

1 REYNOLDS, Chief Referee.

2 NATURE OF THE PROCEEDINGS

3 Petitioners challenge Deschutes County's adoption of Zoning
4 Ordinance No. PL-15 by which the county rezoned petitioners'
5 property EFU-80 (Exclusive Farm Use, 80 acre minimum lot
6 size). Petitioners contend that the previous zoning on their
7 property, EFU-20, was appropriate for their property, that the
8 change in zoning from EFU-20 to EFU-80 was done without any
9 support in the record and that EFU-80 is not appropriate for
10 their property.

11 STATEMENT OF FACTS

12 Deschutes County Zoning Ordinance PL-15 was adopted on
13 November 1, 1979, and zoned petitioners' property EFU-20. This
14 zoning ordinance, together with the Deschutes County Year 2000
15 Comprehensive Plan, were submitted to LCDC for acknowledgment.
16 After review of the comprehensive plan and implementing zoning
17 ordinance, LCDC returned these documents to the county for
18 further work. As part of its order, LCDC adopted the DLCD
19 staff report which stated that there was "inadequate
20 justification" for Deschutes County's 20 acre EFU
21 designations. In particular, the staff report stated the
22 following:

23 "In addition, Deschutes County has not provided
24 adequate justification for the minimum lot sizes used
25 in the EFU-40 and EFU-20 zone as required by Goal 3.
26 Information in the Resource Element Plan and the
August 1979 Draft Plan indicate that lot sizes and
farm units in these zones are larger than the 40 acre
and 20 acre minimums allowed. In particular, the

1 Resource Element (p. 100) specifically notes that
2 farms smaller than 40 acres cannot 'produce crops in
commercial quantities.'"

3 The staff report adopted by LCDC concluded that in order to
4 comply with Goal 3 Deschutes County must:

5 "Review the 40 acre and 20 acre minimum lot
6 sizes and where appropriate establish minimum lot
7 sizes or a method of review which ensures that the lot
8 sizes or farm land use divisions are 'appropriate for
9 the continuation of the existing commercial
agricultural enterprise' in Deschutes County. There
are also several methods that combine the use of a
minimum lot size with review criteria which can also
comply with Goal 3." Record 228 and 229.

10 Upon reconsideration, Deschutes County amended its zoning
11 ordinance so as to zone petitioners' property EFU-80 instead of
12 EFU-20 as originally provided. The evidence before the county
13 concerning the appropriate lot size for petitioners' property
14 consisted essentially of the county's comprehensive plan and
15 the testimony of P.W. Chase on minimum lot sizes. The
16 Agricultural Lands Policy "B" of the Deschutes County
17 Comprehensive Plan, Riparian Meadows, provides:

18 "Riparian Meadows: These meadows (mostly
19 natural) border waterways and are subsurface
20 irrigated. In spite of a rather severe climate they
21 are suited for the grazing of livestock and the
22 harvesting of a limited tonage [sic] of meadow hay.
23 Lot sizes vary, but the most frequently occurring are
24 40 and 80 acres the median and the average of the
parcels equalling 109 acres. Ownerships often combine
lots to create areas several hundred to several
thousand acres in size. Due to the ground water and
frequent flooding, there are few residences. Typical
lands are along the upper Deschutes River, the Little
Deschutes River and in the Sisters area."

25 Mr. Chase testified to the effect that even an 80 acre minimum
26 lot size would not be adequate to protect commercial

1 agriculture in Deschutes County:

2 "In short, under today's conditions, 40 and 80
3 acre commercial farms are hardly viable, and would not
4 preserve and maintain the current farm productivity in
5 the county. The validity of this observation is
6 evidenced by the fact that current commercial and
7 semi-commercial farming in the county is almost
8 entirely confined to farms considerably larger than
9 the 80 and 40 acre minimums proposed, - the average
10 being probably twice these sizes.

11 "Grazing, whether on dry land or riparian meadows
12 also requires acreages far larger than those proposed
13 in the amendments as evidenced by the fact that in the
14 high desert east of Horse Ridge, it takes 25-40 acres
15 to support a cow, while 3-5 acres are required on
16 unimproved meadows; and it takes quite a few cows
17 these days to make grazing profitable. Ask the
18 cattlemen."

19 Petitioner Lelco, Inc. objected to the 80 acre zoning
20 designation for its property. Petitioner Lelco, Inc. stated in
21 a letter to the Board of County Commissioners:

22 "As you can tell by the attached map, the lands
23 on all four sides of this property have been
24 extensively subdivided. The property is a mile and
25 one half from the Sunriver development. The property
26 is bordered on the west by Oregon Water Wonder Land
27 Unit II. To the immediate south of the property is
28 the Thousand Trails Campground and further south is
29 the Lazy River West development. To the east of the
30 property is some forest service property and then the
31 south Vandervert subdivisions. [owned by petitioner
32 Lelco, Inc.].

33 "In spite of this intense subdivision on four
34 sides of the property, this property is being zones
35 [sic] EFU-80. We cannot accept the rationale used by
36 the Planning Department that they must zone this
37 property consistently with the lot sizes in the area.
38 The lot sizes in the area are essentially one acre or
39 less. Furthermore, this is not farm land. The
40 growing season is less than sixty (60) days and there
41 is no month during the year when it is frost free.
42 Furthermore, the land is not now being used as a farm
43 and has not been actually used for a farm for over two
44 years. In fact its only use has been for pasture.

1 The property is not an economically feasible unit. It
2 would not qualify for any additional forest service
3 grazing rights because the property has to support by
itself a herd of cattle before they are allowed any
additional forest service grazing rights."

4 Petitioner Lelco Inc. concluded its letter by urging that
5 the county zone the property for 10 acre minimum lot sizes
6 "with provisions that the meadow be reserved." Clustering
7 houses on the upland while maintaining the meadow open would,
8 according to petitioner Lelco, Inc., make a reasonable use of
9 its property possible, whereas the present zoning, in its view,
10 rendered the property virtually useless.

11 OPINION

12 As we understand petitioners' assignment of error, it is
13 that there is no substantial evidence in the record to support
14 the county's decision to designate petitioners' property EFU-80
15 and that the evidence which is in the record indicates that
16 EFU-80 is an inappropriate minimum lot size for petitioners'
17 property. Because we conclude that there was substantial
18 evidence in the record to support the county's designation of
19 petitioners' property EFU-80, petitioners have not shown that
20 the 80 acre minimum lot size designation was inappropriate.

21 Our scope of review in this case is very narrow. We do not
22 review the county's decision to determine whether it is
23 consistent with Goal 3,¹ whether it is consistent with the
24 county's comprehensive plan, or whether it is consistent with
25 ORS 215.243 or ORS 215.203. While any or all of the above
26 standards may have to be considered by a county proposing to

1 adopt a minimum lot size for an EFU zone, petitioners have not
2 alleged any of these standards has been violated. Petitioners
3 simply have alleged that there is no substantial evidence
4 supporting the county's decision. Because all parties appear
5 to concede that the adoption by the county of Ordinance PL-15
6 rezoning petitioners' lands as well as many other areas in the
7 county is a legislative decision, our function is to review the
8 record to see if there is some basis for the county's decision
9 to rezone petitioners' property EFU-80.² Oregon Laws 1979,
10 chapter 772, section 5(4)(a)(C); Realty Investment v
11 Gresham, ___ Or LUBA ___ (LUBA No. 80-085, 1981).

12 The evidence in the record shows that the median lot sizes
13 for riparian lands such as petitioners' is 40 to 80 acres and
14 that the average lot size is 109 acres. It appears to us in
15 view of these facts, that Deschutes County determined that an
16 80 acre minimum lot size would be appropriate on the basis of
17 what it perceived to be the current size of lots in riparian
18 areas. As there is some basis in the record for the county's
19 decision, we conclude there is substantial evidence to support
20 the county's decision and that the county's decision is not
21 arbitrary. See: Realty Investment v. Gresham, supra.

22 Because we were uncertain as to the nature of petitioner's
23 challenge in this case, we requested a supplemental memorandum
24 on what, if any, standard petitioners were alleging had been
25 violated by the county's decision. Petitioners responded by
26 saying, in part, that the county had not complied with the DLCD

1 staff report as embodied in LCDC's Continuance Order. That
2 staff report, according to petitioners, required the county
3 during its reconsideration, to include specific information or
4 an explanation as to the minimum lots sizes chosen by the
5 county. Petitioners argued in their supplemental memorandum
6 that the county produced no such information explaining why the
7 80 acre minimum lots size was "appropriate to continue the
8 existing commercial agricultural enterprise within the area,"
9 and, thus, the county failed to comply with the DLCD staff
10 report.

11 To the extent petitioners may be arguing that this Board
12 may reverse the county's decision because the county failed to
13 comply with the DLCD staff report as embodied in the LCDC
14 Continuance Order, we disagree. A directive by LCDC to a city
15 or county as part of an acknowledgment proceeding before LCDC
16 is not, even if violated, a basis upon which this Board may
17 reverse the city or county's decision. Oregon Laws 1979, ch
18 77, sec 5(4) provides as follows:

19 "(4) The Board shall reverse or remand the land
20 use decision under review only if:

21 (a) The Board finds that the city, county
or special district governing body:

22 (A) Exceeded its jurisdiction;

23 (B) Failed to follow the procedure
24 applicable to the matter before it in a
25 manner that prejudiced the substantial
rights of the petitioner;

26 (C) Made a decision that was not
supported by substantial evidence in the

1 whole record;

2 (D) Improperly construed the
3 applicable law; or

4 (E) Made a decision that was
5 unconstitutional; or

6 (b) After review in the manner provided in
7 section 6 of this 1979 act, the commission has
8 determined that the city, county or special
9 district governing body or state agency violated
10 the statewide planning goals."

11 The only one of the above provisions which, considering
12 petitioners' allegations, might be construed as providing some
13 basis for this Board to reverse the county's decision, is
14 section 5(4)(a)(D). We do not, however, view LCDC's directive
15 to Deschutes County as constituting "the applicable law" with
16 which the county was required to comply. We view the term
17 "applicable law" as used in the above referenced section of
18 Oregon Laws 1979, ch 772 to mean statutory (i.e., legal
19 requirements appearing in statutes, statewide goals,
20 ordinances, and other rules and regulations) and case law
21 (i.e., judicial and quasi-judicial interpretations of the
22 requirements of legislative enactments). The DLCD staff
23 report, as embodied in LCDC's order, does not constitute
24 "applicable law" as used in chapter 772.³

25 In summary, we conclude that there was a basis in the
26 record for the county's choice of an 80 acre minimum lot size.
The county's decision is, accordingly, affirmed.

FOOTNOTES

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Petitioner's conceded during oral argument they were not asserting that the county's decision violated Goal 3.

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Our conclusion that petitioner has not alleged in this proceeding a Goal 3 violation does not mean the zoning on petitioners' property will never be reviewed for compliance with Goal 3. The county's decision will have to be again reviewed by LCDC in order for the county's plan and zoning ordinance to be acknowledged. Presumably, the EFU-80 designation will be scrutinized under Goal 3 as were the earlier EFU-20 and EFU-40 designations.

3

We view LDCD's order on a continuance involving an acknowledgment proceeding to be an order which may be enforced, if at all, in a judicial proceeding in Circuit Court. See, e.g., ORS 34.110, et seq.