BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner,	)	LUBA No. 94-045
vs.	)	FINAL OPINION AND ORDER
DOUGLAS COUNTY, Respondent.	)	

Appeal from Douglas County.

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

Paul E. Meyer, Assistant County Counsel, Roseburg, filed the response brief and argued on behalf of respondent.

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

REMANDED 11/09/94

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner challenges amendments to the Douglas County Land Use and Development Ordinance (LUDO).

MOTION FOR SUMMARY AFFIRMANCE

The notice of intent to appeal in this matter identifies the challenged decision as follows:

> "Notice is hereby given that petitioner intends to appeal that land use decision of respondent entitled 'An ordinance Adopting Amendments to the Comprehensive Plan and the Coastal Resources Plan, 'also known as 'Ordinance 94-1-2,' which became final on February 23, 1994, and which involves comprehensive plan amendments addressing House Bill 3661 (Or Laws 1993, ch 792), Osprey habitat and Winchester Bay land use. The challenged ordinance <u>also involves amendments to respondent's [LUDO]</u> and Coastal Resources Plan and plan map." (Emphasis added.) Notice of Intent to Appeal 1.

The petition for review exclusively challenges amendments to the LUDO which were adopted by Ordinance 94-1-3. Although Ordinance 94-1-2 (which amends the comprehensive plan and coastal resources plan) is referenced by number in the notice of intent to appeal, Ordinance 94-1-3 (which amends the LUDO) is not referenced by number. Because petitioner's challenge is directed at Ordinance 94-1-3, whereas only Ordinance 94-1-2 is specifically referenced in the notice of intent to appeal, respondent contends the county's decision should be affirmed.

As petitioner correctly notes, LUBA's rules do not require that the notice of intent to appeal identify the

challenged decision by the number assigned to the challenged decision by the local government. Instead our rules require that the notice of intent to appeal include "[t]he full title of the decision to be reviewed as it appears on the final decision." OAR 661-10-015(3)(c). Petitioner's notice of intent to appeal does not comply with OAR 661-10-015(3)(c). However, the notice does specifically state that the decision challenged amends the LUDO. The record filed by the county in this matter includes Ordinance 94-1-3 and documents submitted during the local proceedings leading to the adoption of Ordinance 94-1-3. In these circumstances, we conclude petitioner's error in failing to include in the notice of intent to appeal "[t]he full title of [Ordinance 94-1-3] as it appears [in that ordinance]" is a technical violation of our rules. Petitioner's technical violation of our rules does not affect respondent's substantial rights and, therefore, does not affect our review or provide a reason for summary affirmance of the county's decision. OAR 661-10-005; see Fraser v. City of Joseph, ___ Or LUBA ___ (LUBA No. 94-067, Order on Motion to Dismiss, June 28, 1994), slip op 4 (failure to include in the notice of intent to appeal the full title of the decision and the date the decision became final); Davenport v. City of Tigard, 23 Or LUBA 679, 680 (1992); Brotje-McLaughlin v. Clackamas County, 21 Or LUBA 606, 610 n 4 (1991); Tice v. Josephine County, 21 Or LUBA 550, 551-52 (1991).

ASSIGNMENT OF ERROR

Petitioner argues the ordinance challenged in this appeal violates certain provisions of Oregon Laws 1993, chapter 792 (HB 3661), and administrative rules adopted by the Land Conservation and Development Commission (LCDC) to implement Statewide Planning Goals 3 (Agricultural Land) and 4 (Forest Lands).[1] Petitioner presents a single assignment of error with six subassignments. Respondent answers by identifying 12 issues raised by the six subassignments. Respondent concedes certain issues. At oral argument, petitioner also conceded certain issues.[2] We identify the conceded issues and resolve the issues remaining in dispute below.

Issue 1 (ORS 215.705 Lots-of-Record)

Or Laws 1993, chapter 792, section 2, is codified at ORS 215.705. ORS 215.705(1) provides the following lot-of-record provisions:

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[1]On February 18, 1994, LCDC adopted revisions to its Goal 3 and 4 administrative rules in response to HB 3661. The effective date of those amendments was March 1, 1994. Additional amendments to those rules have been adopted since February 18, 1994. The parties agree the pre-February 18, 1994 Goal 3 and 4 rules apply to the challenged decision. Therefore, the rule provisions cited in this opinion are the pre-February 18, 1994 versions of those rules.

[2]Following adoption of Ordinance 94-1-3, the county adopted Ordinances 94-2-2 and 94-3-2, which change the effective date of Ordinance 94-1-3 and correct some of the defects petitioner identifies in Ordinance 94-1-3. Based on certain corrections adopted by Ordinance 94-3-2, petitioner concedes certain issues raised in the petition for review.

"A governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a farm or forest zone as set forth in this section and ORS 215.710, 215.720, 215.740 and 215.750 after notifying the county assessor that the governing body intends to allow the dwelling. A dwelling under this section may be allowed if:

"(a) The lot or parcel on which the dwelling will be sited was lawfully created and was acquired by the present owner:

"(A) Prior to January 1, 1985; or

"(B) By devise or by intestate succession from a person who acquired the lot or parcel prior to January 1, 1985.

"* * * * *"

Petitioner cites a number of LUDO provisions adopted by Ordinance 94-1-3 which include language similar to that contained in ORS 215.705(1).[3] Petitioner's concern is that

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[3]Petitioner cites LUDO 3.2.100.5, 3.2.155.2.a, 3.3.050.3, 3.3.125.2, 3.4.050.3, 3.4.125.2, 3.5.050.3 and 3.5.115.2. For example, LUDO 3.2.155 includes the following standards for "Owner of Record" dwellings in the Timberland Resource zoning district:

"Standards for 'Owner of Record' Dwellings

"A dwelling on a lot or parcel that the current owner acquired before January 1, 1985, or acquired by devise or intestate succession from an owner who acquired the property before January 1, 1985, may be allowed subject to the following:

"* * * * *

"2. Findings must be made to satisfy all of the following:

"a. That the lot or parcel on which the dwelling will be sited was lawfully created.

"* * * * *"

the county interprets the above quoted language of ORS 215.705(1) and the similar LUDO language to apply the qualifying language in subsections (A) and (B) of ORS 215.705(1)(a) only to the "ownership" element of that statute. Petitioner's specific concern is that under the county's interpretation, lot-of-record dwellings could be allowed in circumstances where the statute does not allow them. First, petitioner argues a lot-of-record dwelling could be allowed on a lot or parcel that was illegally created, so long as the owner (1) acquired the illegally created lot or parcel either prior to January 1, 1985 or by devise or intestate succession from a person who acquired the illegally created lot or parcel prior to January 1, 1985; and (2) action was taken after January 1, 1985 to make the lot or parcel legal. Second, petitioner argues if a person acquired property prior to January 1, 1985 or acquired property by devise or intestate succession from a person who acquired the property prior to January 1, 1985, that property could be divided after January 1, 1985 and a lot-of-record dwelling could be approved for each of the new parcels or lots.

We do not understand the county to argue it interprets ORS 215.705(1)(a) to allow dwellings in the second circumstance identified above. To the extent it does, we agree with petitioner that such an interpretation is inconsistent with the language in ORS 215.705(1)(a). We

also agree with petitioner that respondent's interpretation of ORS 215.705(1)(a) and the challenged LUDO provisions as allowing lot-of-record dwellings in the first circumstance described above is inconsistent with the language of ORS 215.705(1)(a).

With regard to the first circumstance identified above, respondent relies in large part on Oregon Laws 1993, chapter 436, section 2, codified at ORS 92.177, which provides:

> "Where application is made to the governing body of a city or county for approval of the creation of lots or parcels which were improperly formed without the approval of the governing body, the governing body of a city or county or its designate may consider and approve an application for the creation of lots or parcels notwithstanding that less than all of the owners of the existing legal lot or parcel have applied for the approval."[4]

According to respondent, as a matter of grammatical construction of ORS 215.705(1)(a) and as a matter of construction of ORS 215.705(1)(a) in context with ORS 92.177, ORS 215.705(1)(a) is correctly construed to allow lot-of-record dwellings where the lot or parcel was acquired prior to January 1, 1985 and action is taken after January 1, 1985 to make the lot or parcel legal.

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[4]Petitioner contends ORS 92.177 was adopted simply to overrule LUBA's opinion in Kilian v. City of West Linn, 15 Or LUBA 585, aff'd 88 Or App 242 (1987), where this Board held that where a property is illegally partitioned, the consent of all current owners of the illegally partitioned parcels is required to legalize the partition after-the-fact.

Under PGE v. Bureau of Labor and Industries, 317 Or 606, 859 P2d 1143 (1993), our first inquiry in attempting to determine the meaning of statutes is directed at the language of the statute itself and its context. If the legislature's intent in ORS 215.705(1)(a) is clear from this inquiry, we need not consider legislative history.[5] The language of ORS 215.705(1)(a) itself supports petitioner's construction of that statute. The subject of the "acquisition" requirement is a "lawfully created" "lot or parcel." The present owner must have acquired a "lawfully created" "lot or parcel" prior to 1985, or acquired the "lawfully created" "lot or parcel" by "devise or intestate succession" from someone who acquired it prior to 1985. The statute simply does not apply to lots or parcels that were "illegally created" prior to 1985. Such lots or parcels may be legalized after 1985, and ORS 92.177 facilitates such after-the-fact legalization. However, such after-the-fact legalization of lots or parcels does not mean they were "lawfully created" before 1985. Such after-the-fact legalized lots or parcels do not qualify for lot-of-record dwellings under ORS 215.705(1)(a).

This subassignment of error is sustained.

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[5]Petitioner attaches, as attachments 1, 2, and 3 of its post oral argument memorandum, legislative history supporting its construction of ORS 215.705 and 92.177. Respondent provides no legislative history, but argues LUBA only requested that the parties submit post oral argument memoranda clarifying those issues remaining in dispute. Respondent moves that we strike attachments 1, 2, and 3. We grant the motion to strike.

Issue 2 (ORS 215.284(2)(b) Requirement that Nonfarm Dwellings be Situated on Land that is Generally Unsuitable for Production of Merchantable Tree Species)

LUDO 3.5.100(9)(f), as adopted by Ordinance 94-1-3, provides that a nonfarm dwelling is allowed in the Farm Forest district if, among other things, the dwelling "is situated upon land generally unsuitable for the production of farm crops and livestock." In addition to unsuitability for "farm crops and livestock," ORS 215.284(2)(b) imposes a requirement that nonfarm dwellings be located on land that is generally unsuitable for the production of "merchantable tree species." LUDO 3.5.100.9(f), as adopted by Ordinance 94-1-3, does not include the latter requirement concerning general unsuitability for production of "merchantable tree species."

However, Ordinance 94-3-2 amended LUDO 3.5.100.9(f) to add the missing reference to lands generally unsuitable for production of merchantable tree species. Based on this amendment to LUDO 3.5.100.9(f), petitioner concedes issue 2.

This subassignment of error is denied.

Issue 3 (Churches and Schools)

OAR 660-33-120 lists uses authorized on agricultural lands. Among the uses listed are "[c]hurchs and cemeteries in conjunction with churches," and "[p]ublic or private schools, including all buildings essential to the operation of a school." Unless an exception under ORS 197.732 and OAR

chapter 660, division 4 is approved, OAR 660-33-130(3) precludes approval of churches or public or private schools on agricultural lands "within 3 miles of an urban growth boundary."

As amended by Ordinance 94-1-3, LUDO provisions for certain resource zones subject to OAR chapter 660, division 33, allowed churches and schools without imposing the above noted 3-mile limitation. However, as amended by Ordinance 94-3-2, only the Agriculture and Woodlot district arguably fails to impose the 3-mile limitation required by OAR 660-33-130(3).

As relevant, LUDO 3.6.100, which specifies permitted uses in the Agriculture and Woodlot district, provides:

> "In the [Agriculture and Woodlot district], the following uses and activities and their accessory buildings and uses are permitted * * *:
>
> "1. Uses listed in §3.5.100 * * *.[6]
>
> "* * * * *
>
> "3. Public and semipublic buildings, structures and uses essential to the physical, social and economic welfare of the area, including but not limited to * * * schools * * * and churches."

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[6]LUDO 3.5.100 lists conditional uses allowable in the Farm Forest district. Among the uses listed in LUDO 3.5.100 are the following:

> "12. Churches and public or private schools, including all buildings essential to the operation of a school, provided that they are not within 3 miles of a UGB unless an exception is approved pursuant to ORS 197.732 and OAR [chapter] 660 division 4."

"* * * * *"

Respondent argues we may overlook the failure explicitly to impose the OAR 660-33-130(3) 3-mile limitation on churches and schools in subsection 3 of LUDO 3.6.100, because that limitation is imposed on churches and schools in the Farm Forest district by LUDO 3.5.100(12), and the Farm Forest district conditional uses are incorporated by reference by subsection 1 of LUDO 3.6.100. According to respondent, subsections 1 and 3 of LUDO 3.6.100 must be read together and, therefore, the 3-mile limit would apply to any churches or schools allowed in the Agriculture and Woodlot district.

Respondent concedes the listing of churches and schools in subsection 3 of LUDO 3.6.100 as examples of public and semipublic buildings without specifically imposing the 3-mile limitation "may be inartful," but argues it does not intend to allow churches and schools in violation of the OAR 660-33-130(3) requirement that such churches and schools not be located within 3 miles of a UGB. Douglas County's Memorandum in Response to Petitioner's Memorandum 6.

We seriously question whether the county would violate LUDO 3.6.100(1) by approving a church or school within 3 miles of a UGB in the Agriculture and Woodlot district, when LUDO 3.6.100(3) expressly allows churches and schools without any limitation on their proximity to UGBs. Construing LUDO 3.6.100(1) and (3) to give effect to both of

those subsection would appear to allow the county to approves churches and schools within 3 miles of a UGB in the Agriculture and Woodlot District, when OAR 660-33-130(3) prohibits approval of such churches and schools.

This subassignment of error is sustained.

Issue 4 (Power Generation Facilities)

In its petition for review, petitioner argues the county's Exclusive Farm Use-Grazing and Exclusive Farm Use-Cropland districts are inconsistent with OAR 660-06-025(4)(i). OAR 660-06-025(4)(i) allows power generation facilities on forest lands without a Goal 4 exception, provided such facilities do not remove more than 10 acres of land from resource use. LUDO 3.3.100(9) and 3.4.100(9) allow power generation facilities in the Exclusive Farm Use-Grazing and Exclusive Farm Use-Cropland districts without a goal exception, so long as such facilities do not remove more than 20 acres "from use as a commercial agricultural enterprise."

Petitioner concedes the Exclusive Farm Use-Grazing and Exclusive Farm Use-Cropland districts are districts adopted to implement Goal 3 and that LUDO 3.3.100(9) and 3.4.100(9) are consistent with OAR 660-33-130(23), which prohibits power generation facilities on agricultural lands without an exception if such facilities "preclude more than 20 acres from use as a commercial agricultural enterprise * * *."

At oral argument and in its post oral argument memorandum, petitioner argues the county's Farm Forest district is a mixed Goal 3 and 4 zoning district which must comply with OAR 660-06-025(4)(i) and 660-33-130(23). Petitioner contends the Farm Forest district allows "[c]ommercial utility facilities for the purpose of generating power for public use by sale * * *," without imposing any limitation on the amount of land removed from resource use. LUDO 3.5.100(6). According to petitioner, LUDO 3.5.100(6) violates OAR 660-06-025(4)(i) and 660-33-130(23).

Respondent does not dispute petitioner's argument concerning the Farm Forest district. However, respondent correctly points out that petitioner's arguments in the petition for review are limited to the Exclusive Farm Use-Cropland and Exclusive Farm Use-Grazing zoning district provisions for power generation facilities. Respondent contends petitioner may not raise arguments concerning the Farm Forest district for the first time at oral argument and in its post oral argument memorandum. We agree with respondent.

This subassignment of error is denied.

Issue 5 (Small Scale Farm or Forest Dwellings)

LUDO 3.6.050(3) permits the county to approve single family dwellings "in conjunction with small scale farm or forest use" in the Agriculture and Woodlot district, which

implements Goals 3 and 4. Petitioner contends such "small scale" farm or forest dwellings are not allowable under Goals 3 and 4 and that ORS 215.304(1)[7] precludes LCDC from adopting or implementing any rule which would permit the county to adopt a provision such as LUDO 3.6.050(3).

Respondent concedes this issue. This subassignment of error is sustained.

Issue 6 (Definition of Campground)

LUDO 1.090 provides the following definition of "campground:"

> "An area designed for short-term recreational purposes and where facilities, except commercial activities such as grocery stores and laundromats, are provided to accommodate that use. Space for tents, campers, recreational vehicles, and motor homes are allowed and permanent open air shelters (adirondacks) may be provided on the site by the owner of the development. In the exclusive farm use zones intensively developed recreations such as swimming pools, tennis courts, retail stores or gas stations shall not be allowed."

Although campgrounds are allowed on lands subject to Goals 3 and 4, OAR 660-06-025(4)(e) and 660-33-130(19) specifically define campgrounds as follows:

> "[A]n area devoted to overnight temporary use for vacation, recreational or emergency purposes, but not for residential purposes. A camping site may be occupied by a tent, travel trailer or

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[7]ORS 215.304(1) provides:

> "The Land Conservation and Development Commission shall not adopt or implement any rule to identify or designate small-scale farmland or secondary land."

> recreational vehicle. Campgrounds * * * shall not include intensively developed recreational uses such as swimming pools, tennis courts, retail stores or gas stations."

Petitioner argues the LUDO, as amended by the challenged decision, allows campgrounds in a number of resource zones. Petitioner contends the county's definition of "campground" is inconsistent with the above quoted definition of that term in OAR 660-06-025(4)(e) and 660-33-130(19).

As clarified by the parties' post oral argument memoranda, the Timberland Resources, Farm Forest, Agriculture and Woodlot, Exclusive Farm Use-Grazing and Exclusive Farm Use-Cropland districts allow campgrounds. Three of those zoning districts (the Timberland Resources, Farm Forest, and Agriculture and Woodlot districts) explicitly include a definition of campground that repeats the definition contained in OAR 660-06-025(4)(e) and 660-33-130(19), rather than relying on the LUDO 1.090. Only the Exclusive Farm Use-Grazing and Exclusive Farm Use-Cropland districts rely on the definition of "campground" provided in LUDO 1.090.

LCDC does not require that local governments adopt comprehensive plans and land use regulations that restate, word for word, the statewide planning goals or the administrative rules which implement those goals. The comprehensive plans and land use regulations must "comply" with the goals and rules. ORS 197.175(2)(a); see ORS

197.646. The court of appeals has explained this obligation as follows:

> "LCDC's goals and rules are not self-executing. The actual regulation takes place through the local legislation that is enacted pursuant to them and is found to comply with them. The distinction is not one without a without a difference. Local comprehensive plans and land use regulations need not simply parrot LCDC's goals and rules; the local legislation is required to comply with them but not to duplicate them." Oregonians in Action v. LCDC, 106 Or App, 721, 726, 809 P2d 718 (1991).

Petitioner's entire argument in the petition for review is:

> "[T]he broader definition of 'campground' allows more uses in the resource zones that do [LCDC's] rules. Respondent's broader definition of 'campground' is therefore inconsistent with applicable requirements." Petition for Review 17.

In its post oral argument memorandum, petitioner explains its concern is that LUDO 1.090 allows "motor homes," whereas OAR 660-06-025(4)(e) and 660-33-130(19) do not mention motor homes. According to petitioner, motor homes may be larger and require more facilities than travel trailers or recreational vehicles. Petitioner also objects that under LUDO 1.090 campgrounds need only be "designed for short-term recreational purposes," whereas OAR 660-06-025(4)(e) and 660-33-130(19) require that the campground be "devoted to overnight temporary use for vacation, recreational or emergency purposes, but not for residential purposes." Petitioner contends a facility may be "designed for" a particular purpose, but nevertheless be "devoted to" other

purposes. Petitioner also objects to the failure of the LUDO 1.090 definition expressly to preclude use for "residential purposes."

We do not believe petitioner has shown that the LUDO 1.090 definition fails to comply with OAR 660-06-025(4)(e) and 660-33-130(19). The definitions are different. However, we agree with respondent that there is not a substantial amount of difference between a recreational vehicle and a motor home. Petitioner's concern about the "designed for" versus "devoted to" language presents a closer question, but we do not agree the different language used in the LUDO amounts to a conflict with the rule language. We also conclude the LUDO 1.090 definition makes it sufficiently clear that a campground may not be used for residential purposes, without specifically saying so.

This subassignment of error is denied.

Issue 7 (Definition of Golf Course)

Respondent concedes that, as amended by Ordinance 94-1-3, the Agriculture and Woodlot and Farm Forest districts simply allow "golf courses" as a conditional use, without specifying that the definition of "golf course" in OAR 660-33-130(20) applies. LUDO 3.5.100(5); 3.6.100(4). Because other resource zones specifically include the OAR 660-33-130(20) definition of "golf course," but the Agriculture and Woodlot and Farm Forest districts do not, petitioner contends the challenged decision must be remanded

so the county may make it clear that the OAR 660-33-130(20) definition applies in the Agriculture and Woodlot and Farm Forest districts.

The county points out that Ordinance 94-3-2 amended LUDO 3.5.100(5) to explicitly refer to the OAR 660-33-130(20) definition, making it clear that the rule definition of "golf course" applies in the Farm Forest district. Therefore, a remand to correct LUDO 3.5.100(5) is unnecessary. However, the county concedes LUDO 3.6.100(4) must be amended to incorporate a reference to the OAR 660-33-130(20) definition.

This subassignment of error is sustained, in part.

Issue 8 (35 Acre Minimum Lot or Parcel Size in the Exclusive Farm Use-Cropland District)

The 1993 legislature adopted specific minimum lot and parcel sizes. For forest land and farm land not designated range land, the minimum lot or parcel size is 80 acres. ORS 215.780(1)(a) and (b). For land zoned for exclusive farm use and designated as rangeland, the minimum lot or parcel size is 160 acres. ORS 215.780(1)(c). ORS 215.780(2) provides what the parties refer to as a "go below" provision, which permits a county to establish minimum lot or parcel sizes smaller than would otherwise be required by ORS 215.780(1):

> "A county may adopt a lower minimum lot or parcel size than that described in [ORS 215.780(1)] by demonstrating to [LCDC] that it can do so while continuing to meet the requirements of ORS 215.243

and 527.630 and the land use planning goals adopted under ORS 197.230."

Petitioner contends the requirement of ORS 215.780(2) that the county demonstrate to LCDC that a minimum lot or parcel size smaller than required by ORS 215.780(1) will meet "the requirements of ORS 215.243 and 527.630 and the land use planning goals adopted under ORS 197.230" must come before the county adopts the smaller minimum lot or parcel size.[8] Therefore, petitioner contends the county erred by adopting a 35-acre minimum lot or parcel size for the Exclusive Farm Use-Cropland district. LUDO 3.400(1)(a).

We agree with petitioner's construction of ORS 215.780(2). This subassignment of error is sustained.

Issue 9 (Exceptions to Minimum Lot or Parcel Sizes in the Timberland Resource District for Exchanges or Transfers)

As adopted by Ordinance 94-1-3, LUDO 3.2.200(1)(b)(1) exempted from partitioning review certain divisions of land "for the purposes of exchanges and transfers between forest land owners * * *." Petitioner objects that LUDO 3.2.200(1)(b)(1) improperly allows divisions that do not comply with the 80-acre minimum lot or parcel size requirement of ORS 215.780(1)(c).

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[8]Although LCDC approved the county's proposal for a 20-acre minimum lot size on lands currently zoned Agriculture and Woodlot, the county's request for a 35-acre "go below" minimum lot or parcel size in the Exclusive Farm Use-Cropland zone was denied by LCDC at its May 27, 1994 meeting.

Respondent points out Ordinance 94.3.2 amends LUDO 3.2.200(1)(b)(1) to explicitly impose the 80-acre minimum lot or parcel size. Petitioner concedes this subassignment of error.

This subassignment of error is denied.

Issue 10 (Exceptions to Minimum Lot or Parcel Sizes in the Timberland Resource District for Certain Listed Uses)

LUDO 3.2.200(1)(b)(2) provides that lot or parcel sizes of less than 80 acres may be allowed for certain specified uses in the Timberland Resource district.

> "Lot or parcel sizes may be reduced below 80 acres through the administrative action process specified in LUDO 2.060.1.c only for [certain listed] uses * * *."

OAR 660-06-026(3) provides:

> "New land divisions less than [80 acres] may be approved only for the uses listed in OAR 660-06-025(3)(m) through (o) and (4)(a) through (n) provided that such uses have been approved pursuant to OAR 660-06-025(5)."

Respondent contends that, with the exception of limited maintenance and repair facilities, deviation from the 80-acre minimum lot or parcel size for the listed uses in LUDO 3.2.200(1)(b)(2) is authorized by OAR 660-06-026(3). Respondent agrees that remand is appropriate to delete "limited maintenance and repair facilities" from the list of uses that may be authorized on lots or parcels of less than 80 acres in the Timberland Resource District.

Petitioner accepts respondent's concession with regard to "limited maintenance and repair facilities" and concedes that the other uses petitioner challenges under this subassignment of error are allowed by OAR 660-06-026(3).

This subassignment of error is sustained, in part.

Issue 11 (Exceptions to Minimum Lot or Parcel Sizes in the Timberland Resource District for Homestead Dwellings)

LUDO 3.2.200(1)(b)(3) provides:

> "The minimum parcel size [in the Timberland Resource district] may be waived to allow a division of forest land involving a dwelling existing prior to January 25, 1990 * * * provided that:
>
> "(a) The new parcel containing the dwelling is no larger than 5 acres; and
>
> "(b) The remaining forest parcel, not containing the dwelling, meets the minimum land division standards of this zone; or
>
> "(c) The remaining forest parcel, not containing the dwelling, is consolidated with another parcel which together meet the minimum land division standards of this zone."

The administrative rules in effect when Ordinance 94-1-3 was adopted allowed a homestead exemption, such as that authorized by LUDO 3.2.200(1)(b)(3), for existing dwellings occupied by retiring land managers. The parties point out that ORS 215.720(3) does not explicitly authorize or prohibit "homestead dwellings."[9] Respondent cites

[9]ORS 215.720(3) provides:

legislative history which it contends shows the legislature did not intend to preclude creation of parcels of no more than five acres for homestead dwellings. However, before resorting to legislative history, we first must consult the statutes adopted by the legislature governing minimum lot and parcel sizes in forest zones. PGE v. Bureau of Labor and Industries, supra. ORS 215.780(1) unambiguously imposes an 80-acre minimum lot size on lands designated for forest use, unless the exceptions provided by ORS 215.780(2) or (3) apply. Neither of the referenced exceptions allows the creation of parcels for homestead dwellings.

This subassignment of error is sustained.

Issue 12 (Exceptions to Minimum Lot or Parcel Sizes in the Farm Forest District for Nonfarm Dwellings)

As adopted by Ordinance 94-1-3, LUDO 3.5.200(1)(b)(1) allowed creation of a lot or parcel of less than 80 acres for nonfarm dwellings in the Farm Forest district. Petitioner contends that provision violates ORS 215.284(2), which imposes a number of requirements not included in LUDO 3.5.200(1)(b)(1).

"No dwelling other than those described in this section and ORS 215.740 and 215.750 may be sited on land zoned for forest use under a land use planning goal protecting forest land."

"Homestead" dwellings by definition are existing dwellings. ORS 215.720(3) therefore has little bearing on the question of whether the legislature intended to preclude the creation of parcels for homestead dwellings.

Respondent concedes the point, but notes that Ordinance 94-3-2 amended LUDO 3.5.200(1)(b)(1) to address this concern, and LUDO 3.5.200(1)(b)(1) now specifically references the requirements of ORS 215.284(2). Petitioner agrees and concedes this issue.

This subassignment of error is denied.

The county's decision is remanded.