

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

MAR 18 10 48 AM '82

DONALD A. STILL,

Petitioner,

v.

MARION COUNTY BOARD OF
COMMISSIONERS, and
LOYD A. KAUFMAN,

Respondents.

LUBA NO. 81-131

FINAL OPINION
AND ORDER

Appeal from Marion County.

Donald A. Still, Salem, filed a petition for review and argued the cause on his own behalf.

Robert C. Cannon, Salem, filed a brief and argued the cause for Respondent Marion County.

Malcolm L. Brand, Salem, filed a brief and argued the cause for Respondent Loyd A. Kaufman.

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

Affirmed.

3/18/82

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 NATURE OF THE DECISION

3 Petitioner challenges approval of a minor partitioning by
4 the Marion County Board of Commissioners. The partition is of
5 a parcel of 21.47 acres into three parcels of approximately
6 5.5, 6.5 and 9.5 acres in a Special Agriculture (SA) zone near
7 Salem, Oregon.

8 STANDING

9 Petitioner Donald Still alleges he appeared at the public
10 hearing (to consider the partitioning) conducted by the Marion
11 County hearings officer on July 14, 1981. Petitioner does not
12 allege, but the record shows, that petitioner appealed the
13 hearings officer's decision to the Marion County Board of
14 Commissioners. Petitioner claims that he farms some 26 acres
15 in the South Salem hills and "runs" 70 sheep. Petitioner says
16 he is injured by the partitioning on the grounds that
17 "fractionalization" of farmland into non-farm parcels raises
18 the cost of land "and places it beyond the economic reach of
19 those engaged in agriculture and desiring to expand their
20 operation." Petition for Review at 4. The petitioner assert
21 "fractionalization" of agricultural land violates Goal 3 and
22 causes land values to rise. The consequent creation of
23 non-farm parcels causes county costs for services to rise "and
24 thereby generates increased taxation, not to mention the
25 increased abuse of trespass, litter, vandalism and marauding
26 dogs." Ibid. Petitioner says all these issues cause him to

1 suffer economic injury.

2 "It is all of these matters which will cause me to
3 suffer economic injury if this partitioning and the
4 partitioning of farm land in general in rural Marion
5 County is allowed to go unchecked and not made
6 consistent with the policies expressed in Land Use
7 Goal 3 and the state statute. My economic well-being
8 is tied to the actions of the Planning and County
9 Commissioner officials in Marion County." Petition
10 for Review at 4.

11 Petitioner then cites 1000 Friends of Oregon v. Benton County,
12 2 Or LUBA 324 (1981).

13 The county attacks petitioner's standing on the ground that
14 there are no facts in the record to support petitioner's
15 allegations. Respondents correctly note that the issue of
16 standing is a question of fact, but respondents are mistaken
17 when they claim that the facts supporting standing must be
18 present in the record. Facts to support standing are to be
19 alleged in the petition for review, and support for those facts
20 may be tested not by a review of the record, but by an
21 evidentiary hearing before this board.

22 "Within 20 days after the date of transmittal of
23 the record, a petition for review of the land use
24 decision and supporting brief shall be filed with the
25 board. The petition shall include a copy of the
26 decision sought to be reviewed and shall state:

27 (a) "The facts that establish that the
28 petitioner has standing." Oregon Laws 1979, ch
29 772, sec 4(6).

30 "(7) Review of a decision under sections 4 to 6
31 of this 1979 Act shall be confined to the record. In
32 the case of disputed allegations of
33 unconstitutionality of the decision, standing, ex
34 parte contacts or other procedural irregularities not
35 shown
36 in the record which, if proved, would warrant reversal

1 or remand, the board may take evidence and make
2 findings of fact on those allegations. The board
3 shall be bound by any finding of fact of the city,
4 county or special district governing body or state
5 agency for which there is substantial evidence in the
6 whole record." Oregon Laws 1979, ch 772, sec 4(7)

7 Respondent County is correct, however, when it criticizes
8 petitioner's use of the Benton County case, supra, as

9 "[r]eciting what other petitioners have proved in
10 other cases to justify standing before this body is
11 not proof of facts sufficient to support this
12 petitioner's standing." Respondent County's Brief at
13 1-2.

14 We will treat the citation to the Benton County case as a
15 citation to the legal standard petitioner believes his facts
16 meet. Fairly read, petitioner has alleged personal injury and
17 has stated facts that, if true, give rise to a sufficient
18 injury to him to confer standing.

19 FACTS

20 In April of 1981, the County Planning Director approved a
21 minor partitioning application by Loyd Kaufman to divide 21.47
22 acres into three parcels of approximately 5.5, 6.5 and 9.5
23 acres. The petitioner appealed the planning director's
24 decision, and the Marion County hearings officer held a hearing
25 on the appeal in July of 1981. The hearings officer sustained
26 the partitioning, and the petitioner here appealed to the
County Board of Commissioners. The County Board denied the
appeal and issued an order incorporating the findings and order
of the hearings officer and attached certain conditions to be
followed by the applicant. Included in those conditions was a

1 condition requiring the applicant to adhere to the
2 recommendations of an engineer. Those recommendations were
3 based on a stability investigation. The engineer did not find
4 that the site had any detectable soils stability problems, but
5 the engineer did recommend certain guidelines to be used in
6 construction to provide safeguards. The engineering report
7 recognized that the State Department of Geology and Mineral
8 Industries had identified the area as a potential landslide
9 area, but the engineer found no visible signs of soil
10 slippage.

11 The site was the subject of a detailed soils analysis. The
12 report found that the property consisted of at least 51 percent
13 SCS Class VI soils. The largest of the parcels contains a
14 mixture of Class III, IV and VI soils. The soil content of
15 each of the parcels was found by the county's hearings officer
16 as follows:

17 "The proposed 9.5 acre parcel contains a mixture of
18 Class III, IV and VI soils. The northern section of
19 the 9.5 acres is a combination of 2 acres of Nekia
20 silty clay loam, 7 - 12 percent slope, and 1.5 acres
21 of Hazelair silt loam soil, 2 - 6 percent slope. This
22 area is located just to the south of Riverside Road
23 and gently slopes to the south, then drops off at 35 -
40 percent to a lower bench. The slope soil is Class
VI, Nekia silty clay loam soil, 30 - 50 percent slope,
with 1 acre of Class IV Hazelair silt loam, 6 - 20
percent slope. The southern bench of this proposed
parcel is 3 acres, Class of III Nekia silty clay loam,
7 - 12 percent slopes.

24 "The 6.5 acre parcel contains a mixture of Class III
25 and VI soils. There is 1 acre in the northwest corner
26 of this proposed parcel that is Class III, Hazelair
silty loam, 2 - 6 percent slope. The remaining 5.5
acres is Class VI Hazelair silty clay loam (eroded), 2

1 - 15 percent slopes.

2 "The proposed 5.5 acre parcel consists of a mixture of
3 Class I, III and VI soils. There is approximately .5
4 acre Class III Hazelair silty loam, 2 - 6 percent
5 slopes, located in the center of the parcel adjacent
6 to Riverside Road. There is approximately .5 acre of
7 Class I Chehalis silty clay loam, 0 - 3 percent
8 slopes, located in the southeast corner of the
9 proposed parcel.

10 "The remaining 4.5 acres is Class VI Hazelair silty
11 clay loam, eroded, 2 - 15 percent slopes. The
12 Hazelair soil series on this property is highly
13 eroded, with a seasonal water table steeply sloping to
14 the south and very low in natural fertility. This
15 soil type is not suitable for growing normal crops or
16 trees, and has no woodland suitability. Natural
17 vegetation produced by the Hazelair soils and consists
18 predominantly of briars, weeds, poison oak and scrub
19 white oak trees of non-commercial value. The Nekia
20 soil on this property is well suited for grain, seed
21 or row crops, however irrigation and cultivation are
22 difficult, with mechanical harvesting generally not
23 feasible. This soil type has bedrock outcroppings
24 with medium runoff and erosion being a moderate
25 hazard. All soils on the subject property are very
26 shallow, with little or no topsoil."

16 The county found that this division of the property
17 included most all of the marginal (but better) soil in one
18 parcel, the 9.5 acre parcel. The other two parcels contain,
19 according to the county, almost exclusively Class VI soils.
20 The county found that the size and location of the parcels was
21 chosen to accommodate the proposed use and "to insure that
22 there is adequate buffer area for compatibility with the
23 adjacent farm use."

24 The county found that the property was bordered on the west
25 by limited pasture, on the east by smaller acreage homesites,
26 on the north by Riverside Road and on the south by the Oregon

1 Electric Railroad right of way.

2 "The property is bounded to the north by Riverside
3 road. Across Riverside Road are six parcels ranging
4 in size from 2 to 6 acres. Three of these contiguous
5 parcels are under one ownership and are used as one
6 residential homesite. Two contiguous parcels are
7 under one ownership, also used as a residential
8 homesite. There are three houses located on the six
9 parcels. Also to the north is a 30 acre commercial
10 timber tract with a homesite and a parcel
11 approximately 85 acres that is also a commercial
12 timber tract. White Cloud Estates, and a large 40
13 acre tract held for investment purpose are located to
14 the north. These parcels are under one ownership and
15 are currently undeveloped, though White Cloud is a
16 County-approved subdivision. To the east of the
17 subject property is a series of small acreage
18 homesites, parcels ranging from .75 acre to 3 acres.
19 There are four houses on five tracts, with one person
20 owning two adjacent parcels and using it as one
21 homesite. Farther to the east are eight tracts
ranging in size from 1 to 9 acres, all under separate
ownership, five of which have homes located on them.
To the south lies the Oregon Electric Railroad
right-of-way. Across the railroad tracks are three
parcels, a 32 acre parcel, a 5 acre and a 3 acre
parcel (approximate sizing), all under one ownership.
This land is river bottom land located within a 10
year flood plain. In an area shown on the aerial
photograph and described the Assessor's map for S36
T8S R4W, and S35 T8S R4W, parcel sizes range from .75
acre to 85 acres. The area to the north is higher in
elevation and generally used for timber production,
either as individual parcels or in combination with
other tracts. The area to the east is also timbered
with occasional acreage homesites interspersed. To
the south lies the Willamette River and Polk County.
The area to the west is generally large farm tracts
with parcels being farmed together as farming units up
to 160 acres."

22 The SA zone existing on this property allows the
23 segregation of Class V through VIII soils that are not suitable
24 or needed for farm use and permits construction of non-farm
25 dwellings so long as they are compatible with nearby farm and
26 forest uses. Marion County Zoning Ordinance Section

1 137.030-.070. The county found these criteria had been met.

2 FIRST ASSIGNMENT OF ERROR

3 The first assignment of error alleges that the county
4 failed to comply with ORS 215.263(2) and (3).¹ Petitioner
5 claims that these statutes require the governing body to review
6 all divisions of land in exclusive farm use zones (as here)
7 that result in parcels of less than 10 acres. The county
8 review is to test the parcelization for conformity with ORS
9 215.243. Petitioner claims that the County Board essentially
10 took no action at all as it only adopted the action of its
11 hearings officer. It is our understanding that petitioner
12 believes the statutes require the Board of County Commissioners
13 to consider each application, and that land use decisions about
14 divisions of farmland within an exclusive farm use zone
15 resulting in parcels of less than 10 acres may not be delegated
16 to a planning commission or a hearings officer.

17 The county and the applicant disagree. The county and the
18 applicant argue that the County Planning Department and the
19 county hearings officer "are as much a part of the governing
20 body of Marion County as the County Commissioners themselves."
21 Respondent Kaufman's Brief at 2. The county directs our
22 attention to ORS 92.046(3) providing that the governing body of
23 a city or county may delegate "any of its lawful functions with
24 respect to minor partitionings to the planning commission of a
25 city or county or to an official of the city or county
26 appointed by the governing body for such purpose."

1 We agree with the respondents. The law clearly provides
2 that the county may delegate its responsibilities with respect
3 to minor partitionings to a planning commission or a hearings
4 officer. Further, the county governing body did, itself, by
5 virtue of this appeal proceeding, consider this particular
6 minor partitioning contrary to the assertion of Petitioner
7 Still.

8 It is also our view that a county is entirely free to adopt
9 the findings of its hearings officer, assuming, of course, it
10 does so intelligently and with full knowledge of the record of
11 the case. C.f. Tierney v. Duris, 21 Or App 613 (1975). We
12 have no allegation that the county commission performed a mere
13 mechanical act in approving the order of its hearings officer,
14 and we have no allegation that the county did not review the
15 entirety of the record generated below.

16 The first assignment of error is denied.

17 SECOND ASSIGNMENT OF ERROR

18 The second assignment of error alleges that the county
19 erred in concluding that Goal 3 does not apply in this case.
20 The petitioner argues that the applicant himself stated that
21 the property could sustain "marginal pasture and hay crops for
22 the raising of a few animals * * * *" Record 30. Petitioner
23 alleges that the contention that the property consists of soils
24 that are not sufficiently fertile for growing normal crops is
25 erroneous as fertility may be improved. Petitioner claims that
26 soil type found on the property can support certain crops and

1 pasture. Further, we understand petitioner to allege that the
2 portion of the property that does not contain SCS Class I-IV
3 soils are "other lands" as defined in Goal 3 and needed for
4 agricultural use.

5 The county found that the property was not predominantly
6 Class I-IV soil, as agricultural land is defined in Goal 3. As
7 far as the property's farm use suitability as "other lands,"
8 the county noted the definition of "other lands" contained in
9 Goal 3 and found as follows:

10 "Other lands which are suitable for farm use,
11 even though they do not contain predominately Class I
12 through IV soils, may be defined as agricultural land
(making the resource goal applicable). Suitability
13 for farm use must take into consideration the
14 following issues:

15 "A. Soil Fertility: Expert testimony indicates
16 that the predominate soil type on the parcel
17 is Hazelair, which is one of the poorest
18 soils in Marion County. This soil has very
19 little natural fertility, with natural cover
20 including blackberries, weeds, poison oak
21 and scrub white oak. The topsoil on the
22 entire parcel is very shallow. There are
23 some sections of Nekia Class III soil. This
24 is a better soil type, with better natural
25 fertility, however the land is steep and
26 benched, leaving small sections (2 - 3.5
acres) isolated from each other. The Nekia
soil is also very shallow. The parcel lay
idle from 1956 to 1976. Between 1976 and
1981 there have been three grain crops
planted on the property, two of which were
not harvestable. The third provided a
limited yield. Based upon these facts, the
soil fertility on the subject parcel is not
suited for growing normal crops. The soil
does not have woodland suitability and
therefore is not suited for normal tree
production. See the discussion on forest
lands below.

1 "B. Suitability for Grazing: Because of the
2 slope and the terrain on the subject
3 property and the water table, there has been
4 extensive erosion on the property. It is
5 the recommendation of the soil scientist
6 that some permanent grass cover be planted
7 on the subject property to prevent further
8 soil loss. Once the grass sod becomes
9 established limited seasonal grazing may be
10 appropriate. The number of animals would
11 have to be limited and would not be allowed
12 on the property during the wet season when
13 the animal's hooves would cut through the
14 ground cover and further erosion would be
15 possible. Based on these facts the subject
16 property is not suitable for grazing.

17 "C. Climatic Conditions: The subject property
18 lies on a south-facing slope and is adjacent
19 to the Willamette River flood plain. These
20 conditions and other climatic conditions do
21 not render the land unsuitable for farm use.

22 "D. Irrigation: Irrigation is not a problem on
23 the subject parcel. The Willamette River is
24 located just to the south. The water table
25 in the area is very dry in the summer and
26 very wet in the winter months. All other
things being equal, there would be a
sufficient availability of water for farm
irrigation purposes.

"E. Existing Land Use Patterns: The parcel is
located in an area characterized by a
mixture of acreage residential homesites,
large parcels held for speculation, and
medium-sized timber tracts. To the north
are three dwellings on six parcels, with
three ownerships. Farther to the north are
several timber tracts located on the crest
of the hill, as well as the White Cloud
Subdivision, which is as yet undeveloped,
and another large tract owned by an
investment company. To the east and
southeast are four homesites on six parcels
with four ownerships. Farther to the south
are five dwellings on eight parcels, a
little larger in size (approximately 5
acres). To the south is a seasonal 40 acre
row crop parcel, located in the 10-year
floodway. Farther to the south is the

1 Nelson's Landing Subdivision, a 24
2 (urban-size) lot subdivision that is
3 approximately 75 percent developed.
4 Nelson's Landing borders the Willamette
5 River. To the west lies a large farming
6 area, with parcels ranging from 20 to 40
7 acres and generally farmed with other
8 parcels to make farm units of upwards to 160
9 acres. The existing land use in the are
10 contains such a diverse mixture that
11 (standing alone) does not require this land
12 to be classified as suitable for farm use
13 and thereby protected as agricultural land.

14 "F. Technology/Energy Inputs Required: Because
15 of the soil types and steep terrain of the
16 area, it would take a massive amount of
17 sophisticated machinery to cultivate and
18 harvest crops which may not grow. The needs
19 in this area would be so great that it would
20 render any active farming operation
21 economically unfeasible.

22 "G. Accepted Farming Practices: The applicant
23 has attempted to farm the parcel three out
24 of the last five years, using accepted
25 farming practices. The applicant's efforts
26 have been unsuccessful. Accepted farming
practices are such that this land is not
suitable for farm use.

"Taking into consideration the above factors, the
subject parcel is not suitable for farm use. The soil
type, classification, depth of soil, steepness of the
slopes, erosion and technology are all such that
farming cannot take place on the parcel.

"Lands which are not Class I through IV and not
are not [sic] suitable for farm use must still be
protected as agricultural land if they are necessary
to permit farm practices on adjacent or nearby lands.
The only farming operation that is adjacent or nearby
(within 500 feet) is the 40 acre row crop field to the
south. This parcel is separated from the subject
parcel by a steep slope and the Oregon Electric
Railroad right-of-way. Access to this parcel is
provided by a road several hundred feet to the
southeast of the subject property. Because the farm
parcel lies in a 10-year flood plain and is covered
with water several months of every year, agricultural
operations occur only during the summer months. Based

1 on these factors, the subject parcel is not necessary
2 to permit the effective and efficient farming
3 operation on the 40 acres. The large farming area to
4 the west of the subject property, although not
'nearby', [sic] is not materially affected by the land
use on the subject property and the subject property
is not necessary for farming operations in that area.

5 "The subject parcel does not fit any of the three
6 definitions for agricultural land found in Goal 3,
7 therefore Goal 3 is inapplicable to the subject
property."

8 The county further notes that the minor partitioning includes
9 within the largest of the three parcels those soils which may
10 be conducive to agricultural use.

11 The county has adequately shown the greater portion of soil
12 type on the property fails to meet the first part of the
13 definition of agricultural land in Goal 3.² The property
14 consists of "predominantly" Class VI soils, not Class I-IV
15 soils. We believe "predominantly" as used in the goal refers
16 to the soil type that holds "advantage in numbers or
17 quantity." See "predominant," Webster's New International
18 Dictionary 1786 (3d ed 1966). We recognize that 51% is not an
19 overwhelming percentage of SCS Class VI soils, but absent a
20 goal amendment, we do not view the law to set a higher
21 standard. As to the "other lands" part of the Goal 3
22 definition of agricultural lands, we believe the county has
23 adequately shown that this property does not fall into that
24 second category. See definition of agriculture land in
25 footnote 2, supra. The county's findings rest upon soil
26 fertility, suitability for grazing, irrigation, existing land

1 use patterns and the effort required to render the land
2 farmable.³ Given all these considerations, the hearings
3 officer found that the work and experience required would not
4 be sufficient to classify the parcel as resource land. The
5 effort and expense required is relevant in considering whether
6 the land is "suitable" for farm use within the meaning of the
7 goal. We understand petitioner to say that the soil types on
8 the property, notwithstanding their high soil classification
9 (SCS Class VI), are automatically "suitable" for growing some
10 crops and therefore to be included as agricultural land.
11 Petitioner views any agricultural potential to mandate
12 agricultural zoning and partitioning restrictions.⁴ We do
13 not believe the test is that simple, and we believe the county
14 has adequately met the test contemplated in Goal 3.

15 The second assignment of error is denied.

16 THIRD ASSIGNMENT OF ERROR

17 The third assignment of error alleges that the county
18 commissioners erred in finding that Goal 4 does not apply in
19 this case. Petitioner argues that the county misunderstands
20 Goal 4. Petitioner asserts that the county improperly relied
21 on a finding that no commercial timber is present on the
22 property. Petitioner notes that the applicant stated that the
23 land was recently cleared. We understand petitioner to say
24 timber was present on the property and may grow there again.
25 Petitioner notes that the Hazelair soils present on the
26 property are used "mainly as woodland and woodland pasture"

1 (extract SCS Soils Book)." Petition for Review at 7. Some of
2 the property, 10.5 acres total, have a woodland suitability
3 group of at least 3cl. See Record at 57. In short, petitioner
4 argues that Goal 4 does apply to the property at least in part
5 because the soils present are suitable for timber production.

6 Respondent Kaufman points to the observation of the soil
7 scientist that the land is not suitable for growing trees. See
8 pages 52-53 of the record.⁵ Respondent Kaufman claims that
9 petitioner could have obtained his own soil analysis to show
10 that the property was suitable for the growing of trees.

11 Respondent County states that Marion County's comprehensive
12 plan is acknowledged as to Goal 4. The county argues that the
13 comprehensive plan shows the property not to be within the
14 protection of Goal 4. Respondent cites the continuance order
15 of August 24, 1981 in support of this proposition. The
16 respondent notes that the order has been appealed to the Court
17 of Appeals but as yet no decision has been rendered. The
18 decision of the Marion County Board of Commissioners in this
19 matter occurred on October 30, 1981, after the LCDC
20 acknowledgment as to Goal 4.⁶

21 We believe the acknowledgment of the Marion County
22 Comprehensive Plan controls. Petitioner does not argue that
23 the comprehensive plan shows the property to be forest land,
24 and the fact that the plan is acknowledged makes it impossible
25 for us to review the decision for compliance with Goal 4. See
26 Fujimoto v MSD, 1 Or LUBA 93 (1980), Fujimoto v. LUBA, 52 Or

1 App 875 (1981).

2 The third assignment of error is denied.

3 FOURTH ASSIGNMENT OF ERROR

4 The fourth assignment of error alleges that the county
5 failed to apply Goal 7 and failed to adhere to its own adopted
6 comprehensive plan. Petitioner notes that the county found
7 that the property was within an identifiable landslide area.
8 Petitioner states that the Marion County Comprehensive Plan
9 requires specific site studies by a qualified engineer prior to
10 any construction in hazard areas. The policy controlling is
11 Development Limitation Policy No. 2 at 49 of the Comprehensive
12 Plan. Petitioner says that there is no specific geologic site
13 survey as required.

14 The Comprehensive Plan provision cited by petitioner is as
15 follows:

16 "2. Construction, involving the placement of
17 structures on or in the land surface and other
18 such disturbances or excavations of the land
19 surface in active or inactive landslide areas (as
20 identified in the Background and Inventory
Report) shall require specific site study by a
qualified engineering geologist prior to
development." Marion County Comprehensive Plan,
p. 49.

21 Respondent Kaufman states there was an onsite inspection
22 concluding that there was no visible sign of soil slippage and
23 essentially no erosion hazard. See Record 60. The engineer's
24 conclusion that the site "does not have any detectable soil
25 stability problems" is sufficient to answer any question
26 regarding natural hazards, asserts Respondent County.

1 The county also states that Marion County is acknowledged
2 as to Goal 7. According to the county, the acknowledgment
3 order precludes any test of this decision against Goal 7.
4 Further, the evidence in the record shows that there is no
5 slide hazard on the property.

6 We agree that acknowledgment of the Marion County
7 Comprehensive Plan controls as to any alleged violation of Goal
8 7 for the reasons stated under petitioner's fourth assignment
9 of error. As to a possible violation of the comprehensive
10 plan, the engineer concluded that the site was not subject to
11 hazard, and we view his study to comply with the comprehensive
12 plan mandate cited above.⁷ Here, there is sufficient
13 evidence in the record for the county to conclude that this
14 particular property, though identified as a hazard area, is not
15 itself subject to such hazards. Surely, not every portion of
16 every property inventoried as a potential or active slide area
17 need forever be considered hazardous even in the face of
18 detailed evidence. The intent of the comprehensive plan
19 provision is to insure no unsafe sites are developed. This
20 intent and the literal meaning of the comprehensive plan
21 provision is fulfilled when, as here, an investigation is made.

22 The fourth assignment of error is denied.

23 FIFTH ASSIGNMENT OF ERROR

24 The fifth assignment of error claims:

25 "Marion County continues to pursue the concept of
26 deducing [sic] the size of a parcel to achieve more

1 productivity. Such concept has been found to be
2 faulty."

3 We understand petitioner to argue that a conclusion in the
4 order is erroneous. The conclusion cited is

5 "Converting this idle land into acreage residential
6 homesites will promote the economy of the state while
7 making land more efficiently used and more productive,
8 will add to the number of available acreage
9 residential homesites in the county and will maximize
10 energy conservation and efficiency as required by Goal
11 13."

12 We agree with the county that the statement is a conclusion, it
13 is not a finding, and it does not constitute a basis on which a
14 reversal could be made.

15 Even if the county's conclusion is in error, the error is
16 not sufficient to warrant reversal as the order is not premised
17 on this proposition but is premised on compliance with the
18 Marion County Comprehensive Plan, Zoning Ordinance and
19 applicable statewide goals. At worst the finding is surplusage.

20 The fifth assignment of error is denied.

21 The decision of Marion County is affirmed.

FOOTNOTES

1
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3 1

ORS 215.263(2) and (3) state as follows:

4 "(2) Any proposed division of land included within an
5 exclusive farm use zone resulting in the creation of one or
6 more parcels of land of less than 10 acres in size shall be
7 reviewed and approved or disapproved by the governing body
8 of the county within which such land is situated.

9 "(3) If the governing body of a county initiates a
10 review as provided in subsection (1) or (2) of this
11 section, it shall not approve any proposed division of land
12 unless it finds that the proposed division of land is in
13 conformity with the legislative intent set forth in ORS
14 215.243."

11 2

The first part of Goal 3 states

13 "In western Oregon is land of predominantly Class I,
14 II, III and IV soils and in eastern Oregon is land of
15 predominantly Class I, II, III, IV, V and VI soils as
16 identified in the Soil Capability Classification
17 System of the United States Soil Conservation Service,
18 and other lands which are suitable for farm use taking
19 into consideration soil fertility, suitability for
20 grazing, climatic conditions, existing and future
21 availability of water for farm irrigation purposes,
22 existing land use patterns, technological and energy
23 inputs required, or accepted farming practices."

The second part of Goal 3 states

20 "Lands in other classes which are necessary to permit
21 farm practices to be undertaken on adjacent or nearby
22 lands, shall be included as agricultural land in any
23 event.

22 "More detailed soil data to define agricultural land
23 may be utilized by local governments if such data
24 permits achievement of this goal."

25 3

See Marion County Zoning Ordinance Section 137.030-.070.

1
4

2 The petitioner does not argue with the provisions of
3 the SA zone and the findings made by the county showing
4 that the parcels are not "suitable" for farm use
5 considering the several factors listed in the SA zone and
6 used by the hearings officer in making his determination.
7 See County Findings beginning at page 11, supra.
8 Petitioner does not assert the property is "necessary" to
9 be kept in farm use to protect adjacent farm operations
10 and we do not address the county's findings on this issue.

7
5

8 The soil scientist notes that the western portion of the
9 property, some nine acres, is comprised of Nekia soils, and
10 this is the only area that can produce crops satisfactorily
11 even though part of it is too steep, having over a 30 percent
12 slope. The eastern portion is made up of the Hazelair series
13 and is highly eroded. The report concludes that it is not
14 suitable for growing normal crops or trees. The report
15 suggests that the property should be maintained in permanent
16 grass cover to protect it from further soil loss, and after a
17 grass sod becomes established, it could be used for limited
18 grazing.

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15 In an apparent abundance of caution and notwithstanding the
16 acknowledgment, the hearings officer applied the four-part
17 definitional test of Goal 4 and concluded that the parcel was
18 not suitable for forest uses. The hearings officer found as
19 follows:

20 "Forest land must be retained for the production
21 of wood fiber and other forest uses. Statewide Goal
22 4, (Forest Lands). Forest lands are defined as
23 follows:

24 "a. Lands composed of existing and potential forest
25 lands which are suitable for commercial forest
26 uses. The subject parcel has no commercial
timber on it. There are a few scrub white oak
trees located along Riverside Drive that have
grown up over the last 25 years. The predominate
[sic] Hazelair soil has no woodland suitability
whatsoever. The Nekia soil carried a woodland
suitability rating of 3c 1, which would be
suitable for limited Christmas tree production.
This soil is located in two sections of
approximate 2 - 3.5 acres each, separated by a
steep slope in western section of the property.

1 Shallow soil depth prohibits any commercial
2 forest use.

3 "b. Other forested lands needed for watershed
4 protection, wildlife and fisheries habitat and
5 recreation. The subject parcel is not
6 'forested'. It is cleared of what brush was on
7 it. The parcel, even though it is not forested,
8 is not a part of a significant watershed and does
9 not need to be maintained for watershed
10 protection. There is no wildlife or fisheries
11 habitat located on the subject parcel or nearby,
12 and the parcel does not provide a material
13 recreational resource.

14 "c. Lands where extreme conditions of climate, soil
15 and topography require the maintenance of
16 vegetative cover, irrespective of use. The
17 subject parcel is subject to erosion, however
18 (because of soil types and depth) the vegetative
19 cover necessary to protect the soil is a grass
20 sod, rather than timber. Based upon the soils
21 information and expert testimony this land will
22 not maintain a vegetative timber cover, and a
23 grass cover is required to prevent further soil
24 loss.

25 "d. Other forested lands which provide buffers.
26 Again, it is important to remember that this
27 parcel is not, and never has been, 'forested'
28 land. 25 years. There are no urban areas in the
29 surrounding area, therefore no buffer between
30 timbered areas and residential communities are
31 necessary. The acreage homesites in the area
32 provide their own buffers. The subject parcel is
33 not needed as a windbreak or as a livestock
34 habitat. As discussed above, the parcel provides
35 no material recreational use and is not a part of
36 a scenic corridor."

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The county does not argue that the comprehensive plan
provision is not applicable at this stage of the development
proposal.

In contrast, the applicant argues that petitioner's
concerns are "improper at this time," as the present
application is only to divide the property and not fix
locations for houses. We disagree, the time to determine site
suitability is early enough to allow adequate review of the

1 evidence and, indeed, to determine if the property is buildable
2 and useable for residential purposes or any other purpose
3 involving construction that is recognized in the comprehensive
4 plan.
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BEFORE THE LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

DONALD A. STILL,

Petitioner,

v.

MARION COUNTY BOARD OF
COMMISSIONERS, and
LOYD A. KAUFMAN,

Respondents.

LUBA No. 81-131

LCDC DETERMINATION

The Land Conservation and Development Commission hereby
approves the recommendation of the Land Use Board of Appeals in
LUBA case No. 81-131.

Dated this 17th day of March, 1982.

For the Commission:



James F. Ross, Director
Department of Land Conservation
and Development

1 - LCDC DETERMINATION
MJD:mb 3-17-82



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 2/23/82

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: STILL v MARION COUNTY
LUBA No. 81-131

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

In this case, the petitioner challenges a partitioning of 21.47 acres into three lots. The land to be divided is composed of a majority (51%) of Class VI soil. Most of the better agricultural soils are left in one of the three new lots. The county says the property is not agricultural land within the meaning of Goal 3 as it is not composed of predominantly SCS Class I-IV soils and is not "other lands" suitable for farm use. The county does say the property is near agricultural land, and the county claims the lot lines insure an adequate buffer with nearby agricultural lands.

The petitioner challenges the partitioning as being in violation of Goals 3, 4 and 7. In addition, petitioner makes certain non-goal arguments. The goal issues are discussed at pages 9 through 17.

We found that the decision did not violate Goal 3 because the property was not subject to the protection of Goal 3. We found your acknowledgment of the Marion County plan as to Goals 4 and 7 precluded our review under those goals.

The Board is of the opinion that oral argument will 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

DONALD A. STILL,)
)
Petitioner,) LUBA NO. 81-131
)
v.) PROPOSED OPINION
) AND ORDER
MARION COUNTY BOARD OF)
COMMISSIONERS, and)
LOYD A. KAUFMAN,)
)
Respondents.)

Appeal from Marion County.

Donald A. Still, Salem, filed a petition for review and argued the cause on his own behalf.

Robert C. Cannon, Salem, filed a brief and argued the cause for Respondent Marion County.

Malcolm L. Brand, Salem, filed a brief and argued the cause for Respondent Loyd A. Kaufman.

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

Affirmed. 2/23/82

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).