

NOV 18 3 15 PM '81

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRUCE PHILLIPI and U. S. NATIONAL)
BANK OF OREGON, Co-Trustees of)
the Estate of ROY PHILLIPI,)

Petitioners,)

LUBA NO. 81-073

v.)

POLK COUNTY, OREGON)

FINAL OPINION
AND ORDER

Respondents.)

Appeal from Polk County.

John L. Hemann, Salem, filed a brief and argued the cause for petitioners. With him on the brief were Garrett, Seideman, Hemann, Robertson & DeMuniz, P.C.

Peter M. Linden, Dallas, filed a brief and argued the cause for Respondent Polk County.

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

Remanded.

11/18/81

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 COX, Referee.

2 NATURE OF THE PROCEEDING

3 Petitioners appeal the Polk County land use decision
4 entitled "Special Exception 81-3," which denied petitioners'
5 request to partition an approximate 180 acre parcel into three
6 parcels containing 20 acres, 146 acres and 14.7 acres.

7 Petitioners seek reversal of the decision.

8 ALLEGATIONS OF ERROR

9 Petitioners assert two assignments of error as follows:

10 "Polk County erred in finding that Parcels One and
11 Three would not comply with the requirements for
12 commercial agricultural use, according to Chapter 136
13 of Polk County Comprehensive Plan.

14 "Polk County erred in failing to recognize the
15 'proposed partition', already established by the
16 contractual obligations between Petitioners and Eagle
17 Crest Vineyards, which predated the adoption of the
18 Comprehensive Plan."

19 FACTS

20 Roy Phillipi entered into a lease-option agreement in
21 November, 1972, with Eagle Crest Vineyards for the cultivation
22 and production of grapes. The agreement applies to the middle
23 146 acres (proposed parcel two) of the subject 180 acres. The
24 option provision anticipated Eagle Crest Vineyards' purchase of
25 parcel two before September 1, 1979. Eagle Crest Vineyards has
26 fenced the 146-acre piece of property and commenced cultivation
of grapes.

On September 22, 1978, the Polk County Comprehensive Plan
was adopted. According to that Plan, the subject property is

1 zoned for exclusive farm use. Any division of the property is
2 subject to the standards and exceptions contained in Chapter
3 136 of the Polk County Comprehensive Plan. The Land
4 Conservation and Development Commission acknowledged the Polk
5 County Comprehensive Plan as being in accordance with the
6 statewide goals on March, 19, 1981.

7 Eagle Crest Vineyards exercised its option to buy parcel
8 two on August 30, 1979. In order to fulfill their contractual
9 obligation, petitioners applied to the Polk County Department
10 of Development for the subject partitioning. That application
11 was denied on March 31, 1981. The denial was subsequently
12 upheld upon appeal to the Polk County Board of Commissioners on
13 May 27, 1981.

14 In the denial, respondent expressed concern about the size
15 and use of the proposed parcels one and three. Petitioners
16 propose to cultivate Christmas trees on those parcels.
17 Proposed parcel one is approximately 20 acres in size and
18 contains some timber on its northwest corner with the balance
19 of it cleared. Proposed parcel three is approximately 14.7
20 acres in size. Its "lower 10 acres" are covered with timber
21 and its "upper 4.3 acres" are cleared "with little
22 vegetation." In their application for partitioning,
23 petitioners stated:

24 "The requested action complies with Polk County
25 Zoning Ordinance, in particular, Polk County Code
26 Section 136.030. The applicants seek to partition one
large agricultural parcel into three smaller
agricultural parcels. No residential uses are

1 contemplated for any of the proposed parcels in the
2 foreseeable future. The applicants seek this
3 partition to be able to convey Parcel Two to the
4 optionees so they may permanently establish a labor
5 intensive commercial vineyard on the parcel. The
6 applicants foresee no change in the uses of any of the
7 parcels, so as to leave the wildlife habitat of the
8 area unaffected. The proposed sizes of the
9 contemplated parcels are comparable to parcels under
10 separate ownership surrounding the proposed parcels."
11 (Emphasis added).

7 DECISION

8 In their first assignment of error petitioners assert that
9 Respondent Polk County violated its own ordinances in several
10 ways. Specifically petitioners direct their attack at Polk
11 County Ordinance Section 136.030. The provisions of Polk
12 County Zoning Ordinance 136.030 are set forth in their entirety
13 because petitioners' allegations all refer back to its
14 provisions.

15 "136.030. SPECIAL EXCEPTION

16 "(a) The Planning Commission or the Director may
17 permit a special exception allowing the division of
18 land in an EFU Zone when the proposed division is
19 found to be consistent with the purpose of the EFU
20 Zone.

19 "(b) The Planning Commission or the Director
20 shall consider:

21 "(1) If the residential use permitted will
22 seriously interfere with the usual and
23 normal farm practices on adjacent
24 agricultural lands (such as hazardous
25 pesticide and herbicide applications, noise,
26 dust, smoke and offensive odors.)

24 "(2) If the residential use will materially alter
25 the stability of the overall land use
26 pattern of the area.

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

7 "(4) If the new lot or the non-agricultural use
8 of it will adversely affect fish and
9 wildlife resources and habitat areas,
10 natural areas, and scenic areas.

11 "(5) If the proposed division will result in
12 parcels with areas similar to the areas of
13 commercial agricultural enterprises which
14 may predominate in the area and which are
15 adequate to sustain such forms of
16 agriculture.

17 "(c) An affirmative decision may be granted only
18 if one or more of the following conditions are found
19 to exist:

20 "(1) The division is for the purpose of expansion
21 or consolidation of adjoining farming
22 activities.

23 "(2) The division is for the purpose of disposing
24 of a second dwelling which has existed on
25 the property.

26 "(3) The division clearly follows a physical
27 feature which would hinder normal and
28 necessary farming activities.

29 "(4) The division is required to obtain
30 construction financing for housing to be
31 occupied by those engaged in the farming
32 operation.

33 "(5) The division is for the purpose of
34 establishing a labor intensive agricultural
35 activity meeting the definition of Farm Use
36 as contained in ORS 215.203.

37 "(6) The land to be divided is generally
38 unsuitable for the production of farm crops
39 and livestock as conducted in that area
40 considering the terrain, adverse soil and
41 land conditions, drainage and flooding,
42 vegetation, and size of tract."

1 Petitioners first argue that respondent's order denying
2 their proposed partitioning fails to address their proposal to
3 cultivate Christmas trees on parcels one and three. The
4 failure to address specifically petitioners' proposal as
5 regards parcels one and three appears to arise out of a seeming
6 change in petitioners' position between the time of their
7 initial request to the Polk County Planning Director and their
8 subsequent appeal of the Planning Director's decision. In
9 their application for the partitioning, petitioners indicated
10 that "parcels one and three are not subject to the lease-option
11 agreement and shall continue to be under the same use that they
12 have been in the past."¹ It was not until they appeared
13 before the Board of County Commissioners that petitioners
14 clearly indicated that they intended to cultivate Christmas
15 trees on the 14.7 acre and 20 acre parcels. The Polk County
16 Board of Commissioners, rather than making entirely new
17 findings, adopted by reference the findings of the Planning
18 Director. Since the issue of Christmas tree cultivation was
19 not presented to the Planning Director, there is no reference
20 in his, and, therefore, the Board of Commissioners' order
21 regarding the petitioners' proposal to cultivate Christmas
22 trees.

23 Petitioners argue that respondent's findings regarding
24 petitioners' failure to satisfy portions (b)(1), (2) and (5) of
25 Section 136.030 become inaccurate and not responsive to
26 petitioners' request when viewed in light of their proposal to

1 cultivate Christmas trees on proposed parcels one and
2 three.² They argue that the document "Background Report,
3 Polk County Comprehensive Plan (1978),"³ on page 25 states in
4 a section entitled "Acreage Requirements for Economic Farm
5 Units" that Christmas tree cultivation on 15 to 20 acre parcels
6 is a recognized farm use. The Background Report states in
7 pertinent part:

8 "As stated previously, the market for farm products
9 often fluctuates. Thus, it is very difficult to
10 produce a formula by which one can determine minimum
11 acreage requirements for an economically viable farm
12 unit. (That is to say, a formula by which one can
13 readily determine that 'X' number of acres is always
14 needed for winter wheat production in order to show a
15 profit.) Although exact acreage requirements can not
16 be determined, it is possible to present some general
17 acreage ranges (John Burt, April 27, 1977).

18 "a) grain or seed production
19 a farmer might own 300 acres and lease
20 upwards to 700-800 acres.

21 "b) filbert production
22 an economic unit of production would need
23 possibly 100-200 acres.

24 "* * *

25 "f) ornamental production (e.g. nursesey)
26 (irrigation required)
"15-20 acres."

27 Petitioners further argue that according to ORS 215.203(2)
28 Christmas tree cultivation is an acceptable farm use for land
29 use development and planning purposes. They conclude that in
30 light of ORS 215.203(2) and the Background Report's
31 acknowledgement that 15-20 acres are sufficient for "ornamental
32 production," parcels one and three qualify as sufficient in

1 size to support a commercial agricultural operation. It is
2 assumed from the argument that the petitioners are equating
3 Christmas tree cultivation with ornamental crop production.
4 Respondents take the position that the Board of County
5 Commissioners did not ignore applicants' evidence regarding the
6 cultivation of Christmas trees but rather they were just not
7 persuaded by it.

8 Petitioners next argue that the county is incorrect in its
9 finding that parcels one and three do not satisfy at least one
10 of the conditions of Section 136.030(c). Petitioners argue
11 that the county is misapplying the requirements of Section
12 136.030. Petitioners argue that their application for a
13 partitioning addresses condition 5 which requires that the
14 partitioning "is for the purpose of establishing a labor
15 intensive agricultural activity meeting the definition of farm
16 use in ORS 215.203."⁴ Petitioners contend they have already
17 shown that Christmas tree cultivation complies with the ORS
18 definition of farm use and, therefore, parcels one and three do
19 comply with section 136.030(c)(5).

20 Petitioners argue in the alternative that all 136.030
21 requires is that the 146 acre parcel now in grape cultivation
22 be addressed. Petitioners contend that the terminology in
23 136.030 that "the division is for the purpose of establishing a
24 labor intensive agricultural activity" only reflects a need to
25 concentrate on one of the three parcels. They argue there is
26 no requirement that labor intensive activity occur on all three

1 resulting parcels. Respondent County argues that each of the
2 parcels which result from the division must meet at least one
3 of the five tests set forth in 136.030(c).

4 On petitioners' alternative argument we agree with the
5 position taken by the County. In creating three new parcels of
6 property in an EFU zone, each of the new parcels must be tested
7 against the criteria in 136.030. To hold otherwise would be to
8 ignore the intent and purpose of the Polk County Comprehensive
9 Plan regarding agricultural land. Specifically Policy 1.5
10 states:

11 "Polk County will review all requests for the division
12 of land in agricultural areas and will permit only
those which meet the following criteria.

13 * * *

14 "(c) The proposed division complies with all
15 application requirements of the zoning and
16 partitioning ordinances, and it is consistent
with all the following criteria:

17 * * *

18 "(3) The proposed division or use of the proposed
19 parcels will not eliminate or substantially
reduce the potential for agricultural land to be
used for farming; and * * * "

20 If we were to agree with petitioners' position that only the
21 center parcel in this three-parcel partitioning need comply
22 with the terminology of 136.030, the other two parcels could
23 become merely "excess" land, the use of which would be left
24 unaddressed and unplanned.

25 Our agreement with the county's position on petitioners'
26 alternative argument does not allow us to affirm the county's

1 decision, however. The county in its adoption of the Planning
2 Director's order fails to address petitioners' contention that
3 the resulting 20 and 14.7 acre parcels which would be used as
4 Christmas tree "farms" will meet the requirements of the Polk
5 County Comprehensive Plan. While the record is sketchy on
6 several factors requiring satisfaction before petitioners can
7 meet Polk County's standards, we determine that petitioners,
8 nevertheless, did propose during a de novo review of the
9 Planning Director's determination that they would use parcels
10 one and three for a farm purpose. The petitioners' assertions
11 that they meet the requirements for establishing a farm use on
12 parcels one and three seems to be supported by the county's
13 "Background Report" which says "economically viable,"
14 "ornamental production" in Polk County can take place on 15-20
15 acres. Absent, therefore, a finding that Christmas trees do
16 not fit within the definition of "ornamental production," the
17 county was required at a minimum to determine whether creation
18 of proposed parcels one and three (1) is consistent with the
19 purpose of the EFU zone (136.030(a)), (2) will result in
20 parcels with areas similar to the areas of commercial
21 agriculture enterprises which may predominate in the area
22 (136.030(b)(5)), and (3) is for the purpose of establishing a
23 labor intensive agricultural activity meeting the definition of
24 Farm Use as contained in ORS 215.203 (136.030(c)(5)). As part
25 of its deliberations, the county must determine what it means
26 when it uses the word "area" in 136.030(b)(5). This Board is

1 cognizant that "area" is a frequently used term in land use
2 planning jargon which has to this point been undefined by LCDC,
3 the courts, and the legislature. It is a term whose importance
4 in contested cases is difficult to over emphasize. The county
5 has an opportunity to fill this void through interpretation of
6 its own comprehensive plan and implementing ordinances. See:
7 Sun Ray Dairy v. O.L.C.C., 16 Or App 63 (1973).

8 SECOND ALLEGATION OF ERROR

9 Petitioners next contend that Polk County erred in failing
10 to recognize the "partition", which they allege was established
11 by the 1972 contractual obligations between petitioners and
12 Eagle Crest Vineyards. It is important to point out the 1972
13 agreement was never recorded with the county. Petitioners
14 argue that, in effect, this appellate body has the power to
15 instruct the Polk County Board of Commissioners, a lay body, to
16 decide an issue which belongs in a circuit court. The county
17 refused to decide the legal effect of a contract
18 (lease-option), predating local land use ordinances and
19 statutory revisions, on a partitioning of land. We hold not
20 only that this Board lacks the authority to decide the
21 contractual issue presented by petitioners, we also lack the
22 authority to require Polk County to decide the issue.

23 Therefore, we must remand the matter to the county for
24 further proceedings not inconsistent with this opinion.
25
26

FOOTNOTES

1
2 1
3 Petitioners did, however, indicate as noted supra on page 4
4 that they "seek to partition one large agricultural parcel into
5 three smaller agricultural parcels."

6
7 2
8 Respondent's findings stated:

9 "The Planning Staff must consider the following when
10 acting upon an application for a land division in the
11 EFU Zone:

12 "(1) If the residential use permitted will seriously
13 interfere with the usual and normal farm
14 practices on adjacent agricultural lands (such as
15 hazardous pesticide and herbicide applications,
16 noise, dust, smoke and offensive odors).

17 "(2) If the residential use will materially alter the
18 stability of the overall land use pattern of the
19 area.

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

25 "(4) If the new lot or the non-agricultural use of it
26 will adversely affect fish and wildlife resources
and habitat areas, natural areas, and scenic
areas.

"(5) If the proposed division will result in parcels
with areas similar to the areas of commercial
agricultural enterprises which may predominate in
the area and which are adequate to sustain such
forms of agriculture.

"Regarding (1) and (2), approval of this request could
result in two additional residential uses in the
area. Currently, there is one small parcel (less than
5 acres in size) within 800 feet of the property that
is used for rural residential purposes. Generally, an
increase in housing density tends to interfere with
agricultural activities due to increased complaints
about spraying, burning, trespass, and dogs.
Additionally, allowing land divisions in an

1 agricultural area tends to encourage other property
2 owners to divide their properties based on past
3 experiences. Staff finds that approval of this
4 request could result in two additional residential
5 uses and would lower the average parcel size of the
6 area. Of the four objections received to this
7 request, two were from property owners in the area.
8 Another person expressed a concern that the new owners
9 might complain about dust, noise, etc arising from
10 their operations located to the south. Staff finds
11 that there are persons in the area who are concerned
12 about possible interference from potential residential
13 uses that could result from an approval of this
14 request.

8 "Regarding (3), the SCS soils maps show that each of
9 the proposed parcels contain predominately SCS Class
10 II, III and IV soils. Polk County's Comprehensive
11 Plan (acknowledged as of March 19, 1981) states that
12 all lands which are predominately Class I-IV soils
13 'shall be considered to be agricultural land'. One
14 neighbor indicated that the subject property was
15 previously used as an apple orchard and for the
16 production of grass seed. The property has been
17 subsequently developed as a vineyard. Based on the
18 above, staff finds that the land is generally suitable
19 for the production of farm crops and livestock.

15 "Regarding (4), the staff has not received any
16 information that would indicate that this proposal
17 would have an adverse effect on any of the concerns
18 listed in item (4).

17 "Regarding (5), the applicant states that proposed
18 parcels one and three (14.7+ and 20+ acres) are
19 presently 'unused for any recognized farming
20 activity. Parcel one has some timber on the Northwest
21 corner, however, the balance of the parcel is
22 cleared. On Parcel Three, the lower 10 acres is
23 covered with timber, and the upper 4.3 acres is
24 cleared, with little vegetation growing upon it.'"
25 Record 42-43.

23

3

24 That report, according to Polk County Assistant County
25 Counsel, was accepted in its entirety at the time LCDC
26 acknowledged Polk County's comprehensive plan.

2 ORS 215.203(2)(a) states:

3 "As used in this section, 'farm use' means the
4 current employment of land for the primary purpose of
5 obtaining a profit in money by raising, harvesting and
6 selling crops or by the feeding, breeding, management
7 and sale of, or the produce of, livestock, poultry,
8 fur-bearing animals or honeybees or for dairying and
9 the sale of dairy products or any other agricultural
10 or horticultural use or animal husbandry or any
11 combination thereof. 'Farm use' includes the
12 preparation and storage of the products raised on such
13 land for man's use and animal use and disposal by
14 marketing or otherwise. It does not include the use
15 of land subject to the provisions of ORS chapter 321,
16 except land used exclusively for growing cultured
17 Christmas trees as defined in subsection (3) of this
18 section."
19
20
21
22
23
24
25
26