

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,)

8)
9 vs.)

10) LUBA No. 92-103

11 COOS COUNTY,)

12) FINAL OPINION
13 Respondent,) AND ORDER

14)
15 and)

16)
17 PETER BUSSMAN and DIANNA BUSSMANN,)

18)
19 Intervenors-Respondent.)

20
21
22 Appeal from Coos County.

23
24 Jane Ard, Salem, filed the petition for review and
25 argued on behalf of petitioner. With her on the brief was
26 Charles S. Crookham, Attorney General; Jack Landau, Deputy
27 Attorney General; and Virginia L. Linder, Solicitor General.

28
29 No appearance by respondent.

30
31 Douglas M. DuPriest, Eugene, filed the response brief
32 and argued on behalf of intervenors-respondent. With him on
33 the brief was Hutchinson, Anderson, Cox, Parrish & Coons.

34
35 KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,
36 Referee, participated in the decision.

37
38 REMANDED 10/09/92

39
40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county ordinance taking an
4 exception to Statewide Planning Goal 3 (Agricultural Land),
5 for a 20 acre portion of a 175 acre parcel, and amending the
6 comprehensive plan designation for the 20 acres from Forest
7 to Rural Residential and the zoning map designation from
8 Forest/Mixed Use to Qualified Residential 5.

9 **MOTION TO INTERVENE**

10 Peter Bussmann and Dianna Bussmann move to intervene on
11 the side of respondent. There is no objection to the
12 motion, and it is allowed.

13 **STANDING**

14 ORS 197.620 authorizes any "person" who appeared during
15 the proceedings below to seek this Board's review of a land
16 use decision. In addition, ORS 197.090(2) authorizes the
17 Director of the Department of Land Conservation and
18 Development (DLCD) to seek review of a land use decision
19 involving the Statewide Planning Goals.

20 Intervenors challenge petitioner's standing to appeal
21 the challenged decision to this Board. Intervenors argue
22 that petitioner DLCD has no statutory authority to seek this
23 Board's review of a local land use decision. Intervenors
24 argue that under ORS 197.020(15), only the Land Conservation
25 and Development Commission (LCDC) or its designee is
26 considered a "person." Intervenors also contend that

1 petitioner's director is not the legal equivalent of
2 petitioner.

3 Petitioner points out that ORS 197.015(15) defines the
4 term "person" to include any state agency, and that there is
5 no dispute that petitioner is a state agency. Petitioner
6 contends that because it is a state agency, it is a person
7 and as a person it may appeal the challenged decision to
8 this Board. We agree with petitioner. Petitioner appeared
9 during the local proceedings and, therefore, is a person
10 with standing to bring this appeal. ORS 197.830(2).

11 **MOTION TO DISMISS**

12 The challenged decision includes certain exhibits that
13 are specifically incorporated by reference and attached as a
14 part of the challenged county decision.¹ While petitioner
15 attached a copy of the challenged ordinance to its petition
16 for review, it failed to attach the exhibits to the decision
17 to the petition.

18 Intervenors contend that because ORS 197.830(11)
19 requires the challenged decision to be attached to the
20 petition for review, and the decision here includes the
21 exhibits, this Board should dismiss this appeal proceeding.
22 Intervenors analogize this situation to that presented in
23 Horizon Construction, Inc. v. City of Newberg, 114 Or App
24 249, 251, ___ P2d ___ (1992), where the Court of Appeals

¹The disputed exhibits are found at Record 57-81.

1 stated it would, in the future, strike a petition for review
2 that failed to include a copy of the appealed LUBA decision.
3 Intervenors alternatively argue that, at a minimum, we
4 should strike the second assignment of error because it
5 challenges the exception to Statewide Planning Goal 3, which
6 is supported by the omitted exhibits.

7 Petitioner attached to its petition a copy of the
8 challenged ordinance. We will not dismiss this appeal
9 proceeding simply because petitioner failed to attach the
10 exhibits to the challenged ordinance. Similarly, we do not
11 believe the failure to attach the exhibits warrants striking
12 any portion of the petition for review.

13 Intervenors' motion to dismiss is denied.

14 **FACTS**

15 The subject property is the undivided westernmost 20
16 acre portion of a 175 acre parcel.² The history of the 175
17 acre parcel is relevant to this appeal proceeding.

18 Until 1986, the 175 acre parcel was part of a larger
19 parcel. In 1986, intervenors sought and were granted
20 approval to partition the larger parcel into the 175 acre
21 parcel, of which the subject 20 acres are a part, and two

²The record is confusing about the size of the parcel of which the subject 20 acres are a part. It is described variously as consisting of 175 acres (Record Vol II 175), 165 acres (Record Vol II 197) and 163 acres (Record Vol II 159, 183). In their briefs, the parties refer to the larger parcel of which the 20 acres are a part as a 175 acre parcel. In this opinion we do the same.

1 other parcels.³ The purpose of the partition was "to
2 reorganize two working ranches and create smaller, more
3 efficient management units." Record Vol II 172.

4 The subject 20 acres consist of sand and wetland soils
5 having an agricultural capability classification of SCS
6 Class VII. Between 26% and 40% of the soils on the 175 acre
7 parcel are SCS class III and IV. The balance of the soils
8 are SCS Class VII.

9 The planning commission recommended approval of the
10 proposed plan and zone change. The board of commissioners
11 followed the planning commission's recommendation, and
12 adopted the challenged decision. This appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 "The county misconstrued the applicable law,
15 failed to make adequate findings and made a
16 decision not supported by substantial evidence in
17 the whole record in determining that 20 acres of a
18 175-acre parcel is not agricultural land as
19 defined in Goal 3 and OAR [Chapter] 660, Division
20 5."

21 Although the county adopted an exception to Goal 3, it
22 also found, in the alternative, that the subject 20 acres
23 are not "agricultural land" subject to Goal 3. Petitioner
24 contends under this assignment of error that the subject 20
25 acres is properly considered "agricultural land" as defined
26 in Goal 3 and the Goal 3 rule -- OAR 660-05-010 et seq.

³Apparently, this partition resulted in the creation of two farm parcels and one nonfarm parcel. The nonfarm parcel is located to the north of the subject 20 acres.

1 Intervenors respond to this argument in two parts.
2 First, they argue the 20 acres is not "agricultural land"
3 under Goal 3 or the Goal 3 rule. Second, they argue the
4 Goal 3 rule exceeds LCDC's authority, because it expands the
5 Goal 3 definition of agricultural land. We address these
6 issues separately below.

7 **A. Agricultural Land**

8 The county determined:

9 "[T]he subject property does not contain
10 predominantly agricultural land, as defined by
11 Goal 3, and no Exception [to Goal 3] is required
12 to be taken. * * *" Record Vol I 21.

13 Goal 3 defines "agricultural land" as follows:

14 "[i]n western Oregon [agricultural land] is land
15 of predominantly Class I, II, III and IV soils * *
16 * as identified in the Soil Capability
17 Classification System of the United States Soil
18 Conservation Service, and other lands which are
19 suitable for farm use taking into consideration
20 soil fertility, suitability for grazing, climatic
21 conditions, existing and future availability of
22 water for farm irrigation purposes, existing land-
23 use patterns, technological and energy inputs
24 required, or accepted farming practices. Lands in
25 other classes which are necessary to permit farm
26 practices to be undertaken on adjacent or nearby
27 lands, shall be included as agricultural land in
28 any event."

29 OAR Chapter 660, Division 5 (hereafter the Goal 3 rule)
30 implements Goal 3. OAR 660-05-005(1) defines agricultural
31 land in a manner nearly identical to the Goal 3 language
32 quoted above.

33 OAR 660-05-010 further identifies the types of land a

1 county must inventory as agricultural land, and the factors
2 which must be considered in identifying agricultural land:

3 "(1) All land defined as 'agricultural land' in
4 [OAR] 660-05-005(1) shall be inventoried as
5 agricultural land. Lands in other than
6 capability classes I-IV * * * that are
7 adjacent to or intermingled with lands in
8 capability classes I-IV * * * within a farm
9 unit, shall be inventoried as agricultural
10 lands even though these lands may not be
11 cropped or grazed.

12 "(2) When a jurisdiction is determining the
13 predominant soil capability classifications
14 of a tract of land it need only look to the
15 land within the tract being inventoried.
16 However, whether land is 'suitable for farm
17 use' requires an inquiry into factors beyond
18 the mere identification of scientific soil
19 classifications. The factors are listed in
20 the definitions of agricultural land set
21 forth at OAR 660-05-005(1)(b). This inquiry
22 requires the consideration of conditions
23 existing outside the tract being inventoried.
24 Even if a tract of land is not predominantly
25 class I-[IV] soils or suitable for farm use,
26 Goal 3 nevertheless defines as agricultural
27 'lands in other classes which are necessary
28 to permit farm practices to be undertaken on
29 adjacent or nearby lands.' A determination
30 that a tract of land is not agricultural land
31 requires findings supported by substantial
32 evidence which address each of the factors
33 set forth in OAR 660-05-005(1).

34 "(3) Goal 3 attaches no significance to the
35 ownership of a tract of land when determining
36 whether it is agricultural land. Nearby or
37 adjacent land, regardless of ownership must
38 be examined to the extent that a tract of
39 land is either 'suitable for farm use' or
40 'necessary to permit farm practices to be
41 undertaken on adjacent or nearby lands'
42 outside the tract of land.

1 "* * * * *" (Emphases supplied.)

2 In sum, Goal 3 and the Goal 3 rule require that land be
3 considered agricultural land in four circumstances. First,
4 land is agricultural land if it has the requisite soil
5 classification. Second, land is agricultural land if it is
6 "intermingled with or adjacent to" SCS Class I-IV land
7 within a "farm unit." Third, land is agricultural land if
8 it is suitable for farm use. Fourth, land is agricultural
9 land if it is necessary to permit farm practices to be
10 undertaken on adjacent or nearby lands. Kaye v. Marion
11 County, ____ Or LUBA ____ (LUBA Nos. 92-005 and 92-010, July
12 13, 1992), slip op 7.

13 There is no dispute that the county properly determined
14 that neither the subject 20 acre portion of the parent
15 parcel, nor the 175 acre parent parcel itself, are composed
16 of predominantly SCS Class I-IV soils. The dispute upon
17 which we focus in this opinion, is whether the 20 acre
18 portion of the parent parcel is "intermingled with or
19 adjacent to" SCS Class I-IV land that is "within a farm
20 unit."

21 There is no dispute that the 20 acres itself has never
22 been actively farmed. The proposal upon which the 1986
23 partition was based, states in part:

24 "The proposal is to reorganize two working ranches
25 and create smaller, more efficient management
26 units. The proposed parcels are appropriate for
27 the continuation of the agricultural enterprises
28 within Coos County, and specially compatible with

1 ranch sizes in the immediate area * * *.

2 * * * *

3 "The reason for the division of the ranches and
4 why this division is beneficial is due to the
5 presence of Four-Mile Creek. The creek runs year
6 around and is 50 to 75 feet wide. It provides a
7 natural division * * * within the ranches. [The
8 proposal] is to make this natural division work
9 for better management techniques, and for more
10 productive, and specialized agricultural
11 practices." Record Vol II 172.

12 Attached to the proposal are what appear to be detailed
13 management plans for each of the parcels created by the 1986
14 partition decision. The management plan governing the
15 creation of the 175 acre parcel, of which the subject 20
16 acres is a part, states the following:

17 "[175] acre ranch used to raise cattle. * * *

18 "60 head of cattle are grazed on the ranch. There
19 are two Brahma Bulls. Every September the calves
20 are sold at the local Auction Barn for the market
21 price. About 30 acres of land is swamp and
22 relatively useless. The remainder is in 15 year
23 old Douglas fir, which is to be harvested on a
24 long term future program.

25 "The cattle survive without much maintenance.
26 They feed on the grass and drink from the creek.
27 From November to March, the cattle are fed a total
28 of 10 tons of alfalfa hay which is purchased for
29 \$100 per ton.

30 "Plans for the ranch include maintaining the
31 present management program." Record Vol II 183.

32 Regardless of whether the subject 20 acres may have
33 been regarded as "relatively useless" in the management plan
34 quoted above, or actively farmed in the past, it is clear

1 that the 175 acre parcel was created as a cattle ranching
2 farm unit. Further, we do not understand the parties to
3 dispute that the 175 acre parcel is, in fact, managed in the
4 manner described in the management plan quoted above.
5 Consequently, we believe the 175 acre parcel, of which the
6 20 acres are a part, is a farm unit. The final inquiry is
7 whether the 20 acres are "adjacent to or intermingled with"
8 SCS Class I-IV soils. The answer is yes, because the 20
9 acres are a part of the farm unit which includes those SCS
10 Class I-IV soils. Accordingly, we agree with petitioner
11 that the county erred in determining that the subject land
12 is not "agricultural land" as defined in OAR 660-05-010(1).

13 **B. LCDC's Authority to Promulgate OAR 660-05-010(1)**

14 Intervenor's argue LCDC has no authority to expand by
15 rule the Goal 3 definition of "agricultural land." As we
16 understand it, intervenors are also arguing that the Goal 3
17 rule states policy which can only be stated in a Goal.
18 Finally, we understand intervenors to argue that the Goal 3
19 rule unlawfully amends Goal 3 without following the
20 statutorily required Goal amendment process. See Willamette
21 University v. LCDC, 45 Or App 355, 373-74, 608 P2d 1178
22 (1980); Marion County v. Federation for Sound Planning, 64
23 Or App 226, 234-35, 668 P2d 406 (1983).

24 We note at the outset that this Board has no authority
25 to invalidate a rule promulgated by LCDC. ORS
26 197.825(2)(d). However, in any event, we note that we do

1 not believe the Goal 3 rule amends Goal 3, or exceeds LCDC's
2 statutory authority. The Goal 3 rule elaborates upon,
3 refines and implements Goal 3's definition of agricultural
4 lands and the Goal 3 requirement that such lands be
5 inventoried and preserved for farm use.

6 In Newcomer v. Clackamas County, 94 Or App 33, 37-38,
7 764 P2d 927 (1988), the Court of Appeals stated the
8 following concerning the Goal 3 rule:

9 "It is part of a series of rules which articulate
10 directory standards about dwellings in
11 agricultural zones and related matters, define
12 operational relationships between Goal 3 and the
13 agricultural lands statutes and have the stated
14 purpose of implementing Goal 3 and the
15 'Agricultural Land Use Policy' pursuant to ORS
16 215.243. * * *" (Emphasis supplied.) Id. 37-38.

17 Further, the Court of Appeals held that LCDC has
18 statutory authority:

19 "* * * to adopt the statewide land use policies
20 which LCDC considers necessary to carry out [ORS
21 ch 196 and 197]." Id. at 37.

22 Intervenors' arguments concerning the alleged invalidity of
23 the Goal 3 rule provide no basis for reversal or remand of
24 the challenged decision.

25 The first assignment of error is sustained.

26 **SECOND ASSIGNMENT OF ERROR**

27 "The county misconstrued the applicable law,
28 failed to make adequate findings, and made a
29 decision not supported by substantial evidence in
30 the record when it concluded that the proposal met
31 the requirements for a reasons exception to Goals
32 3 and 4."

1 The county alternatively determined if the 20 acres are
2 properly considered "agricultural land," that a "reasons"
3 exception to Goal 3 is justified under OAR 660-04-020 and
4 022.⁴

5 One of the requirements for reasons exception is that
6 the county adopt findings demonstrating that:

7 "There is a demonstrated need for the proposed use
8 or activity based on one or more of the
9 requirements of Statewide Goals 3 to 19 * * *"
10 OAR 660-04-022(1)(a).

11 The challenged decision does not demonstrate the existence
12 of a need for the subject 20 acres to be rezoned and
13 replanned for residential use. In 1000 Friends of Oregon v.
14 Marion County, 18 Or LUBA 408, 413 (1989), we explained the
15 methodology for establishing the existence of a
16 "demonstrated need" as required by OAR 660-04-022(1)(a).
17 Specifically, we stated that OAR 660-04-022(1)(a):

18 "* * * contemplates that the 'need' requirement
19 may be met based upon a showing of (1) market
20 demand for the proposed use, and (2) that the
21 county cannot satisfy its obligations under one or
22 more of Goals 3-19, or the requirements of an
23 acknowledged comprehensive plan, without
24 accommodating the proposed use at the proposed
25 location."

26 While the challenged decision may establish the existence of
27 a market demand for rural residential homesites, the

⁴The county also found that the subject 20 acres are not "forest lands" as defined by Goal 4. Record 28-32. Petitioner does not challenge those findings, and the county did not adopt an exception to Goal 4. Therefore, we do not consider any issue raised by petitioner concerning Goal 4.

1 challenged decision falls far short of establishing the
2 second part of the test quoted above.

3 The second assignment of error is sustained.

4 The county's decision is remanded.