

SEP 29 11 37 AM '80

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

3	RALPH C. SPOONER and	)	
	DENICE L. SPOONER,	)	
4	Petitioners,	)	LUBA NO. 80-054
		)	
5	vs.	)	FINAL OPINION
		)	AND ORDER
6	MARION COUNTY BOARD OF	)	
	COMMISSIONERS,	)	
7		)	
	Respondent.	)	

9 Appeal from Marion County.

10 Michael N. Gutzler, Salem, filed the petition for review  
11 and argued the cause for Petitioners Spooner. With him on the  
brief were Williams & Spooner.

12 Respondent Marion County did not appear.

13 Mike L. Balloun and Deborah J. Balloun, Salem, filed a  
14 brief and argued the cause on their own behalf as respondents.

15 COX, Referee; REYNOLDS, Chief Referee; BAGG, Referee;  
participated in the decision.

16 Affirmed. 9/29/80

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

1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioners seek reversal of a Marion County land use  
4 decision granting the division of a 5.5 acre parcel of property  
5 near Salem into two parcels of 2.5 and 3.0 acres.

6 STANDING

7 Standing is not an issue in this case.

8 ASSIGNMENTS OF ERROR

9 Petitioners assert the following assignments of error:

10 "The partitioning should have been denied,  
11 because it materially alters the stability of the  
overall land use pattern of the area."

12 "The partitioning should have been denied because  
13 it will encourage strip-type development along Bethel  
Road."

14 "The partitioning should have been denied,  
15 because the subject property is suitable for  
agriculture."

16 "The partitioning should have been denied,  
17 because it will interfere with farming practices on  
adjoining lands."

18 FACTS

19 Pursuant to Section 7 of Marion County's subdivision and  
20 partitioning ordinance no. 540, the applicants Mike and Deborah  
21 Balloun applied to the Planning Department for permission to  
22 divide 5.5 acres into two parcels of 2.5 acres and 3.0 acres at  
23 7128 Bethel Road, SE, near Salem. The Planning Director  
24 conditionally granted the application which was appealed by  
25 petitioner herein. Public hearing before a hearings officer  
26 was held on the matter.

1           The subject property is zoned special agricultural in the  
2 Marion County Comprehensive Plan (unacknowledged). A farm  
3 parcel, presently producing grass seed, adjoins the property on  
4 the south and east. To the north, across Bethel Road, are  
5 acreage homesites comparably sized to the 5.5 acre subject  
6 parcel. Immediately adjacent on the west is a 4.5 acre parcel  
7 originally divided from the subject parcel. The U. S. Soil  
8 Conservation Service records show the subject property as being  
9 composed of Neikia silty clay loam, varying slope, with Class  
10 III and IV soils. The applicants, however, employed a  
11 qualified soil scientist to conduct a more detailed soil  
12 analysis. Apparently using the same system of analysis but  
13 surveying on a more detailed scale than that of the SCS, the  
14 property was found to have only a fringe of Class III soil on  
15 the east and a fringe of Class IV soil on the west. The  
16 remaining four plus or minus acres in the center was found to  
17 consist of primarily Class VI soils due to stony surface and  
18 steep slopes. The soil scientist reported finding many large  
19 boulders and stones on the subject property. He testified that  
20 the land was unsuitable for any type of cultivation and  
21 likewise would have low value for timber production. Based on  
22 his testimony the county concluded the property was  
23 predominantly Class VI soil.

24           A dwelling is presently located on the proposed 2.5 acre  
25 parcel. The proposed 3.0 acre parcel will be served by an  
26 individual septic tank and well. The 3.0 acre parcel has been

1 approved for a subservice sewage disposal. Respondent Marion  
2 County found that the subject property is not agricultural land  
3 within the meaning of LCDC Goal 3. It determined that the  
4 property is not suitable for farm use and is not necessary to  
5 permit farm practices to be undertaken on adjacent or nearby  
6 lands.

7 DECISION

8 Petitioners in their petition for review based their  
9 argument to a great extent on Chapter 137 of the Marion County  
10 Zoning Ordinance as amended June 18, 1980. The decision to  
11 allow the applicants requested partitioning was signed by the  
12 Board of Commissioners for Marion County on April 17, 1980 at  
13 which time a prior version of Chapter 137 was in effect. What  
14 follows is the numbering system in effect at the time of the  
15 contested decision rather than the numbering system cited to  
16 this Board by petitioners in their brief. Where there is a  
17 discrepancy other than numbering in the content of the two  
18 versions of the chapter that discrepancy will be discussed.  
19 However, it is the opinion of this Board that the law  
20 controlling the contested decision was set forth in the version  
21 of respondent's chapter 137 in effect on April 17, 1980.

22 ASSIGNMENT OF ERROR NO. 1

23 Petitioners allege that respondent's action will materially  
24 alter the stability of the overall land use pattern of the  
25 area. Chapter 137 of the Marion County Zoning Ordinance  
26 Section 137.030(i)(3) states in pertinent part:

1           "The following non-farm uses may be permitted in  
2 a SA zone subject to obtaining a conditional use  
3 permit:

4           "(i) Dwellings in a planned development or a  
5 single family dwelling not in conjunction with farm  
6 use provided:

7           "\*\*\*

8           "(3) It does not materially alter the stability  
9 of the overall land use pattern of the area;"

10           Petitioners argue that although the present case involves  
11 the creation of only one additional homesite, the partitioning  
12 will set a precedent in the area which will justify further  
13 partitionings and result in a reduction in the area's  
14 livability. Petitioners fear additional subdivisions will  
15 create increasingly smaller and smaller lots. They also claim  
16 that the respondent's proposed flag lot configuration  
17 constitutes a break with the existing land use pattern in the  
18 area and would be the first instance of houses being two deep  
19 along Bethel Road. Petitioners fear the flag lot nature of the  
20 parcel being created would set precedent for further similar  
21 development on both sides of Bethel Road.

22           Respondent found in its findings and conclusions section that:

23           "The proposed division and resulting parcels  
24 would not materially alter the stability of the  
25 overall land use pattern of this area. It is  
26 consistent with the range of parcel sizes and uses of  
the area."

          Judging from Petitioners' argument they seem to be  
alleging, although they don't specifically so state, that there  
is a lack of substantial evidence to support Respondent's

1 finding.

2 A review of the record indicates the respondent had before  
3 it conflicting evidence regarding the proposal's impact on the  
4 overall land use pattern in the area. The applicant indicated  
5 through his testimony, as well as that of an expert witness,  
6 that there are other similar size parcels in the area and  
7 neighboring farming activity would not be infringed upon.  
8 Respondents testified to the contrary.

9 This Board has consistently held in cases where there is  
10 conflicting evidence we will only look to see if there is  
11 evidence in the record upon which a reasonable mind might  
12 arrive at the same conclusion reached by the governing body.  
13 Stringer v. Polk County, \_\_\_\_\_ Or LUBA \_\_\_\_\_ (1980). As the  
14 Court of Appeals stated in Christian Retreat Center v. Comm.  
15 for Wash. Co., 28 Or App 673, 679, 560 P2d 1100 (1977):

16 "Where, as here, it is alleged that the findings  
17 of the lower tribunal are not supported by substantial  
18 evidence, the inquiry to be made by this court is the  
19 limited one of whether the record contains evidence  
20 which a reasonable mind might accept as adequate to  
21 support the findings challenged. Where the record  
22 includes conflicting believable evidence, that  
23 conflict is to be resolved not by this court but by  
24 the lower tribunal which may choose to weigh the  
25 evidence as it sees fit. Desler v. Lane County  
26 Commissioners, 27 Or App 709, 557 P2d 52 (1976);  
Braidwood v. City of Portland, 24 Or App 477, 546 P2d  
777, Sup Ct review denied (1976); Auckland v. Bd. of  
Comm. Mult. Co., 21 Or App 496, 536 P2d 444, Sup Ct  
review denied (1975); Dickinson v. Bd. of County  
Comm., 21 Or App 98, 533 P2d 1395 (1975)."

25 We find sufficient evidence in the record upon which Marion  
26 County could base its decision. Therefore, petitioners' first

1 assignment of error is denied.

2 ASSIGNMENT OF ERROR NO. 2

3 Petitioners allege that the partitioning should have been  
4 denied because it will encourage strip-type development along  
5 Bethel Road. In support of their argument, petitioners cite  
6 this Board to Marion County's comprehensive plan containing a  
7 policy concerning rural development, which states in part:

8 "Strip-type' commercial or residential  
9 development along roads in rural areas shall be  
discouraged."

10 Petitioners argue that the proposed partitioning would tend  
11 to encourage or justify further development along Bethel Road.  
12 Petitioners submit this contested decision is inconsistent with  
13 the announced policy of Marion County to discourage such  
14 strip-type development. Again we interpret petitioners to be  
15 arguing lack of substantial evidence upon which the county  
16 could base its decision. We disagree. The record again  
17 contains conflicting evidence mainly coming from the applicant  
18 and the petitioner. Therefore, based on the same reasons set  
19 forth in our holding regarding petitioners' first assignment of  
20 error, we deny their second assignment of error.

21 ASSIGNMENT OF ERROR NO. 3

22 Petitioners allege that the partitioning should have been  
23 denied because the subject property is suitable for  
24 agriculture. They argue that respondents have not demonstrated  
25 the subject property is not suitable for agriculture.

26 Petitioners further allege that the U.S. Soil Conservation

1 Service "Soil Survey for Marion County, Oregon" shows the  
2 subject property consists of Class III and IV soils. They also  
3 argue the record indicates the property is heavily wooded and  
4 there is a grass seed field adjacent to the property at the  
5 south and east. Petitioners allege that there are other  
6 agricultural type activities in the vicinity and the subject  
7 property should be suited for agricultural uses considering the  
8 factors of adjacent uses, soil class and existing vegetation.  
9 In addition, it is alleged the decision is in violation of that  
10 portion of Marion County's special agricultural zone criteria  
11 which states:

12 "The following non-farm uses may be permitted in  
13 a SA zone subject to obtaining a conditional use  
14 permit:

15 "(i) Dwellings in a planned development or a  
16 single family dwelling not in conjunction with farm  
17 use provided:

18 "\* \* \*

19 "(4) Is situated upon generally unsuitable land  
20 for the production of farm crops and livestock,  
21 considering the terrain, adverse soil or land  
22 conditions, drainage and flooding, location and size  
23 of tract;" 137.030(i)

24 Petitioners contend there is a lack of substantial evidence  
25 in the record to support the decision made by the Respondent  
26 Marion County in this case. Specifically "petitioners submit  
27 that the record is not sufficient to demonstrate that the  
28 property is unsuited for agriculture, and in fact, that the  
29 record indicates the property should be used for agriculture."

30 Respondent made the following findings regarding the

1 agricultural nature of the property in question.

2 "1. The subject property is not agricultural  
3 land within the meaning of LCDC Goal 3. It is not  
4 suitable for farm uses and is not necessary to permit  
5 farm practices to be undertaken on adjacent or nearby  
6 lands.

7 "2. The subject property contains predominantly  
8 Class VI soils according to a detailed soils  
9 evaluation by a qualified soils scientist.

10 "\* \* \*

11 "6. The proposed new nonfarm homesite would be  
12 situated on land generally unsuitable for the  
13 production of farm crops and livestock as well as  
14 commercial timber production considering its limited  
15 size, adverse soils and land condition including rock  
16 content, and vegetation and terrain.

17 "7. Maintaining this particular 5.5 acre parcel  
18 in the largest block possible will not tend to  
19 encourage or enhance its use for agricultural  
20 production.

21 A review of the record indicates that there was conflicting  
22 believable evidence on the relevant issues before the board at  
23 the time that it made its decision. The testimony of Clarence  
24 Knezevich, a soil scientist with 30 years work experience for  
25 the Soil Conservation Service (Retired), testified that out of  
26 the five and one-half acres, approximately four acres are Class  
VI land. In addition, he indicated that the ground was covered  
with large boulders. In some places, he indicated you could  
walk across the land just stepping from boulder to boulder.  
His testimony indicates that this would be considered Class VI  
land not suited for cultivation and of very limited use for  
trees or pasture because of the stony condition.

27 / /

1 As regards the conflict between the general soil  
2 conservation map indicating that this was III and IV class soil  
3 and Mr. Knezevich's finding that the land is predominantly  
4 Class VI soil, Mr. Knezevich testified as follows:

5 "The published soil map is acknowledged that it  
6 is a general map. On a square mile of land there is  
7 about 5,000 feet to the side, which is about 26  
8 million square feet in a square mile and a published  
9 map is nine square inches so you can see this is a  
10 ratio of almost 30 million to one on an area basis, so  
11 it is impossible to get all the small cracks in there,  
12 and they are generalizing. This is the reason for any  
13 intensive use you have to get into on-site  
14 investigation."

15 Petitioners herein introduced conflicting evidence to that  
16 of the testimony submitted Mr. Knezevich. We find sufficient  
17 evidence in the record upon which Marion County could base its  
18 decision. Therefore, Petitioners' third assignment of error is  
19 denied. (See Assignment of Error No. 1, supra.)

20 ASSIGNMENT OF ERROR NO. 4

21 Petitioners assert that the partitioning should have been  
22 denied because it will interfere with farming practices on  
23 adjoining lands. Petitioners again cite us to Chapter 137.030  
24 of Respondent's zoning ordinance. Specifically they direct us  
25 to section 137.030(i)(2) which states:

26 "The following non-farm uses may be permitted in  
a SA zone subject to obtaining a conditional use  
permit:

"(i) Dwellings in a planned development or a  
single family dwelling not in conjunction with farm  
use provided:

"\* \* \*

1           "(2) It does not interfere seriously with  
2           accepted farming practices, as defined in paragraph  
3           (c), subsection (2), ORS 215.203, on adjacent lands  
4           devoted to farm use;

5           Petitioners state that the subject property is bordered on  
6           the east and south by a large field which is actively used for  
7           the production of wheat and grass seed. They claim that the  
8           proposed partitioning would place unnecessary pressure on the  
9           adjoining farm use. Petitioners assert there was no testimony  
10          to indicate the proposed homesite was needed or desirable.

11          Petitioners do not cite this Board to any evidence in the  
12          record that suggests the proposed partitioning would place  
13          unnecessary pressure on the adjoining farm use. This Board is  
14          not directed to any evidence in the record which would allow us  
15          to make a decision, other than on speculation, that the farming  
16          practices on the adjacent land would be seriously interfered  
17          with. Without the petitioners giving us more to go on, this  
18          Board is not in a position to reverse the decision of  
19          respondent Marion County. Therefore, petitioner's fourth  
20          assignment of error is also denied.

21          Based on the foregoing, the decision of Marion County is  
22          affirmed.