

LAND USE
BOARD OF APPEALS

APR 6 11 51 AM '82

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

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ROBERT CHRISTIE,)	
)	
Petitioner,)	LUBA NO. 81-113
)	
v.)	FINAL OPINION
)	AND ORDER
TILLAMOOK COUNTY, A Political)	
subdivision of the State of)	
Oregon,)	
)	
Respondent.)	

Appeal from Tillamook County.

Robert Christie, Tillamook, filed a petition for review and argued the cause for Petitioner.

Lynn Rosik, Tillamook, filed a brief and argued the cause for Respondent.

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

Affirmed. 4/06/82

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 appeals denial of a building permit to construct
4 a single-family dwelling on a one-half acre parcel in Tillamook
5 County.

6 FACTS

7 Petitioner applied for the building permit on April 29,
8 1981. The Tillamook County Planning Department denied the
9 permit on May 6. Petitioner appealed that decision to the
10 Planning Commission, and the Planning Commission similarly
11 denied issuance. Petitioner appealed to the Board of
12 Commissioners which issued its denial of the building permit on
13 September 30, 1981. The appeal to the Land Use Board of
14 Appeals followed.

15 The subject one-half acre parcel is described as Tax Lot
16 403 in Section 10, Township 2 South, Range 9 West of the
17 Willamette Meridian. The parcel was partitioned off a 140 acre
18 parcel owned by petitioner.

19 The zoning on the property is R-1 which permits one-family
20 dwellings on lots as small as 7,500 square feet. The proposed
21 zoning for the area under the new Tillamook County
22 Comprehensive Plan, however, is SFW-20, a 20 acre small farm
23 and woodlot zone. In that proposed zone, farm uses are
24 permitted and single-family residential dwellings are
25 conditionally permitted upon certain findings.¹

26 The property is presently in farm use and is on property

1 meeting the definition of agricultural land found in Statewide
2 Planning Goal No. 3. The county's decision recites the
3 county's view that issuance of a building permit on the parcel
4 would violate Goal 3. The county found that

5 "under the current county 'R-1' zone, if there were no
6 statewide planning goals, the building permit could be
7 approved."

8 The county's decision is based on its view that the
9 property is subject to Goal 3, notwithstanding the existence of
10 the R-1 zoning. We note that the county found the property met
11 necessary frontage and road access, received a favorable onsite
12 sewage disposal facility report and could be provided with
13 water. The county also found that in 1980, the owner had
14 partitioned the 140 acre parcel into three large parcels, and
15 this year further partitioned these three parcels resulting in
16 a total of nine parcels. Notwithstanding the parcelization,
17 the county recognized the issuance of a building permit on a
18 half-acre parcel would violate Statewide Planning Goal No. 3
19 and, therefore, could not be allowed.

20 The county listed in its order a alternative for the
21 petitioner. The county stated that other than agricultural
22 uses are allowed on agricultural lands providing an exception
23 to Goal 3 may be justified. The county recited that no
24 exception had been requested, and the county said the exception
25 would have to consist of a justification for one of two
26 alternatives.

27 "(1) 'R-R' rural residential zoning for the new

1 parcels created with frontage on Brickyard Road
and the planned new access road; or

2 "(2) 'SFW-10' zoning applied to all of Christie
3 properties and approval of a cluster development
4 plan for the smaller sites on Brickyard Road and
the new access road."

5 The county then stated that the alternatives would have to be
6 approved by the planning commission and the Board of
7 Commissioners "as part of the new comprehensive plan when the
8 final hearings are held later this year."²

9 ASSIGNMENTS OF ERROR

10 Petitioner makes eight assignments of error. The eight
11 assignments of error follow a discussion of petitioner's
12 general concerns and an explanation of how it is petitioner
13 feels his interests are adversely affected.³ As we
14 understand petitioner's concerns, petitioner believes he was
15 entitled to partition the property and be issued a building
16 permit notwithstanding the fact that the property is
17 agricultural land within the meaning of Goal 3. Petitioner
18 recites there was a discussion of a 10-acre zoning for the
19 property, and petitioner attempts in his brief to accept "the
20 alternative zoning offered" and asks this Board "to instruct
21 Tillamook County Commissioners and Planning Department to
22 cooperate with the petitioner in disposing of his property
23 under Small Farm 10 zoning." Petitioner also believes he has
24 been subjected to prejudicial decisions at various stages in
25 his permit process. He recites events occurring during his
26 permit application process that he feels show he has been

1 denied due process of law. Petitioner also complains about
2 what he sees as an absence of written procedural rules in
3 Tillamook County. The absence of written rules allows the
4 county planning staff to dominate county hearings, according to
5 petitioner. We also understand the petitioner to say that the
6 imposition of regulations prohibiting his building permit are
7 retroactive.

8 Included in petitioner's discussion of the background of
9 his case, is information on dairy farming and farming in
10 Tillamook County generally. Petitioner argues that the soils
11 on the property are of limited quality, and considerable money
12 would have to be spent in order to build an adequate dairy
13 facility. The petitioner also states that the 140 acre parcel
14 is surrounded by 117 parcels averaging approximately three
15 acres in size. Petitioner adds that many of the parcels are
16 one-half acre or less in size.⁴ The record reveals an
17 agricultural suitability report apparently prepared by the
18 planning staff stating that "more than 50 percent of the
19 surrounding area contains parcels of at least 20 acres in size
20 * * * *" Record 61.⁵

21 We are appreciative of petitioner's concerns regarding the
22 applicability of statewide planning goals and the processes of
23 the county. However, what petitioner has to say in his
24 introduction to the eight assignments of error is information
25 better read and considered by a factfinding body than a
26 reviewing body such as this Board. Petitioner presents a

1 number of arguments based on facts which might help persuade a
2 fact-finding body that petitioner's property is not suited for
3 agricultural use. The county, however, has made no such
4 finding and we are constrained to review the county's findings
5 and the record to see whether the county's position is
6 supported by adequate findings of fact.

7 Assignment of Error No. 1

8 The first assignment of error alleges the planning process
9 lacked written procedures. Petitioner here argues that the
10 "general procedure" was for the planning staff to submit "their
11 position and then the petitioner to submit his proposal." The
12 petitioner complains that during his presentation, the planning
13 staff would interrupt him. The petitioner argues that the CAC
14 (Citizen Involvement Committee) and the Planning Commission
15 members seem to rely too heavily on the Planning Staff's
16 interpretations.

17 The county responds by stating the record of the hearings
18 shows due process was afforded the petitioner. The county
19 asserts the petitioner was given notice of his right to appeal
20 in writing and was given ample opportunity to present his case
21 at each stage of the proceedings, and did so.⁶

22 In this case, we do not understand petitioner to argue that
23 he has been prohibited from presenting evidence he felt
24 appropriate and necessary to his cause. Rather, the
25 petitioner's complaint appears to be his perception of the
26 influence wielded by the Citizen Involvement Committee and the

1 planning staff.⁷ We do not know of a legal basis upon which
2 to invalidate the county's action because it may have been
3 influenced by the CAC.

4 In any event, as petitioner has not shown he was prejudiced
5 in the preparation and the delivery of his case before the
6 county, we find no violation of due process or other legal
7 standard in the county's failure to have written procedures
8 serious enough to warrant reversing the county's order. See
9 also Oregon Laws 1981, ch 748, sec 5(4)(B).

10 Assignment of Error No. 2

11 In Assignment of Error No. 2, petitioner alleges he was
12 subjected to a "prejudicial decision." Petitioner argues that
13 family members were members of different committees or
14 commissions ruling on his case. He cites the example of one
15 Bill Meyers, a CAC member and his wife, Sherry Meyers, a
16 planning commission member. Petitioner gives other examples
17 including a member of the planning commission whose wife also
18 serves as a county commissioner. Petitioner claims these
19 individuals should have disqualified themselves when ruling on
20 property at different levels.

21 The county states the Citizen Involvement Committee took no
22 part in the consideration of this building permit application;
23 and, therefore, allegations concerning members of the Citizen
24 Involvement Committee, whose relatives have seats on other
25 committees, cannot give rise to a conflict of interest. As to
26 the allegation of prejudice concerning a member of the planning

1 commission whose spouse serves on the Board of Commissioners,
2 the county responds that Mr. Williams, the planning commission
3 member, resigned from the planning commission when his wife was
4 elected to the Board of County Commissioners. "Thus, there
5 were not two family members serving on different bodies and
6 commissions and making a decision on this building permit
7 application at the same time."

8 The facts as we understand them do not illustrate any
9 conflict of interest. Even if during the pendency of
10 petitioner's application the facts of committee membership were
11 as alleged by petitioners, we do not believe these facts would
12 give rise to a conflict of interest. Public officials are
13 presumed to perform their duties properly, and absent proof of
14 acts showing a conflict of interest, we will not hold that a
15 conflict of interest prejudicial to petitioner exists in simple
16 family committee and CAC membership.⁸ 3 McQuillin Municipal
17 Corporations, Sec. 12.126 (3d ed, 1973).

18 Assignment of Error No. 3.

19 Under assignment of error No. 3, petitioner alleges he was
20 subjected to "retroactive and changing legislation."
21 Petitioner first argues that the county planning staff "would
22 continually change the rules."⁹ Petitioner claims a change
23 in the description of farm zones altered the permissible use of
24 his property, and the changes were made after the proposed
25 zoning for the petitioner's property was determined. We
26 understand petitioner to be referring to discussions with the

1 county concerning the possibility of a ten-acre minimum lot
2 size farm use zone.

3 The petitioner next argues that a policy established by a
4 memo from the planning staff of August 14, 1981 was applied to
5 the petitioner's property on January 2, 1981, long before the
6 memo was written. We understand petitioner to be referring to
7 a letter from Paul Benson to planning commission members
8 explaining, in essence, that statewide land use goals will be
9 applied to land use actions while the county waits for
10 acknowledgment of the new county comprehensive plan. The
11 policy states that the guidelines for the department will be
12 the land use designations for the new comprehensive plan "as
13 established by the Board of Commissioners in October of 1980."
14 The memo states that if the proposed use is in conformance with
15 existing zoning ordinances and with zone designations as
16 proposed, it shall be deemed in compliance with the statewide
17 planning goals. Other more specific policies are listed for
18 other proposed zoning designations including the SFW-20 zone.
19 Policy controlling the SFW-20 zone requires, as we understand
20 the policy, that lot sizes must be in accordance with zone
21 requirements

22 "since these are the measures deemed necessary to
23 preserve agricultural and forest lands under Goals 3
24 and 4. The only exception to this policy will be in
25 cases where it can be clearly shown that the proposal
meets all criteria for non-farm or non-forest dwelling
in the zone."

26 Petitioner's third complaint under this assignment of error

1 is that the planners have changed and added regulations "some
2 as late as December 16, 1981, which affect and change permitted
3 usage of this property."

4 Respondent says petitioner misunderstands the scope of the
5 appeal to the Land Use Board of Appeals. Respondent states the
6 legislation the county applied in this land use decision was
7 passed in 1973. Respondent is referring to Senate Bill 100
8 establishing statewide land use planning and creating the Land
9 Conservation and Development Commission. Respondent states
10 that the county comprehensive plan and implementing ordinances
11 were adopted by the Board of Commissioners on December 30, 1981
12 for the purpose of complying with statewide land use planning
13 goals. Respondent argues that at the time of this land use
14 decision, the county was obliged to conform to the statewide
15 goals, notwithstanding its ordinances. Respondents states the
16 changes in zoning affecting petitioner's property do not affect
17 the legality of a one-half acre single-family residence on
18 agricultural land.

19 Respondent states the August 14 memo was not part of the
20 record and should not be considered. However, respondent
21 advises that the memo simply clarifies and outlines the
22 county's obligation to conform to statewide goals prior to
23 acknowledgment of the comprehensive plan. Respondent states
24 once the comprehensive plan was in workable form, the Planning
25 Department began to utilize the plan for assistance making
26 decisions. As Goal 3 has been in existence for some time and

1 the county is simply attempting to comply with the goal,
2 respondent states there is no retroactive legislation.

3 We agree with the respondent. The county was under a
4 continuing obligation to comply with Statewide Goal 3
5 notwithstanding any contrary zoning existing on petitioner's
6 property. Indeed, prior to acknowledgment, the county was
7 under an obligation to test each of its land use decisions
8 against applicable statewide planning goals. The County was
9 simply doing its duty in reviewing petitioner's application
10 against Goal 3.¹⁰

11 Assignment of Error No. 4

12 Assignment of error no. 4 alleges that the planning staff
13 gave petitioner "false and misleading information as to the
14 procedure to obtain usage of his land." Here the petitioner
15 argues that the planning staff required petitioner to go
16 through a long drawn out procedure "so new regulations would be
17 in effect by the time a ruling was received." The petitioner
18 argues his land was and is zoned R-1, allowing the intended
19 use. We understand petitioner to be claiming that the county
20 waited until it had a chance to amend its zoning ordinance in
21 order to prohibit petitioner's request.

22 The county asserts that though petitioner's land was zoned
23 R-1 at the time the decision was made, that zoning did not
24 entitle petitioner to use his property "without regard to Goal
25 3 considerations until the new comprehensive plan and land use
26 ordinance took effect." Respondent states that delays in the

1 planning process do not make any difference in the applicable
2 law, and petitioner has not been free to "enjoy the benefits of
3 the R-1 zoning" since adoption of Goal 3.

4 Petitioner's assignment of error is denied because Goal 3
5 controls this land use decision, not the county zoning. There
6 are insufficient facts in the record for us to conclude that
7 the county staff intentionally or unintentionally misled the
8 petitioner. Even if the county planning staff had given the
9 petitioner erroneous information or allowed him to proceed
10 under an illusion, Goal 3 requirements remain in effect and
11 must be enforced.¹¹ Whether the county arrived at an
12 understanding of Goal 3 applicability too late is not an issue
13 that we may address here.

14 Assignment of Error No. 5

15 Assignment of error no. 5 alleges that the Tillamook County
16 officials "used one agency against another in a manner that
17 places the petitioner in an impossible position." Petitioner
18 argues that the Tax Assessor assesses petitioner's property as
19 developmental property, and the Board of Equalization upholds
20 this decision. The planning department, on the other hand,
21 denies building permits, and is upheld by the Board of
22 Commissioners. Petitioner argues this procedure "is a form of
23 county land confiscation that can be used on political
24 adversaries to suppress their views."

25 The county responds simply that denial of a building permit
26 is a land use decision reviewable by the Land Use Board of

1 Appeals, and decisions of the Tax Assessor and the Board of
2 Equalization are not reviewable by LUBA.

3 We understand the petitioner to be arguing that he is taxed
4 as though he were able to develop the property on one hand,
5 while being prohibited from developing the property on the
6 other. We can sympathize with petitioner's view, but if the
7 property is zoned for exclusive farm use, petitioner does have
8 the option of placing the property in a farm assessment. See
9 ORS 308.345 to 308.395. The petitioner is not required to
10 suffer a large tax burden because his property is agricultural
11 land within the meaning of Goal 3.¹²

12 Assignment of Error No. 6.

13 The petitioner alleges he has not been "awarded
14 compensation for time, cost, and loss associated with the
15 planning process." Petitioner argues that Tillamook County is
16 taking rights from petitioner, "downzoning" his property and
17 offering no compensation.

18 Respondent argues the petitioner is obliged to comply with
19 all land use laws which affect every private landowner in
20 Tillamook County and the state. Respondent argues that
21 downzoning is not an issue in this case, except insofar as
22 petitioner may consider it downzoning to zone his 140 acre farm
23 as agricultural land. Respondent argues there is no obligation
24 for respondent to compensate petitioner in the manner requested.

25 We agree with the county. Petitioner is not deprived of a
26 use of his property, and no compensation is necessary for

1 owners of land subjected to the rigors of Goal 3.¹³ See
2 generally 40 Op Atty Gen 194 (No. 7836, January 4, 1980).

3 Assignment of Error No. 7.

4 Petitioner here argues he has been denied the separation of
5 the executive, legislative and judicial branches of government
6 in the planning process of Tillamook County in that planners
7 write zoning descriptions, resolutions, and ordinances and then
8 submit them to the county commissioners who pass on them.
9 Petitioner says the planners then rule on these individual
10 cases and that go to the commissioners "and then rule as the
11 planners requested." Petitioner complains that the
12 commissioners then discourage landowners from discussing land
13 problems and legislation with the commissioners because "they
14 may later rule on their properties."

15 The county responds by saying there is no response to this
16 assignment of error other than to agree that the procedure
17 described "is partially correct." The county argues that it is
18 necessary for the commissioners to try to avoid "ex parte"
19 contacts with landowners who are appealing adverse decisions.
20 Respondent says the landowners are, however, allowed to testify
21 at public hearings, as did petitioner. The county denies the
22 Board of Commissioners automatically rules as the planners
23 request.

24 Counties are political subdivisions of the State of Oregon,
25 and are acting according to state direction when they pass
26 ordinances and implement them. ORS Chapter 197 and ORS Chapter

1 215 very clearly give local governments the power and the duty
2 to enact land use ordinances and to conduct contested case
3 proceedings under those ordinances. There is no
4 unconstitutional merging of the powers of government in this
5 delegation. The final decision as to what an ordinance
6 provision means or how it affects the petitioner is still a
7 matter for the courts, and nothing in Oregon's land use laws or
8 Tillamook County ordinances abridges petitioner's access to the
9 courts and to judicial review. See Meyer v. Lord, 37 Or App
10 59, 586 P2d 367 (1978); 8 McQuillin, Municipal Corporations,
11 Sec 25.05, 25.47 (3d ed 1976); Village of Euclid, Ohio v.
12 Ambler Realty Co., 272 US 365; 71 L Ed 303, 47 S Ct 114 (1926).

13 Assignment of Error No. 8.

14 Petitioner's eighth assignment of error alleges he is
15 denied use of his property. Petitioner's argument is that the
16 planners and commissioners pass laws and regulations with no
17 checks and balancing "to the amount of regulations they
18 impose." Petitioner complains he is prohibited from discussing
19 the matter with the commissioners, and the appeals process
20 takes so long that a new set of regulations is in effect when
21 the appeal is over. "The net effect is no development and a
22 declining economy."

23 The county responds that the petitioner has not lost use of
24 his property, as he may use it as a farm or divide it into
25 20-acre farm units.¹⁴ The county states that the petitioner
26 is incorrect in his charge that the county passes laws and

1 regulations which hinder petitioner's property. The county
2 points instead at "state law" which requires the county to
3 apply statewide goals and guidelines to land use decisions.
4 The county says that the petitioner has been dealing with the
5 same set of regulations throughout this planning process.

6 The county is correct that the petitioner may use his
7 property as a farm and has, therefore, not been denied use of
8 his property as alleged. We can understand the petitioner's
9 frustration at not being able to obtain the zoning and
10 consideration he believes is appropriate for his property. We
11 recognize that it is difficult for the county commissioners to
12 on the one hand be required to apply statewide land use
13 planning laws and, during a contested case proceeding, be
14 prohibited from exercising their role as representatives of the
15 citizens in the county and informally and personally explain
16 what is going on to constituents. However, requirements for
17 application of land use planning rules are clearly established,
18 as are requirements for a fair and impartial tribunal. See
19 Fasano v. Bd. of Co. Comm., 264 Or 574, 507 P2d 23 (1973).

20 While we can sympathize with the petitioner, we can not agree
21 that he is persecuted or badly treated.

22 The decision of Tillamook County Board of Commissioners
23 denying petitioner's request for a building permit is affirmed.

24 Affirmed.

2 The term "conflict of interest" has a specific meaning in
3 Oregon Law:

4 "(4) 'Potential conflict of interest' means any
5 transaction where a person acting in a capacity as a
6 public official takes any action or makes any decision
7 or recommendation, the effect of which would be to the
8 private pecuniary benefit or detriment of the person
9 or a member of the person's household, unless the
10 pecuniary benefit or detriment arises out of the
11 following:

12 "(a) An interest or membership in a particular
13 business, industry, occupation or other class required
14 by law as a prerequisite to the holding by the person
15 of the office or position.

16 "(b) Any action in the person's official
17 capacity which would affect to the same degree a class
18 consisting of all inhabitants of the state, or a
19 smaller class consisting of an industry, occupation or
20 other group including one of which or in which the
21 person, or a member of the person's household or
22 business with which he is associated, is a member or
23 is engaged. The commission may by rule limit the
24 minimum size of or otherwise establish criteria for or
25 identify the smaller classes that qualify under this
26 exception." ORS 244.020(4).

27 The remedy for the existence of a conflict under this law
28 is with the Oregon Ethics Commission.

29 The other "conflict of interest" law is about planning
30 commission members only and does not apply to the facts of this
31 case.

32 "Planning commission member conflict of interest
33 activities. A member of a planning commission shall
34 not participate in any commission proceeding or action
35 in which any of the following has a direct or
36 substantial financial interest: The member or his
37 spouse, brother, sister, child, parent, father-in-law,
38 mother-in-law, partner, any business in which he is
39 then serving or has served within the previous two
40 years, or any business with which he is negotiating
41 for or has an arrangement or understanding concerning
42 prospective partnership or employment. Any actual or
43 potential interest shall be disclosed at the meeting
44 of the commission where the action is being taken."
45 ORS 215.035.

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9
Petitioner's assignment of error discusses the conduct of county staff members, not state statute or ordinance changes. See ORS 215.253.

10
Sections 9-13, Chapter 884, Oregon Laws 1981 excepts a "lot of record" from certain restrictions on single family dwellings. The terms of the law do not apply to this case because among other reasons, the law only exempts parcels created after December 31, 1964 and before January 1, 1975.

11
We do not have jurisdiction to consider allegations of misconduct made against county officials.

12
We understand petitioner appealed the tax assessment to the county Board of Equalization. If dissatisfied with the Board's decision, petitioner can appeal to the Oregon Tax Court. See ORS 305.405 - 305.1575.

13
If petitioner is seeking a claim of inverse condemnation, a proceeding in circuit court is required, not an appeal to the Land Use Board of Appeals.

14
We express no opinion as to whether a 20-acre lot size is appropriate under Statewide Goal 3.

FOOTNOTE

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The county requires that a single-family residential dwelling in the SFW-20 zone meet the criteria in ORS 215.213(3).

2

We express no opinion on the county's above recited justification for an exception to Goal 3.

3

Petitioner does not challenge the applicability of Statewide Goal 3 or the county's reliance on Goal 3.

4

We do not understand petitioner to be claiming the land is "committed" to nonagricultural uses. See 1000 Friends of Oregon v. Douglas County, 4 Or LUBA 24 (1981).

5

The petitioner attaches maps to his petition that purport to show partitionings in the vicinity of petitioner's property. The county objects to consideration of the maps as they were not part of the county's record below. We agree with the county and decline to consider the maps.

6

There is a requirement that county governing bodies adopt, by ordinance or order, procedures governing the conduct of hearings in land use matters. ORS 215.412. However, the mere existence of this duty does not invalidate actions taken without rules being in place. Were we to hold otherwise, the absence of rules, whether to the injury of a party or not, would result in all land use decisions being voidable.

7

We do not believe it is necessary or appropriate for the county to adopt rules controlling who or what entities have how much influence. The "order" or "ordinance" required by 215.412 is to control the manner of conduct of hearings only.