

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

Appeal from Deschutes County.

Dennis Fennell, Bend, filed the petition for review and argued on behalf of petitioner.

Richard L. Isham, Bend, filed the response brief and argued on behalf of respondent.

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

REMANDED 04/22/92

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the board of county
4 commissioners denying his application for a minor partition.

5 **FACTS**

6 The subject parcel consists of 60 acres and is zoned
7 Exclusive Farm Use, 20 acre minimum (EFU-20). Petitioner,
8 the applicant below, applied for county permission to
9 partition the subject parcel into three 20 acre parcels.
10 The planning department denied the application, and
11 petitioner appealed to the hearings officer. The hearings
12 officer conducted a hearing and affirmed the decision of the
13 planning director, also denying the application. Petitioner
14 appealed to the board of county commissioners. The board of
15 county commissioners conducted an evidentiary hearing on
16 petitioner's appeal. Following the hearing, the board of
17 county commissioners adopted the challenged order affirming
18 the hearings officer's decision and denying the application.
19 This appeal followed.

20 **FIRST ASSIGNMENT OF ERROR**

21 "Deschutes County erred in entering the following
22 findings of fact and conclusions of law: The
23 property would be more suited for farm use by
24 retaining its current size."

25 **SECOND ASSIGNMENT OF ERROR**

26 "Deschutes County denied the partition without a
27 substantial factual basis in the record to support
28 a conclusion that the undivided 60 acres were
29 'more suited' to agricultural use.

1 "Deschutes County denied the partition without a
2 substantial factual basis in the record to support
3 the conclusion that the continuation of existing
4 commercial agricultural enterprises within the
5 area was not possible if the partition was
6 allowed."

7 **THIRD ASSIGNMENT OF ERROR**

8 "Deschutes County erred in entering the following
9 conclusion: that the division of land would
10 create nonfarm use."

11 ORS 215.263(2) provides:

12 "The governing body of a county * * * may approve
13 a proposed division of land to create parcels for
14 farm use as defined in ORS 215.203 if it finds:

15 "(a) That the proposed division of land is
16 appropriate for the continuation of the
17 existing commercial agricultural enterprise
18 within the area; or

19 "(b) The parcels created by the proposed division
20 are not smaller than the minimum lot size
21 acknowledged under ORS 197.251." (Emphasis
22 supplied.)

23 The reason stated in the challenged decision for
24 denying the proposed partition is the following:

25 "The Hearings Officer finds that the subject
26 property, with its limited farm production and the
27 location of the pasture (irrigated) areas, will be
28 more suited for farm use by retaining its current
29 size. Dividing this parcel into three lots will
30 divide the irrigated area into three less useable
31 and productive tracts, and reduce the agricultural
32 productivity of this property. There are 22.5
33 acres of water on the 60 acres. One 60-acre
34 parcel with 22.5 acres of water would be
35 significantly more productive than three 20-acre
36 parcels with 7.5 acres of water.

37 "A finding that this division of land would create
38 parcels for farm use cannot, therefore, be made.

1 The lots would, instead, be rural residential
2 parcels.

3 "** * * * [T]he Hearings Officer does believe that
4 the applicant must establish that the proposed
5 parcels will provide lands which would enable farm
6 use activity (as defined in ORS Chapter 215) to
7 occur. Given the history of this parcel and the
8 manner in which it is proposed to be divided, the
9 Hearings Officer cannot make such a finding and,
10 therefore, DENIES this proposed partition."
11 Record 8-9. (Emphasis in original).

12 Petitioner contends the county erroneously denied the
13 proposal because it determined the 60 acre parcel is more
14 suited for farm uses than the proposed three 20 acre parcels
15 would be. Petitioner argues that neither the county code
16 nor ORS 215.263(2) imposes a "more suited" standard.
17 Petitioner contends the proposal satisfies ORS 215.263(2)
18 because it is to divide the subject parcel for farm use and
19 the resulting parcels meet the county's acknowledged minimum
20 lot size standard.¹ The county states it applied ORS
21 215.263(2) as the basis for denying the proposal. The
22 county argues it correctly determined that denial was
23 appropriate because the 60 acre parcel is in "farm use" as
24 defined in ORS 215.203(2), whereas the proposed three 20
25 acre parcels could not support "farm use" as defined in ORS
26 215.203(2).

¹Petitioner also argues the proposal satisfies any relevant standards in the county code applicable to divisions of EFU-20 zoned land.

1 We view ORS 215.263(2) as establishing minimum
2 standards for approving divisions of land for farm purposes
3 in an EFU zone. We reject the county's argument that the
4 above emphasized words in ORS 215.263(2), "to create parcels
5 for farm use," establish an approval standard requiring
6 findings either that the existing parcel is in farm use as
7 defined in ORS 215.203(2) or that the resultant parcels will
8 be in farm use as defined in ORS 215.203(2). Rather,
9 ORS 215.263(2) requires simply that proposals to divide
10 exclusive farm use zoned land for farm use must either
11 establish that (1) the resultant parcels will be appropriate
12 for the continuation of the existing commercial agricultural
13 enterprises in the area, or (2) the resultant parcels will
14 be no less than the acknowledged minimum lot size for the
15 area.

16 Here, there is no dispute that the acknowledged minimum
17 lot size for the EFU-20 zone in which the subject parcel is
18 located is 20 acres. Further, there is no dispute that the
19 proposal is to divide the subject parcel into three parcels
20 of 20 acres each for farm use. Consequently, the proposal
21 satisfies ORS 215.263(2)(b).

22 As stated above, ORS 215.263(2) sets minimum standards
23 for divisions of exclusive farm use zoned land for farm use.
24 Clearly, the county may adopt more stringent approval
25 standards for such divisions. Kola Tepee, Inc. v. Marion
26 County, 99 Or App 481, 782 P2d 955 (1989), rev den 309 Or

1 441 (1990); Avgeris v. Jackson County, ___ Or LUBA ___ (LUBA
2 No. 91-208, April 10, 1992), slip op 5. However, the
3 challenged decision does not consider whether the proposal
4 complies with any other applicable standards in the
5 Deschutes County Zoning Ordinance (DCZO). Accordingly, we
6 must remand the challenged decision to the county to
7 determine whether the proposal complies with applicable
8 standards of the DCZO for approving divisions of EFU-20
9 zoned land for farm use.

10 The first, second, and third assignments of error are
11 sustained.

12 The county's decision is remanded.