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

MARK J. LAUDAHL and
MILDRED A. LAUDAHL,
Petitioners,

vs.

POLK COUNTY, VALLEY & SILETZ
RAILROAD, CHARLES PHILLIPS
and JOANNE PHILLIPS,
Respondents.

LUBA No. 81-022
FINAL OPINION
AND ORDER

Appeal from Polk County.

Mark Irick, Dallas, filed the Petition for Review and argued the cause on behalf of Petitioners. With him on the brief were Hayter, Shetterly & Irick.

Polk County did not file a brief but did make an appearance at oral argument through Dennis McCaffrey, Polk County Counsel.

Scott McArthur, Monmouth, filed the brief and argued the cause on behalf of Respondents Valley & Siletz Railroad, Charles and Joanne Phillips. With him on the brief were McArthur & Jennings, P.C.

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

REVERSED

6/10/81

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 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioners appeal Polk County's decision to partition a
4 one acre parcel located within an exclusive farm use zone in
5 Polk County. Petitioners advance six reasons why Polk County's
6 decision is in error. The first reason is that the decision is
7 not supported by substantial evidence. In this assignment,
8 petitioners argue (1) the county failed to make findings on all
9 factors listed in the county's ordinance (Ordinance No.
10 136.030) and, (2) there is no evidence in the record indicating
11 that the property could not be sold, leased or by some other
12 arrangement put to profitable agricultural use. The second
13 reason for declaring the county's decision in error, according
14 to petitioners, is that the county misconstrued its own
15 Ordinance, No. 136.030(c), in basing its decision on a physical
16 feature "which would hinder normal and necessary farming
17 activities." The third reason is that the county's findings
18 concerning ORS 215.243 were conclusory and unsupported. The
19 fourth reason is that the decision is inconsistent with the
20 Polk County Comprehensive Plan because the county failed to
21 consider how the granting of this partition would be consistent
22 with the plan which requires the conservation of agricultural
23 lands. The fifth reason for invalidation is that the decision
24 violates Goal 3. The final reason for invalidation is that the
25 decision violates Goal 2 because it is inconsistent with the
26 county's comprehensive plan.

1 STATEMENT OF FACTS

2 The Valley and Siletz Railroad abandoned a railroad
3 "right-of-way"¹ which generally consists of a strip 60 feet
4 wide and 38 miles long. The right-of-way had been developed
5 with a railroad line, ties and gravel located on the center 14
6 feet of the right-of-way. The parcel involved in this appeal
7 is a 1 acre, triangular shaped parcel located adjacent to the
8 60 foot strip. The parcel is bordered on the north by a county
9 road, on the east by the abandoned railroad strip and on the
10 west by property owned by a Mrs. Burroughs and leased by
11 petitioners for pasture. Petitioners own property across the
12 county road from the parcel as well as on the other side of the
13 railroad strip from the parcel.

14 The 1 acre parcel was once used by Valley & Siletz as a
15 siding and way station. In 1978, Valley and Siletz purportedly
16 sold this parcel to Respondent Phillips without first obtaining
17 the necessary permission from Polk County to partition the
18 parcel from the 60 foot strip. After purchasing the one acre
19 parcel, the Phillips applied for a building permit and
20 discovered that the property had been partitioned illegally.
21 Valley and Siletz then applied to the Polk County Planning
22 Department for a special exception from the EFU zone in which
23 the property lay. The planning department denied the requested
24 special exception on the basis that the one acre parcel could
25 be put to agricultural use if sold to an adjoining farm
26 operator. Because of this potential agricultural use, the

1 planning commission concluded that the partition would conflict
2 with policies in the Polk County Comprehensive Plan. The Board
3 of County Commissioners, however, reversed the planning
4 department and granted the special exception partitioning the
5 property.

6 The county adopted extensive findings of fact in support of
7 its decision to grant the special exception. The county made
8 findings both with respect to the 38 mile long, 60 foot wide
9 abandoned railroad strip as well as the 1 acre triangular
10 shaped parcel. Sections 136.030, 136.010 and 136.030(B) of the
11 Polk County Ordinance required the county to determine that the
12 property was generally unsuitable for the production of farm
13 crops and livestock. The county found that the 38 mile long
14 strip of abandoned railroad was not suitable for production of
15 farm crops or livestock due to chemical spraying which had
16 taken place on the property over the years and rock which lay
17 on the center portion of the property to a depth of 18 to 30
18 inches and to a width of 14 feet.

19 Concerning the triangular shaped 1 acre parcel, the county
20 adopted the statements of the applicant's expert witness, an
21 agronomist, Mr. DeNoma. Based upon his statements, the county
22 found that the property could not be reasonably used for any
23 agricultural purpose considering the property's terrain, soil
24 conditions, drainage, flooding, vegetation, location and size.

25 The county then examined section 136.030(c) of the Polk
26 County Ordinance, noting that the county could "grant an

1 affirmative decision only if one or more of the following
2 conditions are found to exist." The county found two
3 conditions existed: the division clearly followed a physical
4 feature which would hinder normal and necessary farming
5 activities, and the land was generally unsuitable for the
6 production of farm crops and livestock. The finding under the
7 first factor is as follows:

8 "Although there is no physical feature such as a
9 canyon or cliff or unfordable stream dividing the
10 property subject to partition, the fact that the
11 right-of-way itself, for the reasons set forth herein,
12 cannot be farmed in any reasonable manner, is
13 sufficient. One of the purposes of the EFU zone is to
14 preserve agricultural land. Since the Valley & Siletz
15 property is not suited for agricultural purposes, no
16 injury is done by the granting of this partition.

17 "Mr. DeNoma has noted that the right-of-way
18 property generally which will remain in the ownership
19 of the Valley & Siletz Railroad cannot, for the many
20 reasons set forth in his report, be farmed. That is
21 sufficient to permit division of this property."

22 The county's finding with respect to unsuitability of the
23 property for production of farm crops and livestock reiterated,
24 for the most part its findings with respect to unsuitability of
25 the 38 mile stretch of abandoned railroad. There was no
26 finding, however, as to the unsuitability of the 1 acre parcel.

27 The evidence in the record concerning the suitability of
28 the 1 acre parcel for farm crops and livestock relied upon by
29 the county is that produced by the expert agronomist, Mr.
30 DeNoma. That portion of his report relating to the 1 acre
31 parcel stated as follows:

32 "This is a small triangular piece of ground

1 adjacent to an abandoned trackage and property owned
2 by Mrs. Burroughs affronting Stapleton Road. Past
3 history indicated this at one time consisted of a
4 small way station consisting of several buildings.
5 The buildings have been removed and the property
6 returned to a natural state.

7 "Agronomically, the majority of the soil is type
8 100A, referred to as Willamette. Adjacent soil types
9 consist of 105B Woodburn, and 125A Dayton. The above
10 types of soil are compatible with production crops as
11 wheat and rye grass, to the multiple use of grazing
12 types of farm livestock. Most of the soil in the area
13 is utilized for pasture, and the production of hay.
14 There are marginal croppings of rye grass and wheat,
15 but limited due to insufficient drainage.

16 "In consideration of this information, it is my
17 opinion this triangular plot consisting of 1 acre is
18 not generally suitable for production of farm crops or
19 livestock for the following reasons:

20 "1. The general topography of the plot has
21 made it the recipient of adjacent drainage.

22 "2. Utilizing best use for cost - the cost
23 of tiling and the engineering would exceed the
24 cost of utilization of crop land. Without proper
25 drainage, the physical use of the property would
26 be minimal.

27 "3. The property would be of some use to
28 the adjacent land owner, Mrs. Burroughs, however,
29 it would still have to be tiled and engineered
30 before it could be used effectively.

31 "In summarizing:

32 "There is no question, agronomically, the soil is
33 not generally suitable for production of farm crops or
34 livestock. From a practical point of view, the cost
35 involved in basic recovery, would not be acceptable by
36 today's standards. The site in question is
37 homogeneous with adjacent property and farm
38 operations. Therefore, I consider a homesite be
39 regarded as the best use for the purchasers, the
40 county, and the Valley & Siletz Railroad."

41 Mr. DeNoma was cross-examined by petitioners' attorney
42 before the Board of Commissioners. In response to a question

1 as to whether there was any reason the 1 acre parcel could not
2 be used for grazing sheep, Mr. DeNoma testified that at the
3 present time there was. He stated as his reason:

4 "I have to look at this piece of ground so far as
5 the soil, as far as its compatibility with any crops.
6 Now I have crossed that road and served that piece of
7 ground now for approximately six years and during a
8 great period of time it has always been under water.
9 The only time it has not been under water at this time
of the year has been due to the fact that somebody has
tiled. So, if it were to be available for use they
would have to go through the same expense of tiling it
to make it readily available for any type of livestock
whether it is sheep, cattle or pigs."

10 He then stated that if the drainage problems were resolved, if
11 the people were willing to "spend the money on it, fine. They
12 certainly could do this." He then testified that the cost of
13 draining the land properly would be \$2,500.

14 Mr. Laudahl testified about the water problem as follows:

15 "I think you will find this particular piece of
16 ground is no more adverse, no more exceptable [sic] to
17 the flooding than any of the other ground in the
18 area. The entire ground on the portion marked E which
19 is east of the railroad half of the time during the
20 winter is flooded. Half the time in a real heavy rain
21 in fact my entire place is under water except for
right up around the buildings. This does not make it
unsuitable for grazing the rest of time of the year.
Certainly the entire situation down in the American
Bottoms and all along the rivers is in the same sort
of situation. It certainly floods part of the year
but it is some of the best soil in the county."

22 Mr. Laudahl then testified that he was willing to purchase the
23 property notwithstanding potential problems with flooding and
24 drainage. He also testified that he was willing to assume the
25 responsibility of correcting those problems, if in fact they
26 needed to be corrected.

1 The county made certain findings concerning the Laudahl's,
2 intentions with respect to acquisition and use of the 1 acre
3 parcel:

4 "Mr. and Mrs. Laudahl have now appeared before
5 the Board of County Commissioners and have suggested
6 that the partitioning be denied, contending that the
7 railroad should be required to sell them the property
8 for \$250."

9 ***

10 "Mr. and Mrs. Laudahl stated that they should be
11 permitted to purchase this property and have stated
12 they can use it as a grazing area, or as a holding pen
13 for livestock. However, we note that any reasonable
14 agricultural use would, of necessity, require
15 additional adjacent farm property in the same
16 ownership.

17 ***

18 "Mr. and Mrs. Laudahl have indicated that the
19 property can be used by them and can be put to
20 effective use if the Valley & Siletz Railroad will
21 also sell to them part of the railroad right-of-way.
22 The railroad has no plans to dispose of that property.

23 ***

24 "Mr. and Mrs. Laudahl suggest that the partition
25 not be granted because the 1 acre portion of this
26 property could be used by them for an agricultural
purpose. They contend they could pasture animals upon
it or use it as an impound area. They contend that
the property would be more usable if Valley & Siletz
would sell them additional portions of its
right-of-way to make this 1 acre parcel contiguous
with their land.

27 ***

28 "We note that Mr. and Mrs. Laudahl have offered
29 to pay \$250 for this land and that the going price for
30 farm land in the area is \$2,000 to \$3,000 per acre."

31 With respect to the Laudahl's intention concerning the 1
32 acre parcel, the evidence in the record only shows that the

1 Laudahl's offered in 1978 to purchase the property from the
2 Valley & Siletz Railroad for \$250. Nothing in the record
3 suggests that they would not purchase the property at a higher
4 price. In fact, the record indicates that they would be
5 willing to pay a much higher price:

6 "Hardy [Commissioner] -- Okay. Let me say then
7 that the property value in that area is approximately
8 \$2,000 an acre for farm land. Would you argue with
9 that?

10 "Irick [attorney for Laudahl's] -- I have no
11 idea. I could ask Mr. Laudahl. He might have a
12 better idea.

13 "Hardy -- Well I would suggest that it is an
14 accurate figure and if that is the case I would like
15 to know why your client placed \$250 an acre on this
16 particular piece of ground as an reasonable price if
17 in fact it is valuable farm ground.

18 "Irick -- That was done several years ago. That
19 offer was never accepted. In our opinion...

20 "Hardy -- That same offer is extended now.

21 "Irick -- No it is not. Not \$250. A reasonable
22 price. If in fact it can be shown that Valley &
23 Siletz Railroad that \$2,000 is a reasonable price, my
24 clients will pay the price."

25 The county found, as previously noted, "that any reasonable
26 agricultural use [of the 1 acre parcel] would, of necessity,
27 require additional adjacent farm property in the same
28 ownership." The evidence in the record, however, only shows
29 that the Laudahl's would like to have access from the 1 acre
30 parcel across the Valley & Siletz 60 foot abandoned railroad to
31 the Laudahl's property to the east. However, the Laudahl's
32 testimony also indicated they could use the 1 acre parcel

1 without that access because it is directly across the county
2 road from their ownership to the north and is adjacent to
3 property which they lease from Mrs. Burroughs.

4 OPINION

5 The primary thrust of petitioners' argument in this case is
6 that the county erred in concluding that the 1 acre parcel was
7 generally unsuitable for the production of farm crops and
8 livestock within the meaning of Polk County's Comprehensive
9 Plan and Zoning Ordinance. Because this determination was
10 inaccurate, because the property is agricultural land as
11 defined in Goal 3 and because no exception to Goal 3 was taken,
12 the county's decision, according to petitioners, also violated
13 Goal 3. See Jurgensen v Union County Court, 42 Or App 505, 600
14 P2d 1241 (1979).

15 The only evidence in the record relative to the 1 acre
16 parcel's unsuitability for production of farm crops and
17 livestock is (1) that the parcel is subject to flooding; (2)
18 that the parcel is 1 acre in size and (3) the location of the
19 parcel relative to other farm parcels in the area. With
20 respect to the issue of flooding, we do not believe the county
21 was justified in concluding, based upon the facts in this case,
22 that flooding was such a problem as to render the property
23 unsuitable for the production of farm crops and livestock. As
24 Mr. Laudahl testified and as is common knowledge to many of us
25 who live within the Willamette Valley, many productive
26 agricultural lands are subject to flooding during wet weather.

1 Moreover, in this case there is evidence that the flooding
2 problem can be solved by the implementation of proper drain
3 control methods and that a nearby property owner who is
4 interested in purchasing the property for farm use is willing,
5 if necessary, to pay the cost of correcting the flooding
6 problem. The question, then, becomes one of whether this
7 property, due to its limited size and location, is to be
8 considered unsuitable for the production of farm crops and
9 livestock.

10 In Stringer v Polk County, 1 Or LUBA 104 (1980), we were
11 concerned with Polk County's proper application of section
12 137.030(k) of its ordinance, to the partitioning of a 1.02 acre
13 parcel from a 4.6 acre parcel. Polk County Ordinance, section
14 137.030(k) is virtually identical to the Polk County standard
15 in this case.² In Stringer we said:

16 "As was held in Rutherford v Armstrong, 31 Or App
17 1319, 1327, 572 P2d 1331 (1977) interpreting ORS
215.213(3)(d):

18 "'The fact that the property cannot be
19 farmed as an economically self sufficient farm
20 unit is irrelevant if it is otherwise suitable to
produce farm crops and livestock.'

21 "The Rutherford court also stated at 31 Or App
1324 in review of the record in that case:

22 "'There is no evidence in the record that
23 the subject five acre parcel cannot be sold,
24 leased or by some other arrangement put to
profitable agricultural use.'" 1 Or LUBA at 108.

25 In the present case, petitioners stated their desire to
26 purchase the 1 acre parcel to use the property for limited

1 grazing purposes or as a holding pen for livestock. They have
2 stated that they are willing to pay whatever price is
3 determined to be reasonable for the property and expend
4 whatever money may be necessary to correct the flooding
5 situation on the property. Petitioners own property across the
6 county road to the north from the subject parcel, lease land
7 adjacent to the parcel on the east and own additional land
8 across the Valley & Siletz Railroad strip from the parcel.
9 There is no evidence in the record that the Laudahl's could not
10 use this 1 acre parcel as part of their existing farming
11 operation.³

12 Whether the property is "better suited" for a homesite than
13 for use with a farm operation, either by sale or lease of the
14 property to that farm operation, is irrelevant for purposes of
15 Polk County's ordinance criteria. The sole question is whether
16 the property is unsuitable for farm use. Here, the undisputed
17 evidence is that the property is suitable for farm use and will
18 be used by the Laudahl's for such purpose if allowed to
19 purchase the property at a reasonable price. Given these
20 facts, we conclude that the county's determination that the 1
21 acre parcel is generally unsuitable for the production of farm
22 crops and livestock, given the property's terrain, soil
23 conditions, drainage, flooding, vegetation, location and size
24 was not supported by substantial evidence in the record. The
25 county's decision is, therefore, reversed.⁴

26

FOOTNOTES

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3 1

The property is referred to as a right-of-way, however, we understand from the record that Valley and Siletz Railroad owns the property in fact.

6 2

Section 137.030(k) of the Polk County Ordinance involved in Stringer is concerned with special exceptions in the A-F zone. Section 136.030 of the ordinance involved in this case is concerned with special exceptions in the EFU zones. Section 137.030(k) requires compliance with ORS 215.213(3), ORS 215.213(3)(d) requires a finding that the property

"Is generally unsuitable for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract; and"

Section 136.030 does not refer to ORS 215.213(3) but does require consideration

"If the land is generally suitable for the production of farm crops and livestock, as conducted in that area, considering the terrain, adverse soil and land conditions, drainage and flooding, vegetation, location and size of tract."

We see no material distinction between the ordinance section involved in Stringer and that involved here.

19 3

We note that a partition of this property could be allowed under Polk County's zoning ordinance if "the division is for the purpose of expansion or consolidation of adjoining farm operations." Section 136.030(c). A partition could, thus, be effected for sale of the property to the Laudahl's. Their property across the county road from the parcel could be considered "adjoining" notwithstanding the existence of the road. See State v Emmich, 34 Or App 945, 580 P2d 570, (1978).

25 4

Subsequent to the decision in this case by Polk

1 County, its comprehensive plan and implementing ordinances
2 were acknowledged by LCDC as in compliance with the
3 goals. Because we conclude the county's decision does not
4 comply with its own zoning ordinance, we do not address
5 the question of whether the decision must be reviewed for
6 conformance with Goal 3. See ORS 197.275(2).
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