

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 SCHROCK FARMS, INC., an Oregon)
5 corporation, VERNON SCHROCK,)
6 and DEAN SCHROCK,)
7)
8 Petitioners,)

9)
10 vs.)

11)
12 LINN COUNTY,)
13)
14 Respondent,)

15)
16 and)

17)
18 OREGON DEPARTMENT OF)
19 TRANSPORTATION,)
20)
21 Intervenor-Respondent.)

LUBA No. 90-061

FINAL OPINION
AND ORDER

22
23
24 Appeal from Linn County.

25
26 Edward F. Schultz, Albany, filed the petition for
27 review and argued on behalf of petitioners. With him on the
28 brief was Weatherford, Thompson, Quick & Ashenfelter.

29
30 John T. Gibbon, Albany, filed a response brief and
31 argued on behalf of respondent.

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33 Lucinda D. Moyano, Salem, filed a response brief and
34 argued on behalf of intervenor-respondent. With her on the
35 brief was Charles S. Crookham, Attorney General; Jack
36 Landau, Deputy Attorney General; and Virginia L. Linder,
37 Solicitor General.

38
39 SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON,
40 Referee, participated in the decision.

41
42 REMANDED 09/21/92

43
44 You are entitled to judicial review of this Order.
45 Judicial review is governed by the provisions of ORS

1 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county ordinance approving an
4 exception to Statewide Planning Goal 3 (Agricultural Lands),
5 a resource land division and a minor partition, to allow
6 realignment of a portion of State Highway 34.

7 **MOTION TO INTERVENE**

8 The Oregon Department of Transportation (ODOT), the
9 applicant below, moves to intervene on the side of
10 respondent in this proceeding. There is no objection to the
11 motion, and it is allowed.

12 **FACTS**

13 The subject property is an approximately 195 acre
14 commercial farm parcel owned by petitioners. The parcel is
15 designated Agricultural Resource on the Linn County
16 Comprehensive Plan (plan) map and is zoned Exclusive Farm
17 Use (EFU). The subject property is adjoined by the original
18 alignment of Highway 34 to the north and the city limits of
19 the City of Tangent to the west.

20 ODOT desires to realign a segment of Highway 34 between
21 Interstate-5 and Highway 99E. ODOT's desired alignment
22 crosses the subject property in an east-west direction. The
23 realignment converts the subject property into two farm
24 parcels. The northern parcel includes approximately 59
25 acres and the southern parcel includes approximately 124
26 acres. The two farm parcels are separated by a five-lane

1 segment of Highway 34 occupying approximately 12 acres. The
2 only road adjoining the southern parcel is the realigned
3 Highway 34.

4 **FIRST, SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

5 In these assignments of error, petitioners contend the
6 creation of new parcels for highway reconstruction or
7 modification is not allowed in an EFU zone under
8 ORS 215.283(1) and (2) or the corresponding provisions of
9 Linn County Zoning Ordinance (LCZO) 6.030, 6.040 and 6.050.
10 Petitioners further contend the findings supporting the
11 challenged decision are not adequate to justify an exception
12 to Goal 3 and are not supported by substantial evidence in
13 the record.¹

14 The challenged decision relies on the adoption of an
15 exception to Goal 3 as the justification for not complying
16 with ORS 215.283 and LCZO Article 6. ORS 215.283 and LCZO
17 Article 6 establish the requirements of the county's EFU
18 zone. However, it is Goal 3 that requires exclusive farm
19 use zoning to be applied to the subject agricultural land.
20 We therefore agree with the county that, if an adequate

¹Petitioners also argue the county failed to adopt the findings required by LCZO 21.415(3) for a land division to create a parcel for nonfarm use. The county contends petitioners failed to raise this issue during the county proceedings and, therefore, are precluded from raising it before this Board. Under 197.835(2), our review is limited to issues which were raised "before the local hearings body as provided in ORS 197.763." Petitioners do not identify in the record where they raised the issue of compliance with LCZO 21.415(3). Accordingly, we may not review this issue. Wethers v. City of Portland, 21 Or LUBA 78, 92 (1991).

1 exception to Goal 3 is properly adopted for the proposed
2 highway realignment, then failure to comply with ORS 215.283
3 and LCZO Article 6 would not provide a basis for reversing
4 or remanding the challenged decision.

5 As we explained in Caine v. Tillamook County, ___
6 Or LUBA ___ (LUBA No. 91-091, February 20, 1992), slip op 9,
7 statute, goal and administrative rule provisions clearly
8 require that the findings and reasons justifying a goal
9 exception be adopted as part of the county comprehensive
10 plan. ORS 197.732(8); Goal 2, Part II, definition of
11 "exception;" OAR 660-04-000(2) and 660-04-015(1); DLCD v.
12 Josephine County, 18 Or LUBA 88, 90 n 1 (1989); Johnson v.
13 Tillamook County, 16 Or LUBA 855, 859-60 (1988).

14 In Schrock Farms, Inc. v. Linn County, ___ Or LUBA ___
15 (LUBA No. 90-061, Order on Record Objection, February 3,
16 1992) (Schrock), slip op 4, we concluded the challenged
17 decision does not amend the county's comprehensive plan, for
18 the following reasons:

19 "The * * * county did not purport to amend its
20 comprehensive plan during the proceeding leading
21 to the appealed decision. [ODOT] did not apply
22 for a comprehensive plan amendment. Supp. Record
23 1, 5. The notices of planning commission and
24 board of commissioners hearings do not state that
25 a comprehensive plan amendment is proposed.
26 Record 52, 59. Most importantly, the challenged
27 decision does not adopt a comprehensive plan
28 amendment. It approves only a goal exception,
29 resource land division and minor partition.
30 Record 9-10." (Footnote omitted.)

31 Because the county did not adopt the challenged goal

1 exception as part of its comprehensive plan, it cannot be a
2 valid exception to Goal 3 or provide justification for not
3 complying with ORS 215.283 and LCZO Article 6.²

4 The first, second, third and fourth assignments of
5 error are sustained.

6 **FIFTH ASSIGNMENT OF ERROR**

7 Petitioners contend the county erred in approving the
8 proposed realignment as a minor partition. Petitioners
9 argue the approved highway realignment results in a major
10 partition, because it includes the creation of a new road
11 across the subject property. Petitioners state this new
12 road provides the only access to the southern parcel created
13 from the subject property. Petitioners also contend county
14 regulations impose different approval standards on major and
15 minor partitions.

16 The county contends the challenged decision does not
17 approve a major partition because a state highway does not
18 fall within the definition of "road" or "street" in
19 ORS 92.010(13). According to the county, this state highway
20 is not being created to provide access to adjacent property,
21 but rather to provide a route for traffic to travel through
22 this region, and any access it provides to adjacent

²The adoption of a Goal 3 exception as part of the county's comprehensive plan will require that additional county hearings be held and a new decision and exception findings adopted. Therefore, we do not consider further the adequacy of or evidentiary support for the findings adopted by the county in support of the goal exception in the challenged decision.

1 properties is merely incidental. The county does not
2 dispute that under its regulations, there are different
3 approval standards for major and minor partitions.

4 LCZO Article 32 defines "partition, major" as "a
5 partition which includes the creation of a road or street
6 * * *." Conversely, "partition, minor" is defined as "a
7 partition that does not include the creation of a road or
8 street." "Road" is defined as follows:

9 * * * Road means the entire right-of-way of any
10 public or private way that provides ingress or
11 egress from property by means of vehicles or other
12 means or that provides travel between places by
13 means of vehicles. 'Road' includes but is not
14 limited to:

15 "1. Ways described as streets, highways,
16 throughways, or alleys[.]

17 * * * * *³ (Emphasis added.)

18 The segment of Highway 34 created by the subject land
19 division is clearly a "road" under the above quoted LCZO
20 definition. In addition to providing access to the farm
21 parcel to the south, it provides a route for vehicular
22 traffic between Corvallis and Lebanon. Consequently, we
23 agree with petitioners that the county erred in not treating
24 ODOT's request as being for a major partition. Because it

³We have not been provided with a copy of the county's land division ordinance. For the purposes of this opinion, we assume that the definitions of "partition, major," "partition, minor" and "road" in the LCZO are the same as any that may be in the county's land division ordinance.

1 is not contested that there are different approval standards
2 for major and minor partitions, the error is not harmless.

3 The fifth assignment of error is sustained.

4 The county's decision is remanded.