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

Nov 23 11 49 AM '82

CAL KRAHMER and BART KAMNA,)
)
 Petitioners,)
)
 v.)
)
 WASHINGTON COUNTY,)
)
 Respondent.)

LUBA NO. 82-057

FINAL OPINION
AND ORDER

Appeal from Washington County.

Robert Stacey, Jr., Portland, filed a brief and argued the cause for Petitioners.

Gregory Hathaway, Hillsboro, and David G. Frost, Hillsboro filed a joint brief and argued the cause for Respondent Washington County and Participant Kamna, respectively.

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

Remanded . 11/23/82

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).

1 BAGG, Referee.

2 NATURE OF THE DECISION

3 Petitioners appeal approval of a minor partition of a
4 123.36 acres into two parcels of 38 and 85.36 acres. The
5 Washington County Board of Commissioners approved the minor
6 land partition on May 18, 1982.

7 FACTS.

8 In December of 1981, Washington County's planning director
9 denied the initial application for this partition. The
10 partition application had been submitted to implement a divorce
11 decree dividing property between Linda and Barton Kamna. The
12 parcel is zoned for exclusive farm use (EFU-38) and consists
13 primarily of Class I and II soils. There is an escarpment that
14 divides the parcel, with land to the northeast of the
15 escarpment bordered in part by the Tualatin River and within
16 the 100 year floodplain. Land to the southwest of the
17 escarpment is slightly higher in elevation. The northerly
18 parcel would contain about 70 acres of bottom land and 10 acres
19 of top land, and the southerly parcel would have 32 acres of
20 top land and only 2 acres of bottom land.

21 The planning director's decision was appealed to the
22 Washington County hearings officer in January, 1982. The
23 record before the hearings officer included an inventory
24 submitted by the applicant of all land uses in a six square
25 mile area. The inventory showed some 2,735 acres of 3,300
26 acres as tillable, with 99.5 percent of the tillable land in

1 active farm use. The median farm unit size was found to be 15
2 to 18 acres (excluding lots of less than 2 acres) or 30 acres
3 (excluding lots of less than 5 acres). All operations larger
4 than 1500 acres were excluded from the inventory. The average
5 farm unit size was found to be 120.6 acres. See Washington
6 County Planning Department Report, Record 293. There is
7 evidence in the record to suggest that strawberry operations
8 are part of larger farm management units. The record includes
9 evidence showing that in 1979, 59 percent of the farms in
10 Washington County were of less than 50 acres in size.
11 Approximately half of the property owners are part-time
12 farmers, and the other half are full-time farmers. There are
13 nine farmers within the six square mile area who rent but do
14 not own land within the survey area.

15 The hearings officer found the smaller parcel was suitable
16 for strawberry farming, as the average size of strawberry
17 operations in Washington County is 25 to 30 acres. The
18 hearings officer also found that strawberries could be grown
19 only for five years on a particular parcel before crop rotation
20 is necessary to prevent disease. Crop rotation would have to
21 occur on the 38 acre parcel, if planted in strawberries.

22 The hearings officer's denial of the major partition
23 request was appealed to the Board of County Commissioners. The
24 commissioners granted the partitioning request, but attached
25 four conditions:

26 (1) That the present drainage course running through the

1 property should be placed in a drainage easement;

2 (2) The 38 acre tract be combined with the tax lot
3 presently owned by Mrs. Kamna (approximately 2 acres);

4 (3) There would be no additional division of the
5 properties of either tax lot;

6 (4) No additional residence be allowed on either tax lot.

7 Included in the county's findings, is a finding that the 38
8 acre parcel has been leased to the "Unger Brothers" for ten
9 years of "intensive farming." Also, the county found that the
10 partition would produce more economical and efficient
11 utilization of the land. The county said the 85 acre parcel is
12 consistent with grain farming, and the 38 acre parcel is
13 consistent with intensive farming. The county apparently
14 relied on the six square mile study area submitted by the
15 applicant for those findings. The county did not explain its
16 reliance on this choice of "area," however. The county found
17 that two sets of farm equipment were necessary to farm the land
18 as one unit, and a greater potential existed for combining
19 either of the two units with similar adjacent parcels than if
20 the parcel is left as one unit. The county found the 85-acre
21 lot to be "identical" to the property to the north, and the
22 38-acre lot is "identical" to property to the south.

23 The county found leased income of the property as one unit
24 was \$7,000 to \$7,500 per year. The county found the average
25 net income of the property as one unit is \$3,000 a year. The
26 county estimated that leasing the parcels for farm use, as two

1 separate units, would be \$3,500 per year for the 85 acre parcel
2 and \$3,750 for the 38 acre parcel.

3 FIRST ASSIGNMENT OF ERROR

4 The first assignment of error states:

5 "Washington County violated Goal 3 by approving
6 parcels not appropriate for the continuation of the
7 existing commercial agricultural enterprise within the
8 area."

9 Petitioners' first assignment of error is broken into two
10 parts: In the first, petitioners claim that the parcels
11 resulting from the partition are too small to constitute
12 commercial farms; and in the second, petitioners argue that the
13 38 acre parcel is not an "intensive commercial farm."

14 Petitioners' argue that the commercial agricultural
15 enterprises in the area consist of large diversified farms
16 which may indeed include plots of 30 or more acres devoted to
17 strawberries. Petitioners claim the appropriate standard for
18 partition of agricultural land limits such division to lot
19 sizes that will be equal to sizes of prevailing commercial
20 farms in the area. Petitioners cite Eugene v. Lane County, 1
21 Or LUBA 265 (1980), affirmed sub nom Lane County v. City of
22 Eugene, 65 Or App 26 (1981).

23 The second part of the first assignment of error relies on
24 Stringer v. Polk County, 4 Or LUBA 99 (1981) for the
25 proposition that if a person wishes to establish a "intensive"
26 farm operation, that new operation must be undertaken on tracts
of land large enough to maintain the existing commercial

1 enterprise in the area. If the new enterprise fails for some
2 reason, the land can still be used for more traditional farming
3 purposes. Petitioners assert that the 38 acre parcel to be
4 created here simply is not appropriate to continue the existing
5 commercial agricultural enterprise in the area. The parcel is
6 not large enough to accommodate the kind of diversified farming
7 operations which petitioners assert constitutes the existing
8 commercial agricultural enterprise in the area.

9 Respondents reply that the record shows a large percentage
10 of farm units in the area are of less than the 85 and 38 acre
11 sizes that this case is about. Respondents claim the record
12 shows that 38 acres is sufficient to accommodate necessary crop
13 rotation. Respondents specifically deny the proposition that
14 the standard for division of agricultural land requires that
15 divisions not result in parcels any smaller than existing
16 farms. Respondents say this land division will contribute "in
17 a substantial way" to the area's agricultural economy, citing
18 Kenagy v. Benton County, ____ Or LUBA ____ (LUBA No. 82-019,
19 1982).

20 We agree with respondents that the standard for division of
21 agricultural land is not that the resulting parcels must be as
22 large as existing "farms" within the area. In Kenagy, we
23 specifically rejected the proposition that partitionings are
24 permissible only so long as they create lots as large as
25 existing commercial farm operations in the area. We stated
26 that the standard is that the lots must be appropriate for the

1 continuation of the existing commercial agricultural enterprise
2 in the area. Also, we agree that this Board and LCDC should
3 not consider matters of farm and crop management beyond
4 whatever minimal inquiry is necessary to show that the lot
5 division will meet the Goal 3 commercial agricultural
6 enterprise standard. Matters of farm management are up to the
7 farmer and not this Board, provided it can be shown the parcels
8 will contribute in a substantial way to the area's economy.
9 See Kenagy, supra.

10 We must agree with the petitioners, however, that the
11 county "violated Goal 3 by approving parcels not appropriate
12 for the continuation of the existing commercial agricultural
13 enterprise in the area." The county's choice of the six square
14 mile area and its inventory limitation of parcels under 1500
15 acres in size results in a study that does not show the
16 "commercial agricultural enterprise" of the area sufficiently
17 for us to review the lot division. In the LCDC Policy Paper
18 entitled "Common Questions About Goal 3 - Agricultural Lands:
19 Minimum Lot Sizes in EFU zones," the commission stated:

20 "Once the types of commercial agricultural in the area
21 are identified, one can determine the lot size(s)
22 needed to maintain it (sic). The appropriate size
23 should be determined based on type of crops grown,
24 yields, acres in production, existing processing and
marketing practices, type of farms (i.e. practices and
crops) and most important, the amount and type of land
needed, in various parts of the county, to constitute
a commercial farm unit.

25 "The type and quantity of crops produced and how
26 they are marketed are the key factors in determining
appropriate lot sizes. Owner characteristics, such as

1 percent of income from farming and primary occupation,
2 do not necessarily define a commercial farmer or a
3 commercial farm unit. Commercial agricultural in
4 Oregon is supported, in part, by less than full-time
5 farmers."

6 Also included in the policy paper is a definition of
7 "commercial agricultural operation." Such an operation is one
8 that will

9 "(1) contribute in a substantial way to the area's
10 existing agricultural economy; and

11 "(2) help maintain agricultural processors and
12 established farm markets.

13 "Therefore, when determining whether a farm is part of
14 the commercial agricultural enterprise, one should
15 consider not only what is produced, but how much and
16 how it is marketed. These are important factors
17 because of the intent of Goal 3 to maintain the
18 agricultural economy of the state."

19 In this case, as in Kenagy, the county limited the "area"
20 to a particular geographical area. The choice of area did not,
21 apparently, result from an analysis of crops, yields, acres in
22 production or marketing, but simply was a line drawn on a map.
23 We do not understand from the county's findings whether the
24 geographical area was chosen because of peculiar geographical
25 features or distinguishing farming practices, and we are
26 therefore unable to determine whether the area is
27 representative of the agricultural economy of the county or
28 not. Without a sufficient explanation of this area, our review
29 of the county's analysis of the commercial agricultural
30 potential of the two newly created lots is impossible. As
31 stated in Kenagy

1 "It is our view that the county was required to
2 determine what current agricultural operations make up
3 the agricultural enterprise of the county. From that
4 inquiry, the county must determine what size parcel is
5 necessary to constitute a 'commercial agricultural
6 operation.' Once those two decisions are made, the
7 county may then determine what agricultural activities
8 are suitable on the subject property. The next step,
9 as we understand commission policy, is to determine
10 whether or not given the agricultural activities which
11 are suitable, the particular land division proposed
12 will result in parcels large enough to maintain the
13 county's commercial agricultural enterprise. Sane
14 Orderly Development v. Douglas County, supra. The
15 immediate 'area' around the subject parcel may be
16 important because of limitations on the kind of
17 agricultural operations that may take place, ownership
18 and leasehold patterns, climate and any number of
19 other factors that may bear upon what crops may be
20 grown and what size parcel is needed to grow the crops
21 on a commercial scale. However, we think as a general
22 rule, the county must determine what the commercial
23 agricultural enterprise is within its county as a
24 first step."

14 Because the county's analysis of the agricultural
15 enterprise within the area was incomplete, we must remand this
16 case for future proceedings.

17 Assignment of error no. 1 is sustained insofar as it
18 alleges that the county violated Goal 3 by approving parcels
19 not shown to be appropriate for the continuation of existing
20 commercial agricultural enterprise within the area.

21 SECOND ASSIGNMENT OF ERROR

22 The second assignment of error states:

23 "The County Commissioners adopted findings not
24 supported by substantial evidence."

25 Petitioners present four findings which they claim are not
26 supported by substantial evidence.

1 "- Finding 25's assertion that 'two sets of farm
2 equipment are necessary to farm the land as one
3 unit';

4 "- Finding 26, that the 'partition will produce more
5 economical and efficient utilization of the land
6 and help the two separate units to have a more
7 reasonable chance of financial success';

8 "- Finding 27, that the partition 'would
9 geographically separate two different types of
10 farm units in a more appropriate manner', and

11 "- Finding 43, that the proposed parcels 'are large
12 enough to utilize crop rotation and
13 diversification."

14 Petitioners state that "[r]eliance by the county on these
15 findings warrants reversal."

16 Respondents state as to Finding 25 that there is testimony
17 in the record showing two separate irrigation systems are
18 necessary to serve the top and bottom land. We agree that such
19 testimony was made, and apparently there was no counter
20 testimony to refute it. See Record 224 and 281.

21 As to Finding 26, we believe the finding is a conclusion
22 and not a finding of fact. The conclusion that the partition
23 will produce some more economical use of the land, if wrong,
24 would not warrant reversal in any event. Whether or not a more
25 economical and efficient use of the land will result does not
26 mean that the property will or will not contribute in a
27 substantial way to the existing commercial agricultural
28 enterprise of the area.

29 As to Finding 3, respondents state the evidence shows that
30 the original creation of the parcel was a mistake. Apparently,

1 respondents are referring to the varying characteristics of the
2 land as mismatched by the original lot line selection. We are
3 not sure what the finding means, but again it appears to be a
4 kind of value judgment which, even if mistaken, does not
5 warrant reversal. The Goal 3 standard is whether or not the
6 division will result in parcels large enough to maintain the
7 existing commercial agricultural enterprise in the area, not
8 whether a particular division repairs some poor lot line
9 arrangement made in the early 1900s.

10 As to Finding 43, respondents cite to the record at pages
11 83-86 and 224-226. These portions of the record contain
12 testimony discussing the various kinds of crops that might be
13 grown on the parcels. We believe the testimony is adequate to
14 show that the parcels are usable for different kinds of crops.
15 Whether all the uses would be highly profitable is not an issue
16 that we believe we are empowered to review. The information is
17 adequate to support the county's conclusion that the existing
18 agricultural enterprise in the area will be maintained and the
19 crops and leasing available will contribute in a substantial
20 way to the area's farm economy.

21 The decision of the Washington County Board of
22 Commissioners is remanded for proceedings not inconsistent with
23 this opinion.

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