

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 FRIENDS OF UMATILLA COUNTY,
5 ROBERT KLEIN and NORM KRALMAN,
6 *Petitioners,*

7
8 vs.

9
10 UMATILLA COUNTY,
11 *Respondent,*

12
13 and

14
15 POWERLINE RANCH, LLC, VINEYARD
16 GROUP, LLC, HIGH RIDGE PROPERTIES, LLC
17 and NORTH SLOPE MANAGEMENT, LLC,
18 *Intervenors-Respondents.*

19
20 LUBA No. 2008-096

21
22 FINAL OPINION
23 AND ORDER

24
25 Appeal from Umatilla County.

26
27 Daniel Kearns, Portland, filed the petition for review and argued on behalf of
28 petitioners. With him on the brief was Reeve Kearns, PC.

29
30 Douglas R. Olsen, County Counsel, Pendleton, filed the response brief and argued on
31 behalf of respondent.

32
33 John M. Junkin, Portland and Patricia Sullivan, Pendleton represented intervenors-
34 respondents.

35
36 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

37
38 RYAN, Board Member, did not participate in the decision.

39
40 AFFIRMED

12/09/2008

41
42 You are entitled to judicial review of this Order. Judicial review is governed by the
43 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a post acknowledgment plan amendment (PAPA) that amends the county’s exclusive farm use zone.

MOTION TO INTERVENE

Powerline Ranch, LLC, Vineyard Group, LLC, High Ridge Properties, LLC and North Slope Management, LLC (intervenors), move to intervene on the side of the respondent in this appeal. There is no opposition to the motion, and it is granted.

INTRODUCTION

Under Goal 3 (Agricultural Lands), counties are required to identify and protect agricultural lands for agricultural use. The primary regulatory mechanism for protecting agricultural land is the statutory exclusive farm use (EFU) zone. As adopted and subsequently amended by the Oregon Legislature, the statutory EFU-zone occupies 24 pages of the Oregon Revised Statutes. ORS 215.203 through 215.327. An additional eight pages of statutes regulate dwellings and land divisions on farm and forest lands. ORS 215.700 through 215.799. The Land Conservation and Development Commission (LCDC) has elaborated considerably on both Goal 3 and these statutes. OAR chapter 660, division 33.

The aforementioned statutes and rules impose a detailed planning and regulatory scheme for protecting agricultural lands for agricultural uses and allowing certain specified non-farm uses. Counties are required to adopt EFU zones that are consistent with these statutes and rules. OAR 660-033-0090(1). The level of detail in these statutes and rules frequently dictates that counties essentially replicate the statutory and rule language in their EFU zones. These statutes and rules are amended with some frequency. Under ORS 197.646, when counties do not amend their comprehensive plans and zoning ordinances to comply with changes in statutes and LCDC rules within the time period dictated by ORS 197.646(3)(b), the new rules and statutes apply directly to individual land use decisions. In

1 that circumstance, any comprehensive plan or land use regulation provisions that are more
2 permissive than the new statutes or rules must give way to more restrictive new statutes or
3 rules. The potential for regulatory confusion in that circumstance is obvious.

4 A number of statutory and LCDC rule amendments have been adopted since the
5 Umatilla County Comprehensive Plan (UCCP) and Umatilla County Development Code
6 (UCDC) were adopted by the county and acknowledged by LCDC. The challenged PAPA
7 was adopted to eliminate inconsistencies between the UCCP and UCDC and the statutory
8 EFU zone, Goal 3, and LCDC administrative rules that elaborate on Goal 3 and the statutory
9 EFU zone.

10 **ASSIGNMENT OF ERROR**

11 **A. Third Subassignment of Error**

12 In their third subassignment of error, petitioners allege the county's decision should
13 be remanded because the county failed to adopt findings that explain how the adopted
14 amendments are consistent with Goal 3 and relevant statutes and LCDC rules. We
15 understand petitioners to contend that the county's failure to adopt findings to explain each
16 of the adopted amendments, in and of itself, requires remand.

17 The challenged decision is a legislative decision. A local government may be
18 required by local law to adopt findings in support of its legislative land use decisions. In that
19 circumstance a lack of findings to support the legislative land use decision, without more,
20 could provide a basis for remand so that the legally required findings can be adopted. *City of*
21 *Woodburn v. Marion County*, 45 Or LUBA 423, 443 (2003); *Foster v. Coos County*, 28 Or
22 LUBA 609, 612 (1995); *Andrews v. City of Brookings*, 27 Or LUBA 39, 43 (1994). In
23 addition, there are some kinds of land use decisions, whether they be legislative or quasi-
24 judicial, that must be supported by adequate findings. *See* ORS 197.732(4) (in approving a
25 statewide planning goal exception a local government "shall set forth findings of fact and a
26 statement of reasons that demonstrate that the [relevant] standards * * * have or have not

1 been met”). With those exceptions noted, LUBA has observed many times, there is no
2 statute, goal or rule that generally requires that legislative decisions must in all cases be
3 supported by findings that demonstrate compliance with applicable criteria. *Citizens Against*
4 *Irresponsible Growth v. Metro*, 39 Or LUBA at 546 n 7 (2001), *aff’d* 179 Or App 12, 38 P3d
5 956 (2002); *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 870, 875 (2000); *Churchill*
6 *v. Tillamook County*, 29 Or LUBA 68, 77 (1995); *Redland/Viola/Fischer’s Mill CPO v.*
7 *Clackamas County*, 27 Or LUBA 560, 563 (1994). However, as the Court of Appeals
8 observed in affirming LUBA’s decision in *Citizens Against Irresponsible Growth*, even
9 without a generally applicable legal requirement that legislative land use decisions must be
10 supported by findings, “there must be enough in the way of findings or accessible material in
11 the record of the legislative act to show that applicable criteria were applied and that required
12 considerations were indeed considered.” *Citizens Against Irresponsible Growth v. Metro*,
13 179 Or App 12, 16 n 6, 38 P3d 956 (2002). In summary, absent a local or specific statutory
14 requirement to the contrary, legislative land use decisions need not be supported by findings
15 so long as LUBA and the appellate courts with the aid of the parties and the record can
16 perform their review function.

17 Petitioners cite no local law, goal or statutory requirement that a county legislative
18 PAPA that amends comprehensive plan and land use regulation text to make it consistent
19 with parallel statutory, goal or administrative rule text must be supported by findings. It is
20 true that it would have been helpful if the county had identified the individual statutory and
21 administrative rule language that formed the basis for the amended UCCP and UCDC text.
22 However, where, as appears to be the case here, the amended comprehensive plan and land
23 use regulation text was adopted to make the comprehensive plan and land use regulations
24 consistent with current statutory, goal and administrative rule text, the question simply
25 becomes whether the adopted text is consistent with the statutory, goal and administrative
26 rule text. If petitioners are able to establish that the disputed UCCP and UCDC text is

1 inconsistent with the parallel statutory goal or administrative rule text, or LUBA is unable to
2 determine from the record whether the amendments are consistent with applicable statutes,
3 goals or administrative rules, then remand would be appropriate. Stated differently, the
4 county’s failure to adopt findings may make our review more difficult and may require
5 remand if we are unable to determine from the record whether the amendments are consistent
6 with identified statutes, goals and rules, but the county’s failure to adopt findings in support
7 of the challenged legislative PAPA is not by itself a basis for remand.

8 We turn to the UCDC text that petitioners contend is inconsistent with the goals,
9 statutes or administrative rules that UCDC text was adopted to be consistent with.

10 **B. First and Second Subassignments of Error**

11 Goal 3 provides in part:

12 “Agricultural lands shall be preserved and maintained for farm use, consistent
13 with existing and future needs for agricultural products, forest and open space
14 and with the state’s agricultural land use policy expressed in ORS 215.243
15 and 215.700.”¹

16 Petitioners contend that the disputed amendments allow division of certain EFU-
17 zoned lands into parcels of less than 160 acres, and that under the text of Goal 3 quoted
18 above and ORS 215.243 and 215.700, the county should have adopted findings that justify
19 doing so. Petitioners point out that there was testimony below that the average farm parcel
20 size in Umatilla County is much larger than 160 acres. Petitioners also argue that the
21 amendments to the UCDC that authorize creation of parcels that are smaller than 80 acres for
22 farm use are inconsistent with OAR 660-033-0100(2) through (9) which authorize such

¹ ORS 215.243 (1) identifies some of the benefits of open land in agricultural use, (2) states the importance of preserving the maximum amount of agricultural land in large blocks, (3) states that expansion of urban development into rural areas is a matter of public concern, and (4) states that the importance of limiting uses of agricultural lands justifies providing its owners incentives to do so. ORS 215.700 expresses a legislative intent to allow some residential development on less productive agricultural land while protecting more productive resource land from partitions and residential development.

1 parcels only if the demonstrations that are required by those sub-sections of OAR 660-033-
2 0100 are made.

3 Before turning to the amendments that petitioners specifically challenge, we note that
4 there is other language in Goal 3, which makes it clear that the goals of maintaining
5 agricultural land for agricultural uses and maintaining large agricultural parcels as large
6 parcels is not absolute.

7 **“USES**

8 “Counties may authorize farm uses and those nonfarm uses defined by
9 commission rule that will not have significant adverse effects on accepted
10 farm or forest practices.

11 **“IMPLEMENTATION**

12 “Zoning applied to agricultural land shall limit uses which can have
13 significant adverse effects on agricultural and forest land, farm and forest uses
14 or accepted farming or forest practices.

15 “Counties shall establish minimum sizes for new lots or parcels in each
16 agricultural land designation. The minimum parcel size established for farm
17 uses in farmland zones shall be consistent with applicable statutes. If a county
18 proposes a minimum lot or parcel size less than 80 acres, or 160 acres for
19 rangeland, the minimum shall be appropriate to maintain the existing
20 commercial agricultural enterprise within the area and meet the requirements
21 of ORS 215.243.”

22 As the above Goal 3 language makes clear, the goal of protecting agricultural for
23 agricultural uses is not absolute and with limitations nonfarm uses are expressly authorized.
24 Until 1993, the statutory EFU-zone did not set out a numerical minimum parcel size in EFU-
25 zones. Oregon Laws 1993, chapter 792, section 7 authorized counties to adopt a minimum
26 parcel size of 160 acres for designated range land and minimum parcel size of 80 acres for
27 other EFU zoned lands. Goal 3 was amended to include the language quoted above, to
28 reflect that 1993 statutory change. Oregon Laws 1993, chapter 792, section 7 also held out
29 the possibility that a county could authorize a minimum parcel size of less than 80 acres if

1 the county could demonstrate that such smaller parcel sizes would be sufficient to continue
2 commercial agriculture.

3 We turn to the UCDC amendments that petitioners contend are inconsistent with Goal
4 3, ORS 215.243, 215.700 and OAR 660-033-0100.

5 **1. UCDC 152.710(C)(3) (80-Acre to 160-Acre Farm Parcels)**

6 The challenged PAPA amends UCDC 152.710(C)(3) to allow creation of 80-acre to
7 160-acre parcels for farm use. The amended text is set out below:

8 “(3) Criteria for approval of a Type IV, Review II Land Division
9 application * * *:

10 “(a) The partition will preserve and maintain farm use consistent
11 with Oregon Agricultural Land Use Policy found in ORS
12 215.243.

13 “(b) [The partition i]s for the purpose of farm use as defined in
14 §152.003.

15 “(c) [The partition m]eets the minimum frontage and access
16 requirements.

17 “(d) All parcels created will be 80 to 160 acres, in accordance with
18 ORS 215.780; or, parcels less than 80 acres may be established
19 if located within an approved ‘go below’ area pursuant to OAR
20 660-033-0100(1)-(9).”

21 We understand petitioners to argue that it was error for the county to amend the UCDC to
22 authorize new farm parcels that are as small as 80 acres or, in some areas, even smaller.

23 Under the statutory EFU zone, divisions of land within EFU zones require prior
24 county approval. ORS 215.263(1). Under ORS 215.263(2), counties may decide on a case-
25 by-case basis whether proposed new parcels are appropriate to continue commercial
26 agriculture or they may adopt the minimum parcel sizes authorized by ORS 215.780.² ORS
27 215.780 sets out the following minimum parcel sizes in EFU zones:

² ORS 215.263(2) provides:

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

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

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

7 “(c) For land designated forestland, at least 80 acres.

8 “(2) A county may adopt a lower minimum lot or parcel size than that
9 described in subsection (1) of this section in any of the following
10 circumstances:

11 “(a) By demonstrating to the Land Conservation and Development
12 Commission that it can do so while continuing to meet the
13 requirements of ORS 215.243 and 527.630 and the land use
14 planning goals adopted under ORS 197.230.

15 “* * * * *

16 “* * * * *.”

17 OAR 660-033-0100(1) authorizes 160-acre and 80-acre minimum parcel sizes in the
18 EFU zone, in language that is materially the same as the language in ORS 215.780(1). OAR
19 660-033-0100(2) provides the following description of ORS 215.780(2)(a), which is
20 commonly referred to as the “go below” authority:

21 “A county may adopt a minimum parcel size lower than that described in
22 section (1) of this rule by demonstrating to the Commission that it can do so
23 while continuing to meet the requirements of ORS 215.243 and that parcel
24 sizes below the 80 or 160 acre minimum sizes are appropriate to maintain the
25 existing commercial agricultural enterprise within an area. This standard is
26 intended to prevent division of farmland into parcels that are too small to

The governing body of a county or its designee may approve a proposed division of land to create parcels for farm use as defined in ORS 215.203 if it finds:

“(a) That the proposed division of land is appropriate for the continuation of the existing commercial agricultural enterprise within the area; or

“(b) The parcels created by the proposed division are not smaller than the minimum size established under ORS 215.780.”

1 contribute to commercial agriculture in an area. This standard does not
2 require that every new parcel created be as large as existing farms or ranches
3 in an area. The minimum parcel size may allow creation of parcels smaller
4 than the size of existing farms or ranches. However, the minimum parcel size
5 shall be large enough to keep commercial farms and ranches in the area
6 successful and not contribute to their decline. Lots or parcels used, or to be
7 used, for training or stabling facilities shall not be considered appropriate to
8 maintain the existing commercial agricultural enterprise in any area where
9 other types of agriculture occur.”

10 OAR 660-033-0100(3) through (8) elaborate considerably on what is required in a “go
11 below” demonstration. OAR 660-033-0100(9) expressly authorizes counties to “establish a
12 different minimum parcel size for distinct commercial agricultural areas of the county,”
13 under the “go below” authority.

14 As far as we can tell, the UCDC 152.710(C)(3) authority for dividing EFU-zoned
15 land into new parcels for farm use is exactly what ORS 215.780 authorizes. UCDC
16 152.710(C)(3)(d) authorizes parcels that are as small as 80 acres. ORS 215.780(1)(a)
17 expressly authorizes the county to adopt an 80-acre minimum parcel size.³ Although the
18 challenged PAPA does not establish any “go below” areas in Umatilla County, UCDC
19 152.710(C)(3)(d) recognizes that such areas may be established in the future and provides
20 that the smaller minimum parcel sizes that may be authorized in any such future “go below”
21 areas would apply. The authority for seeking such smaller minimum parcel sizes is expressly
22 provided by ORS 215.780(2)(a) and OAR 660-033-0100(2) through (9).

23 Petitioners appear to be arguing that even though ORS 215.780(1)(a) expressly
24 authorizes the county to adopt an 80-acre minimum parcel size in the EFU zone, and ORS
25 215.263(2)(b) expressly authorizes the county to approve partitions of EFU-zoned land if the
26 resulting parcels “are not smaller than the minimum size established under ORS 215.780,”
27 additional justification for adopting the statutorily authorized 80 acre minimum parcel size is

³ Under ORS 215.780(1)(b), designated rangeland is subject to a 160-acre minimum parcel size. We do not understand petitioners to argue that UCDC 152.710(C)(3) allows division of designated rangeland into 80-acre parcels. It does not appear that Umatilla County has designated any of its EFU-zoned land as rangeland.

1 required by Goal 3, ORS 215.243 and 215.700. We reject the argument. As noted earlier,
2 Goal 3 expressly recognizes that an 80 acre minimum parcel size is authorized in the EFU
3 zone. Similarly it is not error for UCDC 152.710(C)(3)(d) to recognize that under ORS
4 215.780(2)(a), a minimum parcel size of less than 80 acres may be authorized by LCDC in
5 the future pursuant to OAR 660-033-0100(2) through (9), if the county is able to justify such
6 smaller minimum parcel sizes.

7 **2. Petitioners' Remaining Challenges**

8 Petitioners' remaining challenges all concern UCDC amendments that authorize
9 division of EFU-zoned parcels for certain non-farm uses. UCDC 152.710(D)(4) authorizes
10 division of EFU-zoned parcels that are larger than 160 acres to create up to two new parcels
11 for approved non-farm dwellings where the parent parcel is larger than 160 acres and will be
12 larger than 160 acres after the partition. UCDC 152.710(D)(5) allows certain existing 40-
13 acre to 160-acre parcels to be divided to create new parcels for non-farm dwellings. UCDC
14 152.710(E)(3) authorizes division of EFU-zoned land for authorized non-farm uses, other
15 than non-farm dwellings.

16 ORS 215.263 expressly authorizes a number of different kinds of land divisions of
17 EFU zoned land for development of certain non-farm uses. In all material respects, UCDC
18 152.710(D)(4) is identical to ORS 215.263(5)(a), and UCDC 152.710(D)(5) is in all material
19 respects identical to ORS 215.263(5)(b). UCDC 152.710(E)(3)(a) is identical to ORS
20 215.263(3), without the last sentence of the statute. The last sentence of ORS 215.263(3)
21 authorizes counties to establish additional criteria for creation of non-farm parcels for non-
22 farm uses other than dwellings. The remaining parts of UCDC 152.710(E)(3) impose
23 additional criteria for partitions. Petitioners appear to be arguing that even though the
24 partitions that are authorized by these UCDC amendments are expressly authorized by
25 almost identically worded statutes, Goal 3, ORS 215.243 or 215.700 nevertheless require that

1 the county further justify its decision to adopt those UCDC amendments. We reject the
2 argument.

3 Finally petitioners argue it was error for the county to eliminate its acknowledged
4 EFU-10, EFU-20 and EFU-40 zones that apply in particular areas of the county and allow
5 creation of smaller parcels for farm use, based on the specialized types of agriculture that
6 exist in those areas. Petitioners also argue that it was error for the county to repeal “circular
7 area review,” a county review standard under which partitions that produce parcels of less
8 than 160 acres could be approved in the EFU zone where smaller parcels already exist in the
9 area. *See Friends of Umatilla County v. Umatilla County*, ___ Or LUBA ___ (LUBA No.
10 2008-102, November 25, 2008) (reviewing a county decision that applied circular area
11 review).

12 The county responds that the challenged PAPA does not eliminate the EFU-10, EFU-
13 20 and EFU-40 zones. The county appears to be correct, and petitioners do not identify what
14 part of the challenged PAPA they believe repealed the EFU-10, EFU-20 and EFU-40 zones.
15 Even if those zones had been repealed, petitioners offer no explanation for why they believe
16 such repeals would violate Goal 3 or any other applicable standard. With regard to the
17 elimination of the circular area review, the county has simply replaced its prior standards for
18 reviewing partitions of EFU-zoned land with a new set of standards. So long as the newly
19 adopted standards for reviewing partitions of EFU-zoned lands comply with applicable state
20 standards, we do not see that the county is obligated to explain or justify its decision to
21 repeal prior standards that were adopted to review such partitions. The new standards that
22 petitioners challenge in this appeal are all expressly authorized by ORS 215.263 and 215.780
23 and we reject petitioners’ challenge to those standards under Goal 3, ORS 215.243 and
24 215.700. The county is not obligated to explain its choice to adopt current statutory
25 standards for land divisions in its EFU zone in place of the previously adopted county
26 standards for such land divisions.

- 1 The first and second subassignments of error are denied.
- 2 Petitioners' assignment of error is denied.
- 3 The county's decision is affirmed.