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

HAROLD F. MEYER,)
)
 Petitioner,)
)
 vs.)
)
 WASHINGTON COUNTY, BOARD OF)
 COMMISSIONERS OF WASHINGTON)
 COUNTY, OREGON, and)
 LLOYD DUYCK,)
)
 Respondents.)

LUBA No. 80-146
FINAL OPINION
AND ORDER

Appeal from Washington County.

DeMar L. Batchelor, Hillsboro, filed the Petition for Review and argued the cause on behalf of petitioner. With him on the brief were Schwenn, Bradley, Batchelor and Brisbee.

Yvonne M. Sherlock, Hillsboro, filed the brief and argued the cause on behalf of Respondent Washington County.

Thomas J. Moore, Hillsboro, filed the brief and argued the cause on behalf of Respondent Duyck. With him on the brief were Brink, Moore, Brink and Peterson.

BAGG, Referee; REYNOLDS, Chief Referee; COX, Referee; participated in this decision.

REMANDED 5/12/81

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

1 BAGG, Referee.

2 STATEMENT OF THE CASE

3 Petitioner Meyer challenges a partitioning approval and a
4 variance issued to Respondent Lloyd Duyck. The approval given
5 was for the partition of an 18 acre parcel from a 41.55 acre
6 parcel located within an exclusive farm use zone in Washington
7 County. The minimum lot size in the zone (EFU-38) is 38
8 acres. A lot size variance was granted in order to facilitate
9 the partitioning.

10 STANDING

11 Standing is an issue in this case. Oregon Laws 1979, ch
12 772, Section 4(3) provides as follows:

13 "4(3) Any person who has filed a notice of
14 intent to appeal as provided in subsection (4) of this
15 section may petition the board for review of a
quasi-judicial land use decision if the person:

16 "(a) Appeared before the city, county or
17 special district governing body or state agency
orally or in writing; and

18 "(b) Was a person entitled as of right to
19 notice and hearing prior to the decision to be
reviewed or was a person whose interests are
adversely or who was aggrieved by the decision."

20 Petitioner Meyer bases his claim of standing on the fact that
21 he is the "owner" of property lying within 250 feet of the
22 subject property. His ownership interest is that of a contract
23 vendor. He does not have an equitable interest in the
24 property, and the allegations of standing set out in the
25 petition do not demonstrate that he is a person "adversely
26 affected or aggrieved" within the meaning of the above quoted

1 portion of Oregon Laws 1979, ch 772. His claim for standing is
2 based upon the provision of the law giving standing to persons
3 who were entitled to notice of the proceedings.

4 Article II of Section 2201 of the Washington County
5 Community Development Ordinance sets forth provisions regarding
6 notice in land use hearings. Pertinent sections are as follows:

7 "2201-3.10 The following persons only, if making
8 an appearance of record, are hereby defined as
9 'parties' and shall be entitled either themselves or
10 through counsel, to a full hearing before the
11 appropriate hearings officer or body and, upon such
12 participation, to review by the Board and the courts:

13 "a. Those persons entitled to personal notice
14 pursuant to Section 2201-2.2;"

15 * * * *

16 Section 2201-2.2 states:

17 "2201-2.2 Such notice shall be sent by mail at
18 least 10 days prior to the initial hearing to the
19 following persons:

20 "a. The applicant.

21 "b. All property owners of record, as provided
22 in Section 2201-2.3, within 250 feet of the property
23 which is the subject of the application, or in the
24 case of applications within the EFU-38, AF-10, AF-5
25 and MA-E zoning district, within 500 feet of such
26 subject property."

* * * *

Section 2201-2.3 provides:

"2201-2.3 For the purpose of personal
notification, the records of the Department of
Assessment and Taxation shall be used and persons
whose names and addresses are not on file at the time
of the filing of the application need not be notified
of the action. The failure of the property owner to
receive notice shall not invalidate the action if a
good faith attempt were made to notify all persons

1 entitled to personal notice."

2 Under these provisions, the legal interest of the party is not
3 the deciding factor. The right to notice is quite simply a
4 matter of mechanics in that it only requires a posting to the
5 persons named on a Department of Assessment and Taxation list.
6 The parties to this appeal do not dispute the fact that the
7 petitioner received notice. At the hearing before this Board,
8 a copy of a portion of the Department of Records and Taxation
9 address list was introduced bearing petitioner's name. As
10 petitioner was entitled to received notice under the Washington
11 County ordinance, he is entitled to standing to prosecute this
12 appeal.¹

13 FACTS

14 The property in question is a 41.55 acre lot located within
15 Washington County in an exclusive farm use zone. The Exclusive
16 Farm Use Zone, EFU-38, provides for minimum lot size of 38
17 acres. The property is cultivated and presently used for
18 agricultural purposes, except for an area along a drainage
19 ditch which runs through the property. Part of the new 18 acre
20 parcel to be created by the division is within a flood plain
21 area. The proposed division of the property coincides with the
22 physical boundary made by the ditch and the border of the flood
23 plain. The respondent owns other tracts of varying sizes
24 contiguous to the subject property and used for commercial
25 agricultural enterprises. This proposed partition would result
26 in a sale, for farm purposes, of the 18 acre parcel and

1 consolidation of the remainder of the 41.55 acres into a parcel
2 known as Tax Lot 600. The stated reason for this consolidation
3 is to permit the respondent to transfer certain water rights
4 from the subject parcel to Tax Lot 600.²

5 There is testimony in the record regarding the kind of
6 farming employed on the property. The 18 acre parcel is
7 apparently inconveniently located for the use of the particular
8 mechanical devices employed by respondent. The terrain is too
9 steep for mechanical harvesters, and the belief was expressed
10 that the 18 acre parcel could be farmed economically by someone
11 using smaller farming equipment than that held by Respondent
12 Duyck for use on his other properties.

13 Assignment of Error No. 1.

14 Assignment of error no. 1 alleges that the county's
15 decision violates Goal 3, the Agricultural Lands Goal.
16 Petitioner alleges that the land includes predominately Class I
17 through III soils and is located in an exclusive agricultural
18 zone. The petitioner claims the respondent has said, in
19 effect, that the 18 acre tract which he seeks to divide will
20 result in a parcel that is not suitable for the continuation of
21 the existing agricultural enterprise within the area.
22 Petitioner points to testimony in the record wherein respondent
23 claims that the 18 acre tract is "wasteland." (Record 45).
24 Petitioner states respondent's belief that this particular
25 tract can be farmed more efficiently with a different operator,
26 is not sufficient to satisfy Goal 3's requirement that

1 agricultural lands be preserved and maintained for farm use.
2 Further, any division of agricultural land that occurs must be
3 shown to be consistent with the existing agricultural
4 enterprise in the area, and petitioner asserts respondent has
5 not demonstrated compliance with this requirement.

6 We note that the findings and the record do not contain
7 reference to any inventory of the existing agricultural
8 enterprises within the area of the subject parcel. The only
9 agricultural enterprise that is mentioned with any specificity
10 is the respondent's own agricultural enterprise. It is
11 impossible for us to consider whether the proposed division is
12 consistent with existing agricultural enterprise in the area
13 without some examination of the existing agricultural
14 enterprise. Respondent Washington County cites us to the
15 county's findings concluding that the division may allow "more
16 intensive farming practices using smaller farming equipment for
17 greater production and the best possible use of this land * * *
18 *." However, we are unable to find any facts in the record
19 that would suggest that this more intensive farming practice
20 would be consistent with the existing commercial enterprise in
21 the area. It may be that the smaller farm could so be
22 consistent utilizing various intensive farming methods.
23 However, the evidence as to what the standard is and how that
24 standard is to be achieved is simply not before us. Where a
25 comprehensive plan has not been acknowledged, the inventory is
26 necessary before a division may be made consistent with Goal 3

1 requirements. Without this informatin, we are unable to
2 evaluate the partitioning for compliance with Goal 3. 1000
3 Friends of Oregon v. Marion County Board of Commissioners, 1 Or
4 LUBA 33 (1980); Mechau v. Baker County, LUBA No. 80-103, 1980.

5 Assignment of error no. 1 is sustained.

6 Assignment of Error No. 2.

7 Assignment of error no. 2 alleges "the County action does
8 not comply with the requirements of Section 166-1.2(a) and
9 Section 2102-2.1(f), Article II, Washington County Community
10 Development Ordinance relating to zoning."

11 Section 166-1 provides that minimum lot sizes existing
12 within the EFU-38 zone are to be 38 acres, except as
13 specifically provided through a variance procedure. A variance
14 may be granted if it is filed in accordance with the county's
15 variance procedure and if "the intent and purpose of the
16 chapter [of the county ordinance, including the zone] and
17 chapter 503, Oregon Law 1973 (ORS 215.243) are preserved."³

18 The county variance procedure sets out six basic conditions
19 which must be met before the applicant may proceed to attempt
20 to satisfy one of three special conditions:

21 "2102-2.1 Basic Conditions. That any variance
22 granted from this Article:

23 "a. Will not be contrary to the public
24 interest or to the intent and purpose of this
25 Article and particularly the District involved.

26 "b. Shall not permit the establishment
within a district of any use which is not
permitted within that zone district, or any use
for which a conditional use permit is required.

1
2 "c. Will not cause a substantial adverse
3 effect upon property values or environmental
4 conditions in the immediate vicinity or in the
5 district in which the property of the applicant
6 is located.

7
8 "d. Is not one where the specific
9 conditions relating to the property are so
10 general or recurrent in nature as to make the
11 formulation of a general regulation for such
12 conditions reasonably practical.

13 "e. Will relate only to property that is
14 under control of the applicant.

15 "f. Such circumstances or conditions for
16 which a variance is requested shall not: have
17 resulted from any act of the applicant or his
18 predecessors or agents subsequent to the adoption
19 of the particular zoning regulations from which
20 relief is sought; and thereby be used as
21 justification of issuance of a variance.

22 "2102-2.2 Special Conditions. When ALL of the
23 foregoing basic conditions can be satisfied, a
24 variance may be granted when any ONE of the following
25 special conditions can be clearly demonstrated:

26 "a. Where there are practical difficulties
or unnecessary hardships which prevent carrying
out the strict letter of this Ordinance. These
hardships or difficulties shall not be deemed
economic, unless the same are of such character
as to prevent a reasonable return to be made on
the subject property, but shall be evaluated in
terms of the use of a particular parcel of land.

"b. Where there are exceptional or
extraordinary circumstances or physical
conditions such as narrowness, shallowness, shape
or topography of the property, that do not
generally apply to other property or uses in the
same zoning district.

"c. Where such variation is necessary for
the preservation of a substantial property right
possessed by other properties in the same zoning
district, and where such variation would result
in comparatively trivial detriment to the
neighborhood, clearly outweighed by benefits to

1 the neighborhood or to the public safety,
2 convenience or general welfare."

3 Petitioner urges the county did not satisfy the
4 requirements of 2102-2.2(f) in that the conditions and
5 circumstances for which the variance is requested do not exist
6 upon the subject property. Petitioner believes the
7 circumstance and reason for the application for the lot
8 exception was the loss of irrigation water for Tax Lot 600.
9 Petitioner states that the conditions giving rise to the
10 variance request must exist only on the subject property, Tax
11 Lot 100. Because the applicant seemed to rely on this off-site
12 condition, petitioner finds the variance to be improperly
13 granted.

14 Respondent argues that the language of the section does not
15 limit circumstances to only the subject site, but to any site
16 under control of the applicant. Both Tax Lot 100, the subject
17 site, and Tax Lot 600 are controlled and owned by the
18 applicant. Further, Respondent Duyck urges the Board to view
19 the circumstance of topography and physical characteristics of
20 the property described above as evidence supporting this
21 particular requirement of the Washington County ordinance.

22 As petitioner has only challenged Subsection (e) of Section
23 2102-2.1, we conclude that the second assignment of error
24 should be denied.⁴ The circumstances claimed by the county,
25 whether or not sufficient to grant a variance are relevant only
26 to property "controlled" by Respondent Duyck. Petitioner's

1 assertion of error is misplaced.⁵

2 Assignment of Error No. 3.

3 Assignment of error no. 3 alleges the county action
4 violated the intent and purpose of ORS 215.243. ORS 215.243
5 provides:

6 "215.243 Agricultural land use policy. The
7 Legislative Assembly finds and declares that:

8 "(1) Open land used for agricultural use is
9 an efficient means of conserving natural
10 resources that constitute an important physical,
11 social, aesthetic and economic asset to all of
12 the people of this state, whether living in
13 rural, urban or metropolitan areas of the state.

14 "(2) The preservation of a maximum amount
15 of the limited supply of agricultural land is
16 necessary to the conservation of the state's
17 economic resources and that the preservation of
18 such land in large blocks is necessary in
19 maintaining the agricultural economy of the state
20 and for the assurance of adequate, healthful,
21 nutritious food for the people of this state and
22 nation.

23 "(3) Expansion of urban development into
24 rural areas is a matter of public concern because
25 of the unnecessary increases in costs of
26 community service, conflicts between farm and
27 urban activities and the loss of open space and
28 natural beauty around urban centers occurring as
29 the result of such expansion.

30 "(4) Exclusive farm use zoning as provided
31 by law, substantially limits alternatives to the
32 use of rural land and, with the importance of
33 rural lands to the public, justifies incentives
34 and privileges offered to encourage owners of
35 rural lands to hold such lands in exclusive farm
36 use zones."⁶

37 Petitioner's specific allegation is that the approval violates
38 ORS 215.243(2). The violation is the county's failure to
39 "preserve such lands [agricultural lands] in large blocks [in

1 order] to maintain the agricultural economy of the state."
2 (Petition for Review, 21). The property, according to
3 petitioner, may be used for the production of berries in
4 conjunction with an additional 137 acres of respondent's
5 property, and if the 18 acre parcel is permitted to be severed,
6 the economic viability of the entire tract is weakened.

7 Respondents appear to view the statute as satisfied because
8 the division of property will, according to them, allow the
9 respondent to combine a portion of Tax Lot 100 with Tax Lot
10 600.⁷ That combination will contribute to the continuation
11 of his large lot farming operation. Greater efficiency will be
12 affected by this division, and respondents say that no
13 agricultural land will be taken out of production. Further,
14 respondents reason there will be no expansion of urban
15 development, the land will remain in an exclusive farm zone,
16 and the newly created parcel will be farmed more efficiently
17 than it was in the past.

18 ORS 215.243 is made part of the Washington County Community
19 Development Ordinance specifically by the requirement quoted
20 above that any variance granted to the minimum lot size in the
21 EFU-38 zone will be supported by a finding that the intent and
22 purpose of that statute is preserved. (See Section 166-1).
23 The greater portion of the statute is directed toward
24 preventing encroachment of intensive uses into farm areas. To
25 achieve that purpose, exclusive farm use zones are encouraged.
26 The statute also encourages preservation of farm land in large

1 blocks. We believe that expression of intent echoes the
2 requirement in Goal 3 that any division of agricultural land be
3 consistent with the existing commercial agricultural enterprise
4 in the area.

5 As it has not been shown that this particular division will
6 be so consistent, we must agree with the petitioner and sustain
7 the assignment of error. There has not been a showing that the
8 provision in ORS 215.243 requiring the preservation of
9 agricultural land in large blocks is either not applicable to
10 this land use action because of compliance with Goal 3 in some
11 other fashion or has been satisfied by showing that 18 acres,
12 at least in this particular area, is a "large block" of
13 agricultural land.⁸

14 This matter is remanded to Washington County for further
15 proceedings consistent with this opinion.

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FOOTNOTES

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4 This case may be distinguished from Van Volkinburg v.
5 Marion County, 2 Or LUBA 112 (1980), wherein the Board
6 dismissed parties to the appeal on the ground that the only
7 interest held by the parties was that of a contract vendor. In
8 that case, however, the standing of the dismissed individuals
9 was not asserted on the basis of their entitlement to notice
10 under a local ordinance, but upon other grounds not found to be
11 persuasive by the Board.

8 2
9 It was stated at the hearing before the Board that water
10 could be made available to Tax Lot 600 with or without this
11 partitioning. We also understand the newly created 18 acre
12 parcel will be served with water.

12 3
13 Other conditions are included but they are not relevant to
14 this action.

14 4
15 Petitioner incorrectly cites this section as 2102-2.1(f).
16 That section of the code requires a finding that the special
17 circumstances or conditions not have resulted by an act of the
18 applicant or his predecessor. The text of the assignment of
19 error clearly indicates petitioner is attacking 2.1(e)
20 requiring that the variance relate only to property under
21 control of the applicant.

19 5
20 We will not express an opinion as to the adequacy of the
21 findings to show compliance with the other basic and special
22 conditions provided in the ordinance.

22 6
23 This provision is not changed from its enactment as 1973
24 Oregon Laws, ch 503.

25 7
26 This assertion is difficult to understand. Respondent's
properties (here, "tax lots") are contiguous. They are

1 combined now. The partition of a part of one lot will not
2 combine them further.

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4 We are mindful that the other purposes expressed in ORS
5 215.243 do not appear to have been violated.

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