BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON SHORES CONSERVATION COALITION,
KALMIOPSIS AUDUBON SOCIETY,
JIM ROGERS, CATHERINE WILEY
and NANCY ZVAN,
Petitioners,

vs.

CURRY COUNTY,
Respondent.

LUBA Nos. 2006-218 and 2006-219

FINAL OPINION
AND ORDER

Appeal from Curry County.

James D. Brown, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Cascade Resources Advocacy Group.

M. Gerard Herbage, Gold Beach, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 03/20/2007

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

Petitioners appeal two ordinances that amend the county's comprehensive plan and zoning ordinance to create a new rural residential zoning district with a two-acre minimum lot size.

INTRODUCTION

Curry County's comprehensive plan (CCCP) and zoning ordinance (CCZO) were first acknowledged by the Land Conservation and Development Commission (LCDC) in 1984. That acknowledgment order was appealed to the Court of Appeals. The appellants alleged, in part, that the county's planning and zoning for certain rural areas allowed urbanization of rural land, in violation of Goal 14 (Urbanization). LCDC's Acknowledgment Order was ultimately reversed and remanded in 1986. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 724 P2d 268 (1986). The Oregon Supreme Court held that "[b]efore acknowledging that the plan complies with the goals, LCDC must determine that the plan allows no 'urban uses' outside [urban growth boundaries (UGBs)] which are not supported by exceptions to Goal 14." 301 Or at 521.

Following the Oregon Supreme Court's decision, the county amended the CCCP and CCZO to address Goal 14. As relevant here, by 1989 the county adopted amended rural exception areas and applied Rural Residential (RR) zoning to some of the lands within those exception areas. As amended in 1989, the CCCP and CCZO authorized a single Rural Residential (RR) zone with two minimum lot sizes—RR-5 (five-acre minimum lot size) and RR-10 (ten-acre minimum lot size). The choice between minimum lot sizes in the RR zoning district is governed by CCCP policies. The RR-5 and RR-10 zoning district was applied to residentially planned and zoned land within the amended rural exception areas. In 1991, the amended CCCP and CCZO were again acknowledged by LCDC.

1 In 2000 LCDC adopted administrative rules to respond to the Oregon Supreme
2 Court's Curry County decision. OAR 660-004-0040. For rural residential areas designated
3 after the effective date of OAR 660-004-0040, OAR 660-004-0040(7)(i) requires a minimum
4 lot or parcel size of two acres. Any lot sizes between 10 acres and 2 acres must be justified
5 by an exception to Goal 14. [1] The rule also sets a two acre minimum lot size standard for
6 rural residential areas that had already been designated on the date OAR 660-004-0040 took
7 effect. OAR 660-004-0040(5).[2] OAR 660-004-0040(7) provides that creation of lots larger
8 than two-acres is not necessarily consistent with Goal 14 in all circumstances, and sets out a
9 variety of factors that must be considered when creating new lots in rural residential areas.[3]

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[1] OAR 660-004-0040(7)(i) provides:

> "For rural residential areas designated after the effective date of this rule, the affected county shall either:
>
> "(A) Require that any new lot or parcel have an area of at least ten acres, or
>
> "(B) Establish a minimum size of at least two acres for new lots or parcels in accordance with the requirements for an exception to Goal 14 in OAR 660, Division 014. The minimum lot size adopted by the county shall be consistent with OAR 660-004-0018, 'Planning and Zoning for Exception Areas.'"

[2] OAR 660-004-0040(5) provides:

> "(a) A rural residential zone currently in effect shall be deemed to comply with Goal 14 if that zone requires any new lot or parcel to have an area of at least two acres.
>
> "(b) A rural residential zone does not comply with Goal 14 if that zone allows the creation of any new lots or parcels smaller than two acres. For such a zone, a local government must either amend the zone's minimum lot and parcel size provisions to require a minimum of at least two acres or take an exception to Goal 14. Until a local government amends its land use regulations to comply with this subsection, any new lot or parcel created in such a zone must have an area of at least two acres.
>
> "(c) For purposes of this section, 'rural residential zone currently in effect' means a zone applied to a rural residential area, in effect on the effective date of this rule, and acknowledged to comply with the statewide planning goals."

[3] Those provisions are detailed and complicated. Because they are not at issue in this appeal, we do not set all of them out here.

1 LCDC recognized that some local governments, like Curry County, had already
2 adopted comprehensive plan and land use regulation amendments to respond to the Supreme
3 Court's 1986 Curry County decision, and that those amendments had already been
4 acknowledged by LCDC. OAR 660-004-0040(3)(b).[4] Under OAR 660-004-0040(3)(b),
5 local governments that had already adopted such comprehensive plan and land use regulation
6 amendments are not required to further amend their comprehensive plan and land use
7 regulations to comply with OAR 660-004-0040. *See* n 4 (italicized language). But if such a
8 local government amends those previously acknowledged comprehensive plans and land use
9 regulations, the local government must "do so in accordance with [OAR 660-004-0040]."
10 *See* n 4 (underlined language). OAR 660-004-0040(6) imposes one additional relevant
11 limitation on local governments that can take advantage of OAR 660-004-0040(3)(b).[5]

12 The parties interpret OAR 660-004-0040(6) differently. As relevant here, OAR 660-
13 004-0040(6) is clear that if the county amends its RR zone to now allow a two-acre minimum
14 lot size as a third option, any such two-acre zoning must be justified by a Goal 14 exception.
15 Petitioners apparently read OAR 660-004-0040(6) to go farther, and require that if the county
16 amends its RR zone to authorize a two-acre minimum lot size (if justified by an exception to

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[4] OAR 660-004-0040(3)(b) provides:

> "Some rural residential areas have been reviewed for compliance with Goal 14 and acknowledged to comply with that goal by the department or commission in a periodic review, acknowledgment, or post-acknowledgment plan amendment proceeding that occurred after the Oregon Supreme Court's 1986 ruling in *1000 Friends of Oregon v. LCDC, 301 Or 447 (Curry County)*, and before the effective date of this rule. *Nothing in this rule shall be construed to require a local government to amend its acknowledged comprehensive plan or land use regulations for those rural residential areas already acknowledged to comply with Goal 14 in such a proceeding.* However, if such a local government later amends its plan's provisions or land use regulations that apply to any rural residential area, it shall do so in accordance with this rule." (Italics and underline emphases added.)

[5] OAR 660-004-0040(6) provides:

> "After the effective date of this rule, a local government's requirements for minimum lot or parcel sizes in rural residential areas shall not be amended to allow a smaller minimum for any individual lot or parcel without taking an exception to Goal 14 pursuant to OAR 660, Division 014."

Goal 14), it must also amend its RR zone to require that any rezoning of any property from RR-10 to RR-5 must also be justified by an exception to Goal 14. The city disputes that broader reading of OAR 660-004-0040(6).

FIRST ASSIGNMENT OF ERROR

A. Introduction

The county's RR zone is set out at CCZO 3.080 through 3.086. Ordinance 06-09, one of the two ordinances that are the subject of this appeal adopts the following relevant amendments to CCZO 3.083:

> "The RR zone has minimum lot sizes of **2,** 5, and 10 acres which are applied according to policies in the comprehensive plan. Changes in minimum lot size designation from 10 to 5 acres shall only be approved by the ~~Commission~~ **Board** when found to be in compliance with the policies related to the urbanization element of the Curry County Comprehensive Plan and upon a determination that all proposed lots are adequate for proper sewage disposal and have a suitable source of water for residential use.
>
> "**Changes in minimum lot size in from 10 or 5 acres to 2 acres shall only be approved by the Board for land within a Rural Residential zoning designation if the proposed development on the subject property:**
>
> **"1. Was within a Rural Exceptions area as of February 13, 1989; and**
>
> **"2. Is not currently within an Urban Growth Boundary; and**
>
> **"3. Is found to be in compliance with the policies related to the urbanization element of the Curry County Comprehensive Plan; and**
>
> **"4. Is not applied to areas presently zoned for rural use unless an exception to Statewide Goal 14 (Urbanization) is approved by the County[.]**"

The bold type language is added by Ordinance 06-09, the regular type language was part of the acknowledged CCZO before Ordinance 06-09 was adopted. The lined through language is deleted by Ordinance 06-09. As relevant here, the Ordinance 06-09 amendments (1) added an RR two-acre minimum lot size to the existing five-acre and ten-acre minimum lot sizes, (2) changed the body that must approve changes in RR minimum lot size designations from

the planning commission to the board of county commissioners, (3) limited RR-2 zoning to rural exception areas that existed on February 13, 1989, and (4) required that any RR-2 zoning be justified by an exception to Goal 14.[6]

B. Petitioners' Interpretation of OAR 660-004-0040(6)

As we noted previously, petitioners' first assignment of error is relatively straightforward. Petitioners read the OAR 660-004-0040(6) requirement that reductions in minimum lot sizes in rural residential areas be justified by an exception to Goal 14 to apply in two ways. First, petitioners argue the amendment to allow rezoning of RR-10 and RR-5 zoned property to RR-2 must be justified by an exception to Goal 14. Second, petitioners argue that under OAR 660-004-0040(6), by virtue of the two ordinances, the CCZO must also be amended to require that rezoning RR-10 zoned property to RR-5 must also be justified by an exception to Goal 14.

The county does not dispute the first point, but points out that Ordinance 06-08 and 06-09 both require that changing RR-10 or RR-5 zoning to RR-2 zoning must be justified by a Goal 14 exception. The county does dispute petitioners' second argument. The county contends that although the *amendment* to the RR zone is subject to the Goal 14 exception requirement in OAR 660-004-0040(6), the *unamended* and previously acknowledged RR zoning provisions, which allowed RR-10 to RR-5 rezoning without a Goal 14 exception, is not subject to OAR 660-004-0040(6). The county contends that petitioners' argument under

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[6] The other ordinance that is before us in this appeal, Ordinance 06-08, adopts the following corresponding amendments to CCCP Urbanization Policy 10:

> "Curry County has zoned lands located within the various rural land exception areas for Rural Resiential (**RR-2,** RR-5, **and** RR-10) use which limits rural residential development to dwellings on existing parcels and the development of new parcels at a density of **2-acre**, 5 acre or 10 acre minimum lot sizes. **Rural Residential—Two (RR-2) shall not be applied to areas presently zoned for rural residential use unless a Goal 14 exception is approved by the county. A zone change from RR-10 or RR-5 to RR-2 shall only be permitted in Rural Land Exceptions areas existing as of February 13, 1989 that are not within a current Urban Growth Boundary**." (Bold type language new; regular type language previously existed.)

the first assignment of error is an impermissible collateral attack on the unamended acknowledged comprehensive plan. *See Friends of Neaback Hill v. City of Philomath*, 139 Or App 39, 49, 911 P2d 350 (1996) (challenge to interpretation and application of an acknowledged comprehensive plan rejected as a *de facto* challenge to the acknowledged comprehensive plan itself). We agree with the county.

We set out the text of OAR 660-004-0040(6) again below:

> "After the effective date of this rule, a local government's requirements for minimum lot or parcel sizes in rural residential areas *shall not be amended to allow a smaller minimum for any individual lot or parcel without taking an exception to Goal 14 pursuant to OAR 660, Division 014*." (Emphasis added.)

While the text of OAR 660-004-0040(6) could be clearer, we believe it refers to the *amendment* to allow a smaller minimum lot size and does not refer to an existing acknowledged zoning ordinance that already allowed a reduction from a ten-acre minimum lot size to a five-acre minimum lot size in the RR zone without an exception.

Relevant context supports the more narrow reading as well. As we noted earlier, when LCDC adopted OAR 660-004-0040 in 2000, it expressly provided that local governments like Curry County with comprehensive plans and land use regulations that had been acknowledged for compliance with Goal 14 after the Supreme Court's 1986 Curry County decision were not required to amend their comprehensive plans and land use regulations to comply with OAR 660-004-0040. However, that express exemption from OAR 660-004-0040 did not extend to amendments to those previously acknowledged comprehensive plans and land use regulations that post-date OAR 660-004-0040:

> "However, if such a local government later amends its plan's provisions or land use regulations that apply to any rural residential area, *it shall do so in accordance with this rule*." OAR 660-004-0040(3)(b) (emphasis added); *see* n 4.

While OAR 660-004-0040(3)(b) also could be clearer, the command to "do so in accordance with this rule" refers to the "later amend[ment]" and requires that the "later amend[ment]" must comply with OAR 660-004-0040. If LCDC had not intended that more

1 limited meaning, it would have drafted the emphasized language of OAR 660-004-
2 0040(3)(b) to read something like, "it shall ensure that its comprehensive plan and land use
3 regulations fully comply with OAR 660-004-0040." LCDC choose the more limited
4 language in OAR 660-004-0040(3)(b). Like the language in OAR 660-004-0040(6) itself,
5 the language in OAR 660-004-0040(3)(b) is not consistent with the broad reading petitioners
6 urge for OAR 660-004-0040(6).

7 **C. Petitioners' Other Arguments**

8 In support of their argument that the disputed amendments must also amend the RR
9 zone to require a Goal 14 exception to rezone RR-10 property RR-5, petitioners also cite the
10 Ordinance 06-09 amendment of CCZO 3.083 to provide that the board of county
11 commissioners rather than the planning commission must approve rezoning in the RR zone
12 and statements by county planning staff that a Goal 14 exception was required to rezone
13 property from RR-10 to RR-5 prior to the disputed amendments.

14 Petitioners do not challenge the change in approving body, and we do not see how
15 that amendment has any bearing on whether RR-10 to RR-5 zoning must be accompanied by
16 a Goal 14 exception. With regard to planning staff statements, we do not know why staff
17 may have taken the position that a Goal 14 exception might be required under the CCZO for
18 RR-10 to RR-5 zoning. If that position was based on any language in the RR zone itself, that
19 language has not been called to our attention. If that position was based on prior LUBA
20 cases such as *DLCD v. Klamath County*, 40 Or LUBA 221, 226-27 (2001), our decision in
21 *Klamath County* was based on Goal 14 itself, not Klamath County's acknowledged
22 comprehensive plan and land use regulation. *Klamath County* simply holds that although a
23 rural residential zone may be acknowledged for application in rural areas, particular
24 applications of such zoning may nevertheless run afoul of the Goal 14 prohibition against
25 urbanizing rural areas. *Id.* In the abstract, that holding might well apply in particular cases
26 of RR-10 to RR-5 zoning under the CCZO, both before and after the disputed ordinances,

notwithstanding the lack of any generally applicable requirement in the CCZO for an exception to Goal 14 when changing RR-10 zoning to RR-5 zoning.

D. Conclusion

Under OAR 660-004-0040(3)(b) and 660-004-0040(6) the county was required to ensure that its amendment of the RR zone to authorize a two-acre minimum lot size required that any such rezoning is justified by an exception to Goal 14. We reject petitioners' argument that the OAR 660-004-0040(6) Goal 14 exception requirement also applies to RR-10 to RR-5 rezoning under the unamended portion of the county's previously acknowledged comprehensive plan and RR zone.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners' second assignment of error is based on a misreading of what Ordinances 06-08 and 06-09 authorize. Petitioners understand those ordinances to authorize applying RR-10, RR-5 and RR-2 zoning to areas outside existing rural exception areas. The county responds that neither ordinance adopts any amendments with respect to how RR-10 zoning may be changed to RR-5 zoning. The county also points out that any RR-2 zoning authorized by the challenged amendments is expressly limited to rural exception areas "existing as of February 13, 1989." We agree with the county that petitioners' second assignment of error challenges something that neither ordinance authorizes and, therefore, provides no basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

As previously noted, OAR 660-004-0040(7)(i) provides:

> "For rural residential areas designated after the effective date of this rule, the affected county shall either:
>
> "(A) Require that any new lot or parcel have an area of at least ten acres, or

1 “(B) Establish a minimum size of at least two acres for new lots or parcels
2 in accordance with the requirements for an exception to Goal 14 in
3 OAR 660, Division 014. The minimum lot size adopted by the county
4 shall be consistent with OAR 660-004-0018, ‘Planning and Zoning for
5 Exception Areas.’”

6 OAR 660-004-0040(7)(i)(B) requires that for new rural residential areas, the county must
7 establish that the minimum lot size applied to such new rural residential areas complies with
8 OAR 660-004-0018.[7]

9 Petitioners argue that the county “fails to comply with OAR 660-004-0040(7)(i) by
10 authorizing the establishment of RR2 and RR5 zoning for newly designated rural residential
11 areas without demonstrating or requiring consistency with OAR 660-004-0018.” Petition for
12 Review 13. The short answer to petitioners’ third assignment of error is that OAR 660-004-
13 0040(7)(i)(B) applies where “rural residential areas [are] designated after the effective date
14 of this rule.” The challenged ordinances neither designate any new rural residential areas nor
15 authorize RR-5 or RR-2 zoning to be applied to any newly designated rural residential areas.
16 OAR 660-004-0040(7)(i)(B) therefore does not apply to the challenged ordinances. Because

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[7] As relevant, OAR 660-004-0018(2) imposes the following requirements on “physically developed” and “irrevocably committed” statewide planning goal exceptions:

> “For ‘physically developed’ and ‘irrevocably committed’ exceptions to goals, residential plan and zone designations shall authorize a single numeric minimum lot size and all plan and zone designations shall limit uses, density, and public facilities and services to those:
>
> “(a) That are the same as the existing land uses on the exception site;
>
> “(b) That meet the following requirements:
>
> > “(A) The rural uses, density, and public facilities and services will maintain the land as ‘Rural Land’ as defined by the goals and are consistent with all other applicable Goal requirements; and
> >
> > “(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to nonresource use as defined in OAR 660-004-0028; and
> >
> > “(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses[.]”

1 petitioners' third assignment of error is based on the erroneous premise that OAR 660-004-

2 0040(7)(i)(B) does apply to the disputed ordinances, it provides no basis for remand.[8]

3 The third assignment of error is denied.

4 The county's decision is affirmed.

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[8] Petitioners do not argue that OAR 660-004-0018 applies to the disputed ordinances independently of OAR 660-004-0040(7)(i)(B), and we do not consider that question.