BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF LINN COUNTY,
CLEMENT OGILBY, TRUMBULL OGILBY,
ROBERT JUMP and BARBARA JUMP,
Petitioners,

vs.

LINN COUNTY,
Respondent,

and

BURTON HOTCHKISS and
NANCY HOTCHKISS,
Intervenors-Respondent.

LUBA No. 2006-223

FINAL OPINION
AND ORDER

Appeal from Linn County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners. With her on the brief was the Goal One Coalition.

No appearance by Linn County.

Edward F. Schultz, Albany, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief were Andrew J. Bean and Weatherford, Thompson, Cowgill, Black & Schultz, PC.

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

REMANDED 05/09/2007

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a partition and access application.

FACTS

Intervenors Burton and Nancy Hotchkiss (intervenors) purchased their 44.16-acre property on October 7, 1976. Six acres of the property are currently used for holly production, while the remainder is identified as in woodlot or hay production.

On April 13, 2005, Linn County adopted Resolution 2005-125 that waived the requirements of Linn County Code (LCC) Section 934.510 under ORS 197.352 (Measure 37). Record 226-228. That resolution was later amended to additionally waive the requirements of LCC Sections 905.300 through 905.330, and 933.310 through 933.770.[1]

On July 21, 2005, the Oregon Department of Land Conservation and Development (DLCD) issued a final order granting intervenors a waiver (DLCD waiver) from the application of the following laws:

> "* * * those provisions of Statewide Land Use Planning Goals 3 and 4, ORS 215, and OAR 660, divisions 6 and 33, that restrict the division of the [subject property] into lots or parcels or the establishment of a single family dwelling on each lot or parcel, except for the provisions of each of these laws that were in effect when * * * [intervenors] acquired their interest in the [subject property] on October 7, 1976." Record 230.

On June 2, 2006, intervenors requested approval to partition the subject property into 3 parcels of approximately 10, 16 and 18 acres, subject to the requirements of Goal 3 as it existed in 1976. The planning director approved their application. Petitioners appealed the planning director's decision to the planning commission, who approved the application. Petitioners appealed the planning commission's decision to the board of commissioners, who adopted the planning commission's decision. This appeal followed.

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[1] The sections of the LCC that the county waived are the provisions of the LCC that generally govern the use and development of agricultural lands such as intervenors.'

JURISDICTION

Intervenors argue that LUBA does not have jurisdiction to hear this appeal because LUBA was not created by the legislature until 1979, and intervenors acquired their property in 1976. Intervenors cite no statute, rule or other provision to support this argument, and we reject it. Under ORS 197.825(1), LUBA has exclusive jurisdiction to review land use decisions. Intervenors do not assert that the challenged decision approving intervenors' application for partition and access review for their property is not a "land use decision," as that term is defined in ORS 197.015(11). As such, we have jurisdiction to review the county's decision.

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners argue that the county's findings misconstrued the version of Statewide Planning Goal 3 (Agricultural Lands) that applies to the proposed partition, and that the findings are not supported by substantial evidence in the record.[2] As discussed below, the then-applicable version of Goal 3 provided that the minimum parcel size for farm use must be "appropriate for the continuation of the existing commercial agricultural enterprise within the area."

Petitioners' arguments in support of their first assignment of error are not particularly clear. However, we think that, fairly read, petitioners argue that the county must determine the minimum parcel size "appropriate for the continuation of the existing commercial enterprise within the area" based on the hay production and livestock grazing that is the predominant commercial farm activity in the area within a one-mile radius of the subject property, and not based on specialty horticultural crops that exist only in a few areas scattered throughout the county.

[2] In approving the application, the county applied the version of Goal 3 that was in effect on October 7, 1976. Record 11, 230-231.

Intervenors respond initially by claiming that petitioners are precluded under ORS 197.763(1) from raising the issue that is raised in their first assignment of error. We understand intervenors to argue that in order for petitioners to assign error to the county's findings, petitioners must have challenged the findings adopted by the planning commission below. We reject that argument. ORS 197.763(1) requires a party to have raised an *issue* regarding a proposal's compliance with an approval criterion with sufficient specificity to afford other parties the opportunity to respond. It does not require a party to have specifically challenged findings that were adopted as part of a local government's decision below, or to raise the precise *argument* below that they assert on appeal to LUBA. *See Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334, 352, *aff'd* 191 Or App 305, 82 P3d 653 (2003); *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001). The issue set forth in the first assignment of error was raised at Record 30 and at Record 184-85.

A. Goal 3

Statewide Planning Goal 3, Agricultural Lands, took effect on January 25, 1975, and on October 7, 1976, Goal 3 applied directly to intervenors' property because the county's comprehensive plan had not yet been acknowledged by the Land Conservation and Development Commission (LCDC). *See* 197.175(1) (1973); *Alexanderson v. Polk County Commissioners*, 289 Or 427, 434, 616 P2d 459 (1980). That version of Goal 3 provided in relevant part:

> "Agriculture lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space. These lands shall be inventoried and preserved by adopting exclusive farm use zones pursuant to ORS Chapter 215. *Such minimum lot sizes as are utilized for any farm use shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area.*" Record 243 (emphasis added).[3]

[3] The current version of Goal 3 includes substantially similar language, and counties may, consistent with Goal 3, still determine the minimum parcel size for farm use based on analysis of the minimum size "appropriate to maintain the existing commercial agricultural enterprise within the area[.]" However, the more

1. Existing Commercial Agricultural Enterprise

The first step the county must take in assessing compliance with Goal 3 is to determine the "existing commercial agricultural enterprise within the area." In *Sane Orderly Development v. Douglas County*, 2 Or LUBA 196, 200 (1981), we determined that Goal 3's definition of "commercial agricultural enterprise" focused on "* * * the need to contribute in a 'substantial way' to the area's existing agricultural economy and to provide the 'volume' to maintain the agricultural market system."[4] *Id*. We quoted with approval an LCDC Policy Paper entitled "Common Questions About Goal #3 – Agricultural Lands: Minimum Lot Sizes in EFU Zones" that explained what the "commercial agricultural enterprise" involves:

> "[t]he commercial agricultural enterprise is specified in Goal 3 because of its economic importance as Oregon's second largest industry. The commercial agricultural enterprise involves more than just agricultural production. It involves the entire marketing system through processing, packaging, distributing, wholesaling and retailing. * * * Commercial agricultural production provides the volume to maintain this market system." *Id*. at 200.

In explaining the reason for looking at "large" commercial producers and the agricultural products they produce in order to determine the correct minimum lot size in an EFU zone, we summarized the testimony of a former LCDC commissioner, who explained that small producers typically farm on small parcels, and may contribute farm products to the agricultural system, but will not produce enough volume to sustain the entire system. We

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usual course is to determine minimum farm parcel sizes based on statutory numerical minimum lot sizes. Those statutes were adopted long after promulgation of Goal 3 and did not apply in 1976.

[4] LCDC subsequently adopted OAR 660-033-0020(2), which provides:

> "(a) 'Commercial Agricultural Enterprise' consists of farm operations that will:
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> > "(A) Contribute in a substantial way to the area's existing agricultural economy; and
> >
> > "(B) Help maintain agricultural processors and established farm markets.
>
> "(b) When determining whether a farm is part of the commercial agricultural enterprise, not only what is produced, but how much and how it is marketed shall be considered. These are important factors because of the intent of Goal 3 to maintain the agricultural economy of the state."

rejected the county's proposed definition of "commercial agricultural enterprise," which was broad enough to encompass non-commercial "hobby" farms, finding:

> "[w]hile these small parcels may provide an element of production to the total agricultural activity in [the county], they do not 'maintain' the commercial agricultural enterprise. They are not capable by themselves of maintaining a processing and marketing system like that needed in 1978 to convert the 1.25 billion dollars in gross farm sales into the 3.75 billion dollar industry upon which Oregon's economy is based.
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> "*These small parcels when aggregated with the large clearly commercial operations result in an artificially low 'average' parcel size which can then be used to further reduce the large blocks of land. This results in eventual chopping up and destruction of one of the basic economic resources of this state.*" *Id* at 203 (emphasis added).

Thus, farms are part of the "existing commercial agricultural enterprise" if they contribute to the overall agricultural economy in the area *in a substantial way*. *See also City of Eugene v. Lane County*, 1 Or LUBA 265, 269 (1980) (whatever method a county chooses to establish minimum lot sizes must ensure that agricultural land remains in parcels large enough to contribute in a substantial way so as to maintain the existing commercial agricultural enterprise); *Thede v. Polk County*, 3 Or LUBA 335, 340 (1981) (describing how the "existing commercial agricultural enterprise in the area" should be identified).

2. Minimum Parcel Size Necessary to Continue That Enterprise

After the county has identified the existing commercial enterprise within the area, it must determine what parcel size is necessary to maintain that enterprise. In *Stephens v. Josephine County*, 14 Or LUBA 133, 137 (1985), we rejected the county's attempt to include non-commercial farm parcels in its inventory because the inclusion of non-commercial farm parcels resulted in an inaccurate minimum lot size. Regarding the county's method for determining the appropriate minimum parcel size, we noted:

> "* * * [i]t is not sufficient to find a small agricultural enterprise within a given area, even one which qualifies under the LCDC rule, and use the size of that enterprise as justification for breaking apart other larger holdings. The goal requires maintenance of the existing commercial agricultural enterprise, including all of its parts. Activities on the larger holdings must be considered

> as part of that enterprise. It is the activity on the larger holdings which must be maintained under Goal 3. The fact that other activities exist on smaller parcels does not mean that the agricultural enterprise in the area is maintained by reducing all the parcels in the area to the size of the smallest common commercial agricultural denomination where other commercial agricultural activities are conducted on larger parcels." *Id.* at 139.

B. The County's Decision

The county found that "* * * [c]ommercial agriculture in the upper Calapooia River valley is generally characterized by hay and livestock production on the foothills with some seed crops on the bottomlands along the river * * *," and that those enterprises are also representative of the agricultural enterprises within a one-mile radius from the subject property. Record 11. The county specifically found that "commercial enterprises contributing *in a substantial way* to the commercial agricultural enterprise of the area *within one mile of the subject property* are listed in Table 1 * * *." Record 12 (Emphases added).[5]

However, the county did not determine the appropriate minimum parcel size under Goal 3 based on the median size of the parcels supporting hay and livestock operations in that one-mile radius area. Instead, the county determined the appropriate minimum parcel size based on consideration of 18 farms that existed in the county in 1978 that were primarily producing some type of "horticultural specialty crop." The county justified that approach based on the fact that approximately 6 acres of the subject property are currently devoted to the production of holly, which is classified as a "horticultural specialty crop" by the US Department of Agriculture Census of Agriculture. Horticultural specialty crops are crops such as ornamental plants and other nursery products, such as florists' greens, shrubbery, and holly. Record 12.

[5] Table 1 is entitled "Agricultural Uses on Farm Tracts Within One Mile of The Hotchkiss Farm – Hay Production and Extensive Livestock Grazing" and shows 18 farm parcels that are more than 10 acres in size within one mile of the subject property. Half of the farms listed in the table are between 10 and 35 acres, and the median size of those farms is approximately 35 acres. Record 48. The subject property is included as one of the farm parcels and Table 1 lists its total farmed acreage as 21.2 acres. Record 59.

Perhaps recognizing that no horticultural specialty crops are grown within one mile of the subject property, except by intervenors, and perhaps recognizing that intervenors' holly farm operation, standing alone, may not qualify as "the existing commercial agricultural enterprise in the area," the county then determined that it was "appropriate to analyze the characteristics of commercial horticultural specialty crop operations in Linn County in order to determine if the proposed parcels are appropriate for the "continuation of existing commercial agricultural enterprises within the area.'" Record 13. The county then considered evidence that in 1978, 18 farms in the county were primarily engaged in the production of horticultural specialty crops, and that the median size of those 18 farms was 13 acres. The county concluded that the proposed parcel sizes—10, 16 and 18 acres—are consistent with the 1978 13-acre median parcel size for farms primarily engaged in producing horticultural specialty crops:

> "* * * the farming operation on the proposed parcels will be consistent with that of commercial horticultural specialty operations in the county. Two of the three proposed parcels will be larger than the median size of existing commercial horticultural specialty operations *as they existed in the county in 1976*. Proposed parcel 2 is only slightly smaller than the median size parcel and produces nearly the same amount of gross sales of agricultural products." Record 14 (emphasis added).[6]

C. Analysis

Petitioners argue that the county erred in determining the minimum parcel size based on evaluation of horticultural specialty crops across the county, rather than the hay and livestock production that is apparently the predominant commercial agricultural enterprise in the area, or at least within a one-mile radius of the subject property. Although it is not clearly stated, we understand petitioners to argue that the county erred in relying on

[6] We note that the applicants propose to divide the existing 6-acre holly operation on the subject property among the three proposed parcels, with the 16-acre parcel 1 including 1.5 acres of holly, 7 acres in hay, and the remainder in woodlot, the 10-acre parcel 2 to include 2 acres of holly, 3 acres of hay, 2.5 acres of woodlot, and the existing homesite, and the 18-acre parcel 3 to include 2.5 acres of holly, 9.5 acres of hay and 6 acres of woodlot. Record 12-13.

intervenors' holly operation, or "horticultural specialty crops" in general, as the basis to determine the "the existing commercial agricultural enterprise within the area" and the minimum parcel size that is necessary to continue that existing enterprise.[7]

In determining the "existing commercial agricultural enterprise," the county must take a broad-based view of the entire agricultural enterprise in a given area, not a limited inventory of one specific crop or farm use.[8] While the "enterprise" in a given area could turn out to be monocultural, more likely the existing commercial agricultural enterprise in the area will feature a mix of crops or farm uses, and even a mix of uses on individual farms, much like the farm operation on the subject property, which includes hay, woodlands, and holly crops. *See* n 6.

In the present case, the county took a *county-wide* inventory of only one crop or type of crop (*i.e*. "horticultural specialty crop"), and either did not inventory or ignored the existence of other crops and farm uses in the county that make up the county's "agricultural

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[7] We note that petitioners do not explicitly assign error to one fairly significant error on the county's part. In a number of places the county suggests that it believes the relevant "commercial agricultural enterprise" for purposes of establishing the appropriate parcel size for intervenors' proposed parcels is the commercial agricultural enterprise *as it existed in 1976*. That suggestion is wrong. While the land use *law* that applied in 1976 must be applied following the county's and state's Measure 37 waivers, that law is applied to the *current facts*. Describing the commercial agricultural enterprise for purposes of determining the appropriate minimum lot size for continuing that existing commercial agricultural enterprise is largely an exercise in fact finding.

[8] Additionally, in order to be a part of the existing commercial agricultural enterprise, the farm activity must contribute "in a substantial way" to the agricultural economy. *See Sane Orderly Development*, 2 Or LUBA at 204. Both the volume of crops produced, and whether and how they are marketed factor into whether the farm activity is a part of the existing commercial agricultural enterprise. The county specifically found that hay and livestock production contribute in a substantial way to the commercial agricultural enterprise of the area within one mile of the subject property. Record 12.

The decision also contains sales data from the US Department of Agriculture Census of Agriculture, 1978 edition, regarding horticultural specialty crop farms in the county, and notes that in 2002, the number of farms with *some* horticultural specialty crops in the county had increased from 49 to 63. Record 14. While we do not categorically preclude use of 1978 sales data in determining that horticultural specialty crops contribute to the area's agricultural economy "in a substantial way," we note that 2002 sales data seems more reliable and is likely available through the USDA Census of Agriculture, 2002 edition, which is also referenced in several places in the decision.

enterprise." That was error. If the county defines "the area" to be inventoried under Goal 3 as the entire county, it must inventory the existing commercial agricultural enterprise in the county, and determine the minimum parcel size necessary to continue that enterprise. Conversely, if the county defines a smaller area, such as lands within a one-mile radius of the subject property, it may not include in that inventory other farm uses that are outside of that radius. *See Kenagy v. Benton County*, 6 Or LUBA 93, 105 (1982) (county erred in limiting its inventory to an area within a one-mile radius of the subject property, without a showing that that area was representative of the agricultural enterprise in the county, resulting in an improperly restrictive view of agricultural operations that might be conducted on the property).

Based on its limited inventory of horticultural specialty crops, the county concluded that intervenors' proposed parcel sizes were large enough to provide for the continuation of the existing commercial agricultural enterprise within the area because those parcel sizes are consistent with the smaller parcel sizes for "commercial horticultural specialty crops" that existed in 1976. It was error for the county to rely on an inventory of only one crop or type of crop that is generally grown on smaller parcels to determine the appropriate parcel size. The appropriate minimum parcel size must be large enough to maintain the existing commercial agricultural enterprise in the area, taking into account all parcel sizes, size of farm operations, and the variety of farm activities occurring on those parcels, not just parcel sizes for one particular crop or type of crop that is grown on smaller farming operations. *Stephens*, 14 Or LUBA at 139.

Because the county failed to adequately inventory the existing commercial agricultural enterprise within the area, and relied on that flawed inventory to find that the proposed parcel sizes are adequate to continue farming only one specific type of crop, the findings are inadequate.

The first assignment of error is sustained.

SECOND AND FOURTH ASSIGNMENTS OF ERROR

In their second assignment of error, petitioners argue that the county's decision violates the provisions of ORS 215.780, which establishes a minimum lot size of eighty acres in farm or forest zones. According to petitioners, DLCD exceeded the scope of its authority in purporting to waive ORS 215.780. In their fourth assignment of error, petitioners argue that a partition is not a "use" of land as that term is used in ORS 197.352(8) and as such, laws applying to a partition cannot be waived under that statute. Intervenors respond that both of these assignments of error are impermissible collateral attacks on the DLCD waiver that was granted to intervenors.

The DLCD waiver stated in relevant part:

> "* * * In lieu of paying just compensation under Measure 37, the State of Oregon *will not apply the following laws to [intervenors'] division of [the subject property] into lots or parcels* or to the establishment of a single-family dwelling on each lot or parcel: *those provisions of* Statewide Land Use Planning Goals 3 and 4, *ORS 215*, and OAR 660, divisions 6 and 33, *that restrict the division of the property into lots or parcels* or the establishment of single-family dwelling on each lot or parcel, except for the provisions of each of these laws that were in effect when [intervenors] acquired their interest in the Property on October 7, 1976." Record 230 (emphases added).

ORS 197.352(9) provides:

> "A decision by a governing body under this section shall not be considered a land use decision as defined in ORS 197.015(10) [sic should be ORS 197.015(11)]."

Therefore, under ORS 197.352(9), LUBA does not have jurisdiction to review challenges to the DLCD waiver.[9]

[9] As part of their second assignment of error, petitioners also assert that DLCD's waiver of the provisions of ORS 215 exceeded its scope of authority because ORS 197.352(8) only allows "the governing body responsible for enacting the land use regulation * * * to modify, remove, or not * * * apply" a land use regulation in lieu of compensation, such that the only body with the authority to waive the provisions of ORS 215 is the Oregon legislature. Because that challenge is a challenge to the validity of the DLCD waiver, under ORS 197.352(9) we do not have jurisdiction to review that issue either.

The decision before us is the county's decision to grant intervenors' partition and access review application, and that is the only decision we may review.

The second and fourth assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

In their third assignment of error, petitioners assign error to the county's decision because the decision failed to condition the partition approval on the continued ownership of the property by intervenors. Petitioners argue that under ORS 197.352(8), the county's decision was required to include a condition similar to a provision included in DLCD's waiver that provided:

"**FOR INFORMATION ONLY**"

> "The Oregon Department of Justice has advised [DLCD] that '[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.'" Record 232.

ORS 197.352(8) provides:

> "Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property."

Whatever the effect of the language quoted above on intervenors' ability to transfer the property, petitioners cite no applicable criterion in any statute, rule, or local ordinance that requires the *county* to include language in its decision regarding that issue or to impose a condition of approval regarding that issue.[10]

Moreover, ORS 93.040(1) requires that all instruments conveying an interest in real property contain the following language:

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[10] To the extent that petitioners' challenge is to the county's April 20, 2005 and September 21, 2005 Measure 37 waivers, for the reasons discussed under the second and fourth assignments of error, we reject that challenge. *See* ORS 197.352(9).

> "BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, *UNDER ORS 197.352*. THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, *UNDER ORS 197.352*." (Emphases added)

See also ORS 93.040(2) (disclosure language required in earnest money agreements). That provision is sufficient to provide notice to a potential holder of an interest in intervenors' property that the property may be subject to additional regulations and restrictions.

The third assignment of error is denied.

The county's decision is remanded.