BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARGE TABER, Petitioner, vs. MULTNOMAH COUNTY, Respondent.	LUBA NO. 80-042 FINAL OPINION AND ORDER

Appeal from Multnomah County.

Randall L. Dunn, Portland, filed the petition and argued the cause for Petitioner Taber.

Laurence Kressel, Portland, filed a brief and argued the cause for Respondent Multnomah County. With him on the brief was John B. Leahy, County Counsel for Multnomah County.

REYNOLDS, Chief Referee, COX, Referee, BAGG, Referee; participated in the decision.

REVERSED and REMANDED. 8/25/80

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).

REYNOLDS, Chief Referee

NATURE OF THE DECISION

Petitioner appeals Multnomah County's granting of a Lot of Exception for a .68 acre parcel located on Sauvie's Island in an exclusive farm use zone with a 38 acre minimum lot size (EFU-38). Petitioner complains that the county erred in rejecting a proposed condition to the order which would have, essentially, prohibited the conveyance of the .68 acre parcel except in conjunction with acreage sufficient to meet the 38 acre minimum lot requirement within the zone.

STATEMENT OF FACTS

The applicants, Mr. and Mrs. Dennis Grande, own in partnership with other members of their family 145.60 acres on Sauvie's Island in Multnomah County. The property is actively being farmed and is in an area zoned EFU-38 (exclusive farm use, 38 acre minimum lot size). The property consists of two parcels, one of which is 144.92 acres, the other of which is .68 acres in size. The two parcels adjoin one another and under Multnomah County's ordinance which aggregates adjoining lots in common ownership, are treated as one lot of record.

The property was purchased by the partnership with the assistance of a loan from the Federal Land Bank, which holds a first mortgage upon the entire farm property. The Grande's desire to construct a house on the .68 acre parcel to serve as their primary residence while engaging in farming activities on the 144.97 acre parcel. They want to build their house with

state GI financing, but the state will not accept anything other than a first lien on the property upon which the house would be constructed.

At least two options were available to the Grandes in order to enable the state to obtain first priority on their mortgage. One option was to divide the entire farm into three parcels of 38 acres in size or larger and construct the residence on one of these parcels. This would, according to the Grandes, have required an agreement from the Federal Land Bank to release the parcel upon which the house was to be erected for mortgage purposes as well as dissolution of the partnership.

Another option involved requesting Multnomah County to recognize this parcel as a separate lot so that a house could be erected and then obtaining a release from the Federal Land Bank of the old .68 acre lot. This required the Grandes to obtain a "Lot of Exception" pursuant to sec. 3.104.1 of Multnomah County Ordinance No. 100 inasmuch as the lot created would be smaller than the 38 acre minimum lot required in the EFU-38 zone.[1]

The latter option was the course which the Grandes chose to follow. It was probably a logical choice since the .68 acre parcel used to be the location of and still contained the foundation for the old farm residence. The farm residence had actually been removed to another portion of the property by the Grandes and refurbished as living quarters for the farm help.

The request was heard and denied by the Multnomah County hearings officer. It appears that the basis for his denial was his conclusion that if the .68 acre parcel were recognized as a separate zoning lot it could be sold independent of agricultural land with which it had been historically associated and, thus, would no longer serve as the primary residence for the 144 plus acres in agricultural production.

The applicants appealed the hearings officer's decision to the Multnomah County Board of Commissioners. The findings of fact adopted by the county in support of approval of the request and reversal of the hearings officer in many respects mirrored those of the hearings officer. However, the county made some additional findings having not so much to do with land use as with the fairness of the request. For example, the county found that if the .68 parcel had not been put in the partnership's name when the parcel was purchased but had been put solely in the applicant's name, the applicants would have been able to build a farm residence on the property without a Lot of Exception.[3] The county also found that when the county planning staff advised the applicant the old farm house could be replaced with another house mortgaged under the GI loan program the staff did not realize that to obtain the mortgage the applicant would have to use the land on which the house would sit, (i.e. the .68 acre parcel) as security, and that to use the lot as security would require that the lot be separated from the remainder of the farm.[4]

Multnomah County's order granting the Lot of Exception found that each one of the criteria contained in subsection 3.104.1 of Ordinance No. 100 had been met. The county concluded that the request would have no adverse effect on the character and stability of the overall land use pattern of the surrounding area because the proposed lot of exception had historically been used as the farm residence and there were other small lots in the area developed for residential purposes. The county concluded that the .68 acre parcel was generally unsuitable for farming purposes due to its small size, its separation from the remainder of the farming unit and the expense associated with the removal of the old foundation and several trees located on the lot. The county concluded that because the lot would be developed with a residence for the operator of the adjoining 144.92 acre property, it would "be comparable to surrounding farming operations."[5] With respect to consistency of the request with the purposes described in the EFU zoning ordinance, the county found that

> "This proposal is consistent with the purpose of the EFU-38 District of preserving agricultural lands for farm use purposes. By allowing a residence on a portion of the property which has never been utilized for agricultural purposes, preservation of the remainder of the site will be insured."

This conclusion was based, at least in large part, upon the county's finding that:

> "The EFU-38 Zoning District establishes use restrictions and development requirements intended to insure the continuation of commercial agriculture. The house proposed to be constructed would aid the

> purpose of overseeing the farming operation on the entire lot of record and provide the owner an on-site residence from which to manage the property. The main purpose of the Lot of Exception is to allow the applicant to obtain low cost financing for the construction of his primary residence. This will help reduce the expenses of the overall farm operation."

The county also determined in its order that granting the proposed lot of exception as compared to other means available to the applicants by which they could construct a residence to be used in conjunction with their farming activities would "preserve agricultural land in a way that most meets the needs of the agricultural producer."

OPINION

Petitioner sets forth two assignments of error. The first assignment alleges that Multnomah county failed to comply with LCDC Goal 3 (Agricultural Lands) in approving the Lot of Exception. The second assignment of error alleges that the Grandes failed to comply with the Lot of Exception requirements in Multnomah County's Zoning Ordinance No. 100 in that there is nothing which requires a transferee of the .68 acre parcel to use the parcel in conjunction with farm use on the adjoining 144.92 acre parcel or a smaller parcel which meets the 38 acre minimum lot size requirement. In addition under this assignment of error, petitioner alleges that no evidence was presented to establish that a subsurface sewage disposal unit could be placed upon the Lot of Exception in compliance with existing regulations and the criteria of subsection 3.104.1(e).

Divisions of agricultural land within the meaning of Goal 3 prior to acknowledgment of a governing body's comprehensive plan and implementing ordinances must comply with Goal 3. Jurgenson v. Union County Court, 42 Or App 505, ___ P2d ___ (1979). In order to comply with Goal 3, one of three decisions must be made and supported by substantial evidence in the record: (1) The division is appropriate for continuation of commercial agricultural enterprises in the area; (2) The division conforms to the requirements of ORS 215.213(3) for creation of non-farm dwellings; or (3) An exception to Goal 3 is justified. Jurgenson, supra; Goal 3.

In the present case, Multnomah County applied its own ordinance, subsection 3.104.1 of Ordinance No. 100, in approving the partitioning and did not apply Goal 3. This ordinance, however, is in all material respects similar to ORS 215.213(3).[6] Thus, if complied with, compliance with Goal 3 would also be achieved. Jurgenson, supra. Because the applicants in this case fully intended to use the .68 acre parcel as their primary residence while engaging in farming activities on the adjoining property, the county treated the request for a "Lot of Exception" or a conditional use not as one for a non-farm dwelling but as one for a dwelling in conjunction with farm use. The findings of the county make it clear that the basis for approving the request was that creation of the parcel would actually promote commercial farming of the adjoining 144 plus acre parcel. The county

concluded that the proposal would be compatible with adjacent farming activities and would be consistent with the purposes contained in the EFU-38 zone because the house would service the residence "for the operator of the adjoining 144.92 acre property" and because:

> "The house proposed to be constructed would aid the purpose of overseeing the farming operation on the entire lot of record and provide the owner an on-site residence from which to manage the property. The main purpose of the Lot of Exception is to allow the applicant to obtain low cost financing for the construction of his primary residence. This will help reduce the expenses of the overall farm operation, thereby insuring its commercial viability."

No one in this case has argued that the .68 acre parcel is, by itself, suitable for farm use let alone commercial farm use. While creation of the parcel may be appropriate for continuation of the commercial agricultural enterprise within the area if used as the site for the primary residence of those engaging in farming activities on the adjoining parcel, there is no assurance that the parcel will in the future be used for this purpose. We do not mean here to imply that the applicants in this case acted in anything but good faith in representing their full intent to use the parcel as a farm residence. However, conditions very well could change in the near future which would make the sale of the parcel to a non-farmer irresistible or even mandatory. The legislature and LCDC have stated the most effective means of guarding against such an occurrence is to not allow the parcel to be created in the first place unless it is determined that such action poses no

threat to adjacent agricultural lands if the parcel is put to a non-farm use (ORS 215.213(3)), or if there exists a compelling need to create the parcel and no reasonable alternatives exist (Goal 2, Part II, Exceptions).

In the present case, the county did not insure that the .68 acre parcel would not some day be used for purposes wholly unrelated to or inappropriate for continuation of commercial agricultural enterprises in the area.[7] Nor has the county justified creation of the parcel under ORS 215.213(3) because its analysis of the impact which the parcel would have on adjoining agricultural lands does not consider the possibility that the property will be used for non-farm purposes. If a parcel is not determined to be appropriate for continuation of the commercial agricultural enterprises in the area, it must be viewed as a non-farm parcel. The decision whether to allow it must then be made pursuant to ORS 215.213(3) regardless of what the owner in fact intends or states his intent to be with respect to use of the property.

Finally, no attempt was made by the county in this case to take an exception to Goal 3 in creating the .68 acre parcel. While an exception to the comprehensive plan may not have been necessary in this case because the property may be committed to non-agricultural uses by reason of previous development of the property (see LCDC Policy Paper "Common Questions Concerning the Exceptions Process as it Relates to Land Use Decisions Prior to an Acknowledged Comprehensive Plan", May 3, 1979), the

county made no finding in this regard and we are unwilling to make such a finding based upon the evidence in this record. See Rivergate Residents Association v. LCDC, 38 Or App 149, 590 P2d 1233 (1979). Even if such a finding were made, however, we believe a finding would still have to be made based upon evidence in the record that the allowed non-farm use of the property would be compatible with other adjacent farm uses. See Goal 2, Part II, Exceptions.

For the foregoing reasons, the county allowed creation of the parcel in violation of Goal 3. We similarly conclude that the county failed to comply with subsections 3.104.1(a) and (c) of Ordinance No. 100, which require a finding that the proposed division would:

> "Substantially maintain or support the character and stability of the overall land use pattern of the area;"
>
> and
>
> "be compatible with accepted farming practices on adjacent lands."

The county's analysis of the impact on the area was limited to the effect the parcel would have if used as a farm parcel. Inasmuch as no consideration was given to the effect of the parcel on farming in the area if the parcel were used as a non-farm parcel, a clearly permitted and foreseeable use of the property, the county failed to adequately address the standards contained in Section 3.104.1.

The decision of Multnomah County creating a Lot of

Exception is reversed and remanded for additional proceedings consistent with this opinion.[8]

FOOTNOTES

[1] Subsection 3.104.1 of Ordinance No. 100 allowed creation of lots less than 38 acres as required by the EFU .38 zone when the proposed division would:

> "a. substantially maintain or support the character and stability of the overall land use pattern of the area;
>
> "b. be situated upon land generally unsuitable for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation and location or size of the tract;
>
> "c. be compatible with accepted farming practices on adjacent lands;
>
> "d. be consistent with the purposes described in section 3.01;
>
> "e. satisfy the applicable standards of water supply, sewage disposal, and minimum access; and
>
> "f. not require public services beyond those existing or programmed for the area."

[2] The Grandes relocated the old farm residence upon advice from the Multhnomah County Planning Department that a new home could be built at the same location. What the planning department was not aware of at the time, however, was the existence of a mortgage on the entire property and the need for the mortgagee of the new residence to have a first lien on the property.

[3] This notion is in error in view of ORS 215.130(6). A non-conforming use, such as a house on a .68 acre parcel in a 38 acre minimum zone, can only be restored or replaced if the house is destroyed due to fire, other casualty or natural disaster.

[4] This finding is also not entirely accurate. Petitioners have pointed out that creation of a separate lot may not be required in order for the Grandes to obtain financing to build their house. ORS 215.263 permits financial institutions to take and record a security interest in a parcel of land for the

purpose of financing, without creating a separate zoning lot. If foreclosure becomes necessary, then the parcel used for security may be divided from the larger parcel and sold free of zoning law restrictions.

[5] The order's use of the phrase "comparable to" instead of "compatible with" appears to be a typographical error. Because the standard in subsection 3.104.1(C) of Ordinance No. 100 uses the term "compatible with" we treat this conclusion of the county as meaning "compatible with" instead of "comparable to."

[6]

> "(3) Single-family residential dwellings, not provided in conjunction with farm use, may be established, subject to approval of the governing body or its designate in any area zoned for exclusive farm use upon a finding that each such proposed dwelling:
>
> "(a) Is compatible with farm uses described in subsection (2) of ORS 215.203 and is consistent with the intent and purposes set forth in ORS 215.243; and
>
> "(b) Does not interfere seriously with accepted farming practices, as defined in paragraph (c) of subsection (2) of ORS 215.203, on adjacent lands devoted to farm use; and
>
> "(c) Does not materially alter the stability of the overall land use pattern of the area; and
>
> "(d) Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soild or land conditions, drainage and flooding, vegetation, location and size of the tract; and
>
> "(e) Complies with such other conditions as the governing body or its designate considers necessary. ORS 215.213(3)

[7] Petitioner proposed a condition to approval of the .68 acre parcel which would have required that the property could not be sold except in connection with the sale of adjoining property sufficient to meet the minimum lot size within the zone. The condition, if adopted, would have been recorded in the deed records of the county. The county rejected the proposed condition without a statement of reasons as to why. The minutes simply reflect that the Grandes rejected the proposed condition.

If valid, such a condition may very well be sufficient under Goal 3 to insure that the parcel so created would be appropriate for continuation of the commercial agricultural enterprise of the area, especially given the facts in this particular case.

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8 In view of our conclusions stated above, it is not necessary to reach the second half of petitioner's second assignment of error concerning subsurface sewage disposal.