

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34

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

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

LUBA No. 95-165
FINAL OPINION
AND ORDER

Appeal from Polk County.

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

David Doyle, County Counsel, Dallas, filed the response brief and argued on behalf of respondent.

LIVINGSTON, Chief Referee; GUSTAFSON, Referee, participated in the decision.

REMANDED 03/28/96

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner seeks remand of the county's amendment of
4 its comprehensive plan and land use regulations in a manner
5 that petitioner contends is inconsistent with 1993 land use
6 legislation affecting agricultural land.

7 **MOTION TO DISMISS**

8 During oral argument before this Board, the county
9 contended for the first time that the challenged county
10 ordinance provisions were identical or nearly identical to
11 similar provisions in the Lane [County] Code, and argued
12 petitioner was treating the two counties differently for no
13 good reason. We generally do not consider arguments made
14 for the first time at oral argument before the Board. See
15 DLCD v. Douglas County, 28 Or LUBA 242, 252 (1994).
16 Moreover, we do not understand petitioner's treatment of
17 Lane County to be particularly relevant to our determination
18 of whether the Polk County Zoning Ordinance (PCZO) satisfies
19 applicable statutory requirements. However, petitioner's
20 attorney volunteered to investigate the county's contention
21 and, if it proved true, to consider dismissing its appeal.
22 We asked petitioner to notify us by letter within two weeks
23 of oral argument whether it wished to dismiss this appeal.

24 Within that time, petitioner filed a Supplemental
25 Memorandum Addressing Lane County Minimum Lot Size
26 Requirements (Supplemental Memorandum), which apparently

1 distinguishes comparable provisions in the Lane Code from
2 the challenged provisions in the PCZO. The Supplemental
3 Memorandum obviously goes beyond the scope of the letter the
4 Board had requested.¹ The county then filed an Objection to
5 Supplemental Memorandum (Objection), in which it asks this
6 Board to "find that the Supplemental Memorandum was both
7 untimely and improper, and has in fact prejudiced the rights
8 of [the county]." Objection 3. The county also moves to
9 dismiss this appeal on the grounds that the Supplemental
10 Memorandum is not authorized by our rules.

11 The filing of the Supplemental Memorandum has served to
12 notify this Board that petitioner has decided not to dismiss
13 its appeal. We will consider neither the county's arguments
14 pertaining to the Lane Code nor the discussion and argument
15 contained in the Supplemental Memorandum. The county has
16 not been prejudiced by the filing of the Supplemental
17 Memorandum.

18 The county's motion to dismiss is denied.

19 **FACTS**

20 On May 5, 1995, the county notified petitioner that, as
21 required by ORS 197.646(1), the county intended to amend its
22 comprehensive plan and zoning ordinance in response to 1993

¹Petitioner may have been confused at oral argument by a discussion of possible further briefing to occur by agreement between the parties. That discussion was unproductive. The ultimate consensus was that petitioner would merely notify the Board of its decision on whether to dismiss its appeal.

1 legislative changes. See Oregon Laws 1993, chapter 792(7).²
2 After public hearings and an opportunity to comment, in
3 which petitioner participated, the county adopted amendments
4 that left unchanged the lot and parcel sizes that predated
5 the adoption of the 1993 legislative changes.

6 This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioner contends the county's newly amended land use
9 regulations do not establish a "minimum lot or parcel size,"
10 as required by ORS 215.780, the codification of Oregon Laws
11 1993, chapter 792(7) and subsequent amendments.³ The county

²Oregon Laws 1993, chapter 792 is commonly known as "House Bill 3661."

³ORS 215.780 provides, in relevant part:

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

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

** * * * *

"(2) A county may adopt a lower minimum lot or parcel size than that described in subsection (1) of this section in any of the following circumstances:

** * * * *

"(3) A county with a minimum lot or parcel size acknowledged by the [Land Conservation and Development Commission (LCDC)] pursuant to ORS 197.251 after January 1, 1987, or acknowledged pursuant to periodic review requirements under ORS 197.628 to 197.636 that is smaller than those prescribed in subsection (1) of this section need not comply with subsection (2) of this section.

1 responds that it is exempt under ORS 215.780(3) from the 80-
2 acre minimum lot or parcel size requirement stated in ORS
3 215.780(1)(a) for "land zoned for exclusive farm use and not
4 designated rangeland," because it has a minimum lot or
5 parcel size smaller than 80 acres that was acknowledged by
6 LCDC after January 1, 1987.⁴

"* * * * *"

⁴The county's land partition standards are found at PCZO 136.070(A), which provides:

- "1. Parcels 80 Acres or Larger The following standards apply to all land divisions on resource (farm) parcels where the proposed or existing parcels are 80 acres or larger in size.
 - "a. All proposed parcels are 80 acres or greater in size;
 - "b. The agricultural enterprise is appropriate for the area considering other commercial agricultural enterprises located within 1/4 mile to determine if there are conflicts; and
 - "c. The additional parcel(s) will not significantly impact identified sensitive fish or wildlife habitat.
 - "d. The resulting parcels are configured such that they are efficient for agricultural use employing accepted farming practices.
 - "e. The division will not result in an appreciable increase in operating costs.
 - "f. The division will not materially alter the stability of the land use pattern in the area.
 - "g. The division is consistent with ORS 215.243.

"* * * * *"

"2. Parcels Less than 80 Acres The following standards apply to all proposed land divisions on resource (farm) parcels where the proposed or existing parcels are less than 80 acres, but at least as large as the size determined under subsection (a) below.

"a. Minimum parcel size. Minimum acreage is a function of commodity type, and is defined by the smaller of: (1) the average owned size of farm; or, (2) the average acreage of the specified crop in the acreage range. No parcels smaller than 20 acres shall be created. The minimum parcel sizes by commodity are:

"Berries and Grapes	20 acres
"Horticultural Specialties	20 acres
"Vegetables	30 acres
"Tree Fruits and Tree Nuts	56 acres
"Field Crops	80 acres
"Cash Grains	80 acres
"General Farms	80 acres
"Extensive Animal Grazing	80 acres

"b. The new parcel(s) will not significantly impact identified sensitive fish and wildlife habitat.

"c. The agricultural enterprise is appropriate considering soils, productivity, topography, and other agricultural activities located within 1/4 miles to determine if there are conflicts.

"d. The resulting parcels are configured such that they are efficient for agricultural use employing accepted farming practices.

"e. The division will not result in an appreciable increase in operating costs.

"f. The division will not materially alter the stability of the agricultural enterprise in the area.

"g. The division is consistent with ORS 215.243.

** * * * *

"3. Parcels With Special Circumstances The following standards apply to all proposed land divisions on resource (farm) parcels with extremely unusual

circumstances which do not qualify for a land partition under Sections 136.070(A)(1) or 136.070(A)(2). The hearings officer for Polk County shall conduct a public hearing to determine whether the subject parcel(s) qualify for a land partition under the special circumstances criteria. The hearings officer shall determine that:

"a. The applicant has submitted a Farm Management Plan (for at least a 3-year period) that includes:

"1. Evidence that the parcel is capable of producing a yield sufficient to qualify as a parcel size listed by commodity based on soils, yield data and current employment; [t]he minimum parcel sizes by commodity are:

"Berries and Grapes	20 acres
"Horticultural Specialties	20 acres
"Intensive Animal Husbandry	24 acres
"Vegetables	30 acres
"Tree Fruits and Tree Nuts	56 acres
"Field Crops	80 acres
"Cash Grains	80 acres
"General Farms	80 acres
"Extensive Animal Grazing	80 acres

"2. An evaluation by the farm review team * * * addressing the parcel's production capability to produce \$40,000 in annual gross sales;

"3. Evidence that improvements as specified in the Farm Management plan are installed or a performance bond or letter of credit has been required, and financing is arranged; and

"4. Evidence that marketing commitments have been obtained.

"b. The agricultural action is appropriate, considering soils, productivity, topography, and other agricultural activities located within one-quarter mile to determine if there are conflicts;

"c. No new parcel is less than 20 acres;

"d. The new parcel(s) will not significantly impact identified sensitive fish or wildlife habitat;

1 A comprehensive discussion of the evolution of the
2 relevant state regulations, Statewide Planning Goal 3 and
3 OAR Chapter 660, Division 33 (particularly OAR 660-33-100),
4 is found in DLCD v. Wallowa County, 28 Or LUBA 452, 453-55
5 (1994). As we stated there:

6 "[OAR 660-13-100] currently requires counties to
7 establish minimum sizes for new parcels for land
8 zoned for exclusive farm use. The rule allows a
9 county to adopt different minimum parcel sizes for
10 distinct commercial agricultural areas of the
11 county. OAR 660-33-100(9). However, a county
12 cannot adopt a minimum parcel size of less than
13 160 acres for rangeland or less than 80 acres for
14 other farmland, unless LCDC approval is granted.
15 OAR 660-33-100(1) and (2). The rule sets out the
16 process the county must use to determine
17 appropriate minimum parcel sizes for its
18 agricultural areas, but does not provide that
19 minimum parcel sizes can be determined on a case-
20 by-case basis, through the application of
21 performance standards to individual land division
22 applications." Id. at 455.

23 ORS 215.780(3) establishes two sets of circumstances
24 under which a county need not comply with ORS 215.780(2) to
25 establish a minimum lot or parcel size smaller than those

"e. The resulting parcels are configured such that they
are efficient for agricultural use employing
accepted farming practices;

"f. The division will not result in an appreciable
increase in operating costs;

"g. The division will not materially alter the
stability of the land use pattern in the area; and

"h. The division is consistent with ORS 215.243.

** * * * *

1 stated in ORS 215.780(1). The first, which is presented in
2 this appeal, concerns counties with "a minimum lot or parcel
3 size acknowledged by [LCDC] pursuant to ORS 197.251 after
4 January 1, 1987." The second, which was presented in DLCD
5 v. Wallowa County, concerns counties whose plans were
6 "acknowledged pursuant to periodic review requirements under
7 ORS 197.628 to 197.636." We decided DLCD v. Wallowa County
8 on the basis that Wallowa County's minimum lot or parcel
9 sizes had not been acknowledged pursuant to periodic review
10 requirements under ORS 197.628 to 197.636 (new periodic
11 review process), as required by ORS 215.780(1), but instead
12 pursuant to the earlier periodic review process set forth in
13 ORS 197.640 to 197.647. Id. at 457.

14 Nevertheless, in DLCD v. Wallowa County dicta, we
15 expressly agreed with the petitioner that ORS 215.780, Goal
16 3 and OAR 660-33-100

17 "require a county to adopt one or more minimum
18 parcel sizes of specific acreages for exclusive
19 farm use zone(s), and do not allow determinations
20 of minimum parcel sizes in EFU zones through the
21 case-by-case application of performance
22 standards." Id. at 458.

23 In this appeal we must address the county's contention
24 that the regulations acknowledged in 1988, which we
25 understand to be the same as those in PCZO 136.070(A),
26 established a "minimum lot or parcel size," as that term is
27 used in ORS 215.780. This contention is critical to the
28 county's claim that it need not comply with ORS 215.780(2).

1 Petitioner challenges all three subsections of
2 PCZO 136.070(A) on the ground that each violates
3 ORS 215.780(1)(a) by requiring determinations of minimum
4 parcel sizes through the case-by-case application of
5 performance standards, exactly the approach we rejected in
6 DLCD v. Wallowa County. The county responds that ORS
7 215.780 does not mandate a fixed, numerical minimum lot or
8 parcel size. The county maintains that
9 PCZO 136.070(A)(2)(a) and 136.070(A)(3)(c) establish a 20-
10 acre minimum lot or parcel size. The county contends that
11 ORS 215.780 requires only that there be an absolute minimum
12 and does not prohibit increasing that minimum depending on
13 the commodity type or special circumstances.

14 ORS 215.780(1) establishes one minimum lot size for
15 each of three types of resource land, including the "land
16 zoned for exclusive farm use and not designated rangeland"
17 described in ORS 215.780(1)(a). ORS 215.780(3) speaks of "a
18 minimum lot or parcel size." Nevertheless, PCZO
19 136.070(A)(2)(a) and 136.070(A)(3)(c) establish an array of
20 minimum lot or parcel sizes, depending either on the
21 proposed commodity or on circumstances which can only be
22 ascertained through a case-by-case review. The 20-acre
23 "floor" is not the minimum lot or parcel size when, for
24 example, the proposed commodity is tree fruits (56 acres) or
25 field crops (80 acres).

26 The county did not have one minimum lot or parcel size,

1 acknowledged by LCDC after January 1, 1987, for land
2 designated for exclusive farm use. Therefore, ORS 197.646
3 requires that it either adopt the 80-acre lot or parcel size
4 set forth in ORS 215.780(1)(a) or meet the requirements of
5 ORS 215.780(2).

6 Petitioner's assignment of error is sustained.

7 The county's decision is remanded.