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

MAC LYLE and TERRY LYLE, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
WHEELER COUNTY, )  
 )  
Respondent. )

LUBA No. 97-117

)  
FINAL OPINION  
AND ORDER

DEPARTMENT OF LAND CONSERVATION )  
AND DEVELOPMENT, )  
 )  
Petitioner, )

)  
LUBA No. 97-118

vs. )  
 )  
WHEELER COUNTY, )  
 )  
Respondent. )

Appeal from Wheeler County.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review on behalf of petitioner Department of Land Conservation and Development. With her on the brief was Hardy Myers, Attorney General, David Schuman, Deputy Attorney General, Virginia L. Linder, Solicitor General, and, on behalf of petitioners Mac Lyle and Terry Lyle, Sharon R. Smith, Bend.

No appearance by respondent.

GUSTAFSON, Chief Administrative Law Judge; HANNA, Administrative Law Judge; LIVINGSTON, Administrative Law Judge, participated in the decision.

REVERSED 12/15/97

1           You are entitled to judicial review of this Order.  
2 Judicial review is governed by the provisions of ORS  
3 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's approval of a  
4 nonfarm dwelling on 1.5 acres partitioned from a 79-acre  
5 parcel zoned Exclusive Farm Use (EFU).

6 **FACTS**

7 The subject property is a timbered 79-acre parcel  
8 bisected by Highway 207 into two portions approximately  
9 1.5 acres and 77.5-acres in size. One dwelling currently  
10 exists on the larger portion. On October 4, 1996, Terry  
11 Burgess, the applicant below, filed an application to  
12 partition the subject property into two parcels  
13 corresponding to the portions bisected by Highway 207,  
14 and for a conditional use permit to build a nonfarm  
15 dwelling on the 1.5 acre portion.

16 On December 5, 1996 the planning commission  
17 (commission) denied the application, on the basis that  
18 the property was then designated and zoned for Exclusive  
19 Timber Use (ETU) and could not be partitioned under that  
20 zoning. On January 2, 1997, the commission approved a  
21 zone change for the subject property from ETU to EFU, and  
22 then reversed its earlier denial, approving the partition  
23 and granting the conditional use permit to build a  
24 nonfarm dwelling.

25 Petitioners Mac and Terry Lyle appealed the  
26 commission's approvals to the county court. On March 5,

1 1997 the county court held a hearing and remanded the  
2 decision to the commission for more adequate findings.  
3 Shortly thereafter the commission voted to send the  
4 original findings back to the county court without any  
5 changes. On May 14, 1997, the county court voted to  
6 uphold the commission's decision.

7 This appeal followed.

8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioners jointly argue that partition of the  
10 subject property into a 1.5 acre nonfarm parcel and a  
11 77.5-acre farm parcel is erroneous as a matter of law  
12 because it creates a farm parcel less than the minimum  
13 parcel size in violation of ORS 215.780(1)(a) and Wheeler  
14 County Zoning Ordinance (WCZO) 2.150.2. ORS  
15 215.780(1)(a) imposes a minimum parcel size of at least  
16 80 acres on lands zoned EFU, unless the county  
17 establishes a lesser minimum parcel size pursuant to  
18 either ORS 215.780(2) or (3).<sup>1</sup> The county has

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<sup>1</sup>ORS 215.780(1) provides that:

"\* \* \* [T]he 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;

"(b) For land zoned for exclusive farm use and designated  
rangeland, at least 160 acres; and

"(c) For land designated forestland, at least 80 acres."

1 established a minimum parcel size in EFU zones of 160  
2 acres. WCZO 2.150.2.<sup>2</sup>

3 In Dorvinen v. Crook County, \_\_\_ Or LUBA \_\_\_, (LUBA  
4 No. 96-208), issued this date, we addressed a similar  
5 challenge to division of a 40-acre parcel into three  
6 parcels, on which three nonfarm dwellings would be  
7 placed. In Dorvinen, we examined the text, legislative  
8 history, and relationships among ORS 215.780(1), the  
9 nonfarm dwelling schemes at ORS 215.284(2) and (3),<sup>3</sup> and

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<sup>2</sup>WCZO 2.150.2 provides in relevant part that:

"Land may be partitioned, as defined in Wheeler County Zoning Ordinance, and as referenced in ORS 215.243 and 215.263, when:

- "a. Each lot or parcel created will be 160 acres or more in size; or
- "b. Each lot or parcel created, if intended for a conditional use, shall be for the minimum land area required, as determined by the Planning Commission. Lots or parcels created for non-farm dwellings shall first be found to meet the requirements of Section 2.100 (13), a through f, of this zone." (Emphasis in original).

<sup>3</sup>ORS 215.284(2) provides that:

"In counties not described in subsection (1) of this section, a single-family residential dwelling not provided in conjunction with farm use may be established, subject to approval of the governing body or its designate, in any area zoned for exclusive farm use upon a finding that:

- "(a) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;

1 the corresponding partition statutes at ORS 215.263(7)  
2 and (4).<sup>4</sup> We held in Dorvinen that the legislature did

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"(b) The dwelling is situated upon a lot or parcel or portion of a lot or parcel that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel or portion of a lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land;

"(c) The dwelling will be sited on a lot or parcel created before January 1, 1993;

"(d) The dwelling will not materially alter the stability of the overall land use pattern of the area; and

"(e) The dwelling complies with such other conditions as the governing body or its designate considers necessary."

ORS 215.284(3) is identical to 215.284(2), except with respect to subsection (c):

"In counties not described in subsection (4) of this section, a single-family residential dwelling not provided in conjunction with farm use may be established, subject to approval of the governing body or its designate, in any area zoned for exclusive farm use upon a finding that:

"\* \* \* \* \*

"(c) The dwelling will be sited on a lot or parcel created after January 1, 1993, as allowed under ORS 215.263 (4);

"\* \* \* \* \*" (Emphasis added.)

<sup>4</sup>ORS 215.263(4) provides that:

"The governing body of a county may approve a division of land in an exclusive farm use zone for a dwelling not provided in conjunction with farm use only if the dwelling has been approved under ORS 215.213 (3) or 215.284 (3) or (4)." (Emphasis added.)

In contrast, ORS 215.263(7) provides that:

1 not intend that the minimum parcel size apply to a  
2 nonfarm parcel created under ORS 215.284(3) and ORS  
3 215.263(4). Slip op at 20.

4 As part of the same analysis, we determined that the  
5 legislature also intended that partition under ORS  
6 215.284(3) must leave a remainder parcel that meets the  
7 applicable minimum parcel size. Id. at 21-22. That  
8 conclusion derives from our lengthy analysis, which we do  
9 not repeat here, of the relevant statutes, and the  
10 legislative history.

11 For the reasons expressed in Dorvinen, we conclude  
12 in this case that the county erred in approving the  
13 partition, because it creates a remainder EFU-zoned  
14 parcel less than the applicable minimum parcel size.  
15 Because the partition approved in the decision is  
16 prohibited as a matter of law, the decision must be  
17 reversed. OAR 661-10-071(1)(c); Harrell v. Baker County,  
18 28 Or LUBA 260, 261 (1994); DLCD v. Wallowa County, 28 Or  
19 LUBA 452, 457 (1994).

20 Petitioners make two additional assignments of  
21 error. Because we reverse the county's decision on one  
22 assignment of error, no purpose would be served by our  
23 addressing the remaining assignments of error for which

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"The governing body of a county shall not approve any  
proposed division of a lot or parcel described in ORS  
215.213 (1)(e) or 215.283 (1)(e) or 215.284 (1) or (2)."  
(Emphasis added.)

1 petitioners seek relief. DLCD v. Jackson County, \_\_\_\_

2 Or LUBA \_\_\_\_ (LUBA No. 96117, June 25, 1997), slip op 14.

3 The county's decision is reversed.

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