BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TERRY DORVINEN and JORENE BYERS, Petitioners, vs. CROOK COUNTY, Respondent, and CHARLIE MOORE, Intervenor-Respondent.	LUBA No. 96-208 FINAL OPINION AND ORDER

Appeal from Crook County.

Gary Abbott Parks, Lake Oswego, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent.

William C. Cox, Portland, filed the response brief and argued on behalf of intervenor-respondent.

HANNA, Administrative Law Judge; LIVINGSTON, Administrative Law Judge, participated in the decision.

REVERSED 12/15/97

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal (1) the county's approval of the division of a 40-acre parcel into three parcels; and (2) conditional use permits for a nonfarm dwelling on each of the resulting parcels.

MOTION TO INTERVENE

Charlie Moore (intervenor), the applicant below, moves to intervene in this proceeding on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

The subject property is a 40-acre parcel located in the county's exclusive farm use (EFU) zone. Intervenor applied for approval to divide the parcel into one 20-acre parcel and two 10-acre parcels, and for a conditional use permit for a nonfarm dwelling on each parcel. The property is not irrigated, and has no water rights. Soil on the property consists of Ayres gravelly sandy loam, SCS Class II, and Ayres stony sandy loam Classes IV-VI if not irrigated.

Within one mile of the subject property are approximately 39 parcels of sizes ranging from five acres to 831 acres, all zoned EFU. Within a mile of the subject property are three irrigated mint farms, and several cattle operations, including an 831-acre tract used both as a Goal 5 aggregate site and for grazing.

The remainder of the parcels within one mile are nonirrigated parcels with sizes ranging from five to 120 acres, none of which currently receive farm tax deferral. Eight nonfarm dwellings exist within a mile of the subject property, and the county recently approved three additional nonfarm dwellings in the area.

The planning commission (commission) denied intervenor's application on the basis that, while the property would not itself support a viable agricultural operation at commercial levels, the proposed nonfarm dwellings would have a significant cumulative negative impact on the land use pattern and agricultural operations in the area, because they would contribute to the transition of the area from agricultural to low-density residential use. Intervenor appealed that decision to the county court. The county court heard intervenor's appeal on the record compiled by the commission, and reversed the lower decision, approving the land divisions and conditional use permits.

This appeal followed.

SIXTH ASSIGNMENT OF ERROR

Petitioners contend that partitioning a 40-acre parcel into three smaller parcels violates the requirement of ORS 215.780 that all partitions of lands

zoned EFU comply with applicable minimum parcel sizes.[1] Under both ORS 215.780(1)(a) and CCZO 3.030(9), the applicable minimum parcel size for the subject property is 80 acres. Petitioners argue that nothing in the plain language of ORS 215.780(1) indicates an exception for partitions associated with nonfarm dwellings.

Intervenor responds that ORS 215.780 does not apply to partitions associated with nonfarm dwellings, and that the only applicable standards consist of the nonfarm dwelling statutes at ORS 215.284(3), read in conjunction with ORS 215.263(4).[2] ORS 215.263(4) permits a partition

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[1]ORS 215.780(1) provides that:

> "* * * the following minimum lot or parcel sizes apply to all counties:
>
> > (a) For land zoned for exclusive farm use and not designated rangeland, at least 80 acres;
> >
> > "* * * * *."

[2]ORS 215.284(3) provides in relevant part:

> "[A] single-family residential dwelling not provided in conjunction with farm use may be established, subject to approval of the governing body or its designate, in any area zoned for exclusive farm use upon a finding that:
>
> "(a) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;
>
> "(b) The dwelling is situated upon a lot or parcel or portion of a lot or parcel that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the

associated with a nonfarm dwelling when the nonfarm dwelling is approved under ORS 215.284(3). Neither section, however, speaks to whether the resulting parcels must comply with the minimum parcel size applicable in the zone.

The arguments as framed turn on the proper interpretation of ORS 215.780(1) and the nonfarm dwelling and partition provisions at ORS 215.284 and 215.263, or, more precisely, the interactions among them. In interpreting a statute, we first examine the text and context to determine the legislature's intent. PGE v. Bureau of Labor and Industries, 317 Or 606, 610-11, 859 P2d 1143 (1993). The initial task of statutory interpretation is to determine whether the text permits

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tract. A lot or parcel or portion of a lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land;

"(c) The dwelling will be sited on a lot or parcel created after January 1, 1993, as allowed under ORS 215.263(4);

"(d) The dwelling will not materially alter the stability of the overall land use pattern of the area; and

"(e) The dwelling complies with such other conditions as the governing body or its designate considers necessary." (Emphasis added.)

ORS 215.263(4) provides that:

"The governing body of a county may approve a division of land in an exclusive farm use zone for a dwelling not provided in conjunction with farm use only if the dwelling has been approved under ORS 215.213(3) or 215.284(3) or (4)."

one and only one plausible construction. State v. Allison, 143 Or App 241, 247, 923 P2d 1224 (1996). One rule of construction applicable at this stage is that, where two statutes conflict, the two should be read together and harmonized, if possible, while giving effect to a consistent legislative policy. State v. Guzek, 322 Or 245, 268, 906 P2d 272 (1995).

In our view, ORS 215.263(4) and ORS 215.284(3) are capable of at least four plausible constructions, depending on how they interact with ORS 215.780(1)(a). Under the first construction, all parcels created from a partition associated with a nonfarm dwelling must comply with the applicable minimum parcel size. Under the second, the resulting nonfarm parcel need not comply with the minimum parcel size, but the partition must leave a remaining parcel that complies with the minimum parcel size. Under the third, a variant of the second, the resulting nonfarm parcel need not comply with the minimum parcel size, but if the partition leaves a remaining parcel that is suitable for farm use, that parcel must comply with the minimum parcel size. Under the fourth, no parcel resulting or remaining from a partition associated with a nonfarm dwelling need comply with the minimum parcel size.[3]

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[3]For purposes of this discussion, we use "resulting parcel" or "nonfarm parcel" to mean a parcel on which a nonfarm dwelling is approved under ORS 215.284(3), and "remaining parcel" or "farm parcel"

Stated another way, these readings differ according to whether the minimum parcel size at ORS 197.780(1) applies to all parcels, only to the remaining parcel, or to no parcels remaining or resulting from a partition associated with a nonfarm dwelling. The second and third constructions differ over whether and under what circumstances a partition must leave a remainder parcel that meets the minimum parcel size. In this case, we understand petitioners to urge adoption of the first or second interpretation, intervenor the third or fourth.

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to mean the remaining farm portion of the originating parcel, if any, on which a nonfarm dwelling is not approved.

The immediate context of ORS 215.284(3) includes three similar nonfarm dwelling provisions at ORS 215.284(1), (2) and (4). ORS 215.284(1) and (4) govern Willamette Valley counties; ORS 215.284(2) and (3) govern all other counties, including the one at issue. The only difference between ORS 215.284(2) and ORS 215.284(3) is that ORS 215.284(2) appears to permit a nonfarm dwelling on an existing parcel, whereas ORS 215.284(3) appears to contemplate creating a new parcel on which the nonfarm dwelling will be sited. Cf. ORS 215.284(2)(c) and 215.284(3)(c).[4] A partition associated with a nonfarm

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[4]ORS 215.284(2) provides:

> "[A] single-family residential dwelling not provided in conjunction with farm use may be established, subject to approval of the governing body or its designate, in any area zoned for exclusive farm use upon a finding that:
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> "(a) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;
>
> "(b) The dwelling is situated upon a lot or parcel or portion of a lot or parcel that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. * * *;
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> "(c) The dwelling will be sited on a lot or parcel created before January 1, 1993;
>
> "(d) The dwelling will not materially alter the stability of the overall land use pattern of the area; and

dwelling is not permitted under ORS 215.284(2), when that statute is read in conjunction with ORS 215.263(7).[5] Harrell v. Baker County, 28 Or LUBA 260, 261 (1994).

The relationship between ORS 215.284(2) and (3) is not immediately apparent. The separate listing of otherwise identical standards, and the prohibition on partitions for a nonfarm dwelling under ORS 215.284(2), strongly suggest that the legislature intended that partition is permitted in some circumstances, and prohibited in others. Yet nothing in the text seems to dictate what those circumstances are. If an applicant can obtain a partition simply by choosing to apply under ORS 215.284(3) rather than (2), then the prohibition on partitions for nonfarm dwellings under ORS 215.284(2) makes little sense.

The apparent textual distinction between ORS 215.284(2) and (3) is that the former applies to parcels created before January 1, 1993, and the latter applies to parcels created after January 1, 1993. ORS 215.284(2)(c), (3)(c). However, the difference that

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> "(e) The dwelling complies with such other conditions as the governing body or its designate considers necessary."

[5]ORS 215.263(7) states:

> "The governing body of a county shall not approve any proposed division of a lot or parcel described in ORS 215.213 (1)(e) or 215.283 (1)(e) or 215.284 (1) or (2)."

distinction makes is not apparent. The reference in ORS 215.284(3)(c) to a "lot or parcel created after January 1, 1993" appears to be a reference to the nonfarm parcel that will be created under ORS 215.263(4). But in that case, nothing prevents an applicant with a parcel created before 1993 from obtaining a partition pursuant to ORS 215.263(4) and 215.284(3). That reading eliminates any meaningful distinction between ORS 215.284(2) and (3), which is inconsistent with the markedly bifurcated nature of the statutory scheme. On the other hand, reading the parcel referred to in ORS 215.284(3)(c) as the parent parcel seems contrary to its plain terms.

In short, it is not evident to us under what circumstances the legislature intended the nonfarm dwelling statutes at ORS 215.284(2) and (3) to operate, much less whether it intended minimum parcel sizes to apply to all, some, or none of the parcels created under ORS 215.284(3).

The only other contextual statutes not already described are the partition statutes at ORS 215.263(2) and (3).[6] ORS 215.263(2) provides that parcels created

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[6]ORS 215.263(2) & (3) provide that

> "(2) The governing body of a county or its designate may approve a proposed division of land to create parcels for farm use as defined in ORS 215.203 if it finds:
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> "(a) That the proposed division of land is appropriate for the continuation of the existing

for "farm use" must meet the applicable minimum parcel size. ORS 215.263(3) provides that partitions for conditional uses, "except dwellings," are permitted if the new parcel is not larger than the minimum size necessary for the use. These sections are arguably consistent with each of the four identified constructions, and thus do not assist in resolving the issue before us.

To the extent the relevant Oregon Administrative Rule at OAR 660-33-100 provides any context for ORS 215.780, 215.284 and 215.263, it is singularly unhelpful on this point.[7] The rule merely repeats some of the

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commercial agricultural enterprise within the area; or

"(b) The parcels created by the proposed division are not smaller than the minimum lot size acknowledged under ORS 197.251.

"(3) The governing body of a county or its designate may approve a proposed division of land in an exclusive farm use zone for nonfarm uses, except dwellings, set out in ORS 215.213 (2) or 215.283 (2) if it finds that the parcel for the nonfarm use is not larger than the minimum size necessary for the use. The governing body may establish other criteria as it considers necessary." (Emphasis added).

[7]At the time the present case arose, OAR 660-33-100 provided in relevant part:

"(10) Counties may allow the creation of new parcels for nonfarm uses authorized by this division. Such new parcels shall be the minimum size needed to accommodate the use in a manner consistent with other provisions of law except as required under paragraph (11)(a)(D) of this rule.

statutory language, and sheds no light on whether minimum parcel sizes apply to partitions associated with nonfarm dwellings. The rule was adopted in 1994, but refers to a subsection of ORS 215.283 that has not existed since 1993, and does not address ORS 215.284 at all.

Considered as a whole, we do not discern that the text or context renders only one construction plausible,

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> "(11)(a) Counties may allow the creation of new lots or parcels for dwellings not in conjunction with farm use. In the Willamette Valley, a new lot or parcel may be allowed if the originating lot or parcel is equal to or larger than the applicable minimum lot or parcel size, and:
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> "(A) Is not stocked to the requirements under ORS 527.610 to 527.770;
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> "(B) Is composed of at least 95 percent Class VI through VIII soils; and
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> "(C) Is composed of at least 95 percent soils not capable of producing 50 cubic feet per acre per year of wood fiber; and
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> "(D) The new lot or parcel will not be smaller than 20 acres.
>
> "(b) No new lot or parcel may be created for this purpose until the county finds that the dwelling to be sited on the new lot or parcel has been approved under the requirements for dwellings not in conjunction with farm use in ORS 215.283(5) and (6) [sic], 215.236 and OAR 660-33-130(4)." (Emphasis added.)

Effective December 23, 1996, OAR 660-33-100(10) was amended to state:

> "(10) Counties may allow the creation of new parcels for nonfarm uses authorized by this division. Such new parcels shall be the minimum size needed to accommodate the use in a manner consistent with other provisions of law except as required for nonfarm dwellings authorized by section (11) of this rule." (Emphasis added, showing language added to rule).

or necessarily renders any of the identified constructions implausible. It appears to us that this statutory scheme reflects two potentially conflicting purposes: (1) to preserve large blocks of land zoned EFU, but (2) to permit nonfarm dwellings and (some) land divisions with respect to relatively unproductive portions of lands zoned EFU. The first and fourth constructions ignore one or the other of these purposes and thus fail to harmonize the relevant statutory provisions. The second and third constructions (that the minimal parcel size does not apply to the resulting nonfarm parcel, but does to the remaining parcel, at least in some circumstances) give some scope to both purposes and their statutory embodiments. Nonetheless, the text and context do not make the legislature's intent certain on this point, and, accordingly, we consider the legislative history. PGE, 317 Or at 611-12.

The relevant portions of the statutory provisions at issue were each created or put into their current form in 1993 as part of a complex omnibus land use bill: HB 3661, Oregon Laws 1993, chapter 792. Given the complexity of the legislation, we describe the relevant legislative history at some length.

Upon reaching the Senate, HB 3661-A was entirely replaced with HB 3661-A50. HB 3661-A50 added seven sections to ORS chapter 215, sections 1-6 creating lot of

record dwellings and section 7 imposing a minimum parcel size of 80 acres on lands zoned EFU. These sections reflect one of the basic premises of HB 3661-A50: permitting lot of record dwellings in return for a restriction on new parcels. See comments of Senator Joyce Cohen, Minutes of the Senate Agriculture and Natural Resources Committee, July 26, 1993, page 41. Accordingly, section 7 of HB 3661-A50 originally provided that:

> "(3) Notwithstanding any other provision of law, no new lots or parcels may be created on land zoned for exclusive farm use to site a dwelling that is not used in conjunction with farm use."

That trade-off was subsequently modified, in the next major draft, when subsection (3) was replaced by a provision allowing nonfarm dwellings on new or existing parcels only if the parcel is comprised of poor soils. HB 3661-A57, section 14; testimony of Russ Nebon, Marion County Senior Planner, before the Senate Agriculture and Resource Committee, July 17, 1993, Tape 239, side B, counter 368. This proposal evolved into a bifurcated scheme, roughly corresponding to the current form of ORS 215.284(1) and 215.284(2), under which nonfarm dwellings were allowed on existing parcels on poor soils in the Willamette Valley, and on existing parcels in eastern Oregon where the parcel or portion of the parcel was generally unsuitable for agriculture. HB 3661-A71, section 14. On July 22, 1993, the committee conceptually

approved HB 3661-A71, section 14, but reserved for later discussion the issue of whether to allow new parcels for nonfarm dwellings in non-Willamette Valley counties. Minutes of the Senate Agriculture and Natural Resources Committee, July 22, 1993, 14.

On July 26, 1993, the committee returned to HB 3661-A71, section 14. The discussion focused on modifying for eastern Oregon the holding in Smith v. Clackamas County, 313 Or 519, 836 P2d 716 (1992).[8] The deputy legislative counsel outlined proposed refinements to section 14 reflecting two modifications of the outcome in Smith: (1) siting a nonfarm dwelling on an unsuitable portion of a farm parcel where no partition occurs; and (2) siting a nonfarm dwelling on an unsuitable portion of a farm parcel, which portion is then carved off into a nonfarm parcel.[9] The committee passed a conceptual motion to "go

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[8]In Smith, the applicant sought to place a nonfarm dwelling on seven acres, unsuitable for farming, situated on an otherwise productive 54 acre-farm, under a provision that allowed a nonfarm dwelling only if the dwelling is situated on "generally unsuitable" land. The Oregon Supreme Court agreed that the county must consider whether the entire 54-acre parcel is unsuitable, not just the seven acres. 313 Or at 527-28.

[9]The deputy legislative counsel testified that:

> "* * * In the Smith case, as I pointed out before, there are two aspects. Those where you decide to put a dwelling on a large existing parcel and you are just going to put it over on the side that is not too good. The other aspect of the Smith case is where you can have a land division, where you divide off a chunk of the not-so-good parcel. You will see under subsections (3) and (4) [ORS 215.284(1) and (2)] are where we have the existing parcel, although the language at the moment is missing in this draft. On subsections 5 and 6

back to the period prior to the Smith case" in eastern Oregon. Minutes, July 26, 1993, page 41.

The question then arose whether the minimum parcel size requirement would affect new nonfarm parcels created in non-Willamette Valley counties. The committee appeared to agree that when a nonfarm parcel is carved off from a farm parcel, the nonfarm parcel is not subject to the minimum lot size. Minutes, July 26, 1993, pages 43-44.

On July 28, 1993, the committee considered sections 12 and 14 of HB 3661-A83, which amended ORS 215.263(4) and ORS 215.284, respectively, into a recognizable version of their current forms.[10] The relevant discussion is set out below in a footnote, but can be summarized as follows: Anne Squier, the governor's natural resources advisor, questioned whether ORS 215.263(4) should be amended to state that (1) the nonfarm parcel carved off from the parent parcel is not subject to the minimum parcel size, but (2) the remaining parent parcel is

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> [ORS 215.284(4) and (3), respectively] is where we deal with the land division. * * * In (3) you are basically talking about western Oregon with a little side trip as usual for existing parcels. Subsection (4) is talking about eastern Oregon with a modifier for existing parcels. Subsection (5) is western with new parcels. And (6) is eastern with new parcels." Minutes, July 26, 1993, at 35-36.

[10]Section 14 of HB 3661-A83 actually amended ORS 215.283. At a later stage, legislative counsel codified the nonfarm dwelling provisions at ORS 215.284 to separate them from other conditional uses, which remained in ORS 215.283.

subject to the minimum parcel size.[11] Squier and several members of the committee made statements indicating that they understood that, under existing law and practice, the county's minimum parcel size applied to the remaining parent parcel, but the amendments were proposed because there had been questions from the counties on whether the minimum also applies to the nonfarm parcel. Senator Bunn then questioned the rationale for why, under existing law and practice, the minimum should apply to the remaining parent parcel. After some discussion about obtaining testimony from counties on existing practices, and not wishing to be distracted from more important matters, the committee decided not to amend ORS 215.263(4) in either

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[11]The proposed language would have changed ORS 215.263(4) to state:

> "The governing body of a county may approve a division of land smaller than the minimum lot or parcel size of the zone in an exclusive farm use zone for a dwelling not provided in conjunction with farm use only if the dwelling has been approved under ORS 215.213(3) or [current ORS 215.284(3) or (4)], and the remaining lot or parcel, not containing the dwelling:
>
> "(a) Meets the minimum lot or parcel size of the zone; or
>
> "(b) When consolidated with another lot or parcel, meets the minimum lot or parcel size of the zone." (Emphasized language proposed by HB 3661-A84 amendments).

particular, with the apparent intent that ORS 215.263(4) as it stood should reflect existing law and practice.[12]

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[12]The following colloquy occurred July 28, 1993, before the Senate Agriculture and Natural Resources Committee (Tape 267-A, counter 300-475):

> Squier: "Mr. Chair, I think I missed one section here because they were renumbered. It would be in the -83 amendments subsection 4 on page 11, line 17 through 20 [referring to amendments to ORS 215.263(4)]. The issue here is to clarify the circumstances when a division of land is made where the land is generally unsuitable and to clarify whether the piece of land that is created by carving it out because it's generally unsuitable must meet a minimum lot size."
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> Sen. Cohen: "You mean, Mr Chair, the leftovers, not the piece that's unsuitable, the other --"
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> Squier: "The leftover does, but it's to clarify whether the carved out piece needs to meet the minimum lot size."
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> Cohen: "Not the rocks, not the rocks [i.e. the unsuitable portion of the parcel], the remaining fields."
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> Squier: "Well I think that's what the clarification should be, that the rocks don't."
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> "* * * * *
>
> Cohen: "The rocks don't have to be minimum, but the other one does."
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> Sen. Bunn: "Mr. Chair, if we got 80 acres and an 80-acre minimum, and you've got ten acres of rocks, you're saying that you can't carve that ten off because it would make a substandard parcel?"
>
> Squier: "I think that's the way it works. But the issue was whether if you were in a 20 acre lot size whether the rocks you carve off have to be 20 acres, and I think they don't."
>
> Deputy legislative counsel: "It might be easier for the committee if you look at the language, which I think is here, I'll look and see if you have that set of amendments [-84]."

Bunn: "So, Anne [Squier], you are not saying that we are concerning ourselves with the agricultural size that is left, because we are carving off nonagricultural anyway, but what we are concerned about is the size of the parcel we are taking off the agricultural land?"

Squier: "My understanding is that the remaining parcel which is remaining in EFU complies with the minimum lot size, but that the carved off piece need not comply with that minimum lot size, and that there has been some circumstances, where people have argued at least, that the carved off piece needs to meet the minimum lot size, and I think --"

Bunn: "OK, and you are advocating that we do care that the base piece meet the minimum size, but the unsuitable piece does not need to meet the minimum in the area."

Squier: "Right, which I think is how it has been intended to operate."

Bunn: "Why do we care if the piece that it's carving off falls below the minimum if its already an existing tract and we're carving off something that isn't farmed anyway? I'm not trying to open a new issue, I guess I didn't understand that piece of it.

Squier: "I think the question was whether one was retaining a parcel that met the minimum lot size within that farm zone, the farm use parcel.

Bunn: "But what is the benefit of retaining it if what you retain -- if you retain 100 percent of the agricultural part of it, why do we want to maintain any more just to achieve a lot size? And, again, if I'm bringing up a completely new issue, I'll just drop it here.

Squier: "I'll have to defer to Dick [Benner, Director, Department of Land Conservation and Development] or [the deputy legislative counsel].

Bunn: "Dick [Benner], do you understand my question? I'll use 90 acres. If you've got 90 acres, and on that 90 acres, it's in an 80 acre zone, if 20 acres or 15 acres of that is unsuitable, and you carve off that 15, you're left with 15 and 75, this bill -- Are we trying to say you cannot carve off 15, you can only to carve off 10, because you got to keep it at the 80,

and if so, why do we care other than to preserve 100% of the farmable land?"

Richard Benner [Director, Department of Land Conservation and Development]: "You're looking at the dash -84s [amendments]?"

Unknown: "Page 11, line 17."

Benner: "OK, but I mean, do you have the -84s in front of you?"

Unknown: "I think she just brought it."

Benner: "I think the effect of the language is as you describe it, Sen. Bunn. If you have a 90 and you want to cut off 15 but there's an 80 acre minimum lot size, you wouldn't be able to cut off 15, you'd have to cut off fewer than 15 acres, you'd have to cut off 10."

Bunn: "What are we achieving with that requirement?"

Benner: "The intention of it probably is to try to keep farm parcels of a size that continue to be an efficient and effective unit for agriculture and that's generally the basis for a minimum lot size."

Bunn: "So once you set that lot size but you have acknowledged that a certain percentage of this parcel is not suitable for farming, why do you want to keep that on it anymore. Once you got that 90 and you know that 15 is not suitable for farming, then you know that you only have 75 acres suitable for farming. so is there another reason why you don't allow that to be cut to the 75?"

Benner: "Well there's -- probably, no, not on that basis. I think the overall idea is to make sure that the nonfarm parcel you are creating is the minimum necessary for septic purposes or something like that, and you don't end up reducing the parent parcel except to the minimum necessary. You might want to hear from a county about its current practice on that, or a county that has a minimum lot size, because some currently don't have a minimum lot size."

Bunn: "It's just a little cloudy on both sides what we're doing. I'd like to hear from a county their perspective on it."

Squier: "Mr. Chair, Sen. Bunn, if I may, I thought I was suggesting a clarification, because there have been

The other relevant commentary occurred as part of the Senate floor debates, when Senator Bunn stated that "[u]nder ORS 215.263(2) and (4) you cannot create a parcel for farm use that is less than the applicable minimum lot size * * *." Senate Floor Discussion, August 2, 1993 (Tape 203-A, 200). Senator Bunn's remark appears in the context of a discussion of nonfarm dwellings in

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> questions at the county level with respect to the piece that is carved off. I don't want to introduce a whole new debate here. Whatever the law is with the existing language in the statutes, if it's not easy, I would rather we not get hung up on this tonight, frankly."
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> Bunn: "I would just as soon stay with existing law, and not try to recreate it."
>
> Squier: "I truly, um, the question was what the existing practices in the counties were and I was fearful that --"
>
> Cohen: "But we do have the record that the counties if they have a minimum lot size, they can enforce it. and that we expect that there be one, that's the language that's in here already. The other piece of it, the property that is --"
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> Bunn: "If we're operating under current law, and that's working for us, we're just not changing it, whatever that is."
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> Chairman Cease: "Well, let me ask you -- I think I would agree with Sen. Bunn, since we're operating under current law, and that's not a problem, keep it that way. But is paren 4 on 17 in that situation?"
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> Squier: "Mr. Chair, my thought was that there was a clarification that was possible there. I don't think that this is the most important thing in this bill. I don't want a half hour or hour spent on it, so I'd be glad to pass on it."
>
> Cease: "Let's pass it for now." (Emphasis added.)

the Willamette Valley under ORS 215.284(4), which has its own particular criteria. However, ORS 215.263(2) applies equally to creation of parcels for farm use in eastern Oregon, and ORS 215.263(4) by its terms also applies to partitions associated with nonfarm dwellings in eastern Oregon under ORS 215.284(3). Senator Bunn's remark is equally applicable to nonfarm dwellings under ORS 215.284(3).

The foregoing legislative history suggests an intent that after a nonfarm parcel is carved off under ORS 215.284(3) and ORS 215.263(4), the nonfarm parcel is not subject to the minimum parcel size at ORS 215.780. Accordingly, we reject petitioners' first construction, that a nonfarm parcel carved from a parent parcel must meet the minimum parcel size.

We can also dismiss intervenor's fourth construction, that no minimum parcel size applies to <u>any</u> parcel created by partition pursuant to ORS 215.284(3). The legislative history, in combination with ORS 215.263(2), suggests that, at least where a remaining parcel that is suitable for farm use is created from a partition pursuant to ORS 215.284(3), the remaining farm parcel must meet the minimum parcel size. This view corresponds to the third construction identified above, and we can therefore conclude that the legislature intended that ORS 215.284(3) have at least that meaning.

However, the legislative history is not decisive in selecting between the second and third construction, which differ precisely over whether a partition under ORS 215.284(3) must leave a parent parcel that meets the minimum parcel size, even if that parent parcel is not in farm use and consists entirely, in the words of the committee, of "rocks" unsuitable for farm use. The only paradigm the committee expressly considered was the one presented in Smith: a parcel in farm use, some portion of which consists of "rocks."

In our view, the legislative history cannot resolve whether the legislature intended the second or the third construction. The committee did not consider the issue before us, and there is little reliable indication how it would have resolved the present case. Two relatively clear propositions emerge from the legislative history: (1) that one can carve off and build on the "rocks" without complying with a minimum parcel size, and (2) that any remaining parcel suitable for farm use must comply with the minimum parcel size. However, neither proposition necessarily controls the present case, i.e., where the parent parcel is sub-minimum, and allegedly consists entirely of "rocks" unsuitable for farm use.

Accordingly, we proceed to the third stage of the PGE analysis. At the third stage, we resort to general maxims of statutory construction. PGE, 317 Or at 612.

We are aware of only one applicable maxim, one that returns us to our original task: to harmonize apparent conflicts within the statutory scheme, if it is possible to do so. Friends of Neabeack Hill v. City of Philomath, 139 Or App 39, 49, 911 P2d 350 (1996).

Applying that maxim, we conclude for several reasons that the interpretation that most harmonizes the conflicts in this statutory scheme is the second construction: that partition under ORS 215.284(3) must leave a remainder parcel that meets the minimum parcel size. That interpretation is more consistent with the statutory policy at ORS 215.243 to preserve the maximum amount of the limited supply of agricultural land from urban and residential development.[13] And it is more

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[13]ORS 215.243 states that:

"The Legislative Assembly finds and declares that:

"(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.

"(2) 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.

"(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts

consistent with the fundamental premise of the EFU statutes that nonfarm dwellings are the exception and that approval for them should be difficult to obtain. Cherry Lane, Inc. v. Board of County Comm., 84 Or App 196, 199 n3, 733 P2d 488 (1987); see also Lindquist v. Clackamas County, 146 Or App 7, 13, 923 P2d 1190 (1997) (HB 3661 retained the status of nonfarm dwellings as one of the most stringently regulated nonfarm uses in EFU zones). It is evident that many more nonfarm dwellings could be created, and more easily, under the third construction than under the second.

Finally, the second construction gives greater effect to the differences between ORS 215.284(2) and 215.284(3). As we explained in our textual analysis, the structure of ORS 215.284(2) and 215.284(3) strongly suggest that partition is permitted under some circumstances, but prohibited in others. Further, the general tenor of the legislative history is to restrict partitions of EFU land, including partitions associated with nonfarm dwellings, to a greater rather than a lesser

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between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.

"(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones."

degree. Under the third construction, the only circumstance where a partition is prohibited is where the applicant seeks to create a remainder farm parcel less than the minimum parcel size. Under the second construction, partition is prohibited where it fails to leave a remainder parcel, whether or not suitable for farm use, that meets the minimum parcel size. Again, the third construction permits many more partitions of the type sought here, and hence loss of larger blocks of EFU land. Where the parent parcel is subminimum, as here, only the second construction gives effect to the differences between ORS 215.284(2) and (3), and to each of the divergent policies identified above: to limit partitions of EFU land, preserve blocks of EFU land, but permit some nonfarm dwellings.[14]

Applying the foregoing to the present case, it follows that the county erred in approving a partition of the subject property, and we therefore sustain the sixth assignment of error. Because the partition in the challenged decision is

[14]Under the second construction an applicant can still seek to place a nonfarm dwelling on a subminimum parcel under ORS 215.284(2); he is prohibited only from obtaining a partition to place two or more nonfarm dwellings.

prohibited as a matter of law, the decision must be reversed. OAR 661-10-017(10(c); Harrell, 28 Or LUBA at 262.

Petitioners make five additional assignments of error. Because we reverse the county's decision on one assignment of error, no purpose would be served by our addressing the remaining assignments of error for which petitioners seek relief. DLCD v. Jackson County, ___ Or LUBA ___ (LUBA No. 96117, June 25, 1997), slip op 14.

The county's decision is reversed.