BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, DONALD A. STILL, and EARL VAN VOLKINBURG,	)	
Petitioners,	)	LUBA Nos. 93-200 and 93-201
vs.	)	FINAL OPINION AND ORDER
MARION COUNTY,	)	
Respondent.	)	

Appeal from Marion County.

F. Blair Batson, Portland, filed the petition for review and argued on behalf of petitioners.

Jane Ellen Stonecipher, Assistant County Counsel, Salem, filed the response brief and argued on behalf of respondent. With her on the brief was Robert C. Cannon, County Counsel.

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

AFFIRMED (LUBA No. 93-200) 05/31/94
REMANDED (LUBA NO. 93-201)

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

Opinion by Sherton.

NATURE OF THE DECISIONS

In LUBA No. 93-200, petitioners appeal a county ordinance amending the text of the county's Exclusive Farm Use (EFU) zoning district. In LUBA No. 93-201, petitioners appeal a county ordinance amending the text of the county's Special Agriculture (SA) zoning district.

FACTS

The county's comprehensive plan and land use regulations have been acknowledged by the Land Conservation and Development Commission (LCDC) under ORS 197.251. The county's EFU and SA zoning districts were acknowledged as exclusive farm use zones. The postacknowledgment amendments to the text of the EFU and SA zoning districts challenged in this appeal were adopted on November 3, 1993.

Subsequent to acknowledgment of the county's plan and land use regulations, LCDC adopted amendments to Statewide Planning Goal (Goal) 3 (Agricultural Lands) and promulgated new rules implementing Goal 3, OAR Chapter 660, Division 33 (Agricultural and Small Scale Resource Land). These goal amendments and rules became effective on August 7, 1993, and are referred to below as the "1993 version" of Goal 3 and the Goal 3 rule.

The 1993 Oregon Legislature enacted HB 3661, which significantly amends the provisions governing exclusive farm use zoning in ORS chapter 215. Or Laws 1993, ch 792.

HB 3661 became effective on November 4, 1993. After HB 3661 took effect, LCDC again amended Goal 3 and OAR Chapter 660, Division 33. These amendments became effective March 1, 1994, and are referred to below as the "1994 version" of Goal 3 and the Goal 3 rule.

PRELIMINARY ISSUES

A. Scope of Review

As relevant here, ORS 197.835(5)(b) provides this Board shall reverse or remand an amendment to a local government land use regulation if:

> "The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals."

Where petitioners contend challenged land use regulation amendments fail to comply with the statewide planning goals and implementing rules, we rely on respondents to identify any specific provisions in the local government comprehensive plan they contend provide the basis for the challenged amendment. If respondents fail to do so, we will not search the plan for such provisions, but rather will assume no such provisions exist, and that we have authority under ORS 197.835(5)(b) to reverse or remand the amendment to the local government land use regulation if it does not comply with the statewide planning goals or the administrative rules adopted by LCDC to implement those goals.

The decisions challenged in this consolidated proceeding are amendments to a county land use regulation, the Marion County Zoning Ordinance (Rural) (hereafter MCZO). No party contends the county comprehensive plan contains specific policies or other provisions which provide the basis for the challenged amendments. Consequently, we are authorized to reverse or remand the challenged decisions if they fail to comply with applicable provisions of the goals or LCDC rules.[1]

B. Applicable Versions of EFU Statute, Statewide Planning Goals and Administrative Rules

The parties disagree concerning which versions of the EFU statute, Goal 3 and the Goal 3 rule apply to the challenged decisions. HB 3661 and the 1994 version of Goal 3 and the Goal 3 rule, took effect after the challenged decisions were adopted by the county. In fact, the 1994 version of Goal 3 and the Goal 3 rule did not even exist when the county adopted the disputed amendments. Nevertheless, in several assignments of error petitioners contend provisions of ORS 215.203 to 215.327 (1993) (the EFU statute, as amended by HB 3661) and the 1994 versions of Goal 3 and the Goal 3 rule are applicable to the challenged amendments.

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[1]Of course, as we explain in more detail below, we are also authorized to reverse or remand the challenged amendments to the county's EFU and SA zones, if they are inconsistent with the applicable version of the state exclusive farm use zoning statute. ORS 197.835(7)(a)(D).

The Oregon Supreme Court has stated "in determining whether to give retroactive effect to a legislative provision, it is not the proper function of [the reviewing body] to make its own policy judgments, but its duty instead is to attempt to 'discern and declare' the intent of the legislature." Whipple v. Howser, 291 Or 475, 480, 632 P2d 782 (1981). Petitioners point to only one provision in the 1993 amendments to the EFU statute expressing a legislative intent that the provision be applied retroactively. ORS 215.316(1) (1993) provides that "[a]fter January 1, 1993, no county may adopt marginal lands provisions."

Prior to the enactment of HB 3661, under ORS 197.247 (1991), counties were authorized to designate certain types of poorer quality agricultural and forest lands as "marginal lands." Designated marginal lands were not subject to EFU zoning requirements. Rather, the uses allowable on marginal lands were governed by ORS 215.317 (1991) and 215.327 (1991), and generally included nonresource-related single-family dwellings on lots of record and on newly created parcels of 10 or more acres. Counties that amended their plans and land use regulations to designate marginal lands were required to apply ORS 215.213(1) to (3) (1991) to their remaining exclusive farm use zoned land.[2]

[2]This presumably was required because ORS 215.213(1) to (3) (1991) imposed more stringent requirements than the corresponding provisions of ORS 215.283 (1991).

ORS 215.288(2) (1991). With one exception not important here, counties that did not amend their plans and land use regulations to designate marginal lands were allowed to apply either ORS 215.213(1) to (3) (1991) or ORS 215.283 (1991) to their exclusive farm use zoned land. ORS 215.288(1) (1991).

In stating that no county may "adopt marginal land provisions" after January 1, 1993, ORS 215.316(1) (1993) expresses a legislative intent to retroactively prohibit counties from designating what was heretofore resource lands as marginal lands, and from adopting plan and code provisions allowing additional nonresource uses on those marginal lands, after January 1, 1993. We do not believe ORS 215.316(1) (1993) indicates an intent to retroactively prohibit counties which had not designated marginal lands from applying either ORS 215.283 (1991) or the supposedly stricter provisions of 215.213(1) to (3) (1991) to their exclusive farm use zones.[3]

In this case, the county has not adopted plan or land use regulation provisions designating marginal lands. Rather, the challenged decisions simply amend the MCZO

[3]Petitioners' second assignment of error contends the disputed amendments violate ORS 215.316 (1993) because they apply ORS 215.213 (1991) to the county's exclusive farm use zones after January 1, 1993. For the reasons explained in the text, we do not believe ORS 215.316 (1993) has a retroactive effect on the ability of counties that do not designate marginal lands to apply ORS 215.213 (1991) to their exclusive farm use zones after January 1, 1993. We therefore reject petitioners' second assignment of error without additional comment.

standards governing uses in the county's exclusive farm use zones. As such, we are unaware of any provisions of the 1993 amendments to the EFU statute intended to apply retroactively to the county's decisions and believe the disputed amendments must be reviewed against the versions of the EFU statute, Goal 3 and the Goal 3 rule that were in effect when the challenged decisions were adopted.[4] In the remainder of this opinion, unless otherwise indicated, we refer to the EFU statutory provisions codified in the 1991 edition of the Oregon Revised Statutes and the August 7, 1993 version of Goal 3 and the Goal 3 rule.[5]

FIRST ASSIGNMENT OF ERROR

Petitioners contend that under the disputed amendments, the approval criteria for dwellings in conjunction with farm use (farm dwellings) in the SA zone, set out in

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[4]We note that ORS 197.646(1) requires the county to amend its plan and land use regulations to implement new or amended land use statutes, statewide planning goals and LCDC rules "when such goals, rules or statutes become applicable to the [county]." Thus, even if we affirmed the challenged decisions, ORS 197.646(1) would still require the county to amend its plan and land use regulations to comply with HB 3661 and the 1994 version of Goal 3 and the Goal 3 rule, once those provisions became effective. However, for the reasons given below, the challenged decision amending the SA zoning district must be remanded. On remand, the county will be required to apply the current version of the EFU statute, codified in the 1993 edition of the Oregon Revised Statutes, and the 1994 versions of Goal 3 and the Goal 3 rule, to any decision to amend its regulations governing the SA zoning district.

[5]We address infra only petitioners' arguments that allege violations of the 1991 version of the EFU statute or the 1993 version of Goal 3 and the Goal 3 rule. Petitioners' third and sixth assignments of error allege solely violations of OAR 660-33-135 (1994), or ORS 215.263(4) (1993) and OAR 660-33-100(11) (1994), respectively. We therefore deny these assignments of error without further comment.

MCZO 137.030(a) and 137.040(b) fail to comply with Goal 3 and the Goal 3 rule. Petitioners make the same contention with regard to the approval criteria for dwellings in conjunction with the propagation or harvesting of a forest product (woodlot dwellings) in the SA zone, set out in MCZO 137.030(k) and 137.040(h). Petitioners argue that regardless of whether these MCZO approval standards satisfy ORS 215.213, they improperly fail to comply with the standards for uses of "important farmland" established by OAR 660-33-120 and 660-33-130.[6]

With one exception not relevant here, OAR 660-33-150(3) provides that "a county shall amend its comprehensive plan and land use regulations to implement the requirements of this division for important farmland by August 7, 1993." Therefore, in adopting the challenged amendments to its EFU and SA zoning districts on November 3, 1993, the county was required to comply with the requirements of the Goal 3 rule for important farmland.

Under OAR 660-33-120(1), "[d]wellings customarily provided in conjunction with farm use" are permitted on important farmland, subject to the requirements of OAR 660-33-130(1)(a) to (c) and (e). The standards for farm dwellings in the SA zone set out in MCZO 137.040(b) do not

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[6]Under OAR 660-33-110(1), "important farmland" includes all agricultural land not identified as high-value farmland" or "small-scale resource land." There is no dispute that under this definition all of the agricultural land to which the county's EFU or SA zone applies is "important farmland."

include the requirements of OAR 660-33-130(1)(a) to (c) and (e). OAR 660-33-120 does not list "dwellings in conjunction with the propagation or harvesting of a forest product" as a permitted or conditionally allowed use of important farmland. Single-family dwellings "not provided in conjunction with farm use" are listed as conditionally permitted under OAR 660-33-120(2). However, the county does not contend the standards for woodlot dwellings in the SA zone set out in MCZO 137.040(h) satisfy the requirements of OAR 660-33-130(4) for nonfarm dwellings, and we do not see that they do.

The first assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend the criteria for approving nonfarm dwellings in the SA zone set out in MCZO 137.040(i), as amended by the challenged decision, do not comply with the applicable requirements for nonfarm dwellings on important farmland established in OAR 660-33-130(4). However, petitioners provide no explanation of why they believe the criteria of MCZO 137.040(i) are inadequate to implement the requirements of OAR 660-33-130(4).

The provisions of MCZO 137.040(i)(1) through (3), (6) and (7) generally parallel those of OAR 660-33-130(4)(a) through (d). MCZO 137.040(i)(4) and (5) impose additional requirements, which appear to be allowed under OAR 660-33-130(4)(e). MCZO 137.040(i)(8) imposes additional

requirements for property under forest assessment that appear to parallel the additional requirements for such property imposed by OAR 660-33-130(4)(a), (b) and (d)(B). At least without further explanation from petitioners, we fail to see how the requirements of MCZO 137.040(i) are inconsistent with OAR 660-33-130(4).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

A. Subdivisions

Petitioners contend MCZO 137.070 is inconsistent with ORS 215.263 and OAR 660-33-100, because it allows subdivisions in the SA zone. Petitioners argue that because ORS 215.263 and OAR 660-33-100 refer only to the creation of "parcels" in EFU zones, and do not mention "lots," they do not authorize subdivisions in EFU zones. Petitioners point out that ORS 92.010(3) and (5) define "lot" as the unit of land created by a subdivision and "parcel" as the unit of land created by a partition.

As relevant here, ORS 215.010(1) provides that, as used in ORS chapter 215, terms defined in ORS 92.010 shall have the meaning stated therein, except that "parcel" includes a unit of land created:

> "(a) By partitioning land as defined in ORS 92.010;
>
> "(b) In compliance with all applicable planning, zoning and partitioning ordinances and regulations; or

> "(c) By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances and regulations[.]" (Emphases added.)

ORS 215.263(1) through (4) and (8) authorize counties to approve the creation of parcels for farm uses, nonfarm uses and, under certain circumstances, existing dwellings.[7] This is in marked contrast to the provisions of ORS 215.327 governing division of designated marginal lands, which allow divisions of land to create lots or parcels.

The definition of "parcel" in ORS 215.010 specifically includes units of land created in compliance with applicable "partitioning ordinances," but omits any mention of "subdivision ordinances." We therefore conclude the term "parcel," as used in ORS chapter 215, does not include units of land created by subdivision. Had the legislature intended to allow subdivision of EFU land it could easily have referred to the creation of both lots and parcels in ORS 215.263, as it did in ORS 215.327. Since it did not do so, we agree with petitioners that ORS 215.263 does not authorize subdivision of land zoned for exclusive farm use.

This subassignment of error is sustained.

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[7]The only reference to "lot" in ORS 215.263 is the prohibition against approving a "division of a lot or parcel" for which a dwelling for a relative of the farm operator has been approved under ORS 215.213(1)(e) or 215.283(1)(e). (Emphasis added.) This provision says nothing about whether a new "lot" may be created through subdivision of EFU zoned land.

B. Woodlot Parcels

Petitioners also contend MCZO 137.070 violates ORS 215.263 and OAR 660-33-100, because it allows the creation of "woodlot parcels" in the SA zone.

As amended, MCZO 137.070(a) sets out the same standards for approval of the creation of farm parcels and "woodlot parcels" in the SA zone.[8] ORS 215.263, which governs the division of land in EFU zones, refers to the creation of parcels for farm use, but does not refer to the creation of "woodlot parcels." OAR 660-33-100 refers to the creation of parcels for farm uses and nonfarm uses, but not to the creation of parcels for "woodlots." We are not cited to any definition in the MCZO of the term "woodlot" or "woodlot parcel." To the extent a "woodlot parcel" is something other than a farm parcel, we agree with petitioners that the creation of a "woodlot parcel" in an exclusive farm use zone is not authorized by ORS 215.263, Goal 3 or the Goal 3 rule.

This subassignment of error is sustained.

The fifth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

Petitioners contend the challenged decisions fail to comply with Goal 3 and OAR 660-33-080, 660-33-090 and 660-33-120, because they fail to identify and limit the uses of "high-value farmland," as required by the goal and rules.

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[8]These standards are significantly different than those set out in MCZO 137.070(b) for the creation of nonfarm parcels in the SA zone.

OAR 660-33-150(4)(a) requires that Marion County complete the process of implementing the requirements of the Goal 3 rule for high-value farmland by October 31, 1995. Accordingly, the county did not err by failing to bring its exclusive farm use zones into compliance with the requirements of the Goal 3 rule for high-value farmland when it adopted the challenged amendments on November 3, 1993.

The seventh assignment of error is denied.

EIGHTH AND NINTH ASSIGNMENTS OF ERROR

Under the disputed amendments to the SA zoning district, MCZO 137.120 (Density and Lot Area) provides that a new nonfarm dwelling lot or parcel "shall not be less than 2 acres unless the lot or parcel is located within a planned unit development." In a planned unit development (PUD), the "maximum density * * * shall be one non-farm dwelling unit per two acres * * *." Id. Under MCZO 137.120, there is no minimum lot area for a nonfarm dwelling lot or parcel in a PUD.

Petitioners contend that with regard to PUDs in the SA zone, the challenged decisions fail to demonstrate that MCZO 137.120 complies with the provisions of Goals 11 (Public Facilities and Services) and 14 (Urbanization) limiting areas outside of urban growth boundaries (UGBs) to "rural" uses and levels of public services, or to take exceptions from these goals. 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 505, 724 P2d 268 (1986).

Petitioners argue that compliance with Goals 11 and 14 must be demonstrated because the maximum density of one nonfarm dwelling per two acres may itself be urban, and because clustering may produce effectively urban densities of far greater than one dwelling per two acres. Kaye/DLCD v. Marion County, 23 Or LUBA 452, 463-64 (1992). Petitioners also argue that because the county has not restricted the proximity of SA zoned PUDs to UGBs, it must consider the effects of such PUDs on the integrity of established UGBs. Holland v. Lane County, 16 Or LUBA 583, 594-95 (1988).

The county argues it is not required to apply Goals 11 and 14 because the challenged decision does not change the MCZO 137.120 PUD density provisions to which petitioners object. According to the county, its acknowledged land use regulations allowed a maximum density of one nonfarm dwelling per two acres in PUDs in the SA zone, with no minimum lot size requirement, prior to the adoption of the disputed ordinance.

The county correctly notes that the allowable density of PUDs in the SA zone, as set out in MCZO 137.120, was not itself changed by the challenged amendments. However, as discussed supra, the challenged amendments to the SA zone do change the standards for approval of farm dwellings, nonfarm dwellings and land divisions in the SA zone. These changes may have the effect of increasing the numbers of, and circumstances in which, residential PUDs may be approved on

SA zoned land. Therefore, the county must consider these potential secondary effects of the challenged amendments to the SA zone in determining whether the SA zone, as amended, complies with Goals 11 and 14. See 1000 Friends of Oregon v. Jackson County, 79 Or App 93, 98, 718 P2d 753, rev den 301 Or 445 (1986).

The challenged decision amending the SA zone neither includes findings demonstrating compliance with Goals 11 and 14 nor adopts exceptions to Goals 11 and 14.

The eighth and ninth assignments of error are sustained.

CONCLUSION

We sustain petitioners' first, fifth, eighth and ninth assignments of error based on challenges to the county ordinance amending the SA zone appealed in LUBA No. 93-201. Consequently, that ordinance must be remanded. We do not sustain any assignments of error based on challenges to the county ordinance amending the EFU zone appealed in LUBA No. 93-200. Accordingly, we affirm that ordinance.