

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

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

DUANE DOUGHTY and TONYA DOUGHTY,
Intervenors-Respondents.

LUBA No. 2019-044

FINAL OPINION
AND ORDER

Appeal from Lane County.

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

No appearance by Lane County.

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

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

REVERSED

10/15/2019

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

1 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner challenges a board of county commissioners' approval of a replacement dwelling in an exclusive farm use zone.

MOTION TO INTERVENE

Duane Doughty and Tonya Doughty (intervenors), the applicants below, move to intervene on the side of the respondent. No party opposes the motion, and it is granted.

FACTS

Intervenors sought county approval of a replacement dwelling on a 10.33-acre property zoned Exclusive Farm Use (E-40) and designated tax lot 1400 (referred to herein as tax lot 1400). ORS 215.213(1)(q) provides that, “[s]ubject to section 2, chapter 462, Oregon Laws 2013, alteration, restoration or replacement of a lawfully established dwelling” is allowed on land zoned for exclusive farm use. On April 4, 2018, the planning director approved intervenors' application for a replacement dwelling on tax lot 1400. On April 16, 2018, petitioner appealed the planning director's decision to the hearings officer. Petitioner alleged that the replacement dwelling approval was improper because tax lot 1400 is not a legal parcel.

The parties do not dispute the history of dwellings on the land area that comprises tax lot 1400. The land now designated tax lot 1400 was formerly part of a larger unit of land and, in the early 1900s, a dwelling was constructed on the

1 larger unit of land in the area now designated tax lot 1400. Subsequent dwellings
2 have been placed in the same location following fires in the 1950s and 1970s,
3 and intervenors' proposed dwelling is sited in the same location.

4 Intervenor, the county and petitioner also agree that tax lot 1400's land
5 area is part of the area of land described in a 1943 deed (the larger property). In
6 the years following 1943, the larger property was carved up by creation of a road
7 in 1956, at some point by exception of a small cemetery parcel, and in 1992, by
8 a deed conveyance of the area now designated tax lot 1401. The parties disagree,
9 however, as to the legal significance or import of the 1992 deed conveyance.¹

10 Although Lane County land division regulations became applicable to the
11 larger property in 1975, the 1992 conveyance did not comply with the applicable
12 land division regulations. The 1992 conveyance divided the remaining property
13 (remaining after the road creation and conveyance of the cemetery parcel) into
14 tax lots 1400 and 1401 in violation of applicable land use laws. Petitioner argued
15 to the hearings officer that in the absence of legal lot creation, the replacement
16 dwelling was improperly approved. Intervenor argued that despite the 1992
17 conveyance's failure to comply with applicable laws, a replacement dwelling was
18 properly approved on tax lot 1400.

¹ The 1992 deed describes the conveyed property as Tracts I and II. Tract I is designated tax lot 501 and Tract II is designated tax lot 1401. Intervenor's consultant advised the county that tax lot 501 was a separate, existing lot at the time of the 1992 deed. Record 133.

1 On November 7, 2018, the hearings officer issued a decision denying
2 petitioner’s appeal, concluding that:

3 “[A]n illegal division of a lawfully created parcel does not negate
4 the lawful status of that parcel but rather voids the development
5 potential, for land use purposes, of the newly created parcel. No new
6 parcel is created because the division is inconsistent with applicable
7 land division law.” Record 18.

8 On November 19, 2018, petitioner appealed the hearings officer’s decision to the
9 board of commissioners. On November 26, 2018, the hearings officer, after
10 reviewing the appeal, affirmed his November 7, 2018 decision. The planning
11 director recommended that the board of commissioners conduct an on the record
12 hearing on the appeal.

13 On January 29, 2019, the board of commissioners reviewed the matter and
14 elected to conduct an on the record hearing on the appeal. On February 26, 2019,
15 the board of commissioners heard arguments and reviewed the hearings officer’s
16 decision. On March 12, 2019, the board adopted the hearings officer’s decision
17 as supplemented and modified by its findings in support of its order.

18 This appeal followed.

19 **STANDARD OF REVIEW**

20 Our review of the county’s interpretation of state law is subject to ORS
21 197.835(9)(a)(D) and we will reverse or remand the land use decision if the city
22 improperly construed applicable law. In construing the law, we will consider the
23 text, context and legislative history of the law at issue in order to determine the

1 intent of the enacting legislature. *PGE v. Bureau of Labor and Industries*, 317 Or
2 606, 610-12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171-172, 206
3 P3d 1042 (2009).

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioner’s sole assignment of error is that the county improperly
6 approved intervenors’ replacement dwelling because it will be sited on an
7 unlawful parcel. For the reasons we explain below, we agree with petitioner.

8 A parcel is a unit of land created through the partition of land into three or
9 fewer units of land within a calendar year. ORS 92.010(6), (9); ORS 215.010. A
10 lot is a unit of land created through the subdivision of property into four or more
11 units of land within a calendar year. ORS 92.010(4), (16); ORS 215.010. Because
12 the property composed of tax lots 1400 and 1401 as currently configured resulted
13 from a deed that resulted in two units of land, we will refer to them as parcels.

14 ORS 215.213 requires that the replacement dwelling be located on the
15 same parcel as the dwelling being replaced. ORS 215.213(1)(q); Or Laws 2013,
16 ch 462, § 2(4)(b)(A).² We have previously held that references in ORS chapter

² Oregon Laws 2013, chapter 462, section 2 was not codified into the Oregon Revised Statutes, and for that reason we cite the statute as it appears in the session laws. Section 2 of the 2013 statute will be automatically repealed on January 2, 2024. Or Laws 2013, ch 462, § 11.

Section 2(4)(b)(A) of 2013 Oregon Laws, chapter 462 provides: “The replacement dwelling [m]ay be sited on any part of the same lot or *parcel*.” (Emphasis added.)

1 215 to parcels relate to lawfully created parcels. *Reeves v. Yamhill County*, 53 Or
2 LUBA 4, 11 (2006) (“when the word ‘parcel’ is used in ORS Chapter 215, the
3 parcel must be a lawfully created parcel”); *Friends of Yamhill County v. Yamhill*
4 *County*, 229 Or App 188, 192, 211 P3d 297 (2009) (explaining relationship
5 between parcel as defined in ORS 215.010 and “lawful creation”). We therefore
6 conclude that the parcel on which a proposed replacement dwelling is proposed
7 to be sited must have been lawfully created.

8 ORS 215.010 provides that for purposes of ORS chapter 215, a lawfully
9 established parcel has the definition provided in ORS 92.010(3), which provides:

10 “(a) ‘Lawfully established unit of land’ means:

11 “(A) A lot or parcel created pursuant to ORS 92.010 to
12 92.192; or

13 “(B) Another unit of land created:

14 “(i) In compliance with all applicable planning,
15 zoning and subdivision or partition ordinances
16 and regulations; or

17 “(ii) By deed or land sales contract, if there were no
18 applicable planning, zoning or subdivision or
19 partition ordinances or regulations.

20 “(b) ‘Lawfully established unit of land’ does not mean a unit of
21 land created solely to establish a separate tax account.”

22 A lawful lot or parcel may therefore be created through the subdivision or
23 partition process, or through a deed or land sales contract describing the area of

1 land as a unit before planning, zoning or subdivision or partition ordinances or
2 regulations became applicable.

3 The boundaries of tax lot 1400, as currently configured, were not
4 established through any of the lawful mechanisms described immediately above.
5 The hearings officer nonetheless concluded that the unlawful division of the
6 larger property resulted in tax lot 1401, the unlawful parcel, and tax lot 1400, the
7 remainder or parent parcel. Under the hearings officer's view of the law, tax lot
8 1401 is unlawful and a replacement dwelling could not be approved on tax lot
9 1401, but tax lot 1400 is a remainder or parent parcel and remains eligible for a
10 replacement dwelling. Petitioner cites *Hartmann v. Washington County*, 36 Or
11 LUBA 442, *aff'd*, 164 Or App 177, 991 P2d 65 (1999), for the proposition that
12 an illegal land division creates two new, undevelopable units of land rather than
13 an undevelopable lot and a remainder lot. We agree that an unlawful division of
14 land does not result in the creation of a lawful remainder.

15 The hearings officer in *Hartmann* concluded that the proposed site of a
16 nonfarm dwelling was a parcel created by a 1994 partition. Because OAR 660-
17 033-0130(4)(a) required that the site of the proposed dwelling be a lot or parcel
18 created before January 1, 1993, and the proposed dwelling site was a parcel
19 created by the lawful partition after the operative January 1, 1993 date, the
20 application for a nonfarm dwelling was properly denied. We affirmed the
21 hearings officer's determination that the 1994 partition established new, lawful
22 lots as opposed to a new lawful lot and a remainder or parent parcel.

1 Here, in 1992, deeds conveyed portions of the larger property into different
2 ownerships. However, new parcels have not been created because the deed
3 creating the parcels occurred after land use laws regulating land division became
4 applicable. ORS 92.017 provides that “[a] lot or parcel lawfully created shall
5 remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot
6 or parcel is further divided, as provided *by law*.” (Emphasis added.) In the context
7 of land use law, division *by law* requires a subdivision, partition or, prior to the
8 applicability of the land division regulations, a deed conveyance. We conclude
9 that tax lot 1400, standing alone, is an unlawfully created parcel and a
10 replacement dwelling may not be authorized on tax lot 1400.

11 Our recent decision in *Landwatch Lane County v. Lane County*, ___ Or
12 LUBA ___ (LUBA No 2018-077, Feb 6, 2019), *aff’d*, 297 Or App 582, 442 P3d
13 245, *rev den*, ___ Or ___ (2019) (*Kasle*) is consistent with this result. In *Kasle*,
14 we reviewed a decision approving a forest template dwelling pursuant to ORS
15 215.750(1)(a). The ORS 215.750(1)(a) test requires placing a 160-acre template
16 on the property on which the potential dwelling will be placed and then
17 determining whether there are at least three other lots or parcels “*that existed on*
18 *January 1, 1993*” within the template area. (Emphasis added.) In *Kasle*, one of
19 the areas of land counted as a parcel within the template area was created in 1984.
20 In 1992, part of the area of land legally created in 1984 was conveyed without
21 complying with applicable land division laws. The hearings officer relied on the
22 provision in ORS 92.017 that “[a] lot or parcel lawfully created shall remain a

1 discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel
2 is further divided as provided by law” and concluded that for purposes of
3 applying the template test, the appropriate consideration was the 1984
4 configuration of the property and not the unlawful configuration resulting from
5 the 1994 conveyance. We agreed.

6 Intervenor’s argue that *Kasle* controls in this case and requires we affirm
7 the hearings officer’s decision that tax lot 1400 is a lawful parcel for purposes of
8 a replacement dwelling approval. We conclude that *Kasle* is legally
9 distinguishable. In *Kasle*, the legal issue was whether a parcel “*existed on*
10 *January 1, 1993*” for purposes of the template test. We concluded that an
11 underlying parcel that had been unlawfully divided “existed on January 1, 1993.”
12 We limited our holding to that narrow legal issue.

13 Differently, here, the issue is the current land use status of tax lot 1400.
14 Contrary to the hearings officer’s conclusion, the 1992 conveyance did not create
15 one compliant, developable “remainder” parcel designated tax lot 1400 and one
16 unlawful, undevelopable parcel designated tax lot 1401. Such a reading would in
17 fact allow the creation of a new lot in violation of applicable land use laws, with
18 the reduced size parcel designated the parent or remainder.

19 The Supreme Court has held that an unauthorized division of land does not
20 create legal lots of record and that a land unit resulting from an unlawful division
21 does not qualify for a conditional use permit where the applicable land use code
22 requires, as a condition precedent to a conditional use permit, the existence of a

1 legal lot of record. *Yamhill County v. Lundwick*, 294 Or 778, 663 P3d 398 (1983).
2 Here, a legal parcel is a condition precedent to issuance of a replacement dwelling
3 permit. Because the replacement dwelling was not approved on a lawful unit of
4 land, the county erred in approving intervenors' application.

5 **DISPOSITION**

6 We will reverse a land use decision when the decision “violates a provision
7 of applicable law and is prohibited as a matter of law.” OAR 661-010-
8 0071(1)(c); ORS 197.835(9)(a)(D). ORS 215.213(1)(q) requires that the
9 replacement dwelling be located on a lawful parcel.³ The replacement dwelling
10 is not proposed to be located on a lawful parcel. We conclude that the decision is
11 prohibited as a matter of law. Accordingly, the appropriate disposition is reversal.

12 The county's decision is reversed.

³ See n 2.