

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CHRISTOPHER DOBSON, and)
5 DEPARTMENT OF LAND CONSERVATION)
6 AND DEVELOPMENT,)

7)
8) LUBA Nos. 91-148 and 91-149
9)

10) FINAL OPINION
11) AND ORDER

12 POLK COUNTY,)
13)
14) Respondent.

15
16
17 Appeal from Polk County.

18
19 Christopher Dobson, Dallas, filed a petition for review
20 and argued on his own behalf.

21
22 Jane Ard, Salem, filed a petition for review and argued
23 on behalf of petitioner Department of Land Conservation and
24 Development. With her on the brief was Dave Frohnmayer,
25 Attorney General; and Virginia L. Linder, Solicitor General.

26
27 Robert W. Oliver, Dallas, filed the response brief and
28 argued on behalf of respondent.

29
30 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
31 Referee, participated in the decision.

32
33 REMANDED 02/21/92

34
35 You are entitled to judicial review of this Order.
36 Judicial review is governed by the provisions of ORS
37 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals Polk County Ordinance No. 91-16
4 changing the comprehensive plan map designation for eight
5 parcels of land, totalling 210 acres, from Agriculture to
6 Farm/Forest and rezoning them from Exclusive Farm Use (EFU)
7 to Farm/Forest (F/F).

8 **FACTS**

9 The subject eight parcels range in size from 6.6
10 to 59.5 acres. Properties to the north, east and west are
11 predominantly zoned EFU, with some properties zoned Acreage
12 Residential (AR-5). Lands to the south are zoned F/F. The
13 eight parcels lie along a moderately steep ridge. Record
14 32. The soils on the eight parcels range from SCS Class II
15 to IV.

16 An application was submitted by the county planning
17 department to redesignate and rezone the subject eight
18 parcels from Agriculture-EFU to Farm/Forest-F/F. The
19 hearings officer recommended that the application be
20 approved. The county commissioners held a public hearing
21 and adopted the challenged ordinance redesignating and
22 rezoning the subject parcels. This appeal followed.

23 **FIRST AND SECOND ASSIGNMENTS OF ERROR (DLCD)**

24 **FIRST AND SECOND ASSIGNMENTS OF ERROR (DOBSON)**

25 Petitioners Department of Land Conservation and
26 Development (DLCD) and Dobson (petitioners) argue the

1 challenged decision to redesignate and rezone the subject
2 parcels from Agricultural-EFU to Farm/Forest-F/F violates
3 both Polk County Zoning Ordinance (PCZO) 136.010 (the
4 purpose statement for the county's EFU zone) and Statewide
5 Planning Goal 3 (Agricultural Lands). We address these
6 claims separately below.¹

7 **A. PCZO 136.010**

8 PCZO 136.010 provides, in part:

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

21 We previously determined, in another case involving an
22 appeal of a Polk County decision to rezone property from EFU
23 to F/F, that in the absence of an explanation of why
24 PCZO 136.010 is inapplicable to a zone change from EFU
25 to F/F, PCZO 136.010 provides standards which must be met in
26 order to accomplish such a zone change. DLCD v. Polk
27 County, supra, slip op at 6.

¹Petitioner Dobson argues the F/F zone was not acknowledged by the Land Conservation and Development Commission (LCDC) under Goal 3 as an exclusive farm use zone. However, in DLCD v. Polk County, ___ Or LUBA ___ (LUBA No. 91-044, August 14, 1991), slip op 7-8, we concluded the F/F zone was acknowledged as an exclusive farm use zone.

1 In the decision challenged in this appeal, the county
2 found the following concerning compliance with PCZO 136.010:

3 " * * * PCZO § 136.010 * * * by its terms was
4 intended to address changes from agricultural to
5 non-agricultural use. It was not intended to
6 inhibit changes to other zones which are also
7 acknowledged as agricultural zones by the Land
8 Conservation and Development Commission under Goal
9 3. The F/F zone is so acknowledged, there is no
10 diversion from agricultural use, and a rezoning of
11 the subject parcels would not violate
12 PCZO § 136.010." Record 13.

13 PCZO 136.010 expressly applies when the county's EFU
14 zoning designation for a property is changed. The exception
15 the challenged decision reads into PCZO 136.010 for changes
16 from EFU to F/F has no support in the language of PCZO
17 136.010. Although it is appropriate for this Board to
18 consider a local government's interpretations of its own
19 enactments, and to defer to such interpretations when they
20 are reasonable and correct, neither the county nor this
21 Board may properly construe PCZO 136.010 in a manner which
22 writes in language that is not there. ORS 174.010; See Von
23 Lubken v. Hood River County, 104 Or App 683, 803 P2d 750
24 (1990). Additionally, we note that although the F/F zone
25 may have been acknowledged as complying with Goal 3, the F/F
26 zone is less protective of agricultural uses. Therefore,
27 there is no basis to presume the county did not intend
28 PCZO 136.010 to apply as it is written.

29 This subassignment of error is sustained.

1 **B. Goal 3**

2 Petitioners argue the county failed to properly apply
3 Goal 3 to the challenged decision.

4 In DLCD v. Polk County, supra, slip op at 8, we stated
5 that Goal 3 applies to a proposal to rezone EFU land to
6 F/F.² We noted that one of the most important aspects of
7 compliance with Goal 3 is satisfying the requirement that
8 minimum lot sizes be "appropriate for the continuation of
9 the existing agricultural enterprise in the area."³ To
10 satisfy this part of Goal 3, we stated:

11 "Specifically, the county must explain what the
12 'existing agricultural enterprise in the area' is.
13 Once the county has described the existing
14 agricultural enterprise in the area, it may be in
15 a position to adopt findings explaining why
16 applying a zone which may allow the subject parcel
17 to be further divided is consistent with the Goal
18 3 requirement that the minimum lot sizes used by
19 the county in its exclusive farm use zones be
20 appropriate for the continuation of the existing
21 agricultural enterprises in the area." DLCD v.
22 Polk County, supra, slip op at 9.

23 The county's findings concerning compliance with this

²The challenged decision contains findings suggesting that Goal 3 need not be applied because the proposed amendment merely changes the subject properties from one acknowledged Goal 3 complying designation and zone to another Goal 3 complying designation and zone. Record 12, 32-34. We note that this proposition, i.e. that a change from one plan map designation and zone to another acknowledged plan map designation and zone necessarily complies with the goals, has been squarely rejected. 1000 Friends of Oregon v. Jackson County, 79 Or App 93, 718 P2d 753 (1986).

³The minimum lot size in the county's EFU zone is 80 acres. The F/F zone would allow the subject properties, already below the minimum lot size, to be further divided. Further, dwellings could be approved for such newly created parcels.

1 requirement are as follows:

2 "A site analysis indicates that the subject
3 property lies along a moderately steep ridge
4 immediately south of the City of Dallas. The
5 properties are characterized by orchard, woodlot
6 and open fields that have frontage on Highway 23,
7 South Church Road and Mistletoe Road. The area is
8 surrounded by urban and rural residential,
9 industrial and farm uses.

10 * * * * *

11 "An area analysis indicates that the property is
12 surrounded to the north by the City of Dallas and
13 to the east, south and west by rural residences,
14 open fields and woodlots." Record 32.

15 The county's findings fail to adequately establish (1)
16 what the agricultural enterprises in the area are, and (2)
17 how rezoning the eight parcels to F/F (a zone that would
18 allow further divisions), will "continue those existing
19 agricultural enterprises in the area," as required by Goal
20 3.⁴

21 Finally, the county asks that we determine, under
22 ORS 197.835(9)(b),⁵ that there is evidence in the record to

⁴We do not mean to suggest the county must identify each agricultural enterprise in the area in excruciating detail. See Schellenberg v. Polk County, ___ Or LUBA ___ (LUBA No. 91-206, February 19, 1992), slip op 13-14. However, the county must adopt findings explaining the nature of the agricultural enterprises in the affected area in such a manner as to enable an analysis of whether rezoning the subject parcels from EFU to F/F would allow the continuation of the identified existing agricultural enterprises.

⁵ORS 197.835(9)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the

1 "clearly support" such determinations. We have examined the
2 evidence in the record cited by the parties. We do not
3 believe that evidence is adequate to clearly support a
4 determination of what the existing agricultural enterprises
5 in the area are, or how the rezoning to F/F will continue
6 those enterprises.⁶

7 This subassignment of error is sustained.

8 Petitioner DLCD's first and second assignment of error
9 and Petitioner Dobson's first and second assignment of error
10 are sustained.

11 **THIRD ASSIGNMENT OF ERROR (DLCD)**

12 Petitioner DLCD argues the county erroneously found
13 that lands zoned F/F are not subject to Goal 4 (Forest
14 Lands).

15 The challenged decision states:

16 "Lands zoned EFU and F/F are not subject to Goal
17 4, and this proposal does not affect commercial
18 forest lands." Record 12.

19 While petitioner DLCD takes issue with this finding, it
20 does not contend there are any forest lands subject to

facts, but the parties identify relevant evidence in the record
which clearly supports the decision or part of the decision,
the board shall affirm the decision or part of the decision
supported by the record * * *."

⁶Specifically, the county cites a chart prepared by the county planning
department showing generally the kinds of development on various area
parcels. Record 64. However, that chart does not establish the nature of
the existing agricultural enterprises. It merely states whether particular
parcels are "Farm/residence," "Farm/vacant," "Rural/residence" or
"Rural-farm/residence."

1 Goal 4 at issue here. Petitioner DLCD simply argues in the
2 abstract that lands zoned F/F are subject to Goal 4.⁷

3 While we might agree with petitioner that as a general
4 proposition F/F lands are subject to Goal 4, because there
5 are no forest lands at issue in this case, such a
6 determination would provide no basis for reversal or remand
7 of the challenged decision. Therefore, we do not reach the
8 issue.

9 Petitioner DLCD's third assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR (DOBSON)**

11 In this assignment of error, petitioner Dobson contends
12 the county erroneously determined the proposed rezoning of

⁷The county's plan describes the Farm/Forest plan designation as follows:

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

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

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

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

"* * * The Farm/Forest zone shall be applied to land where the parcelization pattern was predominantly less than 80 acres as of October 12, 1988. * * *" (Emphasis supplied.) Plan 79.

1 the subject eight parcels from EFU to F/F may be justified
2 on the basis that those parcels were improperly zoned EFU in
3 the first place.

4 We do not understand the county to have determined the
5 subject parcels were improperly zoned EFU at the time they
6 were originally zoned EFU. The county's findings simply
7 state that the county believes that, for a number of
8 reasons, the EFU zoning applied to the parcels is no longer
9 appropriate. Therefore, petitioner's arguments under this
10 assignment of error provide no basis for reversal or remand
11 of the challenged decision.

12 Petitioner Dobson's third assignment of error is
13 denied.

14 **FOURTH ASSIGNMENT OF ERROR (DOBSON)**

15 Under this assignment of error petitioner Dobson
16 contends the county's decision violates the agricultural
17 land use policy of ORS 215.243(2) that agricultural land be
18 preserved in large blocks.

19 Many of the arguments presented in this assignment of
20 error have been disposed of in the preceding sections of
21 this opinion. However, we understand petitioner Dobson to
22 also argue under this assignment of error that any rezoning
23 of EFU land which would allow further land divisions,
24 regardless of whether such land divisions would be
25 consistent with Goal 3, violates the legislative land use
26 policy of ORS 215.243(2) to preserve agricultural land in

1 large blocks.⁸ We rejected the argument that such an
2 extreme limitation is contained in ORS 215.243(2) in Still
3 v. Marion County, ___ Or LUBA ____ (LUBA No. 91-092,
4 November 14, 1991), slip op 3. See also Stephens v.
5 Josephine County, 11 Or LUBA 154, 160 (1984). We similarly
6 reject petitioner's contention that such a limitation is
7 imposed by ORS 215.243(2).

8 Petitioner Dobson's fourth assignment of error is
9 denied.

10 **FIFTH ASSIGNMENT OF ERROR (DOBSON)**

11 Petitioner Dobson argues that OAR 660-06-000 et seq
12 (amended Goal 4 rules) apply to the challenged decision,⁹
13 and that the county failed to establish compliance with
14 OAR 660-06-057.¹⁰

⁸ORS 215.243(2) provides:

"The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation."

⁹There is no dispute that the county did not apply the amended Goal 4 rules to the challenged decision.

¹⁰OAR 660-06-057 provides:

"Any rezoning of lands from an acknowledged zone to an agricultural forest zone requires a demonstration that each parcel within the area being rezoned contains such a mixture of agriculture and forest uses that neither Goal 3 nor Goal 4 can be applied alone."

1 The application to change the plan designation and to
2 rezone the subject parcels was submitted early in 1991.¹¹
3 The challenged decision was final on September 15, 1991.
4 The amended Goal 4 rules were effective February, 1990.
5 Consequently, it appears that the amended Goal 4 rules are
6 relevant to the subject decision.

7 The amended Goal 4 rules include an "applicability"
8 rule (OAR 660-06-003). The applicability rule of the
9 amended Goal 4 rules establishes criteria for determining
10 when local governments must apply the amended Goal 4 rules.
11 OAR 660-06-003(1) provides that the amended Goal 4 rules
12 apply immediately if a local government engages in certain
13 land use actions. Otherwise, the amended Goal 4 rules do
14 not apply until one of the eventualities stated in OAR 660-
15 06-003(2)-(4) occur.

16 OAR 660-06-003(2) provides local governments must amend
17 their plans and land use regulations to conform to the
18 amended Goal 4 rules at the time the local government
19 "submits a final periodic review order." OAR 660-06-003(3)
20 provides that after the termination of periodic review all
21 local governments must comply with the amended Goal 4 rules.

22 OAR 660-06-003(4) is different from the previous three
23 sections of the applicability rule. OAR 660-06-003(4)

¹¹The record does not contain a copy of the application. However, the county file numbers for the proposal are "91-02" and "91-03" and the earliest record documents relating to the application date from June 21, 1991. Record 100-01.

1 apparently provides an exception to the applicability rule
2 of the amended Goal 4 rules. Specifically,
3 OAR 660-06-003(4) states that if a local government
4 submitted a proposed periodic review order "prior to the
5 effective date of [the amended Goal 4 rules]," then such
6 local governments need not comply with the amended Goal 4
7 rules until "three years of the effective date of [the
8 amended Goal 4 rules]."

9 OAR 660-06-003(1) appears to apply here. Specifically,
10 OAR 660-06-003(1)(b) provides that the amended Goal 4 rules
11 apply "[i]f the governing body amends a plan map * * *."
12 The county has amended its plan map to change the
13 designation of the subject land from Agriculture to
14 Farm/Forest. However, the parties have not, in any detail,
15 analyzed the issue of whether the amended Goal 4 rules apply
16 to the subject decision. Further, the manner in which the
17 provisions of the applicability rule are intended to be
18 applied is somewhat unclear. Accordingly, on remand, the
19 county should either (1) explain why the amended Goal 4
20 rules do not apply, or (2) apply those rules, including
21 OAR 660-06-057, to the challenged decision.

22 Petitioner Dobson's fifth assignment of error is
23 sustained.

24 **SIXTH ASSIGNMENT OF ERROR (DOBSON)**

25 Petitioner Dobson argues the county failed to
26 adequately discharge its duties associated with Goal 1

1 (Citizen Involvement).

2 We disagree. We have previously stated that where, as
3 here, comprehensive plan amendments do not amend or directly
4 affect an acknowledged citizen involvement program in a
5 comprehensive plan, the only way a violation of Goal 1 may
6 be established is by demonstrating a failure to comply with
7 that acknowledged citizen involvement program. Wade v. Lane
8 County, ____ Or LUBA ____ (LUBA No. 90-095, December 12,
9 1990).

10 Petitioner Dobson does not explain how the procedures
11 employed below violated the county's acknowledged citizen
12 involvement program. We note that interested citizens were
13 provided an opportunity to participate in the decision
14 making process below, which included public hearings before
15 the hearings officer and the county commissioners.¹² In
16 short, none of petitioner's arguments provide any basis for
17 concluding the county failed to comply with Goal 1.

18 Petitioner Dobson's sixth assignment of error is
19 denied.

20 The county's decision is remanded.

¹²Petitioner Dobson argues that the county commissioners did not comment on each of the issues raised by the participants below, or did not agree with particular positions presented below. Assuming for the sake of argument that the county commissioners acted as petitioner states, we do not see how this establishes any violation of any the county's acknowledged plan and ordinance provisions concerning Goal 1.