

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

SEP. 3 9 47 AM '82

OF THE STATE OF OREGON

3	JACK AND PAT NIEMI,)	
)	LUBA NO. 82-021
4	Petitioners,)	
)	
5	v.)	FINAL OPINION
)	AND ORDER
6	CLATSOP COUNTY and)	
	JOSEPH DEMARSH,)	
7)	
	Respondents.)	

8 Appeal from Clatsop County.

9 Jack and Pat Niemi, Warrenton, filed a petition for review
10 and argued the cause on their own behalf.

11 Robert J. Gunn, Salem, filed a brief and argued the cause
12 for Respondent DeMarsh.

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

14 Remanded. 9/03/82

15 You are entitled to judicial review of this Order.
16 Judicial review is governed by the provisions of Oregon Laws
17 1979, ch 772, sec 6(a).
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1 Bagg, Referee.

2 NATURE OF PROCEEDING

3 Petitioners are contesting the February 10, 1982 resolution
4 and order of Clatsop County approving Respondent DeMarsh's
5 partitioning of his property into three parcels, two of which
6 are five acres and the remainder of which is 20 plus acres.

7 STANDING

8 Petitioners claim standing on the ground that they are
9 owners of property bordering the applicant's property, and they
10 participated in the proceedings below by filing an appeal with
11 the Board of Commissioners contesting the planning commission's
12 approval of the major partition. Petitioners further allege
13 that they will be adversely affected by the partition because
14 homes built on the subject property may block petitioners'
15 visual access to the lake and interfere with petitioners'
16 enjoyment of their surroundings. Petitioners also allege that
17 the roads in the area will not support additional development
18 without major improvements, and that additional homes will
19 affect petitioners farm operation "by harrassment of animals,
20 etc."

21 Respondents contest petitioners' standing by claiming
22 petitioners will not be adversely affected by the
23 partitioning. Respondent explained this assertion further at
24 oral argument to be a claim that a review of the merits of the
25 decision will show that petitioners will not be adversely
26 affected. Respondents do not challenge petitioners' assertion

1 that petitioners appeared in the proceedings below.

2 To establish standing the petitioners must meet the
3 following test:

4 "(3) Any person who has filed a notice of intent
5 to appeal as provided in subsection (4) of this
6 section may petition the board for review of a
quasi-judicial land use decision if the person:

7 "(a) Appeared before the city, county or special
8 district governing body or state agency orally or in
9 writing; and

10 "(b) Was a person entitled as of right to notice
11 and hearing prior to the decision to be reviewed or
12 was a person whose interests are adversely affected or
13 who was aggrieved by the decision." Oregon Laws 1979,
14 ch 772, sec 4(3)(a)(b), as amended by Oregon laws
15 1981, ch 748. (Emphasis added).

16 In their statement of standing, petitioners allege they filed
17 an appeal of the planning commission approval to the Board of
18 County Commissioners. Petitioners appeared before the Board of
19 Commissioners to prosecute their appeal. As petitioners below,
20 they were "entitled as of right to notice and hearing prior to
21 the decision to be reviewed." Lemmon v. Clemens, ___ Or
22 App _____ (Slip Opinion June 9, 1982). Consequently, the
23 provisions of 3(a) and (b) have been met, and petitioners do
24 not need to prove adverse affect. Petitioners have standing to
25 bring this appeal.

26 FACTS

The subject property consists of some 39 acres located in
the "Clatsop Plains" area of Clatsop County, Oregon. It is a
rural area east of Neacoxie Lake (Sunset Lake) and west of

//

1 Highway 101. The soils in the vicinity of the subject parcel
2 are predominantly SCS Class VII and VIII, with the subject
3 property containing predominantly Class VI soil. Part of the
4 applicants' property (approximately 10 acres) is under the
5 water of Neacoxie Lake.

6 The Clatsop County Comprehensive Plan has not been
7 acknowledged by LCDC. The plan designates the subject property
8 as rural residential. The property has not been included in
9 the Clatsop Plains inventory of agricultural lands. The area
10 surrounding the subject property consists of varying size
11 parcels, some of 1, 2, 3, 5 and 7 acres and one lot as large as
12 65 acres. Petitioners' parcel is about 7 acres in size. The
13 lake next to the subject property is used by some migrating
14 fowl, but the record does not show the area to have been
15 designated as a preserve or other such wildlife habitat.

16 DECISION

17 First Assignment of Error

18 Petitioners allege the county's order violates Statewide
19 Goal 3 because the order "approves non-farm residential use of
20 agricultural land without a proper exception or proper
21 application of ORS 215.213(3)."¹ Petitioners argue no
22 exception was taken to Statewide Goal 3 even though one should
23 have been. Petitioners here admit that the subject land is not
24 Class I-IV soils, but they say that it "has been used for farm
25 use for many years" and is in an area surrounded by land which
26 is being and has been used for farm use. Petitioners point out

1 that all the land in the surrounding area, and the subject
2 parcel, have received farm deferral treatment for tax purposes.

3 Respondent argues Goal 3 is not applicable, citing
4 Jurgenson v. Union County, 42 Or App 505 (1979) and Harrell v.
5 Baker County, 5 Or LUBA 192 (1982). In Jurgenson the court
6 stated:

7 "In order to satisfy Goal 3, an owner seeking to
8 partition land has the burden of proving: (1) the
9 predominant soil classes on the property are other
10 than agricultural land within the Goal 3 definition,
11 see Meyer v. Lord, 37 Or App 59, 586 P2d 367 (1978),
12 rev den 286 Or 303 (1979); or (2) the lot sizes
13 created by the partition will be sufficient for the
14 continuation of the existing agricultural enterprise
15 in the area; or (3) the factors set out in ORS
16 215.213, and incorporated by reference into Goal 3,
17 relevant to permitting non-farm uses--usually meaning
18 residential use--on agricultural land are met, see
19 Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331
20 (1977), rev den 281 Or 431 (1978)."

21 Respondent takes the position that no matter which of the
22 alternatives set out by the Jurgenson court is relied upon, the
23 county has shown Goal 3 is not applicable. In support of this
24 assertion, respondent points to the soil classification of the
25 property and to the county's findings. The county's findings
26 on this issue are as follows:

27 "2. Zoning for the area in question is
28 residential agricultural one-acre minimum lot size.

29 "* * *

30 "4. Soils on the parcel in question are
31 predominately Class VI.

32 "5. The protein content of the grass in the
33 Clatsop Plains area is of significant nutrient value
34 for only two to three months out of the year.

1 "6. There has been no significant agricultural
2 activity at or near the parcel in question."

3 Respondent says the fact that tax deferral has been granted for
4 the parcel or surrounding parcels is not conclusive or
5 persuasive to demonstrate that the land is agricultural land.

6 We believe the county has adequately demonstrated that the
7 property does not fall into the first of the three part
8 definition of agricultural land found in Goal 3.² However,
9 the county's findings do not adequately address the second and
10 third parts of the definition. The county has not addressed
11 whether the property is suitable for farm use notwithstanding
12 the poor SCS soils classification or "necessary" in order to
13 "permit farm practices to be undertaken on adjacent or nearby
14 lands." Finding No. 5 quoted above might arguably support a
15 determination that the property is not "suitable for farm use"
16 notwithstanding the soil classification, but the finding fails
17 to explain how it is that the poor nutrient value of the soil
18 adversely affects farm use. That is, it may be that
19 agricultural activities in the area do not require high protein
20 content grass. The finding is not self-explanatory, and there
21 are no other findings to explain the significance of grass
22 protein content. We believe the finding is particularly
23 deficient when considered along with evidence in the record,
24 albeit given by petitioners, that the property in question has
25 been used and is used for agricultural purposes. Given this
26 evidence, and we can find no facts in the record to contradict

1 this evidence of agricultural use, the county was under an
2 obligation to address the suitability of the property for farm
3 use and whether or not the property was "necessary" to "permit
4 farm practices to be undertaken on adjacent or nearby lands."

5 Finding No. 6, that "there has been no significant
6 agricultural activity at or near the parcel in question," is
7 entirely without support in the record. As mentioned above,
8 the evidence in the record, though given by the petitioners,
9 shows that there has been agricultural activity on the parcel
10 and in the area and the record reveals no facts contracting
11 this fact. The finding is, therefore, not supported by
12 substantial evidence in the record and can not be used to
13 support the proposition that the land is not suitable for farm
14 use or otherwise necessary to permit farm practices on nearby
15 lands. In sum, the record and the findings do not adequately
16 address the three-part definition of agricultural land found in
17 Goal 3.

18 The first assignment of error is sustained.

19 Second Assignment of Error

20 Petitioners' second assignment of error alleges the county
21 violated "Land Use Planning Goal 2 because respondent failed to
22 amend its comprehensive plan to incorporate its findings and
23 decisions to take an exception to Goal 3."

24 The second assignment of error alleges a violation of Goal
25 2 because the respondent failed to take exception to Goal 3.
26 We do not know whether in fact the land is subject to Goal 3

1 because the county's findings do not sufficiently address Goal
2 3. Therefore, we can not rule on this particular assignment of
3 error. We note, however, that where land is subject to Goal 3
4 and is to be put to other than agricultural use, an exception
5 is necessary.

6 Third Assignment of Error

7 Petitioner's third assignment of error asserts a violation
8 of Goal 5, Open Spaces, Scenic and Historic Areas and Natural
9 Resources, "because respondent did not show that the wild fowl
10 would not be adversely affected."

11 In this assignment of error petitioners claim Statewide
12 Goal 5 was violated because there was no showing that
13 "wildfowl" would not be adversely affected. Specifically
14 petitioners claim:

15 "Respondents February 10, 1982 order violates
16 Open Spaces, Scenic & Historic Area and Natural
17 Resources Goal (Goal 5) because respondent did not
18 show that development would not have adverse affects
19 on ducks, geese, swans that use the lake and
20 surrounding fields in their migration. Goal 5
21 requires the county to determine whether the homes
22 would conflict with wildfowl on the lake. If so, the
23 county must develope [sic] a program to protect the
24 Wildfowl. Failure to do so violates Goal 5."

25 In pertinent part, Statewide Goal 5 states:

26 "5. OPEN SPACES, SCENIC AND HISTORIC AREAS, AND
27 NATURAL RESOURCES

28 "GOAL: To conserve open space and protect natural and
29 scenic resources.

30 "Programs shall be provided that will: (1)
31 insure open space, (2) protect scenic and historic
32 areas and natural resources for future generations,
33 and (3) promote healthy and visually attractive

1 environments in harmony with the natural landscape
2 character. The location, quality and quantity of the
3 following resources shall be inventoried:

4 * * *

5 "d. Fish and Wildlife areas and habitats.

6 * * *

7 "Where no conflicting uses for such resources
8 have been identified, such resources shall be managed
9 so as to preserve their original character. Where
10 conflicting uses have been identified the economic,
11 social, environmental and energy consequences of the
12 conflicting uses shall be determined and programs
13 developed to achieve the goal."

14 The implementation guidelines in the goal include a
15 provision that "fish and wildlife areas and habitats should be
16 protected and managed in accordance with the Oregon Wildlife
17 Commission's Fish and Wildlife Management plans."

18 The county's findings clearly indicate it was aware of the
19 wildlife in the area. The findings also address petitioners'
20 concerns about the "wildfowl" that use the lake. The county
21 concluded no conflicting uses were being permitted in approving
22 the partitioning. Specifically, the county found:

23 "8. Sunset lake is used by migrating birds and
24 the surrounding lands are inhabited by some small
25 mammals.

26 "9. Sunset Lake is ringed by a shorelands
27 overlay which prohibits development within 75 feet of
28 the line of non-aquatic vegetation.

29 "10. The vast majority of wildlife in this area
30 are located on the lake or within the overlay area.

31 / / /

32 / /

1 "11. The parcel in question is adjacent to the
2 eastern shoreline of Sunset Lake. The western one
3 third of the parcel is located in the shorelands
4 overlay area. Development on the parcel in question
5 can occur only on the eastern two thirds of the parcel.

6 "12. No evidence was presented at the Planning
7 Commission hearing sufficient to support a finding
8 that residential development of the parcel in question
9 would adversely impact upon [sic] wildlife on the
10 parcel or upon wildlife using the lake and overlay
11 habitat, or upon riparian vegetation."

12 Finally, the county concluded:

13 "The proposed partition will not adversely affect the
14 use of that parcel nor the surrounding area by
15 wildlife and will not adversely affect riparian
16 vegetation."

17 We believe these findings are sufficient to answer
18 petitioners' concerns about wildlife. We do not find the
19 record to contain any information that contradicts the county's
20 findings. We understand the findings to show that the wildlife
21 existing in the area will not be impacted by the partitioning
22 because of the location of the proposed development. In other
23 words, there is no "conflicting use" as the term is used in
24 Goal 5 that requires further county inquiry and action. The
25 above quoted findings are sufficient to show that no violation
26 of Goal 5 will occur as alleged by petitioners.

27 Fourth Assignment of Error

28 Petitioners allege the county's order violates "the Coastal
29 Shoreland Goal (Goal 17) because the property is a part of the
30 Coastal Shorelands around the lake and the partition would
31 divide part of the Coastal Shorelands." Petitioners claim that
32 section 3(f) of the Comprehensive Plan Requirement portion of

1 Goal 17 has been violated. In pertinent part Statewide Goal 17
2 states

3 "17. COASTAL SHORELAND

4 "GOAL

5 "OVERALL STATEMENT

6 "To conserve, protect, where appropriate develop and
7 where appropriate restore the resources and benefits
8 of all coastal shorelands, * * *

9 "To reduce the hazard to human life and property,
10 and the adverse effects upon water quality and fish
11 and wildlife habitat, resulting from the use and
12 enjoyment of Oregon's coastal shorelands.

13 "Programs to achieve these objectives shall be
14 developed by local, state, and federal agencies having
15 jurisdiction over coastal shorelands.

16 * * *

17 "COMPREHENSIVE PLAN REQUIREMENTS

18 "Based upon inventories, comprehensive plans for
19 coastal areas adjacent to the ocean, estuaries and
20 coastal lakes shall:

21 "(1) identify coastal shorelands;

22 "(2) establish policies and uses of coastal shorelands
23 in accordance with standards set forth below.

24 * * *

25 "Coastal Shoreland Uses

26 "(1) Major marshes, significant wildlife habitat,
27 coastal headlands, exceptional aesthetic
28 resources, and historic and archaeological sites
29 shall be protected. Uses in these areas shall be
30 consistent with protection of natural values.
31 Such uses may include propagation and selective
32 harvesting of forest products consistent with the
33 Oregon Forest Practices Act, grazing, harvesting
34 wild crops, and low intensity water-dependent
35 recreation.

36 * * *

1 "(3) Shorelands in rural areas other than those
2 designated in (1) above shall be used as
3 appropriate for:

4 "* * *

5 "(f) subdivisions, major and minor partitions and
6 other uses only upon a finding by the governing
7 body of the county that such uses satisfy a need
8 which cannot be accommodated at other upland
9 locations or in urban or urbanizable areas and
10 are compatible with the objectives of this goal
11 to protect riparian vegetation and wildlife
12 habitat; and

13 "(g) a single family residence on existing lots,
14 parcels or units of land when compatible with the
15 objectives and implementation standards of this
16 goal." (Emphasis added)

17 The goal defines coastal shorelands for the purpose of
18 establishing comprehensive plans as:

19 "All lands within an area defined by a line measured
20 horizontally:

21 "a) 1000 feet from the shoreline of estuaries; and

22 "b) 500 feet from the shoreline of coastal lakes."

23 *The goal identifies the above area as a "planning area ...
24 for inventory, study and initial planning for development and
25 use to meet the Coastal Shorelands Goal."

26 The Commission's adoption of the Coastal Goals in 1976
27 added the following qualifiers:

28 "During the interim period to the final identification
29 by a city or county governing body of the coastal
30 shorelands within its jurisdiction, only land within
31 200 feet measured horizontally from the shoreline, or,
32 where there are tidal marshes, then 200 feet from the
33 inland extent of tidal marshes, shall be presumed to
34 constitute shorelands subject to the provisions of the

1 Coastal Shorelands Goal."

2 "This provision shall be deemed to be a part of the
3 Coastal Shorelands Goal and to apply to all planning
4 activities affecting land uses within a city or county
5 until such time as the city or county governing body
6 has identified and approved the areas constituting
7 coastal shorelands within its jurisdiction."*

8 Respondents argue that Goal 17 has been complied with as is
9 evidenced by the county's findings establishing that a need for
10 the parcels exists. (Referring to Section 3(f) above.)

11 Respondents also point out that any development which may
12 eventually occur requires DEQ sewage disposal approval and must
13 be located on the eastern portion of the parcels, away from the
14 lake. The county's findings about Goal 17 are as follows:

15 "9. Sunset Lake is ringed by a shorelands
16 overlay which prohibits development within 75 feet of
17 the line of non-aquatic vegetation.

18 "10. The vast majority of wildlife in this area
19 are located on the lake or within the overlay area.

20 "11. The parcel in question is adjacent to the
21 eastern shoreline of Sunset Lake. The western one
22 third of the parcel is located in the shorelands
23 overlay area. Development on the parcel in question
24 can occur only on the eastern two thirds of the parcel.

25 "12. No evidence was presented at the Planning
26 Commission hearing sufficient to support a finding
that residential development of the parcel in question
would adversely impact upon [sic] wildlife on the
parcel or upon wildlife using the lake and overlay
habitat, or upon riparian vegetation.

"13. Goal 17 allows partitioning of shorelands in
rural areas upon a finding that such use would satisfy
a need which cannot be accommodated at other upland
locations or in urbanizable areas.

"14. The projected new housing need for the
Clatsop Plains area over the next two decades is
approximately 900 units, or 45 units per year.

1 "15. Parcel creation through partitioning has
2 averaged close to 45 per year and has not exceeded 45
3 per year.

4 "16. There exists a need for partitioning of
5 parcels in the Clatsop Plains area to accommodate the
6 projected new housing need for that area, and the
7 Board being fully advised in the premises,"

8 The county then concludes:

9 "There is a need for housing in the Clatsop Plains
10 area and said partitioning is a valid means of meeting
11 that housing need."

12 We find that the county's findings fail to adequately show
13 a need to develop this particular property. There is no
14 inventory of upland locations, and no apparent inventory of
15 housing needs sufficient to support the county's conclusion
16 that there is a need to develop the property within the
17 shorelands. There may indeed be a general need within the
18 county for additional residential properties. Goal 17
19 requires, however, a finding that the partition "satisfy a need
20 which can not be accommodated at other upland locations." The
21 county does not explain how it is that any such need can not be
22 accommodated at other upland locations.

23 *Additionally, the county seems to rely on a 75-foot line
24 from the shore of the lake as a means of complying with the
25 coastal shoreland goal's prohibition against development within
26 the shorelands. The shorelands in this case, however, is
defined by a 200-foot line, not a 75 foot line, until such time
as the county makes a final determination of its coastal
shorelands based on the seven identification factors in Goal

1 17. The county needs to explain its choice of the 75 feet and,
2 indeed, whether or not the partitioning or other development
3 will occur within the 200-foot line that temporarily defines
4 the coastal shorelands in this area.*

5 Assignment of error no. 4 is sustained.

6 The decision of Clatsop County is remanded.
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20 NOTE: LCDC issued a determination, in accordance with their
21 August 19, 1982 commission meeting, revising certain portions
22 of LUBA's opinion. The revisions are on pages 13-15 and are
23 set off by asterisks (*).

1 COX, Referee, Dissenting.

2 I dissent. The majority relies on the amorphous term of
3 "need" as a basis for saying Goal 17 has not been properly
4 applied. Continued use of the term as a basis for deciding
5 land use cases is unwarranted. See SunRay Dairy v. OLCC, 16 Or
6 App 63, 517 P2d 289 (1973); DLCD v. Tillamook County, 3 Or LUBA
7 138, 144 (1981) (Cox, Concurring Opinion).

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FOOTNOTES

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Goal 3 states:

4 "Agricultural lands shall be preserved and
5 maintained for farm use, consistent with existing and
6 future needs for agricultural products, forest and
7 open space. These lands shall be inventoried and
8 preserved by adopting exclusive farm use zones
9 pursuant to ORS Chapter 215. Such minimum lot sizes
10 as are utilized for any farm use zones shall be
11 appropriate for the continuation of the existing
12 commercial agricultural enterprise with the area.
13 Conversion of rural agricultural land to urbanizable
14 land shall be based upon consideration of the
15 following factors: (1) environmental, energy, social
16 and economic consequences; (2) demonstrated need
17 consistent with LCDC goals; (3) unavailability of an
18 alternative suitable location for the requested use;
19 (4) compatibility of the proposed use with related
20 agricultural land; and (5) the retention of Class I,
21 II, III and IV soils in farm use. A governing body
22 proposing to convert rural agricultural land to
23 urbanizable land shall follow the procedures and
24 requirements set forth in the Land Use Planning goal
25 (Goal 2) for goal exceptions."
26

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Goal 3's definition of Agricultural Land states:

18 "In western Oregon is land of predominantly Class I,
19 II, III and IV soils and in eastern Oregon is land of
20 predominantly Class I, II, III, IV, V and VI soils as
21 identified in the Soil Capability Classification
22 System of the United States Soil Conservation Service,
23 and other lands which are suitable for farm use taking
24 into consideration soil fertility, suitability for
25 grazing, climatic conditions, existing and future
26 availability of water for farm irrigation purposes,
existing land use patterns, technological and energy
inputs required, or accepted farming practices. Lands
in other classes which are necessary to permit farm
practices to be undertaken on adjacent or nearby
lands, shall be included as agricultural land in any
event.

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

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