BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| SUSAN RAMSAY, Petitioner, vs. LINN COUNTY, Respondent, and HILBERT ELLIOT and SHARON ELLIOT, Intervenors-Respondent. | LUBA No. 94-202 FINAL OPINION AND ORDER |

Appeal from Linn County.

Neil S. Kagan, Gresham, filed the petition for review and argued on behalf of petitioner.

Thomas N. Corr, County Counsel, Albany, and Richard D. Rodeman, Corvallis, filed the response brief on behalf of respondent and intervenor-respondent. Richard D. Rodeman argued on behalf of intervenor-respondent.

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

REMANDED 01/05/96

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

Opinion by Livingston.

**NATURE OF THE DECISION**

Petitioners appeal a decision of the board of county commissioners approving a conditional use permit for an accessory dwelling in the county's Farm/Forest (FF) district.

**MOTION TO INTERVENE**

Hilbert and Sharon Elliot (intervenors) move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

On October 5, 1993, intervenors filed an application for a conditional use permit for an accessory farm dwelling on a 78.88-acre parcel in the FF district.[1] The subject property is surrounded by cattle and forest operations on parcels ranging in size from 40 to 240 acres, zoned either FF or Forest Conservation Management. Intervenors have a residence on the subject property, and there is also an authorized medical hardship mobile home, which was occupied at the time of application by intervenors' son and his family. Intervenor Hilbert Elliot was 61 years old at the time of the application and was beginning to need more help

[1]At the time of the challenged decision, 45 acres of the 78.88 acre parcel were employed for growing Christmas trees. The remaining 34 acres were to be converted to Christmas tree production by the end of 1996. Record 4.

with the physical labor associated with farming Christmas trees, which he has done since 1978. Intervenors propose to use the mobile home as a residence for their employees.

The two employees and the family of the married employee would reside in the mobile home. The employees each work 40 hours per week, divided almost evenly between the Christmas tree farm on the subject property and intervenors' 40-acre Christmas tree farm in Polk County. The Polk County property also has a residence, which is occupied by renters who have no involvement with the farm use.

The planning commission approved intervenors' application. On appeal, the board of county commissioners conducted a de novo proceeding and, on September 28, 1994, adopted a final order approving the requested conditional use permit.[2] This appeal followed.

**SCOPE OF REVIEW**

**A. Application of Amended Statute**

The county and intervenors (together, respondents) contend that LUBA lacks jurisdiction to review any of petitioner's assignments of error because they concern

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[2]The county's approval is subject to the following condition:

> "This conditional use permit is issued to Mr. and Mrs. Elliott and is not transferable. If the ownership of the farm changes or the Elliott's farm use changes, making the accessory farm-related dwelling unnecessary, the mobile home shall be removed from the property." Record 2.

issues that petitioner failed to raise below. Petitioner contends she may raise any issue in this appeal, because the county failed to follow the requirements of ORS 197.763 in certain respects. See ORS 197.835(2)(a) (1993 edition); Cummings v. Tillamook County, 26 Or LUBA 139, 143-45 (1993); Wuester v. Clackamas County, 25 Or LUBA 425, 427-30 (1993).

ORS 197.835(2) (1993 edition) provides, in relevant part:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763. A petitioner may raise new issues to [LUBA] if:
>
> "(a) The local government failed to follow the requirements of ORS 197.763; or
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> "* * * * *"

After the briefs were filed in this case, the 1995 legislature amended ORS 197.835(2), which was recodified at ORS 197.835(4), to provide, in relevant part:

> "A petitioner may raise new issues to [LUBA] if:
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> "* * * * *
>
> "(b) The local government failed to follow the requirements of ORS 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government; * * *
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> "* * * * *"

The amended statute overturns the holdings in Cummings and Wuester, supra, upon which petitioner relies. Before

addressing her contention that she can raise any issue because of the county's failure to follow ORS 197.763, we must decide whether ORS 197.835(4) (1995 edition) applies. We conclude it does not.[3]

Some cases contain a general statement that statutory construction requires a prospective interpretation of statutes which affect substantive rights, but permits a statute affecting procedure or remedies to be applied to existing rights as well as rights accruing in the future. See, e.g., Lane v. Brotherhood of L.E. & F., 157 Or 667, 73 P2d 1396 (1937). However, the labels "substantive," "procedural" and "remedial" do not replace an analysis of how a new statute should apply. As the Oregon Supreme Court stated in Joseph v. Lowery, 261 Or 545, 495 P2d 273 (1972), after reviewing earlier cases, "[t]he labels were applied after the court decided whether it thought a new statute affected legal rights and obligations arising out of past actions." 261 Or at 549.

As a general rule, absent some clear indication to the contrary, legislative acts are not to be applied retroactively. Held v. Product Manufacturing Company, 286

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[3]In reaching this conclusion, we overturn our recent holding (which was not essential to the outcome) in Noble v. City of Fairview, ___ Or LUBA ___ (LUBA No. 95-033, November 13, 1995) where, based on Antonnaci v. Davis, 108 Or App 693, 816 P2d 1202 (1991) and State v. Tucker, 90 Or App 506, 753 P2d 427 (1988), we decided that the amendments to ORS 197.835 affect procedural, rather than substantive, rights, and should be applied by LUBA immediately to all pending cases.

Or 67, 71, 592 P2d 1005 (1979); Kempf v. Carpenters and Joiners Union, 229 Or 337, 341, 367 P2d 436 (1961). Since the legislature did not direct that the amendments to ORS 197.835 be applied retroactively, we apply them prospectively.

When a prospective application is required, we "[apply] the legislation in a manner which does not affect legal rights and obligations arising out of past actions or occurrences." Fromme v. Fred Meyer, Inc., 306 Or 558, 562, 761 P2d 515 (1988). The critical issue is when legal rights or obligations are fixed.

When petitioner filed her notice of intent to appeal, she was entitled to rely on Cummings and Wuester, supra. Assuming the county failed to follow the procedural requirements of ORS 197.763, petitioner had the right under ORS 197.835(2) (1993 edition) to raise any issue, whether or not it was raised at the local level. This right was and is substantive. Although the legislature, in amending ORS 197.835, overturned Cummings and Wuester, we do not think it intended to deprive LUBA of jurisdiction over issues that could be raised at the time the notice of intent to appeal was filed.[4]

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[4]This case is not one where a statute completely abolishes appellate jurisdiction. In such cases, the statute applies to cases pending when it becomes effective. See Libby v. Southern Pac. Co., 109 Or 449, 219 P 604, 220 P 1017 (1923); Murphy Citizens Advisory Committee v. Josephine County, ___ Or App ___, ___ P2d ___ (December 27, 1995); Russell v. Pac. Maritime, 9 Or App 402, 496 P2d 292, rev den (1972). Rather, the facts in this case

**B. Application of Wuester Test**

Under ORS 197.835(2)(a) (1993 edition), if petitioner is correct that the county failed to follow any of the requirements of ORS 197.763, petitioner may raise new issues to LUBA. Cummings, supra; Wuester, supra. We consider only petitioner's contention that the board of county commissioners did not make the announcement required by ORS 197.763(5), which provides, in relevant part:

> "At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:
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> "(a) Lists the applicable substantive criteria;
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> "(b) States that testimony and evidence must be directed toward the criteria described in paragraph (a) of this subsection or other criteria in the plan or land use regulation which the person believes to apply to the decision; and
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> "(c) States that failure to raise an issue with sufficient specificity to afford the decision maker and the parties an opportunity to respond to the issue precludes appeal to the board based on that issue."

When petitioners contend they may raise new issues before LUBA because the local government failed to comply

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are similar to those described in In re Estate of T.A. Stoll, 188 Or 682, 686-88, 214 P2d 345, 217 P2d 595 (1950), where a party's right to appeal from a probate claim was preserved, but limited by a new statute to cases where there had been a plenary trial of the claim below. The Oregon Supreme Court held in Stoll that cases over which it already had jurisdiction were not subject to the limitation. See also Warren v. City of Aurora, 23 Or LUBA 507, 509 (1992).

with ORS 197.763 in specified ways, the local government must rebut the contention by demonstrating compliance. Cummings, supra, 26 Or LUBA at 144. The tapes provided by the county are not clearly labeled, and we are not directed by any of the parties to a place on the tapes where we could determine for ourselves whether the requisite announcement was made. From the tapes it is apparent the county planner made statements near the commencement of the hearing that might conceivably satisfy ORS 197.763(5)(a) and (b), but none that satisfy (c), the provision that most directly pertains to waiver. Therefore, we consider all of the issues raised by petitioner in her assignments of error.

**FIRST AND THIRD ASSIGNMENTS OF ERROR**

The parties do not dispute that the state and local criteria applicable to this application are those pertaining to property zoned for exclusive farm use. The first and third assignments of error concern the requirement, found both in ORS 215.283(1)(f) and Linn County Zoning Ordinance (LCZO) 21.435(2)(B), that dwellings on property zoned for exclusive farm use be "customarily provided in conjunction with farm use."[5] As an initial point, we reject the

[5]ORS 215.283 provides, in relevant part:

"(1) The following uses may be established in any area zoned for exclusive farm use:

"* * * * *

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

"* * * * *

LCZO 21.435(2) provides, in relevant part:

"Additional farm-related or forest-related residence:

"(A) Commercial farm factors:

"1. Soil productivity.

"2. Land conditions.

"a. Drainage.

"b. Terrain.

"3. Availability of irrigation water.

"4. Type, yield, and acreage of crops.

"5. Number and type of livestock.

"6. Processing and marketing practices.

"7. Consistency with the definition of commercial agriculture.

"(B) The dwelling is needed as customarily provided in conjunction with commercial farm use or is accessory to and necessary for commercial forest use as determined by the following factors:

"1. Size of the farm or forest unit, including land in contiguous ownership and any other land within the farm or forest unit.

"2. Type of farm or forest activity and typical labor requirements.

"3. The number of dwellings on or serving the entire farm or forest unit.

"4. The number of permanent and/or seasonal employees on the farm or forest unit.

county's argument that because the LCZO includes a local legislative "interpretation" of the statute, the statute is superseded and need not be applied. Relevant state statutes remain applicable to local land use decisions after acknowledgment of local regulations. Kenagy v. Benton County, 115 Or App 131, 134-36, 838 P2d 1076, rev den 315 Or 271 (1992).

After the parties filed their briefs, the Oregon Supreme Court decided, in Brentmar v. Jackson County, 321 Or 481, ___ P2d ___ (1995), that "a county may not enact or apply legislative criteria of its own that supplement those found in ORS * * * 215.283(1)." 321 Or at 496. We therefore focus exclusively on the application of ORS 215.283(1)(f). Although there are no findings that respond directly to the statute, we review the findings made in response to LCZO 21.435(2)(B) to determine if they satisfy the statute.

The challenged decision concludes that

> "the dwelling is needed as customarily provided in conjunction with commercial farm use based upon the following findings:
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> "1. We find the 78-acre Linn County parcel and the 40-acre Polk County parcel to be a total farm unit of 118 acres;

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> "5. The extent and nature of the work to be performed by occupants of the proposed dwelling.
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> "* * * * *"

"2. We find the use of the farm unit to be Christmas tree production which is defined as a farm use;

"3 We find the labor requirements for high-quality Christmas tree production to be intensive and diversified and for an operation of this size, to require two and sometimes three employees. We find that it is an individual management decision whether to provide for the farm's labor needs through employees as compared to contract laborers.

"4. With approval of this application, there are three dwellings serving the entire farm unit, one of which is in Polk County. The Linn County component of the farm unit contains the farm operator's residence. We find that management, labor and equipment storage all need to be centrally located which requires an accessory residence on the Linn County parcel.

"5. The farm employs two permanent and one or more seasonal employees on the total farm unit.

"6. The two permanent and full-time employees who will occupy the proposed dwelling perform nearly all of the actual physical labor involved in the farm use. While the applicant remains physically involved, especially in the grading and tagging of the trees, at 61 years of age, he is doing less manual labor and is increasingly responsible for only supervision, management decisions and the marketing of the crop." Record 7.

Findings with regard to need do not necessarily satisfy the requirement that a dwelling be "customarily required in conjunction with farm use." Individual circumstances may create an acute need for a dwelling, but ORS 215.283(1)(f) does not allow it unless the farm use customarily requires

it. Horacek v. Yamhill County, 17 Or LUBA 713, 719 n8 (1989). Furthermore, the "customarily required" standard must be applied in a manner consistent with the state's policy, stated in ORS 215.243, of protecting farm land. See Newcomer v. Clackamas County, 93 Or App 174, 183, 758 P2d 450, modified 94 Or App 33 (1988). The challenged findings are inadequate because they do not address the "customarily required" standard. See Rebmann v. Linn County, 19 Or LUBA 307, 314 (1990).

ORS 197.835(11)(b) requires us to affirm a local government decision in the absence of adequate findings if the parties "identify relevant evidence in the record which clearly supports the decision or a part of the decision." Respondents purport to cite to evidence in the record they claim would support a finding that the dwelling is customarily required. Intervenor and Respondent's Brief 11-12. The citations are to the challenged decision itself, however, and provide no basis on which to make that finding.

In this case, a finding that a dwelling is customarily required must be based on substantial evidence that goes beyond the facts of intervenors' own Christmas tree farm. If, as intervenors contend, their farm is one where an unusual degree of care, administered on a continual basis, results in a superior product, evidence of accessory dwellings on similarly sized, closely managed Christmas tree farms would tend to support the conclusion that accessory

dwellings are customarily required.[6] However, respondents do not cite to such evidence in the record. This Board does not search the record for evidence supporting a challenged decision, relying instead on the parties to cite to places in the record where the evidence can be found. Calhoun v. Jefferson County, 23 Or LUBA 436, 439 (1992).

The first assignment of error is sustained. To the extent LCZO 21.435(2)(B) imposes the same requirements as ORS 215.283(1)(f), the third assignment of error is also sustained. However, to the extent that LCZO 21.435(2)(B) imposes supplemental legislative requirements, the third assignment of error is denied as moot, since those requirements are unenforceable under Brentmar, supra.

**SECOND ASSIGNMENT OF ERROR**

In the second assignment of error, petitioner contends that the county failed to make a finding of "consistency with the definition of commercial agriculture," as required by LCZO 21.435(2)(A).[7] "Commercial agriculture" is defined by LCZO Article 32 as

> "farm units that either contribute in a substantial way to the existing agricultural

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[6]The challenged decision finds that the 78-acre Linn County parcel and the 40-acre Polk County parcel are a "total farm unit." Record 7. Therefore, the existence of a rental house on the Polk County property is another relevant consideration in determining whether another dwelling would be "customarily required" on the Linn County property. See Horacek, supra, 17 Or LUBA at 718.

[7]See n5, supra.

> economy and help maintain agricultural processors and established farm markets or diversify agricultural processing and create farm markets through the production of agricultural goods currently not part of the agricultural economy."

Petitioner maintains the challenged decision contains neither of the alternative findings permitted by the definition of "commercial agriculture."

When read with the county's definition of "commercial agriculture," LCZO 21.435(2)(A) establishes legislative criteria that supplement those found in ORS 215.283(1) and restrict uses permitted outright under the statute. These restrictions are unenforceable. Brentmar, supra. The second assignment of error is denied as moot.

**FOURTH ASSIGNMENT OF ERROR**

Petitioner contends the challenged decision does not contain findings required under LCZO 21.435(2)(C).[8] Specifically, petitioner contends the county had to adopt findings that

> "an accessory farm dwelling is a mode of operation common to other Christmas tree farms, necessary for the operation of Christmas tree farms to make a profit, and customarily used in conjunction with farm use." Petition for Review 11.

"Accepted farm * * * practices," as used in LCZO

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[8]LCZO 21.435(2)(C) provides:

> "The operation of the farm, based on accepted farm and forest practices, requires that the occupants of the proposed dwelling reside on the subject property."

21.435(2)(C), is defined to mean "a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use." LCZO Article 32.[9] The LCZO definition of "accepted farming practice" is identical to the statutory definition. ORS 215.203(2)(c). However, the statute uses the term to explain one kind of current employment of land for farm use: "land under buildings supporting accepted farm practices." ORS 215.203(2)(b)(F).

Petitioner does not contend the subject property is not in farm use. Therefore the use of "accepted farm practices" in the statute is irrelevant to her contentions regarding the phrase as it is used in the LCZO. Those contentions are actually based on an elaboration in the LCZO on the requirement in ORS 215.283(1)(f) that the accessory dwelling be "customarily provided in conjunction with farm use." To the extent the LCZO imposes supplemental legislative criteria, it is unenforceable. Brentmar, supra.

The fourth assignment of error is denied as moot.

The county's decision is remanded.

[9]"Accepted farm practices," "accepted farming practices" and other similar variants are used interchangeably in the LCZO and statute.