

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION)
5 and DEVELOPMENT,)

LUBA No. 91-105

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FINAL OPINION
AND ORDER

vs.

YAMHILL COUNTY,

Respondent.

Appeal from Yamhill County.

Jane Ard, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief were Charles S. Crookham, Attorney General; Jack Landau, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

John C. Pinkstaff, McMinnville, filed the response brief and argued on behalf of respondent.

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

REMANDED 6/18/92

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision granting approval
4 of a partition creating two 20 acre parcels and one 50 acre
5 parcel from a 90 acre parcel zoned Agriculture/Forest (AF-
6 20). The AF-20 zone is an acknowledged exclusive farm use
7 zone.

8 **INTRODUCTION**

9 **A. Goal 3 Standard for Creation of New Farm Parcels**

10 Partitions to create new farm parcels within exclusive
11 farm use zones are governed by the requirements of Statewide
12 Planning Goal 3 (Agricultural Lands) and OAR 660, Division 5
13 (the Goal 3 rule). Of particular importance are OAR
14 660-05-015 and 660-05-020, which specifically address the
15 Goal 3 minimum lot size standard and application of that
16 standard to the creation of new farm parcels. We discussed
17 the requirements of OAR 660-05-015 and 660-05-020 at some
18 length in our recent decision in Still v. Marion County, ___
19 Or LUBA ___ (LUBA No. 91-092, November 15, 1991). After
20 quoting the relevant portions of OAR 660-05-015 and
21 660-05-020, we summarized the requirements of those rules as
22 follows:

23 "Essentially there are three steps required by
24 [OAR 660-05-015 and 660-05-020], which may be
25 summarized as follows:

26 "1. The relevant 'area' for analyzing the
27 propriety of a proposed farm parcel partition
28 must be identified. That 'area' must be

1 large enough to accurately represent the
2 existing commercial agricultural enterprise.
3 OAR 660-05-015(6)(c).

4 "2. The existing commercial agricultural
5 operations in the area must be identified. A
6 county must distinguish between commercial
7 and noncommercial agricultural operations.
8 OAR 660-05-015(6). Determining whether
9 existing agricultural operations are
10 commercial requires an analysis of 'products
11 produced, value of products sold, yields,
12 farming practices, and marketing practices.'
13 OAR 660-05-015(6)(b).

14 "3. Once a county has identified the relevant
15 area and the existing commercial agricultural
16 operations, the county must determine whether
17 the proposed partition will result in parcels
18 of sufficient size to 'maintain' or
19 'continue' the existing commercial enterprise
20 in the area. In making this determination
21 the county may not assume the partition is
22 appropriate, simply because the resulting
23 parcels are of the same size as the smaller
24 existing commercial agricultural operations
25 in the area. OAR 660-05-020(6)." (Emphases
26 in original; footnote omitted.) Still v.
27 Marion County, supra, slip op at 7-9.

28 In assuring that partitions creating new farm parcels
29 within exclusive farm use zones comply with the above
30 requirements that the parcels be of sufficient size "to
31 maintain and continue the existing commercial agricultural
32 enterprise in the area" (hereafter the commercial farm
33 parcel standard), counties may perform the required analysis
34 legislatively or on a case-by-case basis. Counties
35 proceeding on a case-by-case basis perform the required
36 analysis in quasi-judicial land use proceedings, as
37 applications for partitions are submitted. Alternatively,

1 counties may apply the required analysis in a legislative
2 proceeding and establish one or more minimum lot sizes
3 within their exclusive farm use zones sufficient to satisfy
4 the commercial farm parcel standard. Counties utilizing
5 this latter approach may thereafter approve partitions
6 creating parcels which meet the minimum lot size, without
7 demonstrating in individual partition decisions that the
8 proposed partition will result in parcels of sufficient size
9 to satisfy the commercial farm parcel standard.

10 **B. County Requirements for Creation of New Farm**
11 **Parcels**

12 At the time the partition application at issue in this
13 appeal was filed, the relevant Yamhill County Zoning
14 Ordinance (YCZO) provisions required a case-by-case
15 determination that new parcels proposed within the AF-20
16 zone meet the commercial farm parcel standard.
17 Subsequently, on February 27, 1991, the county adopted
18 legislative amendments to its zoning ordinance, establishing
19 a 20 acre minimum lot size to satisfy the commercial farm
20 parcel standard for partitions in the AF-20 zone. However,
21 because the application for the partition at issue in this
22 appeal was filed prior to the date the amended YCZO
23 provisions were adopted, the previous standards requiring a
24 case-by-case determination of compliance with the commercial
25 farm parcel standard apply. ORS 215.428(3); Kirpal Light
26 Satsang v. Douglas County, 96 Or App 207, 212, 772 P2d 944,
27 modified 97 Or App 614, rev den 308 Or 382 (1989).

1 At the time the application for the partition
2 challenged in this appeal proceeding was submitted, YCZO
3 403.09(B)(1) imposed the following requirement within the
4 AF-20 zoning district:

5 "Any new farm/forest parcel proposed to be created
6 shall be a minimum of 20 acres or that size
7 appropriate for continuation of the existing
8 commercial enterprise in the area, whichever is
9 greater, consistent with the requirements of
10 OAR 660-05-015 and 660-05-020."

11 In concluding that the proposed parcels are consistent with
12 the requirements of OAR 660-05-015 and 660-05-020, and for
13 that reason comply with YCZO 403.09(B)(1), the county relied
14 primarily on a document entitled "Proposal and Justification
15 regarding Compliance with Statewide Goal 3" (hereafter the
16 Goal 3 Report). Record 49-59. That study is based in large
17 part on a 1990 report prepared by the Oregon State
18 University Extension Service (hereafter the Pease Report).
19 Record 79-135. In the Goal 3 report, the county concludes
20 that in an area of the county identified as the "Interior
21 Foothills," which includes the subject 90 acre parcel, new
22 parcels including at least 20 acres may be created
23 consistent with the commercial farm parcel standard.¹

¹The Goal 3 Report and the Pease Report were prepared to justify the county's February 27, 1991 legislative amendments, noted above. Those amendments were submitted to the Land Conservation and Development Commission (LCDC) for Periodic Review. See ORS 197.628 et seq. On December 23, 1991, LCDC adopted an order in which, among other things, it (1) found certain aspects of the county's plan and land use regulations amendments to be inconsistent with Goal 3 and the Goal 3 rule, (2) found the Goal 3 Report and Pease Report to be inadequate in certain respects,

1 In this appeal petitioner challenges the adequacy of
2 the Goal 3 Report and the Pease Report to comply with the
3 requirements of OAR 660-05-015 and 660-05-020, which must be
4 satisfied under YCZO 403.09(B)(1).

5 **DECISION**

6 Petitioner asserts a single assignment of error
7 challenging compliance with YCZO 403.09(B)(1) on three
8 bases. First, petitioner contends the decision inadequately
9 identifies the relevant area for analysis under YCZO
10 403.09(B)(1). Second, petitioner argues that the method
11 used by the county to distinguish between commercial and
12 noncommercial farms is inadequately justified. Finally,
13 petitioner challenges the county's explanation for why the
14 requested 20 acre parcels are of a sufficient size to
15 satisfy the commercial farm parcel standard.

16 **A. The Relevant Area**

17 The Goal 3 Report divides the county into four areas:

and (3) ordered the county to adopt certain amendments to its plan and land use regulations. Appeals of LCDC's December 23, 1991 order are presently pending before the Court of Appeals.

Because the Goal 3 Report and Pease Report also form the bulk of the evidentiary support for the partition decision challenged in this appeal, some of the legal issues presented in this appeal are similar or identical to legal issues presented in the county's periodic review proceeding before LCDC. Presumably those legal issues may also be presented in the appeal of LCDC's order pending before the Court of Appeals. However, neither party argues this Board is bound by LCDC's resolution of such issues in the periodic review proceeding or is bound to give LCDC's resolution of those issues any particular deference in this appeal. Furthermore, neither party has requested that this Board delay its opinion in this matter until such issues are considered by the Court of Appeals in the pending appeal of LCDC's periodic review order. We therefore do not consider LCDC's December 23, 1991 order further.

1 (1) Valley Floor, (2) Interior Foothills, (3) Lower Coast
2 Range Foothills, and (4) Upper Coast Range Foothills. As
3 noted earlier, the subject property is located within the
4 area designated as the Interior Foothills. The Goal 3
5 report describes each of the areas in terms of their soils,
6 the types of crops raised, and the characteristics of the
7 farms within each area. The Interior Foothills area is
8 described as an area having "small farms" with soils of
9 "fair to poor suitability" for agricultural purposes.
10 Record 54. Crop production within the Interior Foothills is
11 described as less diverse than in the Valley Floor.
12 According to the Goal 3 Report, "Christmas trees, grapes,
13 orchards (mostly filberts and sweet cherries) and livestock
14 account for most of the farming activity." Id. The Goal 3
15 Report goes on to explain that the area is characterized by
16 "hobby farms, small commercial farms, and non-farm
17 activities" and "commercial farms in the area typically
18 raise high value-per-acre crops, predominantly filberts and
19 grapes * * *." Id.

20 Petitioner contends that because the subject property
21 is relatively close to the boundary between the Interior
22 Foothills and the Valley Floor, it was inappropriate for the
23 county to consider the Interior Foothills as the relevant
24 area under OAR 660-05-015(6)(c). Petitioner also argues it
25 is not sufficient for the county simply to draw lines on a
26 map in establishing a relevant area under OAR 660-05-

1 015(6)(c), without also identifying the types and sizes of
2 commercial agricultural enterprises.

3 OAR 660-05-015(6)(c) simply requires as follows:

4 "Local governments which apply Goal 3's minimum
5 lot size standard on a case-by-case basis may
6 satisfy the commercial agricultural identification
7 requirement in subsection (6)(a) of this rule by
8 identifying the sizes and other characteristics of
9 existing commercial farms in an area which is
10 large enough to represent accurately the existing
11 commercial agricultural enterprise within the area
12 containing the applicant's parcel."

13 Although we conclude below that the county's method of
14 distinguishing between commercial and noncommercial farms
15 does not comply with OAR 660-05-015(6)(b), we see no reason
16 to fault the county's explanation for the area it selected
17 as the relevant area.

18 The Interior Foothills area represents a large area of
19 the county. The Goal 3 Report identifies a variety of
20 existing commercial agricultural enterprises in the Interior
21 Foothills. The Goal 3 Report admittedly describes those
22 commercial agricultural enterprises in somewhat general
23 terms, but does discuss their "sizes and other
24 characteristics," as required by OAR 660-05-015(6)(c).
25 Beyond claiming the Goal 3 Report findings are inadequate,
26 petitioner offers no further argument challenging the
27 reasons given by the county for selecting the Interior
28 Foothills area as an appropriate area for purposes of the
29 analysis required by OAR 660-05-015 and 660-05-020. We
30 conclude that the county's explanation of its selection of

1 the Interior Foothills as the relevant area in this case is
2 adequate to comply with OAR 660-05-015(6)(c).

3 We reject petitioner's suggestion that because the
4 subject property falls close to the boundary between the
5 Interior Foothills and the Valley Floor, the county was
6 required to include nearby Valley Floor agricultural
7 enterprises in the analysis. OAR 660-05-015(6)(a)
8 specifically permits "identification of commercial farms * *
9 * on a countywide or subcounty basis." Because the rule
10 specifically permits the identification and use of subareas
11 of the county, there is no basis for arguing subareas may
12 not be used, for purposes of the analyses required by OAR
13 660-05-015 and 660-05-020, where properties within those
14 subareas are close to the subarea boundary.

15 This subassignment of error is denied.

16 **B. Identification of Commercial Farms**

17 As we explained in the portion of our decision in Still
18 v. Marion County, quoted supra, the county is required under
19 OAR 660-05-015(6) to distinguish between commercial and
20 noncommercial farms. The requirements for making this
21 determination are set forth in OAR 660-05-015(6)(b), which
22 provides as follows:

23 "Commercial agricultural operations to be
24 identified should be determined based on type of
25 products produced, value of products sold, yields,
26 farming practices, and marketing practices."

27 Petitioner accurately argues the county assumed that

1 farms producing \$10,000 in annual gross income are
2 commercial farms. In its decision, the county notes (1) the
3 \$10,000 figure is used by the U.S. Census of Agriculture as
4 a standard for identifying farms in commercial farm
5 production, and (2) the \$10,000 minimum gross farm income
6 standard appears in ORS 215.213(2)(b)(A), as a standard for
7 approval of dwellings in conjunction with farm use.²

8 While satisfaction of the \$10,000 annual gross farm
9 income standard is a relevant consideration in
10 distinguishing between commercial and noncommercial farms,
11 it may not be relied on as the sole consideration in making
12 the required distinction. Petitioner is correct that LCDC
13 has not adopted that standard as the only factor in its Goal
14 3 rule. To the contrary, OAR 660-05-015(6)(b), quoted
15 supra, makes "value of products sold" one of several
16 considerations. Thus, while some appropriate minimum level
17 of gross farm income is clearly a relevant consideration,
18 under OAR 660-05-015(6)(b), it may not be the only
19 consideration.

20 In the challenged decision, the county points out that
21 certain of the Goal 3 Rule criteria "are not measurable by
22 information from existing data bases." Record 51. The

²The challenged decision also asserts the Department of Land Conservation and 1000 Friends of Oregon have in the past endorsed the use of the \$10,000 gross income standard for identifying commercial agricultural enterprises. Petitioner argues that assertion is a conclusion, unsupported by substantial evidence in the record of this proceeding, but does not dispute the accuracy of the assertion.

1 decision further states "[t]he only way to document this
2 level of information and detail is a door-to-door, kitchen
3 table survey, which would be very expensive * * *." Id.

4 We assume the county intended the above described
5 criticism to apply to the factors identified in OAR 660-05-
6 015(6)(b). We also note that while OAR 660-05-015(6)(b)
7 identifies several factors to be considered in determining
8 whether agricultural operations are commercial, the rule
9 provides absolutely no guidance in how those factors are to
10 be applied to make the required distinction between
11 commercial and noncommercial farms.³ Presumably how those
12 factors are to be applied is left to the county, subject to
13 review by LCDC or this Board to determine whether the
14 particular application of the factors is consistent with the
15 overall requirement to distinguish between commercial and
16 noncommercial agricultural operations. However, while the
17 above argument concerning the subjectivity of the factors
18 and difficulty of applying those factors in view of readily
19 obtainable information might appropriately be presented as
20 arguments for amending OAR 660-05-015(6)(b), they do not

³For example, the rule does not explain how the "types of products produced" factor is to be used to distinguish between commercial and noncommercial farms, and we have some difficulty seeing how the type of product produced will have much bearing on whether a particular farm is commercial or noncommercial. The "value of products produced," "yields," "farming practices," and "marketing practices," factors also present problems. One perhaps could develop assumptions for applying each factor to distinguish between commercial and noncommercial farms, but the rule itself provides no guidance in what those assumptions might be.

1 provide a basis for failing to apply all of the rule's
2 factors.

3 Until LCDC amends OAR 660-05-015(6)(b) to permit the
4 \$10,000 gross income standard to be the determinative
5 consideration in distinguishing between commercial and
6 noncommercial agricultural enterprises, we have no basis for
7 concluding the county may do so.

8 This subassignment of error is sustained.

9 **C. Selection of Parcel Size**

10 For the reasons explained above, we agree with
11 petitioner, that the county failed to adequately justify its
12 method of distinguishing between commercial and
13 noncommercial farms within the Interior Foothills. The
14 county prepared a detailed analysis explaining why, after
15 identifying the commercial farms within the Interior
16 Foothills, it concluded a parcel size of 20 acres is
17 adequate to satisfy the commercial farm parcel standard.⁴

⁴Using the assessed values of contiguous farm ownerships and the \$10,000 gross annual farm income standard, the county applied certain assumptions to identify commercial farm parcels. Record 51; 91-93. The county then calculated that 1/2 of the so identified commercial farms in the Interior Foothills are larger than 30 acres and 1/2 of the commercial farms are smaller than 30 acres. The county then selected 20 acres as the appropriate minimum lot size, explaining that 40 percent of the commercial farms in the Interior Foothills are smaller than 40 acres and 60% are larger. The findings explain that if the crops typically grown in the Interior Foothills are raised on a 20 acre parcel, the parcel would produce substantially in excess of \$10,000 in gross annual farm income. The findings also explain that at 20 acres, the per acre value of land is in substantial part attributable to farm, rather than nonfarm, value. Finally, the findings explain that the county believes the 20 acre parcel size represents an appropriate size for persons wishing to purchase an entry level sized farm parcel.

1 However, even if we agreed with the county's rationale for
2 selecting the 20 acre parcel size, that rationale is based
3 on the county's categorization of farms within the Interior
4 Foothills as either commercial or noncommercial, based on
5 the \$10,000 gross income standard. If, as we conclude
6 above, the county's distinction between commercial and
7 noncommercial farms on that basis has not been adequately
8 justified, then noncommercial farms, potentially on smaller
9 parcels, may be included in the county's analysis. This, in
10 turn, could make the 20 acre parcel size inadequate to
11 satisfy the commercial farm parcel standard, even if the
12 county's rationale for selecting the 20 acre parcel size
13 based on the identified commercial farms in the Interior
14 Foothills is otherwise consistent with the requirements of
15 OAR 660-05-020.⁵ We therefore do not consider petitioner's
16 arguments that the county failed to adequately justify its
17 selection of 20 acres as an appropriate lot size to satisfy
18 the commercial farm parcel standard in the Interior
19 Foothills.

20 The county's decision is remanded.

21

⁵As we explained in Still, the Goal 3 rules simply reject the extremes of allowing parcels to be divided to the size of the smallest commercial agricultural operation in the area on the one hand, and precluding any division that would result in parcels smaller than those utilized by the largest commercial agricultural operations. OAR 660-05-020(5).