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

DORIK V. MECHAU, ROBERT L. FOREE,)
ORVILLE FISHER, ROBERT STEPHENS,)
EMERY COX, KENNETH BOYER, DUANE)
BOYER, JIM E GRAHAM, JOHN GAGE,)
FRED V. SPENCE, JR., DENNIS R.)
SPENCE, PAT CHANDLER, WILLIAM J.)
DETHLOFF, JR., GRANT M. LINDSAY,)
MICHAEL MORE, ROBERT PROEBSTEL,)
and RALPH McCULLOUGH,)

LUBA NO. 80-103

FINAL OPINION
AND ORDER*

Petitioners,

v.

BAKER COUNTY COURT,

Respondent.

and

HOWARD M. SMITH,

Applicant/Respondent.

Appeal from Baker County.

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

Gary L. Marlette, Baker, filed a brief and argued the cause for Applicant/Respondent Howard M. Smith.

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

REVERSED

3/25/81

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).

*Incorporated in this opinion is the LCDC Determination of March 24, 1981.

1 BAGG, Referee.

2 STATEMENT OF THE CASE

3 Petitioners appeal approval of a subdivision in rural Baker
4 County. Petitioners allege the approval violates statewide
5 land use Goals 3, Agricultural Lands, and 5, Open Spaces,
6 Scenic and Historic Areas, and natural resources.

7 STANDING

8 Standing of petitioners has not been challenged.
9 Petitioners have standing to bring this proceeding.

10 FACTS

11 In April of 1980, the Baker County Planning Director gave
12 administrative approval to a subdivision application by Howard
13 M. Smith. The application was to divide some 267 acres into
14 five forty acre lots and one 67 acre lot. The property to be
15 subdivided is within an exclusive farm use zone requiring a
16 forty acre minimum lot size. There is agricultural activity on
17 the property, and the county describes agricultural enterprises
18 in the area as "diverse."

19 The April 1980 administrative approval was appealed to the
20 Baker County Court. A hearing was held on August 5, and the
21 Baker County Court entered an order affirming the approval of
22 the Planning Director along with its own findings of fact on
23 that same date. Petitioner appealed to this Board. We reverse.

24 ASSIGNMENT OF ERROR NO. 1

25 The first assignment of error alleges
26

1 "[t]he county court erred by approving the
2 subdivision without demonstrating that 40-acre lots
3 are appropriate for the continuation of the existing
commercial agricultural enterprise within the area."

4 Within this assignment of error is an allegation that the
5 findings made by the Baker County Court are legally
6 insufficient and are not supported by substantial evidence in
7 the whole record. The county's order in this matter is set out
8 in Appendix A of this opinion.

9 Petitioners argue that as Baker County does not have an
10 acknowledged comprehensive plan, each land use decision must
11 comply with statewide planning goals. Petitioners note the
12 zone in which the subdivision lies permits outright divisions
13 of agricultural land into lots of 40 acres or greater. It is
14 petitioners' view that in order to satisfy goal 3,
15 notwithstanding the 40-acre minimum lot size established by the
16 county, there must be a showing that that 40-acre lot size is
17 appropriate for the continuation of the existing commercial
18 agricultural enterprise in the area.¹ In order to determine
19 the agricultural enterprise within the area, petitioners argue,
20 "the county must first determine which commercial agricultural
21 use is appropriate for the property in question and then
22 determine what the appropriate lot size is for that commercial
23 agricultural enterprise." Petitioners' Brief at 2.
24 Petitioners say this "inventory" is missing. Petitioners
25 assert this missing inventory is necessary before the county
26 can claim there is substantial evidence to support its decision

1 that the subdivision does not violate Goal 3. Also,
2 petitioners assert that since the county has not found that 40
3 acre lot sizes are appropriate for the continuation of the
4 existing agricultural enterprise in the area, the findings are
5 legally inadequate. Petitioner would require such a finding
6 before the county could conclude that Goal 3 had been satisfied.

7 The county responds by saying it is entitled to a
8 presumption that its 40-acre minimum lot size is appropriate
9 for the continuation of the existing agricultural enterprise in
10 the area. The ordinance was adopted some years ago and was
11 adopted for the purpose of protecting agricultural land in
12 Baker County. Respondent believes the petitioners should
13 supply evidence as to how this legislative declaration of a
14 minimum lot size is not appropriate for the continuation of the
15 existing agricultural enterprise in the area. Respondent says
16 petitioners have not come forward with such evidence, and,
17 therefore, their argument should fail. Respondent also argues
18 that the county's findings "as a whole" adequately support the
19 county's decision; and the record taken as a whole shows that
20 "some viable uses of 40-acre parcels will continue or support
21 existing commercial agricultural enterprises." Respondent's
22 brief at 13. Respondent supports its argument by citations
23 from the transcript of the county court hearing.

24 Our review of the county's findings and the record requires
25 us to conclude that the findings are inadequate to show that
26 the subdivision will further the existing commercial

1 agricultural enterprise in the area.

2 The findings and the record fail to set out sufficient
3 information on what agricultural activity occurs within the
4 area and what size parcel is necessary to support that
5 activity. Without such findings and a record including a
6 factual base for such findings, the division of the property
7 does not meet goal 3's requirement that lot sizes be
8 appropriate for the continuation of existing commercial
9 agricultural enterprise in the area. Sane Orderly Development
10 v. Douglas County, ___ Or LUBA ___, LUBA No. 80-121 (1981);
11 City of Eugene v. Lane County, ___ Or LUBA ___, LUBA No.
12 80-053 (1980); 1000 Friends v. Benton County, ___ Or LUBA ___,
13 LUBA No. 80-134 (1981); 1000 Friends v. Marion County, 1 Or
14 LUBA 33 (1980). It is not sufficient to list agricultural uses
15 and lot sizes generally and conclude that the "continuation of
16 existing commercial agricultural enterprises within the area
17 would not be greatly affected." Baker County Court Order of
18 August 5, 1980.

19 It is the county's responsibility to set forth sufficient
20 facts in its findings supported by a sufficient record to show
21 that the applicable standards have been properly and completely
22 applied. 1000 Friends v. Marion County, supra; Sane Orderly
23 Development v. Douglas County, supra. The fact that
24 petitioners have not brought forth evidence showing the
25 inadequacy of the county's 40-acre minimum lot size is not a
26 defense to a challenge that applicable state standards have not

1 been met. The burden is not on the petitioner to demonstrate
2 how a 40 acre minimum lot size is inconsistent with the
3 commercial agricultural enterprise in the area; the burden is
4 on the applicant to provide, and the county to so find, that a
5 40 acre minimum lot size is consistent with Goal 3. Goal 3 is
6 a standard that is in effect, and must be applied in all
7 appropriate circumstances as a condition of approval. MSD v.
8 Washington County, 1 Or LUBA 282 (1980).

9 The first assignment of error is sustained.

10 ASSIGNMENT OF ERROR NO. 2

11 The second assignment of error alleges

12 "[t]he county court erred by failing to determine
13 the consequences of the subdivision on the wildlife
14 resource in the area and by failing to develop a
15 program to protect that resource from the conflicting
16 use."

17 Petitioners' argument is that Goal 5, Open Spaces, Scenic
18 and Historic Areas, and Natural Resources "requires counties to
19 identify and protect natural resources, including wildlife
20 areas and habitats, for future generations." Petitioner's
21 brief at 9. In order to achieve this goal, county's must

22 "inventory the location, quality and quantity of the
23 resource. Where no conflicting uses for the resource
24 are identified, the resource must be managed to
25 preserve its original character. Where conflicting
26 uses are identified 'the economic, social, and
27 environmental and energy consequences of the
28 conflicting uses shall be determined and programs
29 developed to achieve the goal.'" Petitioners' brief
30 at 9-10; LCDC Goal 5.

31 Along with this inventory requirement, petitioners would
32 require that minimum lot sizes appropriate for the continuation

1 of existing agricultural enterprises must also be appropriate
2 to protect Goal 5 resources. Petitioners point to a letter in
3 the record from Dick Humphreys, District Biologist, with the
4 Oregon Department of Fish and Wildlife, Region IV. In his
5 letter of March 11, 1980, Mr. Humphreys expresses concern over
6 the subdivision and its possible damaging effect on deer and
7 elk winter range. Petitioners claim there is no evidence
8 contra in the record, and the concerns, therefore, remain
9 unanswered and the goal unfulfilled.

10 Respondent believes the following finding of the county
11 court to sufficiently address petitioner's concern:

12 [T]hat open space is not obstructed by 40-acre areas and
13 that wildlife would not be greatly affected by said
subdivision and, therefore, goal 5 was not violated."

14 There is no explanation of how the county arrived at this
15 conclusion. The findings and the supporting record do not show
16 the nature and extent of the habitat resource. The findings
17 and the record do not assess the impact on the resource of
18 dividing the land into 40 acre parcels. In the face of concern
19 from the Department of Fish and Wildlife, the need to describe
20 the wildlife habitat and determine whether it is threatened by
21 the development is all the more clear.² Without this
22 "inventory" of the Goal 5 wildlife habitat resource and an
23 assessment of the effect of the land use actions on that
24 resource, we are unable to determine whether Goal 5 has been
25 violated, and the order of the county court cannot stand.

26 The order of the Baker County Court is reversed.

FOOTNOTES

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3 ¹

Goal 3, in pertinent part, provides

4 "Such minimum lot sizes as are utilized for any farm
5 use zones shall be appropriate for the continuation of
6 the existing commercial agricultural enterprise within
7 the area." Goal 3, Agricultural Lands.

8
9 ²

Conceivably, a lot size appropriate for the continuation of
the existing agricultural enterprise may not be sufficient to
protect a wildlife habitat.

10 See Common Questions about Goal #3--Agricultural Lands:
11 Minimum Lot Sizes in EFU Zones, as amended July 12, 1979,
12 footnote 1 states

13 "While a certain minimum lot size may be appropriate
14 for the continuation of commercial agriculture (as
15 required by Goal 3), it may be inadequate to comply
16 with Goal 5 requirements to protect wildlife
17 resources. Counties must identify wildlife habitat
18 areas and ensure that the minimum lot size is also
19 appropriate for the protection of these merits.
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3000 FRIENDS OF OREGON

APPENDIX A

IN THE COUNTY COURT OF THE STATE OF OREGON
FOR THE COUNTY OF BAKER

IN THE MATTER OF
THE APPEAL OF THE
HOWARD SMITH SUB-
DIVISION

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O R D E R

The Baker County Court meeting in session on the 5th day of August, 1980 at 9:00 a.m. for the purpose of holding a hearing under the guidelines of Baker County Resolution Number 1 Series 1974, concerning an appeal from the Baker County Planning Director's decision on the Howard Smith subdivision application, did hold such hearing and after due consideration of the parties respective presentations before the Court, and, furthermore,

The appellants stating that their appeals were based on their belief that LCPC Statewide Planning Goals #1, #3 and #5 had been violated, and furthermore,

The Court having reviewed ORS 215.243, ORS 215.263, and ORS 308.370 and having noted that agriculture uses are very diversified in this area, i.e.: cow/calf operations, dairying, hog farming, hay and grain crops, raspberry crops, etc. and that climatic conditions, market availability, managerial ability and water rights all have a great affect on the various sizes of acreages within the area, now, therefore, makes the following findings:

FINDING: That the Baker County Subdivision and Zoning Ordinances are legal until such time as found otherwise by a higher court.

FINDING: That insufficient evidence was presented to show any violation of Goal #1.

FINDING: That the land in question is under agriculture use at present.

FINDING: That agriculture uses are very diverse in the immediate area: re: cow/calf operation, dairy farm, hog farm, hay farm, grain farming, pasture and one acre raspberry producing 4000 lbs. of berries per year.

FINDING: That climatic conditions, market availability, managerial ability, water rights are outstanding factors in determining agricultural uses and the minimal acreages in an EFU zone and/or to meet Goal #3.

FINDING: That "conditional uses" of agriculture land were not applied for and therefore are not a matter in this appeal.

FINDING: That continuation of existing commercial agricultural enterprises within the area would not be greatly affected.

FINDING: That at least 58 properties are 40 acres or less in T7S, R38 EWM per Exhibit #5 (Ownership Map) which are predominantly for agriculture purposes to some extent and no evidence was presented as to commercial agriculture use or as to farm deferral on most of these acreages.

FINDING: That the soil classification meets the standards of agricultural Goal #3.

FINDING: That open space is not obstructed by 40 acre areas and that wildlife would not be greatly affected by said subdivision and therefore Goal #5 was not violated.

It is therefore CONCLUDED and ORDERED that the appeal is hereby denied and that the decision of Planning Director is hereby upheld.

DONE and dated this 5th day of August, 1980.

BAKER COUNTY COURT

BY: [Signature]

County Judge

[Signature]
County Commissioner

[Signature]
County Commissioner

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

LAND USE
BOARD OF APPEALS

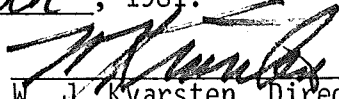
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MECHAU,	Petitioner(s),)	
)	
v.)	LUBA 80-103
)	LCDC Determination
BAKER COUNTY,	Respondent.)	

The Land Conservation and Development Commission hereby adopts the recommendation of the Land Use Board of Appeals in Mechau v. Baker County, LUBA 80-103, with the following modification:

1. Eliminate the last paragraph of footnote 2, dealing with Goal 5.

DATED THIS 24th DAY OF March, 1981.


W. J. Kvarsten, Director
For the Commission

WJK:DB:kb
4823A