

LAND USE  
BOARD OF APPEALS  
APR 2 1 12 PM '85

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

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ARVIS BILLINGTON AND )  
MARY BILLINGTON, )  
 )  
 Petitioners, )  
 )  
 vs. )  
 )  
 POLK COUNTY, )  
 )  
 Respondent. )

LUBA No. 84-094  
FINAL OPINION  
AND ORDER

Appeal from Polk County.

Marion B. Embick, Salem, filed the Petition for Review and argued the cause on behalf of petitioners. With her on the brief were Lee & Embick.

Michael J. Najewicz, Dallas, filed a response brief and argued the cause on behalf of Respondent County.

Alice Schulze and Neoma Reynolds, Sheridan, filed a response brief and argued the cause on their own behalf as participants.

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee, participated in the decision.

REMANDED 04/02/85

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

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioners appeal the county's approval of an exception  
4 permitting creation of a five acre homestead lot in an  
5 Exclusive Farm Use (EFU) Zone.

6 FACTS

7 The land in question consists of five tax lots, totalling  
8 approximately 36 acres. The property is divided roughly in  
9 half by a county road, Red Prairie Road. East of the road is  
10 Tax Lot 2000, a 16 acre parcel occupied by a mobile home and  
11 dairy barns. Lot 2000 is under lease to a dairy farming  
12 operator. The remaining tax lots, including the site of the  
13 proposed Homestead Exception, (lot 1300) are on the west side  
14 of Red Prairie Road.

15 In May, 1984 R.D. and Neoma Reynolds (participants)  
16 proposed to establish a homestead<sup>1</sup> on a two acre portion of  
17 Tax Lot 1300. After the planning commission approved the  
18 request, petitioners, who own adjacent land, filed an appeal  
19 with the Polk County Commission. At the appeal hearing, the  
20 Reynolds orally revised their request by adding approximately  
21 three acres of Tax Lot 1300. The fives acres subject to the  
22 revised application abut Red Prairie Road. The parcel is  
23 occupied by the Reynolds' dwelling and two barns. The final  
24 order approving the Homestead Exception was entered by the  
25 county governing body on November 7, 1984.

26 The county's decision was made under the following

1 standards in the zoning ordinance:

2 "179.050 STANDARDS FOR GRANTING EXCEPTION. The  
3 Planning Commission may only grant a  
4 Homestead Exception upon considering all of  
5 the following:

6 "(a) Lack of suitable alternatives. A Homestead  
7 Exception should be granted only in cases  
8 where the applicant's needs cannot be  
9 satisfied in a suitable manner under other  
10 procedures and provisions of the Polk County  
11 Zoning Ordinance, except for those dealing  
12 with zone changes.

13 "(b) Interference with adjacent agricultural  
14 activities. Each Homestead Exception should  
15 be examined for possible interference with  
16 the usual and normal farm practices on  
17 adjacent agricultural lands.

18 "(c) Preservation of economic land units. A  
19 Homestead Exception should further the  
20 preservation of economic farm units. Where  
21 a strict adherence to minimum area  
22 requirements would require the partitioning  
23 of large parcels or correspondingly greater  
24 fragmentation of the farm, a Homestead  
25 Exception permitting the smaller parcel may  
26 be appropriate in furthering such  
preservations.

"(d) Productivity. New homesites should be  
located on land which is least suitable for  
the production of crops or livestock  
(considering terrain, adverse soil or land  
conditions, drainage and flooding, and  
vegetation).

"(e) Cumulative effects. While the granting of  
any single Homestead Exception is unlikely  
to cause significant detrimental effects  
upon any rural area, the cumulative effects  
of such an exception should be analyzed  
carefully. The Planning Commission,  
therefore, should evaluate area trends and  
patterns in division of land to ensure that  
the granting of a Homestead Exception will  
not initiate, accelerate, or otherwise cause  
the conversion of an area's agricultural  
lands to more intensive development and

1 uses."

2 FIRST ASSIGNMENT OF ERROR

3 Petitioners first claim the county's decision has not been  
4 shown to comply with paragraph (d) of the above-quoted  
5 ordinance and must therefore be remanded. Their claim rests on  
6 the undisputed facts that (1) the five acre parcel consists of  
7 Class II and III soils and has been zoned for exclusive farm  
8 use; and (2) the county's final order does not conclude the  
9 property is "the least suitable" for the production of crops or  
10 livestock, considering terrain, adverse soil or land  
11 conditions, drainage and flooding, and vegetation. See Section  
12 179.050(d), Polk County Zoning Ordinance.

13 Respondent answers that paragraph (d) of Section 179.050 is  
14 inapplicable in this case. The homestead proposal encompasses  
15 an existing residence, and the county interprets the standard  
16 to apply only where a site for a new homestead residence is  
17 proposed. The county's brief explains:

18 "Polk County Zoning Ordinance 179.050(d) is clear in  
19 its statement that new homesites should be located on  
20 land least suitable for production. In the  
21 application before the Land Use Board of Appeals  
today, no application for a new homesite is being  
proposed. An existing homesite is in place today, and  
therefore, not applicable (sic)." Brief of Respondent  
Polk County at 3. (Emphasis added).

22 The county's distinction between proposals for existing and  
23 new homesteads finds support in the text of Section 179.050 and  
24 in the "Purposes" section of the ordinance, Section 179.010.  
25 In addition, Section 179.040 indicates homestead relief is  
26 available in two situations: (1) to permit a longtime farm

1 operator to continue occupancy of an existing residence and  
2 dispose of the remaining farm property (the Reynolds'  
3 proposal), or (2) to permit the farm operator to sell farm  
4 acreage in conjunction with a personal residence and to  
5 relocate a homesite on another portion of the farm.  
6 Petitioners assert the county's interpretation of Section  
7 179.050(d) is "inconsistent with the plain meaning and purpose  
8 of the ordinance." Petition for Review at 8. However, they do  
9 not convincingly explain this assertion and we reject it.

10 Petitioners make a second argument in support of their  
11 challenge under Section 179.050(d) and we find this argument  
12 persuasive. They insist the county must read its ordinance in  
13 concert with ORS 215.283(3)(d), which requires that non-farm  
14 dwellings in EPU zones be "situated upon generally unsuitable  
15 land for the production of farm crops and livestock...." Since  
16 the statute does not distinguish between existing and new  
17 homestead proposal, petitioners contend the county is not free  
18 to make that distinction. Accordingly, they urge us to remand  
19 the decision for findings on the unsuitability question.

20 As explained below, we hold the county was obligated to  
21 apply the statutory standard to the Reynolds' proposal.  
22 However, we read recent case law to permit the county to meet  
23 this obligation by demonstrating (1) its ordinance contains  
24 requirements that are the equivalent of ORS 215.283(3)(d) and  
25 (2) the proposal conforms to those requirements.

26 In 1000 Friends of Oregon v. LCDC, 72 Or App 443, \_\_\_

1 P2d \_\_\_\_ (1985), petitioner challenged LCDC's acknowledgment of  
2 the Benton County plan and implementing ordinance. Petitioner  
3 claimed, inter alia, that the farmstead provisions in the  
4 county zoning ordinance violated ORS 215.283(3)(d), and  
5 therefore, Goal 3 (agricultural lands). Like the ordinance at  
6 issue here, the Benton County farmstead measure was designed to  
7 allow "...retiring or retired farmers to partition a parcel  
8 that contains the family dwelling from the remainder of the  
9 farm property and to use the parcel for non-farm residential  
10 purposes." Slip Opinion at 1.

11 Petitioner claimed the Benton County ordinance contravened  
12 ORS 215.283(3)(d) because it did not expressly require, as does  
13 the statute, that a farmstead dwelling be "situated upon  
14 generally unsuitable land for the production of farm crops and  
15 livestock." However, the court rejected this claim, accepting  
16 the contention that Benton County's standards for farmstead  
17 approval<sup>2</sup> were equivalent to the unsuitability requirement in  
18 ORS 215.283(3)(d). The court stated:

19 "Although petitioner's understanding of the statutory  
20 scheme is colorable, LCDC's is no less so. LCDC  
21 concluded that the requirements that the county's  
22 provision establishes for farmsteads will necessarily  
23 limit the land that can be used for farmsteads to land  
24 that satisfies the requirement of ORS 215.283(3)(d)  
25 and of Goal 3. In effect, that conclusion is an  
26 interpretation of the statutory and goal requirement.  
27 We do not find it to be erroneous. See Springfield  
Education Assn. v. School Dist., 290 Or 217, 621 P2d  
28 547 (1980)." 1000 Friends of Oregon v. LCDC, 72 Or  
29 App at 446. (Footnote omitted.)

30 The Benton County decision is instructive in terms of the

1 direction we should take in considering petitioners' claim  
2 under ORS 215.283(3). The opinion supports petitioners'  
3 argument that ORS 215.283(3)(d) is a relevant standard where,  
4 as here, land with an existing farm dwelling is proposed to be  
5 partitioned to create a homestead. However, the opinion also  
6 seems to leave room for the county to argue that its ordinance,  
7 like the Benton County measure, is the equivalent of the  
8 statute. In the latter instance, it would be unnecessary for  
9 the county to adopt findings under the statutory standard, so  
10 long as findings under the equivalent ordinance provisions were  
11 made.

12 Based on the foregoing analysis, we believe the county's  
13 decision must be remanded. On remand, the county must explain  
14 how the challenged homestead proposal satisfies ORS  
15 215.283(3)(d). If the county maintains its ordinance contains  
16 standards equivalent to the statute,<sup>3</sup> it must explain (1) why  
17 this is so and (2) how the proposal satisfies those standards.

18 We conclude petitioners' first assignment of error must be  
19 sustained.

20 SECOND ASSIGNMENT OF ERROR

21 Petitioners next challenge compliance of the county's  
22 decision with paragraph (b) of Section 179.050. That provision  
23 requires examination of a Homestead Exception proposal for  
24 possible interference with "usual and normal farm practices on  
25 adjacent lands." With respect to this standard, the county's  
26 findings state:

1 "12.\*\*\*

2 "No testimony was received regarding any adverse  
3 effects upon adjacent agricultural lands." Record at  
4 6.

5 The only other reference in the order to the non-interference  
6 standard is the following conclusion:

7 "5. The creation of the homesite shall not interfere  
8 with the usual and normal farm practices on  
9 adjacent agricultural properties." Record at 7.

10 Petitioners assert the county's order is not supported by  
11 sufficient evidence in the record. They direct our attention  
12 to their own testimony that non-farm residents in the area have  
13 complained about spraying practices by farmers. Record at 61.

14 We agree the county's findings lack evidentiary support.  
15 Beyond that, we find the order insufficient under Section  
16 179.050(b) because it does not affirmatively demonstrate  
17 compliance with the standard. The quoted finding erroneously  
18 suggests the burden rests on opponents of the application to  
19 demonstrate non-compliance with the standard. It is well  
20 established, however, that the burden of proving compliance  
21 with the governing approval standards rests on the proponent of  
22 the land use request. Fasano v. Board of County Commissioners  
23 of Washington County, 264 Or 574, 509 P2d 23 (1973). The  
24 findings demonstrating compliance must affirmatively explain  
25 what the relevant facts are and why the facts warrant the  
26 conclusion the standard is satisfied. ORS 215.416(7); South of  
Sunnyside Neighborhood League v. Clackamas County Commission,  
280 Or 3, 21, 569 P2d 1063 (1977). Here, the county has failed

1 to discuss what the "usual and normal" farm practices are on  
2 adjacent lands and has not explained why approval of the  
3 Homestead Exception would not interfere with those practices.

4 The second assignment of error is sustained.

5 THIRD ASSIGNMENT OF ERROR

6 Petitioners next claim the county's order fails to  
7 demonstrate compliance with paragraph (c) of Section 179.050.

8 The ordinance reads:

9 "(c) Preservation of economic land units. A Homestead  
10 Exception should further the preservation of  
11 economic farm units. Where a strict adherence to  
12 minimum area requirements would require the  
13 partitioning of large parcels or correspondingly  
14 greater fragmentation of the farm, a Homestead  
15 Exception permitting the smaller parcel may be  
16 appropriate in furthering such preservations."  
17 Section 179.050(c), Polk County Zoning Ordinance.

18 The county's finding with respect to this standard reads:

19 "13. The application would create approximately a  
20 thirty-two (32) acre parcel exclusive of the  
21 Homestead Exception. Said parcel is consistent  
22 with and compatible with the surrounding farm  
23 units located in the immediate area of the  
24 property." Record at 6.

25 The pertinent conclusion states:

26 "6. The homestead shall preserve the economic farm  
unit in that thirty-two (32) acres shall be the  
remaining sized farm parcel which shall be  
continued in a farm operation and shall not  
require an additional farm dwelling." Record at  
7.

We agree with petitioners that the quoted portions of the  
county's order do not accurately describe the consequences of  
approving the requested exception. The county states, without  
explanation, that the decision will result in a five acre

1 homestead and a 32 acre farm parcel. As we construe the order,  
2 however, approval of the homestead results in three distinct  
3 parcels, i.e., the five acre homestead on Tax Lot 1300 abutting  
4 Red Prairie Road, the remaining 15 acres on the west side of  
5 Red Prairie Road (no portion of which is contiguous to the  
6 property east of the road), and the 16 acre dairy operation  
7 east of the road. See attached site map. The county has  
8 failed to explain how such a tripartite division<sup>4</sup> of the  
9 parcel "furthers the preservation of economic farm units."

10 The third assignment of error is sustained.

11 FOURTH ASSIGNMENT OF ERROR

12 Petitioners next allege the county's decision does not  
13 comply with paragraph (a) of Section 179.050. That provision  
14 authorizes an exception only where "...the applicants' needs  
15 cannot be satisfied in a suitable manner under other procedures  
16 and provisions of the Polk County Zoning Ordinance, except for  
17 those dealing with zone changes." The county found this  
18 standard satisfied, construing the term "need" to refer to the  
19 applicant's desire to create a small homestead and to dispose  
20 of the remainder of the farm.

21 Petitioners dispute the county's interpretation of this  
22 portion of the ordinance. They claim the applicants can  
23 continue to reside in the existing residence and lease the  
24 remainder of the property to a farm operator, without homestead  
25 relief. Since petitioners believe the applicants' needs can be  
26 satisfied without modification of existing zoning requirements,

1 they claim Section 179.050(a) is not met.

2 We cannot concur in petitioners' reading of Section  
3 179.050(a). The standard broadly calls for consideration of  
4 whether other procedures and provisions in the ordinance are  
5 suitable to meet the applicants' needs. Petitioners cite no  
6 such procedures or provisions which would authorize creation of  
7 the five acre homestead. Nor do they cite legal authority  
8 preventing the county from accepting the applicants' version of  
9 the need giving rise to the exception request. The county's  
10 interpretation of the ordinance is reasonable and we therefore  
11 sustain it. Fisher v. City of Gresham, 69 Or App 411, 685 P2d  
12 484 (1984).

13 The fourth assignment of error is denied.

14 FIFTH ASSIGNMENT OF ERROR

15 Petitioners next contend the county has failed to  
16 demonstrate its decision is consistent with Section 179.010 of  
17 the zoning ordinance. The provision reads as follows:

18 "179.010 PURPOSE. The purpose of the Homestead  
19 Exception is to allow county residents residing on  
20 operational farm units prior to the enactment of  
21 countywide zoning (July 1, 1973) to dispose of farm  
22 acreage while either retaining personal residences and  
23 surrounding homesites, or relocating on a portion of  
24 the farm acreage. Not more than one Homestead  
25 Exception shall be granted for any operational farm  
26 unit existing prior to July 1, 1973. No Homestead  
27 Exception shall be allowed for any operational farm  
28 unit established after July 1, 1973.

29 "The Homestead Exception is intended to provide a  
30 means for modifying Special Exception requirements in  
31 cases where a strict adherence to them might cause  
32 unusual or undue hardship to a longtime property owner  
33 and contravene the goals of the Comprehensive Plan of

1 Polk County. The Homestead Exception is not intended  
2 to authorize directly or indirectly speculative land  
3 division otherwise prohibited by zoning area  
4 requirements. Nothing in this chapter will be  
5 construed to require the granting of such a Homestead  
6 Exception. It is not the intent of this section to  
7 regulate or limit farm or agricultural use of land."

8 Petitioners argue the applicants are not qualified for  
9 relief under the quoted provision because their property is not  
10 presently a single operational farm unit. Instead, petitioners  
11 claim use of the property is divided as follows: (1) the 16  
12 acre dairy east of Red Prairie Road and (2) the remaining 20  
13 acres west of the road, occupied by the Reynolds' residence and  
14 barns, but supporting no farming operation.

15 We have difficulty understanding the thrust of petitioners'  
16 argument. Although petitioners place emphasis on the present  
17 use of the property, the stated concern of the ordinance is  
18 whether the Reynolds resided on an operational farm unit prior  
19 to July 1, 1973. The petition does not seem to question  
20 whether this threshold requirement has been met.

21 The fifth assignment of error is denied.

#### 22 SIXTH ASSIGNMENT OF ERROR

23 In this assignment of error petitioners direct our  
24 attention to Section 179.030 of the zoning ordinance. That  
25 section reads:

26 "179.030 SIZE OF EXCEPTION. The maximum area to be  
retained by the applicant as a homesite  
shall be only that area necessary for a  
home, accessory structures, garden, and  
landscaped area. Homesites exceeding three  
acres in the area shall only be approved  
upon a finding that:

- 1 (a) an additional area is necessary for an  
2 adequate homesite; or
- 3 (b) an exceptional circumstance pertains to  
4 the homesite which justifies a larger  
area.

5 The county's order addresses this portion of the ordinance as  
6 follows:

7 "Based upon the location of hedgerows, farm related  
8 barns, and other property necessary for an adequate  
homesite and the circumstances pertaining to the  
9 homesite, justify (sic) the inclusion of this larger  
area as a rational and logical division of the  
homesite from the remaining parcel.

10 \* \* \*

11 "The request for the homestead of approximately five  
12 (5) acres is consistent with the evidence presented  
for the need of retaining a personal residence and  
13 surrounding homesite and barns and is  
consistent with the logical division of the homestead  
14 exception from the remainder of the property."

15 We concur in petitioners' argument that the county's  
16 justification for relaxing the three acre maximum set forth in  
17 the zoning ordinance is conclusional and insufficient for  
18 review. The order fails to explain, as we believe it must, why  
19 an adequate homesite cannot be established within the three  
20 acre standard and why such a homesite must include two  
21 farm-related structures. The vague reference to "the location  
22 of hedgerows, farm related barns and other property" in the  
23 order is of little assistance. To consider such a general  
24 finding adequate would in effect be to read the three acre  
25 standard out of the ordinance. This we decline to do.

26 The sixth assignment of error is sustained.

1 SEVENTH ASSIGNMENT OF ERROR

2 In this assignment of error, petitioners claim the county  
3 erred by approving a Homestead Exception different from that  
4 requested on the application initially filed. As noted  
5 earlier, the applicants orally revised the application, by  
6 adding approximately three acres, at the hearing conducted by  
7 the governing body on petitioners' appeal.

8 The ordinance provides a decision shall be made on the  
9 basis of the application, written comments and staff  
10 investigation. Section 179.080, Polk County Zoning Ordinance.  
11 Petitioners appear to read this provision to prohibit oral  
12 modification of the application, but we find no basis in the  
13 text for such a strict construction. Moreover, even if error  
14 was committed by allowance of the oral modification, we fail to  
15 see how that procedural error caused substantial prejudice to  
16 the substantial rights of petitioners. See ORS  
17 197.835(8)(a)(C). Petitioners were present at the hearing in  
18 question and could have, but did not, request additional time  
19 to comment on the modified application.

20 Petitioners raise one additional claim of error, viz, that  
21 the original application did not include two small tax lots  
22 (602 and 700) owned by the Reynolds on the west side of Red  
23 Prairie Road. The argument seems to be that once the  
24 application was approved, the omitted tax lots were effectively  
25 divided from the property. Petitioners claim that if this was  
26 in fact the case, it would contravene Section 179.050(e) of the

1 ordinance (granting of homestead exceptions should not  
2 "initiate, accelerate, or otherwise cause the conversion of an  
3 area's agricultural lands to more intensive development and  
4 uses.").

5 We do not find petitioners' claim under Section 179.050(e)  
6 persuasive. Although the application may not have included the  
7 tax lots in question, the final order expressly does so.  
8 Record at 8. Under the circumstances, petitioners' concern  
9 that the decision implicitly recognizes Tax Lots 602 and 700 as  
10 zoning lots separate from the remainder of the property is not  
11 well founded.

12 The seventh assignment of error is denied.

13 REMANDED.  
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FOOTNOTES

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4 Under the county zoning ordinance, the purpose of the  
Homestead Exception is to

5 "allow county residents residing on operational farm  
6 units prior to the enactment of countywide zoning  
7 (July 1, 1973) to dispose of farm acreage while either  
8 retaining personal residences and surrounding  
homesites, or relocating on a portion of the farm  
acreage." Section 179.010, Polk County Zoning  
Ordinance.

9 In addition to the approval standards quoted at pages 3-4  
10 of this opinion, the following limitations apply to the  
Homestead Exception: (1) the property subject to the request  
11 must have been an operational farm unit prior to the enactment  
of countywide zoning (July 1, 1973), (2) the applicant must  
12 have resided on the property as of that date, (3) not more than  
one Homestead Exception may be granted for any operational farm  
13 unit, and (4) generally, the maximum area for a homestead is  
three acres. See Sections 179.010 and 179.030, Polk County  
Zoning Ordinance.

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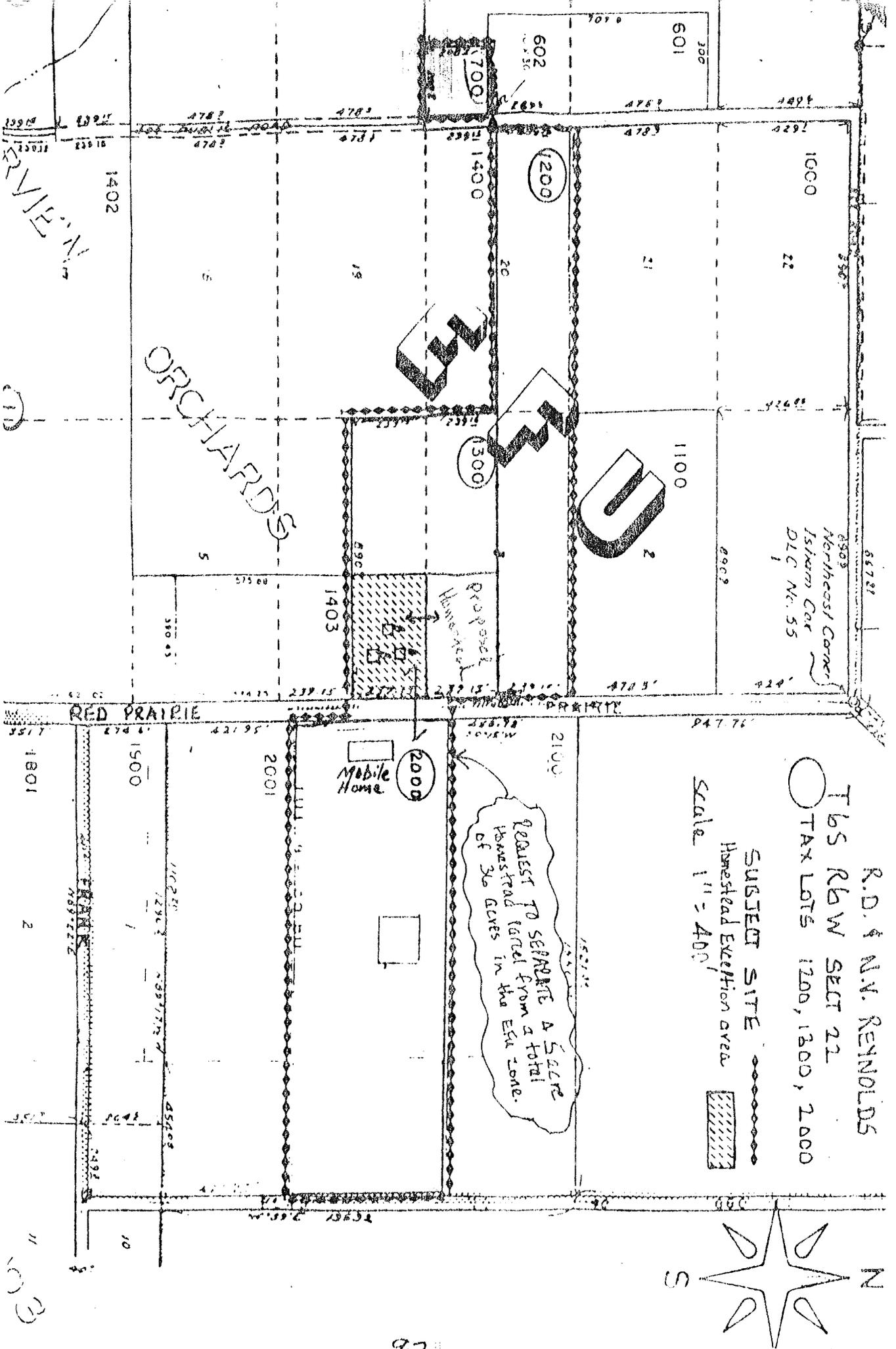
16 Those standards can be summarized as follows: (1) the  
farmstead parcel can not exceed 5 acres and must be "only as  
17 large as necessary to accommodate the residential use," (2) no  
actively farmed land or major farm buildings can be included in  
18 the farmstead proposal, (3) applicants for relief must have  
resided on the property for 30 years or more, (4) the remainder  
of the property must continue in farm use and, (5) further  
19 partition of the property for farmstead use is prohibited.  
1000 Friends of Oregon v. LCDC, supra, 72 Or App at 443.

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22 We are aware Polk County's plan was acknowledged by LCDC in  
1981. Arguably, we should construe the acknowledgment to  
23 represent the state agency's conclusive determination that Polk  
County's homestead requirements satisfy Goal 3 and therefore  
24 are the equivalent of ORS 215.283(3)(d). However, we are  
reluctant to give this interpretation to the 1981  
25 acknowledgement and we have been cited to no authority  
directing us to do so.

2 The record indicates the county was aware its decision  
3 could be construed as creating three parcels by virtue of the  
4 relationship of the proposed homestead to the remaining  
5 acreage. As we understand it, the suggested solution was to  
6 adjust the boundaries of the proposed homestead, creating a  
7 "reserve strip" to make the remaining acreage west of Red  
8 Prairie Road contiguous with the dairy operation east of the  
9 road. Record at 14. However, this solution was not reflected  
10 in the final order. Further, we have serious doubt that the  
11 approach could be construed as a legitimate means of satisfying  
12 Section 179.050(c).

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R.D. & N.V. RENNOLDS

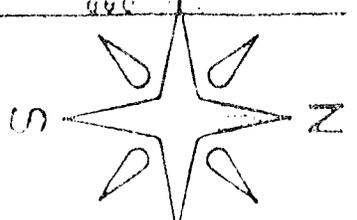
T65 R6W SECT 22

TAX LOTS 1200, 1300, 2000

SUBJECT SITE

Homestead Exception Area

Scale 1" = 400'



REQUEST TO SEPARATE A SECT 22  
HOMESTEAD TRACT FROM A TOTAL  
OF 36 ACRES IN THE EIA ZONE.

Mobile Home

ORCHARDS

REVIEW