BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLIAM H. HOLMSTROM, Petitioners, v. MARION COUNTY, Respondent. and WES AND ROSEMARY GLADOW, Respondent-Intervenor.	LUBA NO. 80-170 FINAL OPINION AND ORDER

Appeal from Marion County.

William H. Holmstrom, Salem, filed a brief and argued the cause on his own behalf.

D. Michael Mills, Salem, filed a brief and argued the cause on behalf of Intervenor Gladow.

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

Remanded. 8/05/81

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).

COX, Referee.

NATURE OF PROCEEDING

Petitioner appearing pro per contests respondent's decision to approve the division of a 28.1 acre parcel consisting of SCS Classes II and III soils into 14 residential lots of not less than 1.5 acres each.

STANDING

Respondent does not contest petitioner's standing.

ALLEGATIONS OF ERROR

Petitioner asserts Respondent Marion County erred as follows:

> "(1) Marion County erred in its approval of Subdivision Plat #895 because it violated state-wide planning Goals 2 and 3 because it approved nonfarm, residential development of agricultural land in violation of Goal 3 without a proper exception in violation of Goal 2.
>
> "(2) Marion County erred in its approval of Subdivision Plat #895 because it violated state-wide planning Goal 11, public facilities and services, because its findings failed to adequately consider Goal 11, because its findings misconstrued Goal 11, and because its limited findings regarding Goal 11 are vague and incomplete."

FACTS

The proposed 14 unit development is situated on rolling terrain between Aumsville Highway and Santiam Highway in rural Marion County. The property is designated rural residential in the Marion County Comprehensive Plan (unacknowledged). This designation calls for parcels ranging from 1.5 to 3 acres in size. The subject 28.1 acre parcel, consisting of SCS Class II

and III soils, has previously been farmed and is within an area consisting of a mixture of residential and agricultural uses.

Approval of the requested subdivision was granted on the basis that the property is committed to nonfarm use. Respondent Marion County realized that given the class of soil on the property, an exception needed to be taken to Statewide Planning Goal 3 prior to approving the proposed residential development. The county found that the property is unsuitable for commercial agricultural use and is committed to residential use "due to the high degree of parcelization and development that has taken place on surrounding lands." The subject property now contains an existing house and two sheds which will be removed under the applicant's development proposal. Waste disposal and water will be provided by individual septic tanks and wells. The record indicates that concern was expressed over the impact of this development on the Aumsville Elementary School (Aumsville School District No. 11C).

DECISION

First Assignment of Error.

Petitioner first attacks Respondent Marion County's exception to Statewide Planning Goal No. 3. It is clear from the findings that the traditional goal 2 exception was not taken to Statewide Goal 3. Rather, Marion County seems to have relied on a procedure for taking an exception to Statewide Goal 3 which does not appear in the text of Statewide Goal No. 2. This procedure is known as the "irrevocably committed test."

The committed test first appeared in the case of 1000 Friends of Oregon v. Bd. of Co. Comm. of Marion County, LCDC No. 75-006 (1975).

In the Conclusion section, the county states:

> "1. * * * This property is considered unsuitable for commercial agriculture use and committed to residential use due to the high degree of parcelization and development that has taken place on surrounding lands. * * * *
>
> "2. The property is located in an area of established and continuing rural residential development characterized by 2 acre to 5 acre tracts. Rural residential development extends from the Rolling Green Estates Subdivision along Walina Court on the west, east to the Shaw area along Highway 214. Additional subdivision and partitioning approvals in the area have committed other lands that currently remain undeveloped. The use of the property for the proposed residential development will represent an in-filling of an area already committed to rural residential development.
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> "3. The Rural Residential Comprehensive Plan designation encourages the type of development proposed. The development of this property into rural residential homesites of this size at this denisty [sic] will be compatible with the surroundings. The subdivision lots should be a minimum of 1.5 acres in area in order to comply with the lot size standards in the Comprehensive Plan. * * * * * "

Petitioner argues that respondent failed to comply with the irrevocably committed test because its findings are inadequate. We agree. When determining that land is built upon or committed to nonresource use, land use characteristics such as adjacent uses, public services (water and sewer lines, etc.), parcel size and ownership patterns, neighborhood and regional characteristics, natural boundaries and other relevant factors must be considered. A conclusion of irrevocable

commitment to nonresource (nonfarm or nonforest) use must be based, at a minimum, on detailed findings supported by substantial evidence showing that the subject land cannot now or in the forseeable future be used for any purpose contemplated in Statewide Goal 3 and/or 4 because of one or more of the above listed characteristics. 1000 Friends v. Clackamas County, ___ Or LUBA ____ (LUBA NO. 80-060, 1981). LCDC Policy Paper, May 10, 1978, as amended May 3, 1979, entitled "Common Questions Concerning the Exceptions Process."

Marion County seems to have relied on the characteristics of adjacent uses and parcel size and ownership patterns on surrounding property to conclude that there has been irrevocable commitment of this property to nonresource use. The findings of Marion County, whether designated findings or conclusions, as Marion County called them, are not sufficient.

Adjacent Uses

LCDC policy indicates that findings regarding adjacent uses must contain a precise statement of why, after listing and considering existing uses and location of residences and buildings on neighboring property, the subject property is irrevocably committed to nonresource uses. In other words, what activities are taking place on the adjacent property and how do those activities prevent the subject property from being used as Goal 3 resource land? LCDC Policy Paper, "Common Questions Concerning the Exceptions Process," supra. Marion County's order doesn't set forth this information.

Parcel Size and Ownership Patterns.[1]

LCDC policy requires that findings must contain detailed information on how any existing subdivision or partitioning pattern came about and whether the Statewide Goals were addressed at the time of such partitioning or subdivision. Past partitioning or subdivision decisions made without findings against the goals when required should not be used to justify new partitions. Existing parcel sizes and their ownership must be considered together in relation to the land's actual use. The mere fact that small parcels exist does not alone constitute a basis for commitment. The degree of commitment of small parcels in separate ownerships will depend on whether or not the parcels are developed and whether they stand alone or are clustered in a large group. LCDC Policy Paper, "Common Questions Concerning the Exceptions Process," supra.

In the first place, Marion County found parcelization existed "in the area," without defining what the area of consideration included. This Board cannot tell by its findings whether the area included a few hundred feet from the subject parcel, a few thousand yards or miles from the subject property. Without knowing the area considered there is no way this Board can review the decision to determine if a reasonable person would be compelled to conclude the parcelization somehow adversely impacts the resource capability of the property. In addition, Marion County did not distinguish between lots of

record versus ownership patterns. Although there was evidence of nineteen 5 acre lots of record "in the area," there is no evidence of whether or not these lots are held in separate ownership or are merely part of a subdivision that never got beyond the paper stage. 1000 Friends v. Marion County, LCDC No. 75-006. Furthermore, there is no evidence of whether the prior subdivision or partitioning activity upon which Marion County relied was based upon a goal 3 exception. Also, there is no indication as to which lots of record have actually been physically developed. Without this type of information, coupled with an explanation of how these factors cause an inability to use the property for resource purposes, the conclusion of commitment cannot logically be arrived at or supported.

Second, it appears that Marion County disregarded evidence of potential or actual agricultural use on nearby property. Marion County recognized, in its findings of fact, that "surrounding lands south of Highway 22 contain a mix of residential and limited agricultural use." In addition, there is indication in the record that there is potential for agricultural use on the subject property. According to the minutes in the record, the owner of the subject property and applicant for the requested subdivision testified he felt his proposed subdivision should be approved because it "would be better for the neighborhood if it was developed rather than sold as one parcel for agricultural use." Such a statement

suggests that the subject property can be used for agriculture purposes. There are agricultural uses in the area and potential agriculture use for the subject parcel. These factors indicate that the commitment test was not properly applied in this case. For the above stated reasons, we find that the county failed to properly consider LCDC's requirements for arriving at a conclusion that the subject property is irrevocably committed to nonresource use.

Second Assignment of Error.

Petitioner next attacks Marion County's decision on the grounds that it violates Statewide Goal No. 11. Petitioner's argument is that the Respondent Marion County's findings failed to adequately consider the goal, that it misconstrued the goal and that the findings are vague and incomplete. Statewide Goal 11's purpose is

> "[t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.
>
> "Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to, the needs and requirements of the urban, urbanizable and rural areas to be served."

Petitioner argues that as part of goal 11, the county is required to consider the impact of the subdivision on school enrollment. Petitioner argues that the county failed to adequately so consider the school impact in this case. We agree with petitioner. The subject property is located in Aumsville School District No. 11C. The school board responded

to Marion County's initial inquiry about this proposed subdivision as follows:

> "The Aumsville Elementary School Board still takes the position against any division of property in this district. We are a one through sixth grade at full capacity and any new subdivisions would mean a new building site for the increase of any more students. The present school complex has been added to the maximum. Bond issues have failed in the past and it seems our only help is to keep the building of new homes at a stand still. The School Board takes no position on any other type of land changes.
>
> "Aumsville Elementary has nearly six hundred students which the state expresses is the maximum for any Elementary School." (Record 77)

In addition to the above quoted letter, the Superintendent and Principal of Aumsville School appeared before the Marion County Board of Commissioners. He said he was concerned about the size of the lots in terms of the precedent it would set for other developments. He stated the school now has 575 students with a capacity for 600. He also added that the school district historically has had difficulty in passing budgets and bond issues for building and that the additional taxes from the subdivision would not pay for the impact upon the school.

Marion County's order approving the subject subdivision addressed this school crowding issue when it stated in Finding No. 8:

> "Testimony from the Aumsville School District No. 11C indicated that their school is near capacity but the projected enrollment generated by the proposal would not likely exceed remaining capacity."

In addition, in Conclusion No. 7, the county states:

> "Concern was expressed over the impact of this development on the Aumsville Elementary School. The Principal of the school testified that projected enrollment for 1980-81 was 575 and the capacity is 600. He was not concerned that this particular development would put them over capacity but was afraid it would set a precedent. It is county policy to review each case to determine if school capacity will be exceeded. Until there is evidence that the proposed development will likely result in more students than the district can handle, there is no basis for denying further development."

In ___ Op Atty Gen ____ (Opinion No. 7607, April 19, 1978), the question of necessity to consider impact on schools under the dictates of Statewide Goal 11 was considered. In that opinion it was stated:

> "* * * * in the absence of an applicable plan of the county and the school district, Goal 11 prohibits the county from approving subdivisions for various areas of the county unless it considers, among other matters, whether school facilities and services are available to meet the need posed by the new subdivision."

The Attorney General then reasoned that such consideration presumably will be based on adequate evidence in the record before the county commissioners. Ideally, such evidence would reflect joint, in-depth school district and county consideration to insure that the need for educational services posed by a new subdivision can reasonably be met with the school facilities available to the area. Short of the ideal, the record would have to reflect the district had been afforded reasonable prior notice of the proposed subdivision and the opportunity to furnish whatever input it deemed appropriate on the issue of its ability to provide educational services to the

new subdivision. We agree with the Attorney General's position and adopt it as the position of this Board.

We are unable to determine in the present case whether an applicable plan exists. It appears, however, in light of the county's statement in its order that each case will be reviewed individually to determine if school capacity will be exceeded, no such plan has been developed.[2] The county did, nevertheless, consider whether school facilities are available. The findings which discuss those considerations are insufficient to satisfy the requirements of goal 11, however. There is no indication the county properly considered, among other factors, projected enrollment. Such consideration should have included the number of students which will be added by ongoing development within the school district boundary as well as the number of students added by this subdivision.

This Board is not saying that goal 11 prohibits approval of subdivisions simply because school facilities are crowded. Neither, are we saying that before a subdivision can be approved, additional school facilities must be in the process of being built. What is required is a showing that advanced planning has been accomplished explaining how school needs can be met. There is no evidence in the record or findings made indicating that the county has done such advance planning. Therefore, petitioner's allegation of error regarding goal 11 is sustained.

Based on the foregoing, this matter is remanded to Marion County for further proceedings not inconsistent with this opinion.

FOOTNOTE

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1 The Land Conservation and Development Commission in its determination of May 5, 1981 adopted the proposed opinion and order of LUBA concerning allegations of Statewide Goal violtions with the following modification in order to be consistent with the Commission's decision in LUBA 80-060:

> "1. At line 1 of page 6, delete the words 'on Neighboring Property.'"

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2 Marion County chose not to appear and there is no plan in the record.