BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALLIANCE FOR RESPONSIBLE LAND USE IN DESCHUTES COUNTY,	)	
Petitioner,	)	
vs.	)	
	)	LUBA Nos. 99-027/028
DESCHUTES COUNTY,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
and	)	
STEVE SCOTT,	)	
Intervenor-Respondent.	)	

Appeal from Deschutes County.

Thomas Johnson, Portland, filed the petition for review and argued on behalf of petitioner.

Bruce W. White, Deschutes County Legal Counsel, Bend, filed a response brief and argued on behalf of respondent.

Robert S. Lovlien, Bend, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Bryant, Lovlien & Jarvis.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 11/15/99

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals the county's decision dividing two 40-acre parcels zoned Exclusive Farm Use (EFU) into 20-acre parcels and approving nonfarm dwellings on each 20-acre parcel.

MOTION TO INTERVENE

Steve Scott (intervenor), one of the applicants below, moves to intervene on the side of the county. There is no opposition to the motion and it is allowed.

FACTS

In 1992, as part of an overhaul of its land use regulations, the county adopted Deschutes County Zoning Ordinance (DCZO) 18.16.060(B), which establishes a 20-acre minimum parcel size for partitions associated with nonfarm dwellings.[1] In 1993, the legislature enacted ORS 215.780, which prescribes minimum parcel sizes of at least 80 acres for lands zoned EFU, with specified exceptions.[2]

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[1]DCZO 18.16.060 sets forth dimensional standards for farm and nonfarm parcels. DCZO 18.16.060(B) provides that "[t]he minimum lot size for nonfarm land divisions is 20 acres."

[2]ORS 215.780 provides in relevant part:

> "(1) Except as provided in subsection (2) of this section, 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;
> >
> > "(b) For land zoned for exclusive farm use and designated rangeland, at least 160 acres; * * *
> >
> > "* * * * *
>
> "(2) A county may adopt a lower minimum lot or parcel size than that described in subsection (1) of this section in any of the following circumstances:
>
> > "(a) By demonstrating to the Land Conservation and Development Commission 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.

In 1998, intervenor applied to the county to partition a 40-acre parcel into two 20-acre parcels and for approval of a nonfarm dwelling on each 20-acre parcel.[3] The hearings officer denied the application because the 20-acre parcel size failed to comply with the minimum parcel size prescribed by ORS 215.780. The hearings officer relied upon the Court of Appeals' decision in *Dorvinen v. Crook County*, 153 Or App 391, 957 P2d 180 *rev den* 327 Or 620 (1998), in which the court held that the minimum parcel sizes in ORS 215.780(1) apply to partitions associated with nonfarm dwellings.

The county board of commissioners reviewed the hearings officer's decision on its own motion, conducted *de novo* proceedings, overruled the hearings officer's denial, and approved the proposed partition and nonfarm dwellings.

This appeal followed.

ASSIGNMENT OF ERROR

Petitioner argues that the county's decision approving a partition of a parcel of land that is zoned EFU and smaller than the minimum parcel size required by ORS 215.780(1) violates that statute and is inconsistent with the Court of Appeals' holding in *Dorvinen*.

At issue in *Dorvinen*, as in the present cases, was a proposal to partition a 40-acre parcel and place nonfarm dwellings on the resulting parcels. The Court of Appeals examined the text and context of ORS 215.780(1) and concluded that "in the absence of the qualifying

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"* * * * *

"(3) A county with a minimum lot or parcel size acknowledged by the commission pursuant to ORS 197.251 after January 1, 1987, or acknowledged pursuant to periodic review requirements under ORS 197.628 to 197.636 that is smaller than those prescribed in subsection (1) of this section need not comply with subsection (2) of this section."

[3]Although the property, applications, and applicants in LUBA Nos. 99-027 and 99-028 are different, the county conducted consolidated proceedings below, and adopted decisions in each case that are identical with respect to the legal issues raised in this consolidated appeal. For those reasons, LUBA consolidated these appeals as closely related decisions, and allowed the county to file a consolidated record. For ease of reference and citation, this opinion will discuss and cite to the decision and record in LUBA No. 99-027, the decision approving intervenor's application, without parallel discussion or citation to LUBA No. 99-028.

circumstances that are described in ORS 215.780(2) and that are not present here, the 80-acre minimum parcel size is an across-the-board requirement in EFU zones." 153 Or App at 397. The court rejected the county's argument that the statutes governing nonfarm dwellings at ORS 215.284(3)[4] and 215.263(4)[5] provide all of the applicable criteria for nonfarm dwellings and for land divisions in conjunction with those dwellings, explaining that

> "Although other provisions in ORS 215.263 refer to parcel sizes, *see* subsections (2) and (3), subsection (4) does not, and none that do are in any way inconsistent with ORS 215.780. * * * Moreover, subsection (4)

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[4]ORS 215.284(3), the statutory authority for the proposed nonfarm dwellings at issue in *Dorvinen* and in the present case, provides:

> "In [non-Willamette Valley counties], 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 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."

[5]ORS 215.263(4) provides:

> "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). The governing body of a county shall not approve a subdivision or series partition for a dwelling not provided in conjunction with farm use. The provisions of this subsection regarding a series partition apply only to applications for a land division submitted after July 1, 1997. For purposes of this subsection, 'series partition' shall have the meaning given that term in ORS 92.305."

> establishes *no* criteria – pertaining to parcel sizes or anything else – *for* the allowance of land divisions related to nonfarm dwellings. Rather, it provides that a partition becomes permissible only after the dwelling itself has been approved under the other standards in ORS 215.284(3).
>
> "In sum, nothing in ORS 215.284(3) or ORS 215.263(4) is inconsistent with the simultaneous application of the parcel size and other partition requirements of ORS 215.780. Insofar as the first two statutes envision that the siting of a nonfarm dwelling may entail a land division, those statutes do not purport to establish standards of their own for land divisions or to obviate the need for compliance with any standards that may be found in other statutes. Hence, ORS 215.284(3) and ORS 215.263(4) provide no basis for concluding that the minimum parcel size requirement of ORS 215.780(1)(a) does not apply to the parcels that result from land divisions for nonfarm dwellings, and the language of ORS 215.780(1) clearly indicates that its requirements do apply to those parcels." 153 Or App at 397-98 (emphasis in original).

In addition, the Court of Appeals examined the other provisions of ORS 215.780, *see* n 2, and noted that ORS 215.780(2)(b) provides a specific exception to the ORS 215.780(1) minimum parcel size for "dwelling[s] on land zoned for forest use or mixed farm or forest use[.]" The court reasoned that the exception at ORS 215.780(2)(b)

> "demonstrates that ORS 215.780(1) *does apply* to parcels and dwellings in those zones and, by implication, in resource zones of the other kinds mentioned in subsection (1) as well. [Further], unlike the forest and mixed zones specified in ORS 215.780(2)(b), the statute permits no exception from its minimum parcel size requirements for parcels on which dwellings are sited in EFU zones of the kind here." 153 Or App at 398-99 (emphasis in original).

The court concluded, essentially, that the legislature knew how to draft an exception for dwellings in certain zones otherwise subject to the sweeping scope of ORS 215.780(1), and its failure to draft an exception for nonfarm dwellings in EFU zones is a significant contextual indication that no such exception was intended.

In the challenged decisions, the county rejected *Dorvinen*'s holding, and concluded that ORS 215.780(1) does not apply to creation of parcels intended for nonfarm dwellings:

> "The fundamental issue is what the legislature intended to encompass with the term 'minimum lot or parcel size' in ORS 215.780(1). The [county] believes that term was meant to refer to minimum lot sizes for farm parcels only and not minimum lot sizes involved with nonfarm dwellings.

> "The [county] believes that the Court of Appeals simply got it wrong when it held that the ORS 215.780(1) minimums apply across the board. The most graphic illustration of this is the conflict that arises when ORS 215.780(1) is juxtaposed against ORS 215.263(3). ORS 215.263(3) governs minimum lot sizes for nonfarm uses other than nonfarm dwellings and specifies that the lot size for such uses be the minimum necessary to accommodate the use. There is no way the two provisions can be harmonized without determining that one or the other provision is inapplicable. Another illustration of a conflict between these statutes is ORS 215.263(2)(a) and ORS 215.780(1). ORS 215.780(1) sets out a fixed minimum lot size, whereas ORS 215.263(2)(a) reflects the previous farm parcel standard, allowing for a case-by-case determination of minimum farm parcel sizes. Finally, the Court's determination that the 80-acre minimum lot size applies across the board flies in the face of the legislature's very determined effort to overturn *Smith v. Clackamas County* [313 Or 519, 836 P2d 716 (1992)] for counties outside the Willamette Valley." Final Decision of Deschutes County Board of Commissioners re: Application for Steve Scott 13-14.

In its response brief, the county amplifies the legal reasoning in the challenged decision. To the extent the county asks this Board to affirm the challenged decisions on a basis inconsistent with the Court of Appeals' opinion in *Dorvinen*, we decline to do so. If the holding in *Dorvinen* applies to this case, *i.e.* if ORS 215.780(1) applies to partitions associated with nonfarm dwellings under ORS 215.263(4) and 215.284(3) then we, as well as the county, are bound to apply it. Because the county identifies no basis to distinguish the applicable law or the facts of the present case from those in *Dorvinen*, the shortest and most dispositive answer to the county's arguments is that *Dorvinen* is controlling precedent to which LUBA, and the county, must adhere.[6] Nonetheless, we must address an alternative argument in the county's response brief suggesting that, even if ORS 215.780(1) applies to some partitions associated with nonfarm dwellings, LUBA can affirm the county's decisions based on LUBA's analysis in *its* opinion in *Dorvinen*.

[6]The challenged decisions note that there are unresolved issues regarding whether the county's 20-acre minimum parcel size for nonfarm dwellings falls within the exceptions provided by either ORS 215.780(2) or (3). The county expressly declined to resolve those issues, and rested the decisions solely on its determination that ORS 215.780(1) does not apply to nonfarm dwelling land divisions.

In LUBA's *Dorvinen* opinion, 33 Or LUBA 711 (1997), the Board found that the interrelationship between ORS 215.780(1) and 215.284(3) was unclear. Therefore, LUBA determined that resort to legislative history was appropriate, under the second step of the process for statutory construction described in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993), to resolve which of several potential constructs the legislature intended. Based on legislative history, LUBA determined that the legislature did not intend that parcels for nonfarm dwellings carved off from a farm parcel be subject to the ORS 215.780(1) minimum parcel size, although the legislature intended that the farm parcel itself remain subject to that minimum size requirement. However, LUBA found no legislative history that resolved the circumstances presented in *Dorvinen* and in the present case: an EFU parcel that is already under the minimum parcel size and that is proposed to be divided to site nonfarm dwellings without leaving a remainder parcel of any size. Accordingly, LUBA proceeded to the third step described in *PGE*, and determined that the construct that most harmonized various competing statutory policies and provisions was to apply ORS 215.780(1) to partitions of sub-minimum EFU parcels, effectively precluding those partitions.

The Court of Appeals affirmed LUBA's holding based solely on consideration of the text and context of ORS 215.780(1). The court noted that:

> "This case does not present the occasion for us to take the further step that LUBA took, or to decide whether we agree with LUBA's interpretation of the statutes that goes beyond the point that we find it necessary to reach to resolve this case. The proposal here is to partition a parcel that is smaller to begin with than the minimum lot size specified by ORS 215.780(1), and to leave no remaining parcel of any size that would not have a nonfarm dwelling on it. Consequently, if ORS 215.780(1) applies *at all* to proposed land divisions related to the siting of nonfarm dwellings, the proposal in the present case cannot satisfy the statute." 153 Or App at 396-97 n 4 (emphasis in original).

As explained above, the court then went on to consider the text and context of ORS 215.780(1) and determined that, subject to specified exceptions, the minimum parcel sizes set forth in that statute apply "across-the-board" to partitions in EFU zones. 153 Or App at 397.

Essentially, the court found that ORS 215.780(1) considered in context is unambiguous and applicable by its terms to all partitions of EFU parcels, unless subject to some specific exception. Because nothing in ORS chapter 215 provides an exception for partitions associated with nonfarm dwellings, the court concluded, ORS 215.780(1) by its terms applies to such partitions.

The remaining question in this case is whether there is anything in LUBA's *Dorvinen* analysis that can provide a basis to affirm the county's decisions, in light of the Court of Appeal's holding and analysis. The answer, we conclude, is no. We understand the county to argue that LUBA's analysis in *Dorvinen*, if corrected for several alleged flaws, demonstrates that the legislature did not intend ORS 215.780(1) to be applied to partitions of sub-minimum EFU parcels where no large parcel in farm use remains, however it might be applied in other cases involving partitions for nonfarm dwellings. However, even if LUBA agreed with the county that its *Dorvinen* analysis is flawed and actually supports a different conclusion than the one LUBA reached, our agreement on that point would not affect the Court of Appeals' holding, which rests on a different and independent base, and which directly controls the present cases.[7]

The assignment of error is sustained.

Petitioner requests that these cases be reversed rather than remanded, because the county's approvals violate the applicable law and are "prohibited as a matter of law." OAR 661-010-0071(1)(c). The county responds that if LUBA sustains the assignment of error, the challenged decisions should be remanded, because the decisions expressly reserve the issue of whether the county's 20-acre minimum lot size for nonfarm dwellings was

[7]These consolidated cases do not present an occasion to determine how much, if any, of LUBA's *Dorvinen* analysis survives the Court of Appeals' analysis. LUBA concluded, based on legislative history, that ORS 215.780(1) does not apply to parcels that are partitioned from farm parcels in order to site nonfarm dwellings as long as a remainder parcel meets the minimum parcel size. That conclusion, arguably, is inconsistent with the Court of Appeals' broader and textually-based conclusion that ORS 215.780(1) applies across the board to all EFU partitions, unless a specific exception applies. However, we express no opinion in this regard.

adopted in a manner that brings it within the ambit of the exceptions to ORS 215.780(1) set out in ORS 215.780(2) and (3). We agree with the county that we cannot determine, on this record, whether the challenged decisions are "prohibited as a matter of law." OAR 661-010-0071(1)(c). Consequently, the appropriate resolution is remand. OAR 661-010-0071(2)(d).

The county's decisions are remanded.