BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF YAMHILL COUNTY,
MERILYN REEVES and JIM LUDWICK,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent,

and

CHARMA VAAGE,
Intervenor-Respondent.

LUBA No. 2008-196

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

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

Fredric Sanai, Assistant County Counsel, McMinnville, filed a joint response brief and argued on behalf of respondent. With him on the brief was Dorothy S. Cofield.

Dorothy S. Cofield, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With her on the brief was Fredric Sanai.

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

REVERSED 02/06/2009

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

Petitioners appeal a decision by the county approving a forest template dwelling.

MOTION TO INTERVENE

Charma Vaage moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

FACTS

The county approved intervenor's application for a forest template dwelling on a 5.5-acre property that is zoned Commercial Forestry. The property is located in an area that the parties refer to as the Eagle Point Ranch.[1]

The property was the subject of a 2006 county approval of a forest template dwelling. We reversed the 2006 dwelling approval in *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006). In 2008, intervenor submitted a new application for a forest template dwelling. The county approved the application, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

The 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."

In *Reeves*, we explained that ORS 215.750 allows a county to approve a forest template dwelling if, after applying a 160-acre template centered on the subject property, at

[1] 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. 294 Or at 786.

least 11 other "lots or parcels that existed on January 1, 1993" are within the 160-acre area and at least three dwellings existed on January 1, 1993 on the "lots or parcels." ORS 215.750(1)(c). We held that the phrase "lots or parcels that existed on January 1, 1993," when viewed in context with other relevant statutes, including the definition of "parcel" found in ORS 215.010(1), "lot" found in ORS 92.010, and other contextual statutes, meant that the county may count only lawfully established lots or parcels in the 160-acre template area. *Id*. at 11. We based our conclusion on the Court of Appeals' direction in *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), *adhered to as modified* 179 Or App 409, 40 P3d 532 (2002), that even though the law governing the particular proceeding at issue may be silent as to whether a lot or parcel must be lawfully created, other "applicable legislation" may contain such a requirement. 53 Or LUBA at 10 (quoting *Maxwell*, 178 Or App at 220-222). In the present appeal, no party assigns any legal significance to whether the properties surrounding the subject property are properly characterized as "lots" or "parcels," and no party maintains that those lots or parcels were lawfully established.

In their first assignment of error, petitioners argue that the county erred in approving the dwelling. Petitioners argue that under *Reeves* and the Court of Appeals' holding in *Maxwell*, the county cannot count illegally created parcels and must deny the requested forest template dwelling.

Intervenor responds that the county correctly applied *Reeves* and *Maxwell* to reach a different conclusion about whether the parcels must be lawfully established. The county concluded that the absence of any express requirement in the text of ORS 215.750(1)(c) that requires a determination of the underlying legality of the parcel, and the presence of such a requirement in other parts of ORS 215.700 *et seq*. means that no such determination is required.[2] In so concluding, the county determined that the definition of parcel found in

[2] The county found:

ORS 215.010 was, in the words of the county, "not applicable, related context" for discerning the meaning of "parcel" set forth in ORS 215.750(1)(c). Record 11.

The county reviewed and relied on the legislative history surrounding the enactment of ORS 215.010(1) to reach its conclusion. Under the test set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993), resort to legislative history to determine legislative intent is appropriate only if the text of the statutory provision at issue is ambiguous, and related context within the same statute does not assist in determining legislative intent. However, ORS 174.020 allows some consideration of legislative history to assist in the construction of a statute.[3] *But see State v. Rodriguez-Barrera*, 213 Or App 56,

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> "The Board finds in reviewing the text of ORS 215.750, the text requires that if there are a requisite number of lots or parcels within the template, a template dwelling may be approved. The Board finds that the term 'lot or parcel' is not defined or explained within ORS 215.750. Because the intent of the legislature is not clear, the Board must look to the related context within the same section of the statute. The Board finds that ORS 215.705 (lot of record dwelling) requires a 'lawfully created' lot or parcel before a dwelling is permitted. The Board finds that by inserting the term 'lawfully created' the intent of the legislature is clear that there is no such 'lawfully created' requirement for the template dwelling in the same statutory context.
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> " * * * * *
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> "Further context showing the intent of the legislature * * * is found throughout ORS 215.700-780. The Board finds the policy statement at ORS 215.700 shows legislative intent that when the Legislature enacted HB 3661, it was adopting equitable provisions to allow rural property owners the right to a dwelling. The Board agrees with and relies upon the applicant's testimony that the trade-off in HB 3661 to allow for more opportunities for rural residential dwellings was the enactment of the 80-acre minimum lot size at ORS 215.780. In using the term 'lot' or 'parcel' without the 'lawfully created' qualifier, the legislature was using a term of convenience to require a certain number of 'units of land' within the template to allow a nonforest dwelling to be approved. The Board finds that had the legislature wanted all the lots within the template to be re-reviewed as 'lawfully created' it would have required it as it did in other parts of the same bill. See e.g. ORS 215.705. The contextual clues in ORS 215.750 clearly demonstrate that the legislature used the words 'in existence on January 1, 1993.' Had the legislature wanted to make sure each of the lots and parcels were 'lawfully' in existence on that date, it would have been a simple addition to make. * * *" Record 8, 11-12.

[3] ORS 174.020 provides:

> **"174.020 Legislative intent; general and particular provisions; consideration of legislative history.**

62, 159 P3d 1201 (2007) ("[i]f the wording of a statute is truly capable of one, and only one, reasonable construction then, whatever the legislative history may show, it cannot alter the unambiguous meaning of a statute").

ORS 215.010(1) was enacted into law by Oregon Laws 1985 Chapter 717. ORS 215.010(1) 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."

ORS 215.010(1) makes clear that when the word "parcel" is used in ORS Chapter 215, it has the meaning given in the statute. The definition makes clear that in order for a unit of land to be a "parcel," it must have been created in compliance with applicable partitioning laws or

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> "(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.
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> "(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.
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> "(2) When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.
>
> "(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate."

created before any partitioning laws were in place. In other words, it must have been "lawfully established."[4] As we explained in *Reeves*:

> "Simply stated, under 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." 53 Or LUBA at 11.

As noted, the county, relying on legislative history regarding ORS 215.010(1), found that the statute was "not applicable, related context" for determining the meaning of ORS 215.750(1)(c):

> "The Board finds that the parcel definition found at ORS 215.010 is not applicable, related context because it was adopted well before the nonforest dwelling provisions in ORS 215.700-750. * * * [T]he partition definition in ORS 215.010 was part of a land division bill in the 1985 legislative session (HB 2381) to clear up the definition of 'lot' and 'parcel' for conveyance purposes.* * *
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> " * * * * *
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> "In other words, the parcel definition in ORS 215.010 is a 'backward looking' recognition test rather than a 'forward looking' lot of record requirement for all development actions allowed in ORS 215." Record 9, 11.

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[4] In 2007, the legislature defined the term "lawfully established unit of land" in ORS 92.010(3); that definition is nearly identical to the definition of "parcel" in ORS 215.010(1):

> "(3)(a) 'Lawfully established unit of land' means:
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> "(A) A lot or parcel created pursuant to ORS 92.010 to 92.190; or
>
> "(B) Another unit of land created:
>
> "(i) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or
>
> "(ii) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.
>
> "(b) 'Lawfully established unit of land' does not mean a unit of land created solely to establish a separate tax account."

While the county may be correct that the legislative history surrounding the enactment of ORS 215.010(1) indicates that one of the purposes for defining "parcel" in ORS Chapter 215 was to clarify that a legally created parcel remains a parcel that can be separately conveyed, the fact remains that at the time ORS 215.750 was enacted in 1993, the definition of "parcel" found in ORS 215.010(1) was in effect and specifically provided that the definition applied when the word "parcel" was used in ORS 215.750. Under the plain wording of ORS 215.750(1)(c) and ORS 215.010(1), "parcels" within the 160-acre template area must be counted, and a unit of land qualifies as a "parcel" only if that unit of land was legally established, that is, either created by the process of partitioning or created by deed if there were no applicable partitioning ordinances on the date it was created in the deed.[5] There is simply no support for the county's conclusion that the word "parcel" as used in ORS 215.750(1)(c) should not have the meaning given it in ORS 215.010(1).[6]

As we have already noted, no party assigns any significance to whether the properties the county counted in applying ORS 215.750(1)(c) are "lots" or whether they are "parcels." In *Reeves*, we also concluded that in applying ORS 215.750(1)(c) any lots that are counted similarly must be legally created lots, in the sense that any lots that were illegally created may not be counted toward the required number of "lots or parcels." 53 Or LUBA at 13-14. In reaching that conclusion, we recognized that there is no ORS Chapter 215 definition of

[5] In the present appeal, we understand the parties to agree that the properties that the county counted in applying the 160-acre template test were created by deed rather than by the recording of a final approved subdivision or partition plat, and that applicable legislation in place at the time those deeds were recorded required that a final subdivision or partition plat be approved.

[6] In the challenged decision, the county suggests it would be "impossible or at least extremely burdensome" if the term "parcel" does not include illegally created parcels, since the county would have to determine the underlying legality of all parcels. Record 9. We assume that when called upon to count "lots" or "parcels," counties generally start with readily available information such as the county assessor's map or GIS maps that show individual units of land. We see no reason why counties cannot assume that the units of land shown on those maps are either parcels that were created in one of the ways specified by ORS 215.010(1)(a) (A) through (C) or lots that were legally created, unless there is some other evidence to the contrary.

"lot" that expressly requires that the lot have been created by following statutorily required procedures, but we concluded that illegally created lots may not be counted in applying ORS 215.750(1)(c), based on the ORS 92.010(4) definition of "lot" and contextual statutes in ORS Chapter 92. *Id*. Intervenor offers no reason why we should revisit or reconsider that conclusion.

In determining that the properties to be counted in the 160-acre template did not need to be lawfully established, the county also relied in part on a statement by a legislator regarding House Bill 3661, the land use bill that was enacted in Oregon Laws 1993, Chapter 792, a portion of which later became codified at ORS 215.700 to 215.780. Record 14-15. However, we do not find that legislative history particularly persuasive, since it appears to be a more generalized statement about the entire land use bill, and not directed at the meaning of the particular provision at issue in this appeal, ORS 215.750.

Finally, the county relied on the Court of Appeals' decision in *Citizens for Responsibility v. Lane County*, 207 Or App 500, 142 P3d 486 (2006). In *Citizens*, the meaning of ORS 197.770 was at issue. ORS 197.770(1) provides in relevant part:

> "Any firearms training facility in existence on September 9, 1995, shall be allowed to continue operating until such time as the facility is no longer used as a firearms training facility."

The Court of Appeals analyzed the text of the provision and reversed LUBA's conclusion that only firearms training facilities established in conformity with law were entitled to its protection. In so holding, the court looked at the text of ORS 197.770 and also pointed to other statutes where the legislature has explicitly included a requirement of lawful establishment to find the absence of such a requirement in the particular statute at issue in that appeal dispositive. However, unlike in the present appeal, there was no other "applicable legislation" from which the court could discern the meaning of the particular statute at issue, and there is no indication in the court's decision that its decision applies beyond the narrow context of ORS 197.770.

Unless the county counts illegally created lots or parcels, the requisite 11 "lots or parcels" are not present. For the reasons explained above, the county may not count illegally created "lots or parcels" in applying ORS 215.750(1)(c). It follows that the county's decision is prohibited as a matter of law. OAR 661-010-0071(1)(c).

The county's decision is reversed.