BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK JONES, KATHARINE JONES,
LINDA HELLENTHAL, ERIK HELLENTHAL,
BEN DAWSON, Jr., QUINTON QUISENBERRY,
and BROOK K. QUISENBERRY,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

PHILIP BOWES and CYNTHIA BOWES,
Intervenors-Respondents.

LUBA Nos. 2010-098, 2010-099, 2010-100,
2010-101, 2010-102 and 2010-103

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Stephen Mountainspring, Roseburg, filed the petition for review and argued on behalf of petitioners. With him on the brief was Dole, Coalwell, Clark, Mountainspring & Mornarich, P.C.

No appearance by Douglas County.

Edward J. Sullivan, Carrie A. Richer, and William K. Kabeiseman, Portland, filed the response brief on behalf of intervenors-respondents. With them on the brief were Garvey Schubert and Barer PC. Edward J. Sullivan argued on behalf of intervenors-respondents.

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

REMANDED (LUBA No. 2010-098) 04/26/2011
DISMISSED (LUBA No. 2010-099)
DISMISSED (LUBA No. 2010-100)
DISMISSED (LUBA No. 2010-101)
DISMISSED (LUBA No. 2010-102)

DISMISSED (LUBA No. 2010-103)

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

Opinion by Bassham.

NATURE OF THE DECISION

In LUBA No. 2010-098, petitioners appeal a June 21, 1995 decision of the county planning director approving an "Owner of Record" dwelling. In LUBA Nos. 2010-099, 100, 101, 102 and 103, petitioners appeal five separate decisions to approve one-year extensions of the original 1995 approval decision, in years 1997, 1998, 1999, 2000, and 2002.

MOTION TO INTERVENE

Philip Bowes and Cynthia Bowes (intervenors) move to intervene on the side of the county in all of the appeals. There is no opposition to the motions, and they are allowed.

REPLY BRIEF

Petitioners move to file a reply brief responding to a challenge to petitioners' standing raised in intervenors' response brief. There is no opposition to the proposed reply brief, and it is allowed.

MOTION TO TAKE EVIDENCE

In an order dated March 10, 2011, we denied petitioners' and intervenors' separate motions to take evidence under OAR 661-010-0045. In particular, we denied as premature intervenors' motion to depose all of the petitioners to determine when petitioners had "actual notice" of the challenged decisions. That request for depositions was predicated on the success of intervenors' argument that our holding in *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003) should be overruled. For the reasons below, we decline to overrule *Frymark*. Accordingly, to the extent intervenors still seek to depose petitioners, that motion is again denied.

FACTS

The subject property is a 78.43-acre parcel located in a farm-forest zone, an exclusive farm use (EFU) zone in the county. The parcel is accessed by private access easements that run across petitioners' properties, which all adjoin the subject property. The property is

located within an area designated in the county's comprehensive plan as Columbian White-Tailed Deer Habitat.

On May 10, 1995, one of the prior co-owners of the subject property, Arthur Coulombe,[1] applied to the county for approval of an "Owner of Record" dwelling under county code provisions at Douglas County Land Use and Development Ordinance (LUDO) 3.5.115 that implement ORS 215.705(1) and OAR 660-033-0130(3). The statute, code and rule authorize a county to allow a single family dwelling on farm or forest land under certain circumstances.[2] Dwellings approved pursuant to ORS 215.705 are commonly referred to as "owner of record" or "lot-of-record" dwellings.

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[1] Elaine Coulombe was a co-owner of the subject property in 1995, but was not an applicant for the owner of record dwelling. Record 92.

[2] ORS 215.705(1) has not materially changed since 1993 and provides, in relevant part:

> "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 farm or forest zone* * *. A dwelling under this section may be allowed if:
>
> "(a) The lot or parcel on which the dwelling will be sited was lawfully created and was acquired by the present owner:
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> "(A) Prior to January 1, 1985; or
>
> "(B) By devise or by intestate succession from a person who acquired the lot or parcel prior to January 1, 1985.
>
> "(b) The tract on which the dwelling will be sited does not include a dwelling.
>
> "(c) The proposed dwelling is not prohibited by, and will comply with, the requirements of the acknowledged comprehensive plan and land use regulations and other provisions of law.
>
> "(d) The lot or parcel on which the dwelling will be sited, if zoned for farm use, is not on that high-value farmland described in ORS 215.710 except as provided in subsections (2) and (3) of this section.
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> "(e) The lot or parcel on which the dwelling will be sited, if zoned for forest use, is described in ORS 215.720, 215.740 or 215.750.
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> "(f) When the lot or parcel on which the dwelling will be sited lies within an area designated in an acknowledged comprehensive plan as habitat of big game, the siting of the dwelling is consistent with the limitations on density upon which the

On May 30, 1995, notice of and a copy of the application was sent to the Department of Land Conservation and Development (DLCD), as required by OAR 660-006-0004 and OAR 660-033-0150. However, no notice of the application or decision was sent to adjoining property owners. On June 21, 1995, the county planning director approved the application, subject to six conditions, providing notice of the decision only to the applicant and DLCD. The 1995 decision states that the approval "will become invalid without special action if the conditions of approval have not been met within two (2) years from the date of the decision. An extension of up to twelve (12) months may be granted by the Director upon request of the applicant." Record 78. As relevant here, the conditions of approval required that prior to obtaining a building permit the applicant must (1) file a resource management easement with the county clerk, (2) record an agreement with the county clerk to meet fire siting standards, (3) obtain certification from a civil engineer that the access road is in substantial conformance with county road standards, and (4), after conditions 1-3 have been met, obtain county planning clearance for dwelling placement.

On June 22, 1995, the day after the lot-of-record approval decision was issued, the applicant Coulombe and his wife deeded the subject property to intervenors. Intervenors, who were serving in the military at the time, did not attempt to complete the conditions of approval or initiate development within the two years following the 1995 approval. On June 17, 1997, the county sent a letter to intervenors advising them "[the county's] records indicate that the conditions have not yet been met and the preliminary approval will soon expire." Record 75. This letter also indicates that an extension request for an additional one-year period may be requested if a written request is submitted that "briefly explain[s]

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acknowledged comprehensive plan and land use regulations intended to protect the habitat are based.

"(g) When the lot or parcel on which the dwelling will be sited is part of a tract, the remaining portions of the tract are consolidated into a single lot or parcel when the dwelling is allowed."

circumstances which have prevented [them] from completing the conditions within the specified time frame." Record 75. This letter was accompanied by an attached form, entitled: "Ministerial Decision Extension Request." Record 76.

At all relevant times, the county's LUDO 2.800(2) provided that an extension of up to 12 months may be granted if the written request for an extension of the development approval period is "submitted to the county prior to the expiration of the approval period," and "states the reasons that prevented the applicant from beginning or continuing development within the approval period," and the approving authority "determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible." LUDO 2.800(2) repeats almost verbatim OAR 660-033-0140(2), which the Land Conservation and Development Commission (LCDC) adopted in 1993 as part of the administrative rule implementing Statewide Planning Goal 3 (Agricultural Land).[3]

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[3] OAR 660-033-0140 provides, in relevant part:

> "(1) Except as provided for in subsection (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land * * * is void two years from the date of the final decision if the development action is not initiated in that period.
>
> "(2) A county may grant one extension period of up to 12 months if:
>
> > "(a) An applicant makes a written request for an extension of the development approval period;
> >
> > "(b) The request is submitted to the county prior to the expiration of the approval period;
> >
> > "(c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and
> >
> > "(d) The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.
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> "(3) Approval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.

Intervenors submitted a "Ministerial Decision Extension Request" form dated June 24, 1997 to the county. The record does not indicate the date the county received that form. However, a letter from a county planner dated August 12, 1997, states that the extension request was approved and the permit was extended until June 21, 1998. Record 72. Similar reminders were sent to intervenors in subsequent years and each year intervenors submitted an extension request, which the county approved. For the years 1998, 1999, 2000, and 2002, which are four of the five extension decisions challenged in these appeals, the extension request submitted by intervenors is dated after the June 21 expiration date. With one exception, the record does not reflect the date the county received the written extension requests. The exception is for the 2000 extension request, which is dated July 3, 2000, and date-stamped as received by the county on July 7, 2000. Notably, petitioners did not appeal the extension decisions made in 2001, 2003 and in following years. The parties do not dispute that the most current extension request was timely requested and approved on June 3, 2010, extending the permit an additional year until June 21, 2011.[4]

In June 2010, intervenors moved back to the local area and at some point thereafter began making some improvements within the easements across some of the petitioners' property, that provide access to the subject property. The parties dispute the content and timing of conversations between intervenors and some of the petitioners regarding the purpose of the road improvements and whether intervenors already possessed county approval for a lot-of-record dwelling. According to the affidavit of petitioner Katharine Jones (Jones), by September 2010 she had heard enough to inquire with the county planning

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> "(4) Additional one year extensions may be authorized where applicable criteria for the decision have not changed."

[4]In 2001, the legislature adopted a statute, ORS 215.417, providing that extensions of approvals for residential development in resource zones, including lot-of-record dwellings, shall be valid for two years, instead of the one year extension that would otherwise apply under OAR 660-033-0140(2). *See* n 9, below. That statute is reflected in OAR 660-033-0140(5).

department regarding existing approvals. According to her affidavit, a planning official spoke with Jones on September 28, 2010, and informed her that she could get copies of the documents in the file on intervenors' lot-of-record dwelling approval. Jones states that on October 6, 2010, she went to the planning department and received a copy of the county's 1995 lot-of-record approval and of the subsequent annual decisions approving extensions of that approval. Petitioners filed these appeals 19 days later, on October 25, 2010.

JURISDICTION

The Board consolidated these appeals on October 27, 2010. In the response brief, intervenors raise a number of jurisdictional challenges to these appeals. Both petitioners and intervenors moved to take evidence outside the record, pursuant to OAR 661-010-0045. On December 30, 2010, the Board issued an order suspending further events in this review proceeding pending resolution of the motions, and to provide time for the parties to file responses to motions. Various responses and replies and additional motions were subsequently filed, including a second and third motion to dismiss filed by intervenors on February 18, 2011 and March 30, 2011, stating additional bases for challenging the Board's jurisdiction. In our March 10, 2011 order, we took the motions to dismiss under advisement.

For the reasons set out below, we deny intervenors' motion to dismiss LUBA No. 2010-098, the appeal of the 1995 lot-of-record approval. The same jurisdictional arguments are also directed at the appeals of the 1997, 1998, 1999, 2000, 2002 extension decisions. But for one significant difference discussed below, we would similarly reject those challenges to the appeals of the extension decisions. As explained below, we conclude that under OAR 660-033-00140(3) we lack jurisdiction over LUBA Nos. 2010-099, 100, 101, 102, and 103, the appeals of the 1997, 1998, 1999, 2000, 2002 extension decisions, because under that rule decisions extending development permits on farm and forest land are not "land use decisions" subject to LUBA's jurisdiction. Because petitioners have not filed a motion to

transfer those appeals to circuit court in accordance with OAR 61-010-0075(11), we dismiss those appeals.

We turn first to intervenors' jurisdictional challenges that are directed at the 1995 lot-of-record approval.

A. 1995 Lot-of-Record Approval (LUBA No. 2010-098)

Intervenors argue that the Board lacks jurisdiction over the appeals based on (1) the equitable doctrine of laches, (2) failure to serve the notice of intent to appeal on the 1995 co-owner of the subject property, one of intervenors' predecessors-in-interest, and (3) a 10-year statute of limitations at ORS 12.140. In addition, intervenors argue that (4) none of the appealed decisions are "land use decisions" subject to LUBA's jurisdiction, (5) some or all petitioners lack of standing to appeal, (6) petitioners failed to file timely appeals under ORS 197.830(3), and (7) the appeals are moot, because the 2010 extension decision, which petitioners did not appeal, is a complete reauthorization of the lot-of-record dwelling. As a variation on their mootness argument, intervenors also argue that as of March 2011 intervenors have complied with all conditions of approval specified in the 1995 decision, by obtaining certification from a civil engineer that the access road is in substantial conformance with county road standards, and county planning clearance for dwelling placement, including a building permit. We address each argument in turn, as each applies to the appeal of the 1995 lot-of-record approval.

1. Doctrine of Laches

With respect to laches, intervenors argue based on intervenors' conversations with some petitioners described in intervenors' affidavits that at least some petitioners had full knowledge that the county had approved a lot-of-record dwelling in 1995 for a long time before filing these appeals. According to intervenors, prosecution of these appeals should be rejected under the equitable doctrine of laches, because petitioners' delay in filing these appeals resulted in substantial prejudice to intervenors.

LUBA has held that it lacks the equitable powers of a court to apply the doctrine of laches, and that our jurisdiction and scope of review are controlled by statute. *Nehoda v. Coos County*, 29 Or LUBA 251, 256 (1995). Intervenors argue that *Nehoda* was wrongly decided or can be distinguished, but we are not persuaded. The legislature has comprehensively prescribed in ORS 197.830(3) and other relevant statutes the deadlines that apply to appeals of land use decisions to LUBA, including what states of knowledge are relevant in applying those deadlines. Even if we had authority to apply the doctrine of laches, it is doubtful that casual conversations between neighbors of the kind recounted in intervenors' affidavits, the content and existence of which petitioners dispute, is sufficient to convey the full knowledge of the relevant facts necessary to apply laches against petitioners.

2. Failure to Serve the NITA on the 1995 Co-Owner

Petitioners served the notices of intent to appeal (NITAs) on the applicant, Arthur Coulombe, as required by OAR 661-010-0015(2) and 661-010-0015(3)(f)(C), and on intervenors as well. Intervenors argue that petitioners should also have served the 1995 co-owner of the property, Elaine Coulombe, and that petitioners' failure to serve Elaine Coulombe warrants dismissal of these appeals. Petitioners respond, and we agree, that Elaine Coulombe was not one of the applicants for purposes of OAR 661-010-0015(2) and (3)(f)(C), or otherwise entitled to service of the notice under our rules. Record 92.

3. ORS 12.140

ORS 12.140 is part of a chapter setting out statutes of limitations for various actions in civil proceedings, and provides: "An action for any cause not otherwise provided for shall be commenced within 10 years." Intervenors argue that this 10-year statute of limitations in ORS 12.140 applies to appeals to LUBA, as a backstop to the statute of ultimate repose that applies specifically to land use appeals, at ORS 197.830(6).[5]

[5] ORS 197.830(6) provides:

Under ORS 197.830(6)(a), a three year statute of ultimate repose governs appeals of decisions under ORS 197.830(3), (4), and (5), except where ORS 197.830(6)(b) applies. In turn, ORS 197.830(6)(b) states that the three-year statute of ultimate repose does not apply if notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided. We address below the parties' contentions regarding whether notice of a hearing or administrative decision was required, but not provided, for the 1995 lot-of-record decision.[6] For present purposes, we disagree with intervenors that ORS 12.140 applies in circumstances where the three-year statute of ultimate repose at ORS 197.830(6)(a) does not apply.

First, we held in *Nehoda*, 29 Or LUBA at 256, that ORS 12.140 applies only to civil proceedings in Oregon courts and does not govern appeals before LUBA. Intervenors argue that *Nehoda* is wrong on that point, but we disagree. A LUBA appeal is not an "action" for purposes of ORS chapter 12; proceedings before LUBA are comprehensively governed by the provisions of ORS chapter 197. Second, even if ORS 12.140 potentially applied to LUBA appeals, it expressly provides for "[a]n action for any cause *not otherwise provided for* * * *." The legislature has already provided for the deadlines and statutes of limitation governing an appeal to LUBA, in ORS 197.830(6). Nothing in ORS 197.830(6) suggests

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> "(a) Except as provided in paragraph (b) of this subsection, the appeal periods described in subsections (3), (4) and (5) of this section shall not exceed three years after the date of the decision.
>
> "(b) If notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided, the provisions of paragraph (a) of this subsection do not apply."

[6] In *Michaels v. Douglas County*, 53 Or LUBA 16, 21-22 (2006), we held that where a local government makes a decision on an ORS 215.402(4) permit application without realizing it was doing so, and therefore fails to provide a hearing or notice of a hearing required by ORS 215.416(3) subject to the requirements of ORS 197.763, the ORS 197.830(6)(b) exception to the three-year statute of ultimate repose at ORS 197.830(6)(a) governs. We conclude below that the 1995 lot-of-record approval is an ORS 215.402(4) permit decision, made without the hearing or notice of the hearing required by ORS 215.416(3). Thus, as applied to the facts in this case, the three year limitation in ORS 197.830(6)(a) does not apply to the appeal of the 1995 lot-of-record decision, and we do not understand intervenors to argue otherwise.

that where the three-year statute of ultimate repose does not apply, in the circumstances set out in ORS 197.830(6)(b), the 10-year statute of limitations in ORS 12.140 applies instead.

From here on the jurisdictional questions become enmeshed in the underlying merits set out in the petition for review and response brief.

4. Land Use Decisions

Petitioners' main argument for why LUBA should remand the original 1995 lot-of-record approval is that the approval was both a land use decision subject to LUBA's jurisdiction and a discretionary "permit" decision under ORS 215.402 *et seq* and the county failed to give notice of the application or decision to petitioners. As explained below, when making a decision on a "permit" as defined at ORS 215.402(4), the county must provide notice and opportunity to request a hearing to nearby property owners. That in turn has a bearing on whether the appeal of the 1995 decision was timely filed under ORS 197.830(3). Similarly, with respect to the 1997, 1998, 1999, 2000, and 2002 extension decisions, petitioners argue that those extension decisions were also "permit" decisions for purposes of ORS 215.402 *et. seq.*, and that the county erred in failing to provide petitioners notice of the decision and opportunity to appeal. Complicating these questions is the fact that only one of the petitioners owned adjoining properties in 1995. Petitioners Mark Jones and Katharine Jones acquired their property in 1999; petitioners Erik Hellenthal and Linda Hellenthal acquired their property in 1998; petitioners Quinton Quisenberry and Brook Quisenberry acquired their property in 2002. Only petitioner Ben Dawson owned adjoining property in 1995.

Intervenors dispute, initially, that the 1995 lot-of-record approval is a "land use decision" subject to LUBA's jurisdiction.[7] Intervenors note that LUBA has never had occasion to rule directly on whether a lot-of-record dwelling approval under ORS 215.705(1) and implementing rules and local regulations is a land use decision. Intervenors contend that the 1995 approval was a ministerial decision that did not involve "discretion" or "the exercise of legal or policy judgment." Response Brief 23. Although intervenors do not cite it, they presumably refer to an exclusion to the definition of "land use decision," for decisions "made under land use standards that do not require interpretation or the exercise of policy or legal judgment." ORS 197.015(10)(b)(A).

In our view, a decision approving or denying a lot-of-record dwelling under the criteria at ORS 215.705(1) and implementing rules and regulations does not fall within the exclusion at ORS 197.015(10)(b)(A), and is a land use decision. While some of the criteria in ORS 215.705(1) are straightforward and in isolation capable of ministerial application, others are not. *See* n 3. For example, ORS 215.705(1)(a) requires a determination that the subject parcel was "lawfully created," a difficult legal determination in some cases. ORS 215.705(1)(c) requires a determination that the proposed dwelling is not prohibited by, and will comply with, the requirements of the acknowledged comprehensive plan and land use regulations and other provisions of law, which will almost always require the exercise of discretion in determining whether any comprehensive plan and land use regulations, or other laws, apply and if so whether the dwelling complies with them. ORS 215.705(1)(f) requires a finding that if the dwelling lies within an area designated in an acknowledged comprehensive plan as habitat of big game it is "consistent with the limitations on density upon which the acknowledged comprehensive plan and land use regulations intended to

[7] ORS 197.015(10)(a) defines "land use decision" to include a final decision or determination made by a local government or special district that concerns the adoption, amendment or application of (i) the goals, (ii) a comprehensive plan provision, (iii) a land use regulation, or (iv) a new land use regulation.

protect the habitat are based," a fairly open-ended inquiry that in many cases will require interpretation or the exercise of policy or legal judgment.[8] Land use standards written in the above manner do not qualify as ministerial or minimally discretionary standards "that do not require interpretation or the exercise of policy or legal judgment" for purposes of ORS 197.015(10)(b)(A).

For largely the same reasons we believe a lot-of-record decision under ORS 215.705(1) is also a "permit" as defined at ORS 215.402, *i.e.*, the "discretionary approval of a proposed development of land." Intervenors argue that a decision approving a lot-of-record dwelling on non-high value farmland under ORS 215.705(1) is not a discretionary approval, unlike a decision approving a lot-of-record dwelling on high-value farmland, which are subject to additional criteria at ORS 215.705(2) that are indisputably discretionary. Intervenors also argue that ORS 215.705(5) authorizes counties to regulate lot-of-record dwellings more stringently than required under ORS 215.705(1), but that the county has not chosen to do so. However, as explained above the criteria set out in ORS 215.705(1) are written in a manner that their application will almost always require exercise of the kind of discretion that results in the "discretionary approval of a proposed development of land."

The foregoing considers the definition of "permit" in effect in June 1995, when the initial lot-of-record permit was issued. In our view, the answer is even clearer under the current statutes. Effective September 1995, ORS 215.402(4) definition of "permit" was amended to include a series reference to ORS 215.700 to 215.780. Further, in 2001 the legislature adopted ORS 215.417, which is implemented in OAR 660-033-0140(5) and (6), discussed below, which characterizes approval of "residential development" that can be

[8] The county has adopted additional lot-of-record dwelling standards, apparently to implement ORS 215.705(1)(d) and (e) (1995), which require the county to determine whether the "predominant" use of the tract is agriculture or forestry, and applying different additional standards depending on that determination. Those additional standards address soil ratings, crops, proximity to a public road, siting standards, and fire safety, among other things. LUDO 3.5.115(3) and (4).

approved for four years and extended for two years with reference to various statutes, including ORS 215.705(1), as a "permit" approved under ORS 215.416, part of the statutes governing approval of permits.[9] That is a strong indication that the legislature views decisions under ORS 215.705(1) to be statutory permit decisions. Accordingly, we agree with petitioners that the 1995 lot-of-record approval was both a land use decision and a "permit" for purposes of ORS 215.402 to 215.416.

5. Standing

Intervenors next argue that petitioners lack standing to appeal the 1995 lot-of-record approval because none of the petitioners "appeared" during the proceedings below as required by ORS 197.830(2) and, even if the county was required to provide a hearing or notice of a hearing or decision, petitioners have not established that any of them owned property within the notice area in 1995 and were entitled to notice. We understand intervenors to argue that only persons who owned property within the notice area in 1995 and were thus entitled to notice have "standing" to appeal the 1995 decision to LUBA under ORS 197.830(3).

ORS 197.830(2) sets out the standing requirements to appeal to LUBA, and in relevant part requires a petitioner to "appear" before the local government during the proceedings below. However, a local government's failure to abide by statutory procedures requiring notice and hearing on permit applications obviates the necessity for making a local

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[9] ORS 215.417 provides, in relevant part:

> "(1) If a permit is approved under ORS 215.416 for a proposed residential development on agricultural or forest land outside of an urban growth boundary under ORS 215.010 to 215.293 or 215.317 to 215.438 or under county legislation or regulation, the permit shall be valid for four years.
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> "(2) An extension of a permit described in subsection (1) of this section shall be valid for two years.
>
> "(3) For the purposes of this section, 'residential development' only includes the dwellings provided for under ORS * * * 215.705 (1) to (3) * * *."

appearance in order to have standing, if that failure bears directly on a petitioner's ability to appear. *Flowers v. Klamath County*, 98 Or App 384, 389, 780 P2d 227 (1989). In such circumstances, ORS 197.830(3) allows the petitioner to appeal to LUBA notwithstanding the lack of an appearance during the proceedings below, if the petitioner demonstrates that he is "adversely affected" by the decision.

ORS 197.830(3) provides, in relevant part:

> "If a local government makes a land use decision without providing a hearing, * * * a person adversely affected by the decision may appeal the decision to the board under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Generally, persons who reside or own property within sight or sound of the subject property are deemed "adversely affected" by the decision for purposes of ORS 197.830(3). *Wilbur Residents for a Clean Neighborhood v. Douglas County*, 151 Or App 523, 526-27, 950 P2d 368 (1997). In the present case, there is no dispute that all petitioners currently reside within the notice area required in making a decision on a permit application under ORS 215.416. However, we understand intervenors to argue that petitioners lack standing to appeal the 1995 decision under ORS 197.830(3) because at the time the 1995 decision was issued none of petitioners owned adjoining property within the notice area.

However, based on the affidavits and documents provided to us there is no longer dispute that one of the named petitioners (Ben Dawson) owned property adjacent to the subject property at the time the 1995 lot-of-record approval was issued and, as explained above, he was entitled to notice of the hearing or decision. Intervenors argue only for dismissal of the entire appeal based on standing; we do not understand intervenors to request that individual petitioners who did not own property in 1995 be dismissed from LUBA No. 2010-098, if that would not result in the dismissal of the appeal itself. Accordingly,

intervenors' arguments regarding standing do not provide a basis to dismiss LUBA No. 2010-098.

6. Timely Appeals

As noted, petitioners rely upon ORS 197.830(3)(a) to argue that they filed timely appeals of the challenged decisions. Under most circumstances, an appeal of a land use decision must be filed with LUBA within 21 days of the date the decision became final. ORS 197.830(9). However, in limited circumstances ORS 197.830(3) tolls the time to file an appeal, to either 21 days of "actual notice where notice is required" under ORS 197.830(3)(a), or 21 days of the date a person "knew or should have known of the decision where no notice is required," under ORS 197.830(3)(b).

One of the circumstances where ORS 197.830(3)(a) applies is where a local government makes a land use decision on a permit application, but does not recognize that it is making a permit decision, and does not provide the notice, hearing, or opportunity to request a hearing required in making permit decisions under ORS 215.416. In that circumstance, a person adversely affected by the decision and entitled to notice of the decision may appeal to LUBA pursuant to ORS 197.830(3)(a), and that appeal will be timely filed if filed within 21 days of "actual notice" of the decision. Conversely, where a person adversely affected by the decision is not entitled to notice of the decision, the 21-day deadline begins running when the person "knew or should have known of the decision[.]" ORS 197.830(3)(b). As noted above, petitioner Ben Dawson as an adjoining land owner in 1995 was entitled to notice of the decision, and at least as to him the appeal deadline is set by ORS 197.830(3)(a). For the remaining petitioners, they were not entitled to notice and therefore ORS 197.830(3)(b) rather than 197.830(3)(a) provides the appropriate standard or state of knowledge.

In *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003), we addressed the differences between the "actual notice" requirement of ORS 197.830(3)(a) and the "knew or

should have known" requirement of ORS 197.830(3)(b). We held that "actual notice" of the decision "where notice is required" for purposes of ORS 197.830(3)(a) refers to (1) the legally required written notice of the decision, or (2) a copy of the decision itself, and that the "actual notice" standard of ORS 197.830(a) is not satisfied by a petitioner's receipt of information from other sources, such as casual conversations with a neighbor. *Id.* at 697. The latter type of subjective or imputed knowledge may be sufficient to satisfy the "knew or should have known" standards of ORS 197.830(3)(b), but not the "actual notice" standard of ORS 197.830(3)(a), which the legislature apparently views as something different and more meaningful than mere subjective or imputed knowledge.

Intervenors argue, however, that "actual notice" under ORS 197.830(3)(a) is triggered on the date that the petitioner is informed by the local government that the local government has approved the disputed development, not necessarily on the date the petitioner obtains an actual copy of either a notice of the decision or the decision itself, and that *Frymark* was wrongly decided or should be modified. Even if conversations with neighbors are not enough to trigger "actual notice," intervenors argue that there is no dispute that petitioner Jones spoke by telephone with county staff on September 28, 2010. Based on the affidavits of county staff, intervenors argue that staffs' oral conversation with petitioner Jones was sufficient to provide her "actual notice" of the existence of the 1995 decision and subsequent extensions for purposes of ORS 197.830(3)(a).[10] If so, intervenors argue, then as to petitioner Jones the 21-day deadline to appeal under ORS 197.830(3)(a) began running September 28, 2010, more than 21 days before the date these appeals were filed. As for the remaining petitioners, intervenors argue that Jones almost certainly informed her attorney,

[10] Petitioners dispute that contention, and filed a counter-affidavit from petitioner Jones describing her recollection of the conversations, which differs to some extent from that of county staff. From the competing affidavits, it is difficult to determine exactly what information was provided to petitioner Jones during those September 28, 2010 telephone conversations.

who later became attorney for the other petitioners, and the attorney's knowledge of the decision can be imputed to the other petitioners.

We continue to believe that the legislature did not intend to conflate the "actual notice" standard of ORS 197.830(3)(a) with the "knew" "or should have known" standards of ORS 197.830(3)(b) and that *Frymark* was correctly decided. ORS 197.830(3)(a) requires "actual notice" where "notice is required." ORS 197.830(3)(b) requires a different state of knowledge where "notice is not required." Because ORS 197.830(3)(a) applies in circumstances where written "notice" of the decision is required, and the legislature described the corresponding state of knowledge as "actual notice," we continue to believe that "actual notice" corresponds to (1) actual written notice of the decision or (2) a copy of the decision. There might be circumstances where the county provides "actual notice" to a petitioner in some other way that is equally authoritative and informative as the written notice of the decision or copy of the decision itself, but intervenors have not demonstrated that the present case is one of them.

Turning to the present case, as noted, the ORS 197.830(3)(a) actual notice standard applies to petitioner Ben Dawson, who was entitled to written notice but was not given notice. Dawson's declaration and petitioners' affidavits adequately establish that Dawson did not receive written notice of the 1995 decision or a copy of the decision or equivalent information more than 21 days prior to the date the appeal was filed. Therefore, LUBA No. 2010-098 was timely filed under ORS 197.830(3)(a). For the remaining petitioners, ORS 197.830(3)(b) supplies the appropriate deadline and state of knowledge.[11] We understand

[11] In *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002), we explained that the "knew or should have known" standard of ORS 197.830(3)(b) embodies the concept of "inquiry notice," such that if a person not entitled to notice is presented with information sufficient to impart to a reasonable person that the local government has approved development or issued a land use decision, that person is obligated to make timely inquiries with the local government and discover the decision (*i.e.* obtain a copy of the decision). If timely inquiries are made, the 21-day appeal period begins to run on the date the decision is discovered. Only if the petitioner does not make timely inquiries after obtaining inquiry notice does the 21-day appeal period begin to run on the date the petitioner is placed on inquiry notice. *Id.*

intervenors to argue that, based on alleged conversations with intervenors and county staff prior to October 6, 2010, at least petitioner Jones "knew or should have known" of the 1995 decision more than 21 days from the date this appeal was filed. However, we need not address the parties' dispute over the content and timing of such conversations, because even if Jones or other petitioners not entitled to notice "knew or should have known" of the decision more than 21 days prior to filing the appeal for purposes of ORS 197.830(3)(b), as explained above petitioner Ben Dawson's appeal is timely under ORS 197.830(3)(a). Thus, even if we resolve all factual disputes in intervenors' favor and conclude that as to those petitioners not entitled to notice the appeal is untimely under ORS 197.830(3)(b), at best that would result in some petitioners being individually dismissed from this appeal (which we do not understand intervenors to request). The appeal itself would not be dismissed.

For the foregoing reasons, the appeal of the 1995 decision was timely filed under ORS 197.830(3)(a).

7. Mootness

Intervenors also argue that the appeal of the 1995 lot-of-record approval is rendered moot by the most recent permit extension decision issued in June 2010, which petitioners have not appealed. According to intervenors, LUBA has held that decisions extending an ORS 215.402(4) permit under discretionary criteria like that in LUDO 2.800 are themselves "permit" decisions. *Heidgerken v. Marion County*, 35 Or LUBA 313, 327 (1998); *Willhoft v. City of Gold Beach*, 38 Or LUBA 375, 384 (2000); *Michaels v. Douglas County*, 53 Or LUBA 16, 23 (2006); *Thalman v. Marion County*, 58 Or LUBA 23, 28 (2008); and *Bard v. Lane County*, __ Or LUBA __ (LUBA No. 2010-091, February 1, 2011) slip op 9, *review pending* CA A147852. Intervenors argue that under the reasoning in *Heidgerken* and its progeny the 2010 permit extension decision is essentially a new permit decision re-approving the underlying permit, and completely superseding all previous permits and extensions.

LUBA has held that it will dismiss an appeal as moot when its review would have no "practical effect." *Rest Haven Memorial Park v. City of Eugene*, 44 Or LUBA 231 (2003); *Davis v. City of Bandon*, 19 Or LUBA 526 (1990). Intervenors argue that resolving the appeal of the 1995 decision (as well as the appeals of the 1997, 1998, 1999, 2000 and 2002 extension decisions) would have no practical effect on the parties because, according to intervenors, the June 2010 permit extension is a complete re-authorization of the initial lot-of-record approval, and petitioners failed to appeal that June 2010 extension decision.

Intervenors also argue that the appeal of the 1995 lot-of-record decision (and extension decisions) is moot for an additional reason: intervenors argue that they have as of February and March 2011 completed all conditions of approval required under the 1995 lot-of-record decision, by obtaining a certification from an engineer that the access road complies with county road standards, county planning clearance to site the proposed dwelling, as well as a building permit. We understand intervenors to argue that because those conditions of approval have now been satisfied, intervenors have sufficient legal authority to construct the dwelling, even if as a result of LUBA's review the 1995 decision would be reversed or remanded. Therefore, intervenors argue, LUBA's review of the 1995 lot-of-record decision would have no practical effect, and this appeal is moot.

These arguments again present novel issues. In *Michaels v. Douglas County*, 53 Or LUBA 16 (2006), we dismissed as untimely under ORS 197.830(4) an appeal of an extension decision that was processed as a permit decision under ORS 215.416. In a footnote, we noted that after the challenged extension decision the county had issued a new extension decision the following year, but expressed no opinion on what effect, if any, our decision dismissing the appeal of the first extension decision had on the subsequently issued extension. *Id*. at 24, n 5. We are now called upon to address a reverse variant of that question: the effect if any of a subsequently issued extension decision on the appeal of the underlying permit decision.

We did not hold in *Heidgerken* or elsewhere that a permit extension decision is in every case a complete re-authorization of the underlying permit, superseding the underlying permit, and thereby rendering any legal errors in the earlier permit decision proof from appeal. As we held in *Heidgerken*, *Willhoft*, *Michaels*, *Thalman* and *Bard*, a decision extending an ORS 215.403(4) permit that is rendered under discretionary criteria may itself constitute a separate ORS 215.403(4) permit decision, but the legal effect of such an extension decision is to extend the expiration date of the underlying permit decision, not to supersede the underlying permit decision or reauthorize that underlying permit under the applicable permit approval standards. Because the June 2010 extension decision did not have the legal effect of superseding or reauthorizing the 1995 lot-of-record approval, we do not agree with intervenors that issuance of the June 2010 extension decision moots LUBA's review of the 1995 lot-of-record decision or renders LUBA's review of that 1995 decision of no practical effect. On the contrary, a LUBA decision affirming, reversing or remanding the 1995 lot-of-record decision would likely have a very significant effect on the parties.

For the same reasons we do not understand how complying in February 2011 with the conditions of the 1995 lot-of-record approval, or obtaining a building permit in March 2011, would moot the appeal of the 1995 lot-of-record approval. Those actions by the county depend for their legitimacy and legal effect on the 1995 lot-of-record approval, and do not somehow supersede the 1995 decision or provide independent authority to construct the lot-of-record dwelling. A county cannot moot an otherwise properly filed appeal of an ORS 215.402(4) permit decision by issuing subsequent ministerial approvals intended to implement the appealed permit decision.

8. Conclusion

For the foregoing reasons, the appeal of the 1995 lot-of-record decision is within LUBA's jurisdiction, and intervenors' motions to dismiss LUBA No. 2010-098 are denied.

B. The 1997, 1998, 1999, 2000 and 2002 Extension Decisions (LUBA Nos. 2010-099, 100, 101, 102, and 103)

In the petition for review, petitioners argue intervenors failed to file timely requests to extend the 1995 approval, in the years 1997, 1998, 1999, 2000 and 2002, and that consequently the 1995 lot-of-record approval became "void" under the express terms of LUDO 2.800 and OAR 660-033-0140(2)(b).[12] In addition, petitioners argue that the county lacked authority under LUDO 2.800 and OAR 660-033-0140(4) to extend the 1995 approval after 1998, because one of the substantive lot-of-record approval criteria was amended in that year.[13]

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[12] We repeat the relevant text of OAR 660-033-0140:

> "(1) Except as provided for in subsection (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land * * * is void two years from the date of the final decision if the development action is not initiated in that period.
>
> "(2) A county may grant one extension period of up to 12 months if:
>
> > "(a) An applicant makes a written request for an extension of the development approval period;
> >
> > "(b) The request is submitted to the county prior to the expiration of the approval period;
> >
> > "(c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and
> >
> > "(d) The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.
>
> "(3) *Approval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.*
>
> "(4) Additional one year extensions may be authorized where applicable criteria for the decision have not changed." (Emphasis added.)

[13] Petitioners argue that, in 1998, the county amended LUDO 3.5.115(2) to add subsection (b), requiring a finding that "if the lot or parcel on which the dwelling will be sited was part of a tract on November 4, 1993, no dwelling exists on another lot or parcel that was part of the tract." LUDO 3.5.115(2)(b) appears to implement OAR 660-033-0130(3)(a)(C).

Intervenors advance the same seven jurisdictional challenges to the five extension decisions, *i.e.*, (1) laches, (2) incomplete service, (3) ORS 12.140, (4) not land use decisions, (5) lack of standing, (6) failure to timely appeal, and (7) mootness. With one exception, we believe none of those jurisdictional challenges are well-taken, for the reasons set out above. The exception is the argument, based on OAR 660-033-0140(3), that a decision extending a permit approval on agricultural land under the rule is "not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision." *See* n 12.

OAR 660-033-0140 was originally adopted in 1993. There are almost no LUBA and no Court of Appeals cases addressing OAR 660-033-0140 or county legislation implementing it, which is surprising given how long the rule has been in force. In *Heidgerken*, which involved an appeal of a denial of a permit extension for a campground on forest land, the county cited the rule to argue that the challenged extension decision was not a land use decision. We rejected that argument, noting that the rule was not in effect when the original permit was issued. We subsequently held that because the original permit was void under the county's code unless acted upon or extended, the applicant relied upon numerous extensions for its continued validity, but the county code lacked any standards for extending the permit, the county's exercise of unfettered discretion in finally denying the last requested extension after providing a full evidentiary hearing was "tantamount" to denial of the underlying permit, and was thus subject to the requirement, at ORS 215.416(8) and (9), that approval or denial of a permit application be based on standards and criteria set forth in the zoning ordinance and supported by findings. *Id.* at 326.

Heidgerken is somewhat *sui generis*, because it involved a situation where the county's exercise of discretion to approve or deny a permit extension was unfettered by any applicable standards, discretionary or ministerial. In subsequent cases noted above, *Bard*, *Thalman*, *Michaels*, and *Willhoft*, we cited *Heidgerken* for the general proposition that, under a regulatory scheme where the initial ORS 215.402(4) permit approval becomes "void"

within a certain period if the approval is not timely acted on or extended, and the applicable extension standards require the exercise of discretion, a decision extending the permit is also an ORS 215.402(4) permit decision.

In each of the above cases we either held or there was no dispute that the challenged permit extension decision was both a land use decision subject to LUBA's jurisdiction under ORS 197.015(10), and a discretionary "permit" decision for purposes of ORS 215.402 and the corresponding statute applicable to cities. Indeed, in *Bard* we addressed a code extension criterion identical to that in OAR 660-033-0140(2)(d) and concluded that an extension under that criterion was an "extremely discretionary" decision. *Id.*, slip op 9. However, it is important to note that none of the above cases appear to involve extensions of permits for development on farm or forest land, or otherwise did not involve circumstances controlled by OAR 660-033-0140.

Our reasoning in the above cases, if extended to permit extensions on farm or forest land under OAR 660-033-00140, would directly conflict with OAR 660-033-0140(3), which as noted provides that a permit extension under the rule is "not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision." *See* n 12. OAR 660-033-0140(3) possibly represents LCDC's interpretation of the ORS 197.015(10) definition of "land use decision" or one of the exclusions to that definition, at ORS 197.015(10)(b). Or possibly it represents the creation of an additional exclusion, independent from those set out in the statute. LCDC has general statutory authority to "adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197." ORS 197.040(1)(b). LCDC also has broad statutory authority to adopt rules regarding use of farm and forest lands. *See generally Lane County v. LCDC*, 325 Or 569, 942 P2d 278 (1997). Petitioners do not argue that OAR 660-033-0140(3) exceeds LCDC's authority, or is inconsistent with any statute, and we express no opinion in that regard. Because petitioners

offer no basis for concluding that OAR 660-033-0140(3) does not control the present circumstances, we apply and give effect to the rule.

Under the plain terms of OAR 660-033-0140(3), a decision extending a permit decision on agricultural or forest land is not a "land use decision" as defined in ORS 197.015 and therefore is not subject to LUBA's jurisdiction. As relevant here, our jurisdiction is limited to land use decisions, and therefore we lack jurisdiction over the extension decisions appealed in LUBA Nos. 2010-099, 100, 101, 102 and 103. Petitioners have not moved to transfer these appeals to circuit court under OAR 661-010-0075(11). LUBA Nos. 2010-099, 100, 101, 102 and 103 are dismissed. OAR 661-010-0075(11)(c).

FIRST, SECOND, THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR

The first through fifth assignments of error challenge the 1995 lot-of-record decision.[14] Under the first assignment of error, petitioners contend that the county erred in processing the 1995 application by failing to provide the notice and hearing required by ORS 215.416 to at least some petitioners. Under the second, third and fourth assignments of error, petitioners argue that the 1995 decision includes inadequate or no findings, unsupported by substantial evidence, addressing applicable criteria under ORS 215.705(1) (1995) and OAR 660-033-0130(3)(1995). Finally, under the fifth assignment of error petitioners argue that the county code requires the county to provide notice of the application to the co-owner, Elaine Coulombe, and the county erred in failing to do so, and thus failed to include an indispensable party to the proceeding.

[14] The eight assignments of error are set out at Petition for Review 8-9, followed by a combined argument for all assignments of error, divided into two major subsections directed at the 1995 decision and the extension decisions, respectively. As stated, the first and second assignments of error include some arguments directed at the permit extension decisions. The sixth, seventh and eighth assignments of error are directed exclusively at the permit extension decisions. Because the permit extension decisions are not before us, we ignore those arguments in the first and second assignments of error directed at the extension decisions, and deny the sixth, seventh and eighth assignments of error without discussion.

A. First Assignment of Error

Our above jurisdictional analysis effectively resolves the first assignment of error. For the reasons set out above, we agree with petitioners that the 1995 lot-of-record decision was a ORS 215.402(4) permit decision, and thus the county was required to provide the notice and opportunity for hearing required by ORS 215.416 to persons entitled to notice. As explained, in 1995 petitioner Ben Dawson owned adjoining property, and there is no dispute he was entitled to the notice of hearing under ORS 197.763 or notice of the administrative decision and the opportunity to request a *de novo* hearing under ORS 215.416(11)(c). The county did not provide either notice and did not conduct a hearing. That lack of notice clearly prejudiced petitioner Dawson's substantial rights. Therefore, remand is necessary for the county to provide the notice and a *de novo* hearing required by the statute. Because any notice of hearing provided on remand must comply with ORS 197.763, and all petitioners are currently entitled to notice as adjoining property owners, the county on remand must provide notice of the hearing to all petitioners. The first assignment of error is sustained, in part.

B. Second, Third and Fourth Assignments of Error

As a consequence of sustaining the first assignment of error, remand is necessary to provide the *de novo* hearing required by ORS 215.416, which will result in a new decision based on different findings and new evidence, any resolution of the findings and evidentiary challenges raised in the second, third and fourth assignments of error would be premature. However, to guide the proceedings on remand we generally agree with petitioners that the county must address all applicable criteria in ORS 215.705(1) (1995) and OAR 660-033-0130(3) (1995), even if certain statutory or rule criteria were not, for whatever reason, implemented in the county's code at the time. ORS 197.646(4). Otherwise, we do not reach or resolve the second, third or fourth assignments of error.

C. Fifth Assignment of Error

Under the fifth assignment of error, petitioners argue that the 1995 decision is invalid, because the county failed to provide notice of the application to the co-owner of the subject property at the time, Elaine Coulombe, as required by LUDO 2.040 (1994).[15] Intervenors do not dispute that the county failed to provide the required notice to Elaine Coulombe, but disputes that the county's failure to comply with LUDO 2.040 has the automatic effect of "invalidating" the 1995 approval.

We agree with intervenors that petitioners have not demonstrated that failure to comply with LUDO 2.040 has the effect of "invalidating" the 1995 decision. Mailing notice is a procedural requirement, and procedural errors, if sustained on appeal, generally warrant remand. On remand, it is not clear to us why the county could not rectify its initial failure to comply with LUDO 2.040 by mailing the required notice of the application to all owners of record at the time the application was filed. If the county receives no timely written objection from owners of record who did not sign the application, which seems likely, such owners are deemed to concur in the application, pursuant to LUDO 2.040. With that observation, the fifth assignment of error is sustained.

D. Conclusion

The first and fifth assignments of error, sustained above, involve the type of errors that warrant remand rather than reversal. OAR 661-010-0071(2)(c) (LUBA shall remand a

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[15] LUDO 2.040 (1994) provided, in relevant part:

> "When an application is initiated and signed by less than all of the owners, purchasers and lessees of record, the Director shall give all other owners, purchasers and lessees of record at least ten days written notice of the initiation of the application. Such notice shall be mailed to such owners, purchasers and lessees at their most recent address of record. Such notice shall provide that all owners, purchasers and lessees of record shall be deemed to concur with the requests of the application, unless a timely written objection is received by the Director. Such notice shall also provide that if a timely objection is received by the Director, the application will be deemed by the Director to be withdrawn by the applicant, without any right to refund of any application filing fee. * * *"

land use decision when the decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s)). However, petitioners argue that reversal is the appropriate disposition:

> "Intervenors admit they came into title on the subject property on June 22, 1995. The record shows that the Coulombes owned the property from before 1985 through 1995. Intervenors are not able to satisfy the conditions of ORS 215.705(1)(a) or LUDO 3.5.115 (first paragraph) in obtaining approval for a proposed [lot-of-record] dwelling.
>
> "It is impossible for the county to approve a lot-of-record dwelling on the subject property, not that intervenors have owned the property since 1995. The decision violates a provision of applicable law, and at this point in time, it is prohibited as a matter of law. OAR 661-010-0071(1)(c)." Petition for Review 25.

Intervenors do not respond to this argument, and do not take a position on whether remand or reversal is the appropriate disposition if one of the assignments of error are sustained, assuming those are the only choices. This issue is also one of first impression. Under ORS 215.705(1)(a), the county may approve a lot-of-record dwelling where the lot or parcel was "acquired by the present owner" prior to January 1, 1985, or by devise or intestate succession from such a person. After the subject property was transferred to intervenors on June 22, 1995, intervenors became the "present owners" of the property. Intervenors clearly do not qualify for a lot-of-record dwelling approval on their own. Because remand under the first assignment of error requires that the county provide a *de novo* hearing on the application, all issues are potentially open for dispute, including whether the application can now be approved under ORS 215.705(1)(a). If petitioners are correct that intervenors are now the "present owners" for purposes of addressing ORS 215.705(1)(a), it is highly doubtful that the lot-of-record dwelling application could be approved on remand, and therefore reversal might well be the appropriate disposition.

However, ORS 215.705(7) provides that "[w]hen 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." Under ORS 215.705(7), once the lot-of-record dwelling approval becomes effective, which in this case was shortly after June 21, 1995, the "application" (and not just the dwelling approval) can be "transferred" to a subsequent, non-qualifying purchaser of the underlying property. The legislature was presumably aware that a lot-of-record dwelling approval could be appealed or reviewed in some forum after its effective date, and potentially returned to the local government for additional proceedings or a new decision on the "application," after the application had been transferred to a non-qualifying purchaser. We believe that the legislature could have intended ORS 215.705(7) to allow a person to whom the application is transferred under the statute following the effective date of the approval to succeed in the interest of the former qualifying owner for all relevant purposes, and if the decision is remanded back to the local government for further proceedings, the subsequent purchaser can pursue the application on remand as if the property were still owned by the qualifying owner, for purposes of ORS 215.705(1)(a). Under that view of ORS 215.705(7), remand and not reversal is the appropriate disposition.

LUBA No. 2010-098 is remanded.