deed restrictions, precluding all future rights to construct a dwelling on the consolidated remainder lot or parcel or to use the remainder lot or parcel to total acreage for future siting of dwellings for present and any future owners, unless the tract is no longer subject to protection under the goals for agricultural lands or forest land, shall be recorded with the deed for each lot and parcel[.]"

[6] LDO 4.3.6 implements ORS 215.705. ORS 215.705 sets out special authority for counties to approve what are referred to as "Lot or Parcel of Record Dwellings," as well as special restrictions on approval of such dwellings.

applies at all in determining whether the parcels are in "the same ownership" for purposes of the LDO 13.268 definition of "tract."

As noted above, LDO 4.3.6(D)(2) provides that, for purposes of determining whether the owner of property acquired that property prior to January 1, 1985, and thus may be entitled to an ownership of record dwelling, " 'owner' includes * * * husband * * *." In *Craven v. Jackson County*, 135 Or App 250, 253-54, 898 P2d 809 (1995), the Court of Appeals concluded that ORS 215.705 and the nearly identical local provisions adopted to implement that statute were limited in their application:

> "The limited application of the definition of 'owner' is express and unambiguous. * * * [I]t has the sole purpose of including relatives of the owner of a lot or parcel acquired before 1985, as well as the actual owner, in the pool of persons whose connection with the lot or parcel may qualify it for a lot of record dwelling under ORS 215.705(1)(a). * * *" *Id*.

We agree with intervenor that the parcels are not in the same ownership. *Friends of Linn County v. Linn County*, 37 Or LUBA 280, 288 (1999) (ownership of two parcels was not the same where the applicant owned one parcel individually and jointly owned the second parcel with ex-wife). We also agree with intervenor that LDO 4.3.6(D)(2) is inapplicable in determining whether the parcels constitute a "tract," as LDO 13.268 defines that term. *Craven* is directly on point and is dispositive of the issue. The hearings officer correctly determined that because the parcels are not in the same ownership, they do not constitute a tract.

The county's decision is affirmed.