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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION)
and DEVELOPMENT,)
Petitioner,)
vs.)
YAMHILL COUNTY,)
Respondent.)

LUBA No. 92-018
FINAL OPINION
AND ORDER

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 Petitioner appeals a decision granting approval for a
4 dwelling in conjunction with farm use on a 20 acre parcel
5 located in the Agriculture/Forestry (AF-20) zoning district.
6 The AF-20 zone is an acknowledged exclusive farm use zone.

7 **DECISION**

8 Under Yamhill County Zoning Ordinance (YCZO) 403.06(A),
9 the relevant criteria for approval of a "dwelling
10 customarily provided in conjunction with farm use"
11 (hereafter farm dwelling) in the AF-20 zoning district are
12 as follows:

13 "1. The parcel is a minimum of 20 acres or that
14 size which is appropriate for the
15 continuation of the existing commercial
16 agricultural enterprise in the area,^[1]
17 whichever is greater, consistent with the
18 requirements of OAR 660-05-015 and
19 660-05-025;

20 "2. The addition and location of new structures
21 and improvements including dwellings, fences,
22 roads, utilities, wells, etc., shall not
23 impose undue limitations upon existing farm
24 or forest uses in the area;

25 "3. The parcel currently supports accepted
26 farming practices * * *;

27 "4. The day-to-day activities of an owner or
28 manager are required to manage the land for

¹We hereafter refer to the "appropriate for the continuation of the existing commercial agricultural enterprise in the area" requirement as the "commercial farm parcel standard."

1 farm use and the activities are principally
2 directed to farm use of the land."

3 Petitioner argues the county incorrectly applied the above
4 criteria and failed to adopt adequate findings, supported by
5 substantial evidence, that the above criteria are satisfied.

6 **A. Waiver**

7 Petitioner challenges the county's findings of
8 compliance with YCZO 403.06(A)(1), (2) and (4). Respondent
9 argues petitioner should be barred from challenging the
10 decision on the basis of YCZO 403.06(A)(1), because
11 petitioner failed to raise an issue concerning compliance
12 with that criterion below. See ORS 197.763(1); 197.835(2);
13 Boldt v. Clackamas County, 107 Or App 619, 813 P2d 1078
14 (1991).

15 YCZO 403.09(B)(1) imposes the commercial farm parcel
16 standard on decisions approving new farm parcels in the AF-
17 20 zone. In doing so, YCZO 403.09(B)(1) uses language
18 identical to that contained in YCZO 403.06(A)(1), which
19 applies the commercial farm parcel standard to approval of
20 farm dwellings on existing parcels. Because the decision
21 challenged in this appeal grants approval for a farm
22 dwelling on an existing parcel, YCZO 403.06(A)(1) is the
23 relevant commercial farm parcel standard. The letter
24 submitted by petitioner during the local proceedings, in
25 which petitioner challenges the county's justification for
26 its conclusion that the subject 20 acre parcel satisfies the
27 commercial farm parcel standard, cites YCZO 403.09(B)(1),

1 rather than YCZO 403.06(A)(1). However, we do not agree
2 this error results in a waiver of petitioner's right to
3 raise the issue of compliance with YCZO 403.06(A)(1) in this
4 appeal.

5 While the letter refers to the wrong code section, it
6 raises the substantive issue, i.e. whether the subject
7 parcel complies with the commercial farm parcel standard.
8 Moreover, the letter specifically refers to the page of the
9 staff report where YCZO 403.06(A)(1) is addressed. The
10 county understood that YCZO 403.06(A)(1) applies in this
11 case and applied that criterion, including the
12 administrative rule provisions referenced therein.
13 Therefore, the purpose of ORS 197.763(1) and 197.835(2),
14 which is to prevent unfair surprise, was served by
15 petitioner's letter. See Boldt v. Clackamas County, supra.
16 Petitioner did not waive its right to raise the issue of
17 whether the county's decision is adequate to demonstrate
18 compliance with YCZO 403.06(A)(1).

19 **B. Minimum Parcel Size**

20 YCZO 403.06(A)(1) establishes 20 acres as the absolute
21 minimum parcel size for approval of new farm dwellings in
22 the AF-20 zone. However, YCZO 403.06(A)(1) requires that
23 even where a parcel includes 20 acres, the county must also
24 determine whether parcels larger than 20 acres are
25 "appropriate for the continuation of the existing commercial
26 enterprise in the area." Depending on the outcome of this

1 determination concerning the commercial farm parcel
2 standard, more than 20 acres may be required for approval of
3 a farm dwelling under YCZO 403.06(A)(1).

4 Under YCZO 403.06(A)(1) and OAR 660-05-025, parcels
5 that are too small to satisfy the commercial farm parcel
6 standard may be eligible for approval of a nonfarm dwelling,
7 but are not eligible for approval of a farm dwelling. See
8 also OAR 660-05-030. Under these code and rule standards,
9 only parcels that are found to satisfy the commercial farm
10 parcel standard are eligible for a farm dwelling in the
11 AF-20 zone. Petitioner argues the county failed to
12 adequately demonstrate that the subject property satisfies
13 the commercial farm parcel standard.

14 In finding the proposed farm dwelling complies with
15 YCZO 403.06(A)(1), the county must comply with OAR 660-05-
16 015(6) which, among other things, requires that the county
17 identify a relevant area for analysis and distinguish
18 between commercial and noncommercial farms within that area.
19 This analysis is required so that the county can make the
20 required ultimate determination, i.e. that the subject
21 property is of sufficient size to maintain the existing
22 commercial agricultural enterprise in the area.

23 OAR 660-05-015(6)(b) provides as follows:

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

1 In identifying a relevant area for analysis and
2 distinguishing between commercial and noncommercial farms
3 within that area, the county relied on a study entitled
4 "Proposal and Justification Regarding Compliance with
5 Statewide Goal 3" (hereafter Goal 3 Report). The Goal 3
6 Report is based in large part on a 1990 report prepared by
7 the Oregon State University Extension Service. In the Goal
8 3 Report, the county concludes that in an area of the county
9 identified as the "Lower Coast Range Foothills," which
10 includes the subject 20 acre parcel, parcels including at
11 least 20 acres satisfy the commercial farm parcel standard.

12 In DLCD v. Yamhill County, ___ Or LUBA ___ (LUBA No.
13 91-105, June 18, 1991) (DLCD I), issued this date, we
14 conclude that the Goal 3 Report is adequate for purposes of
15 satisfying the requirement of OAR 660-05-015(6)(c) to
16 designate an area of sufficient size to accurately represent
17 the existing commercial agricultural enterprise in the
18 area.² Although the property at issue in this appeal
19 involves a different subarea of the county, we find the
20 county's justification of its use of the Lower Coast Range
21 Foothills as the relevant area for purposes of the analyses
22 required by YCZO 403.06(A)(1) and OAR 660-05-015 and 660-05-
23 025 to be adequate, for reasons similar to those explained

²DLCD I involved a decision to partition a 90 acre parcel located in the "Interior Foothills" subarea of the county into two 20 acre and one 50 acre parcels.

1 in DLCD I. We reject petitioner's challenge of the county's
2 use of the Lower Coast Range Foothills as the relevant area.

3 However, in DLCD I we rejected the Goal 3 Report's
4 assumption that farms producing \$10,000 in annual gross
5 income are commercial farms. As we explained in that
6 decision:

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

21 * * * * *

22 "Until LCDC amends OAR 660-05-015(6)(c) to permit
23 the \$10,000 gross income standard to be the
24 determinative consideration in distinguishing
25 between commercial and noncommercial agricultural
26 enterprises, we have no basis for concluding the
27 county may do so." DLCD I, supra, slip op at 10-
28 11.

29 The decision challenged in this appeal must be remanded
30 for the same reason the decision in DLCD I was remanded.
31 There is some discussion in the decision challenged in this
32 appeal concerning the considerations required by OAR 660-05-
33 015(6)(b), i.e. "type of products produced, value of
34 products sold, yields, farming practices, and marketing

1 practices." Similarly, there is some evidence in the record
2 bearing on these factors. However, as explained in our
3 decision in DLCD I, the basis for the county's distinction
4 between commercial and noncommercial farms in the subareas
5 identified in the Goal 3 Report is the \$10,000 gross farm
6 income standard. The county did not, as OAR 660-05-
7 015(6)(b) requires, use the factors listed in that rule to
8 distinguish between commercial and noncommercial farms.³

9 Finally, in this appeal, as in DLCD I, respondent
10 suggests that requiring such a detailed analysis imposes an
11 unduly onerous burden on the county. As we explained in
12 that case, such an argument may appropriately be made as a
13 reason for changing the requirements of OAR 660-05-
14 015(6)(b), but it provides no basis for avoiding the rule's
15 requirements.

16 The county's decision is remanded.⁴

17

³The decision challenged in this appeal also generally discusses farm uses within a 1/2 mile radius of the subject property. We agree with petitioner that the challenged decision does not perform the analysis required by OAR 660-05-015(6) within the 1/2 mile area. It is clear from the county's decision that it used the "Lower Coast Range Foothills" as the relevant area and relied upon the Goal 3 Report to make the distinction between commercial and noncommercial farms that is required by YCZO 403.06(A)(1) and OAR 660-05-015 and 660-05-025.

⁴We do not address petitioner's arguments concerning compliance with the remaining criteria applicable to approval of farm dwellings in the AF-20 zone. Until the county establishes compliance with YCZO 403.06(A)(1), it cannot be determined whether the proposed dwelling may be approved as a farm dwelling or may only be approved as a nonfarm dwelling. In the latter instance, different criteria must be satisfied.