

BEFORE THE LAND USE BOARD OF APPEALS

FEB 4 9 32 AM '81

OF THE STATE OF OREGON

SANE ORDERLY DEVELOPMENT, 1000)
FRIENDS OF OREGON, the assumed)
name of Oregon Land Use)
Project, Inc., an Oregon)
nonprofit corporation, and)
WILLIAM D. STRADER,)

LUBA No. 80-121

Petitioners,)

vs.)

DOUGLAS COUNTY BOARD OF)
COMMISSIONERS,)

Respondent,)

FINAL OPINION
AND ORDER*

and)

THE DOUGLAS COUNTY)
LANDOWNERS ASSOCIATION, et al,)

Intervenors.)

Appeal from Douglas County.

Mark Greenfield, Portland, filed a brief and argued the cause for Petitioners.

Edward J. Sullivan, Portland, filed a brief and argued the cause for Respondent.

Wallace D. Cegavske and Dudley C. Walton, Roseburg, filed and brief and argued the cause for Intervenors.

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

Reversed

2/04/81

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).

*The Land Conservation and Development Commission in its January 30, 1981 Determination approved the decision of the Land Use Board of Appeals concerning the allegations of the Statewide Goal violations in the above captioned proceeding.

1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioners seek review of Douglas County Ordinance No.
4 80-7-2 which amends phase I of the Douglas County Comprehensive
5 Plan, adopts findings, and otherwise ratifies the amended phase
6 I. In part the ordinance reduces the minimum parcel size which
7 will be presumed to be a commercial agricultural entity for
8 grazing and range land from 200 to 150 acres. In addition, the
9 ordinance adopts criteria and procedures governing the
10 identification of commercial farm parcels and the division of
11 cropland and grazing land below the minimum parcel sizes
12 presumed to be commercial agricultural entities. The ordinance
13 adopts a definition of commercial agriculture. Petitioners
14 request that we reverse the decision as it relates to grazing
15 land and rangeland.

16 STANDING

17 Standing of petitioners is not contested. However,
18 petitioners contest the standing of Intervenor Douglas County
19 Landowners Association, the Douglas County Board of Realtors
20 and numerous specifically named individuals. Petitioners argue
21 the organizations and the individuals have not plead enough to
22 show that they will be adversely affected or aggrieved by the
23 outcome of this case.

24 The contested intervenors have answered the motion to deny
25 standing and point out that the ordinance petitioners are
26 attacking is a legislative act which affects every owner of

1 agricultural land in Douglas County. In addition, Respondent
2 Intervenor states that it is a direct "fetter" on the common
3 law right of a private property owner to alienation of his or
4 her land.

5 It is the Board's decision that the individual landowners
6 as they are identified in Respondent Intervenor's brief have
7 stated facts sufficient to establish their standing to appear
8 in this matter. The fact that they own agricultural land in
9 Douglas County and that land is affected by the contested
10 ordinance shows that they are potentially adversely affected or
11 aggrieved by the outcome of the case. As regards the Douglas
12 County Landowners Association inasmuch as it is composed of the
13 individual agricultural landowners, it appears to have
14 representational standing. 1000 Friends v. Douglas County, 1
15 Or LUBA 42 (1980).

16 As regards the Douglas County Board of Realtors, this Board
17 finds that it has alleged no facts which show potential adverse
18 affect or aggrievement by the outcome of this case. Therefore,
19 the Douglas County Board of Realtors standing is hereby denied.

20 FACTS

21 On October 31, 1979, Respondent Douglas County Board of
22 Commissioners signed Ordinance 79-10-6 adopting phase I of the
23 Douglas County Comprehensive Plan. Phase I represented the
24 first of three phases of the county's plan. Phase I contains
25 population, economic, forest and agricultural and rural land
26 elements. The agricultural lands element of phase I

1 established minimum parcel sizes of 50 acres for grain lands,
2 croplands and horticultural areas, and 200 acres for grazing
3 and rangelands. The element provides criteria for land
4 divisions below the specified minimum lot sizes. The element
5 also contains a recommendation that the Board of County
6 Commissioners "create a Land Use Data Base Committee to review
7 minimum lot sizes and alternative land use regulation of
8 agricultural lands."

9 Following the adoption of phase I, the Board appointed a
10 six-person Data Base Committee to deal with the agricultural
11 lands questions. The committee held meetings and received
12 testimony during the period from November, 1979 through
13 February, 1980.

14 On April 3, 1980, the Data Base Committee issued its
15 report. The report contained a definition of "Commercial
16 Agricultural Enterprise" (see footnote 3, infra) and presented
17 facts to "attest to the considerable value of the smaller size
18 farm to the economy of the county" The report
19 concluded that commercial farming in Douglas County is
20 practiced on acreages as small as one acre or less. The report
21 recommended amendments to phase I's policies on minimum lot
22 sizes and agricultural land divisions to guide the division of
23 agricultural land.

24 Following issuance of the report, the county drafted
25 amendments to phase I and held hearings on those amendments.
26 On September 3, 1980, the county adopted Ordinance 80-7-2

1 amending phase I of the comprehensive plan.¹ It is that
2 ordinance which is the subject of this appeal. On September
3 26, 1980, petitioners filed a notice of intent to appeal
4 Ordinance 80-7-2 with this Board.

5 In Ordinance 80-7-2, the county has adopted minimum lot
6 sizes for crop land and rangeland which are presumed to result
7 in commercial agricultural enterprises. Divisions of land in
8 parcels equal to or greater than 50 acres for cropland and 150
9 acres for rangeland are permitted outright by the ordinance.
10 Section 5A of Douglas County's "Land Use Policy Implementation"
11 ordinance states:

12 "5. Revise the zoning Regulations to provide for two
13 Classifications of Exclusive Farm Use (EFU). In
14 order to promote the continuation of commercial
15 agriculture characteristic to Douglas County, the
following shall be the basis for determining
agricultural minimum parcel size:

16 "A. Parcels of 50 acres or greater for
17 agricultural lands, such as grainlands,
18 croplands or horticultural areas, and
19 parcels of 150 acres or greater for grazing
and rangeland designated by the
Comprehensive Plan shall be presumed to be
commercial agricultural entities."

20 DECISION

21 Goal 3 in pertinent part states as follows:

22 "Agriculture lands shall be preserved and maintained
23 for farm use, consistent with existing and future
24 needs for agricultural products, forest and open
25 space. These lands shall be inventoried and preserved
26 by adopting exclusive farm use zones pursuant to ORS
Chapter 215. Such minimum lot sizes as are utilized
for any farm use zones shall be appropriate for the
continuation of the existing commercial agricultural
enterprise with [sic] the area." (Emphasis added).

1 The key question presented by this case is whether
2 Respondent Douglas County used the proper definition of
3 "commercial agriculture enterprise" as that terminology appears
4 in Statewide Goal No. 3. We find that it did not. The effect
5 of this improper definition is to render the work of Douglas
6 County's Data Base Committee incomplete. We first address the
7 definition and then the Data Base Committee's work.

8 "Commercial Agricultural Enterprise"

9 LCDC in its policy paper entitled "Common Questions about
10 Goal #3--Agricultural Lands: Minimum Lot Sizes in EFU Zones"
11 has indicated that a commercial agricultural operation is one
12 which will:

- 13 "1. Contribute in a substantial way to the area's
14 existing agricultural economy; and
15 "2. Help maintain agricultural processors and
16 established farm markets."

16 The LCDC then goes on to state:

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

21 "The commercial agricultural enterprise is specified
22 in goal 3 because of its economic importance as
23 Oregon's second largest industry. The commercial
24 agricultural enterprise involves more than just
25 agricultural production. It involves the entire
26 marketing system through processing, packaging,
distributing, wholesaling and retailing. It is this
marketing chain which multiplied the 1.25 billion
dollars in gross farm sales in 1978 into the 3.75
billion dollar industry on which Oregon's economy is
based. Commercial agricultural production provides
the volume to maintain this market system."

1 The above definition of commercial agricultural operation
2 focuses on the need to contribute in a "substantial way" to the
3 area's existing agricultural economy and to provide the
4 "volume" to maintain the agricultural market system. This
5 emphasis was discussed on November 27, 1974 by a former LCDC
6 Commissioner when he stated that the key to commercial
7 agriculture in the State of Oregon is to have a large enough
8 volume of agricultural products to support a processing and
9 marketing system. Once that volume is attained, then smaller
10 producers of agricultural products can contribute to that
11 market, but if all that exists is the small volume producer
12 sufficient volume won't exist to support the entire
13 agricultural system.²

14 Petitioners assert that respondent's definition of
15 commercial agricultural enterprise is inconsistent with LCDC's
16 commercial agricultural enterprise standard and thereby
17 violates goal 3 by allowing non-commercial parcels to be
18 considered in calculating the size of parcels which make up the
19 existing commercial agriculture enterprise in Douglas County.

20 Respondent's Finding 35 defines a commercial agricultural
21 enterprise:

22 "In Douglas County, commercial agricultural enterprise
23 is considered to be any continuous employment of
24 agricultural land in the production, processing and
marketing of products therefrom with the intent to
obtain monetary profit."³

25 Petitioners argue this definition is essentially a rephrasing
26 of the definition of farm use found in ORS 215.203(2)(a),

1 falling short of that statutory definition, however, by failing
2 to require that the "primary" purpose of the farm use of the
3 land be to obtain a profit in money.

4 ORS 215.203(2)(a) states in pertinent part:

5 "As used in this section, 'farm use' means the current
6 employment of land for the primary purpose of
7 obtaining a profit in money by raising, harvesting and
8 selling crops or by the feeding, breeding, management
9 and sale of, or the produce of, livestock, poultry,
10 fur bearing animals or honey bees or for dairying or
11 the sale of dairy products or any other agricultural
12 or horticultural use or animal husbandry or any
13 combination thereof."

14 Petitioners argue that LCDC has specifically rejected this
15 definition insofar as the creation or identification of
16 commercial farm units is concerned. Petitioners contend the
17 Commission recognizes ORS 215.203(2)(a) for what it is; i.e. a
18 description of farm uses permitted and for what it is not; i.e.
19 a standard for land divisions.

20 Respondent counters this argument by in essence arguing
21 that its definition of commercial agricultural enterprise is
22 not merely a rephrasing of the definition of farm use as set
23 forth in ORS 215.203(2)(a). Respondent asserts that the
24 contested definition incorporates a requirement not found in
25 ORS 215.203(2)(a) that any such commercial agricultural
26 enterprise maintain this status on a "continuing" basis.
Respondent reasons that this crucial additional provision
reflects the purpose of goal 3 which is to maintain the
county's agricultural resource base through a continuation of
the area's commercial agricultural enterprise. Respondents

1 rely further on the holding of 1000 Friends of Oregon v. Benton
2 County, 32 Or App 413, 525 P2d 651 (1978) for the proposition
3 that the county's definition of commercial agriculture
4 enterprises is consistent with goal 3. Respondents argue that
5 the Oregon Court of Appeals in 1000 Friends v. Benton County
6 held that Goal 3 is applicable:

7 "if any of the lands are capable, now or in the
8 future, of being currently employed for agricultural
9 production for the purpose of obtaining a profit in
money." 32 Or App 413 at 426.

10 Respondent thereby reasons that the court in 1000 Friends
11 v. Benton County, supra, established "intent" to obtain profit
12 as the requisite test for agricultural potential under goal 3.
13 Respondent further argues that if the "intent to produce a
14 profit" is the appropriate test for goal 3 application, it
15 therefore follows that the same test should be used to
16 determine the type and extent of farm use to serve as the
17 standard against which new parcels are created. Respondent
18 reasons that size alone is, therefore, not determinative as to
19 the parcel's status as a commercial agricultural unit, citing
20 Meeker v. Board of Comm. of Clatsop County, 287 Or 665 (1979).
21 Therefore, respondents argue the intent to obtain profit and
22 not the sources of the endeavor is sufficient to identify the
23 requisite level of commercial agriculture production under goal
24 3.

25 Petitioners counter by arguing that in using such a
26 definition, Respondent Douglas County has failed to distinguish

1 non-commercial hobby farms from LCDC's definition of commercial
2 agricultural operations, supra. By so doing, petitioners
3 assert the Data Base Committee allowed small, non-commercial
4 parcels to be used in the aggregate calculation of what the
5 existing commercial agriculture enterprise is in the county or
6 area of inquiry. This resulted in a reduction of the number of
7 acres used as the "average" commercial agricultural
8 enterprise.

9 If this Board were to buy respondent's argument that
10 "intent" to obtain profit is all that need be shown, a parcel
11 as small as one acre would fit within the definition of
12 commercial agricultural enterprise provided a well-intentioned
13 but poorly informed individual "intended" to conduct for profit
14 an agricultural enterprise on that parcel. This, in fact, is
15 what has occurred. The Respondent's Data Base Committee,
16 without any factual data to substantiate its claim, found that
17 "commercial farming in Douglas County is practiced on acreages
18 as small as one acre or less."

19 It is this Board's decision that respondent's definition of
20 commercial agricultural enterprise is insufficient to further
21 the goals of maintaining agricultural land in large blocks as
22 set forth in ORS 215.243 and does not comply with Statewide
23 Goal No. 3. Rather than preserving and maintaining in large
24 blocks commercial grazing operations, the definition makes
25 possible the division of larger, clearly commercial ranches
26 into small units in disregard of the existing commercial

1 agriculture enterprise. Under the respondent's definition an
2 area composed of larger (i.e. 1000 acre) grazing operations
3 could be reduced to 150 acre lots to the detriment of the
4 agricultural production in the area. While these small parcels
5 may provide an element of production to the total agricultural
6 activity in Douglas County, they do not "maintain" the
7 commercial agricultural enterprise. They are not capable by
8 themselves of maintaining a processing and marketing system
9 like that needed in 1978 to convert the 1.25 billion dollars in
10 gross farm sales into the 3.75 billion dollar industry upon
11 which Oregon's economy is based.

12 These small parcels when aggregated with the large clearly
13 commercial operations result in an artificially low "average"
14 parcel size which can then be used to further reduce the large
15 blocks of land. This results in eventual chopping up and
16 destruction of one of the basic economic resources of this
17 state. (See also Justice Holman's concurring opinion in
18 Meeker, supra.)

19 Therefore, for the foregoing reasons, we find that
20 respondent's definition of commercial agricultural enterprise
21 as set forth in its contested ordinance and used by its Data
22 Base Committee is insufficient to meet the standards of
23 Statewide Goal 3 and ORS 215.243(2) and ORS 215.263(3).

24 Work of Data Base Committee Incomplete

25 Petitioner alleges that the county's findings justifying
26 the 150 acre grazing land minimum are not supported by

1 substantial evidence in the whole record. Some of those
2 findings are set forth in Footnote 4 to this decision. Of
3 specific interest to this allegation of error is finding no. 39
4 which states:

5 "This plan, based upon the recommendations of the
6 Agricultural Land Use Data Base Committee, finds
7 through the study of information from the Douglas
8 County Assessors' Office, the 1974 Census of
9 Agricultural, the 1979 preliminary data, financial
10 institutions, equipment dealers, Douglas County
11 farmers and farm specialists, Shricker's Livestock
12 Auction and numerous other individuals and
13 associations, that agricultural land will be
14 adequately protected, preserved and maintained through
a process which establishes minimum lot sizes for
agricultural lands based upon the average existing
commercial agricultural activity in an area. Such
process will afford the opportunity for a continuation
of commercial agriculture by establishing a range in
which agricultural division may occur, that range
being 75-150 acres for grazing areas and 20-50 acres
for cropland areas."

15 The Data Base Committee did extensive and obviously well
16 intentioned work but it started its endeavor to determine the
17 existing commercial agriculture enterprise in Douglas County
18 with an inappropriate definition of commercial agriculture
19 enterprise. (See discussion supra). As a result, the data
20 base used to support its conclusions probably includes
21 information on non-commercial agriculture activity. For the
22 sake of aiding Douglas County in further attempts to determine
23 its commercial agriculture enterprise, we will review the data
24 included in the record before the Board.

25 The county, in establishing the contested minimum lot size,
26 has relied in part on testimony provided by local equipment

1 dealers, a local livestock auction, the Douglas County
2 Assessor, local financial institutions, and data from the 1974
3 Census of Agricultural. A review of this evidence fails to
4 provide support for a conclusion that 150 acres is sufficient
5 for continuing the existing commercial livestock grazing
6 operations in the county.

7 Shricker's Livestock Auction reports that 80-90 percent of
8 its gross sales come from "part-time farmers" on units 100
9 acres or less in size. There is no evidence in the record that
10 this report can be substantiated, but taking it at its face
11 value, it still relates to only a portion of the marketing
12 system for agricultural products. It appears from the record
13 that this auction is held on each Saturday of the year, and
14 much of the time is spent selling one animal or a few at a
15 time. According to other testimony in the record, large
16 shipments of livestock numbering up to the thousands of head
17 are trucked from the stock yards and corrals of Douglas County
18 for sale to outlets in other parts of Oregon and out of the
19 State. Allegedly, an overwhelming proportion of the county's
20 large scale production is disposed of by private treaty, and
21 usually only the smaller growers' production or the "tail ends"
22 of the larger growers' production support the weekly Shricker
23 Livestock Auction. In light of the foregoing and LCDC's stated
24 purpose that commercial agricultural production provide the
25 volume to maintain the needed market system, the relevancy of
26 using the size of agriculture operation of those who support

1 the auction as a basis for establishing the commercial
2 agriculture enterprise is certainly questionable. Use of the
3 Shricker Auction supporters as a means of determining the size
4 parcel needed to maintain the commercial agriculture enterprise
5 is further suspect because no attempt appears to have been made
6 to distinguish between the various types of operators who
7 supply animals to the auction. For example, no distinction
8 appears between grazing operations and feed lot operators.
9 Both might supply animals for auction but the latter normally
10 would require fewer acres to support his or her operation than
11 the former.

12 Similarly, the reliance of the Data Base Committee on sales
13 by local equipment dealers is insufficient to support the
14 determination of commercial agriculture when viewed in relation
15 to the entire market system supporting the agricultural
16 enterprise in the Douglas County area. The implement and
17 equipment dealers who supply farm machinery reported that 49
18 percent of the equipment sold for farm use was purchased by
19 part-time farmers and that 80-90 percent of their customers
20 operate farm units of less than 100 acres. This evidence,
21 however, neither discriminates between grazing and non-grazing
22 operations nor indicates which if any of the "part-time
23 farmers" or operators of units less than 100 acres operate
24 commercial farms. Obviously non-commercial and non-grazing
25 operators buy implements. There is evidence in the record
26 which indicates that some large volume operators, as opposed to

1 the part-time farmers, purchased their equipment outside of the
2 county. There is no indication in the findings that these
3 non-local implement dealer purchases were considered by the
4 Data Base Committee.

5 The record indicates that the average size farm unit
6 financed by loan institutions is 70 acres. This information is
7 set forth in the Data Base Committee Report in conclusionary
8 form. The data in support of that conclusion does not appear
9 in the record. Such evidence is irrelevant to determining the
10 existing commercial agricultural enterprise in the area. There
11 is no shown correlation between the "70 acre farm unit" and the
12 existing commercial agricultural enterprise. There is no
13 showing that any "commercial" activity is taking place on such
14 a "farm unit." In addition, no attempt was made to distinguish
15 between grazing land and cropland in using this figure. The
16 testimony in the record from one of the county's largest
17 ranchers is that neither he nor his next door neighbor, also a
18 large rancher, uses lending institutions. In addition, their
19 testimony is that it is the policy of most of the local lending
20 institutions to only extend agricultural loans on livestock,
21 and very rarely on land. This evidence was not discussed by
22 respondent in its findings.

23 Finally, as regards the county's reliance on the 1974 U.S.
24 Census of Agriculture, the relevancy of that information is
25 highly speculative. Those figures do not distinguish between
26 cropland and rangeland so their use as a basis for determining

1 what the minimum grazing or rangeland lot size should be is
2 highly questionable. There is no definition of what is
3 considered a farm in the Census of Agriculture data.

4 In addition, it is important to note that Respondent
5 Douglas County submitted not only a response brief but a reply
6 brief in this matter. In addition, Intervenor Douglas County
7 Landowners Association submitted a respondent's brief in this
8 matter. Neither respondent nor intervenor cite this Board to
9 any evidence of a substantial nature which supports the
10 findings of Douglas County. This is in light of a direct
11 attack on the substantiality of the evidence by petitioner.

12 On the other hand, petitioners cite considerable evidence
13 in the record to support the allegation that the minimum parcel
14 size needed for a commercial grazing operation in portions of
15 Douglas County is at least 200 to 250 acres. In addition,
16 there is evidence in the record that based on 1977 tax roles,
17 the larger operators (no acreage figure is specified)
18 contribute the bulk of the sheep production in the county.
19 According to the information in the record, it would require
20 84.55 families running 100 ewes to replace the production
21 output of some 8 families running 1000 ewes or more.

22 In addition, there is evidence in the record from Oregon
23 State University which indicates that a 200 acre sheep
24 operation is at best a marginal commercial enterprise. It
25 indicates that not until nearly twice that many acres are
26 available will a reasonable return on investment be realized.

1 Respondent has not shown by substantial evidence what the
2 existing commercial agricultural grazing enterprise is in the
3 area. Not only did the county fail to produce substantial
4 evidence to support its findings, it failed to also take into
5 consideration evidence in the record which detracts from the
6 findings it did make. As was stated in K. C. Davis,
7 Administrative Law, 3d ed, sec 29.03, page 531 citing Jaffe,
8 Administrative Procedure Re-Examined: The Benjamin Report, 56
9 Harv L Rev 704, 733 (1943):

10 "Obviously, responsible men would not exercise their
11 judgment on only that part of the evidence which looks
12 in one direction; the rationality or substantiality of
13 a conclusion can only be evaluated in the light of the
14 whole fact situation or so much of it as appears.
Evidence which may be logically substantial in
isolation may be deprived of much of its character or
its claim to credibility when considered with other
evidence."

15 See also Universal Camera Corp. v. NLRB, 340 US 474, 488, 71 S
16 Ct 456, 464, 95 L Ed 456 (1951) wherein the court stated:

17 "The substantiality of evidence must take into account
18 whatever in the record fairly detracts from its
weight."

19 Finally, there appears to be no separate inventory of the
20 existing commercial grazing operations in the county and
21 consequently there is no showing that the proposed lot size is
22 the typical size for livestock grazing operations in the
23 county. City of Eugene vs. Lane County, ____ Or LUBA ____
24 (LUBA No. 80-053) (1980); 1000 Friends of Oregon vs. Marion
25 County, 1 Or LUBA 33 (1980).

26 Based on the foregoing, it is this Board's decision that

1 not only did the Data Base Committee use the wrong definition
2 of commercial agriculture enterprise, Respondent Douglas County
3 failed to support by substantial evidence its conclusion that
4 150 acres constitutes the existing commercial agricultural
5 grazing enterprise in the area.

6 THIRD ASSIGNMENT OF ERROR

7 Petitioner asserts that:

8 "The Board erred by adopting performance criteria and
9 procedures governing divisions of agricultural land
10 for farm use which do not assure that the parcels
11 created will be appropriate for the continuation of
12 existing commercial agricultural enterprises."

11 Section 5B

12 The contested ordinance provides that parcels as small as
13 20 acres for croplands, grainlands and horticultural areas, and
14 75 acres for grazing lands may be determined to be commercial
15 agricultural entities if the county finds, based on six
16 considerations, that the resulting parcels are of sufficient
17 size "to support commercial agricultural production." Section
18 5B of Douglas County Land Use Policy Implementation states:

19 "B. Parcels of 20 acres or greater for agricultural
20 lands, such as grainlands, croplands and
21 horticultural areas, and parcels of 75 acres or
22 greater for grazing and rangeland designated by
23 the Comprehensive Plan may be determined to be
24 commercial agricultural entities based upon the
25 following:

23 "i. Existing commercial agricultural activity within
24 the area;

25 "ii. Types of crops grown in the area, typical yields
26 and market availability;

26 "iii. The area in which the agricultural activity is
conducted;

1 "iv. Soil Conservation Service Soil Capability
2 Classification and soil type;

3 "v. Land Use designations of the Comprehensive Plan
4 Map and other relevant information from the
5 Agricultural Element of the Comprehensive Plan;

6 "vi. The average commercial farm unit size within the
7 area relative to crops and yields typical to the
8 area and land use patterns in the area of the
9 proposed division.

10 "The approving agency of the County shall enter
11 Findings with respect to the above considerations and
12 shall, if the division is to be approved, find, on the
13 basis of such considerations, that the resulting
14 parcels are of sufficient size to support commercial
15 agricultural production on the same, using accepted
16 farming practices as that term is defined in ORS
17 215.203(2)(c)." (Emphasis added).

18 Petitioners assert that there are several errors inherent
19 in the construction of standards which compose section 5B. We
20 will address some of their assertions. Our decision to address
21 only selected assertions should not be interpreted to be an
22 acceptance or denial of the unaddressed assertions validity.
23 Kerns v. Pendleton, 1 Or LUBA 1 (1980).

24 No Reference to "Existing"

25 Petitioners argue that Section 5B violates Goal 3 because
26 its ultimate standard that the resulting parcels are of
sufficient size to "support commercial agricultural production"
makes no reference to the "existing" commercial agricultural
enterprise within the area. Petitioners argue that the final
paragraph of Section 5B contains the ultimate standard by which
the six considerations are judged. They reason that the six
factors set forth in 5B are merely to be considered and that

1 the ultimate test fails to include the word "existing" which
2 appears in Statewide Goal No. 3.

3 Respondent argue that the six criteria are more than mere
4 considerations. It argues that since findings must be made
5 with respect to each of the factors upon an application to
6 create a parcel of 20 to 75 acres in an EFU zone, the findings
7 in turn serve as the basis for a decision that the resulting
8 parcels are of "sufficient size to support commercial
9 agriculture production on the same, * * * *" Respondent
10 further argues that to add the word "existing" as requested by
11 petitioners would result in an incongruous statement at best.
12 Respondent reasons that a finding which would demonstrate that
13 "the resulting parcels are of sufficient size to support
14 [existing] commercial agricultural production on the same
15 * * *" would simply mandate the status quo even if such
16 production far exceeded the level of commercial production
17 within the area.

18 We agree with petitioners' argument. Section 5B does refer
19 to the six items contained therein as "considerations" and not
20 as the ultimate standard. The ultimate standard is found in
21 that section's final paragraph and does not include the Goal 3
22 language referring specifically to "existing" commercial
23 agriculture production. We do not accept respondent's argument
24 that such additional language would merely mandate the status
25 quo. The requirement that the existing commercial agricultural
26 activity in the area be maintained as set forth in Goal 3 is a

1 minimum standard. The word "existing" cannot be interpreted to
2 require that additional production could not be sought out. In
3 fact, additional production is ultimately the goal since the
4 minimum has been mandated by requiring that the existing
5 agricultural activity be protected.

6 It should also be noted that Statewide Goal 3 is designed
7 to "maintain" the existing commercial agriculture enterprise.
8 Respondents standard only "supports" the existing commercial
9 agriculture enterprise. Use of the word "support" allows for
10 non-volume operations which may not "maintain" the "existing"
11 as contemplated by Goal 3. For example, an owner of five acres
12 of pastureland feeding one cow and calf may be able to help
13 "support" the overall beef production of the area, even though
14 the county may determine 200 acre grazing operations are
15 required to "maintain" the area's existing commercial beef
16 enterprise. The key distinction is that the existing
17 commercial beef enterprise in the area can survive without the
18 five acre operations. It is, therefore, the 200 acre or
19 greater operations which determine the "commercial" standard
20 because they, not the five acre operations, are necessary to
21 "maintain" the existing commercial beef enterprise in the area.

22 Therefore as regards this portion of petitioners' petition
23 for review, this Board finds that respondent's Section 5B is
24 defective since it does not comply with Statewide Goal No. 3.

25 / /

26 / /

1 Respondent's Section 5(C) Failed to Protect Agricultural
2 Land for Commercial Farming.

3 Section 5(C) of the Ordinance provides a process for
4 reviewing proposed divisions of land. Section 5C states in its
5 entirety:

6 "Divisions of lands designated for agriculture or
7 grazing by the Comprehensive Plan consistent with the
8 acreages specified in "A" above shall be permitted
9 outright. Divisions of land into parcels of less than
10 50 and 150 acres respectively, but 20 or 75 acres or
11 greater in size respectively, may be administratively
12 approved only upon a finding that such parcels created
13 are: 1) no smaller than the average commercial
14 agricultural acreage within the area in which the
15 property is located, or 2) no smaller than 20 and 75
16 acres respectively, whichever results in the larger
17 acreage designation.

18 "i. For the purposes of defining area, the area shall
19 be a 9 square section area of the County, the
20 property in question shall be located in the
21 center section.

22 "ii. To determine average commercial agricultural
23 acreage, only designated agricultural lands or
24 Farm/Forest Transitional shall be evaluated and
25 the total commercial acreage divided by the
26 number of ownerships.

27 "iii. The Administrative Review Procedure shall provide
28 for notice and an appeals process.

29 "iv. Once an agricultural acreage minimum is
30 established for an area/section, that minimum
31 shall apply to all future applications within the
32 same section.

33 "v. Ownerships located in more than one section shall
34 have an average acreage calculated for each
35 section and if any portion falls below the
36 minimum then the average acreages may be combined
37 and divided by the number of sections to
38 determine the minimum parcel size for the entire
39 ownership.

1 "Divisions of Land in acreages of less than the
2 minimums established in this Policy shall be reviewed
3 as specified in Policy Implementation Statement Number
4 6 which follows."

5 Petitioners argue that section 5(C)(ii) violates Goal 3
6 because the "number of ownerships" which are divided into the
7 total commercial acreage are not restricted to commercial farm
8 ownerships. We agree. To arrive at an accurate figure for the
9 average commercial acreage, the denominator in the calculation
10 set forth by Section 5(C)(ii) is not appropriate. It refers
11 only to the number of ownerships regardless of their commercial
12 agricultural status. Therefore, non-commercial farm units such
13 as pre-existing subdivision lots or "hobby" farms will skew
14 calculations and result in an unrealistically small average
15 commercial acreage figure. The proper denominator should be
16 the number of "commercial" farm units. Therefore, as regards
17 section 5(C)(ii), this Board finds respondent's ordinance to be
18 defective and in violation of Goal 3.

19 Petitioners other assertions regarding respondent's
20 ordinance are not addressed in this opinion. Kerns v. City of
21 Pendleton, 1 Or LUBA 1 (1980).

FOOTNOTES

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4 It should be noted that on June 26, 1980, Respondent
5 Douglas County adopted an ordinance amending the Douglas County
6 zoning and land use ordinance creating an exclusive farm use
zone. This amended ordinance serves to provide implementation
of policies established in phase I and phase 2 of the Douglas
County Comprehensive Plan.

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8 2

9 Former Commissioner Jim Smart testified at an LCDC Goal
10 Work Session on November 27, 1974, as follows:

11 "The pattern of ownership in terms of commercial
12 agriculture, which is really what we have to look at
13 first. Once these patterns of ownership are broken up
14 into small units it is almost impossible to
15 reassemble. And if you've got farm units, it is
16 important that they be preserved. Now, if your small
17 acreage tracts, in terms of their general contribution
18 to the total productivity, there's no way the products
19 can be marketed unless you have markets that are
20 created. Outlets are created by volume, whether it be
21 volume of fruits or volume of vegetables. San Jose is
22 a classic of this [inaudible] in which it was the food
23 processing center of the world. Finally, because of
urbanization, the spread, the sprawl you've heard
about in the Santa Clara Valley, you still had the
processing industry but you had no products. So, the
processing industry moved elsewhere. The products
that are still raised in the Santa Clara Valley have a
problem because there isn't enough volume to attract
buyers. So, if you're going to produce food that's
going to go into the distribution channel, finally
going up the line to the people, you've got to have
the next level of handler on down the market chain to
have a consistent and available product source. Then,
the small acreage treats, their contribution, can also
flow into the same market. Without commercial
agriculture, then you don't have these other factors.

24 . . .

25 "Mr. Chairman, Mrs. Kenagy out here is very
26 concerned because I know what she is going to say.
She's going to say we are talking just about large
commercial economic farms. We're going to put the
rest down the tube, and I have no intention of doing

1 that. The key to agriculture in the State of Oregon
2 is that you've got to have volume in order to have a
3 market and the rest of these smaller units then can
4 contribute to that market. If you have just the samll
5 units, you don't have a market."

3

5 The Douglas County Data Base Committee Report of 4/3/80
6 contains a definition of commercial agriculture enterprise as
7 "any continuous employment of agricultural land in the
8 production, processing and marketing of products therefrom with
9 the intent to obtain a profit in money." Data Base Report,
10 supra at 3.

4

10 "34. The Agricultural Land Use Data Base Committee,
11 established by Phase I recommendation, presented
12 its report to the Board of Commissioners on April
13 9, 1980. The recommendations of that committee
14 have been used to establish the standards and
15 process from which to review divisions of
16 agricultural land.

14 35. In Douglas County, commercial agricultural
15 enterprise is considered to be any continuous
16 employment of agricultural land in the
17 production, processing and marketing of products
18 therefrom with the intent to obtain monetary
19 profit.

17 36. A significant portion of commercial agricultural
18 enterprise in Douglas County is conducted on farm
19 units of 200 acres or less by part-time farmers
20 and rangers.

20 37. Based on the 1974 Census of Agriculture, 45% of
21 Douglas County farms are less than 100 acres in
22 size; 19% are between 100 and 200 acres; and 36%
23 are greater than 200 acres.

22 38. Chacteristic commercial agricultural enterprise
23 in Douglas County can best be established on an
24 area by area basis rather than for the County as
25 a whole.

25 39. This plan, based upon the recommendations of the
26 Agricultural Land Use Data Committee, finds
through the study of information from the Douglas
County Assessor's Office, the 1974 Census of

1 Agriculture, the 1979 preliminary data, financial
2 institutions, equipment dealers, Douglas County
3 farmers and farm specialists, Schricker's Livestock
4 Auction and numerous other individuals and
5 associations, that agricultural land will be
6 adequately protected, preserved and maintained through
7 a process which establishes minimum lot sizes for
8 agricultural lands based upon the average existing
9 commercial agricultural activity in an area. Such
10 process will afford the opportunity for a continuation
11 of commercial agriculture by establishing a range in
12 which agricultural division may occur, that range
13 being 75 - 150 acres for grazing areas and 20 to 50
14 acres for crop land areas.
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