BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENNETH and MICHAEL TIFFANY, Petitioners, vs. MALHEUR COUNTY and RON and ARLENE ZERBEL, Respondents.	LUBA No. 81-105 FINAL OPINION AND ORDER

Appeal from Malheur County.

Kenneth and Michael Tiffany, Adrian, filed the Petition for Review. Kenneth Tiffany orally argued on his own behalf.

Steven J. Pierce, Ontario, filed the brief and orally argued on behalf of Respondents Ron and Arlene Zerbel.

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

REMANDED 2/10/82

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.

INTRODUCTION

Petitioners appeal Malheur County's purported rezoning of a 29 acre parcel from F-1 (Exclusive Farm Use, 40 acre minimum lot size) to F-2 (General Farm Use, 5 acre minimum lot size). Petitioners allege the county's action violates Goals 2, 3 and 5 and the draft Malheur County Comprehensive Plan.

FACTS

Respondents Ron and Arlene Zerbel applied to Malheur County for a rezone of their property from F-1 to R-2 (Residential). The record shows that the parcel is located south of Adrian, Oregon and adjacent to the Snake River on its west side. An airport runway is located on the property and has been used by respondents for commercial crop dusting. Repondents were advised by the Malheur County Planning Director that specific findings would have to be made by the planning commission and accepted by the county court showing compliance with Goals 2 and 3 of the statewide planning goals. The planning commission held a hearing on the rezone request at which petitioners and respondents, among others, participated. The staff recommended to the planning commission that an exception to Goal 3 be approved by the planning commission as the area was committed to non-farm use because of the airport. Respondent Ron Zerbel testified that of the 29 acres of land there was approximately one acre of pavement, 5,400 square feet of aircraft hangar, 4 acres of runway through the middle of the property north and

south, 2 acres devoted to taxiway adjacent to the runway and 2 acres of tiedown area. He testified the property had never been farm land and that the soil was alkaline. Petitioner Kenneth Tiffany testified about his concern as to the effect of the decision on his ability to continue farming his property.

The planning commission voted to recommend to the county court a zone change from F-1 to F-2 instead of from F-1 to R-1. It concluded that the property was irrevocably committed to non-farm use based upon the following findings:

> "(a) No water rights to land;
>
> "(b) Not suitable for farming - alkaline land;
>
> "(c) Not economical farm unit by acre;
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> "(d) Land is not and has not been a farm unit;
>
> "(e) Existing improvements would create a financial burden to reclaim it, even if it was prime farm land;
>
> "(f) Landowner has petition signed by most of the surrounding taxpayers and;
>
> "(g) (As brought out by John Beal and Bill Yost) The land is irrevocably committed to non-farm use."

The planning commission's recommendation was forwarded to the county court for its consideration. The minutes of the county court's hearing reflect that the planning director pointed out the finding of the planning commission concerning no water rights was incorrect as there was, in fact, a certificate of water right from the river. Respondent Ron Zerbel testified that when he bought the property it was for

use as a commercial enterprise and that he now wanted to sell it to finance his retirement. He stated that 11 of the 29 acres were committed to a use other than farming and that the 11 acres cut the balance of the parcel in two. He also stated that at the present time houses were being built so close to the airstrip that he couldn't fly his airplane loaded with spray and stay 500 feet away from the homes as is required by law. Arlene Zerbel testified that they could not sell the land unless it were rezoned and that the parcel could not be sold for farm land. Judge Seuell commented that there were water wheel lines on the land and that one year cattle had been pastured on the parcel. Mrs. Zerbel testified in response that they could not afford to irrigate because the last bill for five days of irrigation had cost $130.

Petitioner Tiffany testified that he owned 37 acres to the east of the property, 20 acres of which he farmed. He testified the Zerbel's parcel had a seed crop on it this year and sheep were on the property the previous year. He expressed his concern again about the impact of additional houses on his ability to continue farming his property.

The county court closed the hearing, and by a vote of 2 to 1, adopted the planning commission's findings of fact with the exception of the finding pertaining to no water rights.[1]

OPINION

Petitioners' primary contention in this case is that Goal 3 was not properly addressed in the county's findings.

Petitioners assert that the county court rezoned the 29 acre parcel to a five acre minimum lot size without first determining what the existing commercial agricultural enterprise in the area was, in violation of Goal 3. Petitioners also assert that no adequate exception to Goal 3 was taken by the county court.

Respondents maintain that the county court did properly address Goal 3 and properly followed the Goal 2 exceptions procedures. Respondents suggest, however, that we must keep in mind that this zone change from one farm use designation (40 acre minimum lot size) to another farm use designation (5 acre minimum lots size) requires a different burden of proof than for a change from a farm use designation to a residential designation.

The county court based its decision to rezone respondents' property on its conclusion that the property was committed to non-farm use. What must be shown in findings to justify a determination that lands otherwise defined as agricultural lands are committed irrevocably to non-farm use has recently been addressed by this Board. See, generally, 1000 Friends of Oregon v Clackamas County, ___ Or LUBA ____ (LUBA No. 80-060, 1981); 1000 Friends of Oregon and City of Sandy v Clackamas County, ___ Or LUBA ___ (LUBA Nos. 80-075 and 80-076, 1981); Cohen v Clackamas County, 3 Or LUBA 26 (1981); 1000 Friends of Oregon v Douglas County, ___ Or LUBA ___ (LUBA No. 80-011, 1981). In 1000 Friends of Oregon v Clackamas County, LUBA No.

80-060, supra, we said:

> "***We hold in sum that a conclusion of irrevocably commitment to non-resource (non-farm or non-forest) use must at a minimum be based on detailed findings, supported by substantial evidence showing that the subject land cannot now or in the foreseeable future be used for any purpose contemplated in statewide Goals 3 and/or 4 because of one or more of the following:
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> "(a) Adjacent uses;
>
> "(b) Parcel size and ownership patterns;[5]
>
> "(c) Public services;
>
> "(d) Neighborhood and regional characteristics;
>
> "(e) Natural boundaries;
>
> "(f) Other relevant factors."
> LUBA No. 80-060, Slip Op at 13-14 (Footnote omitted).

In all of the cases quoted above, we emphasized the absolute necessity for findings to explain why the adjacent uses, parcel size and ownership patterns, etc., for a particular area lead the county to a conclusion of commitment for the area. That is, detailed findings must explain why it is that no reasonable resource use of the property is possible.

Viewed against the standards set in the foregoing cases, we can only conclude that Malheur County's findings concerning commitment are inadequate to demonstrate that respondents' property is committed to non-resource (here non-farm) uses. The county's finding that the property is not suitable for farming because it is alkaline soil does not explain why alkalinity of the soil is a factor which precludes any

reasonable farm use of the property. Suitability of the soil for farm purposes is not a factor which may be considered for purposes of determining whether a parcel is committed to non-farm use where the property is classified as agricultural land under the Soil Conservation Service classification.[2] 1000 Friends of Oregon v Clackamas County, supra, LUBA No. 80-060, Slip Op at 16-17. The finding "not an economical farm unit by acres" is insufficient to conclude the property is irrevocably committed to non-farm use. The question is not just whether the parcel by itself can be economically or profitably farmed, but whether the parcel is so impacted by development and other factors that it cannot be farmed alone or in conjunction with other parcels through sale or lease of the property. Cf Cohen v Clackamas County, supra; 1000 Friends of Oregon v Douglas County, supra. The county's finding that the parcel "is not and has not been a farm unit "appears to suffer the same defect as the previously mentioned finding that the parcel is not an economical farm unit. The finding "existing improvements would create a financial burden to reclaim" the property is not a detailed finding setting forth the facts as to what improvements the county is talking about, what the extent of the financial burden is and why it is the creation of a financial burden justified the county in concluding the parcel is lost to resource use. This finding is particularly weak viewed against the undisputed testimony in the record by Petitioner Tiffany as well as the comments by Judge Seuell that

livestock and grass seed have been grown on at least that portion of the property not covered by improvements. Moreover, the existence of improvements on the property if placed there for agricultural purposes (here, crop dusting) may not be used to support a conclusion that the property is committed to non-farm use absent some explanation in the findings as to why the improvements can no longer be used for farm purposes. See Clemens v Lane County, ___ Or LUBA ___ (LUBA No. 81-056, 1981).

The county's finding that most of the surrounding taxpayers have signed a petition apparently in favor of the zone change does not support a conclusion that the property is committed to non-farm use. The final "finding" of the county court that "the land is irrevocably committed to non-farm use" is not a finding but simply a conclusional statement.

Viewed against the standard established for determining commitment as well as the standard for findings generally in quasi-judicial land use cases, (see e.g., South of Sunnyside Neighborhood League v Board of Commissioners of Clackamas County, 280 Or 1, 21, 569 P2d 1063 (1977); Hill v Union County Court, 42 Or App 883, 601 P2d 905 (1979)), the findings of the Malheur County Court are inadequate to support its decision to rezone respondents' property.

Petitioners' assignment of error with respect to Goal 5 is that the county failed to consider or make findings on the effects of increased density on sensitive riparian habitat and wildlife on adjacent islands located within the Snake River.

The record before us, however, contains only the minutes of the planning commission and county court proceedings. There is no mention in the minutes of the existence of riparian habitat along the Snake River or wildlife on islands within the Snake River that might be affected by this rezoning decision. Petitioner Tiffany advised the Board during oral argument that there was some testimony in the proceeding before the county court about adverse effects on riparian and wildlife habitat. This testimony is not reflected in the record before this Board however, and no request was made to expand the record to include this alleged information. We cannot, therefore, say, based on the record before us, that the county court erred in not making findings concerning the effects of the rezoning decision on wildlife and riparian habitat. Cf Lee v City of Portland, 3 Or LUBA 31 (1981).

Petitioners' final assignment of error is an asserted violation of the draft Malheur County Comprehensive Plan. The draft plan is not in our record. We assume, because of the reference by petitioners to its status as a "draft plan," Malheur County has not yet adopted a plan which could be deemed binding on the county. Failure of the county to have this rezoning decision conform to its "draft" comprehensive plan is not error. See Atwood v City of Portland, 2 Or LUBA 397 (1981).

For the foregoing reasons the decision of Malheur County Court is remanded to the county for further proceedings not inconsistent with this opinion.

FOOTNOTES

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[1] The "decision" here was an oral motion by the county court adopting the findings of the planning commission contained in the planning commission minutes. Neither petitioners nor respondents have raised the issue of whether this act constitutes a final decision or determination of the county court. While we question whether the county's decision is a land use decision and whether a county court can even lawfully rezone land without adopting a written ordinance or resolution, the issue has not been briefed nor argued by any of the parties. We decline, therefore, to raise the matter on our motion.

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[2] In eastern Oregon property with a soil classification of I through VI is agricultural land within the meaning of Goal 3. While the county made no finding as to the soil classification of the parcel it appears from the record that the soil classification falls within the I to VI range.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENNETH and MICHAEL TIFFANY, Petitioners, vs. MALHEUR COUNTY and PON and ARLENE ZERBEL, Respondents.	LUBA No. 81-105 PROPOSED OPINION AND ORDER

Appeal from Malheur County.

Kenneth and Michael Tiffany, Adrian, filed the Petition for Review. Kenneth Tiffany orally argued on his own behalf.

Steven J. Pierce, Ontario, filed the brief and orally argued on behalf of Respondents Ron and Arlene Zerbel.

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

REMANDED 1/19/82

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).

STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION

DATE: 1/19/82

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: TIFFANY v MALHEUR COUNTY
LUBA No. 81-105

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

This case concerns Malheur's County attempt to rezone a 29 acre parcel from F-1 (Exclusive Farm Use, 40 acre minimum) to F-2 (General Farm Use, 5 acre minimum). Petitioners assert the county's decision violates Goals 2, 3 and 5, as well as the draft Malheur County Comprehensive Plan.

The parcel consists of Class I through VI soil. The county, however, determined that the parcel was committed to non-farm use. We reviewed the county's findings against the standard set forth in previous cases for determining commitment and concluded the county's findings were inadequate to support its decision to rezone the parcel.

Petitioners argued that the decision violated Goal 5 because the county failed to consider or make findings on the effects of increased density on sensitive riparian habitat and wildlife on adjacent islands located within the Snake River. There was, however, no reference in our record to any adverse effects from the rezoning decision on riparian habitat or adjacent wildlife. We could not, therefore, conclude that Goal 5 had been violated because the county failed to address matters not reflected in the record.

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.

BEFORE THE LAND CONSERVATION AND DEVELOPMENT COMMISSION

OF THE STATE OF OREGON

KENNETH and MICHAEL TIFFANY, Petitioners, v. MALHEUR COUNTY and RON and ARLENE ZERBER, Respondents.	)	LUBA No. 81-105 LCDC DETERMINATION

The Land Conservation and Development Commission hereby approves the recommendation of the Land Use Board of Appeals in LUBA case No. 81-105.

Dated this 8th day of February, 1982.

For the Commission:

James F. Ross, Director
Department of Land Conservation
and Development

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