

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

3
4 DONALD S. STILL,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 MARION COUNTY,) LUBA No. 91-092
11)
12 Respondent,) FINAL OPINION
13) AND ORDER
14 and)
15)
16 BEATRICE DRURY,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from Marion County.

22
23 Donald A. Still, Salem, filed the petition for review
24 and argued on his own behalf.

25
26 Jane Ellen Stonecipher, Salem, filed a response brief
27 and argued on behalf of respondent.

28
29 Bruce W. Williams, Salem, represented intervenor-
30 respondent.

31
32 HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,
33 Referee, participated in the decision.

34
35 REMANDED 11/15/91

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision approving a minor
4 partition and a farm dwelling.

5 **MOTION TO INTERVENE**

6 Beatrice C. Drury, the applicant below, moves to
7 intervene on the side of respondent. There is no opposition
8 to the motion, and it is allowed.

9 **FACTS**

10 Intervenor owns a 95.21 acre parcel located in the
11 county's Special Agriculture (SA) zone.¹ The county
12 planning director approved a partition creating three
13 parcels of 50.7, 31.8 and 12.7 acres and also granted
14 approval for a farm dwelling on the 31.8 acre parcel and a
15 nonfarm dwelling on the 12.7 acre parcel.

16 On appeal, the county hearings officer modified the
17 planning director's decision and granted approval for a
18 partition dividing the 95.21 acre parcel into a 50.7 acre
19 parcel and a 44.5 acre parcel. The larger parcel was
20 described as a wood lot. The smaller parcel was described
21 as a vineyard parcel, and approval for a farm dwelling on

¹Marion County Zoning Ordinance (MCZO) 137.010 provides that "[t]he SA zone is applied in areas characterized by small farm operations or areas with a mixture of good and poor farm soils where the existing land use pattern is a mixture of large and small farm units and some acreage homesites." However, MCZO 137.010 specifically provides that the SA zone is intended to be an exclusive farm use (EFU) zone. Therefore, the SA zone must comply with the requirements of ORS chapter 215 applicable to EFU zones.

1 the vineyard parcel was granted with conditions.

2 Petitioner appealed the hearings officer's decision to
3 the board of county commissioners. The board of county
4 commissioners considered the appeal during a regular meeting
5 on June 5, 1991 and voted to deny the appeal and affirm the
6 hearings officer's decision. This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 "The county misconstrued the applicable law,
9 failed to make adequate findings, and made a
10 decision not supported by substantial evidence in
11 the record as a whole, in concluding the proposed
12 land division was consistent with Oregon's
13 agricultural land use policy, ORS 215.243, which
14 declares it necessary to preserve agricultural
15 land in large blocks."

16 Petitioner contends that any division of an existing
17 farm parcel violates the legislative land use policy of
18 ORS 215.243(2) to preserve agricultural land in large
19 blocks.² We rejected arguments that such an extreme
20 limitation is contained in Goal 3 in Stephens v. Josephine
21 County, 11 Or LUBA 154, 160 (1984). We similarly reject
22 petitioner's contention that such a limitation is imposed by
23 ORS 215.243(2).

²ORS 215.243(2) provides as follows:

"The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation."

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 "The county misconstrued the applicable law,
4 failed to make adequate findings, and made a
5 decision not supported by substantial evidence in
6 the record as a whole, in concluding the proposed
7 land divisions were 'appropriate for the
8 continuation of the existing commercial
9 agricultural enterprise within the area' as
10 required by ORS 215.243(2), Statewide Planning
11 Goal 3 and OAR 660-05-015 and 660-05-020."

12 **A. Introduction**

13 Marion County's comprehensive plan and land use
14 regulations have been acknowledged by the Land Conservation
15 and Development Commission (LCDC) under ORS 197.251.
16 Therefore, the statewide planning goals do not apply
17 directly to the challenged decision. Byrd v. Stringer, 295
18 Or 311, 666 P2d 1332 (1983). However, it is appropriate to
19 first examine the goal and statutory requirements with which
20 the county's plan and land use regulations were required to
21 comply during acknowledgment, to assist us in interpreting
22 and applying the county's plan and land use regulations.

23 Goal 3 (Agricultural Lands) and Oregon's EFU zoning
24 statute require preservation of commercial agriculture.³
25 Both Goal 3 and ORS 215.243(2) incorporate the premise that
26 preservation of commercial agriculture requires preservation

³Goal 3 requires in part that "[s]uch minimum lot sizes as are utilized in any farm use zones shall be appropriate for the continuation of the existing agricultural enterprise in the area." See n 2, supra.

1 of existing agricultural lands in large parcels. Therefore,
2 in considering whether dividing a farm parcel into two or
3 more smaller parcels is appropriate, a negative answer would
4 always follow if the principle of retaining existing
5 agricultural lands in large blocks is applied as a broad and
6 literal requirement. As we have already explained, such a
7 broad and literal construction has been rejected. Stephens
8 v. Josephine County, supra. However, dividing farm parcels
9 into two or more smaller farm parcels may only be permitted
10 where such divisions are shown to be consistent with the
11 goal of preserving existing commercial agriculture. Using
12 the language of Goal 3, division of existing farm parcels
13 into two or more smaller parcels is only appropriate where
14 the resulting parcels are "appropriate for the continuation
15 of the existing commercial agricultural enterprise within
16 the area."

17 LCDC has adopted an administrative rule which provides
18 some assistance in determining how EFU zoned farm parcels
19 may properly be divided. Instead of establishing generally
20 applicable minimum lot sizes, Marion County considers
21 requests to divide farm land within its SA zone on a case-
22 by-case basis. As relevant to counties adopting this case-
23 by-case approach, section 6 of OAR 660-05-015, which
24 addresses minimum lot sizes in EFU zones generally, provides
25 as follows:

26 "(a) The minimum lot size(s) needed to maintain
27 the existing commercial agricultural

1 enterprise shall be determined by identifying
2 the types and sizes of commercial farms in
3 the area. When identifying commercial farms,
4 entire commercial farms shall be included,
5 not portions devoted to a particular type of
6 agriculture. The identification of
7 commercial farms may be conducted on a
8 countywide or subcounty basis.

9 "(b) Commercial agricultural operations to be
10 identified should be determined based on type
11 of products produced, value of products sold,
12 yields, farming practices, and marketing
13 practices.

14 "(c) Local governments which apply Goal 3's
15 minimum lot size standard on a case-by-case
16 basis may satisfy the commercial agricultural
17 identification requirement in subsection [(a)
18 above] by identifying the sizes and other
19 characteristics of existing commercial farms
20 in an area which is large enough to represent
21 accurately the existing commercial
22 agricultural enterprise within the area
23 containing the applicant's parcel."

24 OAR 660-05-020 applies specifically to creation of new lots
25 in EFU zones and provides, in pertinent part, as follows:

26 "(1) The Goal 3 standard on minimum lot sizes is
27 applied to the creation of new lots to
28 prevent agricultural land from being divided
29 into parcels or lots which will not
30 contribute to the local commercial
31 agricultural enterprise.

32 "* * * * *

33 "(3) The size of new farm parcels must be
34 appropriate for the continuation of the
35 existing commercial agricultural enterprise
36 in the area. * * *

37 "* * * * *

38 "(5) For section [(3) above], it is not sufficient

1 to find a small commercial agricultural
2 enterprise as defined in OAR 660-05-005(2)^[4]
3 within an area of both large and small
4 commercial enterprises, and use the size of
5 that enterprise as justification for allowing
6 a major portion of a large holding to be
7 divided into many small parcels. The goal
8 requires maintenance of the existing
9 commercial agricultural enterprise.
10 Activities on the larger holding must be
11 considered as part of that enterprise. It is
12 the activity on the larger holding which must
13 be maintained under Goal 3, together with
14 those on the smaller parcels. The fact that
15 other activities exists [sic] on smaller
16 parcels does not mean that the commercial
17 agricultural enterprise in the area is
18 maintained by reducing all the parcels in the
19 area to the size of the smallest common
20 commercial agricultural denomination where
21 other commercial agricultural enterprises are
22 conducted on larger parcels. However,
23 individual small parcels may be created under
24 Goal 3, when consistent with [section (3)]
25 above.

26 "(6) As used in this rule, 'maintain' or

⁴OAR 660-05-005(2) defines "commercial agricultural enterprise" as follows:

"'Commercial agricultural enterprise' consists of farm operations which will:

"(a) Contribute in a substantial way to the area's existing agricultural economy; and

"(b) Help maintain agricultural processors and established farm markets;

"(c) When determining whether a farm is part of the commercial agricultural enterprise, not only what is produced, but how much and how it is marketed shall be considered. These are important factors because of the intent of Goal 3 to maintain the agricultural economy of the state."

1 'continue' do not mean that the new and
2 remaining parcel sizes must have no adverse
3 effects whatsoever on an area's commercial
4 agricultural enterprise. Such an
5 interpretation would probably halt most land
6 divisions. 'Maintain' and 'continue' imply a
7 balance. Land divisions often have both
8 positive and negative effects on an area's
9 commercial enterprise. Goal 3 requires that
10 the new and remaining parcels sizes on
11 balance, considering positive and negative
12 effects, will keep the area's commercial
13 agricultural enterprises successful, and not
14 contribute to their decline."

15 Essentially there are three steps required by the above
16 rules, which may be summarized as follows:

- 17 1. The relevant "area" for analyzing the
18 propriety of a proposed farm parcel partition
19 must be identified. That "area" must be
20 large enough to accurately represent the
21 existing commercial agricultural enterprise.
22 OAR 660-05-015(6)(c).
- 23 2. The existing commercial agricultural
24 operations in the area must be identified. A
25 county must distinguish between commercial
26 and noncommercial agricultural operations.
27 OAR 660-05-015(6). Determining whether
28 existing agricultural operations are
29 commercial requires an analysis of "products
30 produced, value of products sold, yields,
31 farming practices, and marketing practices."⁵
32 OAR 660-05-015(6)(b).
- 33 3. Once a county has identified the relevant
34 area and the existing commercial agricultural
35 operations, the county must determine whether
36 the proposed partition will result in parcels

⁵Commercial farms may include diversified agricultural operations producing more than crop. Therefore, the correct focus is on entire commercial agricultural enterprises rather than individual parcels or crops. OAR 660-05-015(6)(a).

1 of sufficient size to "maintain" or
2 "continue" the existing commercial enterprise
3 in the area. In making this determination
4 the county may not assume the partition is
5 appropriate, simply because the resulting
6 parcels are of the same size as the smaller
7 existing commercial agricultural operations
8 in the area. OAR 660-05-020(6).

9 Although steps 1 and 2 generally will require that an
10 extensive evidentiary record be developed and detailed
11 findings be adopted, they are relatively straightforward.
12 Step 3 is far more subjective. The relevant rules
13 underlying step 3 make it clear that divisions may not be
14 automatically allowed because they result in parcels
15 appropriate for a particular type of existing commercial
16 agriculture in the identified area. However, those rules
17 provide no explicit guidance on how the local decision maker
18 should make a decision in a circumstance where there is a
19 variety of different types of existing commercial
20 agriculture operations in the area and those different types
21 of operations have differing land area requirements. The
22 rules that underlie step 3 reject the extremes. Larger
23 parcels need not in all cases be preserved intact, but may
24 not automatically be divided to the size of the smallest
25 commercial agricultural operation in the area. Aside from
26 rejecting those extremes, the rules leave it to the local
27 government to adopt findings adequately explaining why, in
28 the particular circumstances presented, the parcels to be
29 created are of sufficient size to "maintain" and "continue"

1 the existing agricultural enterprises in the area.⁶

2 **B. MCZO Requirements for Division of Farm Parcels**

3 Under MCZO 137.070(a), divisions of farm parcels to
4 create two or more new farm parcels must satisfy the
5 following standards:

6 "(1) Any proposed parcel intended for farm use
7 must be appropriate to the continuation of
8 the existing commercial agricultural
9 enterprise of the particular area based on
10 the evaluation prescribed in [MCZO]
11 137.040(g).^[7] The evaluation shall include
12 the subject property and commercial
13 agricultural enterprises located in the same
14 zone within one-half mile of the subject
15 property.

16 "(2) The parcel shall meet the requirements of ORS
17 215.243.

18 "* * * * *"

19 With one possible exception, the above requirements of
20 MCZO 137.040(g) and 137.070(a)(1) require essentially the
21 same three step substantive review of proposals for farm

⁶For example, if a parcel to be partitioned were unsuitable for the types of existing commercial agricultural enterprises in the area that require large acreages, but were suitable for the types of existing commercial agricultural enterprises in the area using smaller parcel sizes, a division creating such smaller parcels would appear to be consistent with the requirements of OAR 660-05-020.

⁷MCZO 137.040(g) requires consideration of the following factors:

"Soil productivity, drainage, terrain, special soil or land conditions, availability of water, type and acreage of crops grown, crop yields, number and type of livestock, processing and marketing practices, and the amount of land needed to constitute a commercial farm unit. Specific findings shall be made in each case for each of these factors." (Emphasis added.)

1 land divisions imposed by OAR 660 Division 5. Additionally,
2 MCZO 137.070(a)(2) incorporates as a requirement the
3 legislative policy of preserving agricultural land in large
4 blocks. See n 2, supra.

5 The possible exception is the provision of
6 MCZO 137.070(a)(1) that the required "evaluation shall
7 include the subject property and commercial agricultural
8 enterprises located in the same zone within one-half mile of
9 the subject property." (Emphasis added.) The quoted
10 language can be construed to express a minimum requirement
11 (i.e. that those commercial agricultural enterprises within
12 one-half mile of the subject property must be evaluated) or
13 a maximum requirement (i.e. that only those commercial
14 agricultural enterprises within one-half mile of the subject
15 property must be evaluated). We interpret the quoted
16 language consistently with OAR 660-05-015(6)(c) to express a
17 minimum standard.⁸

18 It is possible that an area limited to properties
19 within one-half mile of the subject property will contain a
20 sufficient number of commercial agricultural enterprises to
21 permit the county to perform the evaluation required by MCZO
22 137.040(g) and 137.070(a). However, there may be instances,
23 and this case may be one of them, where the evaluation

⁸As noted supra, OAR 660-05-015(6)(c) requires that in identifying the existing commercial agricultural enterprises in the area, "an area which is large enough to represent accurately the existing commercial agricultural enterprise within the area" must be selected.

1 required by MCZO 137.040(g) and 137.070(a) may not properly
2 be limited to parcels within one-half mile of the subject
3 property, because that area includes too few commercial
4 agricultural operations. See Krahmer v. Washington County,
5 7 Or LUBA 36, 39-40 (1982); Kenagy v. Benton County, 6 Or
6 LUBA 93, 103-04 (1983); Thede v. Polk Cty., 3 Or LUBA 335,
7 339-40 (1981).

8 **C. County Findings Addressing MCZO 137.070(a)(1) and**
9 **(2) and 137.040(g)**

10 The gist of petitioner's arguments under the second
11 assignment of error is that the county's findings are
12 inadequate to satisfy steps 1 and 2 described above.
13 Petitioner contends the county has failed to identify and
14 justify the relevant area for evaluation under MCZO
15 137.040(g). More importantly, petitioner argues the
16 evaluation performed by the county makes no attempt to
17 distinguish between commercial and noncommercial
18 agricultural enterprises in the area. Neither, argues
19 petitioner, does the county establish that vineyards on
20 parcels of the size proposed are part of the existing
21 commercial agricultural enterprise of the area.

22 It is not clear whether the "area" upon which the
23 county based its evaluation is limited to properties within
24 one-half mile of the subject property or whether its

1 evaluation went beyond that area.⁹ This problem aside, we
2 are cited to no findings which approach the kind of detailed
3 findings required by MCZO 137.040(g) and 137.070(a)(1). The
4 evaluation required under those MCZO sections is to be
5 performed for both the subject parcel and other commercial
6 farms in the area. The purposes of the required evaluation
7 are to permit the county to distinguish commercial and
8 noncommercial farms in the relevant area, determine the size
9 of existing commercial agricultural enterprises in the area,
10 and then determine whether, based on the characteristics of
11 the subject property, the proposed division will result in
12 parcels appropriate for the continuation of existing
13 commercial agricultural enterprise in the area.

14 Although the findings on Record 25 generally describe
15 some of the agricultural uses in the area, they do not
16 explain why, applying the evaluation required by MCZO
17 137.040(g), those uses are commercial agricultural
18 enterprises.¹⁰ Waite v. Marion County, 16 Or LUBA 353, 365
19 (1987); Stephens v. Josephine County, 14 Or LUBA 133, 137

⁹Finding number 3 at Record 25 appears to be limited to properties within one-half mile of the subject property. The findings on Record 30 and 31 concerning vineyards do not appear to be limited to the one-half mile radius.

¹⁰The pages in the record cited by respondent as providing evidentiary support for the findings simply provide a summary description of some of the properties within one-half mile of the subject property and make no attempt to explain whether or why those properties constitute commercial agricultural enterprises.

1 (1988). Similarly, the findings do not explain the nature
2 of existing commercial vineyards in the area. Although the
3 findings suggest that two vineyards exist in the area, there
4 is no evaluation of those vineyards nor is it established
5 that they are commercial agricultural enterprises.¹¹

6 There is evidence in the record that the subject 95
7 acre property has been unsuccessfully utilized for a variety
8 of agricultural crops in the past. Record 17-19. There is
9 also evidence in the record that the 44.5 acre parcel is
10 suitable for a vineyard and that a vineyard on a 44.5 acre
11 parcel might be of sufficient size to constitute a
12 commercial agricultural operation. This is all evidence
13 that might well provide a basis for findings that the
14 requirements of MCZO 137.070(a)(1) and 137.040(g) are met,
15 particularly in view of the mixed farm use nature of the SA
16 zone. See n 1, supra. However, before the county will be
17 in a position to adopt such findings, it must (1) identify
18 an area sufficiently large to provide an accurate
19 representation of existing commercial agricultural

¹¹The evidence concerning vineyards cited by respondent includes an extension service report concerning the cost of establishing a vineyard in the Willamette Valley. That study simply assumes a vineyard of 40 acres for purposes of the analysis contained in the report. The only other evidence concerning the size of existing commercial vineyards is an extension service document entitled "Extension Service Estimate of Acres Necessary by Crop Type of Support One Farm Dwelling." Record 127-30. That document simply states that "Commercial Vineyards often range between 20 and 40 acres in size." Neither document establishes the characteristics of commercial vineyards in the area of the subject property.

1 enterprises in the area of the subject property,¹² (2)
2 distinguish between existing commercial and noncommercial
3 agricultural enterprises in that area, and (3) explain why,
4 in view of the particular characteristics of the subject
5 property, the proposed parcels are appropriate to continue
6 the identified existing commercial agricultural enterprise
7 in the area.

8 **THIRD ASSIGNMENT OF ERROR**

9 "The county misconstrued the applicable law,
10 failed to make adequate findings, and made a
11 decision not supported by substantial evidence in
12 the record as a whole, in failing to determine
13 whether the 50.7 acre parcel created by the land
14 division complied with the criteria for farm
15 divisions in ORS 215.263(2) and MCZO 137.070(a) or
16 nonfarm divisions in ORS 215.263(4) and MCZO
17 137.070(b)."

18 The same shortcomings explained under the second
19 assignment of error concerning the 44.5 acre parcel are
20 present regarding the 50.7 acre woodlot parcel. For the
21 same reasons, we sustain the third assignment of error.

22 The county's decision is remanded.¹³

¹²Unless the county designates an area of sufficient size to include some commercial vineyards for evaluation, it will be unable to determine that the proposed division is appropriate for the continuation of existing commercial vineyards in the area. See Meyer v. Washington County, 3 Or LUBA 61 (1981).

¹³In view of our disposition of the second and third assignments of error, the county's decision must be remanded. We therefore do not consider petitioner's contentions that the county improperly approved a farm dwelling for the 44.5 acre parcel or that the board of county commissioners committed prejudicial procedural error in the manner in which it considered petitioner's appeal of the hearings officer's decision.