

1 Opinion by Sheraton.

2 NATURE OF THE DECISION

3 Petitioner appeals an order of Lake County (county) denying
4 a conditional use permit for a residential home for handicapped
5 persons on property zoned for exclusive farm use.

6 FACTS

7 The subject property is zoned and planned for exclusive
8 farm use. Its zoning designation is Agriculture 1 (A-1).
9 Record 126. The property consists of ten acres and is in an
10 area of large agricultural operations. Record 126. The site
11 is approximately 22 miles north of the City of Lakeview. The
12 residential home would be located in an existing residence and
13 would house five unrelated handicapped persons and two live-in
14 staff. Record 117, 184. Other staff would commute to the
15 site. Record 117.

16 The county planning commission approved the conditional use
17 permit for a residential home. Record 113. A neighboring land
18 owner filed an appeal of the planning commission decision to
19 the county board of commissioners. Record 109. The board of
20 commissioners reversed the planning commission and denied the
21 conditional use permit. This appeal followed.

22 REQUEST FOR OFFICIAL NOTICE

23 Petitioner requests that we take official notice of certain
24 prior county decisions concerning conditional use permits for
25 nonfarm dwellings in an EFU zone, copies of which were
26 submitted to us at oral argument in this case.

1 Petitioner points out that in Faye Wright Neighborhood
2 Planning Council v. Salem, 6 Or LUBA 167 (1982) (Faye Wright),
3 LUBA took official notice of the Urban Growth Management
4 Program (UGMP) adopted by the city, even though it was not part
5 of the city record in that appeal. According to petitioner, we
6 stated that the UGMP was part of "the organic law of the City
7 of Salem of which a court is empowered to take notice," and
8 concluded it was within our authority to take official notice
9 of the UGMP under Oregon Evidence Code (OEC) Rule 202(7). Id.
10 at 170.

11 Petitioner argues that the decisions of the county planning
12 commission and board of commissioners concerning nonfarm
13 dwellings "are part of the organic law of Lake County of which
14 a court is empowered to take notice under OEC Rule 202(2)."
15 Petitioner's Memorandum 2. Petitioner contends that under a
16 California provision similar to OEC Rule 202(2), California
17 courts have taken notice of a wide variety of administrative
18 and executive acts, including records of a county planning
19 commission.

20 The county objects to our taking official notice of prior
21 county decisions not in the record of this case. The county
22 argues that we did not rely upon OEC Rule 202(2) in Faye
23 Wright, but rather on OEC Rule 202(7). The county argues that
24 OEC Rule 202(2) applies only to notice of acts of divisions of
25 the state or federal governments. The county also argues that,
26 were we to take the requested official notice, we would be

1 acting inconsistently with our own rules providing for
2 evidentiary hearings to consider material not in the record
3 when necessary to determine disputed allegations of
4 constitutionality.

5 OEC Rule 202(2) and (7) provide, as relevant:

6 "Law judicially noticed is defined as:

7 * * * * *

8 "(2) Public and private official acts of the
9 legislative, executive and judicial departments
10 of this state, the United States, and any other
11 state, territory or other jurisdiction of the
12 United States.

11 * * * * *

12 "(7) An ordinance, comprehensive plan or enactment of
13 any county or incorporated city in this state, or
14 a right derived therefrom. As used in this
15 subsection, 'comprehensive plan' has the meaning
16 given that term by ORS 197.015.

15 We agree with the county that OEC Rule 202(2) applies only
16 to acts of the state of Oregon, the United States or other
17 states, territories or other jurisdictions (e.g. commonwealths)
18 of the United States. On the other hand, OEC Rule 202(7) does
19 apply to official notice of local government ordinances,
20 comprehensive plans or enactments. However, unlike the UGMP in
21 Faye Wright, the prior county decisions concerning nonfarm
22 dwellings of which we are asked to take official notice in this
23 case are not comprehensive plans or ordinances. Furthermore,
24 we do not believe the term "enactment" in OEC Rule 202(7) is
25 intended to include individual orders by county bodies on
26 quasi-judicial matters. As noted by the county, petitioner

1 could have moved, pursuant to ORS 197.830(11)(c) and
2 OAR 661-10-045, for an evidentiary hearing concerning its
3 allegations of unconstitutionality in the county's decision.

4 Accordingly, we deny petitioner's request to take official
5 notice of certain prior county decisions concerning conditional
6 use permits for nonfarm dwellings.

7 FIRST ASSIGNMENT OF ERROR

8 "The County erroneously held that its EFU Zoning
9 Ordinance does not allow for a residential home for
the developmentally disabled in an EFU zone."

10 Petitioner argues that the county erroneously concluded
11 that the proposed use is not a conditional use permitted in the
12 A-1 zone. Petitioner contends that the proposed use is a
13 permissible conditional use in the A-1 zone as either a
14 "residential home"¹ under Lake County Zoning Ordinance
15 (LCZO) 2.03(L), or as a single-family dwelling not in
16 conjunction with farm use under LCZO 2.03(H). We consider each
17 of these contentions separately below.

18 A. LCZO 2.03(L)

19 LCZO 2.03(L) provides:

20 "Conditional Uses. The following uses may be
21 permitted in an A-1 zone * * * upon conditional use
approval:

22 * * * * *

23 "(L) Other uses as authorized by ORS 215.213."²

24 Petitioner contends that the reference in LCZO 2.03(L) to
25 ORS 215.213 refers not to ORS 215.213 as it existed when
26 LCZO 2.03(L) was adopted in 1980, but rather to ORS 215.213 as

1 it presently exists. Petitioner points out that in 1985,
2 ORS 215.213 was amended to add "residential homes for
3 handicapped persons, as those terms are defined in ORS 443.580,
4 in existing dwellings" as a conditional use allowable in an EFU
5 zone. ORS 215.213(2)(m). Petitioner argues that LCZO 2.03(L)
6 prospectively incorporates such changes to ORS 215.213, so that
7 the conditional uses authorized by LCZO 2.03(L) in the A-1 zone
8 include residential homes as currently described in
9 ORS 215.213(2)(m).

10 Petitioner argues that LCZO 2.03(L) is intended to enact
11 zoning policy in the most current form set forth in state law.
12 According to petitioner, by referring to ORS 215.213, rather
13 than enumerating each item in that section of the statute at
14 the time, the county expressed an intent to conform its
15 ordinance to the standards established by state statute.
16 Petitioner argues that this intention includes conformance to
17 subsequent amendments by the state.

18 Petitioner contends that, despite two Oregon appellate
19 court decisions arguably to the contrary, the decision of the
20 United States Supreme Court in United States v. Sharpnack, 355
21 US 286, 78 S Ct 291, 2 L Ed 2nd 282 (1958) (U.S. Congress may
22 by reference prospectively adopt state criminal laws as the
23 laws applying to federal enclaves), clearly establishes that
24 prospective referential incorporation of state statutes by
25 Congress does not violate the United States Constitution.
26 Petitioner further argues that because the county is required

1 to adopt its zoning ordinance in compliance with state statutes
2 and agency rules, terming the prospective referential adoption
3 of state statutes an unconstitutional delegation of power would
4 be inconsistent with the county's duty to cooperate with the
5 state in developing and advocating a consistent land use
6 policy.

7 The county argues that LCZO 2.03(L) refers only to those
8 uses listed in ORS 215.213 as permissible conditional uses in
9 an EFU zone in 1980, when LCZO 2.03(L) was adopted. The county
10 maintains that LCZO 2.03(L) does not purport to adopt
11 prospectively amendments to ORS 215.213. The county contends
12 that if it had intended to adopt prospective amendments, it
13 could have easily added to the end of LCZO 2.03(L) the phrase
14 "and amendments which may hereafter be enacted." Respondent's
15 Brief 5.

16 The county further argues that its interpretation of the
17 effect of its ordinance is consistent with the following rule
18 of statutory construction:

19 "It is well established and practically universally
20 accepted that when a statute adopts a part or all of
21 another statute by specific and descriptive reference
22 thereto, such adoption takes the statute as it exists
23 at the time, and does not include subsequent additions
or modifications of the statute unless it does so by
express intent." Noble v. Noble, 164 Or 538, 551, 103
P2d 293 (1940); accord, Seale v. McKennon, 215 Or 562,
572, 336 P2d 340 (1959).

24 The county contends that if we were to decide that
25 LCZO 2.03(L) adopts prospective amendments to ORS 215.213, such
26 an interpretation would make the adoption of LCZO 2.03 an

1 "unlawful delegation of lawmaking power." Respondent's
2 Brief 6. The county cites Brinkley v. Motor Vehicles Division,
3 47 Or App 25, 613 P2d 1071 (1980) (city ordinance purporting to
4 adopt future statutory amendments is an unconstitutional
5 delegation of lawmaking power). The county also argues that if
6 LCZO 2.03(L) is interpreted to adopt future amendments to
7 ORS 215.213, it would be inconsistent with statutory
8 requirements in ORS 197.610 to 197.625 and 215.223 for notice
9 of and hearings on amendments to county zoning ordinances, and
10 with provisions for citizen participation in Statewide Planning
11 Goal 1 (Citizen Involvement).

12 The county's decision includes the following finding:

13 "In consideration of [LCZO] Article 2 and ORS [ch]215
14 and other planning-related statutes and rules,
15 currently [neither] the Lake County Zoning Ordinance
16 nor State law allows for residential homes in the
County's A-1, Exclusive Farm Use, Zone * * *."
Record 3.

17 The decision also states "[t]he record and findings support the
18 conclusion that * * * [a] residential home is not a permitted
19 conditional use in the A-1 zone." Record 3-4.

20 The interpretation of local ordinance provisions is a
21 question of law which LUBA reviews for correctness. McCoy v.
22 Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988). The
23 rules that govern statutory construction also apply to the
24 construction of local government ordinances. City of Hillsboro
25 v. Housing Devel. Corp., 61 Or App 484, 489, 657 P2d 726
26 (1983); Sevcik v. Jackson County, ___ Or LUBA ___ (LUBA

1 No. 87-087, May 23, 1988), slip op 4. Accordingly, the rule of
2 statutory interpretation explained in Noble v. Noble, supra,
3 applies to interpretation of LCZO 2.03(L) as well.

4 We do not find any expression of intent, in the words or
5 context of LCZO 2.03(L), to adopt future amendments to
6 ORS 215.213. We, therefore, interpret LCZO 2.03(L) to
7 authorize as conditional uses in the A-1 zone only those uses
8 listed in ORS 215.213 on the date the county adopted
9 LCZO 2.03(L).³ Such uses do not include "residential homes
10 for handicapped persons," which was added to ORS 215.213 in
11 1985. Consequently, we agree with the county that LCZO 2.03(L)
12 does not authorize it to approve the proposed use as a
13 conditional use in the A-1 zone.

14 This subassignment of error is denied.

15 B. LCZO 2.03(H)

16 LCZO 2.03(H) provides:

17 "Conditional Uses. The following uses may be
18 permitted in an A-1 zone * * * upon conditional use
approval:

19 * * * * *

20 "(H) Single-family dwellings not provided in
21 conjunction with farm use * * *."

22 Petitioner argues that even if "residential homes for
23 handicapped persons" are not specifically authorized as a
24 conditional use in the A-1 zone under LCZO 2.03(L), the county
25 must nonetheless consider petitioner's application the same way
26 it would consider any other request for a conditional use

1 permit for a nonfarm dwelling in the A-1 zone. Petitioner
2 contends that nonfarm dwellings are specifically authorized as
3 conditional uses by LCZO 2.03(H). Petitioner further argues
4 that the county improperly refused to consider petitioner's
5 application as being for a "single-family dwelling not provided
6 in conjunction with farm use" under LCZO 2.03(H) solely because
7 of the personal characteristics of the proposed residents.

8 The county points out that petitioner's application
9 proposed "[t]o start a private non-profit group home for five
10 developmentally disabled adults * * *." Record 184. The
11 county maintains that the board of commissioners "understood"
12 petitioner's application to be for a "'residential home for
13 handicapped persons' as opposed to a single family residential
14 dwelling not in conjunction with a farm use." Respondent's
15 Brief 8. The county argues it was not asked to approve the
16 proposed use as a nonfarm dwelling under LCZO 2.03(H).

17 However, the county also argues that even if it had been
18 clear that petitioner wanted its application considered under
19 LCZO 2.03(H), it would have been improper for the county to do
20 so. The county argues that the proposed use cannot be
21 considered as a single-family dwelling under LCZO 2.03(H)
22 because the LCZO definition of "family" applicable to the
23 proposed use is limited to " * * * a group of not more than
24 five unrelated persons living together as one housekeeping unit
25 using one kitchen." The county asserts the proposed use does
26 not satisfy this definition because it would include seven

1 unrelated residents, five developmentally disabled persons plus
2 two live-in staff.

3 Finally, the county argues that under state statute, a
4 "single-family residential dwelling not provided in conjunction
5 with farm use," allowed in an EFU zone pursuant to
6 ORS 215.213(3), is inherently different from a "residential
7 home," as defined under ORS 443.580(3). According to the
8 county, a "residential home" is a type of care facility, and is
9 frequently operated as a commercial enterprise. The county
10 contends that in listing "residential homes" as a separate
11 conditional use under ORS 215.213(2)(m) and 215.283(2)(n), the
12 legislature recognized that "residential homes" are different
13 uses than single-family nonfarm dwellings. Consequently, the
14 county maintains it would not have been proper for it to
15 consider petitioner's application under LCZO 2.03(H).

16 The county order denying the requested conditional use
17 permit does not mention LCZO 2.03(H). However, the county's
18 findings state that the proposed use is not a type of use
19 provided for in the A-1 zone, "as more specifically detailed in
20 County Counsel's memorandums dated December 7 and 21, 1988."
21 Record 3. We interpret this reference to incorporate these
22 memoranda into the county's findings. See Astoria Thunderbird
23 v. City of Astoria, 13 Or LUBA 154, 162-163 (1985).

24 The December 21 memorandum includes the following findings
25 relevant to the county's basis for not considering petitioner's
26 application under LCZO 2.03(H):

1 "[A] residential home as [defined under
2 ORS 443.580(3)] is different that [sic] any other use
3 allowed in the County's EFU zone. The County not does
4 [sic] permit outright or by conditional use in it's
5 [sic] EFU zone boarding houses, nursing homes or any
6 other multiple-dwelling facilities similar to a
7 residential home. While [Mental Health Division]
8 argues that a residential home should be treated like
9 a non-farm dwelling, it is different because the
10 residential home is served by staff on a 24 hour
11 basis. The legislature realized that a residential
12 home was different than a non-farm dwelling when it
13 added ORS 215.213(2)(m) and ORS 215.283(2)(n)
14 permitting residential homes as a conditional use in
15 an exclusive farm use zone and listed as a separate
16 conditional use non-farm dwellings." Record 26-27.

17 The above-quoted findings demonstrate that the county was
18 aware that petitioner contended its application should be
19 considered as applying for a permit for a nonfarm dwelling
20 under LCZO 2.03(H). The application does not state that it was
21 submitted solely under LCZO 2.03(L). The application's
22 description of the proposed use as a "group home for five
23 developmentally disabled adults" is not a sufficient basis for
24 the county to refuse to consider whether the proposed use could
25 be allowed as a single family nonfarm dwelling under
26 LCZO 2.03(H), particularly when petitioner raised that issue
below.

27 The above-quoted findings reflect a second reason advanced
28 by the county for refusing to consider the application under
29 LCZO 2.03(H), i.e., that both the statutes and the LCZO
30 recognize that the proposed residence for five handicapped
31 persons is inherently different from a single family nonfarm
32 residence. However, we cannot agree with the county that by

1 listing "residential homes" separately under ORS 215.213(2)(m)
2 and 215.283(2)(n), the legislature intended that uses meeting
3 the definition of residential home not be allowable as single
4 family nonfarm residences under ORS 215.213(3) and 215.283(3).

5 ORS 215.213(2) and (3) and ORS 215.283 (2) and (3) list
6 uses which counties may allow in their exclusive farm use zones
7 as conditional uses. Counties are not required to allow any or
8 all of these uses in their exclusive farm use zones.
9 Washington County Farm Bureau v. Washington County, ___
10 Or LUBA ___ (LUBA Nos. 88-104 and 88-105, June 21, 1989),
11 slip op 20-21; McCaw Communications, Inc. v. Marion County, ___
12 Or LUBA ___ (LUBA No. 88-068, December 12, 1988), slip op
13 27-28, n 10, rev'd other grounds, 96 Or App 552 (1989). We see
14 no reason why a proposed use could not qualify as more than one
15 of the uses listed in the statute. We cannot assume, as the
16 county apparently does, that the legislature intended no
17 overlap between ORS 215.213(2)(m) and ORS 215.213(3).
18 Furthermore, ORS 443.600(1) provides that "a residential home
19 shall be considered a residential use of property for zoning
20 purposes." This language suggests to us the legislature did
21 not intend there be no possibility of overlap between
22 residential homes and other residential uses. Therefore, we
23 cannot accept the county's argument that the LCZO should be
24 interpreted as treating the proposed use like a boarding house,
25 nursing home or other commercial use, thereby foreclosing the
26 possibility that it could qualify as a nonfarm dwelling.

1 The third reason advanced by the county in its brief for
2 not considering the application as requesting approval for a
3 single family nonfarm dwelling under LCZO 2.03(H)--that the
4 residents of the proposed dwelling would not meet the LCZO
5 definition of a "family",--is not reflected in the county's
6 decision. As far as we can tell from the county's order and
7 findings, it did not determine whether the residents of the
8 proposed use would meet the LCZO's definition of "family"
9 because it believed that the proposed use is inherently
10 different from a single family nonfarm dwelling allowable under
11 ORS 215.213(3) and LCZO 2.03(H), as explained supra.

12 As we stated above, the interpretation of local ordinance
13 provisions is a question of law. McCoy v. Linn County, supra;
14 Gordon v. Clackamas County, supra. However, it is the local
15 government which, in the first instance, should interpret its
16 own enactments. Fifth Avenue Corporation v. Washington Co.,
17 282 Or 591, 599, 581 P2d 50 (1974). Although our acceptance or
18 rejection of a local government's interpretation of its own
19 enactment is determined by whether we believe that
20 interpretation to be correct, we do consider the local
21 government's interpretation in our review, and give some weight
22 to it if it is not contrary to the express language and intent
23 of the enactment. McCoy v. Linn County, supra; Sevcik v.
24 Jackson County, supra.

25 Because the county did not interpret the LCZO provisions
26 relating to single family nonfarm dwellings and apply them to

1 petitioner's conditional use permit application, the county's
2 decision must be remanded for it to do so.⁴

3 This subassignment of error is sustained.

4 The first assignment of error is sustained in part.

5 SECOND ASSIGNMENT OF ERROR

6 "ORS [215.213(2)(m)], ORS 443.590 and 443.600,
7 providing that local governments may grant conditional
8 use permits for the location of residential homes in
9 various zoning areas, including EFU zones, preempts
the County's interpretation of its ordinance to the
extent it is inconsistent with those laws."

10 Petitioner argues that, according to the policy
11 statement in ORS 443.590⁵, and as specifically provided
12 in ORS 215.213(2)(m) and 443.600⁶, residential homes in
13 existing dwellings in areas zoned EFU "may be permitted"
14 as conditional uses. According to petitioner, use of the
15 term "may be permitted" in these statutes allows counties
16 discretion to determine through rational land use
17 standards, on a case by case basis, whether a specific
18 proposed residential home would be suitable in an EFU
19 zone, not discretion to refuse to recognize residential
20 homes in general as permissible conditional uses in EFU
21 zones. Citing City of Roseburg v. Roseburg City
22 Firefighters, 292 Or 266, 280, 639 P2d 90 (1981),
23 petitioner argues these state statutes preempt county
24 authority by specifying which uses must be considered as
25 permissible conditional uses in county EFU zones.

26 The county responds that the doctrine of preemption

1 means that local government cannot adopt enactments
2 inconsistent with state legislation. The county maintains
3 that the test for preemption of a local enactment is
4 whether the local law is "incompatible with the
5 legislative policy, either because both cannot operate
6 concurrently, or because the legislature meant its law to
7 be exclusive." LaGrande/Astoria v. PERB, 281 Or 137,
8 148-149, 576 P2d 1204, aff'd on rehearing 284 Or 173
9 (1978).

10 The county points out that whereas ORS 443.600(1)
11 provides that residential homes shall be a permitted use
12 in residential and commercial zones, ORS 443.600(3)
13 provides that counties may allow residential homes in
14 existing dwellings in EFU zones. The county also points
15 out that ORS 215.213(2) and 215.283(2) refer to nonfarm
16 uses which may be established in EFU zones. The county
17 argues that the permissive use of "may" in ORS 443.600(3),
18 215.213(2) and 215.283(2) "clearly indicates that the
19 State legislature intended to defer to the Counties the
20 decision whether residential homes for the handicapped
21 should be allowed in an EFU zone." Respondent's
22 Brief 12.

23 In City of Portland v. Dollarhide, 300 Or 490, 501,
24 714 P2d 220 (1986), the Oregon Supreme Court said that the
25 essential test for preemption of a local ordinance by
26 state law is whether the local enactment "is incompatible

1 with the legislative policy, either because both cannot
2 operate concurrently or because the legislature meant its
3 law to be exclusive," citing LaGrande/Astoria v. PERB,
4 supra. The court also said that with regard to local
5 ordinances regulating local conditions, "it is reasonable
6 to assume that the legislature did not mean to displace
7 local ordinances, unless that intention is apparent."
8 City of Portland v. Dollarhide, supra; see, State ex rel
9 Haley v. City of Troutdale, 281 Or 203, 210-211, 576 P2d
10 1238 (1978).

11 As was explained under section B of the first
12 assignment of error, we have stated in cases dealing with
13 utility facilities and road improvements, that the
14 provisions of ORS 215.213(2) and (3) and ORS 215.283 (2)
15 and (3) list uses which counties may allow, but are not
16 required to allow, as conditional uses in their exclusive
17 farm use zones. Washington County Farm Bureau v.
18 Washington County, supra; McCaw Communications, Inc. v.
19 Marion County, supra. A similar interpretation with
20 regard to residential homes would mean that LCZO 2.03(L)
21 is not inconsistent with ORS 215.213(2)(m). The issue
22 under this assignment of error, therefore, is whether
23 ORS 443.590, 443.600, 215.213(2)(m) and 215.283(2)(n),
24 taken together, express an apparent legislative intent to
25 displace county authority to decide whether to authorize
26 "residential homes" as a permissible conditional use in

1 EFU zones.

2 We conclude that they do not. ORS 443.600(1) uses the
3 mandatory term "shall" with respect to requiring local
4 governments to make "residential homes" permitted uses in
5 areas zoned for residential and commercial use. However,
6 ORS 443.600(3), 215.213(2)(m) and 215.283(2)(n) use the
7 permissive term "may" with respect to the authority of
8 local governments to allow "residential homes" on land
9 zoned for exclusive farm use. The legislature's choice of
10 the term "may" with regard to allowing "residential homes"
11 on land zoned for exclusive farm use demonstrates that the
12 legislature did not intend to require counties to
13 authorize "residential homes" as a conditional use on EFU
14 zoned land. Kola Tepee v. Marion County, supra, slip op
15 at 7-8. Therefore, LCZO 2.03(L), as interpreted under the
16 first assignment of error, is not incompatible with
17 ORS 215.213(2)(m), 443.590 and 443.600.

18 This assignment of error is denied.

19 THIRD ASSIGNMENT OF ERROR

20 "The federal Fair Housing Act, which prohibits
21 discrimination against any person based on handicap,
22 preempts the County's interpretation of its zoning
23 ordinance to the extent that this interpretation
denies handicapped persons the right to live in an EFU
zone according to the same standards as any other
person."

24 Petitioner argues that the Fair Housing Act Amendments of
25 1988 (FHA) apply to local land use regulations and prohibit
26 discrimination against a person in the

1 "terms, conditions, or privileges of sale or rental of
2 a dwelling or the provision of services or facilities
3 in connection with such a dwelling, because of that
4 person's handicap. Fair Housing Amendments Act of
5 1988, Pub. L. No. 100-430, Sec. 6, 102 Stat. 1619,
6 1620 (1988)." Petition for Review 18.

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Petitioner also cites the following legislative history of the
FHA:

7 "While state and local governments have authority to
8 protect safety and health, and to regulate use of
9 land, that authority has sometimes been used to
10 restrict the ability of individuals with handicaps to
11 live in communities. This has been accomplished by
12 such means as the enactment of imposition of health,
13 safety or land use requirements on congregate living
14 arrangements among non-related persons with
15 disabilities. Since these requirements are not
16 imposed on families and groups of similar size of
17 other unrelated people, these requirements have the
18 effect of discriminating against persons with
19 disabilities. H. Rep. No. 100-711, 100th Cong., 2nd
20 Sess., 1988 U.S. Code Cong. and Ad. News 2173, 2185."
21 Petition for Review 19.

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1 and unrelated persons or disabled or nondisabled persons.
2 According to the county, unrelated disabled persons can reside
3 in the county's EFU zone if they meet the nonfarm dwelling
4 standards of LCZO 2.03(H).

5 We agree with the county that the LCZO does not, on its
6 face, discriminate against handicapped persons. It would be
7 premature for us to decide whether the LCZO as applied violates
8 the FHA because the county has not determined whether the
9 proposed residential home can be considered a single family
10 nonfarm dwelling under a correct interpretation of the LCZO.
11 We decided under the first assignment of error that the
12 county's decision must be remanded for this determination. We
13 will not assume in advance of that determination that the
14 county will interpret LCZO 2.03(H) in a manner which
15 discriminates against handicapped persons, in violation of the
16 FHA. We have a statutory obligation to decide all issues
17 presented where the findings, order and record are sufficient
18 to allow review. ORS 197.835(10)(a). However, the county's
19 order is not sufficient for review of this issue, and we,
20 therefore, do not decide this assignment of error.⁷

21 FOURTH ASSIGNMENT OF ERROR

22 "The county's two findings and conclusions are not
23 supported by substantial evidence."

24 Petitioner argues once again that the county improperly
25 refused to consider its conditional use permit application as
26 request for approval of a nonfarm dwelling under LCZO 2.03(H).

1 Petitioner contends the county's findings regarding lack of
2 suitability of the proposed site for a "residential home" have
3 nothing to do with the criteria for approving a nonfarm
4 dwelling, and are not supported by substantial evidence in the
5 record.

6 The county argues that if we should conclude that a
7 "residential home" for handicapped persons is an allowable use
8 in the A-1 zone under LCZO 2.03(L) and ORS 215.213(2)(m), there
9 are adequate findings, supported by substantial evidence, for
10 denial of the conditional use permit because of unsuitability
11 of the subject site for a "residential home." According to the
12 county, since it never specifically adopted ORS 215.213(2)(m),
13 its only ordinance standard for approval of such a conditional
14 use would be the general "suitability" standard for conditional
15 use permits found in LCZO 20.04.

16 The county's decision concludes that "[t]he proposed
17 location is not a suitable location for a residential home."
18 (Emphasis supplied.) Record 3. This conclusion is based on
19 the following rationale:

20 "In consideration of the suitability of the use at the
21 proposed location and availability of services, the
22 proposed location is a considerable distance to
23 available services, is prone to flooding and requires
24 travel in hazardous road conditions." Id.

23 Petitioner challenges the evidentiary support for these
24 findings.

25 We interpret the challenged findings to constitute an
26 alternative county basis for denying the proposed use, should

1 it be determined that a "residential home" is a permissible
2 conditional use in the A-1 zone under LCZO 2.03(L) and
3 ORS 215.213(2)(m). These findings do not, however, address
4 whether the subject site is suitable for a single family
5 nonfarm dwelling under LCZO 2.03(H).

6 We determined under the first and second assignment of
7 error, supra, that the LCZO does not allow "residential homes"
8 in the A-1 zone as a discrete classification of conditional use
9 under LCZO 2.03(L) and ORS 215.213(2)(m). Thus, the findings
10 challenged by petitioner concerning site suitability
11 specifically for a "residential home" are not essential to the
12 county's decision, and no purpose would be served by
13 determining whether they are supported by substantial evidence
14 in the record.⁸ DLCD v. Columbia County, ___ Or LUBA ___
15 (LUBA No. 87-109, March 15, 1988), slip op 7; McNulty v. City
16 of Lake Oswego, 14 Or LUBA 366, 373 (1986).

17 The fourth assignment of error is denied.

18 FIFTH ASSIGNMENT OF ERROR

19 "The County's denial of a conditional use permit to a
20 residential home discriminates against the mentally
21 retarded in violation of the Privilege and Immunities
22 clause of the Oregon Constitution and the Equal
Protection Clause of the Fourteenth Amendment of the
United States Consitution."

23 Petitioner argues that the county unconstitutionally
24 distinguishes between residential homes for handicapped persons
25 and single family nonfarm dwellings based upon the personal
26 characteristics of those who would live in the "residential

1 home." Petitioner maintains that no such discrimination is
2 tolerated under either the federal or state constitution unless
3 such discrimination is "rationally related to a legitimate
4 governmental purpose." Petitioner contends that neither the
5 county's order nor the record in this case demonstrates a
6 rational basis for or a legitimate governmental purpose to be
7 served by denying this conditional use permit.

8 As was the case with the third assignment of error, it is
9 premature for us to decide this assignment of error. The
10 county's order does not provide a sufficient basis for us to
11 determine whether the county ordinance, when correctly
12 construed and applied, in fact requires disparate treatment
13 between the proposed residential home for handicapped persons
14 and single family nonfarm dwellings generally. The county's
15 order, therefore, does not provide a sufficient basis for us to
16 determine whether there is disparate treatment of these two
17 residential uses under the LCZO, and, if so, whether such
18 disparate treatment is unconstitutional.

19 Accordingly, we do not decide this assignment of error.

20 The county's decision is remanded.

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FOOTNOTES

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ORS 443.580(3) defines "residential home" as follows:

" * * * a residence for five or fewer unrelated physically or mentally handicapped persons and for staff persons who need not be related to each other or to any other home resident."

ORS 443.580(1) defines "handicapped person" as:

" * * * an individual who has a physical or mental impairment which for the individual constitutes or results in a functional limitation to one or more major life activities."

2

This provision of the LCZO was adopted in May 1980. Some time after the "marginal lands" legislation, Oregon Laws 1983, chapter 826, section 17, recodified the then existing ORS 215.213 as the newly created ORS 215.283 (see Kola Tepee, Inc. v. Marion County, ___ Or LUBA ___ (LUBA No. 89-021, June 20, 1989), slip op 5-6, for a fuller explanation of the changes in ORS ch215 made by the "marginal lands" legislation), the county staff simply changed the codified version of LCZO 2.03(L) to say "other uses as authorized by ORS 215.283." However, the parties now agree that the 1980 version of LCZO 2.03(L) has never been formally amended by the county and, therefore, this LCZO provision still states "other uses as authorized by ORS 215.213." We, therefore, assume that references in the parties' briefs to provisions of ORS 215.283 are intended to refer to the corresponding provisions of ORS 215.213.

3

Because we do not interpret LCZO 2.03(L) as purporting to adopt future amendments to ORS 215.213, we need not decide whether prospective adoption of statutory amendments by county ordinance is an unlawful delegation of lawmaking power, or inconsistent with statutory or Goal 1 procedural requirements.

We note, however, that it is not clear there is a constitutional impediment to a county prospectively adopting amendments to state land use laws. The cases cited by respondent to establish unlawful delegation are cases analyzed as issues of unconstitutional delegation. We have been cited to no constitutional provision which would prevent a county from prospectively adopting state land use laws.

2 The relevant LCZO definitions provide:

3 "Dwelling, Single-Family. A detached building
4 containing one dwelling unit which may be a mobile
home." (Emphasis supplied.) LCZO 1.03(A)(12).

5 "Dwelling Unit. One or more rooms designed for
6 occupancy by one family and not having more than one
7 cooking facility." (Emphasis supplied.)
LCZO 1.03(A)(15).

8 "Family. An individual, or two or more persons
9 related by blood, marriage, legal adoption, or legal
10 guardianship, living together as one housekeeping unit
11 using one kitchen and providing meals or lodging to
12 not more than two additional persons, excluding
13 servants; or a group of not more than five unrelated
14 persons living together as one housekeeping unit using
15 one kitchen." (Emphasis supplied.)
16 LCZO 1.03(A)(16).

17 We note that by saying that a "related" family may
18 provide meals or lodging to not more than two other
19 people, excluding servants, the above-quoted definition
20 makes it clear that there is no prohibition against a
21 "related" family providing meals or lodging to servants.
22 The definition does not contain a parallel statement with
23 regard to "unrelated" families. However, it would seem
24 that the most reasonable interpretation of this omission
25 is that "unrelated" families may not provide meals or
26 lodging to any additional persons other than servants, not
that "unrelated" families are prohibited from providing
meals or lodging to servants. However, interpretation of
this definition, and a determination whether the staff
people which would receive meals or lodging at the
proposed residence can properly be considered "servants"
is for the county to perform in the first instance on
remand.

23 ORS 443.590 provides:

24 "The Legislative Assembly finds and declares that:

25 "(1) It is the policy of this state that physically or
26 mentally handicapped persons are entitled to live
as normally as possible within communities and
should not be excluded from communities because

- 1 their disability requires them to live in groups;
- 2 "(2) There is a growing need for residences to provide
3 quality care and protection for physically or
4 mentally handicapped persons and to prevent
 inappropriate placement of such persons in state
 institutions and nursing homes;
- 5 "(3) It is difficult to site and establish residential
6 homes in the communities of this state; and
- 7 "(4) Restrictions on the siting of such residences
 have become a state-wide problem."

8

6

9 ORS 443.600 provides:

- 10 "(1) A residential home shall be considered a
11 residential use of property for zoning purposes.
12 Residential homes shall be a permitted use in all
13 areas zoned for residential or commercial
14 purposes, including areas zoned for single-family
15 dwellings. No city or county shall enact or
16 enforce zoning ordinances prohibiting the use of
17 a residential dwelling, located in an area zoned
18 for residential or commercial use, as a
19 residential home.
- 20 "(2) A city or county may impose zoning conditions on
21 the establishment and maintenance of a
22 residential home in an area zoned for residential
23 or commercial use, provided that such conditions
24 are no more restrictive than conditions imposed
25 on other residential dwellings in the same zone.
- 26 "(3) A county may:
- "(a) Allow a residential home in an existing
 dwelling in any area zoned for farm use,
 including an exclusive farm use zone
 established under ORS 215.203;
- "(b) Impose reasonable conditions on the
 establishment of a residential home in an
 area zoned for farm use; and
- "(c) Allow a division of land for a residential
 home in an exclusive farm use only as
 provided in ORS 215.263(8)."

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In n 4, supra, we observed that the county's decision does not explain why the two proposed live-in staff do not qualify as servants under LCZO 1.03(A)(16), thus bringing the proposed use within the limit of five unrelated persons in LCZO 1.03(A)(16). In a similar vein, petitioner does not explain why limiting the proposed facility to three developmentally disabled persons plus two live-in staff, which would also bring the proposal within the limit of five unrelated persons in LCZO 1.03(A)(16), necessarily violates the FHA or, as alleged in the fifth assignment of error, the Privileges and Immunities clause of the Oregon Constitution and the Equal Protection clause of the Fourteenth Amendment of the United States Constitution.

8

On remand, if the county determines the proposed use may be considered a single-family nonfarm dwelling, the county will presumably determine, pursuant to LCZO 20.04, whether the subject site is suitable for a nonfarm dwelling. We note that under the LCZO, state statute and the FHA, such a determination cannot be based on the personal characteristics of the handicapped persons who are expected to reside there.