

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION)

5 AND DEVELOPMENT,)

6)

7 Petitioner,)

LUBA No. 91-044

8)

9 vs.)

FINAL OPINION

10)

AND ORDER

11 POLK COUNTY,)

12)

13 Respondent.)

14

15

16 Appeal from Polk County.

17

18 Jane Ard, Salem, filed the petition for review and
19 argued on behalf of petitioner. With her on the brief were
20 Dave Frohnmayer and Virginia L. Linder.

21

22 Robert W. Oliver, Dallas, filed the response brief and
23 argued on behalf of respondent.

24

25 HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON,
26 Referee, participated in the decision.

27

28 REMANDED 08/14/91

29

30 You are entitled to judicial review of this Order.
31 Judicial review is governed by the provisions of ORS
32 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county ordinance which approves
4 comprehensive plan and zoning map amendments for an
5 approximately 39 acre parcel.

6 **FACTS**

7 The subject property is presently designated
8 Agriculture by the Polk County Comprehensive Plan (PCCP or
9 plan) and is zoned Exclusive Farm Use (EFU) by the Polk
10 County Zoning Ordinance (PCZO). The challenged ordinance
11 changes the plan map and zoning designations to Farm/Forest
12 (F/F).

13 The subject property is bordered by Rickreall Road on
14 the south and Highway 22 to the north and is located a short
15 distance west of the intersection of those two roadways near
16 the City of Independence. The properties adjoining the
17 subject property to the north are in large ownerships and
18 are designated Agriculture by the PCCP and zoned EFU. The
19 properties south of the subject property, between Rickreall
20 Road and Rickreall Creek are smaller, averaging
21 approximately 16.5 acres. These properties are planned and
22 zoned F/F.

23 Although an intermittent stream crosses the east side
24 of the property and contributes to a seasonal soil wetness
25 problem, the record indicates the soils on the property are
26 "high in overall quality [and] well-suited for small grains,

1 hay, pasture and grass seed." Record 47. The large
2 ownerships which adjoin the subject property to the north
3 and west are "devoted to grains, grass seed and pasturage."
4 Id.

5 The county hearings officer approved the requested plan
6 and zone changes, concluding "the purpose of the
7 Comprehensive Plan can be carried out equally well under
8 either the Agricultural or Farm/Forest designations."
9 Record 39. The board of commissioners affirmed the hearings
10 officer's decision, and this appeal followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 "In adopting Ordinance No. 91-7, the County failed
13 to make adequate findings supported by substantial
14 evidence that the proposed plan amendment and zone
15 change meet the criteria for a plan amendment or
16 zone change."

17 A threshold problem in considering the first assignment
18 of error is that the criteria applied by the county in
19 approving the requested plan map amendment have never been
20 formally adopted by the county.¹ Similarly, we are unable
21 to locate in the PCZO, the criteria applied by the county in
22 approving the zoning map amendment. However, the unofficial
23 plan map amendment criteria impose a requirement that a
24 requested map change carry out the purpose of the
25 comprehensive plan. Similarly, the unofficial zoning map

¹The attorney for respondent advised the Board following oral argument in this matter, that while the county has applied these criteria for many years their source cannot be determined.

1 amendment criteria require "[t]hat the purpose of the
2 Comprehensive Plan and Zoning Ordinance will be carried out
3 by approving the proposal at this time." Petition for
4 Review 7. The zoning map amendment criteria essentially
5 restate the statutory requirement that amendments of
6 acknowledged land use regulations must be consistent with
7 the acknowledged comprehensive plan. ORS 197.835(5).
8 Similarly, plan map amendments must comply with controlling
9 provisions of the acknowledged comprehensive plan.²

10 **A. Plan Map Amendment**

11 The PCCP describes the Agriculture plan designation as
12 follows:

13 "The areas designated Agriculture occurs [sic]
14 mainly in the eastern and central sections of the
15 County. These areas are characterized by large
16 ownerships and few non-farm uses. Topography in
17 these areas is usually gentle, including bottom
18 lands, central valley plains and the low foothills
19 of the Coastal Range. This diversity of terrain
20 allows County farmers the option of producing a
21 variety of commodities. Farmers can produce grain
22 or livestock in level areas; set up orchards,
23 vineyards and pastures on the hills; or develop
24 woodlots (or farm forestry) on the foothills. The
25 areas designated for agriculture have a
26 predominance of agricultural soils (SCS capability
27 class I-IV).

28 "It is the intent of the Agriculture Plan

²As defined by ORS 197.015(5) a comprehensive plan is a "coordinated land use map and policy statement that interrelates all functional and natural systems and activities relating to the use of lands * * *." Therefore amendments to the plan map must be consistent with relevant plan policy statements in order to be "coordinated."

1 designation to preserve agricultural areas and
2 separate them from conflicting non-farm uses.
3 Toward that end, the County will discourage the
4 division of parcels and the development of non-
5 farm uses in a farm area (Only those non-farm uses
6 considered essential for agriculture will be
7 permitted).

8 "The Agriculture Plan designation will be
9 implemented throughout [sic] the Exclusive Farm
10 Use Zones." (Emphasis in original.) PCCP 72-73.

11 The PCCP describes the F/F plan designation as follows:

12 "The Farm/Forest designation applies to lands
13 which, for the most part, lay between the
14 relatively flat agricultural areas and the
15 foothills of the Coast Range.

16 "These lands are generally hilly, heavily
17 vegetative, and have scattered areas of
18 residential development. There are many full time
19 farms located within this area; however, smaller
20 part-time farms exist in the area. This area
21 exhibits a predominance of agricultural soils and
22 timber lands as defined by State statutes.

23 "It is the intent of the Farm/Forest designation
24 to provide an opportunity for the continuance and
25 the creation of large and small scale commercial
26 farm and forestry operations. * * *

27 "It is the specific intent of the Farm/Forest Plan
28 designations to ensure that land use actions are
29 consistent with definitions of agricultural and
30 forest land contained within the Polk County
31 Comprehensive Plan. * * *

32 "* * * The Farm/Forest zone shall be applied to
33 land where the parcelization pattern was
34 predominantly less than 80 acres as of October 12,
35 1988. * * *" PCCP 79.

36 The subject 39 acre parcel is flat and well suited to
37 agriculture, but is somewhat smaller than the larger
38 Agriculture designated ownerships to the north. While the

1 subject property is neither hilly nor heavily vegetated, it
2 is closer in size to the smaller F/F planned parcels to the
3 south. In short, the subject property does not fit
4 perfectly in either the Agriculture or the F/F plan
5 designation. Moreover, neither the descriptions of those
6 plan designations quoted above nor the other plan provisions
7 cited by petitioner provide guidance in determining whether
8 to place parcels at the edge of F/F and Agriculture
9 designated areas within one designation or the other.

10 As the respondent correctly notes, preservation of
11 agricultural uses is a policy to be furthered under both
12 plan designations. While petitioner is also correct that
13 the protection afforded agricultural uses under the
14 Agriculture plan designation are more stringent, that fact
15 provides no real assistance in determining which of the two
16 potentially applicable plan map designations to apply to a
17 parcel that does not fit clearly into either. As we explain
18 later in this opinion, Goal 3 (Agricultural Lands) applies
19 to the challenged decision and does impose a standard that
20 must be applied in determining which of the two plan
21 designations to apply. However, we do not believe any of
22 the plan provisions cited by petitioner are violated by the
23 county's decision to change the plan designation for the
24 subject property to F/F.

25 This subassignment of error is denied.

1 **B. Zoning Map Amendment**

2 With one exception, we reach the same conclusion
3 concerning the county's decision to amend the zoning from
4 EFU to F/F. The county's EFU zone purpose statement
5 provides, in part, as follows:

6 "* * * [T]he Exclusive Farm Use Zone is intended to
7 guarantee the preservation and maintenance of
8 those areas so classified for farm use, free from
9 conflicting non-farm uses and influences. The
10 zone is subject to change only in those instances
11 where there is substantial evidence that such land
12 is no longer suitable for agriculture or that
13 there has been a significant and substantial
14 change in the land needs in the county which
15 clearly demonstrates that such land is needed for
16 uses other than agriculture. * * *" (Emphasis
17 added.) PCZO § 136.010.

18 In changing the zoning of the subject property from EFU to
19 F/F, the county does not find that the property is "no
20 longer suitable for agriculture" or that it "is needed for
21 uses other than agriculture." Respondent offers no
22 explanation for why the above quoted provision does not
23 apply, other than to argue that there is no suggestion in
24 the PCCP or the PCZO that the EFU and F/F plan and zoning
25 designations were intended to be maintained as originally
26 applied. However, the above quoted provision does not bar
27 rezoning EFU zoned land, it merely imposes standards that
28 must be satisfied to adopt such a change.

29 We conclude that the county's rezoning of the subject
30 property from EFU to F/F without making the findings
31 required by the above quoted portion of PCZO § 136.010 or

1 offering any explanation why that provision should not apply
2 requires that we remand the county's decision.

3 This subassignment of error is sustained.

4 The first assignment of error is sustained in part.

5 **SECOND ASSIGNMENT OF ERROR**

6 "The plan amendment adopted by the County * * * is
7 not in compliance with Goal 3 or the Polk County
8 Comprehensive Plan."

9 Respondent takes the position, and petitioner does not
10 dispute, that both the EFU and the F/F zone may, consistent
11 with Goal 3,³ be applied to agricultural lands.⁴ Although
12 both zones have been acknowledged as consistent with Goal 3,
13 petitioner is correct that the two zones impose different
14 standards. Under Goal 3 one of the most important
15 considerations is the minimum lot size standard. See n 3,
16 supra. Under the county's EFU zone, the minimum lot size is
17 80 acres and the subject property therefore could not be
18 divided. The F/F zone would allow the subject property to

³Goal 3 requires, in part:

"Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space. These lands shall be inventoried and preserved by adopting exclusive farm use zones pursuant to ORS Chapter 215. Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area." (Emphasis added.)

⁴But see OAR 660-06-055 and 660-06-057, which govern agriculture/forest zones. Petitioner does not contend these rules apply to the county's decision.

1 be divided, provided certain standards are met.
2 Petitioner's primary concern is that under the F/F zoning
3 designation, the subject property may be further divided and
4 dwellings may be approved for the new parcels.

5 The county's decision to change the existing plan and
6 zoning map designations amends its acknowledged
7 comprehensive plan and land use regulations and, therefore,
8 must comply with the statewide planning goals. ORS
9 197.835(4) and (5)(b); 1000 Friends of Oregon v. Jackson
10 County, 79 Or App 93, 97, 718 P2d 753, rev den 301 Or 445
11 (1986). The county adopted no findings addressing Goal 3.
12 Without such findings we cannot determine whether the
13 minimum lot size standard that will be imposed under the F/F
14 zone is sufficient to comply with the requirement of Goal 3
15 that the minimum lots size "be appropriate for the
16 continuation of the existing commercial agricultural
17 enterprise in the area." Specifically, the county must
18 explain what the "existing agricultural enterprise in the
19 area" is. Once the county has described the existing
20 agricultural enterprise in the area, it may be in a position
21 to adopt findings explaining why applying a zone which may
22 allow the subject parcel to be further divided is consistent
23 with the Goal 3 requirement that the minimum lots sizes used
24 by the county in its exclusive farm use zones be appropriate
25 for the continuation of the existing agricultural
26 enterprises in the area.

- 1 The second assignment of error is sustained.
- 2 The county's decision is remanded.