BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

EARL J. VAN VOLKINBURG and CORA M. CANNON, Petitioners, v. MARION COUNTY BOARD OF COMMISSIONERS, Respondents.	LUBA No. 80-009 FINAL OPINION AND ORDER

Appeal from Marion County.

Earl J. Van Volkinburg, Salem, and Cora M. Cannon, Salem, filed the Petition for Review and argued the cause on their own behalf.

Diane Spies, Portland, and Douglas Fowler, Portland, filed the brief. Douglas Fowler argued the cause for Respondent Marion County.

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

REMANDED 12/18/80

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.

STATEMENT OF FACTS

Petitioners appeal Marion County's grant of conceptual approval for a rural subdivision entitled Country View Estates. Marion County's action would provide for the creation of 11 parcels out of a 235 acre parcel located generally south of the City of Salem and outside the city's urban growth boundary. One of the 11 parcels, referred to as the farm lot, would be 97.2 acres in size. The remaining 10 parcels would consist of 4 parcels each approximately 20 acres in size and 6 smaller parcels averaging approximately 10 acres in size.

The request for a conceptual approval first came before the planning commission. The planning commission, following numerous hearings, recommended approval and forwarded its report on to the board of commissioners. The board of commissioners adopted the findings, conclusions and conditions contained in the planning commission recommendation and affirmed the planning commission's action.

The report of the planning commission contains three main sections: Report of Facts, Conclusions, and Recommendation Subject to Conditions. The Report of Facts section states that the State Forestry Department opined that the "tracts of the size proposed could constitute viable commercial timber management units considering the location, soils and timber sites suitability classification for the property. These tracts could also qualifiy for the Oregon Small Timber Tract

Taxation Program."[1]

In the Conclusion section of the report the planning commission states:

> "Based on the opinion of the State Forestry Department, the creation of the proposed small agricultural/timber tracts is in keeping with the requirements of the SA (Special Agriculture) designation and the Statewide Planning Goals. The SA designation provides the opportunity for a property to be used to its best advantage where the physical characteristics of the land vary and the capabilities of the land are not uniform. The proposed subdivision takes advantage of this flexibility by providing a limited number of small acreage homesites on the poor soils and rough terrain, preserving the traditional agricultural potential on the large portion of the property that is suitable for farming and encouraging a specialized form of agricultural resource management on those areas of the property that are not suited to farming techniques but whose resource potential is too great to justify a commitment to development."

The Conclusion section goes on to state that

> "The areas of the proposed development to be included as timber management tracts cannot be considered suitable for traditional farming methods due to their terrain and existing vegetation. Furthermore, most of the properties in the vicinity are too small to attract large scale, full time commercial timber operations. The division of the few larger parcels in the area into tracts small enough to be managed by an individual family working on a part-time basis, yet large enough to produce a commercially viable crop, allows for the optimum agriculture resource use of the available land. The intent of Goal No. 3 is to reserve lands for commercial agricultural purposes and timber production is recognized as a viable agricultural use. The creation of commercially viable, small timber tract parcels from areas of this property that have not previously been actively used for agricultural purposes conforms to the intent of Goal No. 3."

The final section of the Conclusion section states that the soils in the area around the farm house, which is located on

the proposed 97 acre farm lot, consist nearly exclusively of Class III soils. The west side of the property in the area of two of the proposed timber tracts is entirely Class III and IV soils. Finally, the Recommendation section refers to the northwest corner of the property where the 6 acreage homesites are proposed to be located and refers to this area as consisting of Class VI soils.

ASSIGNMENTS OF ERROR

Petitioners set forth 9 assignments of error. The first 3 assignments of error assert that the county failed to properly apply statewide planning Goal 3. In their fourth assignment of error petitioners contend the county failed to establish a definition of economic viability of forest parcels and failed to document economic viability of the forestry parcels for which conceptual approval was granted. The fifth assignment of error asserts a failure to obtain a third opinion prior to settling a dispute as to the soil classification of the property, in violation of a Marion County ordinance. In their sixth assignment of error petitioners allege a failure on the part of the planning commission to provide petitioners with notice of a public hearing held October 16, 1979, to the injury of petitioners. The seventh assignment of error asserts an erroneous designation in the title of the appeal of the planning commission's recommendation to the Marion County Board of Commissioners. The eighth assignment of error asserts a violation of Goal 7 (Natural Hazards), in that the county

failed to make any findings with respect to the geologic stability of the property. Finally, petitioners' ninth assignment of error asserts that the county violated its own comprehensive plan by granting conceptual approval to this subdivision without detailed geologic data.

OPINION

1. Soil Analysis.

We can only conclude from a review of the planning commission's report which the county adopted as its findings and conclusions that the county found the entire 235 acre parcel to be Class IV or better soils with the exception of the 60 or so acres in the northwest corner which the county found to be Class VI soils. Petitioners alleged the county erred because it failed to follow a county mandated procedure in arriving at this finding. Petitioners contend the SCS soil classification indicated that the entire 235 acre parcel was 99% Class IV or better soil. While the applicant introduced more detailed soil data indicating that only 70% was Class IV or better, the county could not rely upon this more detailed data without verifying that data through the Soil Conservation Service or an independent soils expert, according to petitioners.

Marion County Ordinance 137-140 provides, in pertinent part:

> "All agricultural soil determination shall be based on classifications shown as soil survey of Marion County area, September, 1972, unless the applicant provides a detailed soils evaluation by qualified soil scientists using the classification

system established by the Soil Conservation Service. A detailed soils evaluation that is significantly different from the Soil Conservation Service designation shall be verified by the Soil Conservation Service or an independent qualified soil scientist." (emphasis added)

We conclude that the evaluation performed by the applicant's expert and upon which the county apparently relied, is, in the absence of an explanation by the county in its findings to the contrary, "significantly different" from the SCS classification. The entire northwest corner of the 235 acre parcel was apparently determined by the applicant's expert to be Class VI soil, whereas the SCS classification appears to have designated this area as virtually all Class IV or better. This is a significant difference. The county was required to verify the analysis of the applicant's expert. The county failed to do so, in violation of its own ordinance.

2. Goal 3.

Even if, however, the county had properly determined that the northwest corner was Class VI soil, the county was still required to apply Goal 3 to the entire 235 acre parcel before approving its division.

In Meyer v. Lord, 37 OR Ap 59, 586 P2d 367 (1978), the Court of Appeals upheld LCDC's determination that a 70 acre parcel, which was adjacent to and held in common ownership with the remainder of a 250 acre farm and which was used in the commerical operation of the farm, should not be considered as if it were an isolated tract for purposes of determining soil

classification. For purposes of determining soil classifications, the court agreed with LCDC that the farm as a whole should be considered.

Respondent seeks to distinguish the present case from Meyer v. Lord, supra, on the basis that "the approved subdivision would not disrupt any existing farming operation" and that "the 70 acre parcel that was the subject of Meyer v. Lord, consisted of 55% soils in Class I through IV, while the homesites under current consideration are located on Class VI soils." Taking the latter point first, the Court of Appeals analysis, as well as that of LCDC, was premised upon the assumption that Jackson County had properly concluded that the soil capability of the 70 acre parcel was other than Class I through IV. With respect to respondent's attempt to distinguish this case on the basis that the 6 homesite lots would not disrupt any existing farming operations, the county made no findings addressing this issue. In any event, whether the approved lot divisions would disrupt any existing operations on the remainder of the parcel is only relevant in determining whether the lot division should be allowed under ORS 215.213(3) and is not relevant for purposes of determining whether the 60 acre parcel needs to be considered with the remainder of the 235 acre parcel for purposes of determining the soil classification of the property.[2] See also: 1000 Friends of Oregon v Douglas County, 1 Or LUBA ___ (1980).

Marion County appears to have concluded that Goal 3 did not

have to be applied with respect to the 6 homesite lots in the northwest corner of the 235 acre parcel because the soil in this area was Class VI. Whether or not the soil in this area was Class VI, the county was required to apply Goal 3 because the predominant soil classification for the entire 235 acre parcel was Class IV or better.

It appears from the planning commission's report that the county attempted to comply with Goal 3 in determining whether to allow division of the remainder of the 235 acre parcel into a farm lot of 97 acres and 4 timber tracts of approximately 20 acres each. The report seems to indicate that the 20 acre parcels comply with Goal 3 because they are an appropriate size for small, commercial timber operations which are consistent with the uses permitted in an exclusive farm use zone. Moreover, the county concluded that these areas "cannot be considered suitable for traditional farming methods due to their terrain and existing vegetation."

In 1000 Friends of Oregon v. Douglas County, supra, we held that land which is classified as agricultural land on the basis of soil type and which is also suitable for forest uses must be preserved and protected for both agricultural and forest uses. We quoted from the LCDC policy paper entitled "Agricultural/Forestry Goals Interrelationship" and stated:

> "In viewing this interrelationship paper as a statement of policy rather than specific guidelines or regulation, it indicates an intention by LCDC to leave lands which fall into the overlapping category in a condition where one use of the lands does not preclude

an alternative use of the lands. More specifically under the proper zoning section, as above quoted, it is important to look at that portion of the policy paper which states:

> 'Overlapping lands without a clear distinction or suitability for either agricultural or forest uses should allow for the uses identified in Goals 3 and 4. (emphasis added).'
>
> "There was no showing by the applicants nor was there a finding by Respondent Douglas County that the proposed 40 acre lots would allow for the continuation of agricultural activity on the lands. The interrelationship paper stresses flexibility in order to conserve the resource lands for the future, flexibility which would be distroyed if the only future use that could be made of this property was that of small woodlands. As an overlapping land, both agricultural and forestry uses must be protected.***" 1000 Friends of Oregon v. Douglas County, supra, Slip Op at 10.

While timber management may be a permitted use within an EFU zone, (See Goal 3, Guideline B. 4; ORS 215.203(2)(a); 215.213(1)(c)), timber management does not thereby constitute a "commercial agricultural enterprise" which can be used for purposes of determining appropriate lot sizes on agricultural land. The county gave no consideration to whether the proposed 20 acre lot sizes would be appropriate for continuing the commercial agricultural enterprises in the area, inasmuch as the county failed to address what, if any, commercial agricultural enterprise existed within the area.

The county concluded in its findings that the timber tracts "cannot be considered suitable for traditional farming methods due to their terrain and existing vegetation." In view of the county's finding that the timber tract parcels consist of Class

III and IV soils, the finding that they are not suitable for traditional farming methods due to terrain and existing vegetation would only be relevant if the county were attempting to comply with ORS 215.213(3). ORS 215.213(3) allows non-farm lot divisions on agricultural land within the meaning of Goal 3 provided the factors set forth in that statutory provision are met. One of the factors is suitability of the land for production of farm crops and livestock considering the terrain, vegetation, etc. To the extent the county's finding may be attempting to address this requirement, it is defective because it merely states a conclusion without any facts to support it. The findings do not recite what the terrain is or what the existing vegetation is that makes the property unsuitable. Moreover, suitability of the property for producing farm crops and livestock is but one of four criteria in ORS 215.213(3) with which the lot division must comply. Other factors which must be considered include (1) whether the lot division would be compatible with farm uses and is consistent with the intent expressed in ORS 215.243 of preserving agricultural land in large blocks; (2) whether the lot division will interfere with accepted farming practices on adjacent land devoted to farm use; and (3) whether the lot division would materially alter the stability of the overall land use pattern of the area. Marion County does not address any of these three criteria in its findings.

In conclusion with respect to the Goal 3 assignments of

error, Marion County erred in isolating the northwest corner of the 235 acre parcel for purposes of determing whether that land was agricultural land within the meaning of Goal 3. With respect to the timber tract parcels, the county failed to determine whether the lots created were appropriate for continuing the commercial agricultural enterprise of the area and failed to properly determine whether the lots so created were unsuitable for agricultural production or met the other requirements of ORS 215.213(3). This failure constitutes a violation of Goal 3. See Jurgenson v. Union County Court, 42 Or App 505, ___ P2d ___ (1979).

3. Goal 7.

There is considerable evidence in the record that the proposed Country View Estates subdivision is in an area of geologic instability. Evidence to this effect was even introduced by the applicant's own experts. Respondent does not dispute the existence of this evidence but merely states the time to consider Goal 7 is when "applications for road and building permits are made." Respondent argues:

> "Because this subdivision does not rezone specific lands or issue building permits, but only shows a boundary within which development may take place, strict compliance with Goal 7 is not required at this time. Tillamook Citizens For Responsible Government v. City of Tillamook, LUBA No. 80-041."

In Tillamook the city addressed as part of its annexation proceeding the question of the hazards to future development caused by flooding. The Goal 7 concern raised by petitioners

in that case was whether the city had, as part of the annexation process, found adequate solutions to the potential flooding problem. The city contended, and we agreed, that certainly not all of the area proposed for annexation was unsafe and unfit for development by reason of flooding. This was sufficient to satisfy Goal 7 at the annexation stage, as a more detailed analysis would be undertaken at the time specific development proposals were made.

We cannot tell in the present case, however, whether the lots granted conceptual approval in Country View Estates subdivision are appropriate for any development because the county did not in its findings address the evidence in the record with respect to geologic instability. It is consistent with our holding in Tillamook to require that at this subdivision stage where the evidence indicates that the property may be geologically unstable that the county address whether the lots in the proposed subdivision may be built upon. Exactly where on each of the lots development may occur is something which probably need not be addressed in most instances at this stage but may properly await the site review or building permit stage. In any event, at a minimum, the county was required to determine whether the geologic instability of the Country View Estates site was such that any development on the lots proposed could be safely allowed.[3] See Norvell v. Portland Area Boundary Commission, 43 Or App 849, ___ P2d ___ (1979).

4. County Comprehensive Plan.

Petitioners argue that the county's conceptual approval of the Country View Estates subdivision violates the Marion County Comprehensive Plan which states:

> "That any case, development in any identified active or inactive landslide area should be reviewed on an individual basis. Special engineering geology studies will be required to determine if the proposed developments can be safely accommodated and, if so, under what conditions." Marion County Comprehensive Plan, page 38.

Petitioners assert that the Country View Estates subdivision site has been identified in the Marion County Comprehensive Plan as within a major active landslide area and, thus, subject to the above comprehensive plan provision. The county argues that the requirement of special engineering geology studies to determine whether the development will be safe only applies at the actual development stage, not at the subdivision approval stage.[4]

While a county's interpretation of its own comprehensive plan is entitled to deference if reasonable, we conclude that the county's interpretation of its plan is not reasonable in light of Goal 7. If the above quoted comprehensive plan provision were construed so as to allow subdivisions of land within active landslide areas without any consideration being given to whether development of the lots within the subdivision would be safe, the provision would violate Goal 7. As discussed in the previous section of this opinion, Goal 7 requires some consideration of the natural hazards associated

with development of a proposed subdivision at the time approval of the subdivision is contemplated by the governing body. Marion County erred in construing its comprehensive plan provision in a way which would result in a violation of Goal 7.

CONCLUSION

For the foregoing reasons, we conclude that in granting conceptual approval to the Country View Estates subdivision, Marion County violated Goals 3 and 7 as well as its own comprehensive plan and zoning ordinance. This matter must be remanded for further proceedings consistent with this opinion.[5]

FOOTNOTES

[1] This reference to the State Forestry Department's opinion is with respect to a previous plan submitted to the county requesting approval of a total of 16 lots. The previous proposal would have created 2 forest tracts of approximately 14 and 15 acres each on the west side of the property and 3 tracts of 10 to 20 acres each on the east side of the property. The remainder of the sites proposed for division, with the exception of the 97 acre farm lot, ranged in size from 2.5 acres to 7.8 acres. The final plan approved by the planning commission appears to have consolidated the 5 timber tracts into 4 and the 10 acreage homesites into 6.

[2] A better argument, perhaps, for distinguishing the present case from Meyer v. Lord, is that in the present case the 60 acre parcel was apparently not being used as part of the overall farming operation existing on the remaining property. In the case of Meyer v. Lord, the 70 acre parcel was part of the farming operation, as it was used 2 months out of the year for grazing cattle. However, we reject even this distinction. An owner of a parcel of property could create this distinction just by determining which portion of his property is other than Class I through IV soil and removing it from the farm operation for a short period of time. The owner could then claim that inasmuch as the parcel was not part of the overall farm operation, it could be considered separately for purposes of soil classification. Thus, where land is in common ownership, for purposes of determining whether the property is predominately Class I through IV soil, all of the land in common ownership should be considered together.

[3] There may be another "hearing" stage in the subdivision approval process in Marion County prior to final plat approval at which the county could also address Goal 7. In such a case the need to address Goal 7 at this stage would not be critical. We assume, however, since it has not been brought to our attention, that no such stage does exist and that "conceptual" appproval is tantamount to preliminary plat approval.

[4] The county does not site us to any other provision in the comprehensive plan which would address Goal 7 concerns at the time of subdivision approval. We assume, therefore, that the above quoted comprehensive plan provision is the only provision which may be applicable.

[5] It is unnecessary to address petitioners remaining assignments of error.