BEFORE THE LAND USE BOARD OF APPEALS JUL 30 3 54 PM '80

OF THE STATE OF OREGON

DARYL L. SOLE AND WILLIAM PHILLIPS, PETITIONERS, vs. LANE COUNTY, RESPONDENT.	LUBA NO. 80-023
	FINAL OPINION AND ORDER

Appeal from Lane County.

David Moule, Eugene, filed a petition for review, and Jon Wu argued the cause for Petitioners Sole and Phillips.

William A. Van Vactor, Eugene, filed a brief and argued the cause for Respondent Lane County.

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

Affirmed. 7/30/80

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).

parcels comprising approximately thirteen acres immediately adjacent to the Veneta city limits.

The planning commission voted to deny the request for two reasons: 1) that the applicant had failed to address "public need," and had failed to indicate that public need would best be served by the rezoning of this particular area over others; and 2) that the property was in close proximity to Veneta and may interfere with the future orderly development of that community.

Petitioners appealed the planning commission denial to the Board of County Commissioners. Petitioners contended that even though vast amounts of land existed within the city of Veneta there was a public need for two acre lots because the city had largely banned partitioning within the city limits with the result that these vast amounts of land were not available for development. Petitioners further stated that there was a public need for the two acre lots because "the average American today is unable to purchase substantial acreage upon which to build."

Petitioners testified that their property contained timber until 1976 when the timber was logged off. Petitioners further testified that the property was not suitable for grazing, there were some 100 homes sites nearby under five acres in size and that the property was not suitable for timber raising. Petitioners also stated that the zoning request complied with the comprehensive plan.

The "findings" section of the order states the property has produced marketable timber in the past and that some adjacent properties remain in forest use at the present time. The findings recite that there is no pattern of small lots immediately adjacent to the property which would make the property precommitted to nonforest uses. An exception to the forest goal was not found to be warranted because there was no evidence on why the uses allowed by the rezoning should be provided, why the property in question would be the most suitable location for such uses or what the long term effects of the rezoning would be. The findings recite that there is not sufficient market demand for two acre properties to constitute public need, if in fact market demand is the equivalent of public need. Additionally, the findings recite that the city has adequate land within its city limits (which also constitute its urban growth boundary) available for partitioning. A note at the end of the findings states that since Neuberger v. City of Portland, supra, had been decided subsequent to the public hearing on the rezoning request and prior to the county's issuance of a final order, and because public need was therefore questionably a proper basis for denying a zone change, the county commissioners placed primary reliance for the denial on the fact that the request was in violation of goal 4.

OPINION ON THE MERITS

Goal 4 (Forest Lands) states as its purpose "To conserve forest lands for forest uses." The goal provides that:

not be applied by a city or county once its plan becomes acknowledged by LCDC as in compliance with the goals. The lone exception to this rule is stated in ORS 197.275(2)(a) and (b).[1]

However, prior to acknowledgement of a city or county's comprehensive plan, a city must comply with specific provisions of applicable statewide goals. As the Supreme Court stated in Neuberger v. City of Portland, supra;

> "In addition to these general consideration in the zoning enabling statutes, the statewide planning goals promulgated by the Land Conservation and Development Commission stated policies which the city was required, to the extent they were relevant, to apply. ORS 197.225; Sunnyside Neighborhood v. Clackamas Co. Comm., supra 280 280 Or at 16-18. cf., ORS 197.275(2).[5]*** (footnote omitted) 288 Or 155 at 165.
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> "***Under the present legislative scheme, each local government must adopt a comprehensive plan which is in compliance with the LCDC goals, and adopt zoning and other ordinances to implement it. Once the plan and its implementing ordinances have been adopted and have been acknowledged by LCDC to be in compliance with the goals, zoning amendments and other land use decisions will be governed by criteria in the plan and related ordinances or, in cases in which those criteria do not apply, by the goals themselves. ORS 197.275(2).***" 277 Or at 170.

Respondent advised the Board during oral argument that the Long Tom Fern Ridge subarea comprehensive plan had not been acknowedged by LCDC as in conformance with the goals. Thus, the goals were relevant to this zone change request to the extent they were applicable.

Goal 4's reference to non-forest uses being allowed provided they conform to the comprehensive plan, while perhaps ambiguous

under the goal, and is, therefore, some evidence that the property's potential for forest use has declined since 1976 when a commercial timber crop was harvested.

But the question here is whether petitioners proved as a matter of law that the land was not suitable for forest uses and were, therefore, entitled as a matter of right to a determination from the county that the land was not subject to Goal 4. See Jurgenson v. Union County Ct., 42 Or App 505, 600 P2d 1242 (1979). The fact that there was evidence in the record that the property's potential for forest uses may have declined does not mean the property is as a matter of law not suitable for forest uses. Many other uses besides the production of commercial timber are set forth as "forest uses" in Goal 4. See also LCDC Policy Paper "Forest Lands Goal," July 12, 1979. The first use listed in the goal - "the production of trees and the processing of forest products" - is broad enough to include many uses of which commercial timber production is but one. Another appropriate use is the growing and harvesting of Christmas trees. Yet, petitioners introduced no substantial evidence that the property was not suitable for growing and harvesting Christmas trees or any of the other forest uses listed in the goal. Cf. Hillcrest Vineyards vs. Bd. of Comm. of Douglas Co., 45 Or App 285, ___ P2d ___ (1980).

The petitioners' property consists of class II soil and has a history of being capable of growing trees.[2] The county was justified in initially concluding that the property was suitable

FOOTNOTES

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"(2) After the commission acknowledges a city or county comprehensive plan and implementing ordinances to be in compliance with the goals pursuant to ORS chapter 197 and any subsequent amendments to the goals, the goals shall apply to land conservation and development actions and annexations only through the acknowledged comprehensive plan and implementing ordinances unless:

"(a) The acknowledged comprehensive plan and implementing ordinances do not control the action or annexation under consideration; or

"(b) Substantial changes in conditions have occurred which render the comprehensive plan and implementing ordinances inapplicable to the action or annexation." ORS 197.275 (2)(a) and (b).

2

Because the property was agricultural land within the meaning of Goal 3, the fact that the property was suitable for forest uses does not eliminate the necessity to consider Goal 3 in addition to Goal 4. See 1000 Friends v. Douglas Co., LUBA No. 79-006 (1980).

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In view of our conclusion, we need not address the question of whether the holding in Neuberger v. City of Portland, supra, that public need is not an independent criteria for zone changes should be applied retroactively.