07/17/19 AM 8:35 LUBA

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

NORMAN MCDOUGAL,
Intervenor-Respondent.

LUBA No. 2018-134

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.

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

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

REVERSED 07/17/2019

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

1 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the county approving a partition of land
4 zoned Non-Impacted Forest (F-1).

5 **REPLY BRIEF**

6 Petitioner filed a reply brief. There is no opposition to the brief, and
7 accordingly it is allowed.

8 **FACTS**

9 In 2017, intervenor-respondent (intervenor) applied to partition a 48-acre
10 parcel zoned Non-Impacted Forest (F-1) into a 5-acre parcel and a 43-acre parcel,
11 pursuant to ORS 215.780(2)(e). Record 525 (staff report describing the
12 application to partition a 48-acre parcel into two parcels). ORS 215.780(1)(c)
13 provides that the minimum parcel size for forest-zoned parcels is 80 acres unless
14 a lower minimum parcel size is allowed under ORS 215.780(2). ORS
15 215.780(2)(e), and the provisions of the Lane Code (LC) that implement the
16 statute at LC 16.210(9)(e), provide exceptions to the 80-acre minimum parcel
17 size. As relevant here, ORS 215.780(2)(e)(A) allows creation of a forest-zoned
18 parcel less than 80 acres in size if, as relevant:

19 "(A) At least two dwellings lawfully existed on the lot or parcel
20 prior to November 4, 1993[.]"[1]

---

[1] The remaining criteria for an exception under ORS 215.780(2)(e) are:

1 As we explain in more detail in our resolution of the first assignment of
2 error, the 48-acre parcel that is the subject of the partition application is part of
3 tax lot 1500. Tax lot 1500 includes approximately 80 acres. An existing county
4 road, Jones Road, runs from the southwest to the northeast along the boundary of
5 the 48-acre parcel that is the subject of the partition application.

6 In 1991, the property's then owner requested verification from the county
7 that tax lots 1500, 2400, which is located to the north of tax lot 1500, and 500,

---

"(B) Each dwelling complies with the criteria for a replacement dwelling under ORS 215.213 (1)(q) or 215.283 (1)(p);

"(C) Except for one parcel, each parcel created under this paragraph is between two and five acres in size;

"(D) At least one dwelling is located on each parcel created under this paragraph; and

"(E) The landowner of a parcel created under this paragraph provides evidence that a restriction prohibiting the landowner and the landowner's successors in interest from further dividing the parcel has been recorded with the county clerk of the county in which the parcel is located. A restriction imposed under this paragraph is irrevocable unless a statement of release is signed by the county planning director of the county in which the parcel is located indicating that the comprehensive plan or land use regulations applicable to the parcel have been changed so that the parcel is no longer subject to statewide planning goals protecting forestland or unless the land division is subsequently authorized by law or by a change in a statewide planning goal for land zoned for forest use or mixed farm and forest use."

1 which is located to the northwest of tax lot 1500, constituted a single legal lot.[2]
2 The county planner notified the property owner of his conclusion that tax lots
3 1500, 2400 and 500 constituted a single legal parcel. Record 620-21.

4 Then in 2015, intervenor applied, pursuant to the procedure in LC 13.020,
5 to verify that Tax Lots 1500, 2400 and 500 consisted of five legal lots. Record
6 812-813. The county concluded that the three tax lots consisted of five legal lots
7 and that Tax Lot 1500 consists of two legal lots: Legal Lot 1, which is the portion
8 of land lying northwest of Jones Road, and Legal Lot 2, the portion of land lying
9 southeast of Jones Road (which is the subject 48-acre parcel). (2015 Legal Lot
10 Decision). Record 813-14.

11 Two dwellings are currently located on the 48-acre parcel that is the subject
12 of the partition. There is no dispute that one of the dwellings has been located on
13 the property since 1900. A mobile home is also located on the subject 48-acre
14 parcel, and the hearings officer found that the mobile home was placed in its
15 current location on the subject parcel in 1995. Record 12, 15. That mobile home
16 was allowed to be placed in its current location on the subject property in 1995
17 pursuant to a replacement permit issued for replacement of an existing mobile

---

[2] At that time, and prior to 2004, the LC did not include a legal lot verification procedure. *See Wolcott v. Lane County*, 77 Or LUBA 165, 176 (2018) (explaining that the county did not have a formal, codified legal lot verification procedure until 2004).

1 home that was located north of Jones Road, and north of the present location of
2 the existing mobile home.

3 The hearings officer approved the application. As we explain below, we
4 understand the hearings officer to have concluded that two dwellings lawfully
5 existed on tax lot 1500 prior to November 4, 1993, and that all of the other
6 applicable approval criteria were met.

7 Petitioner appealed the hearings officer's decision to the board of county
8 commissioners. The board of county commissioners affirmed the decision and
9 adopted it as the board's decision, and this appeal followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 In various parts of the decision, the hearings officer concluded that at
12 various times prior to intervenor's submittal of the application, the property that
13 comprises 80-acre tax lot 1500 was "viewed" as "a single legal lot" by the county,
14 "considered as one property," and "treated as a single parcel" by the county and
15 the property owner. Record 8, 15. The hearings officer concluded that ORS
16 215.780(2)(e)(A) was met because two dwellings were located on 80-acre tax lot
17 1500 on November 4, 1993."[3] We understand the hearings officer to have

---

[3] The hearings officer found:

> "The basic facts as I understand them are as follows: The subject property is currently occupied by a stick-built house that was constructed circa 1900 and a manufactured dwelling. The manufactured dwelling was constructed (placed) in 1977 on property north of Jones Road (County Rd. 482) on the basis of a

1 concluded that although the manufactured home was located to the north of Jones
2 Road (and north of the parcel that is the subject of the partition application) on
3 November 4, 1993, the application satisfied ORS 215.780(2)(e)(A) because on
4 November 4, 1993, the county and/or the property owner thought that the

---

temporary hardship. The manufactured dwelling was replaced in 1985 near or on its previous location and was granted permanent status through the approval of a special use permit. In 1995 the manufactured dwelling was relocated to its present location south of Jones Road. The property located north and south of Jones Road was considered as one property until 2015 when a legal lot verification determined that Jones Road effectively split the property with County ownership and created two legal lots. The manufactured dwelling and stick-built house are currently located on Legal Lot 2 of that determination.

"Based upon the recitation above, I believe that both structures lawfully existed as of November 4, 1993.

"The Appellant also argues that the mobile home did not exist on the subject property in 1993 but rather was located on a parcel to the north. In 1977, the mobile home was located north of Jones Road, which separated it from the stick-built dwelling. In 1995, the mobile home was moved, via a replacement dwelling permit, to its present location south of Jones Road.

"The property was treated as a single parcel by the County and the property owner until 2015 when it was subject to legal lot verification PA 15-05177. Indeed, in 1991 it was verified as being a single legal lot in PA 91-03270. Since there was no verification that Jones Road had created two separate legal lots in 1993, I believe that it is reasonable to hold that the mobile home was located on the same lot or parcel as the stick-built house on November 4, 1993." Record 15.

1 property that includes tax lot 1500 was part of a single, larger parcel, which also
2 included tax lots 1500, 500, and 2400.

3 In its first assignment of error, petitioner argues that the hearings officer's
4 decision that on November 4, 1993, two dwellings were located on tax lot 1500
5 improperly construes ORS 215.780(2)(e)(A), and is not supported by substantial
6 evidence in the record. ORS 197.835(9)(a)(D) and (C). Petition for Review 20,
7 31, 37. According to petitioner, the hearings officer's conclusion that on
8 November 4, 1993, 80-acre tax lot 1500 "was considered as one property" and
9 "treated as a single parcel" improperly construes ORS 215.780(2)(e)(A), which
10 requires at least two dwellings to have lawfully existed "on the * * * parcel" prior
11 to November 4, 1993. Petition for Review 23. We understand petitioner to argue
12 that the hearings officer's construction of the phrase "on the * * * parcel" as
13 allowing him to consider the entirety of tax lot 1500 because Tax Lot 1500 was
14 "considered as one property" and "treated as a single parcel" is inconsistent with
15 the express language of the statute. We understand petitioner to argue that the
16 phrase in the statute "on the * * * parcel" refers to the parcel that is subject of the
17 application.

18 Intervenor does not dispute that on November 4, 1993, the manufactured
19 dwelling was not sited in the location in which it exists today — on the parcel
20 that is the subject of the partition application, and intervenor agrees that on
21 November 4, 1993 the manufactured home was in a different location north of
22 Jones Road. However, intervenor responds that the hearings officer correctly

1 interpreted the statute to conclude that if on November 4, 1993 a property owner
2 thought it had a legal parcel on which two dwellings existed, "its rights under the
3 statute are not extinguished by the finding of another legal lot at a later point in
4 time." Response Brief 11.

5 We agree with petitioner that the hearings officer's conclusion that ORS
6 215.780(2)(e)(A) was satisfied improperly construes the statute. Eighty-acre tax
7 lot 1500 is not the "parcel" that is the subject of the partition application. The
8 subject of the partition application is the 48-acre parcel identified as Legal Lot 2
9 in the 2015 Legal Lot Decision. The phrase "on the * * * parcel" as used in ORS
10 215.780(2)(e)(A) requires the hearings officer to consider whether the parcel *that*
11 *is the subject of the application for a partition* included two dwellings on
12 November 4, 1993.[4] The statute does not provide any basis for the hearings
13 officer to expand the term "parcel" to include additional land that is not the
14 subject of the partition application, and does not provide any basis for the
15 hearings officer to define the "parcel" as a tax lot of which the parcel that is the

---

[4] 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, 193, 211 P3d 297 (2009) (explaining the relationship between the ORS 215.010 definition of parcel and "lawful creation"). In other words, a "parcel" as used in ORS 215.780 must be a "lawfully created" unit of land. Petitioner does not argue that the parcel that is the subject of the application is not "lawfully created."

1 subject of the partition application is a part for assessment purposes. *See n* 4; *see*
2 *also* ORS 92.010(3)(b) ("'Lawfully established unit of land' does not mean a unit
3 of land created solely to establish a separate tax account").

4 We also agree with petitioner that whether the county or the property
5 owner or any other person "considered," "viewed" or "treated" the entirety of tax
6 lot 1500 as a single legal parcel on November 4, 1993—by virtue of a 1991
7 opinion from the county planner or for any other reason—has no bearing on the
8 question on the applicable criterion that the statute requires an applicant to
9 establish. That question is whether the "parcel" that is the subject of the partition
10 application included two dwellings on November 4, 1993. Accordingly, the
11 hearings officer's consideration of the entirety of 80-acre tax lot 1500 as the
12 "parcel" for purposes of ORS 215.780(2)(e)(A) improperly construed the word
13 "parcel" as used in the statute.

14 Finally, we also agree with petitioner that to the extent the hearings officer
15 concluded that two dwellings existed on the 48-acre parcel that is the subject of
16 the application, that decision is not supported by substantial evidence in the
17 record, or any evidence in the record. The uncontroverted evidence in the record
18 is that (1) intervenor applied to partition a 48-acre forest-zoned parcel into two
19 parcels (Record 3, 8, 755-76); and (2) on November 4, 1993, only one dwelling
20 existed on that 48-acre parcel (Record 480-82). A reasonable decision maker
21 could not have concluded, based on that evidence, that two dwellings existed on
22 the 48-acre parcel on November 4, 1993.

1 Accordingly, the hearings officer erred when he concluded that on
2 November 4, 1993, two dwellings existed on tax lot 1500.
3 The first assignment of error is sustained.

4 **SECOND ASSIGNMENT OF ERROR**

5 After intervenor submitted his partition application in 2017, the hearings
6 officer initially denied the application, and after the board of commissioners
7 adopted the hearings officer's decision as its own, intervenor appealed the
8 decision to LUBA. Thereafter, and prior to filing the record, the county withdrew
9 the decision for reconsideration pursuant to ORS 197.830(13). After withdrawing
10 the decision, the board of county commissioners referred the decision to the
11 hearings officer. The hearings officer held hearings on the application and
12 accepted additional evidence and argument from intervenor and petitioner. The
13 hearings officer then issued a decision approving the application, and the board
14 of county commissioners adopted the hearings officer's decision as its own. That
15 is the decision that petitioner has appealed to LUBA.
16 In its second assignment of error, petitioner argues that the county erred
17 when it withdrew its original decision for reconsideration after intervenor
18 appealed that decision to LUBA, and that it misconstrued the applicable law in
19 conducting the proceedings on reconsideration. As we explain below, reversal is
20 the appropriate remedy. Accordingly, we do not reach the second assignment of
21 error.

DISPOSITION

OAR 661-010-0071(1)(c) provides that LUBA shall reverse a land use decision when the "decision violates a provision of applicable law and is prohibited as a matter of law." As discussed under the first assignment of error, the hearings officer misconstrued the applicable law with respect to whether two dwellings were located "on the * * * parcel" that is the subject of the partition application, and the evidence in the record is that one dwelling was located on the 48-acre parcel. Absent a demonstration of compliance with the criteria for an exception to the 80-acre minimum parcel size, the proposed partition of the subject property fails to comply with ORS 215.780(1)(c) or (2)(e)(A). Accordingly, it is "prohibited as a matter of law," and reversal is the appropriate disposition.

The county's decision is reversed.