BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, the assumed business name of the Oregon Land Use Project, Inc., Petitioner, vs. BENTON COUNTY, JAMES LYDAY, Respondents.	LUBA No. 80-134 FINAL OPINION AND ORDER

Appeal from Benton County.

Richard P. Benner, Portland, filed the Petition for Review and argued the cause for Petitioner.

Richard T. Ligon, Corvallis, filed the brief and argued the cause for Respondent Benton County.

George B. Heilig, Corvallis, argued the cause for Respondent James Lyday.

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

REMANDED 2/27/81

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).

REYNOLDS, Chief Referee.

NATURE OF THE PROCEEDINGS

Petitioner 1000 Friends of Oregon challenges Benton County's grant of a conditional use permit which would authorize construction of a farm dwelling on Tax Lot 1200 consisting of 6.13 acres in the county's EFU zone. Petitioner contends the county's action violates Goal 3 (Agricultural Lands) because the county failed to identify the existing commerical agricultural enterprise within the area, failed to determine the appropriate lot size for the existing commercial agricultural enterprise within the area and failed to determine whether the subject property was large enough to continue the existing commercial agricultural enterprise within the area. Petitioner also contends the county's findings concerning the "commercial" nature of the agricultural enterprise which would be conducted on the 6.13 acre tax lot was not supported by substantial evidence in the record.

FACTS

The facts in this case are not in dispute. The applicant's father, Arthur Lyday, Jr., owns 77 acres in Benton County consisting of two tax lots: Tax Lot 1100 and Tax Lot 1200. Tax Lot 1100 is approximately 71 acres in size and is divided by a road. Sixty acres are one side of the road and 11 acres are on the other. Tax Lot 1200 is 6.13 acres in size and is on the side of the road next to the 11 acres. Tax Lot 1100 has two dwellings, one on each side of the road. Tax Lot 1200 has

at least the foundation of a prior residence. One acre of Tax Lot 1200 is a gravel parking lot. It is on Tax Lot 1200 that the applicant proposes to construct the dwelling.

Currently, Tax Lot 1200 is not in agricultural production. The applicants represented to the county their intent to use the property for growing Christmas trees and filberts. The applicants also proposed to add some trees to the existing 7 to 8 tree apple orchard. The Board of Commissioners found that the farm management plan submitted by the applicant, James Lyday, "indicates that the 6.13 acres will be intensively farmed and the proposed dwelling is needed for purposes of aiding in the farm operation." The County Board concluded that utilization of the parcel as proposed in the management plan "will increase agricultural production." It "accepted" the farm managment plan "as representing a viable agricultural concept, once implemented, and capable of supporting a permanent farm related dwelling." The Board of Commissioners found that the plan "is a viable continuation of commercial farming in the area," but did not expressly find what commercial farming was in the area, nor what lot sizes were appropriate for continuing commercial farming.

The county ordered that the dwelling should be placed at the location of the existing foundation to minimize impact on surrounding farm lands and prevent the taking of good farm land which would otherwise occur if the dwelling were placed as proposed originally in the management plan. A condition placed

upon approval of the conditional use by the county is that Tax Lot 1200 cannot be partitioned and sold separately from the parent parcel. The county also granted its approval subject to the express condition that the Lyday's farm the parcel as represented.

STANDING

Respondent Benton County challenges the standing of petitioner 1000 Friends of Oregon to bring this appeal. Respondent argues petitioner lacks standing because none of petitioner's members was entitled to notice and hearing or had his or her interest adversely affected or was aggrieved by the county's decision.

The Board finds, however, that Edna McDowell, a member of 1000 Friends of Oregon does satisfy the standing requirements contained in Oregon Laws 1979, ch 772, (4)(3) in that Edna McDowell was entitled to notice and a hearing before the Board of County Commissioners and also had her interests adversely affected by the county's decision. Edna McDowell, along with a co-planning commissioner member, Gary Brumbaugh, appealed the planning commission's decision to approve the conditional use permit to the Board of County Commissioners. Neither section 20.04 of the Benton County Zoning Ordinance referring to the process for appeal of planning commission decisions on conditional use permits nor section 23.03 of the zoning ordinance pertaining to the process for appeals of planning commission decisions generally states whether one who files an

appeal of the planning commission's decision to the Board of County Commissioners is entitled to notice and hearing before the Board of Commissioners. Section 23.03 does require, however, that the Board of Commissioners hold a public hearing on the appeal. While not specified in the county's ordinance, we believe one who appeals to the Board of Commissioners a planning commission decision would be entitled as a matter of right to written notice of the Board of Commissioner's hearing on the appeal. This would, in our view, be necessary to satisfy minimal due process requirements as discussed in Fasano v. Board of Commissioners for Washington County, 264 Or 574, 507 P2d 23 (1973).

We also conclude that Edna McDowell qualifies as a person whose interests were adversely affected as a result of Benton County's decision in this matter. Petitioner submitted an affidavit by Edna McDowell which is not challenged by respondent. McDowell's affidavit states that she and her husband have farmed 300 acres in the Wren/Kings Valley area for 30 years and that they lease additional land for grazing. They run 150 sheep, and 30 beef cattle and process 150 tons of hay per year. McDowell contends that "hobby farms"[1] increase the cost of farming in the area by raising the cost of land to buy or rent to "true farmers and ranchers" plus they increase the taxes for county services and schools. McDowell alleges hobby farms also increase complaints about farm practices, such as noise, dust, spray and fertilizers and also contribute to

trespass, litter, vandalism and dogs chasing livestock.

Petitioner also has submitted affidavits of other farmers in the Benton County area which support the factual contentions made by McDowell.[2] One such affidavit is that of David Schmedding who owns 66 acres and leases two additional parcels of 80 and 15 acres each. His farm operation consists essentially of grazing sheep and processing hay. He states in his affidavit:

> "As long as these hobby farms are allowed to be continually created, the price of all farm parcels will continue to be elevated to real estate development prices rather than being valued at their agricultural productivity value. This is the very reason why we now lease more than we own. The economics of a livestock operation limit the land expenditure to about $600-$800/acre which is a far cry from the $2,000-$3,000/acre these "mini-farms" (10-15 acres) typically bring."

Respondents have not challenged the truth or reasonableness of the allegations asserted by McDowell or the supporting allegations asserted by the other large parcel farmers. For purposes of determining whether petitioner would have standing we treat these allegations as true. We believe these allegations demonstrate that there is a reasonable likelihood that McDowell would suffer economic injury if development on small parcels of agricultural land in rural Benton County is not made consistently with the policies expressed in Goal 3 and elsewhere. It is upon adherence to these policies by the planning officials in Benton County that farmers such as Edna McDowell depend for their economic well being. We believe that

Edna McDowell is a person who has demonstrated that Benton County's decision may adversely affect her interests within the meaning of Oregon Laws 1979, ch 772, (4)(3). Because Edna McDowell is a member of 1000 Friends of Oregon, 1000 Friends of Oregon has standing in its representational capacity to bring this appeal. See 1000 Friends of Oregon vs. Marion County, 1 Or LUBA 33 (1980).

OPINION

We agree with petitioner that the county's order approving the conditional use permit in this case violates Goal 3, but not precisely for the reasons advanced by petitioner.

Petitioner accepts the county's treatment of Tax Lot 1200 as a separate parcel but complains because the county failed to determine whether the 6 acre tax lot was of a size appropriate for continuing the existing commercial agricultural enterprise in the area. To treat, as do petitioner and the county, a tax lot as a separate unit of land is to give recognition for land use planning purposes to that which is nothing more than a line created for the convenience of either the property owner or the assessor. See ORS 308.240. In our view, two or more adjoining tax lots in common ownership are to be treated as a single parcel of land. Accordingly, the county was required to consider the entire 77 acre ownership as one parcel for purposes of determining whether the proposed dwelling should have been allowed.

Goal 3 specifies that such minimum lot sizes as are

established within an EFU zone be appropriate for maintaining the commercial agricultural enterprise in the area. Any existing lot in an EFU zone which does not meet the minimum lot size determined to be appropriate for maintaining the commercial agricultural enterprise in the area is a substandard lot. The effect of this is that a dwelling proposed to be located on a lot which does not meet the minimum size must be treated as a non-farm dwelling unless it is found that the smaller lot is appropriate for an intensive commercial farm operation (for example, nurseries, berries, greenhouses). Otherwise the dwelling is assured to be non-farm dwellings and can only be approved if it meets the criteria in ORS 215.213(3).

There is no limit expressed in Goal 3 as to the number of residences which may be erected on a parcel which meets the minimum lot size standard. The only limitation is that the residences must be used in conjunction with farm use of the parcel (ORS 215.213(1)) or they must meet the criteria in ORS 215.213(3).

In approving the conditional use permit in this case, Benton County did not follow the above procedure.[3] Benton County did not determine that the 77 acre parcel was of the size appropriate for maintaining the commercial agricultural enterprise in the area and that the proposed dwelling would be used in conjunction with farm use on the 77 acre parcel. Neither did the county determine that the proposed dwelling was a non-farm dwelling that met the standards in ORS 215.213(3).

Instead the county considered the agricultural viability of only the 6 acre tax lot with a house on it and concluded that "utilization of the parcel as proposed in the management plan will increase agricultural production" and that "the farm management plan [represents] a viable agricultural concept, once implemented, and capable of supporting a permanent farm related dwelling."

Because the county concluded that the 6 acre tax lot was suitable for agricultural production the county could not have approved the dwelling as a non-farm dwelling under ORS 215.213. The county could only have approved the dwelling consistent with Goal 3 if it had determined that the dwelling would be used in conjunction with farm use on the 77 acre parcel and the 77 acre parcel was of a size appropriate for continuing the commercial agricultural enterprise in the area.

There is no finding in the record to the effect that the 77 acre ownership is appropriate for maintaining the agricultural enterprise in the area.[4] Neither is there a finding that the proposed dwelling will be used in conjunction with farm use on the entire ownership. Without such findings, the county's decision violates Goal 3. This case must be remanded for further proceedings consistent with this opinion.

FOOTNOTES

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1 We understand the term "hobby farms" to be a reference to small parcels whose primary purpose is to serve as a residence and whose size is not appropriate to maintain the commercial agricultural enterprise in the area.

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2 Benton County objected at oral argument to our consideration of the affidavits of farmers other than McDowell because they did not appear and, hence, lacked standing. We agree with petitioner, however, that it is appropriate for this Board to consider these affidavits to the extent they may provide support for the factual assertions made by McDowell.

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3 Because its comprehensive plan and implementing ordinances have not been acknowledged as in compliance with the goals, Benton County must follow the procedure specified in Goal 3 or demonstrate that its comprehensive plan provision which it did follow satisfies Goal 3's required procedure.

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4 Although the county has in its zoning ordinance specified a 40 acre parcel as appropriate for maintaining the commercial agricultural enterprise within the area, this zoning ordinance has not been acknowledged. Hence, the county could not rely solely upon the existence of a minimum lot size specified in its zoning ordinance but was required to establish a factual basis for concluding the 77 acre parcel would satisfy the minimum lot size standard set forth in Goal 3.

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

1000 FRIENDS OF OREGON Petitioners, v. BENTON COUNTY, Respondent.	)	LUBA 80-134 LCDC Determination

The Land Conservation and Development Commission hereby adopts the proposed opinion and order of the Land Use Board of Appeals in LUBA 80-134 concerning allegations of Statewide Goal violations with the following modifications:

1. On page 7 at line 20, add the words "or more" after the word "two";

2. On page 8 on line 2, delete "LCDC in its policy paper" Common Questions on Agricultural Lands: Minimum Lot Sizes in EFU zones "issued July 12, 1979, has said, in effect that";

3. On page 8 at line 8, delete footnote 3 and the word "policy."

4. On page 8 at line 10 after the word "dwelling" add the following language "unless it is found that the smaller lot is appropriate for an intensive commercial farm operation (for example, nurseries, berries, greenhouses)."

5. On page 8 at lines 11 and 12 change the line to read: "otherwise the dwelling is assured to be nonfarm dwellings and can only be approved if it meets the criteria in ORS 215.213(3).

DATED THIS 24 DAY OF February, 1981.

W. J. Kvarsten, Director
for the Commission

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