BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOCK DALTON and PAM DALTON,
Petitioners,

vs.

POLK COUNTY,
Respondent,

and

JAMES PHELPS and RACHEL PHELPS,
Intervenors-Respondents.

LUBA No. 2009-127

FINAL OPINION
AND ORDER

Appeal from Polk County.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of the petitioners.

No appearance by Polk County.

James Phelps and Rachel Phelps, Dallas, filed the response brief and argued on their own behalf.

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

AFFIRMED 03/17/2010

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 an application for a replacement dwelling.

MOTION TO INTERVENE

James Phelps and Rachel Phelps, the applicants below, move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

REPLY BRIEF

Petitioners move to file a reply brief to respond to new matters that are raised in the response brief, including an argument that petitioners failed to raise certain issues during the proceedings below. The reply brief is allowed.

FACTS

Intervenors sought approval for a replacement dwelling on an approximately 67-acre parcel zoned Timber-Conservation (TC). The planning director approved the application, and petitioners appealed the decision to the county board of commissioners. The board of commissioners upheld the planning director's decision, and adopted the planning director's original findings and supplemental findings. This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Background

Because the history of previous actions involving both the subject property and the dwelling to be replaced are integral to the county's decision in the present appeal, we briefly set out that history below. The dwelling that intervenors seek to replace was originally built in 1910. That dwelling was located on a 109-acre property. In 1979, the property's then-owner received a building permit to construct a new dwelling on the property. Record 98. That 1979 building permit included a condition requiring the 1910 dwelling to be demolished. A demolition permit for the 1910 dwelling was issued, but the county

subsequently cancelled the demolition permit to allow the 1910 dwelling to be used as a "farm help" dwelling. Record 98-99.

In 1981, the property's owner applied to divide the 109-acre parcel into two parcels: one parcel totaling 84 acres containing the 1979; and the second parcel totaling 25 acres containing the 1910 dwelling. The planning director denied the partition, and the property owner appealed the denial to the board of county commissioners. The board of county commissioners voted on appeal to approve the partition. Record 77-78,163-64. The size of that 25-acre parcel was subsequently increased to 67 acres through a property line adjustment in 1996. Record 95.

B. Assignment of Error

Polk County Zoning Ordinance (PCZO) 177.035(C) allows in the TC zone:

> "Alteration, restoration, or replacement of *a lawfully established dwelling* which has:
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> "(1) Intact exterior walls and roof structure;
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> "(2) Interior plumbing, including kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;
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> "(3) Interior wiring for interior lights;
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> "(4) A heating system; and
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> "(5) The dwelling to be replaced must be removed, demolished or converted to an approved non-residential use, within 3 months of the completion of the replacement dwelling." (Emphasis added.)

In their first assignment of error, petitioners argue that the county's finding that the dwelling to be replaced is "a lawfully established dwelling" misconstrues the applicable law, is inadequate, and is not supported by substantial evidence in the record.

1. Dwelling

Petitioners first argue that the 1910 dwelling fails to qualify as a "dwelling" as defined in PCZO 110.186, which defines "dwelling" as "* * * a building or portion thereof

which is occupied in whole or in part as a home, residence, or sleeping place, either permanently or temporarily, but excluding hotels and motels." (Emphasis added.) According to petitioners, if a structure is not "occupied" as a dwelling for more than one year, it ceases to qualify as a "dwelling" under PCZO 110.186 and therefore cannot be considered a "dwelling" for purposes of approval of a replacement dwelling under PCZO 177.035(C). Petitioners maintain that the dwelling has not been used for more than one year, and has in fact been abandoned, and therefore cannot be considered a dwelling, within the meaning of PCZO 110.186.

Intervenors respond that the definition of "dwelling" set forth in PCZO 177.186 is not relevant in determining whether the PCZO 177.035(C) replacement dwelling standards are met. Intervenors also maintain that the dwelling intervenors seek to replace has not been abandoned, and that even if it had been abandoned, that would not be relevant in determining whether the dwelling is a "lawfully established" dwelling under PCZO 177.035(C). The board of commissioners concluded that PCZO 177.035(C) does not include a standard requiring the applicant to show the existence or particular length of occupancy, and concluded that the structure had not been abandoned, based on the evidence in the record. Record 25-26.

The definition of "dwelling" itself references temporary occupancy of a building, and we do not read the PCZO 110.186 definition of "dwelling" as requiring continual or any particular period of occupancy in order for a building to be considered a dwelling. Thus even if petitioners are correct that the 1910 building has been unoccupied for periods of time, that does not mean that the building no longer qualifies as a "dwelling" for purposes of PCZO 110.186 and PCZO 177.035(C). We reject petitioners' suggestion that the definition of "dwelling" includes a requirement of continuous occupancy, and we agree with intervenors that the county correctly concluded that PCZO 177.035 does not require a showing of continuous occupancy.

2. Lawful Establishment

Petitioners argue that the county erred in determining that the dwelling is a "lawfully established" dwelling as required by PCZO 177.035(C). In approving the application, the board of commissioners reviewed the history of the subject property and the 1910 dwelling, set out above, noting that "[t]he existing dwelling was built in 1910, prior to zoning." Record 6. The board of commissioners also reviewed the 1981 partition approval decision described above and found that that action "* * * lawfully established the dwelling on the property."[1]

Petitioners first argue that the 1981 decision is itself "unlawful," because the board of commissioners erred in 1981 in accepting the appeal of the planning director's initial denial of the partition application because the appeal was untimely filed. Petitioners also argue that even if procedurally proper the 1981 partition decision could not have established the "lawfulness" of the 1910 dwelling. According to petitioners, the partition process was merely a process to create an additional parcel, and while it may have established the lawfulness of the parcels, it did not establish the lawfulness of the dwellings on those parcels.

As we explained above, the dwelling was built in 1910, prior to zoning. There is no dispute that the dwelling was "lawfully established" when it was built in 1910. In 1979, the county required that the 1910 dwelling be demolished, as a condition of approval for replacing the dwelling, and a demolition permit was accordingly issued. As noted, the county

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[1] The board of commissioners found:

> "[The property's owner] filed for a replacement dwelling in 1979. He received approval for [it] and built a new home. At that time [the property's owner] had a need to continue using the original dwelling for farm help. He requested an approval from the Planning Department for the secondary accessory farm dwelling use, and the Planning Department approved his request. Then in 1981, he filed for a Special Exception to divide approximately 27 acres of land in order to lawfully create and dispose of a second dwelling and real property. The Planning Department at that time denied the application. [The property's owner] then filed an appeal with the Board. After public hearings and a site visit by the Board, the application [for the partition] was approved. The County then recognized the dwelling and lot as separate and lawfully established. * * *" Record 24.

subsequently canceled the demolition permit, and apparently approved the continued existence and use of the 1910 dwelling as an accessory "farm help" dwelling.

We understand petitioners to argue that as a matter of law the same dwelling can never be used to justify more than one replacement dwelling. We understand petitioners to assert that the 1979 county replacement approval and demolition order had the legal effect of "de-establishing" the 1910 dwelling for purposes of the county's replacement dwelling criteria, with the consequence that the 1910 dwelling cannot be thereafter used to justify a second replacement dwelling. We generally agree with petitioners on that point, and if the county's 1979 replacement decision constituted the last relevant decision affecting the dwelling, we would likely reverse a subsequent county decision approving a second replacement dwelling for the 1910 dwelling.

However, the 1979 replacement decision was not the last relevant decision. Later that year the county canceled the demolition permit and effectively approved the continued existence of the 1910 dwelling, limited to use as an accessory "farm help" dwelling. When the dust settled on that second 1979 decision, the 1910 dwelling remained a lawful dwelling, albeit one that was subject to the restriction that its use was limited to a "farm help" dwelling. Had the property owner at that point sought county approval to replace the 1910 dwelling with a new "farm help" dwelling, we know of no legal impediment that would have precluded such approval, and petitioners do not identify any. In other words, the effect of the second 1979 decision was that the 1910 dwelling remained a "lawfully established" dwelling for purposes of the county's replacement criteria, although any replacement dwelling would likely have been limited to use as a "farm help" dwelling.

The next relevant decision is the 1981 partition approval. The property owner applied under a "special exception" county code provision that was specifically intended to allow a partition where "the division [was] for the purpose of disposing of a second dwelling which has existed on the property." Record 322. That partition procedure appears to have been

designed to partition a single parcel that contained two dwellings into two parcels, in order to allow the separate new parcel containing the second dwelling to be sold. Such a partition would serve little or no purpose if the second dwelling was limited to use as an accessory farm help dwelling.[2]

The initial 1981 decision by the planning department denied the partition, because the director concluded that the 1910 dwelling had been restricted to use for farm help in 1979, noting that "[i]t has been past policy that second dwellings for farm help do not qualify as a second dwelling for the purposes of a land division." Record 323. In reaching that conclusion, we understand the planning director to have determined that the partition procedure the property owner applied under to create two parcels, each with a dwelling, was not available where one of the existing dwellings on the property was subject to a use restriction, such as a restriction to use as a secondary farm help dwelling.

On appeal of the planning director's denial decision, the board of commissioners held a hearing on the appeal, conducted a site visit, and voted to approve the partition.[3] Although

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[2] Under the current regulatory scheme governing accessory farm dwellings in EFU zones, under OAR 660-033-0130(24), an accessory farm dwelling must be located on the same lot or parcel as the "primary" farm dwelling, with limited exceptions designed to ensure that an accessory farm dwelling remains an accessory use, and is not converted to a primary use dwelling. Although the TC zone is not an EFU zone, the PCZO may have included a similar limitation. If so, after the division, the second dwelling could not be used as a farm help dwelling because it would no longer be an accessory dwelling located on the same parcel as the primary dwelling. Even if the PCZO did not so limit farm help dwellings in the TC zone, it seems unlikely anyone would purchase a parcel with a dwelling that could only be used as a farm help dwelling.

[3] The 1981 board issued a decision stating:

> "The applicants requested to divide a 109 acre parcel into two parcels of 25 acres and 84 acres in the TC zone. The Planning Director denied the request on August 13, 1981. The applicants took an appeal from that decision.
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> "A public hearing was held on September 23, and public testimony was heard. After closing the hearing, the Board viewed the property and then voted to approve partitioning.
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> "The basis of the motion was that the [the property's owners] are not creating a new residence, since one already exists on the parcel. Also, they need capital for their plan to intensify their use off the 84 acres. [The property's owner] plans to plant an additional 15,000 trees on the site; the trees are already ordered.

the board of commissioners' decision does not explain why, it is clear that the board of commissioners disagreed with the planning director that the "farm help" restriction precluded partition under the partition procedure invoked by the applicant. Unfortunately, it is not clear from the commissioners' 1981 decision whether they believed that the partition procedure could be used even when one dwelling was restricted to an accessory farm help dwelling, or whether they believed that approving the partition would remove the farm help restriction. Under the first view, the partition would create a new parcel with a dwelling that remains restricted to use as a farm help dwelling. Under the second view, the partition would create a new parcel with a dwelling that is no longer restricted to use as a farm help dwelling.[4]

Given the apparent purpose of the partition procedure to create new parcels with dwellings that can be readily sold to third parties, and the commissioners' findings, which are sympathetic to the applicant's stated desire to sell the new parcel and dwelling, it seems most likely that the commissioners believed that the partition would create a new parcel with an unrestricted dwelling, not a new parcel with a dwelling that could only be used as a farm help dwelling or perhaps could not be used as a dwelling at all. In the decision before us authorizing replacement of the 1910 dwelling, the board of commissioners adopted findings that view the combined effect of the 1979 farm help dwelling approval and 1981 partition approval to be recognition of the dwelling as "separate and lawfully established." *See* n 1. That understanding of the intent and effect of the 1981 decision is at least as plausible as petitioners' contrary view, that the commissioners intended the 1981 partition approval to

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"* * * * *

"The [property's owners] plan to intensity the use of the 84 acres, but because of the depressed economy, cannot afford to intensify the use of the 84 acres. The selling of the 25 acres will generate enough capital to do this." Record 163-64.

[4] If that was the intended effect of the 1981 partition, it almost certainly was inconsistent with applicable law. Nothing cited to us in any then-current or now-current law authorizes conversion of an accessory farm help dwelling to an unrestricted primary dwelling, simply by approving a partition.

merely create a new parcel and did not intend to affect the legal status or restrictions imposed on the 1910 dwelling.

Petitioners argue that the 1981 commissioners' decision was "unlawful" because of alleged procedural and substantive irregularities. However, the 1981 partition is not before us, and cannot be collaterally attacked in this appeal. Whatever substantive or procedural errors were part of that decision, there is no dispute that it was a final land use decision that was not appealed and that cannot be challenged in an appeal of the decision before us. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, 296, *aff'd* 195 Or App 763, 100 P3d 218 (2004). By virtue of the second 1979 decision and the 1981 partition approval, the 1910 dwelling remained a lawfully established dwelling and that dwelling was no longer limited to use as an accessory farm help dwelling.

Petitioners' remaining arguments under this assignment of error are difficult to follow. However, we understand petitioners to assert that the dwelling to be replaced cannot qualify as a nonconforming use under the relevant PCZO provisions governing nonconforming uses. Petitioners' arguments regarding nonconforming uses are misplaced. Intervenors applied for a replacement dwelling on a parcel zoned TC pursuant to PCZO 177.035(C). Replacement dwellings are allowed uses in the TC zone, and there is no requirement under the applicable criteria or applicable statutes that an applicant prove that the dwelling is a nonconforming use or structure. Petitioners' arguments to the contrary are unavailing.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners argue that the 1910 dwelling does not satisfy PCZO 177.035(C)(1) through (4), which allow replacement of a lawfully established dwelling that has "(1) [i]ntact exterior walls and roof structure; (2) [i]nterior plumbing,

including kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system; (3) [i]nterior wiring for interior lights; [and] (4) [a] heating system * * *."

Petitioners first argue that the subject dwelling does not have "intact exterior walls" because evidence in the record shows that the glass in some of the windows is broken and covered with plastic. Petitioners argue that because the windows do not contain glass, the wall systems for the walls in which those windows are located are not "functionally complete," according to the standard described in *Bradley v. Washington County*, 44 Or LUBA 36, 43 (2003). *Bradley* involved an interpretation of *former* ORS 215.213(1)(t) (since renumbered ORS 215.213(1)(q)(2009)), allowing replacement dwellings in an exclusive farm use zone in marginal lands counties. Although the language in PCZO 177.035(C) is nearly identical to ORS 215.213(1)(t), the TC zone is not an exclusive farm use zone; it is a Goal 4 forest zone. As such, PCZO 177.035(C) does not implement either ORS 215.213(1)(t) or its companion statute for non-marginal lands counties, ORS 215.283(1)(p), or any other statute. Accordingly, while our decision in *Bradley* may be useful to the county in determining the meaning of "intact," as used in PCZO 177.035(C), it is not binding on the county in its interpretation of PCZO 177.035(C).

It is fair to say that the dwelling sought to be replaced is in poor condition. However, the board of commissioners concluded that missing window glass did not mean the walls were not "intact," and that based on the evidence in the record, including observations during a site visit, the exterior walls are "intact." The board of commissioners found:

> "After conducting the site visit and reviewing all the applicable evidence in the record, the Board finds that the exterior walls are intact. While they are not pristine, they do serve the functional purpose of separating the outside elements from the interior of the dwelling and are functionally complete. * * *" Record 18. [5]

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[5] The board of commissioners also found:

We think the county's findings are adequate to explain its conclusion that the existence of broken windows does not mean the walls in which the window frames sit are not "intact" as required by PCZO 177.035(C)(1). The photographs in the record also support the county's conclusion that the exterior walls are intact. Record 153-155, 202, 204, 223.

Petitioners next argue that PCZO 177.035(C)(2), requiring "[i]nterior plumbing, including kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system" is not met because the dwelling does not presently have running water.[6] Petitioners maintain that the requirement for interior plumbing connected to a waste disposal system contains an "implied" requirement that there is running water to support the waste disposal system. Petitioners further argue that there is no evidence in the record that the dwelling is connected to a functioning septic system.

Intervenors disagree, arguing that although there is currently no electricity to the property, there is a well located on the property that can serve the dwelling, and that the requisite plumbing and other fixtures are present in the dwelling, and that there is a septic system to serve the dwelling.

The standard requires interior plumbing connected to a sanitary disposal system. The evidence in the record supports the county's conclusion that the requisite interior plumbing is present in the dwelling. Record 158, 203, 212, 213, 215. The board of commissioners also concluded that evidence in the record from the county environmental health department records and the former owner proved the existence of a septic tank and the connection of that

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> "To require the owners of a dwelling to first replace broken glass in windows with 'new glass' in order to gain approval for a replacement dwelling is unwarranted. The Board does not feel that broken glass in a dwelling is adequate grounds for denial. The window frames in this dwelling are intact and functionally complete. The glass that is missing from the windows is covered with plastic to the point that the outside elements are kept from entering the interior of the dwelling. * * *" Record 17.

[6] Apparently the dwelling is connected to a well, but without electricity the well cannot provide running water to the dwelling.

tank to the plumbing fixtures located in the dwelling. Record 21. Petitioners do not explain why it was error for the county to rely on that evidence to determine that PCZO 177.035(C)(2) was met. Further, we disagree with petitioners' suggestion that the dwelling is required to have running water in order to demonstrate that the plumbing fixtures are connected to a sanitary waste disposal system. All that is required is that those fixtures are "connected" to a waste disposal system. There is no requirement that the applicant demonstrate that the fixtures or the system are in working order.

Petitioners also argue that the county erred in concluding that the dwelling has "[i]nterior wiring for interior lights" as required by PCZO 177.035(C)(3). According to petitioners, evidence in the record indicates that the interior wires are in disrepair and open wires are present in the dwelling. Petitioners also argue that because the house does not currently have electricity, the county could not conclude that PCZO 177.035(C)(3) was met.

The county found:

> "After conducting the site visit and reviewing evidence submitted into the record, the Board finds that the dwelling does have interior wiring for interior lights. During the site visit, the Board viewed interior wiring that included overhead lights, light switches, electrical receptacles, and a wired smoke alarm system. Photographs in the record and observations made during the site visit show a light switch unscrewed from the wall that is connected to wiring. The Board finds that the requirement for internal wiring for internal lights is met by the applicants.
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> "The appellants argue that the dwelling's electrical panel is not operational, and therefore the wiring system is not intact. The Board does not agree with Appellants' argument. In the affidavit from the former owner, Chester R. Jahn, states that the interior wiring worked and functioned properly during his ownership. While electricity is not 'turned on' to the property, the Board finds the property and dwelling are clearly wired for electrical service, Further, the Board does not agree with the Appellants' argument that the dwelling must be connected to electricity in order to meet the interior wiring for interior lights requirement * * *. The Board finds that PCZO 177.035(C)(3) simply speaks to whether there is interior wiring." Record 21.

We agree with the county. Further, we agree that the evidence in the record demonstrates that the house has interior wiring for interior lights. Record 151, 250, 251, 253.

Finally, petitioners challenge the county's conclusion that the house has "a heating system" as required by PCZO 177.035(C)(4). The dwelling has a wood stove that is the heat source. Record 232, 234. Petitioners argue that because the wood stove does not have handles for opening the door of the wood stove, the county could not reasonably conclude that the dwelling has "a heating system." The county found:

> "After conducting the site visit and reviewing photographs submitted into the record, the Board finds that the wood stove in question does qualify as a heat source. The Board finds there are dwellings in Polk County that use wood as either a primary or sole source in providing heat to a dwelling. The Board finds that there is no evidence that the wood stove is not operational. During the site visit, the Board witnessed that the stove was connected to pipes that continue through the ceiling and roof. The wood stove also has a blower on it to aid in radiating heat more effectively. The fact that the door handles are missing does not disqualify the wood stove as a heat source. The Board believes that door handles for a wood stove van be easily replaced just as a fuse could be for an electrical furnace without a permit from the County being issued." Record 21.

We agree with the county. Further, we think the county was correct in concluding that the evidence in the record demonstrates that PCZO 177.035(C)(4) is met. Record 210.

The second assignment of error is denied.

The county's decision is affirmed.