

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioner challenges Marion County Ordinance 601, adopted
4 May 13, 1981. Petitioner's challenge is directed to
5 Subsection 22 of Section 5 of the ordinance which adopted a
6 rural residential "committed" exception from Goals 3 and 4 for
7 429 acres of a 460 acre area generally know as "Shaw Square."
8 Petitioner is a non-profit corporation whose members reside or
9 own property in the Shaw Square area. Petitioner requests that
10 this Board and LCDC invalidate the county's exception for the
11 Shaw Square area.

12 Shaw Square is comprised of agricultural and forest land as
13 defined by Goals 3 and 4. Petitioner alleges Marion County's
14 exception violates Goals 2, 3 and 4 for at least three
15 reasons: (1) The county's findings fail to address at least
16 two relevant criteria, i.e., neighborhood characteristics and
17 farming activities in the area; (2) the conclusion of
18 irrevocable commitment is based, at least in part, upon
19 irrelevant and impermissible criteria, i.e., loss of property
20 tax revenues to the county and the desire of a small minority
21 of area residents to divide their land; and (3) the county's
22 findings would not compel a reasonable person to conclude the
23 Shaw Square area is "irrevocably committed" to non-resource use
24 because the evidence in the record shows a majority of the land
25 in the area currently is being used for agricultural
26 purposes. Petitioner also argues that the county's use of the

1 "irrevocably committed" test, even in the absence of the above
2 errors, is contrary to the requirements of Goal 2.

3 The procedural history of how the county arrived at its
4 latest decision is fairly long and complex. It is sufficient
5 for purposes of this opinion to say that this is the third time
6 Marion County has attempted to justify an exception in its
7 comprehensive plan for the Shaw Square area. Its first effort
8 was invalidated by this Board in 1000 Friends of Oregon v
9 Marion County, 1 Or LUBA 33 (1980). The second attempt was
10 also appealed (1000 Friends of Oregon and Shaw Cause v Marion
11 County, LUBA No. 80-077), but that case was dismissed on
12 stipulation that LCDC would review the county's plan at its
13 October, 1980 meeting.

14 The county's findings in support of the exception for Shaw
15 Square state that the 429 acre area deemed committed contains
16 124 tax lots and 96 ownerships when tax lots in common
17 ownership are considered as one. Eighty-six parcels contain
18 dwellings. Sixty of the parcels with dwellings (almost 70%)
19 are on parcels of less than five acres. Most of the 60 parcels
20 with dwellings (47) are three acres or less in size.
21 Twenty-one parcels are on farm deferral and average 6.6 acres
22 in size. Thirty-two percent of the area (138 acres) is in farm
23 deferral.

24 The county found that only 9% of the parcels with homes
25 have "qualified" for farm tax deferral. Apparently, if only 9%
26 of the 86 parcels with homes qualify for farm deferral (i.e.,

1 about eight parcels) then 13 undeveloped parcels must be in
2 farm deferral because there are a total of 21 parcels on farm
3 deferral. The county discounted evidence presented at the
4 hearings by property owners who testified as to the
5 agricultural activity taking place within Shaw Square. The
6 county found:

7 "If the degree of farming activity reported by
8 many property owners is actually occurring in the
9 area, it would seem that many more homeowners would be
10 able to meet the minimal income requirements to be
11 enrolled in the farm tax deferral. The benefits in
reduced taxes is a significant incentive. If the area
were placed in a farm zone, the minimum qualifications
would drop even further, enabling many homeowners with
very minimal farm activity to qualify."

12 The county thus assumed (1) people who would qualify for tax
13 deferral would have their property receive tax deferral if they
14 could qualify and, (2) apparently 91% of the parcels with homes
15 (77) do not qualify because they are not receiving tax
16 deferral. The county stressed the financial consequences to
17 the county in reduced taxes if the Shaw Square area is zoned
18 exclusive farm use.¹

19 The county noted that only four parcels within the Shaw
20 Square area are ten acres or larger in size, with the largest
21 being 12.4 acres. This figure does not, however, include tax
22 lots which are held in common ownership. The county noted that
23 there are about 21 parcels (tax lots) between five and ten
24 acres in size. The county found:

25 "With very few exceptions, these larger parcels
26 are scattered amongst the numerous small homesites.
The prospects of significant farming activity

1 continuing in an area with this degree of rural
residential development are remote."

2 The county's decision includes a finding to the effect that
3 it would be unfair for the owners of five and ten acre parcels
4 to not allow them to use these parcels as homesites since many
5 of their neighbors have been able to use their five and ten
6 acre parcels for homesites. The county recognized that these
7 parcels would not qualify as commercial farm units and that the
8 only way dwellings could be allowed would be through the
9 conditional use process set forth in ORS 215.213. This process
10 would result in drawn out appeals from neighbors in some cases,
11 which would not be fair, according to the county.

12 The county found the AR-3 zoning for the area would not
13 change the rural nature of the area to any significant degree
14 because there are few parcels larger than six acres in size
15 and, hence, few opportunities to create new homesites.
16 Property owners who actually engage in agricultural activities
17 will be able to continue to do so and to qualify for the farm
18 deferral program. The county concluded with the following
19 finding:

20
21 "The facts show that this area is too developed
22 for zoning or tax incentives to be effective in
23 re-establishing the farm character of the area. The
24 evidence suggests that the objective of protecting the
25 Shaw Square area for farm use is not achievable, and
26 if attempted, the public, the credibility of the farm
land protection program, and the legitimate interests
of a number of property owners would be sacrificed to
the benefit of a few."

1 OPINION

2 Petitioner's first assignment of error is as follows:

3 "The county's adoption of an 'irrevocably
4 committed exception' from Goals 3 and 4 for the Shaw
5 Square Area violates Goals 2, 3 and 4 because (a) the
6 county's findings do not address all relevant
7 criteria, (b) the county's conclusion is based on
8 irrelevant criteria, and (c) the county's findings
9 would not compel a reasonable person to conclude that
10 the area is irrevocably committed to non-resource use."

11 Petitioner argues that the county erred because it
12 addressed only one of the six criteria deemed relevant in 1000
13 Friends of Oregon v Clackamas County, ___ Or LUBA ___ (LUBA No.
14 80-060, 1981), for taking an exception using the "committed"
15 test, that factor being parcel size and ownership patterns.
16 Petitioner argues that even the findings with respect to parcel
17 size and ownership patterns fail to take into consideration or
18 to discuss what activities are actually taking place on these
19 lands, how any existing parcelization came about and whether
20 goal-related findings were made at the time parcelization
21 occurred. Petitioner argues that there is no excuse for the
22 county's not making a finding with respect to the land uses
23 actually taking place within Shaw Square because petitioner
24 itself and its members testified extensively and submitted
25 detailed information about the agricultural uses taking place
26 within the Shaw Square area. For example, according to
petitioner, a 5.3 acre parcel contains a young commercial apple
orchard and a Christmas tree stand. Another five acre parcel
has recently had four acres planted in Christmas trees, and the

1 owner projects an income of \$55,000 in five or six years.
2 Cattle are raised on a nine acre parcel, 2.5 acres of which
3 were recently planted with cherry trees. The owner projects
4 \$2,000 an acre annual income when the trees mature. Christmas
5 trees are raised commercially on a 12 acre parcel and a crop
6 was harvested just last year.

7 In addition to the above, petitioner's members testified
8 that parcels under different ownerships are being farmed as one
9 unit, and that 89% of the land in the area is being used for
10 agricultural purposes. According to petitioner, consolidated
11 farming practices occur in at least two ways. The first way is
12 where two or more lots or parcels are farmed jointly. In one
13 instance four tax lots equalling 40 acres are farmed jointly
14 and producing hay. The second way is for one owner to lease an
15 adjacent parcel or portion of that parcel. In one case cited
16 by petitioner a few acres of an ownership containing a dwelling
17 are leased to a second ownership. The second ownership
18 operates a commercial rabbit operation on its 6.7 acres plus
19 the few acres which it leases.

20 Parcel size and ownership patterns by themselves may be
21 sufficient to demonstrate commitment of an area to non-resource
22 use. 1000 Friends of Oregon v Clackamas County, supra. To the
23 extent petitioner may be arguing that these criteria never can
24 be sufficient by themselves, we disagree. We do not believe,
25 however, that a county may claim an area is committed to
26 non-resource use solely on parcel size and ownership patterns

1 where there is extensive evidence produced as to the
2 agricultural activity actually taking place.

3 The county argues, however, that while petitioner
4 introduced evidence of significant agricultural activity taking
5 place in the Shaw Square area, it is clear that this
6 agricultural activity is only incidental to a rural residential
7 land use pattern. The agricultural activity or "farm use"
8 taking place in the area is not the "primary purpose" under the
9 terms of ORS 215.203(2)(a). In other words, the county seems
10 to be arguing that an area may be committed to rural
11 residential development if the primary purpose of the land's
12 use is rural residential and not agricultural.

13 The county also argues that it did take into account more
14 than parcel size and ownership patterns in the area in
15 determining that the land was committed. It argues that it
16 addressed

17 "[n]eighborhood characteristics and farming
18 activities in the area and, in addition, 'other
19 relevant factors' such as the effect on property tax
20 revenues and the desires of area residents to be able
21 to divide land which is committed to non-resource
22 uses."

23 Moreover, the county says that the testimony of extensive
24 agricultural activity had to be discounted by virtue of the
25 fact only few parcels were actually on farm deferral.

26 The problem with the county's argument about farming being
only incidental to rural residential living is that it
substitutes a different standard for that required by the

1 committed lands test. The ultimate question under the
2 committed lands test is not what the land use pattern is in the
3 area, but whether the land use pattern prevents farm use on the
4 subject property. The fact that the predominant land use in
5 the area may be rural residential with significant incidental
6 agricultural activity does not mean that the land is not
7 capable of being zoned for farm purposes. This is particularly
8 so where there are parcels or land holdings within the area
9 large enough to support substantial agricultural activity.

10 We agree with the county that its findings address, at
11 least to a limited degree, neighborhood characteristics and
12 farming activities. The neighborhood characteristics referred
13 to, however, are limited to parcel sizes (actually tax lot
14 sizes). The findings address farming activities by saying that

15 "If the degree of farming activity reported by
16 many property owners is actually occurring in the
17 area, it would seem that many more homeowners would be
able to meet the minimal income requirements to be
enrolled in the farm tax deferral program."

18 Thus, the county appears to be saying that it does not believe
19 those who testified concerning the farming taking place in the
20 area because, in the county's opinion, if this much farming
21 activity were actually occurring more people would have their
22 properties enrolled in farm deferral. We can only say that
23 this is not particularly persuasive as a basis for concluding
24 agricultural activity is not taking place as testified to in
25 the area. There could be many reasons why persons whose
26 property is otherwise eligible for farm deferral do not apply

1 for this benefit.²

2 The county's findings concerning economic loss to the
3 county and desires of property owners are not relevant under
4 the committed lands test.³ Relevant factors under the
5 committed lands test are those which bear on the question of
6 whether it is possible to retain resource lands in resource
7 use. The criteria for commitment are objective and do not
8 include policy judgments of whether a county should or wants to
9 deem lands committed.

10 We conclude that the county addressed some of the relevant
11 factors under the committed lands test and also considered some
12 irrelevant factors. The county's finding, however, are
13 insufficient to compel a reasonable person to conclude the
14 entire Shaw Square area, save 40 acres, is committed to
15 non-resource use. There was extensive testimony by persons in
16 the Shaw Square area as to the agricultural activity taking
17 place. The only basis stated in the county's findings for
18 discounting this testimony is the county's opinion that if that
19 much agricultural activity were actually taking place more than
20 21 parcels or 32% of the area would be in farm deferral. The
21 county does not, however, state in its findings what percentage
22 of the land it concludes is actually being farmed or why even
23 if only 32% of the entire area is in farm deferral and thus in
24 "farm use" this is such an insignificant amount that the entire
25 area should be deemed to be committed to non-resource use.
26 Petitioner's first assignment of error is sustained.

1 Petitioner's second assignment of error is as follows:

2 "The county violated Goals 2, 3 and 4 by adopting
3 an exception from Goals 3 and 4 for the Shaw Square
4 area without complying with the requirements of Goal
5 2, Part II."

6 The gist of petitioner's argument under its second assignment
7 of error is that the committed lands test does not fully
8 satisfy the requirements of Goal 2, Part II, and is, therefore,
9 invalid under the holding in Willamette University v LCDC, 45
10 Or App 355, 608 2Pd 1178 (1980).

11 It is unnecessary for us to address petitioner's second
12 assignment of error in this case. Since the county has not
13 complied with the committed lands test, the county certainly
14 does not satisfy the allegedly more difficult tests set forth
15 in Goal 2, Part II.

16 For the foregoing reasons, we conclude Marion County erred
17 in determining that 429 acres within the Shaw Square area of
18 Marion County is committed to non-resource use. This matter is
19 remanded to the county for further proceedings not inconsistent
20 with this opinion.

FOOTNOTE

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EFU zoning for this area under Marion County's scheme would probably result in a Special Agriculture (SA) zoning designation.

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One reason could be the penalty which one must pay if land which qualifies for assessment at its value for farm use is later disqualified for such assessment. See, e.g., ORS 308.395.

3
The county's belief tht it may somehow automatically lose substantial sums of money in lost tax revenues if the Shaw Square area were zoned EFU (or SA, see footnote 1, supra) appears to be misplaced. In order for EFU zoned land to qualify for assessment at its value for farm use it must, in addition, be used exclusively for farm use. See ORS 308.370(1).



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 9/3/81

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: SHAW CAUSE V. MARION COUNTY
LUBA NO. 81-065

Enclosed for your review is the Board's proposed opinion and final order in the above captioned appeal.

Petitioner appeals Marion County's exception for 429 of 460 acres of an area known as Shaw Square. The county concluded the area was committed to nonresource use. Petitioner argues this finding was not properly made.

The Board agreed with petitioner and concluded that the county had addressed some of the relevant factors under the committed lands test and also considered some irrelevant factors. The Board decided, however, that the county's findings were insufficient to compel a reasonable person to compel a reasonable person to conclude the entire Shaw Square area, save 40 acres, was committed to nonresource use. There was extensive testimony by persons in the Shaw Square area as to the agricultural activity taking place. The only base, as stated in the county's findings, for discounting this testimony was the county's opinion that if that much agricultural activity were taking place, more than 21 parcels or 32 percent of the area would be in farm deferral. The county did not, however, state in its findings what percentage of the land it concluded was actually being farmed or why, even if only 32 percent of the entire area were in farm deferral. This was such an insignificant amount that the entire area should be deemed to be committed to nonresource use.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



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

SHAW CAUSE, INC.,)
)
Petitioner,) LUBA No. 81-065
)
vs.) PROPOSED OPINION
) AND ORDER
MARION COUNTY,)
)
Respondent.)

Appeal from Marion County.

Corinne C. Sherton, Salem, filed the Petition for Review and argued the cause on behalf of Petitioner.

Marilyn J. Harbur, Salem, filed the brief and argued the cause on behalf of Respondent.

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

REMANDED 9/03/81

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).