BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOCK JOUVENAT,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

THOMAS MAURER and BJORN VIAN,
Intervenors-Respondents.

LUBA No. 2008-197

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was the Law Office of Bill Kloos PC.

No appearance by Douglas County.

James R. Dole, Grants Pass, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was Cauble Dole Sorenson & Ransom.

RYAN, Board Member, participated in the decision.

BASSHAM, Board Chair, concurring.

HOLSTUN, Board Member, dissenting.

REVERSED 02/13/2009

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

Petitioner appeals a decision by the county approving a partition.

MOTION TO INTERVENE

Thomas Maurer and Bjorn Vian (intervenors) move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

REPLY BRIEF

Petitioner moves to file a reply brief. There is no opposition to the motion, and it is granted.

FACTS

The subject property is an 80-acre parcel located adjacent to the North Umpqua Highway, within and east of the unincorporated urban area of Glide. Intervenors applied to partition the subject property into two parcels, one approximately 58 acres in size and the other approximately 22 acres in size. The 58-acre portion of the property is designated in the Douglas County Comprehensive Plan (DCCP) as Agriculture (AGG) and zoned Exclusive Farm Use - Grazing (EFU), and contains a manufactured home. The 58-acre portion of the property is designated on the county's Goal 5 inventory of significant mineral resources as "Mineral Site No. 86."

The remaining 22 acres are located within the boundary of the Glide Unincorporated Urban Area (UUA) boundary, are designated and zoned Tourist Commercial (CT), and are developed with an RV Park. The 22-acre portion of the property containing the RV Park was the subject of a 2004 plan amendment, zone change and exception that added that portion of the subject property to the Glide UUA and assigned that portion of the subject property the current CT plan and zone designations. Record 214.

The applicants seek to partition the subject property along the split zoning line, to create a 58-acre parcel zoned EFU and a 22-acre parcel zoned CT. The planning director

approved the proposed partition, and petitioner appealed the decision to the planning commission. The planning commission affirmed the director's decision, and the board of commissioners declined to hear the appeal. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioner argues that the county erred in approving the partition because it violates ORS 215.263 and ORS 215.780. As petitioner explains, "the county has used its partition process to create an EFU parcel that is less than the statutory minimum of 80 acres. This violates ORS 215.263." Petition for Review 3.

ORS 215.263 provides in part:

> "(1) Any proposed division of land included within an exclusive farm use zone resulting in the creation of one or more parcels of land shall be reviewed and approved or disapproved by the governing body or its designee of the county in which the land is situated. The governing body of a county by ordinance shall require such prior review and approval for such divisions of land within exclusive farm use zones established within the county.
>
> "(2) The governing body of a county or its designee may approve a proposed division of land to create parcels for farm use as defined in ORS 215.203 if it finds:
>
> > "(a) That the proposed division of land is appropriate for the continuation of the existing commercial agricultural enterprise within the area; or
> >
> > "(b) The parcels created by the proposed division are not smaller than the minimum size established under ORS 215.780."

As relevant here, ORS 215.780(1) imposes a minimum parcel size of 80 acres on land zoned EFU.

In approving the partition, the county relied on DCCP Policy 5, which provides:

> "Divisions of legally created properties along the boundaries separating committed areas, exception areas or urban growth boundaries from resource lands shall be allowed, in spite of the size of the property on either side of such boundary, provid[ed] the zoning of the property within the boundary is a developmental classification. * * *"

Petitioner argues that Policy 5 is inconsistent with ORS 215.263 to the extent it allows creation of an EFU-zoned parcel that is less than the minimum 80-acre parcel size prescribed in ORS 215.780(1).

Intervenors respond first that Policy 5 allows the proposed partition and that because the county's comprehensive plan has been acknowledged, Policy 5 is deemed to comply with the statewide planning goals. While we agree that Policy 5 is deemed by its acknowledgment to comply with any applicable statewide planning goals, acknowledgment does not mean that Policy 5 is deemed to comply with applicable state statutes. *See Kenagy v. Benton County*, 115 Or App 131, 134-36, 838 P2d 1076 (1992) (even after acknowledgment, where an acknowledged comprehensive plan or land use regulation is inconsistent with a statutory obligation, the statutory obligation must be observed).

Intervenors next respond that ORS 215.780(2) and (5) authorize the county to create an EFU-zoned parcel that is less than the 80-acre minimum parcel size. ORS 215.780(2), commonly known as the "go-below" statute, provides in relevant part:

> "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."

ORS 215.780(5) provides:

> "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 197.650 that is smaller than those prescribed in subsection (1) of this section need not comply with subsection (2) of this section."

Intervenors point out that the county's comprehensive plan was first acknowledged in the early 1980s and that the county completed periodic review under ORS 197.628 to 197.650 effective December 19, 2000. We understand intervenors to argue that pursuant to

ORS 215.780(2)(a) and/or (5) Policy 5 provides for a lower or smaller "minimum lot or parcel size" than is required by ORS 215.780(1).

There are several problems with intervenors' reliance on ORS 215.780(2)(a) and (5). First, intervenors cite to nothing in the DCCP or elsewhere that suggests that Policy 5 was adopted and authorized pursuant to the "go-below" authority set out at ORS 215.780(2)(a).[1] Further, as we understand the "go-below" process, the end product is typically if not invariably a *numeric* "minimum lot or parcel size" that is "lower" in size than the 80-acre minimum lot or parcel size prescribed by ORS 215.780(1)(a). While a non-numeric minimum lot or parcel size is perhaps conceivable, Policy 5 does not set forth a "minimum" lot or parcel size of any kind. There is no limit under Policy 5 to how small a parcel can be.

Similarly, ORS 215.780(5) exempts counties with already acknowledged *minimum parcel sizes* that are smaller than 80 acres from compliance with ORS 215.780(1)(a). The county in fact appears to have two such zones, the Exclusive Farm Use—Cropland (FC-1) and FC-2 zones, which allow creation of new farm parcels with a minimum parcel size of 20 and 40 acres, respectively. However, as noted, Policy 5 does not establish a "minimum parcel size" as that term is used in the applicable statutes. Moreover, even if Policy 5 is understood to be a non-quantitative "minimum parcel size," intervenors do not assert, and there is no evidence in the record to suggest, that Policy 5 has been reviewed or approved pursuant to ORS 215.780(2)(a) or that it meets the requirements of ORS 215.780(5).

We reject intervenors' argument that Policy 5 is authorized by ORS 215.780(2)(a) or (5) and that those statutes allowed the county approve the partition. The county approved a division of land included within an EFU zone that created an EFU-zoned parcel smaller than allowed under ORS 215.780(1)(a), in violation of ORS 215.263(2)(b). The decision is prohibited by state law.

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[1] *See* OAR 660-033-0100(2), which further describes ORS 215.780(2)(a), and OAR 660-033-0100(3) through (8), which specify the information required in a "go below" demonstration.

The first assignment of error is sustained.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Because we sustain petitioner's first assignment of error and the decision is prohibited as a matter of law, reversal is the appropriate remedy under OAR 661-010-0071(1). Accordingly, we need not address petitioner's remaining assignments of error.

The county's decision is reversed.

Bassham, Board Chair, concurring.

I concur in the majority reasoning and result, and write only to clarify that I am not persuaded by the dissent's interpretation of ORS 215.263(1).

In my view, the meaning of the phrase "proposed division of land included within an exclusive farm use zone" as used in ORS 215.263(1) is ambiguous as applied to a split-zoned parcel. I understand the dissent to read that phrase to mean something like a "proposed division of land included *entirely* within an exclusive farm use zone." The statute is silent, however, on how it is applied to split-zoned parcels.

ORS 215.263(1) is a preamble or general mandate that applies to all types of land divisions in exclusive farm use zones. The directly operative terms are in ORS 215.263(2), which applies specifically to "a proposed division of land to create parcels for farm use" and requires that the size of a newly created farm parcel comply with ORS 215.263(2)(a) or (b). The relevant question here under ORS 215.263(2) is whether creation of a 58-acre farm parcel complies with the minimum size established under ORS 215.780. Read in context with ORS 215.263(2) and ORS 215.780(1), it seems clear to me that the statutory scheme of which ORS 215.263(1) is a part is intended to prohibit creation of new farm parcels less than the minimum size specified in ORS 215.780(1), absent application of explicit statutory exceptions not present here. Under the dissent's interpretation, the statutory scheme includes what is essentially an implicit exception for split-zoned parcels that are partially zoned EFU,

with the result that new farm parcels could be created that are smaller in size than the minimum specified in ORS 215.780(1).

I would agree with the dissent that it makes little practical sense in the present case to preclude partition of the subject property. However, the dissent's interpretation would apply in any circumstances where split-zoned property is partially zoned EFU. For example, a parcel that is partially zoned EFU and partially zoned for forest use might well be partitioned to create a substandard-size farm parcel, even though the forest-zoned part of the property is used in conjunction with the EFU-zoned portion for grazing. I do not believe that result would be consistent with the text or intent of the applicable statutes. If the legislature wishes to allow creation of new substandard-sized farm parcels in circumstances such as the present case, I believe that a statutory amendment is necessary to set out an explicit exception to that effect.

Holstun, Board Member, dissenting.

I agree with the majority that if ORS 215.263 and 215.780(1)(a) preclude division of the split-zoned 80-acre parcel that is the subject of this appeal along the line that divides the CT-zoned portion of the property from the EFU-zoned portion of the property, the county's Policy 5 does not authorize a division that is prohibited by those statutes. I also agree with the majority that Policy 5 does not qualify as a smaller acknowledged EFU-zone minimum parcel size under ORS 215.780(2) or (5). However petitioner's argument that the challenged decision should be reversed assumes that ORS 215.263 and 215.780(1)(a) prohibit such a land division, and neither intervenors nor the majority question that assumed statutory prohibition. I believe that assumption is erroneous and based on a misreading of the statutes.

This state's appellate courts are charged with correctly interpreting state statutes, and are not bound to limit their review to the parties' arguments if the court determines that those arguments are founded on an erroneous reading of the applicable statutes. *Miles v. City of Florence*, 190 Or App 500, 507 n 5, 79 P3d 382 (2003), *rev den* 336 Or 615, 90 P3d 626

(2004) (citing *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997)). I believe the same rule applies to LUBA, and I would not simply proceed as though petitioner's assumption concerning the meaning of ORS 215.263 and 215.780(1)(a) is correct. However, to avoid any potential for unfair surprise to petitioner and the other parties, I would allow all parties additional time to address the interpretation of the statutes set out below. But unless they were able to convince LUBA that the below interpretation of the statutes is erroneous in some way, I would deny the first assignment of error and consider petitioner's remaining assignments of error.

Only 22 acres of the subject 80-acre parcel are included in the Glide unincorporated urban area and zoned CT. The remaining 58 acres of the parcel are outside the Glide unincorporated urban area and are zoned EFU. The 2004 decision that rezoned and redesignated the 22 acres was likely made to reflect preexisting development at the time of rezoning, which supported a decision to include some of the 80 acres in the unincorporated urban area but did not support including the entire 80 acres. I do not believe ORS 215.263 and ORS 215.780 preclude division of properties that are split-zoned EFU and something else (here CT), at least not when the proposed division only divides the existing EFU-zoned portion of the property from the CT zoned portion of the property. ORS 215.263 was quoted earlier in this opinion and applies to "[a]ny proposed division of land *included within an [EFU] zone* * * *." (Emphasis added.) This case does not concern a proposed division of land included within an EFU zone; it concerns a proposed division of land included partially within an EFU zone and partially within a CT zone. Importantly, I think, the disputed partition divides no part of the EFU-zoned 58 acres. The EFU-zoned 58 acres of the property are unaffected by the disputed division, except that they are now located on a different parcel than the 22 CT-zoned acres. To say that such a division creates a 58-acre farm parcel is misleading, since the 22 CT-zoned acres are not limited to farm uses, with or without the disputed partition.

ORS 215.263(2)(b) dictates that the parcels created by a land division that is subject to 215.263 must not be "smaller than the minimum size established under ORS 215.780." The minimum parcel size specified by ORS 215.780(1)(a) is "[f]or land zoned for exclusive farm use and not designated rangeland, at least 80 acres[.]" Again, the parcel that is being divided by the partition that is at issue in this appeal is not "zoned for exclusive farm use;" it is zoned partially for exclusive farm use and zoned partially CT. Again, no EFU-zoned parcel is divided by the disputed partition. I do not believe the minimum parcel size specified by ORS 215.780(1)(a) was adopted to apply in the circumstance presented in this appeal, so long as the proposed partition only divides the EFU-zoned portion of the 80 acres from the CT-zoned portion of the 80 acres. In that circumstance, no EFU-zoned land is partitioned and no new EFU-zoned parcel is created, within the meaning of the statutes.

Another consequence of petitioner's interpretation of the statutes is perhaps not obvious. The CT zone allows urban density uses and new lots as small as 6,500 square feet. Douglas County Land Development Ordinance 3.16.150(1); 3.14.150(1)(a). Under petitioner's interpretation of the statutes, this EFU and CT split-zoned parcel is treated exactly the same way an entirely EFU-zoned parcel is treated, with the result that the CT-zoned 22-acre portion of the subject 80-acre parcel could not be divided to create a new 6,500 square foot parcel.[2] That is because under the petitioner's view such a partition would be a partition of an EFU-zoned parcel, even though no EFU-zoned property would actually be divided by such a partition. If the proposed partition segregated the EFU-zoned portion of the 80 acres onto one parcel and the CT-zoned portion of the property onto a separate parcel and also divided the 58 EFU-zoned acres into two or more additional EFU-zoned parcels, such a partition would violate the statutes. In that circumstance, the ORS 215.780(1)(a) 80-acre minimum parcel size would apply and preclude subdivision of the 58 EFU-zoned acres.

[2] The result of such a partition would be a new approximately .15-acre CT-zoned parcel and a 79.85-acre remainder parcel that is split-zoned EFU and CT.

But this is not such a case, and I do not think ORS 215.263(2)(b) and ORS 215.780(1)(a) prohibit the partition that is before us in this appeal.

I respectfully dissent.