

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

3
4 KEN WACHAL,
5 *Petitioner,*

6
7 vs.

8
9 LINN COUNTY,
10 *Respondent,*

11
12 and

13
14 JOHANNES FARR,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-102

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Linn County.

23
24 David E. Coulombe, Corvallis, filed the petition for review and a reply
25 brief on behalf of petitioner. With him on the brief was Fewel, Brewer &
26 Coulombe.

27
28 Kevan J. McCulloch, Deputy County Attorney, Albany, represented
29 respondent.

30
31 Joel D. Kalberer, Albany, filed a response brief on behalf of intervenor-
32 respondent. With him on the brief was Weatherford Thompson PC.

33
34 RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board
35 Member, participated in the decision.

36
37 TRANSFERRED 01/24/2020

1 You are entitled to judicial review of this Order. Judicial review is
2 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioner appeals a decision by the county planning director approving an application for a replacement dwelling on land zoned exclusive farm use.

FACTS

In January 2018, intervenor-respondent (intervenor) applied for approval of replacement of an existing dwelling located on his 40-acre parcel zoned exclusive farm use (EFU).¹ The existing dwelling to be replaced was approved pursuant to a 1978 board of county commissioners’ decision and thereafter constructed.² Record 10–14. Intervenor provided photographs demonstrating the

¹ The property is the same property that was the subject of our decision in *Wachal v. Linn County*, __ Or LUBA __ (LUBA No 2018-034, Sept 28, 2018), *aff’d*, 295 Or App 668, 433 P3d 787 (2019).

² That 1978 decision approved a “Variance” to allow the dwelling to be located on the EFU-zoned portion of the 40-acre parcel that was, in 1978, split-zoned EFU and Agricultural Resource Timber (ART). Record 10. At the time, the ART zone allowed residential uses outright and the EFU zone allowed farm dwellings.

The property’s owners applied for a variance to site the dwelling on the EFU-zoned portion of the property because the soils on the ART-zoned portion of the property could not support a septic system. Pursuant to a condition of approval, the owners later rezoned the ART- zoned portion to EFU, resulting in the full 40-acre parcel being zoned EFU. At the time, the EFU zone did not include a minimum lot size for a dwelling. Record 10–16.

1 condition of the dwelling with his application. Record 8.³ On January 26, 2018,
2 the planning director approved the application. On October 7, 2019, petitioner
3 appealed the decision to LUBA.

4 After the petition for review was filed, the county moved to dismiss the
5 appeal. Intervenor subsequently filed his response brief, and thereafter the Board
6 issued an order suspending the appeal but allowing petitioner the time set forth
7 in our rules to file a reply brief. Petitioner did so, and also filed a separate
8 response to the county's motion to dismiss. We now resolve the motion to
9 dismiss, based on all of the pleadings and briefs.

10 **JURISDICTION**

11 We begin with a discussion of the provisions in ORS Chapter 215 and in
12 the Linn County Code (LCC) that apply to replacement dwellings on land zoned
13 EFU.

14 **A. ORS 215.283(1)(p)**

15 Oregon land use law preserves land for agricultural uses by restricting uses
16 allowed in EFU zones to farm uses and certain non-farm uses that the legislature
17 has determined may be compatible with farming. *See* ORS 215.203(2)(a)
18 (defining "farm use"); ORS 215.283 (providing non-farm uses permitted in EFU
19 zones in nonmarginal lands counties). A replacement dwelling is a use allowed

³ The decision refers to photographs that the planning director reviewed, but no photographs are included in the record.

1 in the EFU zone under ORS 215.283(1)(p).⁴ A use under ORS 215.283(1) is a
2 use that may be established on EFU-zoned land as a permitted use, free of
3 supplemental county regulation. *See Brentmar v. Jackson County*, 321 Or 481,
4 496–97, 900 P2d 1030 (1995) (discussing the difference between ORS
5 215.283(1) and (2) uses).

6 A brief explanation of the relevant statute governing replacement
7 dwellings is necessary in order to frame the issues. Prior to the 2013 legislative
8 session, ORS 215.283(1)(p) (2011) allowed “[a]lteration, restoration or
9 replacement of a lawfully established dwelling that * * * *[h]as*” intact exterior
10 walls, indoor plumbing, interior wiring, and a heating system. ORS
11 215.283(1)(p)(A)–(D) (2011) (emphasis added). In 2013, the legislature enacted
12 Oregon Laws 2013, chapter 462 (the 2013 Act). The 2013 Act amended ORS
13 215.283(1)(p) (2011). Sections 2 and 3 of the 2013 Act are scheduled to sunset
14 January 2, 2024, while Sections 7, 8 and 9 of the 2013 Act are scheduled to
15 simultaneously become operative January 2, 2024. Or Laws 2013, ch 462, §§ 10–
16 11. We quote the parts of the 2013 Act that are relevant to the assignments of
17 error here. Section 2 of the 2013 Act provides, in part:

⁴ ORS 215.283(1)(p) (2019) provides that “[s]ubject to section 2, Chapter 462, Oregon Laws 2013, alteration, restoration or replacement of a lawfully established dwelling” “may be established in any area zoned exclusive farm use.” Throughout this opinion, we refer to the 2019 version of ORS 215.283(1)(p), which has not been amended since the enactment of Oregon Laws 2013, chapter 462, discussed below, unless otherwise noted.

1 “(1) A lawfully established dwelling may be altered, restored or
2 replaced under ORS 215.213(1)(q) or 215.283(1)(p) in the
3 manner provided by either subsection (2) or (3) of this
4 section.

5 “(2) The dwelling may be altered, restored or replaced if, when an
6 application for a permit is submitted, the permitting authority:

7 “(a) Finds to the satisfaction of the permitting authority that
8 the dwelling to be altered, restored or replaced *has, or*
9 *formerly had*:

10 “(A) Intact exterior walls and roof structure;

11 “(B) Indoor plumbing consisting of a kitchen sink,
12 toilet and bathing facilities connected to a
13 sanitary waste disposal system;

14 “(C) Interior wiring for interior lights; and

15 “(D) A heating system; and

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

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

22 “(B) From the time when the dwelling was erected
23 upon or affixed to the land and became subject
24 to assessment as described in ORS 307.010
25 unless the value of the dwelling was eliminated
26 as a result of the destruction, or demolition in the
27 case of restoration, of the dwelling.” (Emphasis
28 added.)

29 Thus the 2013 amendments to ORS 215.283(1)(p) (2011) allowed, for the first
30 time, a dwelling that was not in habitable condition at the time replacement was

1 sought, but that “formerly had” certain features and met other criteria to be
2 replaced, provided certain siting conditions were met. *See also Landwatch Lane*
3 *County v. Lane County*, 364 Or 724, 726–27, 441 P3d 221 (2019) (describing the
4 2013 Act). For a dwelling that “formerly had” certain features, the 2013 Act
5 requires the replacement dwelling to be sited in a certain location on the “same
6 lot or parcel” as the previous dwelling. Or Laws 2013, ch 462, § 2(5)(b). For a
7 dwelling that “has” certain features, the dwelling may be sited anywhere on “the
8 same lot or parcel.” Or Laws 2013, ch 462, § 2(4)(b)(A).

9 **B. LCC 933.180**

10 In 2016, Linn County amended the LCC to incorporate the changes
11 provided in the 2013 Act and adopted Ordinance 2016-070, codified at LCC
12 933.180. LCC 933.180(A) allows “replacement of a lawfully established
13 dwelling” that meets the criteria in either subsection (B) or subsection (C).⁵

14 The language of LCC 933.180(B) mirrors the statute and includes the
15 criteria for replacement of an existing dwelling that, at the time of application
16 “must have” the enumerated features:

17 “For the alteration, restoration, or replacement of a lawfully

⁵ Applications under LCC 933.180(B) are processed under the county’s “Type IA procedure,” without notice to anyone. LCC 921.075(B) and LCC 921.110. Applications under LCC 933.180(C) are processed pursuant to the county’s “Type IIA” procedure with notice to surrounding landowners and an opportunity to comment. LCC 921.080(B)(12) and LCC 921.120.

1 established dwelling under LCC 928.[3]15(B)(1),^[6] 928.615(B)(1)
2 and 928.915(B)(2), the dwelling must have:

3 “(1) intact exterior walls and roof structure;

4 “(2) indoor plumbing consisting of kitchen sink, toilet and bathing
5 facilities connected to a sanitary waste disposal system;

6 “(3) interior wiring for interior lights;

7 “(4) a heating system; and

8 “(5) the dwelling was assessed as a dwelling for purposes of ad
9 valorem taxation for the previous five property tax years, or,
10 if the dwelling has existed for less than five years, from that
11 time.”⁷

12 LCC 933.180(C), enacted by Ordinance 2016-070, includes the criteria for
13 replacement of a dwelling that “formerly had” the enumerated features. Finally,
14 although ORS Chapter 215 does not define the phrase “lawfully established
15 dwelling,” LCC 920.100(175) defines the phrase “[l]awfully established
16 dwelling” to mean “a dwelling that was established prior to any building codes

⁶ The online and codified version of LCC 933.180(B) contain what appears to be a typographical error in referring to “LCC 928.915(B)(1),” where the version of LCC 933.180(B) adopted by Ordinance 2016-070 reads “LCC 928.315(1).” Intervenor’s Response Brief App 35, 40 (emphases added). We take official notice of Ordinance 2016-070. ORS 40.090(7). The version of the LCC adopted by Ordinance controls. Record 8; *Walker v. City of Sandy*, 62 Or LUBA 358, 366–67 (2010).

⁷ We understand the county’s use of the modal verb “must have” in LCC 933.180(B) to be synonymous with the present tense of the verb “to have” (*i.e.*, “[h]as”) that is used in ORS 215.283(1)(p).

1 that would apply to the establishment of the dwelling or a dwelling that was
2 established pursuant to then existing building codes and land use regulations.”

3 **C. ORS 197.015(10)(b)(A)**

4 The county moves to dismiss the appeal on the basis that the challenged
5 decision falls within the exception to LUBA’s jurisdiction at ORS
6 197.015(10)(b)(A) for a land use decision “[t]hat is made under land use
7 standards that do not require interpretation or the exercise of policy or legal
8 judgment[.]” We refer to that exception in this opinion as the ministerial
9 exception.

10 According to the county, in the circumstances presented by the application,
11 the planning director’s determination that the criteria at LCC 933.180(B)(1) to
12 (5) were met and his determination that the existing dwelling is “lawfully
13 established” did not require interpretation or the exercise of legal or policy
14 judgment. Respondents argue that the application included a statement that the
15 five criteria were met, and the decision includes a statement that pictures,
16 supporting the planning director’s conclusion that the four criteria establishing
17 the habitable condition of the dwelling, were submitted with the application. The
18 decision also relies on the tax account statement for the property to verify that the
19 fifth, tax criterion was met. Record 9. Finally, the decision relies on the 1978
20 decision approving the dwelling on the EFU-zoned portion of the then split-zoned
21 parcel to verify that the existing dwelling is “lawfully established.”

1 Petitioner does not dispute that the existing dwelling has the enumerated
2 features set out in ORS 215.283(1)(p), as implemented in LCC 933.180(B)(1) to
3 (5). Petitioner disputes only that the dwelling was “lawfully established,” for
4 reasons we explain below.

5 In response to the county’s motion, petitioner first argues that the
6 challenged decision is a “[p]ermit” within the meaning of ORS 215.402(4) and
7 therefore not subject to the ministerial exception. However, petitioner does not
8 attempt to explain how the county’s issuance of the replacement dwelling
9 decision was the “discretionary approval of a proposed development of land
10 under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and
11 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto.”
12 *See Regency Centers LP v. Washington County*, 265 Or App 49, 61, 335 P3d 856
13 (2014) (“LUBA was not required to scour the petitions for material that
14 potentially could have supported an argument that the county’s decision involved
15 a ‘proposed development of land’ [under ORS 215.402(4)] when petitioners did
16 not make that argument for themselves”). Petitioner has not established that the
17 challenged decision is a “permit” within the meaning of ORS 214.402.

18 Petitioner also argues that the county was required to exercise “legal
19 judgment” in determining that LCC 933.180(B), rather than LCC 933.180(C),

1 applied.⁸ According to petitioner, the plain language of LCC 933.180(A) requires
2 the planning director to exercise legal judgment in determining whether to apply
3 the criteria in LCC 933.180(B) or (C) to a replacement dwelling application.

4 We disagree. LCC 933.180(B) applies to dwellings that have, at the time
5 of application, the enumerated features listed in LCC 933.180(B)(1) to (5). *See n*
6 7. Again, petitioner does not dispute that the existing dwelling possessed those
7 features at the time of the application, or that it satisfies LCC 933.180(B)(1) to
8 (5). Stated differently, petitioner does not argue that LCC 933.180(C) applied to
9 the application due to the lack of current existence of any enumerated features.
10 Accordingly, the county was not required to exercise legal judgment in reviewing
11 tax records and photographs of the existing dwelling to ascertain that it possessed,
12 at the time of application, the enumerated features.

13 The terms “judgment” and “legal judgment” are not defined in statute or
14 the LCC. *Webster’s Third New Int’l Dictionary* defines “judgment” as “6 a : * * *
15 the mental or intellectual process of forming an opinion or evaluation by

⁸ The LCC implementation of ORS 215.283(1)(p) appears to be exceedingly complicated. As noted, intervenor submitted its application as a replacement dwelling for a dwelling permitted outright in the EFU zone under LCC 928.315. LCC 928.315 is titled “Dwellings, not soil dependent, allowed outright in the EFU zoning district” and provides that the “[a]lteration, restoration or replacement of a lawfully established dwelling meeting the requirements in LCC 933.180” is a use “allowed outright” in the EFU zone.

1 discerning and comparing.” *Id.* at 1223 (unabridged ed 2002). Here, there was
2 nothing for the county to evaluate by discerning or comparing, because the
3 evidentiary support for the existence of the features in LCC 933.180(B)
4 subsections (1) to (5) was clear and unambiguous, and did not require the
5 application of any legal principles.

6 We understand petitioner to argue that the county was required to exercise
7 legal judgment in determining whether the existing dwelling is “lawfully
8 established” because, according to petitioner, the existing dwelling is a
9 nonconforming use and therefore the application for a replacement dwelling
10 seeks alteration of a nonconforming use. Accordingly, petitioner argues, the
11 county was required to apply the provisions of the LCC that govern
12 nonconforming uses at LCC Chapter 936.

13 Here, in order to determine whether petitioner’s argument that the
14 ministerial exception does not apply is meritorious, we are faced with the
15 somewhat awkward situation of being required to resolve the merits of
16 petitioner’s argument that the existing dwelling is a nonconforming use and
17 therefore the city’s nonconforming use provisions applied to intervenor’s
18 application. *South v. City of Portland*, 48 Or LUBA 555, 562 (2005); *Jaqua v.*
19 *City of Springfield*, 46 Or LUBA 566, 581–85 (2004). However, given the
20 statutory definition of “land use decision,” the wording of the ministerial
21 exception, and the nature of petitioner’s assignment of error, that awkwardness
22 is inescapable.

1 Petitioner argues that the existing dwelling is not “lawfully established”
2 because it is a nonconforming use. Petitioner argues that the existing dwelling is
3 a nonconforming use because the dwelling was approved pursuant to a variance
4 procedure the county used in 1978 to site the dwelling on the EFU portion of a
5 split-zoned EFU and ART parcel. *See* n 2. However, we agree with intervenor
6 that the existing dwelling is not a nonconforming use. LCC 936.100(A) describes
7 a “lawful” “non-conforming use” as “a lawful use which existed, and continues
8 to exist, on the date that the zoning district in which the use is located was
9 established[.]” Here, the existing dwelling did not exist on the date that the zoning
10 district was established. It post-dates the application of EFU and ART zoning.
11 Rather, the dwelling is a conforming use because it was approved in a 1978 land
12 use decision that was in conformance with the then-applicable zoning district
13 regulations. The existing dwelling is also a “[l]awfully established dwelling”
14 within the meaning of LCC 920.100(175) because it is “a dwelling that was
15 established pursuant to then existing building codes and land use regulations.”

16 In *Biggerstaff v. Yamhill County*, 58 Or LUBA 476 (2009), we held that
17 the ministerial exception applied to the county’s decision approving replacement
18 dwellings because making the decision did not require the county to exercise
19 legal judgment in determining whether the existing dwellings were “lawfully
20 established,” where the county had previously issued building permits for the
21 dwellings a mere eight months prior to the applications for replacement dwellings

1 and those building permits were before the county in making the replacement
2 dwelling decision.

3 Similarly, here, the county was not required to exercise legal judgment to
4 determine that the existing dwelling to be replaced was “lawfully established,”
5 where the county relied on the 1978 land use approval of the existing dwelling.
6 Accordingly, we agree with the county that under ORS 197.015(10)(b)(A),
7 LUBA lacks jurisdiction over the appeal. In approving the replacement dwelling
8 application, the county did not and was not required to determine whether the
9 existing dwelling is a nonconforming use. Petitioner’s argument on appeal to
10 LUBA does not affect the nature of the county’s decision as a decision that did
11 not require “interpretation or the exercise of policy or legal judgment.”

12 The county’s motion is granted.

13 **MOTION TO TRANSFER**

14 Petitioner requests that if LUBA determines that it lacks jurisdiction over
15 the appeal, that the decision be transferred to circuit court pursuant to ORS
16 34.102 and OAR 660-010-0075(11)(b).⁹ Petitioner’s motion to transfer is
17 granted.

⁹ OAR 661-010-0075(11)(b) provides in part:

“A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent’s brief or motion that challenges the Board’s jurisdiction is filed.”

1 The appeal is transferred to Linn County Circuit Court.