

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

ROBERT RUSSELL,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

LANDWATCH LANE COUNTY,
Intervenor-Respondent.

LUBA No. 2020-072

FINAL OPINION
AND ORDER

Appeal from Lane County.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by Lane County.

Sean Malone, Eugene, filed the response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 01/08/2021

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

NATURE OF THE DECISION

Petitioner appeals a hearings officer decision denying petitioner's forest template dwelling application.

MOTION TO TAKE OFFICIAL NOTICE

Petitioner requests that we take official notice of House Bill (HB) 3125 (2013) as introduced, the amendments made by the House Committee on Land Use, the A-Engrossed version of the bill, the Enrolled version of the bill, and Oregon Laws 2013, chapter 88.¹ Petition for Review 24. LUBA will take official notice of Oregon's statutory law and its legislative history. ORS 40.090(1); *Anderson v. Coos County*, 62 Or LUBA 38, 40 (2010). The motion is granted.

FACTS

The 7.8-acre subject property is located four miles from the unincorporated community of Marcola, between Old Marcola Road and Marcola Road. With the exception of a clearing in its southwestern portion, the subject property is forested and zoned Impacted Forest Land (F-2), as are properties to its west, south, and east. The property to the north is zoned Rural Residential (RR-5). The property to the southwest contains a fire station and is split-zoned F-2 and Rural Public Facilities (RPF).

¹ As we explain below, HB 3125 amended ORS 215.780. *See* n 8.

1 The subject property and the approximately 2-acre property to the
2 southwest were the subject of a 2017 partition of then tax lot 100 to enable the
3 sale of the portion of the land containing a fire station to its tenant fire
4 department.²

5 “The authority for that partition was [Lane County Code (LC)]
6 16.211(10)(b) and ORS 215.780(2)(d), providing for the creation of
7 units of land smaller than the statutory minimum parcel size (80
8 acres) ‘to facilitate a forest practice as defined in ORS 527.620.’”³
9 Record 3.

10 The 2017 partition and the challenged decision refer to the subject property as
11 Parcel 1 and the approximately 2-acre property as Parcel 2. Condition 10 of the
12 tentative partition approval provided:

13 “The following notes shall be placed on the final partition plat

² Whether the 2017 partition was properly approved is not before us.

³ ORS 527.620(5) defines “[f]orest practice” as

“any operation conducted on or pertaining to forestland, including
but not limited to:

“(a) Reforestation of forestland;

“(b) Road construction and maintenance;

“(c) Harvesting of forest tree species;

“(d) Application of chemicals;

“(e) Disposal of slash; and

“(f) Removal of woody biomass.”

1 stating:

2 “(a) ‘Parcel 1 is not guaranteed for approval for residential
3 development unless the zoning requirements and septic
4 requirements are met.’

5 “(b) ‘Parcel 2 is not eligible for siting of a new dwelling.’

6 “(c) ‘Parcel 2 cannot serve as justification for the siting of a future
7 dwelling on other lots or parcels.’

8 “(d) ‘This partition cannot be used to justify the re-designation or
9 rezoning of resource lands.’” Record 3, 90.

10 On December 4, 2019, petitioner filed an application with the county seeking
11 approval of a forest template dwelling on the subject property/Parcel 1. The
12 planning director approved petitioner’s application. The hearings officer reversed
13 the planning director’s decision and denied the forest template dwelling
14 application.

15 This appeal followed.

16 **ASSIGNMENT OF ERROR**

17 ORS 215.780(1) provides:

18 “Except as provided in subsection (2) of this section, the following
19 minimum lot or parcel sizes apply to all counties:

20 “(a) For land zoned for exclusive farm use and not designated
21 rangeland, at least 80 acres;

22 “(b) For land zoned for exclusive farm use and designated
23 rangeland, at least 160 acres; and

24 “(c) *For land designated forestland, at least 80 acres.*” (Emphasis
25 added.)

1 ORS 215.780(2) allows counties to create parcels that are less than these
2 minimums in some circumstances. ORS 215.780(2)(a), commonly referred to as
3 the “go below” statute, allows a county to adopt a lower minimum parcel size if
4 it can demonstrate to the Land Conservation and Development Commission
5 (LCDC) that the lower size continues to meet the requirements of ORS 215.243,
6 ORS 527.630, and the statewide planning goals.⁴ ORS 215.780(2)(b) and (c)
7 authorize the division of forestland to create parcels that are less than 80 acres in
8 size when a dwelling has existed since before June 1, 1995, on the parcel being
9 divided.⁵ ORS 215.780(2)(d), under which the 2017 partition was approved,

⁴ LCDC ensures local compliance with the statewide goals through review and acknowledgement of local land use regulations. ORS 197.251.

⁵ ORS 215.780(2)(b) and (c) allow counties to adopt lower minimum lot sizes in the following circumstances:

“(b) To divide by partition an area of land zoned for forest use to create a parcel for a dwelling that has existed since before June 1, 1995, subject to the following requirements:

“(A) The parcel created may not be larger than five acres, except as necessary to recognize physical factors such as roads or streams, in which case the parcel may not be larger than 10 acres; and

“(B) The parcel that does not contain the dwelling is not entitled to a dwelling unless subsequently authorized by law or goal and the parcel either:

“(i) Meets the minimum lot or parcel size of the zone; or

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- “(ii) Is consolidated with another parcel, and together the parcels meet the minimum lot or parcel size of the zone.
 - “(c) To divide by partition an area of land zoned for mixed farm and forest use to create a parcel for a dwelling that has existed since before June 1, 1995, subject to the following requirements:
 - “(A) The parcel created may not be larger than five acres, except as necessary to recognize physical factors such as roads or streams, in which case the parcel may not be larger than 10 acres;
 - “(B) The parcel that does not contain the dwelling is not entitled to a dwelling unless subsequently authorized by law or goal and the parcel either:
 - “(i) Meets the minimum lot or parcel size of the zone; or
 - “(ii) Is consolidated with another parcel, and together the parcels meet the minimum lot or parcel size of the zone;
 - “(C) The minimum tract eligible under this paragraph is 40 acres;
 - “(D) The tract must be predominantly in forest use and that portion in forest use qualified for special assessment under a program under ORS chapter 321; and
 - “(E) The remainder of the tract does not qualify for any uses allowed under ORS 215.213 and 215.283 that are not allowed on forestland.”

1 authorizes the division of forestland to create parcels less than 80 acres in size in
2 order

3 “to facilitate a forest practice as defined in ORS 527.620 that results
4 in a parcel that does not meet the minimum area requirements of
5 subsection (1)(c) of this section or paragraph (a) of this subsection.
6 Parcels created pursuant to this subsection:

7 “(A) Are not eligible for siting of a new dwelling;

8 “(B) May not serve as the justification for the siting of a future
9 dwelling on other lots or parcels;

10 “(C) May not, as a result of the land division, be used to justify
11 redesignation or rezoning of resource lands; and

12 “(D) May not result in a parcel of less than 35 acres, unless the
13 purpose of the land division is to:

14 “(i) Facilitate an exchange of lands involving a
15 governmental agency; or

16 “(ii) Allow transactions in which at least one participant is
17 a person with a cumulative ownership of at least 2,000
18 acres of forestland.”

19 The hearings officer found:

20 “Subsection (d) is the statutory exception that allows the approval
21 of a land division by partition of forest land ‘to facilitate a forest
22 practice’ ‘that results in a parcel that does not meet the minimum
23 area requirements.’ In this case, the parent parcel of the 2017
24 partition (tax lot 100) was only 10.2 acres. Accordingly, it was
25 already substandard, *i.e.*, smaller than the minimum parcel size. The
26 partition resulted in or created two parcels that were smaller than the
27 minimum parcel size. While the smaller property, Parcel 2,
28 contained the fire station (the alleged forest practice being
29 facilitated), it was the division itself that facilitated the forest
30 practice. The language of subsection (2)(d) focuses on a resulting

1 parcel that does not meet the minimum lot size. In this case, the 2017
2 partition resulted in two parcels, neither of which satisfies the
3 minimum parcel size of 80 acres. Accordingly, although the
4 applicant's focus may be only on Parcel 2, both parcels are 'created'
5 pursuant to subsection (2)(d) * * * because they are both parcels
6 created by partition to facilitate a forest practice and because they
7 are both smaller than the minimum parcel size." Record 7-8.

8 Petitioner asserts that the hearings officer misconstrued ORS 215.780(2)(d) and
9 erred in determining that ORS 215.780(2)(d)(A) prohibits approval of a dwelling
10 on the subject property.

11 For the reasons set forth below, we conclude that the hearings officer
12 correctly construed ORS 215.780(2)(d) and affirm the hearings officer's
13 decision.

14 **A. Text and Context**

15 Our review of the hearing officer's interpretation of state law is subject to
16 ORS 197.835(9)(a)(D), and we will reverse or remand the land use decision if
17 the hearings officer improperly construed the applicable law. In making that
18 determination, we will consider the text and context of the law at issue in order
19 to determine the intent of the enacting legislature. *PGE v. Bureau of Labor and*
20 *Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or
21 160, 171-172, 206 P3d 1042 (2009).

22 Petitioner argues that the 2017 partition "created" only one parcel pursuant
23 to ORS 215.780(2)(d)—Parcel 2—and that Parcel 1 is a "remainder parcel" that
24 was not "created pursuant to" ORS 215.780(2)(d). Thus, petitioner argues, Parcel
25 1 is not subject to the dwelling prohibition in ORS 215.780(2)(d)(A). Petitioner

1 additionally argues that the plain language of ORS 215.780(6)(a) indicates that
2 “the Oregon Legislature did not intend to encumber the remainder of a parcel of
3 land when a landowner partitions the property for the purpose of facilitating a
4 forest practice on the newly created parcel of land under ORS 215.780(2)(d).”
5 Petition for Review 23.

6 Petitioner’s interpretation ignores the use of the plural, *i.e.*, “parcels,” in
7 ORS 215.780(2)(d), indicating *multiple* parcels. When we interpret a statute, we
8 will not insert what has been omitted or omit what has been inserted. ORS
9 174.010. The text of the statute supports the conclusion that both parcels are
10 subject to the new dwelling prohibition.

11 Further, in interpreting a statute, we are to give all parts meaning if
12 possible, including related statutes. ORS 215.010(1)(a)(A) provides that the term
13 “parcel,” as used in ORS chapter 215, “[i]ncludes a unit of land created” “[b]y
14 partitioning land as defined in ORS 92.010.” *See also* ORS 92.010(6) (“‘Parcel’
15 means a single unit of land that is created by a partition of land.”). Subject to
16 exceptions not applicable here, ORS 92.010(9) and ORS 215.010(1) define
17 “partitioning land” as dividing land to create not more than three parcels of land
18 within a calendar year.⁶ Petitioner’s interpretation does not give effect to the
19 definition of “parcel” in ORS 215.010(1) as a unit of land created by a partition

⁶ ORS 215.010(1) provides generally that “terms defined in ORS 92.010 shall have the meanings given therein.”

1 or recognize that a partition “creates” two or three “parcels,” not one parcel and
2 a remainder or two parcels and a remainder. *See Landwatch v. Lane County*, ____
3 Or LUBA ____ (LUBA No 2019-044, Oct 15, 2019) (holding that a legal division
4 of land creates multiple legal parcels; it does not create a new parcel or parcels
5 and a “remainder” parcel).

6 Instead, petitioner argues that we should determine that the dwelling
7 prohibition does not apply to the subject property, based on petitioner’s
8 interpretation of ORS 215.780(6)(a) and that paragraph’s use of the phrases
9 “remaining parcel” and “newly created parcel.” ORS 215.780(6)(a) provides:

10 “An applicant for the creation of a parcel pursuant to subsection
11 (2)(b) and (c) of this section shall provide evidence that a restriction
12 on the *remaining parcel*, not containing the dwelling, has been
13 recorded with the county clerk of the county where the property is
14 located. An applicant for the creation of a parcel pursuant to
15 subsection (2)(d) of this section shall provide evidence that a
16 restriction on the *newly created parcel* has been recorded with the
17 county clerk of the county where the property is located. The
18 restriction may not allow a dwelling unless authorized by law or goal
19 on land zoned for forest use except as permitted under subsection
20 (2) of this section.” (Emphases added.)

21 As explained above, ORS 215.780(2)(b) and (c) authorize the creation of parcels
22 smaller than 80 acres in size on forest land in order to create a separate parcel for
23 a dwelling that has existed since before June 1, 1995, subject to listed conditions.
24 *See* n 5. Because both of these provisions apply to the division of properties that
25 already contain a dwelling, the requirement in paragraph (6)(a) that the applicant
26 “provide evidence that a restriction on the remaining parcel, not containing the

1 dwelling, has been recorded with the county clerk of the county where the
2 property is located” clarifies that the parcel without an existing dwelling will only
3 be allowed to add a dwelling in limited circumstances, including where it meets
4 the lot size requirement or is consolidated with other properties to meet the
5 minimum lot size. ORS 215.780(2)(b)(B), (c)(B). These provisions do not
6 evidence a legislative intent to broadly allow new dwellings.

7 The second part of ORS 215.780(6)(a) addresses parcels created pursuant
8 to ORS 215.780(2)(d) and provides:

9 “An applicant for the creation of *a parcel* pursuant to subsection
10 (2)(d) of this section shall provide evidence that a restriction on *the*
11 *newly created parcel* has been recorded with the county clerk of the
12 county where the property is located. *The restriction may not allow*
13 *a dwelling unless authorized by law or goal on land zoned for forest*
14 *use except as permitted under subsection (2) of this section.”*
15 (Emphases added.)

16 Petitioner emphasizes that the first sentence of this quote refers to “a parcel” and
17 “the newly created parcel,” which are phrased in the singular, to support his
18 argument that the 2017 partition created only one parcel—Parcel 2, “the newly
19 created parcel”—and that petitioner’s parcel, Parcel 1, is not subject to the
20 dwelling restriction in ORS 215.780(2)(d)(A). Petitioner also emphasizes that
21 paragraph (2)(d) allows division by a partition “that results in *a parcel* that does
22 not meet the minimum area requirements.” (Emphasis added.)

23 Although paragraph (6)(a) refers to the creation of “a parcel,” it refers to
24 the creation of a parcel pursuant to paragraph (2)(d), that is, a partition that results

1 in creation of a parcel less than 80 acres in size. We agree with the hearings
2 officer that both the subject property and the fire station parcel are smaller than
3 the 80-acre minimum lot size and were created pursuant to ORS 215.780(2)(d).⁷
4 In this instance, the 2017 partition, pursuant to paragraph (2)(d), resulted in *two*
5 parcels that do not meet the minimum area requirements.

6 The hearings officer also found:

7 “[T]he applicant argues that a dwelling on Parcel 1 is ‘authorized by
8 law’ under the template dwelling provisions, and is therefore
9 permitted. This * * * argument is somewhat circular. If the dwelling
10 on Parcel 1 is prohibited under subsection (2), then it is not
11 ‘authorized by law or goal.’ The Hearings Official does not interpret
12 this provision to allow dwellings where subsection (2)(d)(A)
13 prohibits them.” Record 7.

14 **B. Legislative History**

15 We will consider legislative history in interpreting a statute to the extent
16 that it is helpful.⁸ *Gaines*, 346 Or at 171-72; ORS 174.020(1)(a) (“In the

⁷ Petitioner argues that, if the dwelling prohibition in ORS 215.780(2)(d) does apply to the “remainder” parcel because both parcels are “newly created,” then nothing in the language of ORS 215.780(2)(d) limits that restriction to only sub-sized parcels. Petition for Review 18 n 5. That issue is not presented in this appeal and we express no opinion about petitioner’s interpretation.

⁸ Above, we granted petitioner’s motion to take official notice of the legislative history of the 2013 amendments to ORS 215.780. Petitioner submitted those documents in order to provide context for two letters that intervenor entered into the record before the county. The letters reflect comments that the Oregon Forest Industries Council (OFIC) submitted to the legislature as it considered HB 3125 and the elimination of *former* ORS 215.780(2)(d)(E) (2011). Record 40-42.

1 construction of a statute, a court shall pursue the intention of the legislature if
2 possible.”).

3 ORS 215.780(2)(b), (c), and (d) were enacted by the legislature in 1995.
4 That legislation, Senate Bill (SB) 683, was originally introduced at the request of
5 Douglas County in response to our decision in *DLCD v. Douglas County*, 28 Or
6 LUBA 242 (1994). We decided *Douglas County* after the legislature enacted
7 omnibus changes to existing land use statutes in HB 3661 (1993), including, as
8 relevant here, the 80-acre minimum parcel size for lands zoned for forest uses,
9 codified at ORS 215.780(1)(c). In *Douglas County*, we concluded that a county
10 code provision which waived the minimum parcel size in the Timberland
11 Resource District to allow land divisions to create five-acre parcels containing
12 existing dwellings was inconsistent with the newly-enacted ORS 215.780(1)(c)
13 minimum parcel size on lands zoned and designated for forest use. 28 Or LUBA
14 at 257-58. Our opinion referred to those existing dwellings as “homestead
15 dwellings.” *Id.*

16 In its testimony before the 1995 legislature supporting SB 683, Douglas
17 County took the position that LCDC’s administrative rules implementing
18 Statewide Planning Goal 4 (Forest Lands) that were in effect in 1992—prior to
19 the enactment of HB 3661—authorized the county’s homestead dwelling
20 exception, which it sometimes referred to as the “mom and pop” partition

OFIC’s comments included a statement of its understanding of the operation of
ORS 215.780(2)(d)(A) and (B).

1 exemption. Exhibit B, Senate Committee on Water and Land Use, SB 683, May
2 2, 1995 (accompanying statement of Douglas County Planning Director Keith
3 Cubic). Douglas County asserted that, in enacting HB 3661, the legislature did
4 not intend to eliminate the “mom and pop” partition exemption and SB 683 was
5 needed to clarify that intent. *Id.*

6 All of the testimony both in support of and in opposition to the introduced
7 version of SB 683 presumed that a dwelling existed on the parcel that was to be
8 partitioned and that the goal of the “mom and pop” partition exemption was to
9 allow a homeowner living in an existing dwelling on a forest-zoned property to
10 partition the property to create a small, five-acre parcel for the existing dwelling
11 and a separate parcel that would either meet the 80-acre minimum parcel size or
12 be consolidated with another forest-zoned parcel to meet the 80-acre minimum
13 parcel size. *See, e.g.,* Testimony, House Committee on Legislative Rules, SB 683,
14 May 25, 1995, Ex A (statement of 1000 Friends of Oregon representative
15 Anthony Boutard) (“SB 683 * * * [was] drafted to restore the one-time 5-acre
16 land division for an existing house which was eliminated by the 1993
17 Legislature.”); Tape Recording, House Committee on Legislative Rules, SB 683,
18 May 25, 1995, Tape 88, Side A (statement of Oregon Forest Industries Council
19 (OFIC) representative Lincoln Cannon) (“[T]hat way, people who live in houses
20 and own forest lands can sell their forest lands without having to sell their house
21 also or move out of their house.”)

1 The -A3 amendments introduced by OFIC at the House Legislative Rules
2 Committee’s May 25, 1995 work session proposed, for the first time, language
3 that would allow a parcel created “to facilitate a forest practice” to be below 80
4 acres and provided that “parcels” created pursuant to that language would not be
5 eligible for the siting of a dwelling. SB 683, -A3 amendments (May 23, 1995).
6 The -A3 amendments also introduced language that required a deed restriction to
7 be placed “on the remaining parcel, not containing the dwelling.” *Id.* This
8 language therefore applies to the situation when one of the resulting parcels has
9 a dwelling. The -A3 amendments also introduced the language on which
10 petitioner relies, referencing “the newly created parcel.” *Id.* All of these changes
11 were carried over into the -A4 amendments introduced at the committee’s May
12 26, 1995 work session,⁹ which became the engrossed version of the bill. SB 683,
13 -A4 amendments (May 26, 1995); Or Laws 1995, ch 700, § 1.

14 Testimony from OFIC in favor of the -A3 amendments, which it drafted,
15 explained that

16 “[t]he other provision of this bill allows for the creation of parcels
17 of less than 80 acres such that, for timber transaction purposes, * * *
18 for example, the most common way timberland is transacted among
19 timber firms is through what’s called the 1031 process. * * * And
20 they would like the ability to * * * create parcels less than 80 acres

⁹ The -A4 amendments also introduced language that allowed a less-than-80-acre parcel to “facilitate an exchange of lands involving a governmental agency,” codified at ORS 215.780(2)(d)(D)(i), on which petitioner relied to partition his land in 2017.

1 * * *. * * * *It creates no new opportunities for dwellings or any new*
2 *dwellings in the forest. It does not change the uses.*” Tape
3 Recording, House Committee on Legislative Rules, SB 683, May
4 25, 1995, Tape 88, Side A (statement of OFIC representative
5 Lincoln Cannon) (emphasis added).

6 At the same work session, in response to a question from Representative Roberts
7 regarding whether timber companies could sell or exchange parcels below 80
8 acres “as long as they don’t put a residence up,” Seneca Sawmill representative
9 Mike Evans responded, “That’s correct.” Tape Recording, House Committee on
10 Legislative Rules, SB 683, May 25, 1995, Tape 88, Side B. Department of Land
11 Conservation and Development (DLCD) representative Bob Rindy explained the
12 agency’s understanding that the portion of the -A3 amendments which became
13 ORS 215.780(2)(d) was proposed to allow forest land owners to swap forest
14 parcels and that “no dwellings are involved necessarily.” *Id.* Representative
15 Beyer testified that what became paragraph (2)(d) seems to keep land in forest
16 uses, and Rindy opined that carving up small parcels could create pressure to
17 place a dwelling on the smaller parcels in order to manage the forest resources
18 on small parcels as small woodlots. *Id.* Representative Roberts then asked
19 whether an owner could aggregate multiple parcels which were created pursuant
20 to what became paragraph (2)(d) in order to create an 80-acre parcel and then site
21 a dwelling on it, in response to which Rindy explained that, in DLCD’s opinion,
22 if any of the parcels contained the deed restriction set out in what became ORS
23 215.780(6)(a), then no dwelling would be allowed, even if the parcel met the
24 minimum parcel size. *Id.*

1 The above legislative history provides strong support for interpreting the
2 plain text of ORS 215.780(2)(d) as prohibiting new dwellings on any parcels
3 created pursuant to that paragraph and provides some support for interpreting the
4 deed restriction provision in paragraph (6)(a) as a limiting restriction, in spite of
5 the inartful language referring to “the newly created parcel,” in the singular. The
6 legislative history clearly shows that the legislature was concerned about and
7 intended to limit new dwellings on substandard-sized parcels in forest zones that
8 were created pursuant to ORS 215.780(2)(d). We agree with intervenor that there
9 is no evidence that the legislature intended to avoid placing restrictions on
10 dwellings on substandard-sized parcels.

11 We conclude that the hearings officer correctly interpreted ORS
12 215.780(2)(d)(A) as prohibiting a dwelling on petitioner’s parcel.

13 The county’s decision is affirmed.