BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

TERRY SAYRE and LINDA SAYRE,
Intervenors-Respondents.

LUBA No. 2016-082

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by Lane County.

Michael E. Farthing, Eugene, filed the response brief and argued on behalf of intervenors-respondents.

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

AFFIRMED 02/15/2017

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county approving a forest template dwelling.

FACTS

Intervenors-respondents (intervenors) applied for approval of a forest template dwelling on their 1.29-acre property zoned Impacted Forest Lands (F-2). The planning director approved the application, and petitioner appealed the decision to the hearings officer, who approved the application. Petitioner appealed the decision to the board of county commissioners, which decided not to conduct a hearing on the appeal. The board of commissioners affirmed and adopted the hearings officer's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Lane Code (LC) 16.211(5) implements the provisions of ORS 215.750, a statute that authorizes what are commonly referred to as forest template dwellings.[1] LC 16.211(5)(b) requires the county to determine that "[t]he lot or

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[1] ORS 215.750 provides in relevant part as follows:

> "(1) In western Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:
>
> "* * * * *

parcel upon which the dwelling will be located was lawfully created." LC does not include a definition of "lawfully created," but LC 16.090 defines "Parcel" as:

> "(1) Includes a unit of land created:
>
> "(a) by partitioning land as defined in LC 16.090,
>
> "(b) in compliance with all applicable planning, zoning, and partitioning ordinances and regulations; or
>
> "(c) by deed or land sales contract if there are no applicable planning, zoning or partitioning ordinances or regulations."[2]

In order for a parcel to qualify as a parcel, it must have been created by partitioning, in compliance with all applicable planning, zoning and partitioning ordinances, or by deed if there were no applicable planning, zoning

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> "(c) Capable of producing more than 85 cubic feet per acre per year of wood fiber if:
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> "(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[.]"

[2] ORS 215.010(1) provides that the term "parcel" includes units of land either created by partitioning pursuant to statute, or "[i]n compliance with all applicable planning, zoning and partitioning ordinances and regulations," or by deed or contract, if no such ordinances or regulations were applicable. The definition expressly applies to ORS chapter 215. *Friends of Yamhill County v. Yamhill County*, 229 OrApp 188, 192, 211 P3d 297 (2009).

or partitioning ordinances. Thus the defined term "parcel" encapsulates the concept of "lawful creation" in the definition.

In April 1979, the county approved an application, assigned planning file number M212-79, from the then-owner Carter to partition a 2-acre parcel into two one-acre parcels. The subject property is one of the one-acre parcels. That partition approval included four conditions that were required to be satisfied within one year of the date of approval. Record 300-301. Two conditions (conditions 1 and 3) required submittal to the county of (1) a final partition plat map that included an illustration of the location of existing dwellings and sewage disposal systems on each parcel, and (2) a recording fee for recording the final partition plat map. The record includes a receipt from the county planning department dated April 1, 1980, for a "final plat map" and "M212-79 recording fee," for $7.00. Record 315.

Another condition required submittal of a survey to the county surveyor's office. The record includes a receipt from the county surveyor dated April 1, 1980, that identifies a 14- by 17-inch survey that the original applicant, Carter, submitted on April 1, 1980. Record 318. A fourth condition required deeds to be recorded that included an easement for access. The record includes deeds that were recorded on April 11, 1980 that grant easements for access. Record 305-08.

The record also includes a letter dated July 3, 1980 from the Acting Chair of the county's Land Development Review Committee to Carter, stating

that the conditions had not been fulfilled and the conditional approval of the partition had expired. Record 329. In 1996, at the request of Carter, the county planning department reviewed the April 1980 receipt for the recording fee for the partition plat and submittal of the survey, and the deeds recorded in April 1980, and determined that all of the conditions of approval had in fact been satisfied. The county recorded the final partition plat in April 1996.[3] Record 434.

Based on the April 1980 receipts for the recording fees, the survey, and the April 1980 deeds, and the explanation for the late recording of the final partition plat map contained in the 1996 planning department action to record the final partition plat, the hearings officer found that the subject property was "lawfully created." Record 22-23. The board of county commissioners affirmed and adopted the hearings officer's decision as its own. Record 9.

A. First Subassignment

In a portion of its first assignment of error, petitioner argues that the hearings officer erred in determining that the subject property was lawfully created. According to petitioner, the July 1980 letter in the record from the acting chair of the county's Land Development Review Committee conclusively establishes that the 1979 partition approval expired, and therefore the parcel was not "lawfully created."

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[3] The parties explain that in 1980 the county, not the applicant, was responsible for recording partition plats.

Intervenors respond that the evidence in the record consisting of (1) the April 1980 receipts from the planning department for recording fees for the final partition plat and for submittal of the survey, (2) the deeds recorded in April 1980, and (3) the recorded final partition plat all support the hearings officer's conclusion that the subject property was "lawfully created." According to intervenors, the delay in the recording of the final partition plat until 1996 does not mean the subject property was not "lawfully created" within the meaning of LC 16.211(5)(b), because only *submittal*, not recording, of the final partition plat map was a required condition of approval and the record demonstrates that the plat map was submitted. Intervenors respond that the partitioning process was finally completed in 1996, and that the July 1980 letter stating that the conditions had not been fulfilled was an error. We understand intervenors to argue that because Carter complied with all applicable partitioning requirements, received approval of his partition application, and recorded the final partition plat, the subject property is a "parcel" as defined in LC 16.090, and is lawfully created.[4]

[4] Intervenors also respond that ORS 197.830(6)(b) requires LUBA to deny the first assignment of error. Response Brief 10. ORS 197.830(6)(b) is a statute of ultimate repose that sets a maximum period of ten years for appealing a land use decision that required notice of a hearing or administrative decision that was not provided, after which those land use decisions can no longer be challenged. *See Jones v. Douglas County*, 247 OrApp 56, 65, 270 P3d 264 (2011) (so explaining). There is no dispute that petitioner's appeal of the county's decision approving intervenors' forest template dwelling application

We agree with intervenors that the hearings officer's conclusion that the subject property was lawfully created is supported by substantial evidence in the record. ORS 197.835(9)(a)(C). The hearings officer apparently chose to give little evidentiary weight to the July 1980 letter stating that the conditions of approval had not been fulfilled, and great evidentiary weight to the April 1980 receipts and the 1980 deeds, which call into question the statement in the July 1980 letter, as well as the 1996 recorded plat. That is evidence that a reasonable person could rely on to conclude that the subject property was created by partitioning and in conformance with all applicable zoning and partitioning ordinances. *Younger v. Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

The first subassignment of error is denied.

B. Second Subassignment

In its second subassignment of error, petitioner argues that the hearings officer erred in concluding that the subject property was "lawfully created" because four months after the county approved the partition, in August 1979,

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was timely, and for that reason ORS 197.830(6)(b) simply does not apply to the present appeal.

As noted, LC 16.211(5)(b) requires the county to determine that intervenors' parcel was "lawfully created." That determination requires a present determination by the county regarding whether the subject property was lawfully created. Petitioner's arguments that the property was not lawfully created do not implicate the statute of ultimate repose because petitioner has not appealed the 1979 partition decision.

the county applied FF-20 zoning to the property, requiring a minimum lot size of 20 acres. As we understand petitioner's argument, it is that the post-partition August 1979 zoning of the property to a zoning district that required a 20-acre minimum parcel size means that the one-acre parcels approved by the county in April 1979 were not "lawfully created."

Intervenors respond, initially, that petitioner failed to raise the issue below and is precluded from raising the issue for the first time on appeal to LUBA. ORS 197.835(3); *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991) (petitioner's arguments must give the city "fair notice" that it needed to address that issue). Petitioner cites Record 74, 81, 85, and 351 to demonstrate the issue was raised prior to the close of the initial evidentiary hearing. Petition for Review 17-18. The closest those record pages come to raising the issue is to argue that "the subject parcel was created as a sub-standard sized lot in the applicable zone[,]" and "in addition to being an unreviewed conveyance, the 1980 [property line adjustment action] by warranty deed created substandard sized parcels of 1 acre each[.]" Record 74, 351. The argument presented in the second subassignment of error is much more nuanced and developed than the arguments presented in the cited record pages, which merely allege without developed explanation that the parcel was created in 1980 as a sub-standard sized parcel in the FF-20 zone. We agree with intervenors that petitioner failed to raise the issue presented in the second

subassignment of error with enough specificity to enable the decision maker to understand and respond to it.

However, even assuming the issue was raised, we also reject petitioner's argument. When the county approved the partition application in April, 1979, the property was unzoned. Petitioner does not explain why the later assignment of a zoning designation for the property that required 20-acre minimum parcel sizes means that the parcel was not lawfully created in April, 1979 when the county approved the partition application.

The second subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ORS 215.750(1)(c) allows a county to approve a forest template dwelling if, after applying a 160-acre template centered on the subject property, at least eleven other "lots or parcels *that existed on January 1, 1993, are*" within the 160-acre area. (Emphasis added.) In their application, intervenors identified fourteen parcels within a 160-acre area centered on the subject property. Record 610, 616.

The boundaries of three parcels (Parcels 9, 10, and 11) were reconfigured pursuant to property line adjustments after January 1, 1993. Intervenors argued, and the county agreed, that intervenors could rely on the parcel configurations that existed on January 1, 1993 as long as the parcel as it existed on January 1, 1993 was "partly or completely within the template

boundaries." Record 135. A fourth parcel, Parcel 8, was partitioned into two parcels after January 1, 1993. Intervenors counted Parcel 8 as one parcel, rather than two parcels, towards the minimum 11 parcel count. Intervenors argued, and the county agreed, that intervenors could rely on the pre-partition configuration of Parcel 8, as it existed on January 1, 1993 as a single parcel, and count Parcel 8 towards the 11 parcel count.

In its second assignment of error, petitioner contends that Parcels 8, 9, 10, and 11 may not be counted towards the 11-parcel minimum parcel count because, due to later changes to the configurations of those parcels through partition (Parcel 8) and property line adjustments (Parcels 9, 10, and 11), those parcels are not parcels "that existed on January 1, 1993." Put another way, petitioner argues that none of those parcels may be included in the parcel count because none *currently* exist in the configuration "that existed on January 1, 1993."

In support of its argument, petitioner argues that ORS 215.750(1)(c)(A) uses the present tense word "are" in referring to the 11 lots or parcels that can be included in the parcel count. Petitioner argues that the legislature would have used the word "were" if the legislature intended an applicant to turn the clock back and rely on the configuration that existed prior to January 1, 1993 without consideration of later changes to a parcel's configuration.

Petitioner also relies on the LCDC rule definition of "[d]ate of creation and existence," at OAR 660-006-0005(5). LCDC adopted OAR 660-006-

0005(5) after the enactment of HB 3661 (which created the forest template dwelling provisions) and the rule took effect March 1, 1994. For purposes of OAR 660, division 6's rules, "Date of creation and existence" is defined to mean:

> "When a lot, parcel or tract is reconfigured pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling, the date of the reconfiguration is the date of creation or existence. Reconfigured means any change in the boundary of the lot, parcel, or tract."[5]

Intervenors respond that the county's interpretation of the template dwelling statute as allowing the county to count parcels as they existed on January 1, 1993 independent of later reconfiguration is consistent with the statute and the rule.

We conclude that the forest template statute and OAR 660-006-0005(5) do not prohibit an applicant from relying on the January 1, 1993 configuration of a later-reconfigured parcel in all circumstances. We disagree with petitioner that the statute's use of the word "are" prohibits an applicant from relying on the January 1, 1993 configuration of a later-reconfigured parcel when counting

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[5] OAR 660-033-0020(4) defines the terms "Date of Creation and Existence" for purposes of OAR chapter 660, division 33, nearly identically to mean:

> "When a lot, parcel or tract is reconfigured pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling, the date of the reconfiguration is the date of creation or existence. Reconfiguration means any change in the boundary of the lot, parcel or tract."

parcels towards the minimum parcel count. Nothing in that approach is inconsistent with the statute's use of the present tense word "are."

Further, the language of the rule and LCDC's evident purpose in adopting the rule, which we discuss below, supports an approach that allows, for parcel counting purposes, an applicant to rely on the January 1, 1993 configuration of a parcel that was later adjusted by a property line adjustment, so long as "the effect of" that property line adjustment was not "to qualify a lot, parcel or tract for the siting of a dwelling." The administrative rule history of OAR 660-006-0005(5) indicates that LCDC adopted the rule after it recognized that "[t]he reconfiguration of a parcel *to meet parcel and dwelling requirements for template dwellings* * * * is not contemplated by the language of [HB 3661.]" February 11, 1994, Director's Report to LCDC for February 18, 1994 LCDC Meeting, at 4-5 (emphasis added). The minutes of the February 18, 1994 LCDC meeting explain the purpose of OAR 660-006-0005(5):

> "Mr. Blanton said this issue rose out of discussions regarding lot line adjustments and the impact of those lot line adjustments on the requirements of the Goal 4 rule. * * *
>
> "The department's concern with lot line adjustments and how they affect the date of creation, Mr. Blanton said, is that there are date requirements, particularly for template dwellings on forest land and the lot of record productivity standards that are impacted by the relocation of a lot boundary. *The department wanted to avoid the situation where lot line adjustments are used to qualify a parcel or tract that would not have otherwise qualified under the productivity test, or that the requirement for the template would be moved by the relocation of the common boundary. The department did not believe this was the intent of the drafters of HB 3661, and*

the reason the 1993 date was put in was not to allow the template to 'walk.'

"Mr. Blanton said the proposed language says that when a parcel is reconfigured by moving a lot line, the date that parcel was created changes to the date that it is reconfigured. The commission has heard some concern about how this impacts a road relocation, or a survey error which requires adjustment of a property boundary, or what happens if a property boundary divides a structure. The concern had been raised that the impact of this language unfairly will penalize owners who are seeking lot line adjustments for those reasons.

"* * * * *

"Mr. Johnson said there were two other situations staff is concerned about: lot of record on the agricultural side where the predominant soil class has to be determined; and the template situation discussed earlier.

"Commissioner Brogoitti asked what the affect of this issue would be on county planning departments. Mr. Schlack, AOC land use specialist, said based on staff recommendation, many lots or parcels that would have qualified for a lot of record that because there has been a simple lot line adjustment to address one of the issues [the Lane County Planning Director] identified, would no longer qualify. Mr. Schlack thought there would be people coming to the county saying they thought they did everything right and now this rule is going to disqualify them.

"*Director Benner said the objective was not to disqualify anyone who qualified prior to the reconfiguration. Nor was the objective to qualify someone who did not qualify prior to the reconfiguration.*

"Commissioner Pfeiffer recalled testimony from the Realtors Association expressing concern about how broad the draft language was because it appeared to them it captured reconfigurations that occurred prior to November 4, 1993. It was his sense that not only was that not the intent, no one was reading

> the language to hit reconfigurations that occurred prior to November 4, 1993.
>
> "The staff returned with the following amendment:
>
> "'(4) Date of creation and existence. When a lot, parcel or tract is reconfigured, pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling, the date of the reconfiguration is the date of creation or existence. Reconfigured means any change in the boundary of the lot, parcel or tract.'
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> "It was MOVED by Commissioner Throop, seconded by Commissioner Pfeiffer and passed unanimously to approve the staff recommendation as amended." Minutes, February 18, 1994 LCDC Meeting 22-24 (underlining in original; italics added).

As the above section from the meeting minutes demonstrates, the initial draft of OAR 660-006-0005(5) did not include the phrase "the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling * * *." That language was added to address concerns that were raised that post-November 4, 1993 reconfigurations that occurred for reasons other than to qualify a parcel for a dwelling would inadvertently preclude the ability of an owner to obtain approval of a forest template dwelling.

Notwithstanding the lack of use of the phrase "date of creation and existence" in any of the relevant statutes and rules, the administrative rule history set out above confirms that the definition is relevant in determining whether a change in the boundary of a parcel after November 4, 1993 means that the date of the boundary change is a new "date of existence" for purposes of the requirement that a parcel counted in the parcel count have "existed on

January 1, 1993." However, the key question to be answered in determining whether a post-November 4, 1993 change to the boundary of a parcel that is counted in the parcel count gives that parcel a new "date of * * * existence" is whether the boundary change has the effect of qualifying the parcel for which a template dwelling is sought for that dwelling. Or, in the words of DLCD Director Benner, the key question is whether a change in the boundary of a parcel relied on in the parcel count allowed the 160-acre template to "walk."

In the present appeal, petitioner argues that all post-November 4, 1993 boundary changes have the effect of disqualifying the reconfigured parcel from being counted in the minimum parcel count. The rule history demonstrates that LCDC was concerned with preventing future (post-November 4, 1993) boundary changes that *have the effect of* qualifying a parcel for a template dwelling. That concern is not present when an applicant relies on the January 1, 1993 configuration of a parcel that was later reconfigured by a property line adjustment, so long as that boundary change did not have the effect of qualifying the parcel for the template dwelling that is sought.

As intervenors correctly note, petitioner does not argue that the post-November 4, 1993 changes to the boundaries of Parcels 9, 10, or 11, the parcels that were reconfigured through property line adjustments after November 1, 1993, have the effect of qualifying the subject property for the template dwelling. Response Brief 22. Rather, petitioner takes the position that *any* post-November 4, 1993 change to the boundary of those parcels means the parcels

are disqualified from eligibility in the parcel count, because according to petitioner OAR 660-006-0005(5) assigns the adjusted parcel a new post-1993 "date of * * * existence." For the reasons explained above, we disagree with that broad reading of the rule. Absent any argument that the boundary changes to Parcels 9, 10 or 11 had the effect of qualifying the subject property for the template dwelling, the county correctly counted those three parcels towards the 11-parcel minimum parcel count.[6] Petitioner's argument provides no basis for reversal or remand.

The second assignment of error is denied.

The county's decision is affirmed.

[6] We need not and do not reach petitioner's arguments regarding Parcel 8. That is because, as discussed above, we reject petitioner's challenges to including Parcels 9, 10, and 11 in the parcel count. With those parcels included in the parcel count, there are at least 13 qualifying parcels in the template area, even if Parcel 8 is excluded.