

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

APR 3 1 34 PM '80

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, the)
assumed name of Oregon Land)
Use Project, an Oregon non-)
profit corporation,)
Petitioner,) LUBA No. 79-005
vs.) FINAL
MARION COUNTY BOARD OF) OPINION AND ORDER
COMMISSIONERS,)
Respondent.)

Appeal from Marion County.

Robert E. Stacey, Jr., Portland, argued the cause and filed the petition for review and brief for petitioner.

Mary Ann Hutton, Acting Assistant Legal Counsel argued the cause and filed the brief for Respondent Marion County, with her on the brief was Frank C. McKinney, Marion County Legal Counsel.

Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

Reversed.

4/3/80

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, § 6(a).

1 BAGG, Referee

2
3 FACTS

4 By Ordinance No. 562 dated October 17, 1979, the Marion
5 County Board of Commissioners rezoned lands within adopted (but
6 not acknowledged) urban growth boundaries and other rural lands
7 amounting to over 475,000 acres. The zoning was undertaken to
8 implement the Marion County Comprehensive Plan, adopted April
9 11, 1979. Respondent's Brief at p. 3. A number of zones were
10 created and some old zones eliminated. The zones in force by
11 Ordinance No. 562 are:

12 Timber Conservation (TC)
13 Exclusive Farm Use (EFU)
14 Special Agriculture (SA)
15 Acreage Residential (AR)
16 Public (P)
17 Rural Industrial (IR)
18 Commercial (CO)
19 Rural Commercial (CR)

20 New zones created by the ordinance are the SA, TC, IR and P
21 zones. Respondent's Brief at p. 4, 5.

22 There were no findings adopted with the ordinance, but
23 there is a statement in the ordinance that the Board conducted
24 public hearings concerning the ordinance and that the Board
25 "thoroughly reviewed all of the testimony submitted at the
26 public hearings, both written and oral, and is now fully
advised in the premises." Record at pp. 1 and 2. The ordinance
recites that it was passed "to comply with ORS Chapter 215.050
and 197.175 in order to implement Marion County's Comprehensive

1 Plan" Record, p. 1. Respondent relies on these recitals
2 as statements of support for Ordinance No. 562, and cites the
3 Board to the Comprehensive Plan for whatever "findings" may be
4 necessary. Respondent's Brief at 2, 36-39.

5 Prior to adoption by the Board of Commissioners, the
6 ordinance was reviewed by the Planning Commission. The
7 Planning Commission adopted an exceptions report to go along
8 with Ordinance No. 562. For some reason not made clear in the
9 record of this proceeding or at oral argument, the Board of
10 Commissioners chose not to adopt that report. Respondent's
11 Brief at 4. Exhibit D of the Record, the U. S. Department
12 of Agriculture's soil analysis for the Marion County area,
13 shows the lands to be predominantly agricultural lands as
14 defined by Goal 3.

15 Petitioners filed a notice of intent to appeal on
16 November 14, 1979.

17 STANDING

18 Petitioner, 1000 Friends of Oregon is a non-profit
19 corporation, registered under the business name of "Oregon
20 Land Use Project." The petitioner has three members who,
21 by affidavit, allege they were individually damaged in
22 some way by Marion County's decision to zone their property
23 or property within sight and sound of their property by
24 Ordinance No. 562. Specifically, Charles Frady alleged
25 that his property was rezoned Acreage Residential (AR),
26 and property within sight and sound of his property was

1 standing to attack Ordinance No. 562 to the extent that the
2 affiant members of 1000 Friends of Oregon may attack Ordinance
3 No. 562. Hunt v. Wash. Apple Advertising Comm., 432 US 333, 97
4 S Ct 2434, 53 L Ed 2d 383 (1977); 1000 Friends vs. Multnomah County
5 39 Or App 917 (1979). The affiants allege injury only from
6 adoption of the SA, RA and IR zones. It therefore appears
7 that only these zoning designations may be reviewed. However,
8 the respondent has announced that the issue of validity of the
9 P, CO and CR zones is "inextricably" associated with the AR
10 zone. Respondent must believe that the legal and factual
11 issues involved with the zones are similar enough to be
12 "inextricably" tied to one another. The Board will not ques-
13 tion that conclusion. Therefore, petitioners have standing
14 to contest the P, CO and CR zones.

15 Respondent has challenged petitioner's standing to attack
16 the Timber Conservation zone. Respondent alleges that petitioners
17 have made no allegations showing standing to attack the Timber
18 Conservation zone. A review of the affidavit shows no allegations
19 with respect to the Timber Conservation zone, and the only zones
20 mentioned in the affidavits are the Special Agriculture, Acreage
21 Residential and Rural Industrial.

22 The Timber Conservation zone does not appear to be part of
23 a zoning scheme that requires a connection with other zones. At
24 the hearing, all agreed that each of the zones in Ordinance No. 562
25 could have been enacted separately.

26 The TC zone is designed to comply with Goal 4. Respondent's

1 zoned Rural Industrial (IR). Affidavit of Charles Frady in
2 Petition for Review. Dan Goffin alleges he owns property
3 zoned Exclusive Farm Use (EFU) and that he farms on contract
4 approximately 20 acres rezoned Special Agriculture (SA) by
5 Ordinance 562. He further alleges contract farming of another
6 parcel of property rezoned Acreage Residential (AR) by
7 Ordinance 562. Donald Still alleges that he owns property
8 rezoned Special Agriculture by Marion County Ordinance No. 562.
9 He alleges that his land is within sight and sound of land zoned
10 Acreage Residential by that same ordinance. All three allege
11 membership in 1000 Friends of Oregon, and all three allege
12 injury from either industrial activity, encroachment of resi-
13 dential uses on neighboring farming parcels, or diminution of
14 scenic value and speculation of land value in derogation of
15 possible farm expansion. Oregon Laws 1979, Ch 772, §4(2) gives
16 standing to "any person whose interests are adversely affected
17 or who is aggrieved by a land use decision" The
18 Board believes that the allegations in the affidavit are sufficient
19 to satisfy the statutory test of "adversely affected" or "aggrieved."
20 Each of the affiants has standing to challenge Ordinance 562 to the
21 extent that they were adversely affected or aggrieved by Ordinance
22 562.

23 Each of the affiants is a member of 1000 Friends
24 of Oregon. 1000 Friends of Oregon participated in the
25 proceedings culminating in the adoption of Ordinance No. 562
26 (Record, p. 20-92, 97-98). Petitioners have representational

1 the record to support the conclusions made by the Board of
2 Commissioners when they applied specific zones to the properties
3 in the county. Respondent asserts that these findings are,
4 in fact, included within the Comprehensive Plan, however.

5 Respondent's Comprehensive Plan embodies a number of
6 conclusions regarding lands in Marion County and policies
7 to control land uses within the county. The Comprehensive
8 Plan is cited as Exhibit B in the Record. A review of the
9 record, however, shows only the United States Soil Conservation
10 Service study of Marion County (Exhibit D) as an inventory of
11 the lands within the county. That is, other than the soil
12 types, there is little factual information the Board was able
13 to find in the record to support the conclusions made in the
14 plan. Indeed, statements of landowner desire (Exhibit E) and
15 the soils study are the only inventories in supporting the
16 zone designations made by Ordinance 562. There may, in fact,
17 be the supporting inventories some place in the county, but
18 those inventories were not made part of the record in this
19 proceeding.

20 The Board concludes that findings were required in the
21 adoption of this ordinance, or this ordinance must at least
22 reference findings showing that compliance with the goals,
23 in fact, did occur. Those findings must include inventories
24 far broader and more detailed than owner requests and the
25 soil study document in the record. The first assignment
26 of error is sustained.

1 optional timber tax program or \$1,000 in gross income. What is
2 missing here is an inventory of the existing commercial agricul-
3 tural enterprise in the areas of Marion County in which the zone
4 is applied and a link between that inventory and the chosen
5 standard. The conclusions in Exhibit B (the Comprehensive Plan)
6 at pages 12-17 simply do not illustrate the existing commercial
7 agricultural enterprise within the areas zoned Special
8 Agriculture.¹ The SA zone must fall for that reason.

9 The other portion of petitioner's second assignment of
10 error alleges a violation of Goal 3 because the ordinance
11 fails to require that parcels in contiguous ownership be
12 "aggregated." As the Board understands the aggregation argument,
13 it would require that lots in contiguous ownership be aggre-
14 gated to further the purpose of the preservation of agricul-
15 tural units in "large blocks" as required by ORS 215.243.

16 Again, whether aggregation may or may not be required
17 in a particular area will depend in part upon the commercial
18 agricultural enterprise within that area. It may not be
19 necessary or desirable to aggregate lots where it would be
20 inconsistent with the commercial agricultural enterprise.
21 The Board cannot know whether aggregation is needed in Marion
22 County to comply with Goal 3 without an adequate inventory
23 of the commercial agricultural enterprise. Further, aggregation
24 may not be the only way to preserve agricultural land in large
25 blocks. The method of preservation is surely a local decision.

26 / /

1 Timber Tax Program or \$1,000 in gross income is not an adequate
2 mechanism.

3 The Board finds that without clear knowledge of the
4 particular forest uses, practices and lands extant in Marion
5 County, the Small Tract Tax or \$1000 Standard used by respon-
6 dent in Ordinance No. 562 falls short of the Goal 4 demand
7 that forest lands be retained for forest uses. The zone
8 violates Goal 4.

9 It should be noted that this Board does not find that
10 the uses permitted by the Ordinance and the conditional
11 use procedure are objectionable. What is objectionable is
12 the lack of inventory to show that the standard used is
13 one that will preserve the existing commercial agricultural
14 enterprise and forest uses on agricultural land and forest
15 lands subject to the SA zone. In short, the definitional
16 standard is arbitrary.

17 ASSIGNMENT OF ERROR NO. 4

18 Assignment of Error No. 4 alleges a violation of Goal 4
19 in the enactment of the Timber Conservation zone. As the
20 Board finds petitioner does not have standing to challenge
21 the zone, this assignment of error is denied.

22 ASSIGNMENT OF ERROR NO. 5

23 The fifth assignment of error claims a violation of
24 Goal 3, 4 and Goal 2 in the adoption of Ordinance 562 be-
25 cause the ordinance allegedly zones agricultural and forest
26 land for uses not permitted by Goals 3 and 4 without properly

1 taking exception to Goals 3 and 4. The petitioner alleges
2 a violation of Goals 3 and 4 in all of the zones included in
3 Ordinance No. 562.

4 As there was no adequate definition of farm and forest
5 parcels supported by an adequate inventory, there exists the
6 possibility of the conversion of agricultural lands and lands
7 suitable for forest uses to other uses under all the zones in
8 Ordinance 562 as presently written. If the use designations
9 as now written are to be applied, as they are, to agricultural
10 and forest lands as defined by Goal 3 and Goal 4, then an
11 exception to the goal is required. 1000 Friends vs. Marion
12 County, LCDC No. 75-006.

13 Marion County argues that many of the lands zoned for other
14 than agricultural and forest uses were within agreed to urban
15 growth boundaries. Respondent brief at 37. There is nothing
16 in the record to show that those urban growth boundaries had
17 been approved by the Land Conservation and Development
18 Commission.

19 The validity of the placement of the urban growth boundary
20 in the county is not within the scope of assignment of error
21 no. 5. Petitioners challenge only zoning of "rural" lands
22 under Ordinance 562. The lands in the urban growth boundary
23 are not "rural" lands contained in the goals. The fifth
24 assignment of error is sustained insofar as it alleges a failure
25 to take an exception to rural lands zoned for urban and non-
26 farm or non-forest uses by Ordinance No. 562.

1 The form of order in this case follows the wishes of
2 the parties and the direction of the commission.

3
4 Ordinance 562 is invalid in regard to the adoption
5 of Sections 137.040 and 137.050 of the SA zone under Section
6 4 of the Ordinance. Ordinance 562 is invalid with regard to
7 the rezoning of lands to the AR, IR, P, CO and CR zones.

8 Therefore, the adoption of only sections 137.040 and
9 137.050 of the SA zone of Ordinance 562 is reversed. The
10 rezoning of lands to the AR, IR, P, CO and CR zones under
11 Ordinance 562 is reversed.

12 The rezoning of lands to the EFU zone by Ordinance 562 was not
13 at issue in this appeal and is unaffected by this Order. Because
14 of our determination that Petitioners lack standing with regard
15 to the TC zone, the adoption of the text of the TC zone and the
16 rezoning of lands to the TC zone are also unaffected by this
17 order. Furthermore, consistent with the determination of the
18 Commission in modifying the Board's proposed order, the remain-
19 ing text of the SA zone adopted by Ordinance 562 and the rezon-
20 ing of lands to the SA zone, exclusive of Sections 137.040 and
21 137.050, are unaffected by this order. The adoption of the
22 text of zones created under Section 4 of Ordinance 562 (SA,
23 Chapter 137 except Section 137.040 and 137.050; TC, Chapter
24 138, IR, Chapter 163; and P, Chapter 171) is unaffected by
25 this order.

26 This order does not bar revival of pre-existing zones which

1 would otherwise occur as a result of this order's reversal of
2 rezoning which was made under Ordinance 562.

3 The foregoing declaration with regard to the scope and
4 effect of the Board's order is not necessarily all-inclusive.
5 It is presumed by the Board that portions of Ordinance 562
6 not specifically reversed are unaffected by this Order.

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FOOTNOTES

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The division of property over 20 acres to make "smaller farm units" is subject to a requirement that the applicant give evidence that the "proposed parcels can be managed as a commercial agricultural unit." Section 137.040(d). This standard too ignores the "existing commercial agricultural enterprise" consideration mandated by Goal 3. No less objectionable standard is made by combining this requirement with the tax/\$1000 requirement as in the case for division of land under 20 acres. The standard is still arbitrary.