BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

10/24/17 AM 8:43 LUBA

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

KAY KING,
Intervenor-Respondent.

LUBA No. 2017-056

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.

Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

REVERSED 10/24/2017

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county approving applications for three replacement dwellings on land zoned exclusive farm use.

FACTS

The subject property is a 101-acre parcel zoned exclusive farm use (EFU E25), located approximately 2.5 miles northeast of the city of Florence's urban growth boundary. In 2016, intervenor-respondent Kay King applied to replace three dwellings that were previously located on the property. All three dwellings were demolished in 1997. The planning director approved the applications, and that decision was appealed. The hearings officer held a hearing on the applications and approved them. The board of county commissioners declined review, and this appeal followed.

INTRODUCTION

A brief explanation of the relevant statute governing what are generally referred to as "replacement dwellings" is necessary in order to frame petitioner's assignments of error. Prior to the 2013 legislative session, ORS 215.213(1)(q) allowed "[a]lteration, restoration or replacement of a lawfully established dwelling that *has*" intact exterior walls, indoor plumbing, interior wiring, and a heating system. ORS 215.213(1)(q)(A)-(D)(2011)(emphasis

added).[1] In 2013, the legislature enacted Oregon Laws 2013, chapter 462 (the 2013 Act). The 2013 Act amended ORS 215.213(1)(and its counterpart ORS 215.283(1)), and the Act is scheduled to sunset in 2024. Oregon Laws 2013, chapter 462, section 7. We quote the parts of the 2013 Act that are relevant to the assignments of error here. Section 2 of the 2013 Act provides, in part:

> "(1) A lawfully established dwelling may be altered, restored or replaced under ORS 215.213(1)(q) or 215.283(1)(p) in the manner provided by either subsection (2) or (3) of this section.
>
> "(2) The dwelling may be altered, restored or replaced if, when an application for a permit is submitted, the permitting authority:
>
> "(a) Finds to the satisfaction of the permitting authority that the dwelling to be altered, restored or replaced has, or formerly had:
>
> "(A) Intact exterior walls and roof structure;
>
> "(B) Indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;
>
> "(C) Interior wiring for interior lights; and
>
> "(D) A heating system; and

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[1] ORS 215.213(1) and (2) apply to what are referred to as marginal land counties; ORS 215.283(1) and (2) apply to all other counties. The subsections of ORS 215.213 and 215.283 authorize similar, but not identical, lists of uses. Only Lane and Washington Counties took advantage of the marginal lands authorization before it was repealed in 1993.

"(b) Finds that the dwelling was assessed as a dwelling for purposes of ad valorem taxation for the lesser of:

"(A) The previous five property tax years unless the value of the dwelling was eliminated as a result of the destruction, or demolition in the case of restoration, of the dwelling; or

"(B) From the time when the dwelling was erected upon or affixed to the land and became subject to assessment as described in ORS 307.010 unless the value of the dwelling was eliminated as a result of the destruction, or demolition in the case of restoration, of the dwelling."

OAR 660-033-0130(8) is LCDC's rule that implements the 2013 Act. The rule mirrors the 2013 Act's language, except that the rule substitutes the following relevant language for the language included in the 2013 Act's Section 2(2)(b):

"* * * * *

"(B) The dwelling was assessed as a dwelling for purposes of ad valorem taxation for the previous five property tax years, or, if the dwelling has existed for less than five years, from that time.

"(C) Notwithstanding paragraph (B), if the value of the dwelling was eliminated as a result of either of the following circumstances, the dwelling was assessed as a dwelling until such time as the value of the dwelling was eliminated:

"(i) The destruction (i.e.[,] by fire or natural hazard), or demolition in the case of restoration, of the dwelling[.]" OAR 660-033-0180(8)(2).

FOURTH ASSIGNMENT OF ERROR

Petitioner's fourth assignment of error challenges the hearings officer's conclusion that the applications satisfy OAR 660-033-0180(8), the LCDC rule that implements the 2013 Act. The hearings officer found that the rule was met because the dwellings were (1) assessed for tax purposes from the time they were built in the 1940s (i.e., "erected upon or affixed to the land") until they were (2) removed from the tax rolls in 1997 after the dwellings were demolished. The hearings officer did not apply the "lesser of" language in the statute. He concluded that OAR 660-033-0180(8) "rephrases" the "lesser of" language in Section 2(2)(b). Supplemental Record 14. The hearings officer interpreted the rule as requiring an applicant to show only that a dwelling was assessed as a dwelling up until the time that the dwelling was eliminated from the tax rolls as a result of demolition. *Id.* The hearings officer also concluded that the 2013 Act's phrase "unless the value of the dwelling was eliminated as a result of the destruction, or demolition in the case of restoration, of the dwelling" means that an applicant is not required to show that property taxes were assessed for the previous five years "where the dwelling was destroyed or demolished." Supplemental Record 15.

Petitioner argues that the hearings officer improperly construed Section 2(2)(b) of the 2013 Act, and the LCDC rule. According to petitioner, the "lesser" period of the two periods set out in Section 2(2)(b)(A) and (B) is five years, and the only possible conclusion based on the record is that because the

dwellings were not assessed as dwellings for the previous five property tax years, the county is required to deny the applications.

Our task in interpreting statutes is to discern what the legislature intended a provision to mean by examining the statutory text in context, along with its legislative history. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), *modified by State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009). We agree with petitioner that the hearings officer's construction is inconsistent with the language of the statute, and the rule that implements it. For the reasons we explain below, the statute is somewhat ambiguous, but the administrative rule clarifies any ambiguity.

Section 2(2)(b) of the 2013 Act requires that the county find the dwelling was assessed as a dwelling for purposes of ad valorem taxation for *the lesser of* the time periods set out in (A) and (B). As we understand the statute, those time periods are (1) for the previous five tax years, or (2) for the previous five tax years except for those years where the dwelling had no value as a result of destruction or demolition of the dwelling, or (3) where the dwelling was constructed within the last 5 years, for the rest of that 5-year period. Stated differently, Section 2(2)(b)(A) and (B) work together to specify the default, and longest, assessment look-back possible – five years. That five-year look back may be *shortened* under the exception clauses if either the dwelling has existed for fewer than five years or "the value of the dwelling was eliminated as a result of the destruction, or demolition in the case of restoration" within the last

five years. That five-year look back may not be *lengthened* to start and end at a time prior to the five-year period.

Context provided by earlier introduced versions of the statute and the legislative history of the statute support an interpretation of Section 2(2)(b)(A) and (B) that creates an absolute maximum five-year look back period for property tax assessment purposes. The original, introduced version of the 2013 Act was House Bill (HB) 2746. The original version required that the applicant establish "that the dwelling *is*, for purposes of ad valorem property taxation, assessed as a dwelling." (Emphasis added). The engrossed House version of the original bill slightly expanded the provision to include a requirement that the local government "[f]ind[] that the dwelling *is assessed* as a dwelling for purposes of ad valorem taxation *and has been for the previous five property tax years*." (Emphases added).

Amendments introduced in the Senate Rural Communities and Economic Development Committee became the final version of the 2013 Act. David Hunnicutt of Oregonians in Action, a member of a working group on the bill, testified to the Senate Rural Communities and Economic Development Committee at its May 16, 2013 hearing that the Senate amendments were prompted after the working group identified a deficiency in the bill that would prevent replacement of a dwelling that had stopped being taxed. A summary of that testimony that is included in the record at Supplemental Record 208-211 provides:

> "[U]nfortunately, we've identified a problem - in section II (2)(b), pg 2 of the bill, lines 19 & 20; that being the current bill requires the dwelling to have been assessed for property taxes for the past 5 years; the problem is what if it was built less than five years ago and then burned down or destroyed by floods; if that were the fact pattern this bill would prevent replacement as written; we added language to deal with situations where a dwelling was less than 5 years old, and we are having those amendments prepared[.]" Supplemental Record 208.

At the May 30 work session, Mr. Hunnicutt further explained the amendments:

> "A-19 amendments, supportive of; result of taking a complicated issue and making sure it works properly; current replacement statutes work fine but need to address issue raised by Rep[resentative] Unger and his farmer constituents regarding dilapidated dwellings and the ability to replace them; the A-19 amendments address the issue where a dwelling has not been assessed/taxed as a dwelling for the past 5 years, or if a dwelling was destroyed or demolished by the current owner for rebuilding; for a dwelling more than 5 years old the amendments allow the dwelling to satisfy this subsection (Section 2 (2)(B)[)] if the dwelling was taxed as a dwelling for the past 5 years or if the dwelling would have been taxed as a dwelling for the past five years but stopped being taxed as a dwelling because it was destroyed or demolished by the owner for replacement or rebuilding; if a dwelling is less than 5 years old the amendments allow the dwelling to satisfy this provision if the dwelling [ ] has been taxed as [a] dwelling since it was first occupied or would have been taxed as a dwelling since it was first occupied but stopped being taxed as a dwelling because it was destroyed or demolished by the owner for replacement or rebuilding; *if a former dwelling has not been taxed as a dwelling for the past 5 years it does not meet the criteria in Section 2, sub 2 B, and must meet the criteria in section 2 sub (3)* [that it was "improperly removed" from the tax rolls.]." Supplemental Record 210-11 (emphasis added).

The legislative history supports a construction that the legislature intended that dwellings that were assessed for the previous five tax years from the date an application for a dwelling is submitted under ORS 215.213(1)(q) could be replaced, but that for a "former dwelling [that] has not been taxed as a dwelling for the past five years," the only way to satisfy Section 2(2)(b) is to establish that the dwelling was destroyed within that five year period or was "improperly removed" from the tax rolls, pursuant to Section 2(3).[2] The legislative history does not support the hearings officer's construction of the statute that dwellings that were constructed in the 1940s, demolished in 1997 and for which property taxes were no longer assessed starting in 1997 and for the following nineteen years could be replaced by application in 2016. That is because those dwellings were not assessed for property taxes for the last five years, and no exception to the five-year look back applies.

LCDC 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). As noted, the language of LCDC's rule deviates from the exact

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[2] The 2013 Act Section 2(3) provides:

> "The dwelling may be altered, restored or replaced if, when an application for a permit is submitted, the dwelling meets the requirements of subsection (2)(a) of this section, the dwelling does not meet the requirement of subsection (2)(b) of this section, and the applicant establishes to the satisfaction of the permitting authority that the dwelling was improperly removed from the tax roll by a person other than the current owner."

language of the statute. The history of LCDC's rule adoption explains that LCDC intended the deviation from the statute's language to clarify some "unnecessarily complex" language in the 2013 Act. Testimony of Katherine Daniels, Farm and Forest Specialist, November 14-15, 2013 LCDC Meeting, Agenda Item 13, at 4:25 (explaining that DLCD took the bill and reorganized it in coordination with two county planners and ran it by all of the county planning directors, and that "* * * they were happy to have some more clear language").[3] The rule first combines the first part of the 2013 Act's Section 2(2)(b)(A) and Section 2(2)(b)(B) into the rule's Section (B), and ties the first part of Section 2(2)(b)(B) to the five-year tax assessment look-back. Then, the rule's Section (C)(i) eliminates the duplication in the statute and achieves the same limitation the statute achieves. But the rule does not eliminate the statutory requirement to impose a look-back period of five years, essentially giving effect to the "lesser of" language that is not included in the rule.

The dwellings were not assessed for property taxes during the last five years, which is the maximum look-back period for assessment under the statute and the implementing administrative rule. Therefore the hearings officer erred

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[3] One LCDC commissioner questioned whether, if a dwelling burned down years ago, would someone be able to replace it, and Ms. Daniels' testimony was that in exchange for loosening the requirement that a dwelling be actually located on the property, the bill asks that the dwelling has to have been assessed as a dwelling for the last five years, with some exceptions. November 14-15, 2013 LCDC Meeting, Agenda Item 13, at 6:00.

in finding that Section 2(2)(b) was met, based on an improper construction of Section 2(2)(b) and its implementing rule.

The fourth assignment of error is sustained.

DISPOSITION

OAR 661-010-0071 provides that LUBA shall reverse a decision when "[t]he decision violates a provision of applicable law and is prohibited as a matter of law," while LUBA shall remand a decision when "[t]he decision improperly construes the applicable law, but is not prohibited as a matter of law[.]" As the proposal stands under our resolution of the fourth assignment of error, the applications cannot satisfy Section 2(2)(b) of the 2013 Act. Accordingly, intervenor's only possible path to satisfying the requirements of the 2013 Act is by establishing pursuant to Section 2(3) that the dwellings were "improperly removed" from the tax rolls. Intervenor does not take the position that the dwellings were "improperly removed" from the tax rolls or that the requirements of Section 2(3) are met. Therefore, we conclude that the county's decision is "prohibited as a matter of law."

Because our resolution of the fourth assignment of error requires that the county's decision be reversed, we need not and do not consider petitioner's remaining assignments of error.

The county's decision is reversed.