

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

FEB 23 2 47 PM '81

TOM PILCHER, BERNARD HESSE,
and DON POULSON,

Petitioners,

v.

MARION COUNTY and HOWARD
and DARLYNE STEPHENSON,

Respondents.

LUBA NO. 80-141

FINAL OPINION
AND ORDER

Appeal from Marion County.

Richard C. Stein, Salem, filed a brief and argued the cause for Petitioners. With him on the brief were Ramsay, Stein & Feibleman.

M. Chapin Milbank, Salem, filed a brief and argued the cause for Respondents Howard and Darlyne Stephenson. With him on the brief were Schlegel, Milbank, Wheeler, Jarman & Hilgemann.

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

Reversed.

2/23/81

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).

1 COX, Referee.

2 NATURE OF THE PROCEEDING

3 The challenged decision dated September 18, 1980, is the
4 approval by Marion County of Respondent Stephenson's request to
5 place a non-farm dwelling on 1.7 acres of land located in an SA
6 (Special Agriculture) zone subject to conditions.¹

7 Petitioners seek a reversal of the decision on the grounds that
8 the Marion County Commissioners improperly construed the
9 applicable law and/or the decision is not supported by
10 substantial evidence.

11 STANDING

12 Standing is not an issue in this case.

13 FACTS

14 The subject parcel is located in Marion County outside
15 Salem's urban growth boundary. It is 1.7 acres in size,
16 contains SCS Class VI soil zoned SA (Special Agriculture) and
17 surrounded on all sides by land zoned exclusive farm use
18 (EFU). The adjacent land to the south of the subject parcel
19 supports a veal raising operation (Petitioner Hesse). To the
20 north and west the adjacent land is being used for growing
21 wheat and cattle grazing (Petitioner Poulson). To the east of
22 the subject property are row crops (Petitioner Pilcher). The
23 overall land use pattern of the area is agricultural.

24 Although not in agricultural usage at the present time, the
25 partially wooded 1.7 acre parcel has been used for cattle
26 grazing in conjunction with the adjacent veal raising operation

1 as recently as 1979. Petitioner Hesse offered to purchase the
2 property for use in conjunction with his adjacent grazing
3 operation in January, 1979 for \$6,000. That offer fell through
4 because of the seller's inability to obtain clear title at that
5 time. By July, 1979, the price had gone up to \$8,000 based on
6 the potential use of the land as residential rather than
7 agricultural and Petitioner Hesse was unwilling to pay that
8 amount.

9 DECISION

10 Petitioners allege among other things that Respondent
11 Marion County's decision is in violation of Marion County
12 Zoning Ordinance ch 137, sec 137.040(a)(4) and ORS
13 215.213(3)(d) because there is no showing this land is
14 generally unsuitable for the production of livestock. We agree.

15 Marion County Zoning Code Section 137.030 allows a
16 single-family dwelling or mobile home not in conjunction with
17 farm use in a SA zone subject to obtaining a conditional use
18 permit and satisfying the criteria in Section 137.040. Section
19 137.040(a)(4) is similar to ORS 215.213(3)(d) and requires a
20 showing that the residence is to

21 "(4) * * * [be] situated on generally unsuitable
22 land for the production of farm crops or livestock
23 considering the terrain, adverse soil or land
conditions, drainage and flooding, location and size
of tract; * * * *"²

24 Marion County made numerous "findings," "conclusions of
25 law" and "ultimate conclusions of law" regarding this order.
26 The following findings and conclusions are the only ones

1 relevant to the above cited section of the zoning ordinance.

2 "Finding" No. 3:

3 "* * * The subject property is too small to be
4 considered a farm parcel. The proposed dwelling,
5 therefore, is a non-farm dwelling which can be
6 permitted as a conditional use only if it is found
7 that the dwelling is * * * located on land generally
8 unsuitable for farming." (Emphasis added).

9 "Finding" No. 6:

10 "* * * The small size is the most critical limitation
11 on farm use. The applicant indicates a few head of
12 cattle and a large garden are about the maximum farm
13 potential for the property."

14 "Finding" No. 7:

15 "Adjacent property owners express concern over the
16 circumstances whereby the subject property became a
17 separate parcel. They indicated that the parcel
18 should be reincorporated in a farm operation and
19 objected to a dwelling because of the potential
20 conflicts with farm use, * * * *"

21 "Finding" No. 10:

22 "* * * There is some evidence that the land was grazed
23 on at one time. All evidence indicates that it would
24 not support a commercial operation by itself, nor does
25 the removal of the land in anyway detract from any of
26 the farming operations adjoining in any direction."

27 "Conclusion of Law" No. 5 states:

28 "The Commission concludes further that, since the land
29 is entirely of a Class VI soil classification, this
30 parcel of land, either by itself or in combination
31 with any other parcel, is not generally suited for
32 farming operations of any type." (Emphasis added).

33 "Ultimate Conclusions of Law" No. 7:

34 "The Commission further notes that, had the adjoining
35 farmers wished to purchase the land, they had the
36 opportunity to buy the land prior to applicant's
37 purchasing the land. The Commission notes further

1 that they simply did not wish to pay the price set
2 upon the land, although the total price compared to
the investments of some of the farms is quite small."

3 "Ultimate Conclusions of Law" No. 9:

4 "The Commission concludes that the land, because of
5 its soil type, its location, its long history of
6 non-use for agricultural purposes, its small size and
its rocky configuration all make the land generally
unsuitable for crop production." (Emphasis added).

7 The one finding relevant to a question of whether this land
8 is unsuitable for the production of livestock (Finding No. 10
9 supra) only looks to whether or not the property would support
10 a commercial operation by itself. As this Board held in the
11 case of Stringer v. Polk, 1 Or LUBA 104, 108 (1980) citing
12 Rutherford v. Armstrong, 31 Or App 1319, 1327, 527 P2d 1331
13 (1977):

14 "The fact that the property cannot be farmed as
15 an economically self-sufficient farm unit is
16 irrelevant if it is otherwise suitable to produce farm
crops and livestock." (Emphasis added).

17 "Finding" No. 3 and "Conclusion of Law" No. 5 supra state
18 the parcel of land either by itself or in combination with any
19 other parcel is not generally suited for farming operations of
20 any type. Such findings and conclusions are insufficient to
21 meet the requirements of zoning ordinance section 137.040
22 (a)(4) or ORS 215.213(3)(d). They fail to contain a
23 determination by the county that the property is unsuitable for
24 the production of livestock. If the respondent is referring to
25 grazing activity as a farming operation, there is not
26 substantial evidence in the record to support that conclusion.

1 In the Stringer case, again citing Rutherford, we held that
2 there must be a showing the subject parcel cannot be sold,
3 leased or in some other arrangement put to profitable
4 agricultural use before a conclusion that the land is generally
5 unsuitable for the production of farm crops and livestock can
6 be supported. There is considerable evidence in the record
7 that an attempt was made by an adjoining rancher (Petitioner
8 Hesse herein) to purchase the subject property and incorporate
9 it within his veal raising operation. The evidence indicates
10 that prior to 1979 Petitioner Hesse did utilize the property
11 in his grazing business. In addition, Mr. Hesse testified he
12 could make a net return of \$675 per year off the land if he
13 incorporated it into his grazing operation.

14 Respondent's "Ultimate Conclusion of Law" No. 7, supra,
15 that had adjoining farmers wished to purchase the land they had
16 the opportunity to buy it, reflects one of the core reasons
17 that everyday in the United States four square miles of
18 farmland are shifted to uses other than agricultural. National
19 Agricultural Lands Study, Where Have the Farm Lands Gone? (May,
20 1980). The record indicates that Petitioner Hesse was very
21 much interested in purchasing the property until it became too
22 expensive to him for use as agriculture land. Once the subject
23 property began being considered for a potential residential
24 use, the price started going up to reflect its value as
25 non-agriculture land. One of the key objectives of ORS Chapter
26 215 is to protect agricultural land by relieving pressure on it

1 caused by artificially inflated values resulting from
2 residential use speculation. Marion County's Ultimate
3 Conclusion of Law No. 7 flies in the face of that goal.

4 In sum, Marion County did not determine that the Stephenson
5 property is unsuitable for the production of livestock as
6 required by Marion County Zoning Ordinance Section
7 137.040(a)(4) and ORS 215.213(3)(d). If it intended to include
8 livestock in its finding that the property is unsuitable for
9 farming operations of any type, the record does not support its
10 decision.

11 In light of our decision, we see no need to address
12 petitioner's remaining allegations of error.

13 REVERSED.

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1 FOOTNOTES

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3 The conditions placed on the conditional use permit are as follows:

4 "(1) Applicant concurrence in filing the declaratory
5 statement in Section 137.060 of the Marion County Zoning
6 Ordinance. This deed restriction puts the owner of the
7 parcel on notice that there are farm operations nearby
8 and that a compatible relationship is necessary to
9 protect the continued use of the farmland.

10 "(2) Mobile home to be situated no closer than 50 feet
11 to any property line and be located so that the home is
12 behind the tree line.

13 "(3) Septic approval is obtained for the unimproved
14 parcel."

15 The deed restriction required by condition no. 1 is as follows:

16 "LEGAL DESCRIPTIONS FOR EACH PARCEL INVOLVED MUST ACCOMPANY
17 THIS FORM."

18 The undersigned acknowledge(s) that the subject
19 property is located within, or adjacent to, an area
20 designated by Marion County for agricultural use (i.e. farm
21 or forest use) and that it is County policy to protect
22 agricultural operations from conflicting land uses.
23 Further, that accepted agricultural or forestry practices
24 in this area may create inconveniences for the owners or
25 occupants of the subject property. However, Marion County
26 does not consider it the agricultural operator's
27 responsibility to modify accepted practices to accomodate
28 [sic] the owner or occupants of this property.

29 "In return for allowing the creation of this parcel and
30 permitting a dwelling thereon Marion County expects, and the
31 undersigned acknowledge(s), that as occupants and owners of
32 the subject property, the undersigned will not allow act-
33 ivities on the property to create management difficulties,
34 fire hazards or increased costs for adjacent agricultural
35 operations; and, they will not hold agricultural operators
36 or Marion County responsible for inconveniences to them re-
37 sulting from accepted agricultural or forestry practices."

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39 ORS 215.213(3)(d) provides:

40 "Is situated upon generally unsuitable land for the
41 production of farm crops and livestock considering the
42 terrain, adverse soil or land conditions, drainage and
43 flooding, location and size of tract;"