BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARRY W. and SHARON L. COHEN, Petitioners, vs. CLACKAMAS COUNTY, Respondent.	LUBA No. 81-001 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Garry W. and Sharon L. Cohen, West Linn, filed the Petition for Review and argued the cause on their on behalf.

Michael E. Judd, Oregon City, filed the brief and argued the cause on behalf of Respondent Clackamas County.

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

REMANDED 5/04/81

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).

REYNOLDS, Chief Referee.

NATURE OF THE PROCEEDINGS

Petitioners appeal Clackamas County's decision authorizing a non-forest use of a 4.72 acre parcel located in an area zoned TT-20 (Transitional Timber, 20 acre minimum lot size). The decision would allow the applicant, Mr. Craig, to construct a non-farm, non-forest residence on his 4.72 acre parcel. Petitioners contend that the county's decision violates Goals 1, 2, 3, 4, and 10, and also that the decision denies petitioners equal protection and due process as guaranteed by the Oregon Constitution and the Fourteenth Amendment to the United States Constitution.

STATEMENT OF FACTS

Petitioner owns a 4.72 acre parcel in an area known as Pete's Mountain in Clackamas County and located near the intersection of Southwest Pete's Mountain Road and Southwest Campbell. The parcel was once part of a much larger farm. However, the area in which this parcel lies has experienced significant parcelization over the years. In 1975 the applicant's parcel was created along with two other parcels from a 20 acre parcel. One of the lots created by this partitioning is 10 acres in size and located to the south of the applicant's property. This 10 acre parcel is owned by an individual who also owns a 5 acre lot adjoining the parcel. As we understand the Clackamas County scheme, contiguous lots in common ownership are treated as one parcel. In effect, then,

to the south of the applicant's property is a 15 acre parcel. The record indicates that during the course of these proceedings this parcel was for sale. Adjacent to the applicant's property on the west is the third lot created as a result of the 1975 partitioning. This lot is approximately 4 acres in size on which is situated a house completed within the past year. Adjacent to the applicant's property to the east are two tax lots totalling approximately 5 acres and owned by the petitioners.

The evidence in the record with respect to uses on surrounding lands was furnished primarily by the petitioners. They testified that, based upon their survey of the area, most of the property was in farm use or forest use of some kind. A 9 plus acre parcel across the road from the applicant's property to the north was logged last year and returned approximately $6,000 to the owner. A 30 plus acre parcel to the southwest of the applicant's property contains Christmas trees. A 40 acre parcel across Southwest Campbell Road to the east is used for forestry and farming purposes.

The assessor's map in the record reveals many parcels in the immediate area of the applicant's property which are of the same size or even smaller than the applicant's property. However, using the assessor's map and color codings to outline actual ownerships, petitioners testified that many of these tax lots are grouped in common ownership with the result that the actual lot sizes in the area appear to be larger than the

applicant's property. As previously mentioned, 15, 30 and 40 acre parcels lie in the immediate area of the applicant's property. However, even when the tax lots are grouped by common ownership, most of the parcels in the area surrounding the applicant's property are less than the 20 acre minimum lot size specified in the Timber Transitional Zone.

The applicant's property has historically been used for farming. In announcing his oral decision, prior to reducing the decision to writing, the hearings officer stated:

> "However, it has been, and the evidence is unrebutted, utilized for quite awhile for growing of some grain and probably hay. And it was in fact leased to an adjoining piece of property."

Thus, while the soil on the property is Class IVe to VIe as determined by the Soil Conservation Service Classification System, the property has been used both in its present size and previously when part of the original farm for growing certain crops. One limitation on the parcel's ability to grow crops is the moderate slope of the parcel (8% - 30%) in places, which slope is indicated by the SCS Classification "e" referring to erosion. Although no commercial timber presently exists on the property, the parcel has a forest site classification of II.

The hearings officer's decision, which was ultimately adopted by the Board of Commissioners on appeal, concluded that the request for a non-farm, non-forest use of the property complied with the Clackamas County Zoning Ordinance, Section 403.05.[1]

The hearings officer found, concerning the area around the subject property, that:

> "The subject property is within an area of various size lots, many of which are developed with single family residences. In the immediate area, these lots are similar in size to the subject property and nearly all are developed with single-family residences. Some of these single-family residences appear to be developed in conjunction with hobby farms. There do not appear to be any commercial stands of timber being managed in the immediate area."

The hearings officer considered individually the requirements in Section 403.05 of the Clackamas County Zoning Ordinance and concluded that because the request complied with this ordinance relating to non-farm and non-forest uses, the request also complied with Statewide Planning Goals 3 and 4. Of particular concern to this appeal is the hearings officer's finding concerning the requirement that the parcel be situated on generally unsuitable land for the production of farm and forest products:

> "The 4.72 acre parcel requested to be utilized for a single-family dwelling not in conjunction with a forest use is situated upon generally unsuitable land for the production of farm and forest products. In making this finding, the hearings officer relied upon the size and topography of the subject parcel. The hearings officer is also considering the size of many of the parcels in the immediate area. Adjacent parcels do not readily lend themselves to acquiring the subject parcel by lease or purchase and developing said property on a long range basis for continued agricultural use. This is based upon the testimony indicating the fact that the parcel to the south of the subject property, which is approximately 15 acres in size, considering the single ownership of several contiguous tax lots, is up for sale and maybe, in fact, partitioned, if allowed."

OPINION

Petitioners' principal challenge to Clackamas County's approval of a non-farm, non-forest dwelling concerns the alleged failure to comply with Goals 3 and 4. Petitioners apparently argue that inasmuch as the approved use is a non-farm, non-forest use, an exception to Goals 3 and 4 is required. The county argues, on the other hand, that the county's ordinance, Section 403.05, is the equivalent of ORS 215.213(3) which allows non-farm dwellings to be located within EFU zones. Even if we were to assume, however, that Section 403.05 of the Clackamas County Zoning Ordinance, if complied with, satisfied both Goals 3 and 4, we conclude that the county's findings fail to comply with Section 403.05 in that the county failed to properly determine that the subject parcel was unsuitable for the production of farm and forest products.

The unrebutted testimony in the record clearly indicates that the subject parcel will grow some kinds of crops, i.e., hay and grain. There is also nothing in the record to suggest that the subject property is not capable of growing trees. Hence, the evidence in the record establishes, and the hearings officer did not find to the contrary, that the subject parcel can produce farm crops and forest products, i.e., commercial timber or even Christmas trees.

The hearings officer, and ultimately the County Board of Commissioners, however, believed that the size and topography of the parcel made the parcel unsuitable for growing farm crops

and forest products within the meaning of Section 403.05 of the county's zoning ordinance. If the county's zoning ordinance is to be a substitute for compliance with ORS 215.213(3) as well as Goal 4, the county must interpret its zoning ordinance in a manner which achieves the intent of these statewide requirements. In Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331 (1977), rev den (1978), the Court of Appeals addressed the "unsuitability" requirement in ORS 215.213(3). It said with respect to a parcel of a size similar to the applicant's parcel in this case:

> "The fact that the property cannot be farmed as an economically self sufficient farm unit is irrelevant if it is otherwise suitable to produce farm crops and livestock." 31 Or App 1319, 1327. See also: Stringer v. Polk County, 1 Or LUBA 104 (1980).

The Court of Appeals also stated in Rutherford that:

> "There is no evidence in the record that the subject 5 acre parcel cannot be sold, leased or by some other arrangement put to profitable agricultural use." 31 Or App 1319 at 1324.

In the present case, the hearings officer concluded:

> "Adjacent parcels do not readily lend themselves to acquiring the subject parcel by lease or purchase and developing said property on a long range basis for continued agricultural use. This is based upon the testimony indicating the fact that the parcel to the south of the subject property, which is approximately 15 acres in size, considering the single ownership of several contiguous tax lots, is up for sale and maybe, in fact, partitioned if allowed."

We fail to understand why the hearings officer gave such importance to the fact the 15 acre parcel south of the applicant's property is for sale: the potential still exists

for that 15 acre parcel and the applicant's parcel to be combined through a sale or lease arrangement whereby the 20 acre minimum lot size required in the TT-20 zone could be achieved. Presumably, if the applicant's property were for sale at a price truly reflective of its value for farming or forestry purposes,[2] and the 15 acre parcel to the south were also for sale at a price reflective of its value for farming or forestry purposes, someone interested in having a 20 acre parcel for farm or forest uses would eventually purchase both parcels. If the potential exists, as it appears to exist here, for two parcels to be purchased which, together, meet the minimum lot size within the zone, the county should not interfere with that being allowed to occur. In any event, the county should not be permitted, on the basis of what appears to us to be pure speculation, to conclude that such will not occur and thereby conclude that the property can never be put to a profitable farm or forest use.

We conclude, therefore, that the county's finding that the property is generally unsuitable for the production of farm or forest products is inadequate and is not based upon substantial evidence in the record. For this reason, the county's decision does not comply with its own zoning ordinance, Section 403.05, and as a result, cannot be deemed to comply with Goals 3 and 4. Petitioners' allegations with respect to Goals 3 and 4 are, therefore, sustained.

This matter is remanded to the county for further proceedings consistent with this opinion.

FOOTNOTES

---

1 "403.05 NONFOREST USES SUBJECT TO REVIEW BY THE HEARINGS OFFICER.

"A. Single family dwelling structures not provided in conjunction with a principal use, and undersized lots created for single family residences subsequent to the effective date of this amendment shall be subject to review and approval of the Hearings Officer, pursuant to Section 1300 of this Ordinance. Approval shall not be granted unless the Hearings Officer finds that the proposed nonforest use meets all the following criteria:

"1. Is compatible with forest uses described in subsection 403.03 of this Ordinance;

"2. Does not interfere seriously with accepted forest and farm practices, including chemical spraying or burning on adjacent lands devoted to farm or forest uses;

"3. Does not materially alter the stability of the overall land use pattern of the area;

"4. Is situated upon generally unsuitable land for the production of farm and forest products, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract;

"5. Will not be in conflict with the Comprehensive Plan or deterimental to surrounding property; and

"6. Complies with such other conditions as the Hearings Officer considers necessary.

"B. Lot divisions and dimensions for nonforest uses shall be reviewed as indicated under subsection 403.08C.

"C. New lot divisions created for nonforest uses shall not be allowed in Future Urbanizable areas, as deined in the Comprehensive Plan."

---

[2] During oral argument it was mentioned that the applicant's parcel had been for sale although apparently at a price reflective of its value as a rural residential homesite.