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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
POLK COUNTY,)
)
Respondent,)
)
and)
)
JACK STEWART and BEVERLY STEWART,)
)
Intervenors-Respondent.)

LUBA No. 96-036

FINAL OPINION
AND ORDER

-----)
1000 FRIENDS OF OREGON,)
)
Petitioner,)
)
vs.)
)
POLK COUNTY,)
)
Respondent,)
)
and)
)
JACK STEWART and BEVERLY STEWART,)
)
Intervenors-Respondent.)

LUBA No. 96-042

Appeal from Polk County.

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

1
2 F. Blair Batson, Portland, filed a petition for review
3 and argued on behalf of petitioner 1000 Friends of Oregon.

4
5 David Doyle, County Counsel, Dallas, filed a response
6 brief and argued on behalf of respondent.

7
8 Mark D. Shipman, Salem, filed a response brief and
9 argued on behalf of intervenors-respondent. With him on the
10 brief was Wallace W. Lien, P.C.

11
12 GUSTAFSON, Referee; HANNA, Chief Referee; LIVINGSTON,
13 Referee, participated in the decision.

14
15 REMANDED 09/10/96

16
17 You are entitled to judicial review of this Order.
18 Judicial review is governed by the provisions of ORS
19 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's approval of a farm
4 dwelling on a parcel zoned for exclusive farm use (EFU).

5 **MOTION TO INTERVENE**

6 Jack and Beverly Stewart (intervenors), the applicants
7 below, move to intervene on the side of respondent. There
8 is no opposition to the motion, and it is allowed.

9 **FACTS**

10 Intervenors applied to the county for approval of a
11 farm dwelling on an approximately 90-acre parcel. The
12 county provided intervenors two options for processing their
13 application: (1) a request for a "land use determination"
14 that their requested farm dwelling is a permitted use under
15 ORS 215.283(1)(f), subject to no additional local or
16 administrative standards; or (2) a request for approval of a
17 farm dwelling under Polk County Zoning Ordinance (PCZO)
18 chapter 136, which implements OAR chapter 660, Division 33
19 (Division 33 rules).¹ Intervenors chose to request a
20 determination from the county that they are entitled as of
21 right to a farm dwelling under ORS 215.283(1)(f).

22 The county planning director administratively approved

¹ORS 215.283(1)(f) provides that "dwellings and other buildings customarily provided in conjunction with farm use" are permitted uses in areas zoned EFU. The criteria in PCZO chapter 136 and the Division 33 rules determine when a proposed dwelling is "customarily provided in conjunction with farm use" under ORS 215.283(1)(f).

1 intervenors' request for a land use determination,
2 concluding intervenors are entitled under ORS 215.283(1)(f)
3 to build a farm dwelling. Both petitioners appealed that
4 decision to the board of county commissioners
5 (commissioners), which conducted a public hearing on the
6 appeals. Both petitioners argued that the county was
7 required to comply with applicable provisions of PCZO
8 chapter 136 and the Division 33 rules in order to determine
9 whether the proposed dwelling would satisfy the ORS
10 215.283(1)(f) standard that the proposed use be in
11 conjunction with farm use.²

12 Following the public hearing, the commissioners upheld
13 the planning director's determination. The decision states,
14 as the applicable approval standard:

15 * * * * *

16 "I. ORS 215.283(1)(f) allows for the
17 establishment of dwellings and other
18 buildings customarily provided in conjunction
19 with farm uses as permitted under the EFU
20 zones for non-marginal lands counties. Polk
21 County is a non-marginal lands county.

22 "J. The Board of Commissioners interprets ORS
23 215.283(f)(1) to allow dwellings and other
24 buildings customarily provided in conjunction
25 with farm uses as permitted uses subject to a
26 land use determination through the Polk
27 County
28 Planning Department." Record 17.

²The notice of public hearing for the appeal hearing stated that the application "is subject to the provisions of chapter 136 of the Polk County Zoning Ordinance."

1 The decision does not include any analysis or review of
2 the application against the approval standards of PCZO
3 chapter 136 or the Division 33 rules. Rather, the decision
4 includes general findings that do not relate to any
5 particular approval standards, and conclude, based upon
6 testimony and evidence from intervenors, that intervenors'
7 proposed dwelling will be "customarily provided in
8 conjunction with a farm use of the kind established by the
9 [intervenor] on this property as permitted by ORS
10 215.283(1)(f)" and that "the day-to-day activities on the
11 subject property are principally directed to the farm use of
12 the land." Record 18.

13 These consolidated appeals followed.

14 **ASSIGNMENT OF ERROR**

15 Both petitioners make essentially the same assignment
16 of error: the county misconstrued and failed to apply the
17 applicable law when it approved intervenors' application
18 without applying PCZO chapter 136 or the Division 33 rules.

19 Intervenors and the county provide essentially the same
20 response: the county properly construed the only applicable
21 law when it determined that the proposed farm dwelling is
22 permitted under ORS 215.283(1)(f). The county further
23 responds that it was not required to consider any Division
24 33 rules or PCZO chapter 136 because they are invalid under
25 Brentmar v. Jackson County, 321 Or 481, 900 P2d 1030 (1995)
26 and Lane County v. LCDC, 138 Or App 635, __ P2d __, modified

1 on reconsideration, 140 Or App 368, ___ P2d ___ (1996). On
2 the same basis, intervenors argue specifically that the
3 county was not required to apply the provisions of OAR 660-
4 33-135(7) and PCZO 136.040(A).³

5 It is undisputed that both petitioners raised the
6 applicability of PCZO chapter 136 and the Division 33 rules
7 before the county. Regardless of whether we could agree
8 with the county that either Brentmar and/or Lane County v.
9 LCDC invalidate the local ordinance and rules implementing
10 ORS 215.283(1)(f), the county's findings are inadequate, and
11 therefore subject to remand, because the county made no
12 findings regarding the applicability of those provisions.
13 See Norvell v. Portland Metro Area LGBC, 43 Or App 849, 853,
14 604 P2d 896 (1979); Eckis v. Linn County, 19 Or LUBA 15, 29
15 (1990).

16 However, no purpose would be served by simply remanding
17 this case for findings expressing the county's implicit
18 determination that the local ordinance and administrative
19 rules are invalid. The county has expressed its position
20 that Brentmar and Lane County v. LCDC invalidate any local
21 or administrative rules implementing ORS 215.283(1)(f), and
22 that the statute itself provides the sole applicable

³OAR 660-33-135(7) and PCZO 136.040(A) specify when a dwelling on land identified as high-value farm land may be considered to be customarily provided in conjunction with farm use. While intervenors' argument may be premised on a presumption that the subject property consists of high-value farm land, the county made no such determination in this case.

1 standard by which the county must evaluate the proposed use.
2 The issue is sufficiently framed for our review.

3 ORS 215.283(1) states, in relevant part:

4 "The following uses may be established in any area
5 zoned for exclusive farm use:

6 "* * * * *

7 "(f) The dwellings and other buildings customarily
8 provided in conjunction with farm use."

9 In Brentmar, the Oregon Supreme Court considered
10 "whether a county may enact and apply legislative criteria
11 of its own that are more restrictive than those found in
12 [ORS] 215.213 and 215.283." Brentmar, 321 Or at 485.⁴ In
13 that case, Jackson County required certain uses listed in
14 ORS 215.283 to be evaluated through a local conditional use
15 approval process.⁵ The Court determined that uses listed in
16 ORS 215.213(1) and ORS 215.283(1) are permitted by right,
17 explaining:

18 "[T]he legislature intended that the uses
19 delineated in ORS 215.213(1) and ORS 215.283(1) be
20 uses 'as of right,' which may not be subjected to
21 additional local criteria." Id. at 496.

⁴The EFU statutes were significantly amended during the 1993 legislative session. The application in Brentmar was subject to pre-1993 statutes. Brentmar does not address the 1993 amendments.

⁵ORS 215.213 addresses only counties that have adopted marginal lands provisions under former ORS 197.247. ORS 215.283 addresses non-marginal lands counties. Jackson County is a non-marginal lands county. Therefore ORS 215.213 was not directly at issue in Brentmar. However, because of the similarity in the uses listed in former ORS 215.213(1) and (2) and former ORS 215.283(1) and (2), the court found its holding applicable to both statutes. Brentmar, 321 Or at 496, n10.

1 Consequently, the court concluded:

2 "[U]nder ORS 215.213(1) and 215.283(1), a county
3 may not enact or apply legislative criteria of its
4 own that supplement those found in ORS 215.213(1)
5 and 215.283(1)." Id.

6 LCDC's rulemaking authority was not at issue in
7 Brentmar, and the court's opinion did not address it in any
8 way. However, in Lane County v. LCDC, the Court of Appeals
9 did consider LCDC's rulemaking authority in evaluating the
10 consistency of OAR 660-33-135(7) with ORS 215.213(2)(b).
11 The court determined that the rule imposes a requirement for
12 evaluating farm dwellings on high-value farm land that is
13 inconsistent with the criteria established by ORS
14 215.213(2)(b) that allow a dwelling in conjunction with a
15 farm use.⁶

⁶OAR 660-33-135(7) states:

"On land identified as high-value farm land, a dwelling may be considered customarily provided in conjunction with farm use if:

"(a) The subject tract is currently employed for the farm use, as defined in ORS 215.203, that produced at least \$80,000 (1994) dollars) in gross annual income from the sale of farm products in the last two years or three of the last five years; and

"(b) Except as permitted in ORS 215.213(1)(r) and 215.283(1)(p), there is no other dwelling on the subject tract; and

"(c) The dwelling will be occupied by a person or persons who produced the commodities which grossed the income in subsection (a) of this section;

"(d) In determining the gross income required by subsection (a) of this section, the cost of purchased livestock

1 In invalidating the rule, the court relied specifically
2 on ORS 215.304(3), which states:

3 "Any portion of a rule inconsistent with the
4 provisions of ORS * * * 215.213 * * *:

5 "(a) Shall not be implemented or enforced;
6 and

7 "(b) Has no legal effect."

8 The court also added that this statute "reiterates" a
9 general standard that an agency may not "adopt rules that
10 are inconsistent with the applicable statute." Lane County

shall be deducted from the total gross income attributed
to the tract."

The court determined this rule to be inconsistent with the standard for
allowing dwellings in conjunction with farm uses in marginal lands counties
under ORS 215.213(2)(b), which states,

"* * * the following uses may be established in any area zoned
for exclusive farm use subject to ORS 215.296:

"* * * * *

"(b) A dwelling in conjunction with farm use or the
propagation or harvesting of a forest product on a lot or
parcel that is managed as part of a farm operation or
woodlot smaller than required under paragraph (a) of this
subsection, if the lot or parcel:

"A. Has produced at least \$20,000 in annual gross farm
income in two consecutive calendar years out of the
three calendar years before the year in which the
application for the dwelling was made or is planted
in perennials capable of producing upon harvest an
average of at least \$20,000 in annual gross farm
income; or

"B. Is a woodlot capable of producing an average over
the growth cycle of \$20,000 in gross annual
income."

1 v. LCDC, 138 Or App at 641.⁷

2 On reconsideration, the court in Lane County v. LCDC
3 expressly stated that it found OAR 660-33-135(7) invalid
4 only as it applied to ORS 215.213(2)(b) and did not "express
5 any opinion regarding the validity of the rule as against
6 other statutes." 140 Or App at 372.⁸

7 In this case, the county argues that Brentmar wholly
8 invalidates any local ordinance or administrative rule that
9 implements ORS 215.283(1)(f), because any ordinance or rule
10 would supplement the requirements of the statute. It also
11 suggests that the ruling in Lane County v. LCDC should be
12 read to invalidate OAR 660-33-135(7) as it applies not only
13 to ORS 215.213(2)(b) but also to ORS 215.283(1). We do not
14 find support for the county's position in either case.

15 Brentmar does not prohibit local regulations that

⁷ORS 215.304 was enacted during the 1993 legislative session. ORS 215.283 is notably absent from the list of statutes in 215.304 that specifically circumscribe LCDC's rulemaking authority.

⁸The court on reconsideration did not address, and the county apparently did not raise, the issue of consistency of the rule with ORS 215.213(1)(g), which provides that, in marginal lands counties,

"the following uses may be established in any area zoned for exclusive farm use:

"* * * * *

"(g) A dwelling customarily provided in conjunction with farm use if the dwelling is on a lot or parcel that is managed as part of a farm operation not smaller than the minimum lot size in a farm zone with a minimum lot size acknowledged under ORS 197.251."

1 implement uses permitted under ORS 215.283(1). Rather,
2 Brentmar prohibits counties from imposing supplemental
3 criteria in evaluating uses permitted by right under ORS
4 215.213(1) and 215.283(1). Brentmar, 321 Or at 496. By its
5 terms, Brentmar restricts only the process the local
6 government may use in evaluating a use that is listed as
7 permitted under either ORS 215.213(1) or 215.283(1), not
8 local regulations that are consistent with, and not
9 supplemental to, the statute they implement. Moreover,
10 Brentmar does not address LCDC's authority to adopt or apply
11 rules that implement statutory language. Thus, the county's
12 reliance on Brentmar to support an argument that both the
13 local regulations and agency rules are invalid, is
14 misplaced.

15 Lane County v. LCDC invalidated OAR 660-33-135(7) as
16 exceeding the scope of LCDC's rulemaking authority only as
17 it applies to the approval of dwellings on high-value farm
18 land in marginal lands counties under ORS 215.213(2)(b).
19 That case did not invalidate OAR 660-33-135(7) as it applies
20 to ORS 215.283(1), and we reject the suggestion that it
21 should be so read. ORS 215.213(2)(b) provides specific farm
22 income criteria for the siting of a dwelling in conjunction
23 with farm use in marginal lands counties. In contrast, ORS
24 215.283(1)(f) states only that the dwelling must be
25 "customarily provided in conjunction with farm use," with no
26 specific means by which that determination is made. For

1 purposes of evaluating the extent to which implementing
2 agency rules are consistent with the language of the
3 applicable statutes, ORS 215.213(2)(b) and ORS 215.283(1)(f)
4 are not in any way similar. The court's reasoning in
5 finding OAR 660-33-135(7) inconsistent with ORS
6 215.213(2)(b) cannot be extended to find that the Division
7 33 rules are inconsistent with ORS 215.283(1)(f).

8 Moreover, the Court of Appeals in Lane County v. LCDC
9 did not compromise or invalidate LCDC's rulemaking
10 authority. Indeed, the court specifically recognized LCDC's
11 authority to adopt rules implementing 215.283(1) through its
12 adherence to Newcomer v. Clackamas County, 92 Or App 174,
13 758 P2d 369, modified on reconsideration, 94 Or App 33
14 (1988). As the Court of Appeals recognized in Lane County
15 v. LCDC,

16 "Although LCDC's powers are undoubtedly broad,
17 they are limited to those conferred upon the
18 agency by statute. Fish and Wildlife Department
19 v. LCDC, 288 Or 203, 210, 603 P2d 1391 (1979).
20 Our decision in Newcomer v. Clackamas County * * *
21 illustrates the application of those principles in
22 a statutory context very close to the issues in
23 this case. In Newcomer, LCDC adopted rules to
24 implement ORS 215.283(1)(f), which permitted
25 dwellings 'customarily provided in conjunction
26 with farm use' to be located in EFU-zoned land in
27 nonmarginal land counties. LCDC's rules permitted
28 such dwellings only if the 'day-to-day' activities
29 on the land were 'principally directed to the farm
30 use of the land.' * * * The rules were challenged
31 as being inconsistent with the statute. We held
32 that the rules were valid. * * * We noted that the
33 actual use requirement of the rules merely
34 construed the statutory term 'customarily provided

1 in conjunction with farm use' and permissibly
2 'supplement[ed] the incomplete statutory reference
3 in a manner that was consistent with the agency's
4 statutory authority in general and with the
5 language of the law in particular. * * * Thus,
6 Newcomer merely restates the well-established
7 principle of administrative law that an agency may
8 'supplement' incomplete legislation or fill
9 legislative 'gaps.' See, e.g., Springfield
10 Education Assn. v. School Dist., 290 Or 217, 221-
11 30, 621 P2d 547 (1980). It does not, however,
12 stand for the rule that the agency may adopt rules
13 that are inconsistent with the applicable
14 statute." Lane County v. LCDC, 138 Or App at 640.

15 Thus, Newcomer specifically upheld LCDC's authority to
16 adopt rules implementing the "customarily provided in
17 conjunction with farm use" language of ORS 215.283(1)(f) at
18 issue in this case. If Lane County v. LCDC has any bearing
19 on ORS 215.283(1)(f), it is to confirm that the language
20 "customarily provided in conjunction with farm use" in that
21 statute is subject to agency implementing rules.⁹

22 We find no authority in either Brentmar or Lane County
23 v. LCDC to support the county's position that all local or
24 agency rules implementing ORS 215.283(1)(f) are wholly
25 invalid. Neither states nor even suggests that ORS
26 215.283(1)(f) prohibits all implementing rules and
27 regulations when determining whether a proposed dwelling is

⁹While Newcomer clearly establishes that 215.283(1)(f) is subject to refinement through LCDC rule, that case does not validate the administrative rules at issue here. The administrative rules implementing the "customarily provided in conjunction with farm use" standard have been substantially amended since Newcomer.

1 "in conjunction with farm use."¹⁰

2 Intervenor's argument is more restricted. They do not
3 contend that all the Division 33 rules and PCZO chapter 136
4 are invalid. Rather, the only provisions they argue are
5 invalid are OAR 660-33-135(7) and PCZO 136.040, which relate
6 specifically to siting a dwelling on high-value farm land.
7 However, the county has not done any evaluation or reached
8 any conclusions as to which local provisions of PCZO chapter
9 136 or the Division 33 rules are applicable to this
10 application. The county has not yet even determined whether
11 the subject property contains high-value farm land. Thus,
12 intervenor's argument that the local regulations and agency
13 rules relative to siting a farm dwelling on high-value farm

¹⁰Even the county acknowledges that "in conjunction with farm use" must be implemented by some standard. However, its argument suggests that ORS 215.283(1)(f) allows the county to fashion informal or perhaps ad hoc standards in determining whether a particular proposal satisfies the general statutory requirement. The county cites the "Newcomer test" as the only "standard" to which it must adhere. In Newcomer, the Court of Appeals upheld LCDC's rule that stated, generally, that to be in conjunction with farm use, the dwelling must relate to the "day-to-day" operations of the farm. The county fails to explain how a previous administrative rule has somehow become the only implementing standard by which the county may be required to evaluate whether a proposed dwelling is in conjunction with farm use. We do not understand how the county could reach the conclusion that all current administrative rules implementing ORS 215.283(1)(f) are necessarily invalid, but that a former rule that implemented that statute in 1988 has somehow been elevated to the single, albeit unofficial and unadopted, standard the county is obligated to consider in determining whether a proposed dwelling will be used in conjunction with farm use. We are further troubled by the county's suggestion that its means of implementing ORS 215.283(1)(f) need not be in any way codified or otherwise formally stated in a manner so that those who would be subject to the statute might know the standards by which their application would be judged. Property owners have the right to know the uses allowed on their property, and the standards by which development of their property will be evaluated. See Baker v. City of Milwaukie, 271 Or 500, 553 P2d 772 (1975).

1 land are inconsistent with ORS 215.283(1)(f) is premature.

2 If the county could establish that identified
3 applicable criteria of PCZO chapter 136 impermissibly
4 supplement ORS 215.283(1)(f), the criteria would be
5 inapplicable under Brentmar. Likewise, if the county could
6 establish that the applicable agency rules are inconsistent
7 with uses "customarily provided in conjunction with farm
8 use" the rules would be invalid under the reasoning in Lane
9 County v. LCDC. However, the county has not done so.

10 At this point neither the county nor intervenors have
11 established how PCZO 135.040(A) and OAR 660-33-135(7), or
12 any other specific provisions in PCZO chapter 136 and
13 Division 33, are inconsistent with or prohibit any uses
14 permitted under ORS 215.283(1)(f). Because the county has
15 not yet identified the applicable criteria and evaluated
16 those criteria against the facts of this application, it is
17 premature for this Board to evaluate the validity or
18 applicability of any specific provision of PCZO chapter 136
19 or Division 33.

20 The assignment of error is sustained.

21 The county's decision is remanded.