

OCT 1 4 45 PM '81

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

1
2
3 PHYLLIS KRAUSE,

4 Petitioner,

5 vs.

6 JOSEPHINE COUNTY
7 BOARD OF COMMISSIONERS,

8 Respondent.

)
)
)
) LUBA No. 81-057

)
) FINAL OPINION
) AND ORDER
)
)
)

9 Appeal from Josephine County.

10 Walter L. Cauble, Grants Pass, filed the Petition for
11 Review and argued the cause on behalf of Petitioner. With him
12 on the brief were Schultz, Salisbury and Cauble.

13 Duane Schultz, Grants Pass, filed the brief and argued the
14 cause on behalf of Respondent.

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

17 REMANDED

18 10/01/81

19 You are entitled to judicial review of this Order.
20 Judicial review is governed by the provisions of Oregon Laws
21 1979, ch 772, sec 6(a).
22
23
24
25
26

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioner appeals the county's denial of a request to
4 subdivide 29.13 acres into five lots. The county denied the
5 subdivision request because it found that the criteria in Goal
6 2 for taking an exception to Goal 3 had not been satisfied.

7 In her first three assignments of error, petitioner argues
8 that the county's decision was in error because there was no
9 substantial evidence to justify a determination that
10 petitioner's property was agricultural land within the meaning
11 of Goal 3. Since the property could not properly be determined
12 to be agricultural land, petitioner argues the "need" and
13 "alternative sites" requirements of Goal 2 for taking an
14 exception to Goal 3 were not proper factors to be considered by
15 the county in denying the request. Petitioner argues, in the
16 alternative, that the county erred in finding that petitioner
17 had not met the "need" and "alternative site" criteria in that
18 there was no substantial evidence to support these findings.
19 Petitioner's fourth assignment of error is that the county
20 erred in finding the proposed subdivision would conflict with
21 the comprehensive plan on the basis that the plan did not
22 intend to increase population in rural areas. Petitioner says
23 there is nothing in the comprehensive plan which suggests such
24 an objective. Finally, petitioner argues the findings were
25 inadequate as a matter of law because the county's findings
26 were conclusory and contain no specific findings of fact as to

1 why the criteria of "need" and "alternative sites" had not been
2 met.

3 STATEMENT OF FACTS

4 Petitioner applied to Josephine County for approval of her
5 request to subdivide 29.13 acres into five lots. The planning
6 commission found that 95% of the soil was Class VI for
7 agricultural purposes and site Class V for forestry purposes.
8 The planning commission found that approval of the tentative
9 subdivision plan was contingent upon taking exception to LCDC
10 Goals number 3 and number 4. The planning commission found
11 that exceptions to Goals 3 and 4 were warranted and approved
12 the tentative subdivision plan.

13 The decision of the planning commission was appealed to the
14 Board of Commissioners by a number of interested persons. The
15 Board of Commissioners heard conflicting testimony about the
16 agricultural suitability of the property. The minutes of the
17 hearing before the Board of Commissioners indicate that Mr. McKy

18 "...addressed the preservation of the resource
19 area and elaborated on alternate uses for farming the
20 subject property, other than hay production and
21 pasture land, such as planting fruit trees or raising
22 grapes, maintaining that the property under
23 consideration did have a good agricultural potential."

24 Petitioner, through her attorney, cited the testimony of a
25 consulting engineer and a soil scientist who had stated that
26 the property was not suitable for either agricultural or
forestry purposes. Additional testimony was also received
concerning the "need," "alternative sites," "compatibility" and

1 "consequences" factors in Goal 2 for taking an exception. See
2 Still v Marion County, 42 Or App 115, 600 P2d 433 (1979); DLCD
3 v Tillamook County, ___ Or LUBA ___ (LUBA No. 81-004, 1981).

4 At the conclusion of the testimony, the Board of
5 Commissioners voted to reverse the decision of the planning
6 commission. Two of the commissioners did not believe an
7 exception to Goal 3 had been adequately demonstrated under the
8 "need" and "alternative sites" criteria. The Board of
9 Commissioners adopted a final order, the first page of which
10 concludes by saying that the county "adopts the findings of
11 fact and final order of the planning commission as follows:".
12 The second through the fourth pages of the Board's order
13 explain why the commissioners did not feel the "need" and
14 "alternative sites" criteria had been satisfied. No finding
15 was made by the Board of Commissioners in its four page order
16 that the property was agricultural land within the meaning of
17 Goal 3.

18 OPINION

19 Petitioner's first assignment of error is that the county
20 erred in determining petitioner's property was agricultural
21 land within the meaning of Goal 3 because there was no
22 substantial evidence in the record to justify such a
23 determination. Petitioner asks that we reverse the decision of
24 the county as it relates to Goal 3.

25 Based upon the record before us, we do not know whether
26 there was, in fact, substantial evidence before the county on

1 the matter of whether petitioner's property was agricultural
2 land within the meaning of Goal 3. Implicit in the findings of
3 both the planning commission and the Board of Commissioners was
4 their determination that petitioner's property was agricultural
5 land. However, neither the planning commission nor the Board
6 of Commissioners offered any explanation as to why they
7 considered petitioner's property to be agricultural land.
8 Ninety-five percent of the soil was Class VI and thus not
9 agricultural land on the basis of soil type in western
10 Oregon.¹ Conflicting testimony was received about the
11 suitability of the property for farm use, a second factor in
12 Goal 3 for determining whether land is agricultural. It
13 appears that the only testimony to the effect that the property
14 was suitable for agricultural purposes was that of Mr. McKy.
15 Petitioner contends we should not view Mr. McKy's testimony as
16 substantial evidence on the question of the agricultural
17 suitability of the property because Mr. McKy did not address
18 the criteria in ORS 215.203 which contains the definition of
19 "farm use" as that term is used in Goal 3. Mr. McKy did not
20 say that the property could be used to make a profit in money
21 using accepted farming practices. As a result, petitioner
22 argues, Mr. McKy did not offer substantial evidence that
23 petitioner's property was agricultural land within the meaning
24 of Goal 3.

25 Where conflicting evidence exists on a material fact in
26 issue, it is incumbent upon the county to not only state what

1 it found the facts to be but explain why it found as it did.
2 See: Norvell v Portland Metro ALGBC, 43 Or App 849, 604 P2d
3 896 (1979); City of Wood Village v Portland Metro ALGBC, 48 Or
4 App 79, ___ P2d ___ (1980); Sane Orderly Development v Douglas
5 County Board of Commissioners, 2 OR LUBA 196 (1981). Even if
6 we treat the county's four page order as having adopted the
7 findings of the planning commission except as modified by the
8 board's order, there is no finding in either the planning
9 commission's order or in the board's order explaining why the
10 determination was made that petitioner's land was agricultural
11 within the meaning of Goal 3.

12 The county may have been justified in concluding based
13 solely on Mr. McKy's testimony that the property was suitable
14 for farm use as that term is used in Goal 3. Mr. McKy's actual
15 testimony, we assume, was more detailed than as indicated in
16 the minutes. In any event, his testimony to the effect the
17 property did have "good agricultural potential" and that
18 alternative uses to production of hay and livestock included
19 grapes and fruit trees may be sufficient to warrant the county
20 in concluding that the property does have farm use
21 suitability. We do not know, however, particularly given the
22 conflicting evidence in the record as to suitability of the
23 property for farm use, why the county believed Mr. McKy's
24 testimony to be sufficient.²

25 In the absence of an explanation of the county's reasoning
26 we are reluctant to say there is no substantial evidence in the

1 record to support the county's decision. We believe the proper
2 procedure to follow in this case is to remand the matter to the
3 county so that a proper finding can be made concerning Goal 3.

4 In its brief the county argues that we should not address
5 the adequacy of the county's findings because petitioner's
6 attorney, at her request, reviewed the findings and signed his
7 approval as to their adequacy prior to their final adoption by
8 the board. In addition, the county argues that in petitioning
9 for a rehearing before the county, petitioner did not allege as
10 error the insufficiency or inadequacy of the findings. The
11 county says that for the foregoing reasons the petitioner
12 should not now be permitted to raise the issue of insufficiency
13 of the findings.

14 With respect to whether petitioner raised the issue of the
15 adequacy of the findings relative to Goal 3 in her petition for
16 rehearing, we conclude that petitioner did assert the
17 inadequacy of the county's findings relative to Goal 3 on
18 rehearing.³ Thus, we need not address the effect, if any, a
19 failure to have raised this issue in a petition for rehearing
20 would have on a petitioner's right to appeal that issue to this
21 Board.

22 Concerning the county's argument that petitioner approved
23 the adequacy of the findings and thereby waived her right to
24 assert their inadequacy on appeal, we disagree. It is unclear
25 from the order as well as from the record whether petitioner
26 was assenting to the adequacy of the findings or just to their

1 form.⁴ We are inclined to believe that petitioner only
2 intended to assent to the form of the findings because it is
3 inconceivable, in our judgment, that a person who had just had
4 her request for a land use action denied by the governing body
5 after it had been originally approved by the planning
6 commission would acknowledge, in writing, that the governing
7 body's findings could not be challenged. The county has cited
8 us to no authority which would support a contention that by
9 stating that the findings were adequate as to form a petitioner
10 thereby would waive its right to later challenge the findings
11 as to their adequacy. This would be a particularly harsh
12 result in our judgment and is one for which we are not aware of
13 any legal support.

14 For the foregoing reasons, we conclude that the county's
15 findings pertaining to Goal 3 were inadequate and that
16 petitioner did not waive her right to challenge the inadequacy
17 of those findings in this appeal. This matter must, therefore,
18 be remanded to the county for further proceedings not
19 inconsistent with this opinion.

20

21

22

23

24

25

26

FOOTNOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1
Goal 3 defines land in Western Oregon to be agricultural land on the basis of soil type if the land has Soil Conservation Service suitability rating of I-IV.

2
We disagree as a bold proposition that Mr. McKy had to specifically address in his testimony each element of ORS 215.203 necessary to find that the property was suitable for farm use in order for the county to treat his testimony as substantial evidence on the issue. We do not believe local governing body proceedings are yet at the full "trial" stage and governed by "prima facie case" principles. The standard is whether a reasonable person, based upon Mr. McKy's testimony, would be justified in saying the property was suitable for farm use. Without an explanation from the county, we are unprepared to say one way or the other whether Mr. McKy's testimony was adequate.

3
In her petitioner for rehearing, petitioner stated:

"The specific grounds relied upon in this Petition for Rehearing are as follows:

"a) There is not sufficient agricultural ground within the real property to require the taking of exception to LCDC Goal #3, and if there is, exception to Goal #3 should have been taken."

4
At the very end of the order after the signatures of the County Commissioners appears the following:

"APPROVED AS TO FORM:
/s/ Duane Wm. Schultz
Duane Wm. Schults
County Legal Counsel

ATTORNEY REPRESENTING APPLICANT:

/s/ Walter L. Cauble
Walter L. Cauble
Attorney at Law"



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 9/3/81

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: KRAUSE V. JOSEPHINE COUNTY
LUBA No. 81-057

Enclosed for your review is the Board's proposed opinion and final order in the above captioned appeal.

Petitioner appeals the county's denial of a request to subdivide 29.13 acres into five lots. The county denied the subdivision request because it found the criteria in Goal 2 for taking an exception to Goal 3 had not been satisfied. Petitioner argued that the county's decision was in error because, among other reasons, the county failed to properly determine that petitioner's land was agricultural land within the meaning of Goal 3.

The Board agreed with petitioner that the county failed to state that it found petitioner's land to be agricultural land and why it so found. Ninety-five percent of petitioner's property was other than Class I-IV. There was conflicting testimony as to the suitability of the property for farm use. Faced with conflicting evidence, the county was required to state which evidence it believed and why. Failure to do so necessitates that the case be remanded.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



Contains
Recycled
Materials

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

3 PHYLLIS KRAUSE,)
4 Petitioner,)
5 vs.)
6 JOSEPHINE COUNTY)
7 BOARD OF COMMISSIONERS,)
8 Respondent.)
) LUBA No. 81-057
) PROPOSED OPINION
) AND ORDER

9 Appeal from Josephine County.

10 Walter L. Cauble, Grants Pass, filed the Petition for
11 Review and argued the cause on behalf of Petitioner. With him
12 on the brief were Schultz, Salisbury and Cauble.

13 Duane Schultz, Grants Pass, filed the brief and argued the
14 cause on behalf of Respondent.

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

17 REMANDED 9/03/81

18 You are entitled to judicial review of this Order.
19 Judicial review is governed by the provisions of Oregon Laws
20 1979, ch 772, sec 6(a).