BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT,
Petitioner,

and

FRIENDS OF YAMHILL COUNTY,
Intervenor-Petitioner,

vs.

YAMHILL COUNTY,
Respondent.

LUBA No. 2002-011

FINAL OPINION
AND ORDER

On remand from the Court of Appeals.

Steven E. Shipsey, Salem, represented petitioner.

William K. Kabeiseman, Portland, represented intervenor-petitioner.

Frederic Sanai, Assistant County Counsel, McMinnville, represented respondent.

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

REMANDED 01/21/2004

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

Opinion by Briggs.

This appeal arose from a decision by the county to approve a comprehensive plan map amendment from Agriculture/Forestry Large Holding (AFLH) to Agriculture/Forestry Small Holding (AFSH) and a zoning map amendment from exclusive farm use (EF-80) to Agriculture/Forest Small Holding (AF-10) for a 10-acre parcel. The plan and zoning map amendments necessitated an exception to Statewide Planning Goal 3 (Agricultural Lands), which was approved by the county as well. The express purpose of the plan and zoning map amendments was to allow for the siting of a single-family dwelling on the parcel.

Petitioner and intervenor-petitioner challenged the county's decision on a number of grounds and we sustained all but one of their assignments of error. In that one assignment of error, petitioner argued that OAR 660-004-0000(2) prohibits approval of a statewide planning goal exception to allow a use that is permitted by Goal 3.[1] In this case, petitioner argued, the county's decision indicated that it was possible for the property to qualify for a nonfarm dwelling. In that circumstance, petitioner contended that the county could not approve an exception to Goal 3 to allow the plan amendment and zone change, because the use for which the exception was being sought is allowed by Goal 3. We disagreed, concluding that an applicant is not required to exhaust all options for obtaining a dwelling under regulations implementing Goal 3 prior to seeking an exception to the goal.

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[1] OAR 660-004-0000(2) provides:

> "An exception is a decision to exclude certain land from the requirements of one or more applicable statewide planning goals in accordance with the process specified in Goal 2, Part II, Exceptions. The documentation for an exception must be set forth in a local government's comprehensive plan. Such documentation must support a conclusion that the standards for an exception have been met. The conclusion shall be based on findings of fact supported by substantial evidence in the record of the local proceeding and by a statement of reasons which *explain why the proposed use not allowed by the applicable goal should be provided for.* The exceptions process is not to be used to indicate that a jurisdiction disagrees with a goal." (Emphasis added.)

Petitioner appealed our decision to the Court of Appeals on that issue. *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002). The court reversed and remanded our decision, holding that:

> "[T]here is no basis * * * to conclude that a 'use not allowed by the applicable goal,' * * * includes uses that specifically *are* permitted by the applicable goal under some circumstances. Rather, a use that is permitted under the applicable goal must conform to the requirements of the goal. It is only when a use is *not* permitted at all under the applicable goal that the exceptions process may come into play.
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> "* * * Here, the property at issue is subject to Goal 3. Goal 3 allows nonfarm dwellings to be built under certain circumstances specified in ORS chapter 215. If an applicant wishes to build a nonfarm dwelling on property subject to Goal 3, then the applicant must satisfy the criteria set forth in one of the relevant provisions of ORS chapter 215. The applicant does not have the option of building that dwelling on that property through the exceptions process and rezoning if the applicant fails to satisfy the criteria of ORS chapter 215. That is so because the *type* of use in question—the use of the property for a nonfarm dwelling in this case—*is* permitted under the relevant goal." *DLCD v. Yamhill County*, 183 Or App at 562 (emphasis in original).

The court then remanded the decision to us with instructions to "remand [the decision] to the county for denial of the application." *Id.* After the Court of Appeals issued its appellate judgment on October 23, 2002, we issued a final opinion and order on November 5, 2002, remanding the county's decision, in accordance with the Court of Appeals' directive.

On November 7, 2002, the Court of Appeals recalled its final appellate judgment, as the county had filed a petition for review with the Oregon Supreme Court. On November 12, 2002, we issued an order withdrawing our final opinion in response to the Court's recall. The Supreme Court allowed review on July 1, 2003, then later denied review as being improvidently allowed. *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002), *rev dismissed* 336 Or 126, __ P3d __ (2003). The Court of Appeals reissued its appellate judgment on December 31, 2003.

The proceedings that occurred after our November 5, 2002 final opinion do not change our disposition of the appeal in that final opinion.[2] The county's decision is remanded.[3]

[2] Our final opinion stated:

> "In accordance with the Court of Appeals' directive [to remand the decision to the county for denial of the application], the county's decision is remanded." *DLCD v. Yamhill County*, __ Or LUBA __ (LUBA No. 2002-011, November 5, 2002) slip op 3.

[3] At the conclusion of the initial appeal petitioner, as the prevailing party, filed a cost bill requesting an award of its filing fee and return of its deposit for costs. Petitioner is awarded the cost of its filing fee in the amount of $175 to be paid by the county. The board will return petitioner's $150 deposit for costs.