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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
WALLOWA COUNTY,)
)
Respondent.)

LUBA No. 94-136

FINAL OPINION
AND ORDER

Appeal from Wallowa County.

Celeste J. Doyle, Assistant Attorney General, filed the petition for review. With her on the brief was Theodore R. Kulongoski, Attorney General; Thomas A. Balmer, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

No appearance by respondent.

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

REVERSED 12/21/94

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision approving a minor
4 partition of an approximately 2,289 acre parcel.

5 **FACTS**

6 The parent parcel includes land zoned Exclusive Farm
7 Use (EFU) and land zoned Timber-Grazing (T/G). The approved
8 minor partition divides the parent parcel into three
9 parcels. Parcel 1 is 48.4 acres in size and is zoned EFU.
10 Parcels 2 and 3 are 1040.5 and 1200 acres in size,
11 respectively, and are zoned partly EFU and partly T/G.

12 The Wallowa County Comprehensive Plan and Wallowa
13 County Zoning Articles (WCZA) were originally acknowledged
14 by the Land Conservation and Development Commission (LCDC)
15 pursuant to ORS 197.251 in 1978. Periodic review of the
16 county's plan and land use regulations was completed by LCDC
17 in 1990, pursuant to ORS 197.640 to 197.649 (1989). The
18 subject minor partition application was filed on March 8,
19 1994.

20 **BACKGROUND**

21 Prior to August 7, 1993, Statewide Planning Goal 3
22 (Agricultural Land) provided the following with regard to
23 minimum lot sizes in exclusive farm use zones:

24 " * * * Such minimum lot sizes as are used for any
25 [exclusive] farm use zones shall be appropriate
26 for the continuation of the existing commercial
27 agricultural enterprise within the area."

1 Also prior to August 7, 1993, OAR 660-05-015 ("Minimum Lot
2 Size Standard"), adopted by LCDC to implement the above
3 quoted Goal 3 provision, recognized that the Goal 3 minimum
4 lot size standard does not require a specific minimum lot
5 size expressed in acres, but rather can be applied through
6 local regulations in a variety of ways.
7 OAR 660-05-015(3)(c) specifically recognized the Goal 3
8 minimum lot size standard could be satisfied by "performance
9 standards, which are used to decide appropriate lot sizes
10 for farm and nonfarm uses on a case-by-case basis."

11 Effective August 7, 1993, Goal 3 was amended to
12 recognize three types of agricultural land (high-value
13 farmland, important farm land, and small-scale resource
14 land). With regard to minimum lot sizes for agricultural
15 land, Goal 3 was amended to provide:

16 "Counties shall establish minimum lot sizes for
17 new lots or parcels in each agricultural land
18 designation. The minimum parcel size established
19 for farm uses in high-value and important farmland
20 zones shall be appropriate to maintain the
21 existing commercial agricultural enterprise within
22 the area. The minimum lot or parcel size in
23 small-scale resource zones shall be consistent
24 with the resource capabilities and other factors
25 related to development of such lands."

26 At the same time, OAR Chapter 660, Division 5, was repealed
27 and replaced with OAR Chapter 660, Division 33. OAR
28 Chapter 660, Division 33 included rules entitled "Minimum
29 Lot Size Requirements in Small-Scale Resource Land"
30 (OAR 660-33-070) and "Minimum Parcel Size Requirements in

1 Areas of High-Value and Important Farmland"
2 (OAR 660-33-100). Under these rules, counties were required
3 to establish minimum acreage sizes for new lots or parcels
4 in these areas, and no provision was made for applying
5 performance standards on a case-by-case basis.

6 The 1993 Oregon Legislature rejected the concept of
7 small-scale resource land and directed that LCDC not adopt
8 or implement any rule to identify or designate small-scale
9 farmland. Or Laws 1993, ch 792, § 28 (codified at
10 ORS 215.304). With regard to minimum lot or parcel sizes in
11 exclusive farm use zones, the 1993 Legislature adopted the
12 following provisions, which became effective on November 4,
13 1993:

14 "(1) Except as provided in subsection (2) of this
15 section, the following minimum lot or parcel
16 sizes apply to all counties:

17 "(a) For land zoned for exclusive farm use and
18 not designated rangeland, at least 80
19 acres;

20 "(b) For land zoned for farm use and
21 designated rangeland, at least 160
22 acres[.]

23 "* * * * *

24 "(2) A county may adopt a lower minimum lot or
25 parcel size than that described in subsection
26 (1) of this section by demonstrating to [LCDC]
27 that it can do so while continuing to meet the
28 requirements of ORS 215.243 * * * and the land
29 use planning goals adopted under ORS 197.230.

30 "(3) A county with a minimum lot or parcel size
31 acknowledged by [LCDC] pursuant to ORS 197.251

1 after January 1, 1987, or acknowledged
2 pursuant to periodic review requirements under
3 ORS 197.628 to 197.636[,] that is smaller than
4 those prescribed in subsection (1) of this
5 section need not comply with subsection (2) of
6 this section." ORS 215.780.¹

7 On March 1, 1994, LCDC again amended Goal 3. With
8 regard to minimum lot or parcel sizes for agricultural land,
9 Goal 3 currently provides:

10 "Counties shall establish minimum sizes for new
11 lots or parcels in each agricultural land
12 designation. The minimum parcel size established
13 for farm uses in farmland zones shall be
14 consistent with applicable statutes. If a county
15 proposes a minimum lot or parcel size less than 80
16 acres, or 160 acres for rangeland, the minimum
17 shall be appropriate to maintain the existing
18 commercial agricultural enterprise within the area
19 and meet the requirements of ORS 215.243."

20 At the same time, LCDC amended OAR Chapter 660, Division 33.
21 OAR 660-33-100 ("Minimum Parcel Size Requirements")
22 currently requires counties to establish minimum sizes for
23 new parcels for land zoned for exclusive farm use. The rule
24 allows a county to adopt different minimum parcel sizes for
25 distinct commercial agricultural areas of the county.
26 OAR 660-33-100(9). However, a county cannot adopt a minimum
27 parcel size of less than 160 acres for rangeland or less
28 than 80 acres for other farmland, unless LCDC approval is
29 granted. OAR 660-33-100(1) and (2). The rule sets out the
30 process a county must use to determine appropriate minimum

¹The legislature also directed LCDC to amend its administrative rules to conform to ORS 215.780 by March 1, 1994. ORS 215.304(2).

1 parcel sizes for its agricultural areas, but does not
2 provide that minimum parcel sizes can be determined on a
3 case-by-case basis, through the application of performance
4 standards to individual land division applications.

5 **DECISION**

6 Petitioner contends the challenged decision violates
7 ORS 215.780, Goal 3 and OAR 660-33-100 by creating a new
8 EFU-zoned parcel only 48.4 acres in size.

9 WCZA 15.025(1) establishes standards for the creation
10 of new parcels in the EFU zone. WCZA 15.025(1) does not
11 establish a specific minimum parcel size, but rather allows
12 new parcels of less than 160 acres to be created as farm
13 parcels if findings are adopted demonstrating compliance
14 with either one of the two alternative standards quoted
15 below:

16 "A. [T]he subject parcel is typical of the
17 predominant commercial farm unit pattern in
18 the area, as determined by an inventory of
19 commercial farm units within a two mile
20 radius of the subject parcel.

21 "B. [T]he lot size is appropriate for the
22 continuation of the existing pattern of the
23 commercial agriculture within the area,
24 considering such factors as field size, types
25 of crops and compatibility with adjacent
26 operations. * * *

27 WCZA 15.025(1) was approved by LCDC in its 1990 order
28 terminating the county's periodic review, and has not been
29 amended since then to reflect ORS 215.780 or LCDC's March 1,
30 1994 amendments to Goal 3 and OAR 660-33-100, as required by

1 ORS 197.646.²

2 The challenged decision determines that creation of the
3 subject 48.4-acre parcel is permissible because (1) under
4 ORS 215.780(3), the county is not required to obtain prior
5 LCDC approval for use of a minimum parcel size smaller than
6 allowed by ORS 215.780(1) because WCZA 15.025(1)(B) was
7 acknowledged by LCDC's 1990 periodic review order; or
8 (2) the minimum parcel size standard established by
9 WCZA 15.025(1)(B), which the proposed partition satisfies,
10 complies with ORS 215.780.³ Record 4, 10. The county's
11 decision also states that OAR 660-33-100 is not applicable,
12 because it does not include the exception for minimum parcel
13 sizes previously acknowledged in periodic review found in

²Under ORS 197.646(3), if a local government does not amend its plan and land use regulations to reflect new or amended land use statutes, statewide planning goals or administrative rules when such statutes, goals or rules become applicable to the local government, the new or amended statute, goal or rule "shall be directly applicable to the local government's land use decisions."

³Petitioner contends the county also found, in the alternative, that creation of parcel 1 is justified because conditions imposed on the approval (a limitation that no dwelling shall be allowed on the 48.4-acre parcel 1, and that it cannot be conveyed separately from the 1040.5-acre parcel 2) mean that parcel 1 does not offend the statutory, goal and rule minimum parcel size requirements because it is, in essence, inseparable from parcel 2.

Parcel 1 is physically separated from parcel 2 by a portion of the 1200-acre parcel 3. The challenged decision repeatedly refers to creating parcel 1 as a separate parcel. There is no attempt in the challenged decision to justify the creation of parcel 1 based on the conditions of approval prohibiting a dwelling on parcel 1 and requiring it to remain in common ownership with parcel 2. Therefore, we do not address this issue further.

1 ORS 215.780(3). Record 10.

2 Wallowa County's periodic review was conducted under
3 ORS 197.640 to 197.649 (1989) (old periodic review process).
4 In 1991, after Wallowa County's periodic review was
5 completed, the statutes establishing the old periodic review
6 process were repealed and were replaced by a new periodic
7 review process, codified at ORS 197.628 to 197.646. See
8 Williams v. Clackamas County, 27 Or LUBA 602, 606 (1994).
9 The substantive and procedural requirements for the new
10 periodic review process are found in ORS 197.628, 197.633
11 and 197.636.

12 ORS 215.780(3) exempts a county from having to obtain
13 prior LCDC approval to adopt a minimum parcel size for
14 exclusive farm use zones less than those authorized by
15 ORS 215.780(1), if the county has "a minimum lot or parcel
16 size acknowledged by [LCDC] * * * pursuant to periodic
17 review requirements under ORS 197.628 to 197.636 * * *."
18 (Emphases added.) WCZA 15.025(1)(B) was subject to periodic
19 review by LCDC under the old periodic review provisions of
20 ORS 197.640 to 197.649 (1989), not under the new periodic
21 review provisions of ORS 197.628 to 197.636. We therefore
22 agree with petitioner that the county may not apply a
23 minimum lot size less than that required by ORS 215.780(1)
24 to EFU-zoned land without LCDC approval pursuant to
25 ORS 215.780(2). There is no contention here that such LCDC
26 approval has been sought or obtained.

1 Because the challenged decision creates a 48.4-acre
2 EFU-zoned parcel, and the creation of such a parcel is
3 prohibited under ORS 215.780(1), the decision must be
4 reversed. OAR 661-10-071(1)(c).

5 One additional point merits comment. The challenged
6 decision takes the position that a case-by-case
7 determination of appropriate minimum parcel sizes in the EFU
8 zone, under the WCZA 15.025(1) process, satisfies the
9 requirement of ORS 215.780(2) for a "lower minimum lot or
10 parcel size than that described in [ORS 215.780(1) which]
11 meet[s] the requirements of ORS 215.243 * * * and the land
12 use planning goals adopted under ORS 197.230."

13 Petitioner argues that ORS 215.780, Goal 3 and
14 OAR 660-33-100 require a county to adopt one or more minimum
15 parcel sizes of specific acreages for exclusive farm use
16 zone(s), and do not allow determinations of minimum parcel
17 sizes in EFU zones through the case-by-case application of
18 performance standards. We agree with petitioner. The
19 Goal 3 and administrative rule language existing prior to
20 August 7, 1993 that specifically allowed such case-by-case
21 determinations of minimum parcel size in EFU zones has been
22 repealed and replaced by statutory, goal and rule provisions
23 that make no provision for such case-by-case determinations.

24 The county's decision is reversed.