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

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

LUBA No. 2019-105

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Carol Macbeth, Bend, filed the petition for review and argued on behalf of petitioner.

No appearance by Deschutes County.

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

RUDD, Board Member, did not participate in the decision.

AFFIRMED 01/31/2020

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 county approving a lot of record dwelling.

FACTS

In the county a few miles southwest of the city of Sisters lie two adjacent parcels, which we refer to in this opinion as Tax Lot 1000 and Tax Lot 1100. Both parcels are zoned Forest Use (F-2), which is a county zone that implements Statewide Planning Goal 4 (Forest Lands). In 2019, the applicant, Duncan, applied for approval of a lot of record dwelling on the 8.06-acre Tax Lot 1000. Duncan's parents acquired both tax lots in 1969. In 2015, Duncan's parents executed and recorded a deed that transferred both properties to "David J. Vargas and Patricia A. Vargas, Trustees, Vargas Family Trust" (the Trust). Record 737. The trust includes 14 beneficiaries. Record 81. Duncan's parents subsequently died, and Duncan became successor trustee.

In 2017, Duncan took title to Tax Lot 1000 in a deed from "Elizabeth M. Vargas Duncan, Successor Trustee, Vargas Family Trust, dated February 6, 2015" to Duncan, "individually." Record 124. Accordingly, title to Tax Lot 1000 is vested in Duncan individually, while title to Tax Lot 1100 is vested in "Elizabeth M. Vargas Duncan, Successor Trustee, Vargas Family Trust[.]" In 2018, the county approved an application for a lot of record dwelling on Tax Lot

1100, which is 1.94 acres in size. Record 683, 704. That dwelling has not yet been built.

The county planning director approved Duncan's 2019 application for a lot of record dwelling on Tax Lot 1000, and petitioner appealed the decision to the hearings officer. The hearings officer held a hearing on the application and approved it. The board of county commissioners declined review, and this appeal followed.

INTRODUCTION

This appeal involves the interpretation of ORS 215.705, commonly known as the lot of record dwelling statute, which was first enacted in 1993 as part of comprehensive revisions to the state's land use program. The lot of record dwelling statute is implemented at Deschutes County Code (DCC) 18.40.050(B). ORS 215.700 *et seq.* provide limited exceptions to the general policy set out in Statewide Planning Goal 4 (Forest Lands) to preserve forest lands for forest uses, to allow dwellings on certain farm and forest lands.[1] *See DLCD v. Yamhill*

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[1] The purpose of Goal 4 is:

> "[t]o conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture."

County, 151 Or App 367, 374, 949 P2d 1245 (1997) ("ORS 215.705(1)(a) and (6) are not aimed at advancing the general preservation policy of the goal and the other statutes; their clear objective is to create an exception to the operation of other statutes that do implement the policy."). ORS 215.700 states the legislative purpose of the statutes that authorize the dwellings on resource land described in ORS 215.705 to 215.755:

> "The Legislative Assembly declares that land use regulations limit residential development on some less productive resource land acquired before the owners could reasonably be expected to know of the regulations. In order to assist these owners while protecting the state's more productive resource land from the detrimental effects of uses not related to agriculture and forestry, it is necessary to:
>
> "(1) Provide certain owners of less productive land an opportunity to build a dwelling on their land; and
>
> "(2) Limit the future division of and the siting of dwellings upon the state's more productive resource land."

ORS 215.705 both allows and limits lot of record dwellings on resource land. *See Bruggere v. Clackamas County*, 168 Or App 692, 698, 7 P3d 634 (2000) (observing that ORS 215.705 serves multiple statutory objectives). As relevant to this appeal, ORS 215.705(1) provides:

> "(1) 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 farm or forest zone as set forth in this section and ORS 215.710, 215.720, 215.740 and 215.750 after notifying the county assessor that the governing body intends to allow the dwelling. A dwelling under this section may be allowed if:

"(a) The lot or parcel on which the dwelling will be sited was lawfully created and was acquired by the present owner:

"(A) Prior to January 1, 1985; or

"(B) By devise or by intestate succession from a person who acquired the lot or parcel prior to January 1, 1985.

"(b) The tract on which the dwelling will be sited does not include a dwelling.

"* * * * *

"(6) For purposes of subsection (1)(a) of this section, 'owner' includes the spouses in a marriage, son, daughter, parent, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, parent-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent or grandchild of the owner or a business entity owned by any one or combination of these family members."

Thus ORS 215.705(1)(a) and (6) include "grandfather provisions" that allow a dwelling to be built by certain family members of persons who acquired their property prior to January 1, 1985, but only if no other "contiguous * * * parcels under the same ownership" "include a dwelling." ORS 215.010(2); ORS 215.705(1)(b). As discussed further below, ORS 215.705(1)(g) limits the siting of dwellings on resource land by requiring consolidation of lots or parcels within a tract when a lot of record dwelling is allowed.

ASSIGNMENTS OF ERROR

Petitioner's assignments of error include overlapping arguments that challenge different aspects of the hearings officer's decision that the provisions

of ORS 215.705(1) are met. We therefore address the assignments of error under each subsection of the statute.

A. ORS 215.705(1)(a) and (6) – "Owner"

In its second and third assignments of error, petitioner argues that the hearings officer erred in concluding that ORS 215.705(1)(a) was met. The hearings officer concluded that Duncan is a qualified relative listed in ORS 215.705(6), and that the Trust's 2015 acquisition of Tax Lot 1000 from the pre-1985 owners, Duncan's parents, does not disqualify Duncan as an "owner" under ORS 215.705(1)(a) and (6) because Duncan is the daughter of a pre-1985 owner.

Petitioner's challenges to that conclusion are three-fold. First, petitioner argues that when Tax Lot 1000 was acquired by the Trust in 2015 from the pre-1985 owners, it was not an acquisition by "devise or intestate succession," and accordingly acquisition by the Trust did not satisfy the requirements of ORS 215.705(1)(a). Petitioner argues ORS 215.705(1)(a)(B) grandfathers only post-death acquisitions of a lot or parcel by the two listed methods in that subsection: "devise or intestate succession." We understand petitioner to argue that the 2015 acquisition by the Trust when the pre-1985 owners were still alive, rather than by devise or intestate succession after their deaths, does not fall within the otherwise available protections for family members who succeed in ownership of a lot or parcel under ORS 215.705(1).

Second, petitioner argues, even if the statute allows inter vivos transfers to a qualified relative or business entity, Tax Lot 1000 was not acquired by "a

business entity owned by any one or combination of these family members" within the meaning of ORS 215.705(6) because, according to petitioner, a trust is not "a business entity owned by any one or combination of these family members." Third, petitioner argues, even if the statute allows inter vivos acquisitions and a trust is a "business entity," Duncan does not qualify for a lot of record dwelling because she did not acquire the property from a pre-1985 owner, but rather from the Trust, to which Tax Lot 1000 was transferred in 2015. Stated differently, petitioner argues, the 2017 acquisition of Tax Lot 1000 by Duncan interrupted the allowable grandfathered acquisitions under ORS 215.705(1)(a) and (6).

We reject petitioner's first argument — that ORS 215.705(1)(a)(B) allows acquisitions by qualified relatives only after the death of pre-1985 owners. In *DLCD v. Yamhill County*, 33 Or LUBA 362 (1997), living pre-1985 owners of property sold it to their son in 1994, and he then applied for a lot of record dwelling. The county approved the application and it was appealed to LUBA. We affirmed the county's decision. After reviewing the text, context and legislative history of ORS 215.700 *et seq.*, we concluded that the legislative history supported an interpretation that the intent of ORS 215.705(1)(a)(B) and (6) was to allow transfers between family members during the lifetime of a pre-1985 owner. 33 Or LUBA at 366-67.

The Court of Appeals affirmed our decision, explaining that the intent of ORS 215.705 is to "create an exception to other statutes and regulations that

restrict dwellings, and relief from those other statutory and regulatory restrictions is part of the declared purpose of the statutes of which the provisions in question are a part." 151 Or App at 374-75. The court upheld LUBA's conclusion that the intent of the legislation was to allow the inter vivos transfers between certain specified family members.[2] *Id.* at 377. Similarly, in *Craven v. Jackson County*, 135 Or App 250, 255, 898 P2d 809 (1995), the court explained that "[ORS 215.705(1)(a) and (6)] place a preference on and confer certain favorable treatment on property that remains family-owned."

We also reject petitioner's second argument, that a trust is not a "business entity" as that term is used in ORS 215.705(6) and that the statute limits that term to "corporate" entities. Petition for Review 24. Nothing in the text, context or legislative history indicates that the legislature intended the phrase "business entity" to be construed in the narrow way that petitioner would like it to be construed, to include only corporate entities. The phrase that modifies "business entity" – "owned by any one or combination of these family members" – suggests that the legislature was focused on allowing transfers between and among qualifying family members and less concerned with the form those transfers took.

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[2] Petitioner argues that *DLCD v. Yamhill County* "should be overturned as wrongly decided." Petition for Review 36. To the extent petitioner is asking LUBA to overturn the Court of Appeals' decision affirming LUBA's decision, LUBA is bound by Court of Appeals precedent and is therefore without authority to do so.

Following the court's reasoning in *DLCD v. Yamhill County*, which relied heavily on the statute's stated remedial purpose, we conclude that ORS 215.705(6)'s use of the term "business entity owned by any one or combination of these family members" is broad enough to include a family trust that the record shows was formed for the purpose of managing and eventually disposing of a pre-1985 owner's assets, including real estate, to family members. A broader construction of the term is consistent with the court's holding in *DLCD v. Yamhill County*, in which the court described the statute's grandfather provisions as "extend[ing] to the families of long-standing legal or equitable titleholders as well as the titleholders themselves." 151 Or App at 374 (citing *Craven*, 135 Or App at 254–55). Placing family-owned property into a family trust for future disposition to qualified relatives described in ORS 215.705(6) is an allowable means to ensure that property remains family owned.

Finally, we also reject petitioner's third argument - that Duncan does not qualify for a lot of record because she did not acquire Tax Lot 1000 directly from the pre-1985 owners, but rather from the trust formed by the pre-1985 owners after both pre-1985 owners had died. Again, the Court of Appeals has explained that the statute's purpose is to provide pre-1985 owners and their family members with relief from the otherwise prohibitive statutory policy of protecting farm and forest land by not allowing dwellings, by allowing family members of pre-1985 owners the right to construct a dwelling on a parcel. *DLCD v. Yamhill County*, 151 Or App at 374-75. There is no dispute that Duncan is a qualifying relative of

a pre-1985 owner, who took title to Tax Lot 1000 as part of an estate plan that presumably transferred Tax Lot 1000 first to a family trust, and then to Duncan. We see nothing in the statute that limits the *number* of transfers of an otherwise qualifying parcel to a single transfer. The only limit in the statute is that the recipient of the property must be a qualified relative listed in ORS 215.705(6). Duncan is such a qualifying relative as the daughter of the pre-1985 owners.

B. ORS 215.705(1)(b)

ORS 215.705(1)(b) allows a lot of record dwelling if "the tract on which the dwelling will be sited does not include a dwelling."

1. Tract Must Be "Under the Same Ownership"

ORS 215.010(2) defines "Tract" as "one or more contiguous lots or parcels under the same ownership." In its first assignment of error, and in portions of its second and third assignments of error, petitioner argues that Tax Lot 1000 and Tax Lot 1100 are a "tract" as defined in ORS 215.010(2). That is so, petitioner argues, because Tax Lots 1000 and 1100 are "under the same ownership."

Petitioner first relies on the DCC definition of "[o]wner" at DCC 18.04.030, which includes an "authorized agent" of the owner of real property.[3] Petitioner argues that as trustee, Duncan is the "authorized agent" of the trust,

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[3] DCC 18.04.030 defines "owner" to mean "the owner of real property or the authorized agent thereof or the contract purchaser of real property of record as shown on the last available complete tax assessment roll or County Recorder's records."

and therefore is an "owner." We understand petitioner to argue that Duncan is the "owner" of both tax lot 1000 and tax lot 1100 and therefore, the parcels are "under the same ownership." However, the DCC definition of "owner," which is not intended to implement the lot of record statutes, is not relevant to determining the meaning of the phrase "under the same ownership" in ORS 215.010(2) for purposes of defining "tract" as used in ORS 215.705(1)(b). We reject petitioner's argument that DCC 18.04.030 requires a conclusion that Tax Lots 1000 and 1100 are "under the same ownership." Further, the court has rejected an argument that the definition of "owner" in ORS 215.705(6) should be read as applying to the word "ownership" in ORS 215.010(2), and to the word "tract" in ORS 215.705(1)(b). *DLCD v. Yamhill County*, 151 Or App at 373 ("ORS 215.705(6) defines 'owner' solely 'for purposes of' ORS 215.705(1)(a)."); *Craven*, 135 Or App at 254 ("[T]here is no basis for reading the ORS 215.705(6) definition of 'owner' into parts of the statute other than the single subsection to which ORS 215.705(6) expressly states that it applies."). That is essentially what petitioner argues here.

Relatedly, petitioner argues Duncan is the owner of Tax Lot 1100 because, as explained by petitioner, a trust vests legal title in the trustee and equitable title in the beneficiaries. Petition for Review 12 (citing *Brown v. Brown*, 206 Or App 239, 249, 136 P2d 745, *rev den*, 341 Or 449 (2006), and *Connall v. Felton*, 225 Or App 266, 270, 201 P3d 219, *rev den* 346 Or 257 (2009)). However, while the two decisions cited by petitioner support petitioner's stated proposition that a

trustee holds legal title to property while the trust beneficiaries are equitable title holders, petitioner's argument does not prove that the two tax lots are "under the same ownership" within the meaning of ORS 215.010(2). The person or other entity serving as a trustee holds title as a representative of the trust, and is bound to dispose of the trust's property in accordance with the terms of the trust instrument. To the extent that petitioner's argument is somewhat dependent on its argument in the second and third assignments of error that a trust is not a "business entity" as that term is used in ORS 215.705(6), we also reject that argument here for the reasons explained above. Petitioner's arguments really boil down to an assertion that although title to Tax Lot 1100 is vested in the "Successor Trustee, Vargas Family Trust[,]" the successor trustee and Duncan are one and the same person and therefore the two tax lots are "under the same ownership."

The hearings officer concluded that (1) Tax Lots 1000 and 1100 are not "under the same ownership" because Tax Lot 1000 is titled in Duncan's individual name, while Tax Lot 1100 is titled in Duncan's name as successor trustee of the Vargas Family Trust, and (2) therefore Tax Lots 1000 and 1100 are not a tract. We agree with the hearings officer's conclusion. Tax Lot 1000 and Tax Lot 1100 are not "under the same ownership" when one tax lot is owned by Duncan individually and the other tax lot is owned by the trust, with Duncan serving as trustee. *See Friends of Linn County v. Linn County*, 37 Or LUBA 280, 288 (1999) (two parcels not "under the same ownership" where the applicant

owned one parcel individually, and jointly owned the second parcel with ex-wife); *Craven*, 135 Or App at 253 (parcels not "under the same ownership" where grandmother transferred a parcel in a tract to grandson and then grandmother applied for a lot of record dwelling on another property within the former tract).

2. "Does Not Include a Dwelling"

Petitioner also argues that Tax Lot 1100 has an approved, but not yet constructed, dwelling. As noted above, the dwelling that was approved on Tax Lot 1100 is approved but construction of it has not yet started. We agree with petitioner that Tax Lot 1100 "include[s] a dwelling" within the meaning of ORS 215.705(1)(b), because a lot of record dwelling has been approved on that parcel and could be constructed at any time. *See Bielefeld v. Lane County*, __ Or LUBA __ (LUBA No 2019-027, October 31, 2019) slip op 13 n 7 (an approved dwelling does not need to be constructed in order to preclude a forest template dwelling approval on the same tract under ORS 215.750, which precludes a new dwelling if the tract "include[s] a dwelling"); *Randall v. Klamath County*, 48 Or LUBA 321, 323-24 (2004) (where dwelling has been approved on a parcel in the same tract, ORS 215.705 precludes approval of application for a lot of record dwelling on the same tract). However, because we conclude above that Tax Lot 1000 and Tax Lot 1100 are not a "tract," the fact that Tax Lot 1100 "include[s] a dwelling" within the meaning of ORS 215.705(1)(b) does not provide a basis for reversal or remand of the decision.

The assignments of error are denied.

The county's decision is affirmed.