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

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

LUBA No. 94-102

FINAL OPINION
AND ORDER

Appeal from Josephine County.

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

Gloria M. Roy, County Counsel, Grants Pass, filed the response brief and argued on behalf of respondent.

SHERTON, Referee; HOLSTUN, Chief Referee, participated in the decision.

REMANDED 12/27/94

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county ordinance adopting the
4 Josephine County Rural Land Development Code (RLDC).¹

5 **FIRST ASSIGNMENT OF ERROR**

6 "[The county] adopted a definition of 'taking'
7 that goes beyond the federal and state judicial
8 definitions of the term under constitutional law,
9 and that enables [the county] to avoid application
10 of acknowledged plan provisions and land use
11 regulations."

12 RLDC 11.010 provides the purpose of RLDC Article 11
13 (Definitions) is:

14 "* * * to define the terms and phrases of this
15 Code which are technical, specialized, or may not
16 reflect common usage. If a term is not defined,
17 the definition found in the current edition of
18 Websters, Oxford, or Blacks Law Dictionary shall
19 be used." (Emphasis added.)

20 RLDC 11.030(328) defines "taking" as follows:

21 "A land use regulation applied to a specific
22 property, such as rezoning, which directly
23 interferes with or substantially disturbs the
24 owner's use and enjoyment of the property,
25 including substantial reduction of economically
26 viable uses of the land, interference with
27 distinct investment-backed expectations,
28 prevention of the best use of the land, or
29 deprivation of a fundamental attribute of
30 ownership. Taking does not include the denial of
31 a land use application or a refusal to grant a
32 permit."

33 We agree with petitioner that the above quoted

¹The challenged ordinance also repeals the prior zoning, subdivision and flood hazard ordinances for the rural portion of the county.

1 definition of "taking" neither accurately nor completely
2 reflects the numerous opinions of the U.S. Supreme Court,
3 the Oregon appellate courts and this Board regarding what
4 constitutes a "taking" of private property for public use
5 under the Fifth Amendment to the U.S. Constitution or
6 Article I, section 18, of the Oregon Constitution.²
7 However, RLDC 11.010 provides the definitions set out in
8 RLDC 11.030 define terms and phrases used in the RLDC. The
9 term "taking" is not found anywhere else in the RLDC.
10 Therefore, the definition of "taking" set out in
11 RLDC 11.030(328) has no legal significance. Moreover, the
12 county concedes that what constitutes a "taking" under the
13 federal or state constitutions is governed by the case law
14 established by the appellate courts and this Board, not by
15 the RLDC definition.

16 Based on the above, we conclude the fact that the RLDC
17 definition of "taking" inaccurately reflects existing law
18 provides no basis for reversal or remand.

19 The first assignment of error is denied.

20 **SECOND ASSIGNMENT OF ERROR**

21 "[The county] has failed to comply with
22 ORS 197.646(1) in that it has adopted land use
23 regulations that do not implement applicable

²Even if all relevant prior case law regarding "takings" could be condensed into a definition, cases decided after adoption of the definition would quickly render the definition obsolete.

1 statutory and administrative rule requirements."³

2 Petitioner argues the challenged ordinance violates
3 certain provisions of Oregon Laws 1993, chapter 792
4 (HB 3661), and administrative rules adopted by the Land
5 Conservation and Development Commission (LCDC) to implement
6 HB 3661 and Statewide Planning Goals 3 (Agricultural Land)
7 and 4 (Forest Lands).⁴ Petitioner presents six
8 subassignments of error. Certain issues are conceded by the
9 county in its response brief. Certain additional issues
10 were conceded by petitioner or the county during oral
11 argument. We identify the conceded issues and resolve any
12 remaining areas of dispute below.

13 **A. Destination Resorts**

14 **1. Secondary Lands**

15 The RLDC allows destination resorts in all county
16 resource zones, subject to compliance with the criteria of
17 RLDC Article 96 (Destination Resorts). RLDC 96.020(E)(3)

³ORS 197.646(1) provides:

"A local government shall amend [its] comprehensive plan and land use regulations to implement new or amended statewide planning goals, * * * administrative rules and land use statutes when such goals, rules or statutes become applicable to the jurisdiction. * * *"

⁴On February 18, 1994, LCDC adopted revisions to OAR Chapter 660, Divisions 06 and 33, in response to HB 3661. The effective date of those amendments is March 1, 1994. The appealed ordinance was adopted on May 18, 1994. The parties appear to assume, and we agree, that the challenged ordinance is governed by the administrative rules that became effective on March 1, 1994.

1 provides that destination resorts are allowed on "secondary
2 lands." Petitioner argues this reference to "secondary
3 lands" should be deleted, because HB 3661 ended the
4 secondary lands program. ORS 215.304(1). The county
5 concedes this point and agrees to delete RLDC 96.020(E)(3).

6 This subassignment of error is sustained.

7 **2. Resort Siting Map**

8 Petitioner also argues the RLDC is deficient because it
9 does not include the map of lands suitable for the siting of
10 destination resorts that ORS 197.455(2) and 197.465(1)
11 require to be adopted as part of the county's comprehensive
12 plan.

13 The county points out that Ordinance 86-5, adopted
14 August 6, 1986, amended both the county comprehensive plan
15 and zoning ordinance to incorporate a "resort sitting [sic]
16 map" to implement the zoning ordinance's standards for
17 destination resorts. The county argues the adoption of this
18 map as part of the comprehensive plan was not affected by
19 the challenged ordinance. The county also argues that the
20 zoning maps adopted as part of the RLDC by RLDC 12.030, and
21 the map referenced in the destination resort approval
22 standards of RLDC 96.030(B)-(D), include this resort siting
23 map. Petitioner concedes this subassignment of error.

24 This subassignment of error is denied.

1 **B. Lot of Record Dwellings**

2 **1. Tract**

3 ORS 215.705(1)(b) allows the establishment of a
4 single-family dwelling on certain "lots of record" if "[t]he
5 tract on which the dwelling will be sited does not include a
6 dwelling." (Emphasis added.) ORS 215.010(2) defines
7 "tract" as "one or more contiguous lots or parcels under the
8 same ownership." RLDC 64.070(D)(3), 64.170(D)(3),
9 65.070(C)(3) and 65.170(C)(3) allow establishment of a lot
10 of record dwelling if, among other things, "[t]he lot or
11 parcel [does] not have a dwelling on it." (Emphasis added.)
12 Petitioner argues these RLDC provisions are impermissibly
13 less strict than ORS 215.705(1)(b). The county concedes
14 this point and agrees to replace "lot or parcel" in the
15 cited RLDC provisions with "tract."

16 This subassignment of error is sustained.

17 **2. Oregon Department of Agriculture (ODA)**

18 Under ORS 215.705(1)(d) and (2)(c), a lot of record
19 dwelling cannot be sited on high-value farmland unless an
20 ODA hearings officer determines that:

21 "(A) The lot or parcel cannot practicably be
22 managed for farm use, by itself or in
23 conjunction with other land, due to
24 extraordinary circumstances inherent in the
25 land or its physical setting that do not
26 apply generally to other land in the
27 vicinity.

28 "(B) The dwelling will comply with the provisions
29 of ORS 215.296(1).

1 "(C) The dwelling will not materially alter the
2 stability of the land use pattern of the
3 area." ORS 215.705(2)(c).

4 RLDC 64.070(D)(5)(a)-(c) and 64.170(D)(5)(a)-(c), applicable
5 to lot of record dwellings on high-value farmland in the
6 county's exclusive farm use zones, parallel
7 ORS 215.705(2)(c)(A)-(C), except that RLDC 64.070(D)(5)(b)
8 and 64.170(D)(5)(b) require an ODA hearings officer to
9 determine the lot of record dwelling "meets the criteria set
10 out in ORS and [the RLDC] for review of non-farm uses."
11 Petitioner argues this exceeds the requirement of
12 ORS 215.705(2)(c)(B) that an ODA hearings officer determine
13 a lot of record dwelling complies with ORS 215.296(1), and
14 contends the county does not have authority to impose
15 additional obligations on a state agency. The county
16 concedes this point and agrees to replace
17 RLDC 64.070(D)(5)(b) and 64.170(D)(5)(b) with language
18 equivalent to ORS 215.705(2)(c)(B).

19 This subassignment of error is sustained.

20 **C. Farm Dwelling Standards**

21 **1. Definition of High-Value Farmland**

22 As relevant to Josephine County, OAR 660-33-020(8)
23 defines "high-value farmland" as:

24 "(a) [L]and in a tract composed predominantly of
25 soils that are:

26 "(A) Irrigated and classified prime, unique,
27 Class I or II; or

28 "(B) Not irrigated and classified prime,

1 unique, Class I or II.

2 "(b) [T]racts growing specified perennials as
3 demonstrated by the most recent aerial
4 photography of the Agricultural Stabilization
5 and Conservation Service of the U.S.
6 Department of Agriculture taken prior to
7 November 4, 1993. * * *

8 " * * * * "

9 Petitioner contends the definition of "high-value farmland"
10 at RLDC 11.030(159), although similar to the above quoted
11 definition in OAR 660-33-020(8), does not comply with the
12 rule definition because the RLDC definition is prefaced with
13 the phrase "[f]or the purpose of locating a limited lot of
14 record dwelling on farmland * * *." Petitioner argues the
15 rule definition of high-value farmland applies to a number
16 of standards for allowing dwellings on farmland, whereas the
17 RLDC definition, by its own terms, can only be applied to
18 lot of record dwellings.

19 The county argues that it has incorporated the RLDC
20 definition of "high-value farmland" into a number of
21 different standards for allowing non-lot of record dwellings
22 on farmland -- e.g., RLDC 64.070(A)(1)(e), 64.070(A)(2)(g),
23 64.070(A)(3), 64.170(A)(1)(e), 64.170(A)(2)(g),
24 64.170(A)(3). The county further argues that because the
25 "high-value farmland" definition is specifically
26 incorporated into these standards for approving other types
27 of dwellings, it is sufficiently clear the definition
28 applies in these circumstances, and not just to lot of

1 record dwelling proposals.

2 We agree with petitioner that there would be less
3 potential for confusion if the phrase "[f]or the purpose of
4 locating a limited lot of record dwelling on farmland" were
5 deleted from the RLDC 11.030(159) definition of "high-value
6 farmland." However, the county's specific incorporation of
7 this definition into approval standards for other types of
8 dwellings, as required by LCDC rule, is sufficient to
9 establish that the definition must be applied in these other
10 circumstances as well.

11 This subassignment of error is denied.

12 **2. Reference to ORS 215.283(1)(q)**

13 The county concedes the references to ORS 215.283(1)(q)
14 in RLDC 64.070(A) and 64.170(A) are typographical errors and
15 will be changed to ORS 215.283(1)(p), as requested by
16 petitioner.

17 This subassignment of error is sustained.

18 **D. Minimum Lot Sizes**

19 RLDC 64.190(A) establishes a minimum lot size of 20
20 acres in the Farm Resource zone. RLDC 65.190(A) and (B)
21 establishes minimum lot sizes of 20 or 40 acres in the
22 Woodlot Resource zone. Petitioner argues that unless
23 approval is given by LCDC under ORS 215.780(2) for a smaller
24 minimum lot size or sizes, ORS 215.780(1) requires the
25 county to apply minimum lot sizes of 80 acres (designated
26 forest land and non-range farmland) or 160 acres (designated

1 rangeland) in these zones. Petitioner contends LCDC has not
2 granted such approval. The county concedes this point, and
3 agrees to administer the RLDC consistently with the
4 statutorily-required minimum lot sizes and to make the
5 necessary amendments to the RLDC.

6 In addition, RLDC 65.090(B) and 65.190(C) authorize
7 reduction of the minimum lot sizes otherwise required in the
8 Forest Commercial and Woodlot Resource zones, respectively,
9 for certain listed uses. The uses listed include
10 RLDC 65.040(D) and 65.140(D), both of which provide:

11 "Research natural areas, experimental forests, and
12 facilities for experimental and research
13 activities associated with forest management or
14 utilization. Nurseries for the propagation of
15 forest products, including genetic research and
16 seed processing facilities[.]"

17 Petitioner argues reduction of the statutory minimum lot
18 size is not authorized by either statute or rule for the
19 above described uses. The county concedes this point and
20 agrees to delete RLDC 65.040(D) and 65.140(D) from the uses
21 listed in RLDC 65.090(B) and 65.190(C), respectively.

22 This subassignment of error is sustained.

23 **E. Residential Care Homes and Facilities**

24 Petitioner notes that several RLDC provisions
25 concerning the county's resource zones state "a residential
26 care home or residential care facility may be allowed" where
27 lot of record dwellings, farm dwellings, nonfarm dwellings
28 or forest dwellings are allowed. Petitioner recognizes that

1 under ORS 197.667(3), the county may provide for residential
2 care homes and residential care facilities in any zone where
3 a single-family dwelling would be allowed, but is concerned
4 that the RLDC does not expressly require such residential
5 care homes or facilities to meet the same criteria that a
6 single-family dwelling would have to satisfy.

7 The county responds that nothing in the RLDC provisions
8 identified by petitioner exempts residential care homes and
9 facilities in resource zones from having to satisfy the
10 criteria applicable to single-family dwellings in those
11 zones. However, in order to ensure that the RLDC clearly
12 states the county's intent to allow residential care homes
13 and facilities in resource zones "on the same basis as
14 single-family dwellings," the county agrees to change the
15 current "a residential care home or residential care
16 facility may be allowed" language in the RLDC provisions
17 cited by petitioner to the following:

18 "A residential care home or a residential care
19 facility will be permitted subject to the criteria
20 stated in this subsection." Respondent's
21 Brief 12.

22 This subassignment of error is sustained.

23 **F. Uses of High-Value Farmland**

24 Petitioner contends the RLDC fails to incorporate into
25 the Exclusive Farm Use and Farmland Resource zones, or
26 otherwise implement, the restrictions on uses of high-value
27 farmland required by OAR 660-33-020(8), 660-33-080,

1 660-33-090 and 660-33-120. The county agrees to amend the
2 RLDC to incorporate or implement these rules.⁵

3 This subassignment of error is sustained.

4 The second assignment of error is sustained, in part.

5 The county's decision is remanded.

⁵The county recognizes that some of these rules were further amended in June 1994, after the challenged ordinance was adopted, and agrees to bring the RLDC into compliance with the current version of these rules.