BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

DIANE KASLE,
Intervenor-Respondent.

LUBA No. 2018-077

FINAL OPINION
AND ORDER

Appeal from Lane County.

Andrew Mulkey, 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 intervenor-respondent.

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

BASSHAM, Board Member, dissenting.

AFFIRMED 02/06/2019

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 hearings officer approving a forest template dwelling.

FACTS

The subject property is a 40-acre parcel zoned Impacted Forest Lands (F-2). Intervenor-respondent (intervenor) applied for approval of a dwelling on the subject property pursuant to Lane Code (LC) 16.211(5)(c)(i), which implements ORS 215.750(1)(a).[1] We refer to that LC provision and statute as the template test.

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[1] ORS 215.750(1)(a) provides that:

> "(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:
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> "(a) Capable of producing 0 to 49 cubic feet per acre per year of wood fiber if:
>
> "(A) All or part of at least three other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract; and
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> "(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels[.]"

The subject 40-acre parcel was created in 1984, when the county approved a partition (partition M53-83) of a larger parcel that includes the subject property into two parcels. Parcel 1, the subject property, totaled approximately 40 acres and Parcel 2 totaled 105 acres. Record 200. A dwelling constructed in 1915 existed on Parcel 2 when partition M53-83 was approved, and that dwelling exists today.

In April 1992, the owner of Parcel 2, Forest Solomon, conveyed to Dyann Solomon by statutory bargain and sale deed an approximately 20-acre portion of Parcel 2 that included the dwelling located on Parcel 2.[2] Record 88-89. Forest Solomon retained ownership of the remainder of Parcel 2, which was reduced in size to 85 acres. Intervenor relied on the entirety of Parcel 2 in the 105-acre configuration that existed after it was created in 1984 by partition M53-83, but prior to the 1992 conveyance described above, to qualify her property for a dwelling under the template test. The hearings officer concluded that the application met the template test. This appeal followed.

ASSIGNMENT OF ERROR

As noted briefly above, ORS 215.750(1)(a) allows a county to approve a forest template dwelling if, after applying a 160-acre template centered on subject property, at least three other lots or parcels "that existed on January 1, 1993" are

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[2] Then on May 1, 1992, Dyann Solomon conveyed the same 20-acre unit of land to Gail Hanklin by statutory warranty deed. Record 86-87.

within the 160-acre area. *See* n 1. ORS 215.010(1) provides that the term "parcel" for purposes of ORS Chapter 215 includes units of land either created: (1) "[b]y partitioning land as defined in ORS 92.010;" or (2) "[i]n compliance with all applicable planning, zoning and partitioning ordinances and regulations;" or (3) by deed or contract, if no such ordinances or regulations are applicable. *See Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 192, 211 P3d 297 (2009) (explaining the relationship between the ORS 215.010 definition of parcel and "lawful creation"). Accordingly, while the issue presented in this appeal is the construction of ORS 215.750(1)(a), ORS Chapter 92 provides context for construing the requirement in ORS 215.750(1)(a) that a parcel "existed" on January 1, 1993.

The hearings officer relied on Parcel 2 in the configuration in which it existed after it was created in 1984, and prior to the 1992 conveyance described above, to find that application met the template test. The issue presented in petitioner's single assignment of error is whether the effect of the 1992 deed that conveyed a 20-acre portion of Parcel 2, without compliance with the applicable provisions of the LC governing partitions, is that Parcel 2 did not "exist[] on January 1, 1993" for purposes of the template test in ORS 215.750(1)(a). Stated differently, the question presented is whether Parcel 2 ceased to "exist" upon the 1992 conveyance of a portion of Parcel 2, for purposes of applying the template test. As far as we are aware, the issue is a matter of first impression.

We note at the outset that there are a few issues that the parties agree on. First, the parties agree that Parcel 2 of partition M53-83 was created "[i]n compliance with all applicable planning, zoning and partitioning ordinances and regulations," and therefore is, or at least was, a "lawfully created" parcel as that required by ORS 215.750(1)(a) and ORS 215.010(1). *Friends of Yamhill County*, 229 Or App at 192. Second, the parties agree that in 1992, the then-owner of Parcel 2 conveyed a 20-acre portion of Parcel 2 without complying with LC 13.005, which required landowners to apply to divide land as part of an approved subdivision or partition, and in violation of ORS 92.012 and ORS 92.016(2).[3]

The hearings officer found that the 1992 deed may have effected an unlawful division of Parcel 2, but that an unlawful division of Parcel 2 does not eliminate from consideration Parcel 2 of partition M53-83 for purposes of the analysis under the template test. Record 23 ("an illegal division of that parcel by warranty deed does not destroy the legal status of the parcel but rather is a void attempt to create a legal lot out of [a portion of Parcel 2]").

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[3] ORS 92.012, which was in effect in 1992, provides that "[n]o land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.192."

ORS 92.016(2), which was also in effect in 1992, provides that "a person may negotiate to sell any parcel in a partition with respect to which approval of a tentative plan is required by any ordinance or regulation adopted under ORS 92.044 or 92.046, respectively, prior to the approval of the tentative plan for the partition, but no person may sell any parcel in a partition for which approval of a tentative plan is required by any ordinance or regulation adopted under ORS 92.044 or 92.046, respectively, prior to such approval."

Petitioner argues that the 1992 deed changed the boundaries of Parcel 2, and therefore "on January 1, 1993," the relevant date in ORS 215.750(1)(a), "Parcel 2 * * * did not exist as a single, discrete unit of land" and the county may not rely on it in conducting the template test analysis. Petition for Review 13. According to petitioner, "[w]hether or not a conveyance by deed complies with a county's subdivision and partition ordinances does not change the fact that the division of a parcel by deed creates a property boundary." Petition for Review 11.

Intervenor responds that ORS 92.017 addresses the question of the effect of the 1992 deed on the "lawfully created" status of Parcel 2 for purposes of the template test, and supports the county's conclusion. ORS 92.017 provides:

> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law."

According to intervenor, an unlawful division of land does not affect the lawful status of a lawfully created parcel because the unlawful division is not a division "as provided by law."

Petitioner appears to agree that ORS 92.017 is relevant law in deciding the issue presented, but argues that the 1992 deed was a "further divis[ion]" of Parcel 2 "as provided by law." In support of that argument, petitioner cites ORS 93.010, which generally allows land to be conveyed by deed. Petition for Review 12-13. We reject that argument. ORS chapter 93 addresses conveyances of land, and specifically of title to land, not property boundaries. The phrase "as provided by

law" in ORS 92.017 modifies the phrase immediately preceding it — "further divided" — and is therefore intended to refer to and require compliance with the laws governing the "further division" of property. In other words, that the 1992 conveyance was consistent with the provisions of ORS 93.010 or any other law is not relevant in determining whether Parcel 2 was "further divided, as provided by law," as that phrase is used in ORS 92.017. As noted, there is no dispute that the 1992 conveyance did not comply with the LC or statutory provisions governing division of Parcel 2.

ORS 92.017 was enacted into law by Oregon Laws 1985, chapter 717, section 3.[4] The bill enacting ORS 92.017, House Bill 2381, covered a wide range of issues, including refining the definitions of "partition" and "subdivision," and enacting a provision that lawfully created partitions are entitled to the same status as lawfully created subdivisions. The bill also addressed an issue about whether lots and parcels in the same ownership remained separate lots and parcels for purposes of sale and transfer of those lots and parcels.[5]

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[4] As originally enacted in 1985, ORS 92.017 provided:

> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are *changed or* vacated or the lot or parcel is further divided, as provided by law." (Emphasis added).

In 1993, ORS 92.017 was amended to delete the phrase "changed or," and it remains in that amended form today. Or Laws 1993, ch 702 §2.

[5] In *Kishpaugh v. Clackamas County*, 24 Or LUBA 164, 172 (1992), we reviewed in detail the legislative history of ORS 92.017, and held in part:

Although the legislative history of ORS 92.017 indicates that it was not enacted to address the precise legal question presented in this appeal, we conclude that it provides support for the county's decision that the 1992 deed did not have the legal effect of "further divid[ing]" Parcel 2, for purposes of the template test.[6] ORS 92.017 was enacted prior to ORS 215.750 and was in effect when the legislature enacted ORS 215.750 in 1993. *See State v. Ofodrinwa*, 353 Or 507, 512, 300 P3d 154 (2013) (the statutory framework within which the law was enacted provides context for interpreting a statute's text). Petitioner does not point to, and we are not aware of, anything in ORS 215.750(1), ORS 215.010, or ORS chapter 92 that prohibits a county from relying, for purposes of considering whether an application meets the template test, on a lawfully created parcel a portion of which is later conveyed by deed without complying with the applicable

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> "The text of ORS 92.017, and its legislative history, make it clear that the functions of ORS 92.017 were (1) to prevent local governments from refusing to recognize lawful divisions of land such that lots and parcels could not be sold to third parties, and (2) to establish that the property lines established by such land divisions remain inviolate, absent the employment of a specific process to eliminate such property lines."

[6] We note that our holding here is limited to the effect of the 1992 deed on the county's ability to consider, for purposes of the template test, Parcel 2 as it existed after partition M53-83 was approved, and we express no opinion about the current legal status of Parcel 2, the remainder 85-acre unit of land or the 20-acre unit of land conveyed in 1992, for purposes of any other statute or ordinance.

land division laws, provided that reliance does not result in the county double-counting parcels or dwellings.[7]

The dissent's reliance on ORS 92.176 to support its contention that the county misconstrued ORS 92.017 is unavailing, for two reasons. First, ORS 92.176 was enacted in 2007, well after ORS 215.750 was enacted in 1993 and ORS 92.017 was enacted in 1985 (and amended in 1993). It is doubtful that ORS 92.176 provides relevant context for interpreting either of the earlier-enacted statutes. *See Stull v. Hoke*, 326 Or. 72, 79–80, 948 P2d 722 (1997) (later-enacted statutes are not context for what the legislature intended an earlier-adopted statute to mean).

Second, the staff measure summary for the 2007 that became ORS 92.176 explains that the legislation was proposed to address the specific problems of (1) parcels and lots being sold without buyer knowledge that the parcel or lot was unlawful, or (2) a local government previously granting building permits on unlawful lots and parcels, without requiring proof of legality. Staff Measure Summary, House Committee on Energy and the Environment, H.B. 2723A, April 12, 2007. ORS 92.176 was intended to give cities and counties the authority to adopt procedures to allow an owner to legalize an unlawful lot or parcel, at the conclusion of which "a unit of land becomes a lawfully established parcel" with

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[7] For example, we do not suggest that the county could rely on a dwelling located on a unit of land that was unlawfully divided and a second dwelling located on the pre-unlawful division parcel to meet the template test.

the recording of a partition plat. ORS 92.176(5). In effect, ORS 92.176 complements ORS 92.017, because the end result of a successful validation process under local procedures adopted to implement ORS 92.176 is that a new lot or parcel is created "as provided by law." ORS 92.017.

Here, Parcel 2 was lawfully created, and pursuant to ORS 92.017 unless a further division is effected "as provided by law," Parcel 2 "remain[s] a discrete * * * parcel."[8] The county properly construed ORS 215.750(1)(a) in relying on Parcel 2 as it existed prior to the 1992 conveyance, in analyzing parcels and dwellings under the template test.

The assignment of error is denied.

The county's decision is affirmed.

Bassham, Board Member, Dissenting.

Because I believe the county and the majority misconstrue ORS 215.750(1) and ORS 92.017, I respectfully dissent from the Board's decision.

There does not appear to be any dispute that, at least as a matter of real property law, the 1992 deed divided Parcel 2 of partition M53-83 into two units of land (one 20 acres in size and developed with an existing dwelling, and a second 85 acres in size and vacant) and conveyed the 20-acre unit of land into separate ownership from the 85-acre unit of land. Because those two resulting units of land were created by a process other than subdivision or partition, and at

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[8] We do not address any effect on title to Parcel 2 as a result of the 1992 deed.

a time when the applicable law required county subdivision or partition approval in order to lawfully divide land, the two resulting units of land are, as a matter of land use law, something other than "lots" or "parcels" as those terms are defined at ORS 92.010(4) and (6).[9] Equally important for purposes of ORS 215.750(1), the two resulting units of land are also not "parcels" within the broader definition of that term at ORS 215.010.[10] Indeed, they are not even "lawfully established unit[s] of land" under the similarly broad definition of that term at ORS

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[9] ORS 92.010 provides, in relevant part:

> "(4) 'Lot' means a single unit of land that is created by a subdivision of land.
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> "* * * * *
>
> "(6) 'Parcel' means a single unit of land that is created by a partition of land."

[10] ORS 215.010(1) provides:

> "The terms defined in ORS 92.010 shall have the meanings given therein, except that 'parcel':
>
> "(a) Includes a unit of land created:
>
> "(A) By partitioning land as defined in ORS 92.010;
>
> "(B) In compliance with all applicable planning, zoning and partitioning ordinances and regulations; or
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> "(C) By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances or regulations."

92.010(3)(a).[11] In fact, the correct statutory classification for each of the two units of land "created" from the division of Parcel 2 is something like a "unit of land not lawfully established." *See* ORS 92.176.[12]

The undisputed fact that on January 1, 1993, neither of these two units of land was a "lot" or "parcel" under any statutory definition should mean, without more, that those two units of land, and any dwellings located thereon, cannot be used to qualify property for a forest template dwelling under ORS 215.750(1)(a).

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[11] ORS 92.010(3)(a) provides, in relevant part:

> "'Lawfully established unit of land' means:
>
> "(A) A lot or parcel created pursuant to ORS 92.010 to 92.192; or
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> "(B) Another unit of land created:
>
> "(i) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or
>
> "(ii) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations."

[12] ORS 92.176 is quoted in full at n 13, below. For present purposes, it is worthwhile to note that ORS 92.176 authorizes local governments to validate a unit of land that was not lawfully created, *i.e.*, that was "created by a sale that did not comply with the applicable criteria for creation of a unit of land," precisely the circumstances that resulted in the 1992 "creation" of the 20-acre and 85-acre units of land at issue. ORS 92.176(1). If validated under the criteria at ORS 92.176, a "unit of land not lawfully established" thereby becomes a "lawfully established parcel." ORS 92.176(5). The record does not reflect that the county has ever validated under ORS 92.176 either the 20-acre unit of land or the 85-acre unit of land.

ORS 215.750(1)(a)(A) and (B) both expressly limit qualifying units of land to "lots" and "parcels" that "existed on January 1, 1993." However, the county avoided this seemingly straightforward conclusion by invoking ORS 92.017 in order to resurrect Parcel 2 of partition M53-83 in its 1985 to 1992 configuration, and to use this zombie form of Parcel 2 as a qualifying "parcel" for purposes of ORS 215.750(1)(c).

ORS 92.017 provides:

> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law."

For the following reasons, I believe the county and the majority misconstrue ORS 92.017.

To start with, the legislative history and case law involving ORS 92.017 indicate that ORS 92.017 was primarily intended to correct a specific evil: the practice of some local governments to informally *consolidate* separate and discrete lots or parcels in single ownership into a single lot or parcel, contrary to the wishes of the owner. *See Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992) (quoting at length the legislative history of ORS 92.017). That legislative concern with inappropriate consolidation is reflected in the operative terms of the main clause of ORS 92.017, to ensure that lawfully created lots and parcels remain "discrete," *i.e.*, unconsolidated with other lots or parcels into a larger lot or parcel. Nothing in the main clause (or the legislative history) suggests a concern with preventing the owner of a lawfully created lot and parcel from

dividing it into two or more smaller units of land, or the consequences when that occurs, lawfully or unlawfully.

The county relies on the subordinate clause ("unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law"), specifically the phrase "as provided by law" to conclude that ORS 92.017 operates to allow Parcel 2 of partition M53-83 to continue to "exist" in some ghostly form, notwithstanding that it had been divided into two smaller units of land, because the owner did not obtain the required county partition approval before recording the deed that accomplished the 1992 land division. However, that is an extraordinary gloss to place on the phrase "as provided by law." The subordinate clause must be read in context with the main clause it modifies. Because the main clause (consistent with the legislative history) is concerned with the inappropriate consolidation of lots and parcels, it is most likely that the subordinate "unless" clause is concerned with the *appropriate* means to *consolidate* lots and parcels. The subordinate clause speaks of two such appropriate means: (1) vacating lot or parcel lines, and (2) further dividing the lot or parcel. One of the legitimate means to accomplish the consolidation of lots or parcels is to approve either a new subdivision, partition plat, or replat that encompasses the former lots or parcels. *See Weyerhauser Real Estate Development Co. v. Polk County*, 246 Or App 548, 267 P3d 855 (2011) (a partition plat can erase previously recorded subdivision lot lines, effectively consolidating the prior subdivision lots into new, larger parcels). Read in context,

there is no reason to believe that the phrasing of the subordinate clause of ORS 92.017 reflects a legislative concern with the *division* by deed of a lot or parcel into smaller units of land, or whether that division by deed was lawful or unlawful.

The statute that *is* expressly concerned with the unlawful division of lots and parcels by deed is ORS 92.176, which must be read together and consistently with ORS 92.017.[13] As noted, ORS 92.176 provides a process to validate (and

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[13] ORS 92.176 provides, in full:

> "(1) A county or city may approve an application to validate a unit of land that was created by a sale that did not comply with the applicable criteria for creation of a unit of land if the unit of land:
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> "(a) Is not a lawfully established unit of land; and
>
> "(b) Could have complied with the applicable criteria for the creation of a lawfully established unit of land in effect when the unit of land was sold.
>
> "(2) Notwithstanding subsection (1)(b) of this section, a county or city may approve an application to validate a unit of land under this section if the county or city approved a permit, as defined in ORS 215.402 or 227.160, respectively, for the construction or placement of a dwelling or other building on the unit of land after the sale. If the permit was approved for a dwelling, the county or city must determine that the dwelling qualifies for replacement under the criteria set forth in ORS 215.755 (1)(a) to (e).
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> "(3) A county or city may approve an application for a permit, as defined in ORS 215.402 or 227.160, respectively, or a permit

hence render into lawful and developable "parcels") units of land that were created by conveyance of a deed without the required local government partition or subdivision approval, precisely the circumstances presented here. That statutory validation process is undermined, at the very least, if the unlawfully

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under the applicable state or local building code for the continued use of a dwelling or other building on a unit of land that was not lawfully established if:

"(a) The dwelling or other building was lawfully established prior to January 1, 2007; and

"(b) The permit does not change or intensify the use of the dwelling or other building.

"(4) An application to validate a unit of land under this section is an application for a permit, as defined in ORS 215.402 or 227.160. An application to a county under this section is not subject to the minimum lot or parcel sizes established by ORS 215.780.

"(5) A unit of land becomes a lawfully established parcel when the county or city validates the unit of land under this section if the owner of the unit of land causes a partition plat to be recorded within 90 days after the date the county or city validates the unit of land.

"(6) A county or city may not approve an application to validate a unit of land under this section if the unit of land was unlawfully created on or after January 1, 2007.

"(7) Development or improvement of a parcel created under subsection (5) of this section must comply with the applicable laws in effect when a complete application for the development or improvement is submitted as described in ORS 215.427 (3)(a) or 227.178 (3)(a)."

divided lot or parcel continues to exist in some zombie form and, as in the present case, can be used to qualify land for a development approval. One of the criteria for validation is that the created unit of land "[c]ould have complied with the applicable criteria for the creation of a lawfully established unit of land in effect when the unit of land was sold." ORS 92.176(1)(b); *see* n 13. In some circumstances where that validation criterion cannot be satisfied, it might be possible, under the county's theory, for the owner or applicant to rely on ORS 92.017 to argue that the original undivided lot or parcel continues to legally "exist" and hence potentially provides a basis for a development approval, despite the fact that the original lot or parcel has been divided into unlawful units of land. It is highly doubtful that the legislature, in adopting ORS 92.176, intended such consequences.

The majority opinion carefully expresses no opinion regarding how the resurrected form of Parcel 2 could be relied upon for purposes of any other statute or ordinance, suggesting that LUBA's decision is narrowly concerned only with reliance on resurrected lots or parcels for purposes of the forest template test at ORS 215.750(1). However, if a lot or parcel can be resurrected for the purpose of qualifying a forest template dwelling, it is not clear why it cannot be resurrected for purposes of all other development approvals or land use actions. Nearly all development allowed under ORS chapter 215 on county lands, including farm and forest lands, is premised in one way or another on the existence of "lots" or "parcels," and sometimes on the existence of a lot or parcel

on a particular date. It is difficult to foresee all the mischief that could arise from a broad interpretation of ORS 92.017 that effectively allows development based on a lot or parcel that has been divided and hence no longer exists or did not exist on the relevant date.

The present case is a sufficiently alarming example of such statutory mischief. In adopting ORS 215.750(1) to allow forest template dwellings in forest zones, the legislature carefully set out three essential qualifications: (1) the existence of the requisite number of lawfully created lots or parcels, (2) the existence of the requisite number of dwellings located on those lawfully created lots or parcels, and finally (3) the existence of the qualifying lots and parcels and dwellings on the key date, January 1, 1993. All three of those requirements can be found to be met in the present case only pursuant to a misapplication of ORS 92.017 that is not compelled by that statute's text, and that is inconsistent with its context and the legislative intent in adopting ORS 92.017 and related statutes.

For these reasons, I would sustain petitioner's assignment of error and reverse the county's decision.