

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4                                   OREGON DEPARTMENT OF  
5                                   FISH AND WILDLIFE,

08/06/18 AM 9:38 LUBA

6                                   *Petitioner,*

7  
8                                   vs.

9  
10                                  LAKE COUNTY,  
11                                  *Respondent.*

12  
13                                  LUBA No. 2017-128

14  
15                                  FINAL OPINION  
16                                  AND ORDER

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18                                  Appeal from Lake County.

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20                                  Erin Donald, Assistant Attorney General, Department of Justice, filed a  
21                                  petition for review on behalf of petitioner.

22  
23                                  No appearance by Lake County.

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25                                  ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board  
26                                  Member, participated in the decision.

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28                                  REVERSED

08/06/2018

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

**NATURE OF THE DECISION**

Petitioner appeals a decision approving a partition of a 239-acre parcel.

**FACTS**

The applicants applied to partition their 239-acre parcel into two parcels resulting in one 80.23-acre parcel (parcel 1) and one 158.77-acre parcel (parcel 2). The subject property is zoned Agricultural Use (A-2) and a portion of the property is within designated big game winter range, including portions of both resulting parcels 1 and 2. The planning commission approved the application and adopted findings of fact and conclusions of law. Petitioner appealed to the board of commissioners, which upheld the approval. This appeal followed.

**FIRST AND SECOND ASSIGNMENTS OF ERROR**

We address petitioner’s two assignments of error together because they present the same legal issue. Lake County Development Ordinance (LCDO) 6.070 provides that the county shall not approve a minor partition unless the proposal complies with the Lake County Zoning Ordinance (LCZO). LCZO 18.05(D)(6) specifies that the minimum parcel size for all new parcels in designated big game habitat “shall be 160 acres or larger if required by the underlying zone.”

In approving the partition, the board of commissioners adopted the following finding:

1            “[T]he proposed parcel 1 does not meet the *minimum parcel size for all*  
2            *new parcels of 160 acres or larger*; however, considerations have been  
3            given including the existence of a farm dwelling, structures and intense  
4            farm use of the property to be partitioned, and the fact that only a portion  
5            of this property in [*sic*] within the Big Game Habitat area, and that no  
6            further effect is possible by dividing the land. By not allowing this  
7            partition, the whole intent of the zone is negatively affected. Farming  
8            including partitioning for financing purposes or otherwise should be  
9            considered when reviewing partitions such as this. The proposed parcels  
10           do meet the Comprehensive Plan Designation minimums of 80 acres and  
11           does meet the intent and criteria for the *underlying zone* (A-2). \* \* \*”  
12           Record 78 (emphases in original).

13  
14           There appears to be no factual dispute that property is located within  
15           designated big game habitat. Petitioner argues that the partition is prohibited as  
16           a matter of law because LCZO 18.05(D)(6) mandates 160-acre minimum parcel  
17           sizes for new land divisions within big game habitat.<sup>1</sup> Petitioner argues that  
18           LCZO 18.05(D)(6) does not provide any exceptions to the minimum parcel size  
19           requirement and, thus, none of the “considerations” that the board of  
20           commissioners relied on are relevant or sufficient to allow the partition. We  
21           agree with petitioner. The “considerations” cited in the adopted findings may  
22           be practical reasons why the 160-acre minimum should not be applied in the

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<sup>1</sup> Petitioner’s challenge relates only to parcel 1. The board of commissioners concluded that a general exception to lot size requirements contained in LCZO 25.02 applied to parcel 2. Petitioner does not challenge that conclusion in this appeal and does not argue that parcel 2 also violates the 160-acre minimum parcel size requirement in LCZO 18.05(D)(6).

1 present case, but those considerations do not provide a legally sufficient basis  
2 for deviating from the minimum parcel size requirement.

3 We observe that LCZO 18.05(D)(4)(d) specifically addresses siting a  
4 dwelling on a tract that “crosses over the boundary of a big game winter range  
5 overlay zone” and provides siting alternatives based on practical constraints.<sup>2</sup>  
6 Differently, LCZO 18.05(D)(6) does not provide any exception to the minimum  
7 parcel size requirement for parcels that are not completely within the  
8 designated habitat area or provide alternatives based on parcel-specific  
9 practical constraints.

10 We agree with petitioner that the partition violates LCZO 18.05(D)(6)  
11 and is prohibited as a matter of law.<sup>3</sup>

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<sup>2</sup> LCZO 18.05(D)(4)(d) provides:

“[I]f the tract on which the dwelling will be sited crosses over the boundary of a big game winter range overlay zone, the dwelling shall be sited on a portion of the tract that is located outside the overlay zone, unless not practicable due to characteristics of the portion of the tract outside the overlay zone such as size, topography or access. The development of the proposed dwelling will be more expensive if sited on a portion of the tract outside the overlay zone does not by itself make the development at that site not practicable[.]”

<sup>3</sup> OAR 661-010-0071(1)(c) provides:

“(1) The Board shall reverse a land use decision when:

- 1 The first and second assignments of error are sustained.
- 2 The county's decision is reversed.

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“ \* \* \* \* \*

“(c) The decision violates a provision of applicable law and is prohibited as a matter of law.”