

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

4 ARNOLD ROCHLIN and CHRISTOPHER)
5 FOSTER,)
6)
7 Petitioners,)
8)
9 vs.)
10) LUBA No. 98-067
11 MULTNOMAH COUNTY,)
12)
13 Respondent,) FINAL OPINION
14) AND ORDER
15 and)
16)
17 WESTERN STATES DEVELOPMENT)
18 CORPORATION,)
19)
20 Intervenor-Respondent.)

Appeal from Multnomah County.

25 Arnold Rochlin and Christopher Foster, Portland, filed the petition for review.
26 Arnold Rochlin argued on his own behalf.

No appearance by Multnomah County.

30 Jeff H. Bachrach and Andrew H. Stamp, Portland, filed the response brief. With
31 them on the brief was O'Donnell, Ramis, Crew, Corrigan and Bachrach. Jeff H. Bachrach
32 argued on behalf of intervenor-respondent.

HOLSTUN, Board Member; GUSTAFSON, Board Chair; HANNA, Board Member,
participated in the decision.

REMANDED 12/07/98

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 The challenged decision adopts amendments to the Multnomah County Code (MCC
4 or code) concerning certain previously approved county permits for dwellings in conjunction
5 with farm use (farm dwellings).

6 **MOTION TO INTERVENE**

7 Western States Development Corporation moves to intervene on the side of
8 respondent. There is no opposition to the motion, and it is granted.

9 **FACTS**

10 In years past, the county approved a number of permits authorizing construction of
11 farm dwellings. The applications for these permits were all submitted to the county before
12 August 7, 1993.¹ For simplicity we refer to these farm dwelling permits as the "old farm
13 dwelling permits." None of the old farm dwelling permits included expiration dates, and at
14 the time the permits were approved the MCC did not specify an expiration date for such
15 permits.

16 The challenged decision adopts MCC 11.15.2030 and MCC 11.15.2031. MCC
17 11.15.2030 provides that the old farm dwelling permits will expire on May 2, 2000 (two
18 years after the effective date of the challenged decision). MCC 11.15.2031 provides that
19 such farm dwelling permits will not expire on May 2, 2000, if the property owners apply for
20 a "determination of substantial compliance with the * * * farm management plan [that was
21 approved as part of the old farm dwelling permits]." Record 16. MCC 11.15.2031 also
22 establishes a procedure for the planning director to determine whether there has been
23 substantial compliance with the approved farm management plan. Once a determination of

¹Apparently all but one of these farm dwelling permit applications were also approved prior to August 7, 1993. One of the applications was filed on August 6, 1993, and presumably this application was approved after August 7, 1993. Petitioners' arguments concerning this permit are addressed under the third assignment of error.

1 substantial compliance is made, the property owner is given one year to apply for a building
2 permit for the farm dwelling.²

3 **FIRST ASSIGNMENT OF ERROR**

4 Under their first assignment of error, petitioners contend that: (1) subsequent changes
5 in Land Conservation and Development Commission (LCDC) administrative rules
6 concerning farm dwellings have had the effect of voiding or revoking the old farm dwelling
7 permits and (2) the challenged code amendments erroneously fail to require that the holders
8 of the old farm dwelling permits demonstrate compliance with current standards that govern
9 both approval of farm dwellings and extension of the deadline for completing farm
10 dwellings.³

11 **A. OAR 660-033-0135 and 660-033-0140**

12 Petitioners' first assignment of error rests entirely on two LCDC administrative rules
13 that were adopted after the old farm dwelling permit applications were submitted to the
14 county. The first rule amends the criteria that must be satisfied to approve farm dwellings.
15 OAR 660-033-0135. That administrative rule became effective March 1, 1994.⁴ The
16 amendments adopted by the county decision challenged in this appeal do not require that the
17 holders of old farm dwelling permits (which were granted pursuant to applications filed
18 before August 7, 1993) demonstrate compliance with the standards in OAR 660-033-0135

²The property owner is then required to obtain the applied-for building permit within one year, or within two years if the planning director finds that failure to obtain the building permit within one year is due to circumstances beyond the property owner's control.

³Petitioners also suggest the challenged decision could also be reversed if we conclude the old farm dwelling permits granted "permanent irrevocable rights" and the challenged decision therefore unlawfully conditions or terminates their duration. No party assigns error to the challenged decision on that ground. Because the issue is not before us, we do not decide it.

⁴The county has adopted code provisions to implement OAR 660-033-0135. MCC 11.15.2010(D). Presumably the county has applied OAR 660-033-0135, or its local code analogue MCC 11.15.2010(D), to farm dwelling applications submitted after August 7, 1993. In any event, only the alleged inconsistency of the code provisions adopted by the challenged decision with OAR 660-033-0135 and 660-033-0140 is at issue in this appeal.

1 and MCC 11.15.2010(D).

2 OAR 660-033-0135 does not apply retroactively to farm dwelling permits that were
3 approved under the standards in effect prior to March 1, 1994. We see no reason why LCDC
4 could not have specified that its new farm dwelling standards apply in circumstances where
5 farm dwellings had been approved before March 1, 1994 but not yet constructed. We assume
6 LCDC's failure to do so indicates an intent that the standards adopted by OAR 660-033-0135
7 apply prospectively, and that those standards do not apply to the dwellings authorized by the
8 old farm dwelling permits. See Edwards and Edwards, 127 Or App 489, 493, 873 P2d 401
9 (1994) (legislative silence as to whether a statute is intended to be applied retroactively is a
10 strong indication that the legislature did not intend retroactive application).

11 The second administrative rule petitioners cite is OAR 660-033-0140, which provides
12 that certain development that is approved in Exclusive Farm Use (EFU) zones after August 7,
13 1993 must be initiated within 2 years. OAR 660-033-0140 also provides for extension of this
14 two year requirement in certain circumstances specified in the rule.⁵

15 The OAR 660-033-0140 provisions imposing time limits on and providing standards
16 for extension of certain EFU zone permits, including farm dwelling permits, expressly apply
17 only to permits approved after August 7, 1993. OAR 660-033-0140 does not prohibit
18 extension of farm dwelling permits that were approved prior to August 7, 1993 and does not
19 require that the standards adopted by that rule be applied to any extensions of such
20 previously approved farm dwelling permits. Prior to adoption of the challenged decision, the
21 old farm dwelling permits were not time-limited; they were of indefinite duration. The
22 county has now taken action in the challenged decision that makes those permits time-limited
23 and may result in those permits expiring. However, the challenged county permit expiration
24 and extension provisions apply to the old farm dwelling permits and are not inconsistent with

⁵The provisions for extension of farm dwelling permits under OAR 660-033-0140 differ substantively from those the county proposes to apply to old farm dwelling permits under the challenged decision.

1 OAR 660-033-0140, which applies only to permits approved after August 7, 1993.⁶

2 **B. Implied Revocation of the Old Farm Dwelling Permits**

3 Petitioners argue that OAR 660-033-0135 and OAR 660-033-0140 adopt "significant
4 new requirements." Petition for Review 6. Petitioners contend that because the legal
5 requirements in OAR 660-033-0135 and OAR 660-033-0140 represent a new "sufficiently
6 restrictive requirement," the old farm dwelling permits are no longer valid. Therefore,
7 petitioners reason, the county's decision which allows the county to extend the old farm
8 dwelling permits, without requiring a demonstration of compliance with the standards in
9 OAR 660-033-0135 and OAR 660-033-0140, violates those provisions.

10 Petitioners' argument is based loosely on the unexceptional principle that "what is
11 once allowed under a law or regulation ceases to be allowed on effectiveness of a new and
12 prohibitively restrictive law or regulation." Petition for Review 7. For example, in City of
13 Portland v. Cook, 48 Or 550, 554-55, 87 P 772 (1906), the court observed that a city
14 ordinance authorizing operation of a slaughterhouse does not prevent a city from
15 subsequently adopting a second ordinance that banned operation of slaughterhouses in the
16 city. Similarly, granting a building permit to construct a use that is allowed under the zoning
17 ordinance when the building permit is issued does not, alone, vest an absolute right to
18 construct that use. Twin Rocks Watseco v. Sheets, 15 Or App 445, 447-51, 516 P2d 472
19 (1973). In that circumstance, where the zoning ordinance is later amended to prohibit the use
20 and the building permit holder has not substantially acted on the building permit, the right
21 granted by the building permit may be revoked. Id.⁷ In Struve v. Umatilla County, 12 Or

⁶As noted earlier, we address petitioners' argument that OAR 660-033-0140 applies to the one old farm dwelling permit that apparently was approved after August 7, 1993, under the third assignment of error.

⁷The Court of Appeals in Twin Rocks explains:

"[M]ere possession of a building permit [does not entitle] a property owner to proceed with construction [of a use] prohibited by an amendment to a zoning ordinance if there has been no actual construction before the amendment was adopted. In such a situation, adoption of a

1 LUBA 54, 57 (1984), we extended the general principle discussed in Cook and Twin Rocks
2 regarding new prohibitory regulations, and concluded that a zoning permit authorizing
3 reconstruction of a bridge did not shield the bridge reconstruction proposal from a
4 subsequently adopted change in law which, while not prohibiting bridge reconstruction,
5 imposed a new requirement for a conditional use permit for such reconstruction.⁸

6 The above cases do not assist petitioners. OAR 660-033-0135 and OAR 660-033-
7 0140 do not adopt a new land use regulation that "prohibits" a use that was allowed under
8 prior land use regulations, as was the case in Cook and Twin Rocks. OAR 660-033-0135
9 simply changes the criteria that must be met to approve farm dwelling permits after March 1,
10 1994. OAR 660-033-0140 only provides that the uses authorized by certain EFU permits
11 approved after August 7, 1993, must be initiated within 2 years or any extensions authorized
12 by the rule. Neither rule imposes a requirement for a new kind of permit, where no such
13 permit approval was previously required, as was the case in Struve. Farm dwellings have
14 been allowed under the MCC as "Uses Allowed Under Prescribed Conditions" before and
15 after adoption of OAR 660-033-0135.⁹

16 Petitioners recognize the practical ramifications of a principle of law under which any
17 change in land use regulations would automatically revoke all existing land use permits, if
18 they were approved under prior versions of the land use regulations. Petitioners also
19 recognize that such a rule could be inconsistent with ORS 215.130 (requiring that counties
20 allow nonconforming uses to continue) and ORS 215.428(3) and 227.178(3) (requiring that
21 permits be approved or denied based on standards that apply at the time the permit

zoning amendment in effect revokes outstanding building permits which have not yet been substantially acted upon." 15 Or App at 448.

⁸There was no claim in Struve that the zoning permit had been substantially acted upon.

⁹Petitioners attach previous and current versions of the relevant MCC provisions to their petition for review. At all relevant times, under the MCC, farm dwellings have been and continue to be allowed through a permitting process that requires a decision by the planning director, notice of that decision and the opportunity for a local appeal to challenge the planning director's decision.

1 application is submitted). Petitioners suggest that such concerns could be avoided by
2 allowing a change in approval standards or criteria to revoke existing permits only where the
3 new land use standards are "sufficiently restrictive" and where the permittee has delayed
4 taking action under the permit past a "time reasonably sufficient to implement a permit."
5 Petition for Review 6, 11. The difficulties that would be involved in applying such
6 subjective limitations are obvious. In any event, absent a clearer basis for such a rule of law,
7 we reject petitioners argument that OAR 660-033-0135 and 660-033-0140 have the legal
8 effect of revoking the old farm dwelling permits.

9 In summary, the only legal requirements identified by petitioners as limiting the
10 county's authority to adopt criteria for terminating and extending the old farm dwelling
11 permits are OAR 660-033-0135 and 660-033-0140. Simply stated, OAR 660-033-0135 and
12 660-033-0140 have no legal effect on the continued validity of the old farm dwelling permits
13 or the county's authority to (1) impose time limits on the old farm dwelling permits (where
14 none existed before) or (2) adopt standards for extending those new time limits.

15 Finally, petitioners also argue that the challenged decision violates Policy 9 of the
16 County Comprehensive Framework Plan and Goal 3 (Agricultural Lands).¹⁰ However,
17 petitioners' argument concerning this plan policy is based entirely on petitioners' position that
18 the plan policy implements Goal 3 and therefore requires that the county demonstrate that the
19 challenged decision complies with OAR 660-033-0135 and 660-033-0140, which in turn
20 implement ORS 215.283(1)(f) and Goal 3 (Agricultural Lands). This argument fails based
21 on petitioners' misunderstanding of the legal effect of OAR 660-033-0135 and 660-033-
22 0140.

¹⁰ Policy 9 provides, in part:

"The county's policy is to restrict the use of these lands to exclusive agricultural and other uses, consistent with state law, recognizing that the intent is to preserve the best agricultural lands from inappropriate and incompatible development."

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioners argue the procedure adopted by the challenged decision for determining
4 and extending the validity of the old farm dwelling permits violates public notice, public
5 hearing and decision making requirements of ORS 197.763, 215.412(2), and 215.416(5), (9)
6 (10) and (11)(a) as well as citizen participation requirements under Statewide Planning Goal
7 1 (Citizen Involvement) and Multnomah County Comprehensive Plan Policy 3.D.

8 Intervenor responds that petitioners' arguments under this assignment of error are
9 premature, because the county should be given the opportunity to interpret its code as being
10 consistent with the statutory requirements identified by petitioners. We do not agree that the
11 challenge is premature. As explained below, we agree with petitioners that certain
12 procedures required by the challenged decision to extend the old farm dwelling permits are
13 inconsistent with certain requirements of ORS 215.416(11). It is true that the county might,
14 in future permit proceedings, recognize the conflict between the code and statute and follow
15 the statutory requirements. However, that does not make the challenged decision to amend
16 the code to apply those provisions to extensions of the old farm dwelling permits any less
17 inconsistent with the relevant statutes.

18 **A. The Notice of Appeal Hearing for Local Appeals of Decisions Extending
19 Old Farm Dwelling Permits**

20 The challenged decision amends the MCC to terminate the old farm dwelling permits
21 unless the dwelling has been constructed or the planning director determines there has been
22 "substantial compliance with the approved farm management plan." MCC 11.15.2031(B)(2).
23 The farm dwellings constitute a "proposed development of land" within the meaning of ORS
24 215.402(4).¹¹ The decision about whether there has been "substantial compliance with the

¹¹ORS 215.416 imposes a number of procedural and substantive requirements for county decisions on "permits." As relevant, OAR 215.402(4) defines "permit" as follows:

1 approved farm management plan" also will require the exercise of significant factual
2 discretion or legal judgment and for that reason is a "discretionary approval," within the
3 meaning of ORS 215.402(4). Flowers v. Klamath County, 98 Or App 384, 391-92, 780 P2d
4 227 (1989); Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986).
5 Because a county decision to extend an old farm dwelling permit under code provisions
6 adopted by the challenged decision is itself a "permit" decision under ORS 215.402(4), the
7 local procedures required by the challenged decision must comply with ORS 215.416.

8 ORS 215.416(11)(a) provides that the county may approve permits without first
9 providing a hearing,

10 "if the hearings officer or other designated person gives notice of the decision
11 and provides an opportunity for appeal of the decision to those persons who
12 would have had a right to notice if a hearing had been scheduled or who are
13 adversely affected or aggrieved by the decision. Notice of the decision shall
14 be given in the same manner as required by ORS 197.763. * * * [T]he appeal
15 shall be a de novo hearing."

16 ORS 197.763(2) identifies the persons who are entitled to notice of hearing. ORS
17 197.763(3)(a) through (j) set out the required content of the notice of hearing. Petitioners
18 contend the procedures adopted by the challenged decision fail to require the content
19 required by ORS 197.763(3)(a) through (j) and fail to require notice to persons entitled to
20 notice under ORS 197.763(2).

21 **1. The County's Notice of Hearing**

22 The procedure adopted by the challenged decision is confusing, because some of the
23 standards and procedures to be applied to extend the old farm dwelling permits are new and
24 some previously adopted county standards and procedures are adopted by reference. The
25 procedure apparently envisioned by the challenged decision calls for the planning director to

"Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.293, 215.317 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto. * * *" (Emphases added.)

1 make an initial decision concerning whether there has been "substantial compliance with the
2 approved farm management plan," based on evidence submitted by the applicant. If the
3 planning director finds there has been "substantial compliance with the approved farm
4 management plan," the old farm dwelling permit may be extended. The planning director's
5 decision becomes the county's final decision, unless that decision is appealed to the county
6 hearings officer. MCC 11.15.2031(B)(5) provides:

7 "The decision of the Planning Director shall become final at the close of
8 business on the tenth day following mailed notice unless a party files a written
9 notice of appeal. Such notice of appeal and the decision shall be subject to the
10 provisions of MCC [11.15] .8290 and .8295."¹² (Emphasis added.)

11 MCC 11.15.8290(E) and (F) provide:

12 "(E) On receipt of a Notice of Appeal, the Planning Director shall schedule
13 a hearing on the agenda for the next meeting of the Hearings Officer,
14 for which notice can be given under subsection (F), below.

15 "(F) Notice of hearing on an appeal filed under MCC .8290(A) shall be as
16 required by MCC .8220(A)(1), (2), (3), (5), (6) and (C)(1)."

17 As explained below, under the above code provisions, MCC 11.15.8220(A)(1), (2), (3), (5)
18 and (6) set out the required content for notices of hearings to consider appeals of planning
19 director decisions concerning extension of old farm dwelling permits. MCC
20 11.15.8220(C)(1) identifies who is entitled to such notices of hearing.

21 **2. Content of the Notice of Appeal Hearing**

22 MCC 11.15.8220(A)(1) through (12) specify the county's general requirements for
23 notice of hearing before the hearings officer or planning commission. Some of those
24 provisions duplicate or parallel the requirements of ORS 197.763(3)(a) through (j).
25 However, MCC 11.15.8290(F) does not require that the notice of hearing include all the
26 information under MCC 11.15.8220(A); it only requires the information in subsections (1),

¹²MCC 11.15.8290(A) substantially duplicates MCC 11.15.2031(B)(5), except that MCC 11.15.8290(A) provides for notice of appeal to be filed by "the applicant" and MCC 11.15.2031(B)(5) provides for the notice of appeal to be filed by "a party."

1 (2), (3), (5), (6). The notice of hearing required by MCC 11.15.8290(F) omits the
2 requirements of MCC 11.15.8220(A)(4) and (7) through (12) which include provisions which
3 parallel ORS 197.763(3) (a), (e), (g), (h), (i), and (j).

4 The county's failure to specify in MCC 11.15.8290(F) that the notices of hearing
5 include all the information required by ORS 197.763(3) is error because the notice required
6 by MCC 11.15.8290(F) is inconsistent with the statutory requirements of ORS 215.416(11)
7 and ORS 197.763(2).

8 **2. Persons entitled to Notices of Appeal Hearings**

9 MCC 11.15.8220(C) provides in part:

10 "In addition to the notice required by MCC [11.15].8120(B) [requiring notice
11 by publication] and any other notice required by law, notice shall be mailed at
12 least ten days prior to the hearing to the following persons:

13 "1. The applicant;

14 "2. All record owners of property within [certain specified distances of the
15 property.]"

16 MCC 11.15.8290(F) requires that the notice of hearing be given to the persons identified in
17 MCC 11.15.8220(C)(1). Because MCC 11.15.8290(F) only refers to subsection one of MCC
18 11.15.8220(C), MCC 11.15.8290(F) only requires that notice of hearing be given to the
19 applicant. MCC 11.15.8290(F) does not require that the property owners identified in
20 subsection two of MCC 11.15.8220(C) be given notice of hearing. Petitioners contend the
21 notice of hearing required under the challenged decision therefore violates ORS
22 197.763(2).¹³ We agree with petitioners.

23 As a final point, we note our disagreement with intervenor that the reference in
24 MCC 11.15.8220(C) to "any other notice required by law" means we can overlook the
25 specific provision in MCC 11.15.8290(F) that the notice be given "as required by

¹³The property owners described in ORS 197.763(2) correspond with the property owners described in MCC 11.15.8220(C)(2).

1 MCC 11.15.8220(A)(1), (2), (3), (5), (6) and (C)(1)." Intervenors contend that we may
2 assume that the directive in MCC 11.15.8220(C) to provide "any other notice required by
3 law" means the county necessarily will ignore the explicit directive in MCC 11.15.8290(F)
4 that limits the persons entitled to notice and limits the content of the notice.

We do not agree with intervenor. We have no way of determining whether the county interprets MCC 11.15.8220(C) in the way intervenor does. MCC 11.15.8220(C) simply recognizes that notice by publication may be required by MCC 11.15.8120(B) and that other kinds of notices may also be required by law. The cited words in MCC 11.15.8220(C) do not make the abbreviated notice requirement in MCC 11.8290(F) harmless error and do not relieve the county of the duty to ensure that its code requirements for notices of permit appeal hearings are consistent with relevant statutory requirements.

12 This subassignment of error is sustained.

13 B. Petitioners' Remaining Subassignments of Error

14 Our resolution of the first subassignment of error requires that we remand the
15 county's decision so that it can adopt appropriate revisions to ensure that the notices of
16 hearing that it will provide under the MCC for reviewing planning director decisions
17 concerning extension of the old farm dwelling permits meet the requirements of ORS
18 215.416(11) and 197.763(2) and (3). Petitioners also allege under separate subassignments
19 of error that the procedures in the MCC that the county proposes to follow in making
20 decisions on the old farm dwelling permits are improper because:

21 1. Under MCC 11.15.2031(B)(2) only the applicant's evidence can be
22 considered by the planning director.¹⁴

¹⁴MCC 11.15.2031(B)(2) provides:

"The Planning Director shall find substantial compliance with the approved farm management plan, based on evidence provided by the applicant, if the activities provided for in the first two years of the farm management plan have been implemented." (Emphasis added.)

1 2. Under MCC 11.15.8290(A) only the applicant can appeal the planning
2 director's decision.¹⁵

3 3. The holders of the old farm dwelling permits are relieved of the
4 burden of proof in a local appeal of the planning director's decision.¹⁶

5 As previously noted, we do not have the benefit of a county response to petitioners'
6 arguments. We agree with petitioners that, at the very least, it is unclear under the MCC as
7 amended by the challenged decision whether anyone other than the applicant has a right to
8 participate in the planning director's decision making process under MCC 11.15.2031(B).¹⁷

9 If persons other than the applicant have such a right, the challenged decision and MCC do
10 not explain how that participation will occur.¹⁸ Neither is it clear under MCC
11 11.15.2031(B)(5) and MCC 11.15.8290(A) who, other than the applicant, is permitted to
12 appeal the planning director's decision.

13 Finally, the "burden of proof" imposed by MCC 11.15.8230(D) is specifically made
14 inapplicable by MCC 11.15.8295(B). The burden of proof required by MCC 11.15.8230(D)
15 includes a requirement that the applicant demonstrate the "factors listed in ORS 215.055
16 have been considered" and "a public need for the requested change and that need will be best

¹⁵As noted earlier, MCC 11.15.8290(A) provides that only the "applicant" may appeal the planning director's decision. MCC 11.15.2031(B)(5), which refers to MCC 11.15.8290, states that a "party" can appeal, but it is not clear who would qualify as a "party" under MCC 11.15.2031(B)(5). See n 12.

¹⁶MCC 11.15.8295(B) provides that the burden of proof described by MCC 11.15.8230(D) does not apply in a hearing on appeal under MCC 11.15.8290.

¹⁷Of course persons other than the applicant need not be given such an opportunity to participate before the hearings officer, provided that the notice of decision and right to a local appeal required by ORS 215.416(11) and 197.763 is provided.

¹⁸MCC 11.15.2031(B)(4) and MCC 11.15.8220(C) provide that notice of an application for a planning director decision and the planning director's decision must be given to the same persons who are entitled to notice under ORS 197.763(2)(a) (i.e. the applicant and property owners within certain specified distances of the affected property). However, it appears that notice of the application and planning director's decision is given after the planning director's decision is made.

1 served by changing the classification of the property in question as compared to other
2 available property[.]"¹⁹

3 The county may well have only intended to eliminate any requirement that the
4 particular burden of proof specified by MCC 11.15.8230(D) be met in appeals of planning
5 director decisions under MCC 11.15.2031(B)(5), without necessarily intending to completely
6 eliminate the burden of establishing compliance with relevant approval criteria. However,
7 we agree it is not clear what the county intended. We also agree with petitioners that the
8 applicant retains the burden throughout the local process to demonstrate compliance with all
9 applicable approval criteria. Fasano v. Washington Co. Comm., 264 Or 574, 586, 507 P2d
10 213 (1973); Strawn v. City of Albany, 20 Or LUBA 344, 350 (1990); Billington v. Polk
11 County, 13 Or LUBA 125, 131 (1985).

12 The second assignment of error is sustained.

13 **THIRD ASSIGNMENT OF ERROR**

14 Petitioners contend the county's provisions for allowing extension of the old farm
15 dwelling permits are less stringent than the standards that govern extension of farm dwelling
16 permits under OAR 660-033-0140. As noted above, the application for one of the disputed
17 old farm dwelling permits was submitted before August 7, 1993, but apparently was
18 approved after August 7, 1993. See n 1. Petitioners argue that OAR 660-033-0140 requires
19 that the standards in the rule be applied to such a decision rendered after August 7, 1993.
20 However, the challenged county decision provides that the county standards apply to the
21 application submitted before August 7, 1993, even though the decision may have been
22 rendered after August 7, 1993.

¹⁹We note that ORS 215.055 was repealed in 1977. The burden to demonstrate "public need" was first imposed in Oregon in Fasano v. Washington Co. Comm., 264 Or 574, 584, 507 P2d 23 (1973), and no longer is legally required in land use proceedings, absent a local requirement that public need must be shown. Neuberger v. City of Portland, 288 Or 155, 170, 603 P2d 771 (1979).

1 ORS 215.428(3) requires that the county apply "the standards and criteria that were
2 applicable at the time the application [for a permit] was first submitted." Petitioners do not
3 dispute that the application for an old farm dwelling permit that may have been approved
4 after August 7, 1993 was submitted before August 7, 1993. We agree with intervenor that
5 OAR 660-033-0140 cannot be applied to require that the permit expiration and extension
6 provisions adopted by that rule be applied to a permit application that was submitted before
7 August 7, 1993, and pending on the date the rule took effect. East Lancaster Neigh. Assoc.
8 v. City of Salem, 30 Or LUBA 147, 164-65 (1995), aff'd 139 Or App 333, 911 P2d 1283
9 (1996). ORS 215.428(3) prevents application of OAR 660-033-0140 in that circumstance, so
10 there is no conflict between OAR 660-033-0140 and the challenged decision.

11 The third assignment of error is denied.

12 The county's decision is remanded.