

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

DIANNE BIELEFELD and WILLIAM DUNHAM,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

CASEY JONES, JR.,
Intervenor-Respondent.

LUBA No. 2019-027

FINAL OPINION
AND ORDER

Appeal from Lane County.

Andrew Mulkey, Portland, filed a petition for review and a reply brief and argued on behalf of petitioners.

No appearance by Lane County.

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

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

REVERSED

10/31/2019

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

1 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioners appeal a county hearings officer’s decision approving a forest template dwelling.

FACTS

The subject property is comprised of approximately 10.14 acres, is zoned Impacted Forest Lands (F-2), and is designated as Tax Lot 2403 in the county assessor’s records. On April 3, 2018, Casey Jones, Jr., (intervenor) applied to the county for approval to establish a forest template dwelling on Tax Lot 2403 under Lane Code (LC) 16.211(5) and (8), which implement state law and govern the establishment of template dwellings in the F-2 zone. The planning director approved the application with conditions under a Type II procedure. Petitioners appealed to the hearings officer.¹ Intervenor moved to dismiss the local appeal, arguing that petitioners failed to comply with the requirements for local appeals. The planning director did not dismiss the local appeal and it proceeded to the hearings officer.

The hearings officer held a public hearing and visited the site. In his written decision, the hearings officer reversed the planning director’s decision to accept the local appeal and dismissed the appeal for reasons explained below, affirming

¹ Landwatch Lane County (Landwatch) and petitioners in this appeal filed the local appeal. Landwatch is not a party to this appeal. For simplicity’s sake, in this decision we refer to the local appellants as petitioners.

1 the director's approval of the forest template dwelling. In the alternative, the
2 hearings officer issued written findings and conclusions addressing petitioners'
3 arguments and approving the forest template dwelling. Petitioners appealed the
4 hearing officer's decision to the board of commissioners, which elected not to
5 hear the appeal and adopted the hearings officer's decision as the county's final
6 decision. This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 In his written decision, the hearings officer reversed the planning director's
9 decision to accept the local appeal and dismissed the appeal because petitioners
10 did not provide a statement establishing their status as parties or an appeal
11 statement laying out the issues raised in the local appeal, as required by LC
12 14.080(1)(c)(v) and (vii). See n 2. In the first assignment of error, petitioners
13 argue that the hearings officer erred by dismissing the case. Petitioners argue that
14 the hearings officer erred as a matter of law and request "that LUBA reverse, or
15 remand as appropriate, the county's holding that the director lacked jurisdiction
16 to accept petitioners' initial appeal of the director's decision." Petition for Review
17 3.

18 If we agree with petitioners that the hearings officer erred in dismissing
19 the appeal, the remedy would be remand for a decision on the merits of the
20 application and appeal. However, the hearings officer already decided, in the
21 alternative, to approve the application on the merits. Accordingly, the first
22 assignment of error provides no basis for any relief. However, if petitioners did

1 not challenge the hearings officer’s dismissal, we may have been required to
2 affirm the county’s decision based on an unchallenged jurisdictional basis for the
3 county to affirm the director’s decision made without a hearing and approving
4 the application. Hence, we decide the merits of the first assignment of error and
5 conclude that the hearings officer erred in dismissing the appeal for lack of
6 jurisdiction for the reasons explained below.

7 As stated above, intervenor filed the application in this case on April 3,
8 2018. On July 10, 2018, the county adopted Ordinance No. 18-02, which
9 amended LC 14.080(1) to make appeal submission requirements jurisdictional.²

² As amended, LC 14.080(1) provided, in part:

“(1) Appeal Filing Procedures. Appeals of Type II and III decisions may be filed under this section. Appeals must comply with subsection (1)(a) through (c) below. *The requirements of this section are jurisdictional and must be satisfied as a requirement for the Director to accept the appeal in accordance with subsection (2)(a).*

“(a) Who May Appeal.

“(i) A Type II decision issued by the Director for which a hearing has not been held may be appealed by:

“(aa) A person who is entitled to written notice under LC 14.060; or

“(bb) Any person who is adversely affected or aggrieved by the application; or

1 On September 19, 2018, petitioners filed their local appeal. On November
2 27, 2018, the hearings officer issued his decision. The hearings officer concluded
3 that the amendments to LC 14.080 applied to the appeal, because the county
4 adopted those amendments after the application was filed, but before the local
5 appeal was filed, and the applicable amendments “are procedural not substantive
6 standards.”³ Record 15.⁴ The hearings officer’s decision was not a final decision
7 because it was appealed to the board of commissioners.

“(ii) For other decisions, any party may appeal.

“(b) Time for Filing. A notice of appeal in accordance with subsection (1)(c) below must be filed with the Director prior to the end of business on the 12th day after the date the notice of decision is mailed.

“(c) Content of Notice of Appeal. A notice of appeal must:

“* * * * *

“(v) Include a statement demonstrating the person filing the notice of appeal is a party, if required by subsection (1)(a) above;

“(vi) Include a statement explaining the specific issues being raised on appeal with sufficient specificity to afford the approval authority the opportunity to resolve each issue raised[.]” (Boldface omitted; emphasis added.)

³ Petitioners do not assign error to that conclusion and we express no opinion whether it is correct.

⁴ All record citations are to the replacement record.

1 On February 5, 2019, the board of commissioners issued the final decision
2 in this case, affirming and adopting the hearings officer’s decision.

3 The hearings officer’s dismissal was based on LC 14.080, as amended by
4 Ordinance No. 18-02. Record 17. On January 31, 2019, five days before the board
5 of commissioner’s decision affirming and adopting the hearings officer’s
6 decision to approve a forest template dwelling on Tax Lot 2403, LUBA issued
7 its final opinion and order remanding Ordinance No. 18-02. *Landwatch Lane*
8 *County v. Lane County*, ___ Or LUBA ___ (LUBA No 2018-093, Jan 31, 2019).
9 No part of Ordinance No. 18-02 remained in effect after we remanded that
10 ordinance. *Landwatch Lane County v. Lane County*, ___ Or LUBA ___ (LUBA
11 No 2019-024, Aug 15, 2019) (slip op at 24) (citing *Hatley v. Umatilla County*,
12 66 Or LUBA 433, 439 (2012)). At oral argument in this appeal, the Board
13 requested additional briefing on the effect of LUBA’s decision in *Landwatch*
14 *Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No 2018-093, Jan 31,
15 2019) on the hearings officer’s decision to deny the local appeal, as challenged
16 in the first assignment of error in this appeal. Both parties submitted additional
17 briefing, which we have reviewed and considered.

18 We conclude that the pertinent date for determining the local jurisdictional
19 issue raised in this appeal is the date of the final decision, February 5, 2019. On
20 that date, the remanded version of LC 14.080 was no longer effective.
21 Accordingly, the hearings officer erred in applying and relying on the
22 jurisdictional limitations in LC 14.080 to dismiss the appeal.

1 The first assignment of error is sustained.

2 **THIRD ASSIGNMENT OF ERROR**

3 The county cannot approve a forest template dwelling “[i]f the tract on
4 which the dwelling will be sited includes a dwelling.” ORS 215.750(4)(d). *See*
5 *also* LC 16.211(5)(a) (allowing approval of a template dwelling if “[t]he tract
6 upon which the dwelling will be located has no other dwellings on it”). For
7 purposes of ORS 215.750(4)(d), “[t]ract’ means one or more contiguous lots or
8 parcels under the same ownership.” ORS 215.010(2). Tax Lot 2403 is owned by
9 Casey Jones Jr. (intervenor) and J&K Timber and Land, LLC. Tax Lot 2402 is
10 adjacent and directly to the west of Tax Lot 2403 and is owned by J&K Timber
11 and Land, LLC. Record 13. Tax Lots 2402 and 2403 therefore have a common
12 owner, J&K Timber and Land, LLC.

13 In 2017, the county approved an application for a replacement dwelling to
14 replace a manufactured home on Tax Lot 2402. *See* ORS 215.755 (authorizing
15 local governments to allow replacement dwellings in forest zones); LC 16.211(4)
16 (county criteria for replacement dwellings in impacted forest zones). In the 2017
17 building permit for the replacement dwelling, the county approved a replacement
18 dwelling “in the same footprint as the original home.” Record 201; *see also* LC
19 16.211(4)(a)(iii).⁵ Tax Lot 2402 is developed with a driveway, garage, well, and

⁵ LC 16.211(4)(a)(iii) provides:

1 septic system. Record 200–203. The original manufactured home that was
2 approved in 2017 for replacement had been removed but had not been replaced
3 at the time of the 2018 county proceedings on the forest template dwelling
4 application that the challenged decision approved.

5 It is undisputed that the footprint of the original home that was being
6 replaced is east of the existing garage. Record 203 (replacement dwelling site
7 plan showing the proposed new dwelling located southeast of the existing garage
8 and east of an existing septic system). Before the hearings officer, petitioners
9 pointed to deed descriptions, County Survey File No. 43255 (the survey), and an
10 ArcGIS map marked with distances, and argued that those documents
11 collectively demonstrate that the existing garage is bisected by the property
12 boundary between Tax Lots 2402 and 2403, and that the footprint of the original
13 dwelling is east of the garage and on Tax Lot 2403. Record 83–84; Record 86–
14 87 (ArcGIS map with marked distances); Record 88–93 (deed card and legal
15 descriptions); Record 204 (County Survey File No. 43255).

16 The hearings officer rejected petitioners’ argument because the approved
17 replacement dwelling site plan shows the proposed replacement dwelling sited
18 32 feet west of the boundary of Tax Lot 2403 and Tax Lot 2402 (the property

“An alteration or replacement of a dwelling allowed by LC 16.211(4)(a) above shall be located on the same site as the existing dwelling. For the purpose of LC 16.211(4)(a)(iii) above, ‘the same site’ is defined as a square with dimensions of 200 feet which is centered on the footprint of the established dwelling.”

1 boundary). Record 23, 203. The hearings officer reasoned the replacement
2 dwelling must comply with the approved 2017 site plan and the property
3 boundary location identified in the survey. Record 23. Thus, the hearings officer
4 implicitly concluded that the approved replacement dwelling cannot be sited on
5 Tax Lot 2403. Instead, it must be sited where it is shown on the approved site
6 plan, 32 feet west of the property boundary, on Tax Lot 2402.

7 Petitioners do not contend that Tax Lots 2402 and 2403 are one “tract” for
8 purposes of ORS 215.750(4)(d). Instead, petitioners argue that the replacement
9 dwelling that was approved in 2017, ostensibly on Tax Lot 2402, is actually
10 approved by the county to be sited on Tax Lot 2403. Thus, petitioners argue that
11 the county cannot approve the forest template dwelling on Tax Lot 2403 because
12 Tax Lot 2403 already includes a dwelling. Petition for Review 31. As framed by
13 petitioners’ argument, we understand “the tract” for purposes of ORS
14 215.750(4)(d) in this decision to be only Tax Lot 2403.⁶

15 Petitioners argue that the hearings officer’s finding that Tax Lot 2403 does
16 not “include a dwelling,” as that phrase is used in ORS 215.750(4)(d), is not
17 supported by substantial evidence. ORS 197.835(9)(a)(C). “Substantial evidence
18 exists to support a finding of fact when the record, viewed as a whole, would
19 permit a reasonable person to make that finding.” *Dodd v. Hood River County*,

⁶ Because the parties do not raise the issue, we express no opinion on whether, together, Tax Lots 2402 and 2403 are “under the same ownership” and constitute a “tract.”

1 317 Or 172, 179, 855 P2d 608 (1993) (citing *Younger v. City of Portland*, 305 Or
2 346, 351–52, 752 P2d 262 (1988)).

3 Intervenor responds that the hearings officer’s conclusion that the
4 replacement dwelling will be located entirely on Tax Lot 2402 is supported by
5 the approved 2017 site plan for the replacement dwelling and the survey.
6 Intervenor contends that the county “intended to approve, and believes that it did
7 approve, a replacement dwelling on the adjacent [Tax Lot] 2402.” Intervenor’s
8 Response Brief 14. Thus, according to intervenor, “there is no other dwelling
9 approved for the subject property.” *Id.* Finally, intervenor argues that any error
10 in the replacement dwelling approval or actual siting of the replacement dwelling
11 can be resolved by a later enforcement action. Intervenor argues that petitioners
12 can prevent the replacement dwelling from being sited on Tax Lot 2403 by
13 informing “the county’s enforcement pit bulls” that that the replacement dwelling
14 as approved encroaches on Tax Lot 2403, and the county will intervene to make
15 sure the manufactured home is properly sited on Tax Lot 2402. Intervenor’s
16 Response Brief 14–15.

17 We agree with petitioners that the evidence in the record that petitioners
18 point to establishes that the county approved a replacement dwelling that is
19 required by the 2017 decision to be sited on Tax Lot 2403. Based on distances
20 petitioners measured from survey coordinates and verified by ArcGIS maps, the
21 “original home” footprint is on Tax Lot 2403. The existing septic system is
22 located immediately west and downslope of the dwelling footprint. The existing

1 driveway and garage both cross the property boundary and are partially located
2 on Tax Lot 2403.

3 The hearings officer concluded that, regardless of the physical reality on
4 the ground, the replacement dwelling would be sited on Tax Lot 2402, 32 feet
5 west of the property boundary between Tax Lot 2402 and 2403, based on the
6 hand-drawn site plan and legal boundary descriptions in the survey. That is not a
7 conclusion that a reasonable person would reach based on all of the evidence in
8 the record. The 2017 decision requires the replacement dwelling to be sited in a
9 location that is on Tax Lot 2403 because the footprint of the original home is on
10 Tax Lot 2403. The survey does not depict or refer to a dwelling location, but
11 instead simply locates and describes the legal boundaries of Tax Lot 2403 and
12 adjacent Tax Lot 2402 with reference to established monuments. Record 204. It
13 is not reasonable to conclude that the replacement dwelling will be located 32
14 feet west of the property boundary, pursuant to the site plan and survey, but in a
15 location that is inconsistent with the building permit, the original home site, and
16 other existing development on the ground, including the existing driveway,
17 garage, and septic tank. Considering the evidence as a whole, the hearings officer
18 erred by concluding that the replacement dwelling is approved and will be sited
19 on Tax Lot 2402.

20 We disagree with intervenor that the county's intention or belief controls
21 the issue or that the issue can or should be resolved in a separate, future
22 enforcement action. Putting aside intervenor's perhaps overly optimistic view of

1 proactive county enforcement, the problem is that the county’s approval and the
2 physical reality of the existing development sites the replacement dwelling on
3 Tax Lot 2403. The burden is not on petitioners to attempt to remedy an
4 encroachment in a county enforcement action or civil suit. Instead, under ORS
5 215.750(4)(d), it is intervenor’s burden to establish that the subject tract does not
6 include a dwelling in order to obtain a template dwelling approval.⁷

7 We agree with petitioners that the county erred in approving the forest
8 template dwelling on Tax Lot 2403 because that lot already “includes a
9 dwelling.” ORS 215.750(4)(d). The county’s decision violates ORS
10 215.750(4)(d) and is prohibited as a matter of law.

11 The third assignment of error is sustained.

12 **SECOND ASSIGNMENT OF ERROR**

13 In the second assignment of error, petitioners argue that the county
14 approval violates fuel break requirements in state law. We reverse the county’s

⁷ Intervenor does not argue that Tax Lot 2403 does not “include a dwelling” because the replacement manufactured home has been approved but has not yet been established. We do not think that the approved replacement dwelling must be constructed or installed in order to preclude a forest template dwelling approval on the same tract under ORS 215.750(4)(d). ORS 215.750 and related statutes limit residential uses allowed on resource lands to serve legislative policies protecting resource land for resource uses. *See, e.g.*, ORS 215.750(4)(c) (a template dwelling is not allowed “[u]nless no dwellings are allowed on other lots or parcels that make up the tract” and requiring deed restrictions for the other lots or parcels that make up the tract to prevent future dwelling approvals); ORS 215.740 (limiting large tract forest dwellings).

- 1 decision under the third assignment of error. Accordingly, we need not and do
- 2 not reach the second assignment of error.
- 3 The county's decision is reversed.