

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 SCHROCK FARMS, INC., an Oregon)
5 corporation, VERNON SCHROCK,)
6 and DEAN SCHROCK,)
7)
8 Petitioners,)

9)
10 vs.)

11) LUBA No. 90-061
12 LINN COUNTY,)
13) FINAL OPINION
14 Respondent,) AND ORDER

15)
16 and)

17)
18 OREGON DEPARTMENT OF)
19 TRANSPORTATION,)
20)
21 Intervenor-Respondent.)

22
23
24 On remand from the Court of Appeals.

25
26 Edward F. Schultz, Albany, filed a brief on remand on
27 behalf of petitioners. With him on the brief was
28 Weatherford, Thompson, Quick & Ashenfelter.

29
30 John T. Gibbon, Civil Deputy District Attorney, Albany,
31 represented respondent.

32
33 Lucinda D. Moyano, Assistant Attorney General, Salem,
34 filed a brief on remand on behalf of intervenor-respondent.
35 With her on the brief was Theodore R. Kulongoski, Attorney
36 General.

37
38 SHERTON, Chief Referee; KELLINGTON, Referee,
39 participated in the decision.

40
41 REVERSED 04/19/93

42
43 You are entitled to judicial review of this Order.
44 Judicial review is governed by the provisions of ORS
45 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county ordinance approving an
4 exception to Statewide Planning Goal 3 (Agricultural Lands),
5 a resource land division and a minor partition, to allow
6 realignment of a portion of State Highway 34.

7 **FACTS**

8 This appeal is before us on remand from the Oregon
9 Court of Appeals. In our first decision in this appeal, we
10 described the facts as follows:

11 "The subject property is an approximately 195 acre
12 commercial farm parcel owned by petitioners. The
13 parcel is designated Agricultural Resource on the
14 Linn County Comprehensive Plan (plan) map and is
15 zoned Exclusive Farm Use (EFU). The subject
16 property is adjoined by the original alignment of
17 Highway 34 to the north and the city limits of the
18 City of Tangent to the west.

19 "[The Oregon Department of Transportation (ODOT)]
20 desires to realign a segment of Highway 34 between
21 Interstate-5 and Highway 99E. ODOT's desired
22 alignment crosses the subject property in an
23 east-west direction. The realignment converts the
24 subject property into two farm parcels. The
25 northern parcel includes approximately 59 acres
26 and the southern parcel includes approximately 124
27 acres. The two farm parcels are separated by a
28 five-lane segment of Highway 34 occupying
29 approximately 12 acres. * * *" Schrock Farms,
30 Inc. v. Linn County, ___ Or LUBA ___ (LUBA No.
31 90-061, September 21, 1992) (Schrock Farms I),
32 slip op 2-3.

33 In Schrock Farms I, slip op at 3-4, we discussed the
34 issues raised by petitioners' first through fourth
35 assignments of error as follows:

1 "In these assignments of error, petitioners
2 contend the creation of new parcels for highway
3 reconstruction or modification is not allowed in
4 an EFU zone under ORS 215.283(1) and (2) or the
5 corresponding provisions of Linn County Zoning
6 Ordinance (LCZO) 6.030, 6.040 and 6.050.
7 Petitioners further contend the findings
8 supporting the challenged decision are not
9 adequate to justify an exception to Goal 3 and are
10 not supported by substantial evidence in the
11 record.

12 "The challenged decision relies on the adoption of
13 an exception to Goal 3 as the justification for
14 not complying with ORS 215.283 and LCZO Article 6.
15 ORS 215.283 and LCZO Article 6 establish the
16 requirements of the county's EFU zone. However,
17 it is Goal 3 that requires exclusive farm use
18 zoning to be applied to the subject agricultural
19 land. We therefore agree with the county that, if
20 an adequate exception to Goal 3 is properly
21 adopted for the proposed highway realignment, then
22 failure to comply with ORS 215.283 and LCZO
23 Article 6 would not provide a basis for reversing
24 or remanding the challenged decision." (Emphasis
25 added; footnote omitted.)

26 We then determined the challenged goal exception was invalid
27 because the county did not adopt it as part of its
28 comprehensive plan, and remanded the county's decision.¹

29 The court of appeals reversed and remanded our
30 decision. Schrock Farms, Inc. v. Linn County, 117 Or App
31 390, ___ P2d ___ (1992) (Schrock Farms II). The court
32 specifically disagreed with the above emphasized basis for
33 our determination that a properly adopted exception to

¹An independent basis for remanding the county's decision, not at issue here, was that the county erred in approving the proposed highway realignment as a minor, rather than major, partition.

1 Goal 3 would obviate the requirement for uses of EFU zoned
2 land to comply with ORS 215.283. Id. at 394, 395 n 5. With
3 regard to the applicability of ORS 215.283 to uses of EFU
4 zoned land, the court stated:

5 "ORS 215.283 applies by its terms to land uses in
6 EFU zones and, together with ORS 215.213, it lists
7 the exceptions to farm use that are allowable in
8 those zones. ORS 215.203(1). The county's
9 decision does not purport to change the EFU zoning
10 of the property in question. More to the point,
11 an exception to Goal 3 would not automatically
12 effect or authorize a zone change. * * *
13 Although we do not now foreclose all possibility
14 that the county might properly adopt a zone
15 change, we do conclude that an adequate Goal 3
16 exception does not ipso facto [constitute] one,
17 see ORS 197.732(8)(a), and, without one,
18 ORS 215.283 remains as applicable as it would be
19 in the absence of the goal exception." (Footnote
20 omitted.) Id. at 394.

21 The court remanded the appeal to us "either to resolve the
22 argument [that ORS 215.283 prohibits approval of the
23 proposed highway realignment] or to explain in more detail
24 why an exception would obviate the need for construing and
25 applying ORS 215.283." Id. at 395.

26 **DECISION**

27 **A. Permissibility of Proposed Highway Realignment**
28 **Under ORS 215.283**

29 ORS 215.283(1) lists nonfarm uses that may be allowed
30 in EFU zones. Oregon Laws 1987, chapter 227, section 2,
31 added the following types of roadway improvements to
32 ORS 215.283(1):

33 "(k) Climbing and passing lanes within the right

1 of way existing as of July 1, 1987.

2 "(L) Reconstruction or modification of public
3 roads and highways, not including the
4 addition of travel lanes, where no removal or
5 displacement of buildings would occur, or no
6 new land parcels result.

7 "(m) Temporary public road and highway detours
8 that will be abandoned and restored to
9 original condition or use at such time as no
10 longer needed.

11 "(n) Minor betterment of existing public roads
12 * * * within right of way existing as of
13 July 1, 1987, and contiguous public-owned
14 property * * *."

15 ORS 215.283(2) lists nonfarm uses that may be allowed
16 in EFU zones subject to local government approval under the
17 standards established by ORS 215.296. Oregon Laws 1987,
18 chapter 227, section 2, added the following types of roadway
19 improvements to ORS 215.283(2):

20 "(p) Construction of additional passing and travel
21 lanes requiring the acquisition of right of
22 way but not resulting in the creation of new
23 land parcels.

24 "(q) Reconstruction or modification of public
25 roads and highways involving the removal or
26 displacement of buildings but not resulting
27 in the creation of new land parcels.

28 "(r) Improvement of public roads * * * where
29 additional property or right of way is
30 required but not resulting in the creation of
31 new land parcels."²

²Oregon Laws 1987, chapter 227, section 1, made identical changes to ORS 215.213, which lists the nonfarm uses that may be allowed in the EFU zones of counties that designate marginal lands pursuant to ORS 197.247.

1 The parties agree that the highway realignment at issue
2 in this case is not a type of roadway improvement allowed in
3 an EFU zone under ORS 215.283(1)(k)-(n) or (2)(p)-(r).
4 Petitioners contend that because ORS 215.283 does not
5 authorize the proposed highway realignment in an EFU zone,
6 ORS 215.283 prohibits construction of the proposed highway
7 realignment in an EFU zone.

8 ODOT, on the other hand, contends the proposed highway
9 segment is not a land use regulated by ORS 215.283. ODOT
10 argues that ORS 215.283 does not prohibit new roadways.
11 According to ODOT, roadways are allowed in all zones as uses
12 necessary and accessory to the land uses allowed in those
13 zones. See Lamb v. Lane County, 7 Or LUBA 137, 143 (1983)
14 (uses which are necessary and accessory to forest uses
15 listed in Goal 4, but which are not themselves listed as
16 forest uses, such as logging roads, may be allowed on forest
17 land).

18 ODOT further argues that ORS 366.215, 366.290(1) and
19 (2) and 366.295 authorize the Oregon Transportation
20 Commission (OTC) and ODOT to establish, locate and realign
21 state highways anywhere in the state, regardless of land use
22 designations and zoning.

23 The general statutory authorization given to the OTC
24 and ODOT to establish, locate and realign state highways
25 predates the adoption of statewide land use planning laws.
26 ODOT was a chief sponsor of the 1987 legislation (Senate

1 Bill 711) that added certain types of road and highway
2 improvements to the nonfarm uses allowed in an EFU zone
3 under ORS 215.283. An ODOT representative's testimony in
4 support of Senate Bill 711 included the following
5 statements:

6 "Senate Bill 711 would amend ORS 215.213 and
7 ORS 215.283 by permitting certain public road and
8 highway improvements in [EFU] zoned lands. This
9 bill would apply to all public roads and highways
10 * * *.

11 "Senate Bill 711 would allow improvements to only
12 existing road facilities. This legislation would
13 not apply to major new road alignments, new roads
14 or bypasses, or new interchanges.

15 "This proposed legislation would not apply if the
16 highway improvement created a new isolated parcel.
17 If parcelization occurred, then the existing
18 [goal] exception process would govern." (Emphasis
19 added.) Minutes, Senate Committee on Agriculture
20 and Natural Resources (SB 711), March 25, 1987,
21 Exhibit A, at 1-2.

22 "There is a tremendous gain by passing SB 711.
23 For example, if a county or [the] state wanted to
24 build an additional travel lane next to an
25 existing road facility in EFU lands, existing law
26 requires a lengthy [goal] exception [process]
27 before any construction can begin. However, with
28 SB 711, the local planning body would still review
29 this travel lane proposal, but the planning
30 process would be greatly streamlined because an
31 exception would not be required." (Emphasis
32 added.) Id. at 6.

33 There would be no reason to amend ORS 215.283 to add
34 certain types of road and highway improvements if, as ODOT
35 argues, roadways in EFU zones are not land uses regulated by
36 land use statutes, goals and ordinances. The action of the

1 1987 Legislature to add certain types of roadway
2 improvements to the nonfarm uses that may be allowed in an
3 EFU zone under ORS 215.283, is consistent only with an
4 interpretation of ORS 215.283 as governing the
5 permissibility of constructing new roadways and roadway
6 improvements in EFU zones. Therefore, we agree with
7 petitioners that ORS 215.283 does not allow construction of
8 the proposed highway realignment in an EFU zone.³

9 **B. Effect of Exception to Goal 3**

10 Petitioners argue that regardless of whether an
11 exception to Goal 3 is properly adopted, because ORS 215.283
12 prohibits the proposed highway realignment in an EFU zone, a
13 zone change is required to allow the proposed use. As
14 explained above, the court of appeals rejected our reasoning
15 in Schrock Farms I that because the requirement for the
16 subject property to be zoned EFU is imposed by Goal 3, the
17 proposed highway realignment could be constructed in an EFU
18 zone under an exception to Goal 3.

19 The only additional argument provided by intervenor in
20 support of its position that a Goal 3 exception is a
21 sufficient basis for allowing the proposed highway

³We conclude only that roadway improvements other than those specified under ORS 215.283(1)(k)-(n) and (2)(p)-(r) (and the corresponding provisions of ORS 215.213) are not allowed in EFU zones. Our opinion in Lamb v. Lane County, supra, concerned a situation in which the applicable legal standard governing the use of lands with a particular designation made no mention of road improvements of any type. That is not the case with regard to the standards governing use of EFU zoned lands.

1 realignment, and that a zone change is not required, is that
2 ORS 215.283 is applicable to the challenged decision only
3 because its application is required by Goal 3. Intervenor
4 argues ORS 215.283 is not a land use statute directly
5 applicable to local government land use decisions in EFU
6 zones. According to intervenor, ORS 215.283, together with
7 the definition of "farm use" in ORS 215.203 and the farm tax
8 assessment program established by ORS chapter 308, are
9 primarily tax statutes, and are not land use statutes
10 applicable to land use decisions. Springer v. LCDC, 111
11 Or App 262, 826 P2d 54, rev den 313 Or 354 (1992).

12 Springer concerns review of the Land Conservation and
13 Development Commission's certification, pursuant to
14 ORS 197.180(1) and (6), of the Department of Revenue's
15 (DOR's) state agency coordination program. Springer
16 recognizes that "the definition of 'farm use' in
17 ORS 215.203(2)(a) plays a role in both" the taxation and
18 land use statutes, and concludes that the DOR's farm tax
19 assessment program is not a program affecting land use under
20 ORS 197.180. Id. at 268. Springer does not, however,
21 indicate in any way that ORS 215.213 and 215.283 are
22 primarily tax statutes. Rather, the court states that
23 "ORS 215.213 and 215.283 provide generally for ancillary or
24 nonfarm uses that may be allowed by counties on land zoned
25 for exclusive farm use." Id. at 264.

26 More importantly, the court of appeals has in several

1 instances recognized that ORS 215.283 establishes standards
2 directly applicable to county land use decisions concerning
3 EFU zoned land. In Schrock Farms I, supra, 117 Or App
4 at 394, the court stated that "ORS 215.283 applies by its
5 terms to land uses in EFU zones and * * * lists the
6 exceptions to farm use that are allowable in those zones."
7 In Forster v. Polk County, 115 Or App 475, 478, 839 P2d 241
8 (1992), the court stated that "ORS 215.283(1)(f) [is]
9 directly applicable to the county's decision" to approve a
10 farm dwelling in an EFU zone. Finally, in Newcomer v.
11 Clackamas County, 92 Or App 174, 758 P2d 369, modified 94 Or
12 App 33, 764 P2d 927 (1988), the court found that provisions
13 of ORS 215.283 are directly applicable to county decisions
14 concerning uses in EFU zones.

15 We conclude that ORS 215.283 applies to the challenged
16 decision, limiting the nonfarm uses the county may allow in
17 its EFU zone. Further, the court of appeals rejected our
18 previous rationale for concluding that a properly adopted
19 exception to Goal 3 would allow the county to approve a use
20 not listed by ORS 215.283 in its EFU zone. Accordingly, we
21 also conclude that a zone change is required to allow the
22 proposed highway realignment.

23 ODOT did not apply for a zone change, and the
24 challenged county decision does not purport to adopt one.
25 Because the proposed highway realignment is prohibited as a
26 matter of law in an EFU zone, we must reverse the county's

1 decision. OAR 661-10-071(1)(c).

2 The county's decision is reversed.