BEFORE THE LAND USE BOARD OF APPEALS JUL 16 1 34 PM '82

OF THE STATE OF OREGON

CLIF KENAGY, FRIENDS OF BENTON COUNTY, INC., Petitioners, vs. BENTON COUNTY and, STANLEY STARR, Respondents.	LUBA No. 82-019 FINAL OPINION AND ORDER

Appeal from Benton County.

Richard P. Benner, Portland, filed the Petition for Review and argued the cause on behalf of Petitioners.

Richard T. Ligon, Corvallis, filed the brief and argued the cause on behalf of Respondent Benton County.

Peter L. Barnhisel, Corvallis, filed the brief and argued the cause on behalf of Respondent Stanley Starr. With him on the brief were Fenner, Barnhisel, Morris & Willis.

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

Remanded. 7/16/82

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).

BAGG, Referee.

NATURE OF THE DECISION

Petitioners appeal approval of a minor partitioning of an 80 acre parcel of land in an exclusive farm use (EFU) zone in Benton County. The partitioning allows the division of the 80 acre parcel into two 40 acre parcels.

STANDING

Introduction

Petitioners' claim to standing is founded primarily in the assertion that divisions of large parcels of farm land will result in increased farming costs. This claim is denied as untrue by respondents Benton County and Stanley Starr. Because respondents challenged the truth of the allegations of aggrievement, petitioners moved for an evidentiary hearing. An evidentiary hearing was held before the Board on June 1, 1982.

What follows is a catalog of petitioners' claims, the respondents' objections and our views as to the standing of each of the petitioners.

A. Petitioners' Claims.

Petitioner Clif Kenagy alleges he operates a 326 acre farm in Benton County. Kenagy adds a portion of the land he farms lies in the north Albany area, not far from the subject property. Mr. Kenagy further alleges that he is a member of Friends of Benton County, Inc. and that he participated in the proceedings leading to final approval of the minor partition.

Petitioner Kenagy claims he is adversely affected in two

ways. First, he complains that when large farm parcels in the north Albany area are broken into smaller parcels, the available pool of large farm parcels that may be farmed economically becomes smaller. Kenagy claims that he will "have to quit his diversified operation or deal with increasing inefficiencies."[1] Mr. Kenagy amplifies his complaint in an affidavit attached to the petition for review which explains that "larger parcels are the most desirable because they can be farmed more efficiently." We do not know what is meant by "large parcels."

Mr. Kenagy's second claim to adverse effect rests on his assertion that "division of large farm parcels into smaller parcels increases...land rental, lease and purchase costs." Kenagy claims that smaller parcels cost more per acre, and competition among farmers for large parcels increases rental and lease costs. Mr. Kenagy explains that smaller parcels cost more because they are attractive to a wider market including "hobby farmers."[2]

The petition includes a claim for standing for Friends of Benton County through the standing of petitioner Kenagy and two other members of Friends of Benton County. It is alleged that Friends of Benton County is "an Oregon nonprofit corporation organized to '...permit sound land use planning and the optimum use of land resources to preserve or improve the quality of life in Benton County.'"

Eugene Lemons states he owns a 97 acre farm within sight

and sound of the subject property. Lemons claims he would be able to see homes built on the property. In his accompanying affidavit, Mr. Lemons claims he is also adversely affected because of increased population density near his farm "bringing with it increased potential for trespassing, vandalism and nuisance." He adds a similar allegation with respect to increased price per acre of farm land with each division of farm land. There is no assertion that Eugene Lemons participated in the proceedings before Benton County.

Robert M. Goracke alleges he farms 5,000 acres in the Benton County area. He alleges that he farms scattered parcels and that any partitioning of farm land affects him in the same manner that it affects Mr. Kenagy. That is, partitioning of farm parcels diminishes the number of large parcels that may be farmed economically and increases land acquisition costs. Petitioner Goracke asserts that he participated in the proceedings before Benton County.

B. Respondents' Objections.

Respondent Benton County objects to the standing of Mr. Kenagy on the ground that Mr. Kenagy's interests are not "adversely affected" and he is not "aggrieved" within the meaning of 1979 Or Laws, ch 772, sec 4(3).[3] The county claims that Kenagy has alleged no facts showing how a land use decision about the Starr parcel, has any affect on Mr. Kenagy's parcel located over 2 miles away.

The county also denies Mr. Kenagy's assertion that reducing

farm parcel sizes will result in higher costs. The county points out that Kenagy has not alleged that he has attempted or contemplated adding the Starr parcel to his farm or that Mr. Kenagy seeks to expand his farming operation at all. The county concludes that without this allegation of direct interest in the Starr property, Kenagy has alleged only speculative injury.

The county concludes its objection to Mr. Kenagy's standing by claiming that Mr. Kenagy did not "appear" before the county as required in 1979 Or Laws, ch 772, sec 4(3)(a), as amended by 1981 Or Laws, ch 748.[4] The county says Mr. Kenagy appeared before the county commissioners only as a representative of the Friends of Benton County, and not as an individual. Record pg. 38, 43. The county concludes Mr. Kenagy made no appearance on his own behalf.

The county then claims Friends of Benton County has made no appearance. The county states that as the Friends of Benton County can only act at the direction of its board of directors, and as there has been no allegation that Mr. Kenagy appeared at the direction of the board of directors, there has been no appearance for the Friends of Benton County.

The county also attacks the standing of Friends of Benton County based on the testimony of its three members, Mr. Kenagy, Mr. Lemons and Mr. Goracke. The county reminds the Board that Mr. Lemons did not appear before the county and fails, therefore, to have standing on his own right. Respondents

argue Mr. Kenagy and Mr. Goracke fail to have standing because there is no assertion that either individual intends or has ever even attempted to acquire the Starr parcel. The county believes this interest is prerequisite. In the case of Mr. Goracke, there is not even an allegation that Mr. Goracke's farming operation is anywhere near the Starr property. Even if Mr. Goracke can be said to have an interest in the case, the county states that Mr. Goracke has made mere generalizations and has failed to support with facts his conclusion that smaller parcels are more expensive than larger ones.[5] He therefore has suffered no aggrievement, according to the county.

C. Opinion on Standing.

As stated earlier, because factual allegations included in the petition for review were denied by respondent Benton County and Mr. Starr, petitioners moved for an evidentiary hearing. At the evidentiary hearing, petitioner Kenagy and Goracke testified as did respondent Starr.

Mr. Kenagy testified as to his experience in buying/leasing parcels for farm use. His leaseholds include parcels that vary in size from below 80 acres to more than 80 acres, and he testified that smaller parcels may be cheaper to lease than larger ones as they are less desirable for farmers. Mr. Kenagy reiterated his view that smaller farm parcels are more expensive to purchase for the reasons stated in his original affidavit and claim in the petition for review.

Mr. Kenagy was asked if he would "like to buy more land?"

He responded "oh yeh," and when asked if he would prefer to own land rather than lease it, he stated that he would much prefer to own it. His reason for wishing to own land was that it would make one more "secure," as he would be immune from others leasing "out from under you." Mr. Kenagy stated that the reason he didn't buy more land was because it was "too high." We understand Mr. Kenagy to view land cost as presently too high. His testimony tells us that he is not now in the market for more land.

Indeed, at no time did Mr. Kenagy state he was in the market for additional farm property whether for lease or purchase except on the contingency that he and other members of his family would join together in a farming operation later, perhaps a corporate farming operation. Mr. Kenagy did not claim any of his leases were to expire or needed to be re-negotiated. Mr. Kenagy's testimony was that the only parcel that he was presently interested in purchasing (other than one on which he held an option) was one owned by his mother. Any other acquisition of farm land rested, as we understand his testimony, on family matters as well as price.

In order to have standing, the evidence must show that the individual, here Petitioner Kenagy, may be "impacted" by the decision. That is, the decision must somehow touch the would-be petitioner. Further, this impact must likely result in injury to some interest of the petitioner. Where there is no impact on the petitioner, there can be no injury. If the

first step is reached, if the petitioner is impacted by the decision, then one may inquire as to whether that impact is adverse to the petitioner. See Warren v. Lane County, ____ Or LUBA ____ (LUBA No. 81-102, 1982). We find that Mr. Kenagy is not impacted by the decision as he is not presently interested in the purchase or lease of additional farm land. Any future purchase or lease of farm land is subject to contingencies largely centering around Mr. Kenagy's relationship with his own family. In order for Mr, Kenagy to be affected as alleged, his family would have to come to agreement on future farm operations that included acquisition of additional land. Mr. Kenagy has not even asserted that this family concurrence is even under discussion, let alone a distinct probability. We can only say it is speculative that Mr. Kenagy will be impacted by this decision. Not being impacted by the decision, Mr. Kenagy can not claim his interests are adversely affected or he is aggrieved. We conclude that Mr. Kenagy does not have a personal stake in the outcome of this case. See Oregon Newspaper Publishers v Peterson, 244 Or App 116, 414 P2d 21 (1966). See also Thunderbird Motel v City of Portland, 40 Or App 697, 596 P2d 994 (1979). Petitioner Kenagy does not have standing to bring this appeal.

As to Friends of Benton County, Inc., we find the organization does have standing to bring this appeal through its member, Robert M. Goracke. Mr. Goracke testified, and we find based on his testimony, that partitionings of large farm

parcels increases competition for the purchase of the remaining larger farm parcels. This increased competition results in a higher price per acre of the remaining large farm parcels. The rental value of the resultant smaller farm parcels goes down because the smaller parcels are less desirable. Mr. Goracke also testified and we find that the smaller parcels are more expensive to farm per acre. For example, he testified that a 40 acre parcel has a one mile border, whereas an 80 acre parcel has only a one and a half mile border. The 80 acre parcel takes a shorter time to go around than two 40 acre parcels. There was no testimony, and we make no finding, on whether increased costs of farming the smaller parcels is offset by the reduced rental cost.

Mr. Goracke testified that he was interested in acquiring more large farm parcels, but he expressed no interest in this particular parcel.

We find his interest in acquiring farm parcels establishes a distinct possibility that he will be impacted by this decision. As we find it is true that partitionings result in higher costs of purchase of farm land, we also conclude it is likely Mr. Goracke will be injured. Mr. Goracke, then, has a personal stake in the outcome of this decision.[6]

As Mr. Goracke has standing to prosecute an appeal on his own, petitioner Friends of Benton County has standing. 1000 Friends of Oregon v Multnomah County, 39 Or App 917, 593 P2d 1171 (1979); 1000 Friends of Oregon v Douglas County, 1 Or LUBA

42 (1980), affd on appeal.[7]

FACTS

In June of 1981, Mr. Starr filed an application with the county to divide an 80 acre parcel in an EFU zone into two 40 acre parcels. The property consists of Class II soil and is presently leased for ryegrass production.[8]

The western 40 acres (parcel A) is particularly well suited for filbert production, but the remaining 40 acres (parcel B) is not well suited for orchard crops. Gross income recoverable is much greater with a filbert crop on parcel A than with a grass seed crop on that same parcel. Parcel B is apparently not well suited for filbert production because of poor drainage.

Surrounding properties are in farm use. There is a 99 plus acre parcel to the north in grain and grass seed, 34 and 14 acre parcels to the west in grass seed, 72 plus and 18 acre parcels to the south in grain and grass seed and other uses including a residental subdivision and a school. There are several filbert orchards within a mile of the property, several of which are approximately 40 acres in size. These orchards are part of larger farm operations.

Benton County has no minimum lot size in its EFU zone. Each division is considered individually against Sec IV.06 of the county zoning ordinance.[9] In order to divide farm land within an EFU zone under that provision,

> "Any proposed parcel intended for farm use must be appropriate for the continuation of the existing commercial agricultural enterprise of the particular

area." Benton County Zoning Ordinance, Sec IV.06(a)(1).

That requirement may be satisfied in either of two ways. The first method is through an analysis of "soil productivity, drainage, terrain, special soil or land conditions, availability of water, type and acreage of crops grown, crop yields, processing and marketing practices and amount of land needed based on area characteristics, to constitute a commercial farm unit." Benton County Zoning Ordinance, Sec IV.06(1)(a)(2). The second method is found under Sec IV.06(1)(c) of the ordinance. This latter provision requires a showing that the commercial farm use will be increased by the division. In this case, the county relies primarily on IV.06(1)(a)(2).

Under the heading "processing and marketing practices," the county found:

> "A high demand for filberts currently exists. There is actually a shortage of new filbert starts. The California Almond Growers Association has coorperated with Oregon Nut Growers to market the local product in California. The Board finds that filberts can be economically marketed." Record pg. 10.

The county went on to review the parcel sizes within a one mile radius and noted that many parcels in grass and seed production are smaller than the average parcel size in the area of 35.25 acres. Record pg. 11. We understand this average to be an average of all parcel sizes without regard to crops grown or other agricultural factors. Because the proposed filbert

farm will result in a higher profit to the applicant than possible with the present crop, the county concluded that it is likely that the land will remain in farm production. Record pg. 8. The county found that both 40 acre parcels are viable economic units. Under the heading "amount of land needed, based on area characteristics, to constitute a commercial farm unit" the county found:

> "A 40-acre parcel is a viable commercial unit for ryegrass production as is evidenced by the fact that several, immediately adjoining parcels are in such use, and some are smaller than forty (40) acres. Further, proposed Parcel B currently is leased to a ryegrass grower and will continue to be so leased. It is reasonable to assume that forty (40) acres of ryegrass can bring a profit. Such fact was confirmed by testimony from Mr. Thingvold. A 40-acre parcel is a viable, commercial unit for filbert production. For reasons as noted above, it will, in fact, bring a much higher profit than will the current crop (wheat)." Record at pg. 10.

The county also found that even though the return on parcel B may be reduced because of the parcel's reduced size, "the overall economic return on the eighty (80) acres will increase due to the much higher return from the filbert orchard." Record pg. 11.[10]

ASSIGNMENT OF ERROR NO. 1

Assignment of error number 1 alleges:

> "Respondent Failed to Find that the Two 40-Acre Parcels Are as Large as the Existing Commercial Agricultural Enterprises Within the Area."

In pertinent part, Goal 3 provides:

"Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area."

Under this assignment of error, petitioner claims LCDC Goal 3 is violated because the respondent failed to find that the two 40 acre parcels are as large as the existing agricultural enterprises in the area. Respondent states that counties are free to choose minimum lot sizes, providing that EFU land "remains in parcels large enough to maintain commercial agriculture in an area." See City of Eugene v Lane County, 1 Or LUBA 265 (1980) and Sane Orderly Development, Inc. v Douglas County, 2 Or LUBA 196 (1981).

Respondent argues Goal 3 does not require that proposed partitionings create lots as large as commercial operations, but that the lots be "appropriate" for the continuation of commercial farming operations. Respondent says that its inventory of farm parcels showed that grass/grain seed is produced on parcels of 99, 72, 18, 14 and 34 acres. Respondent states that it is safe to assume that several of the parcels are leased as part of larger operations, but that the proposed parcel B is larger than most of the adjoining parcels producing grass seed and will continue to be leased for that purpose as part of a larger profitable unit. Respondent argues that the easterly parcel will, therefore, "be sufficient" to continue the commercial agricultural enterprise in the area.

Respondent Starr echoes this argument and states there is

nothing in Goal 3 that requires a partitioned lot to be as large or larger than commercial farms in the area.

We do not believe Goal 3 requires that every division of farm property result in parcels that are as large as the exising farms in the area.

Goal 3 requires the maintenance of the existing agricultural enterprise within the area. We believe it is encumbant upon the county to discuss how it is that the division will result in such maintenance. The matter of whether a particular division must result in a parcel size as large as existing farm operations is a matter for individual scrutiny in individual cases. See the discussion in assignment of error number 2, infra. We do not believe the county breached an existing legal duty in failing to find that the two 40 acre parcels were as large as the existing commercial agricultural enterprises within the area.

Assignment of error number 1 is denied.

ASSIGNMENT OF ERROR NO. 2

Assignment of error number 2 alleges:

> "Respondent Misapplied Goal 3 by Finding that the 40-Acre Parcels Are as Large as or Larger than Adjoining Parcels in Commercial Farm Use, and Large Enough for Commercial Farming."

Here, petitioner states that the record shows that grain and ryegrass production are produced on parcels immediately adjacent to the subject property and that there are several filbert orchards within a mile of the subject property.

Petitioner argues respondent looked at the size of adjoining parcels and the feasibility of farming on 40 acre parcels when respondent should have compared the proposed parcels to the size of commercial farms in the area.

Respondent County argues its findings addressed the question of whether the lots to be erected would be comparable in size to commercial farms in the area. The county argues that a commercial farming operation is an operation which will contribute in a substantial way to the area's economy and help maintain agricultural processors and established farm markets. Respondent takes this definition from the LCDC "Common Questions About Goal 3 - Agricultural Lands: Minimum Lot Sizes in EFU Zones." Respondent County states that nothing in Goal 3 requires that a commercial agricultural enterprise be limited to enterprises providing the sole financial source of income for the owner. Respondent County relies on its finding that the proposed production of filberts will supply the identified market of the California Almond Growers and be a viable part of the marketing system in comformity with Goal 3. Respondent Starr states that an adequate inventory of farm operations was made, and the county commissioners' decision was based on more than simply what is possible in farm use in the area.[11]

The inventory requirements that must be addressed prior to any division of agricultural land are discussed in an LCDC policy paper entitled "Common Questions About Goal #3 - Agricultural Lands: Minimum Lot Sizes in EFU Zones." In that

policy paper, determination of lot size is based on a number of factors:

> "Once the types of commercial agriculture in the area are identified, one can determine the lot size(s) needed to maintain it (sic).[2] The appropriate lot size should be determined based on type of crops grown, yields, acres in production, existing processing and marketing practices, type of farms (i.e., practices and crops) and most important, the amount and type of land needed, in various parts of the county, to constitute a commercial farm unit.
>
> The type and quantity of crops produced and how they are marketed are the key factors in determining appropriate lot sizes. Owner characteristics, such as percent of income from farming and primary occupation, do not necessarily define a commercial farmer or a commercial farm unit. Commercial agriculture in Oregon is supported, in part, by less than full-time farmers." (Footnote omitted) (Emphasis added).

In the same policy paper, a "commercial agricultural operation"[12] is defined as an agricultural operation that will:

> "1. Contribute in a substantial way to the area's existing agricultural economy; and
>
> "2. Help maintain agricultural processors and established farm markets.
>
> "Therefore, when determining whether a farm is part of the commercial agricultural enterprise, one should consider not only what is produced, but how much and how it is marketed. These are important factors because of the intent of Goal 3 to maintain the agricultural economy of the state."

As we understand the commission's policy, the county must decide how much land is needed to constitute a commercial farm operation. Any division of land must not go below that limit. Each resulting parcel must contribute "in a substantial way" to

the area's agricultural economy and must further help maintain the processing and wholesaleing markets wherever these markets may be located.

In Thede v Polk County, 3 Or LUBA 335 (1981), we discussed the steps necessary to determine the "area" that must be defined before one may conclude that a particular division will maintain the existing agricultural enterprise "in the area."

> "We recognize that the word 'area' as it appears in Goal 3 has not been clearly defined. We believe it is up to the local governing body to define the area. In this case, respondent county relied in large part on roadways and topographical features. While there may be areas within counties that [sic] are so clearly divided by geographical features as to form convenient geographical 'areas,' the 'area' cannot be fully defined and used as a basis for agricultural land division until the 'commercial agricultural enterprise' is known. That is, the county must first inventory the kinds of commercial agricultural activities and then look to where (geographically) those various agricultural activities take place. Once those two inquiries have been concluded, the county may then make an informed statement of what the 'existing agricultural enterprise within the area' may be. It may be that geographical features and even roadways will be of some significance in deciding whether a particular land division, if allowed to occur, will maintain the existing commercial agricultural enterprise within an area. That conclusion, however, may not be reached without first determining what the existing agricultural enterprise is and where that enterprise is undertaken.
>
> "In this case, as mentioned above, the county determined that there was mixed agricultural uses occuring on parcels of varying size. The county determined that most of the agricultural uses were by 'part-time farmers.' In making its analysis, however, the county reviewed an area of only about one mile radius from the subject parcel. Such an isolated portion of the county cannot give an accurate picture of the 'commercial agricultural enterprise.' Agricultural divisions occurring within that one mile radius may well have an effect on other agricultural

> enterprises outside of that area and be inconsistent with maintaining the local (or even the county's) commercial agricultural enterprise." Thede v Polk County, supra, at 340.

In this case, the county found that each of the parcels was suitable to grow crops and do so at a profit. In the case of parcel A, the county found the land suitable for orchard crops and found the property could produce a net income of $33,067 annually if planted in filberts. Parcel B was found to be capable of producing a net income of $6,360 annually if maintained in ryegrass. The county's inquiry as to the commercial agricultural enterprise in the area, however, was limited to an area of one mile radius from the subject property. This limited inquiry does not satisfy the inventory requirement in the policy paper or in Thede. The county did not determine of what the county's agricultural enterprise consisted and only looked at selected agricultural operations within this limited one-mile radius. In so doing, the county predisposed the use of the property to two possible crops. The county's discussion of the sizes of parcels within which the identified agricultural operations occur is similarly too limited. With respect to wheat and ryegrass, the county did not discuss the market for wheat and ryegrass at all. Without a showing that the one mile radius inventory area is representative of the agricultural enterprise in the county, limiting review to an area of only one mile radius from the subject property resulted in a improperly restrictive view of

the agricultural operations that might be conducted on the property. That restrictive view prevents an accurate determination of the lot sizes needed to maintain the county's agricultural enterprise.[13]

It is our view that the county was required to determine what current agricultural operations make up the agricultural enterprise of the county. From that inquiry, the county must determine what size parcel is necessary to constitute a "commercial agricultural operation." Once those two decisions are made, the county may then determine what agricultural activities are suitable on the subject property. The next step, as we understand commission policy, is to determine whether or not given the agricultural activities which are suitable, the particular land division proposed will result in parcels large enough to maintain the county's commercial agricultural enterprise. Sane Orderly Development v. Douglas County, supra. The immediate "area" around the subject parcel may be important because of limitations on the kind of agricultural operations that may take place, ownership and leasehold patterns, climate and any number of other factors that may bear upon what crops may be grown and what size parcel is needed to grow the crops on a commercial scale. However, we think as a general rule, the county must determine what the commercial agricultural enterprise is within its county as a first step.

In this case, we find that such analyses were not

undertaken. The county did not conduct a sufficiently detailed study to determine the amount of land needed with respect to the crops that it apparently had identified as suitable for the property (filberts, grass seed and grain).[14]

Assignment of error number 2 is sustained.

ASSIGNMENT OF ERROR NO. 3

Assignment of error number 3 alleges:

> "The Two 40-Acre Parcels Are Smaller than the Existing Commercial Farms in the Area."

Petitioner's argument is that the record shows that "all commercial filbert orchards are one part of farms 100 acres or more in size." Petition for Review at 8. Petitioner argues that there are no 40 acre filbert orchards in the area, and by this statement we understand petitioner to claim there are no commercial farms which consist of a single 40 acre filbert orchard in the area. Petitioner makes the same argument with respect to grain and ryegrass farms. Petitioner argues that the respondent has allowed for the creation of parcels smaller than the existing commercial farming opertions in the area in violation of Goal 3.[15]

Again, we decline to hold that a division of land must always result in parcel sizes that are as large as existing ownerships or, necessarily, existing single crop operations in any particular area. The goal provides that the division must maintain the existing agricultural enterprise, but this mandate does not necessarily mean that divisions must result in parcels

as large as existing farm operations where a farm operation may be made up of a mix of ownerships and leaseholds.

Assignment of error number 3 is denied.

This case is remanded to Benton County for action not inconsistent with this opinion.

SPECIALLY CONCURRING, Reynolds, Chief Referee.

I specially concur because while I agree that the county has not complied with Goal 3 as interpreted by LCDC, I am not sure I do so for the reasons advanced by the majority. The majority seems to be saying the county erred in limiting the "area" which it considered to an area one mile in radius from the Starr property. As the majority points out, this holding is consistent with what we said in Thede v Polk County, 3 Or LUBA 335 (1981). However, as I read the LCDC policy paper, which was not before us in Thede, the policy paper is inconsistent with the analysis in Thede. The analysis in Thede, focuses on first defining the "area" within which the agricultural enterprise is located. I believe this approach is confusing, and, practically speaking, impossible for local governments to apply. The policy paper approach, while leaving something to be desired, at least provides a workable method to determine appropriate minimum lot sizes.

As noted by the majority, the policy paper places primary emphasis on determining what lot sizes are needed to allow commercial farm operations to exist. In other words, no division of land may be allowed in EFU zones unless each lot created is of sufficient size to be utilized as a commercial farm operation. A commercial farm operation is not necessarily one which is operated by a person whose primary occupation is farming or whose primary income is derived from farming. Rather, a commercial farm operation is one which 1) contributes

in a substantial way to the area's agricultural economy, and 2) helps maintain agricultural processors and established farm markets. If a county can demonstrate that each lot resulting from a proposed division of land will be suitable in size and type to accomplish these requirements, then the decision may be approved consistent with Goal 3.

The county found, as the majority states, that parcels A & B were suitable for growing filberts and ryegrass respectively and for doing so at a "net" profit. The net annual income derivable from filberts on parcel A was determined to be $33,067 compared to $6,360 from ryegrass on parcel B. The county also found the crops for which parcels A & B were suitable were grown on similar size parcels within a one mile area.

These facts do not explain, however, why parcels A & B will be of a <u>size</u> which will 1) contribute in a substantial way to the area's agricultural economy, and 2) help maintain agricultural processors and established farm markets. The county made no analysis of the area's agricultural economy.[16] Hence, the county could not determine whether these parcels would contribute in a substantial way to that economy. It could be argued a presumption should exist that the parcels would contribute in a substantial way to the area's economy because a net income of a given amount is derivable from each parcel if used to grow crops already grown within the immediate area. It is my understanding, however, LCDC does not

favor an income analysis approach in deciding questions about agricultural suitability. In Coleman v Lane County, 5 Or LUBA 1 (1982), LCDC said the following concerning use of the gross income approach in deciding whether resource lands are committed to non-resource use:

> "Actual or potential production of gross income is not an essential element of the definition of agricultural lands which meet the soil classification definitions of the Goal (Goal 3), nor is a finding that land cannot produce any gross income essential to a finding that land is irrevocably committed to non-resource use. Land is agricultural and Goal 3 applies if it meets the definition of Goal 3. The inability of land to produce gross income is a factor, but only one of the factors, in a finding that agricultural land is irrevocably committed to non-resource use."

If inability of land to produce a gross income is only a factor to be used in deciding whether a parcel is too small or otherwise constrained to be exempt from Goal 3 protection, it appears to me that the ability of a parcel to produce a net income should only be a factor in deciding whether it is large enough to qualify as a commercial farm operation. LCDC could, if it so chose, draw a distinction between use of gross income in determining whether a parcel is unsuitable for agricultural uses, and use of net income for determining whether a parcel contributes in a substantial way to the area's agricultural economy. LCDC could announce, through appropriately adopted policies, that a county may utilize a net income approach in determining whether parcels will be of a size that will contribute in a substantial way to the area's agricultural

economy. Such a policy would probably be of benefit to counties because it would be fairly easy to apply. Unless and until such policies are adopted, however, and in view of LCDC's apparent present concern with use of an income analysis, I am compelled to conclude the county has failed to explain why parcels A & B will each contribute in a substantial way to the area's agricultural economy.

The county also did not determine whether the parcels would be of a size which would help maintain agricultural processors and established farm markets. We know, in the case of filberts, that the processors are in California. Yet, the county undertook no analysis of what size parcels were necessary to help maintain such processors. The same can be said of ryegrass processors. Just because on other parcels within a one mile area and of a similar size are grown filberts and ryegrass does not mean these other parcels are of a size which help maintain filbert and ryegrass processors or established farm markets.

Again, it may be that LCDC will adopt a policy that this requirement is presumed met if each parcel will be capable of producing a net income of a given amount. It may also be that LCDC could interpret "agricultural processors and established farm markets" as meaning only those within the county. Benton County in this case would not, then, have to consider whether a 40 acre filbert orchard will help maintain filbert processors in California, or the "established" filbert market, if located

outside Benton County. I believe, however, as with utilization of a net income approach, that these policy decisions should be adopted if at all by LCDC pursuant to ORS 197.040(1)(c) and not this appeals format.

For the foregoing reasons, I concur in the result reached by the majority.

FOOTNOTES

1

We understand from the evidentiary hearing that Mr. Kenagy calls his farm "diversified" because he grows several different crops. The word "inefficiencies" is not defined by Mr. Kenagy.

2

In his affidavit, petitioner Kenagy includes a claim that on 5/21/81 Mr. Starr bought the subject 80 acre parcel for $2,500 an acre. On 7/07/81, a 20 acre parcel with the same soil class and the same zoning sold for $5,400 an acre.

3

1979 Or Laws, ch 772, 4(3)(a):

"(3) Any person who has filed a notice of intent to appeal as provided in subsection (4) of this section may petition the board for review of a quasi-judicial land use decision if the person:

"(a) Appeared before the city, county or special district governing body or state agency orally or in writing; and"

"(b) Was a person entitled as of right to notice and hearing prior to the decision to be reviewed or was a person whose interests are adversely affected or who was aggrieved by the decision."

Objections to Mr. Kenagy's standing are echoed by participant Stanley Starr. Mr. Starr notes that Mr. Kenagy has not asked to lease farm land from Mr. Starr, and Mr. Starr asserts that Mr. Kenagy farms parcels of land smaller than 40 acres. Respondent Starr also denies that division of the 80 acre parcel into two 40 acre parcels will increase rental or lease costs of Mr. Kenagy or the Friends of Benton County.

4

Petitioner Kenagy disputes the assertion that he appeared only for the Friends of Benton County. Because we find, infra, that Mr. Kenagy is not adversely affected or aggrieved, we do not express an opinion as to the manner of his appearance.

5

As with the assertion of standing by Mr. Kenagy,

participant Starr echoes the arguments of Benton County on Mr. Lemons and Mr. Goracke and Friends of Benton County.

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[6] Mr. Goracke has been engaged in farm activities and the dealing in farm property for 41 years. He has also served on the Board of Directors of the Federal Land Bank. One of the functions of the Federal Land Bank is to provide loans for the acquisition of farm land.

Stanley Starr testified that he also would expect to pay more for smaller parcels. However, the reason for the increased cost would be the cost of partitioning the parcels, and not the inherent cost of smaller parcels. Mr. Starr's experience in farming operations, while extensive, is not as extensive in the purchase, lease and sale of farm parcels as that of Mr. Goracke. Consequently, we view Mr. Goracke's testimony to be the more substantial.

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[7] With respect to Eugene Lemons, we hold that Mr. Lemons does not have standing in his own right and therefore, he may not contribute any standing for the benefit of Friends of Benton County. Mr. Lemons failed to allege any participation in the matter below as required by 1979 Or Laws, ch 772, sec 4(3). We should note that at the evidentiary hearing petitioner Friends of Benton County put forth a theory that where the organization has standing, anyone of its members therefore has standing. There is no authority for such a proposition, and we decline to adopt such a proposition here. Indeed, the whole matter of representational standing is now before the Supreme Court in the case of Benton County v. Friends of Benton County, 56 Or App 567 (1982).

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[8] Mr. Starr proposes to plant filberts on the western 40 acres (parcel A) and to continue to act as a lessor of the eastern 40 acres (parcel B). A potential sale of the eastern 40 acres (parcel B) would only occur if necesssary to raise money to afford machinery to harvest filberts on the western 40 acres (parcel A). Harvest of the first crop is not expected for some 6-7 years after planting. We note, however, that Mr. Starr's intentions are not particularly relevant to our inquiry. Stringer v Polk County, 4 Or LUBA 99 (1981). Sane Orderly Development v Douglas County, 2 Or LUBA 196, 203 (1981).

[9] Benton County requires that additional criteria be applied to any division of farm land in which a residence is to be constructed. There are no residences on the property now, and there has been no application for a residence. See Benton County Zoning Ordinance IV.03(2)(a,b).

[10] We understand the county to believe LCDC Goal 3 is satisfied through application of the ordinance.

[11] At oral argument and in supplemental memoranda, respondent county argues further that LCDC has determined that Sec IV.06(1)(a)(2), when properly applied, complies with statewide Goal 3. Respondent states that LCDC held that the particular ordinance provision was adequate once the area within which farm use inventories would be made had been defined. The county goes on to claim that a 1/2 mile radius study area for such inventories has been established by Benton County, and that the Department of Land Conservation and Development has "indicated" that this area is an acceptable definition. The "approval" apparently came by telephone. We do not view a casual comment as an approval by the DLCD or the LCDC. The county argues the 1 mile radius surveyed during this course of this particular partitioning application more than satisfies the ordinance and should therefore show compliance with statewide Goal 3. We do not understand respondent to assert that we may not review the partitioning for compliance with Goal 3. Indeed, respondent agrees that we may review the partitioning against Goal 3. As stated in its letter of June 4, 1982, respondent county's argument is that the favorable LCDC review of Benton County's zoning ordinance establishes "a virtual prima facie case" that Benton County's farm division ordinance as applied in Kenagy complies with Goal 3.

[12] We understand the policy paper treats the terms "commercial farm unit" and "commercial agricultural operation" as synonymous.

[13] The county's inquiry was also limited in that it did not consider whether the parcels surveyed within the one mile radius contributed in a substantial way to the agricultural enterprise of the county. For example, the county did not

determine whether the small parcels in ryegrass contributed substantially to the agricultural enterprise of the county and, therefore, maintained the existing agricultural enterprise, or whether the small parcels could only be considered along with other parcels which together so maintained the existing agricultural enterprise.

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14 We believe the policy paper and our holding in Thede, which we continue in this case, presents some problems for local governments. As we understand the policy paper and our holding in Thede, the county must look not only to agricultural activity within in its own borders, but also to the market for those agricultural activities. In this case, the county would have to look to California to find out what size filbert farm is necessary to support the California processor and wholesaler. If it turns out that the California buyer requires orchards of several hundred acres in order to stay in business, then arguably a 40 acre filbert orchard in Benton County does little to maintain that marketing activity; and, therefore, a 40 acre filbert orchard in Benton County is not a commercial agricultural operation.

As we understand the term, commercial agricultural enterprise, means all activities which combine to make it possible to plant, grow, harvest, process and distribute agricultural products. If only the planting, raising and harvesting of crops takes place within a county, then the commission may wish to say those functions alone constitute the "commercial agricultural enterprise within the area." Under this view, "area" equals county.

The commission might wish to consider that whenever a crop is sold outside of the county, a presumption exists that this growing and harvesting activity contributes in a substantial way to the agricultural enterprise of the area. In other words, when it is shown that the market for a crop exists outside the county, the market for that crop is not considered in determining whether a particular agricultural operation maintains the agricultural enterprise of the county. Rather, what is considered is whether the particular agricultural operation has a history of being able to sustain itself. That is, do similar operations on similar size parcels come and go, or do they tend to stay and continue over a period of years. If a particular agricultural operation can sustain itself, perhaps a presumption should exist that it is a substantial contributor to the existing agricultural enterprise and, therefore, maintains the existing agricultural enterprise of the area.

We would ask that LCDC clarify whether "agricultural enterprise within the area" requires an analysis of the lot sizes necessary to maintain the processors and wholesalers who may be located out of the county or, as in this case, out of state.

It may be the very difficult task that seems to be required by the policy paper in Thede is indeed the requirement of the commission. The commission may require the partitions of farm land, especially before acknowledgment, be difficult to the point of practical impossibility.

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15 We do not characterize this assignment of error as one of substantial evidence only as does respondent Starr. We understand petitioner to be arguing a goal violation based upon a failure to comply with Goal 3's inventory and parcel size mandates.

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16 Use of the term "area" here as in Goal 3 creates confusion. My understanding of the term, as used in the policy paper, is that it refers to the county as a whole. If this is not what the term means, LCDC should explain what the term does mean.

BEFORE THE LAND CONSERVATION AND DEVELOPMENT COMMISSION

OF THE STATE OF OREGON

CLIF KENAGY, FRIENDS OF BENTON COUNTY, INC., Petitioners,	)	
v.	)	LUBA No. 82-019
BENTON COUNTY and STANLEY STARR, Respondents.	)	LCDC DETERMINATION

The Land Conservation and Development Commission hereby approves the recommendation of the Land Use Board of Appeals in LUBA case No. 82-019.

Dated this 15th day of July, 1982.

For the Commission:

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

Department of Justice
100 State Office Building
Salem, Oregon 97310
Phone 378-4400

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CLIF KENAGY, FRIENDS OF BENTON COUNTY, INC.,	)	
Petitioners,	)	LUBA No. 82-019
vs.	)	PROPOSED OPINION AND ORDER
BENTON COUNTY and, STANLEY STARR,	)	
Respondents.	)	

Appeal from Benton County.

Richard P. Benner, Portland, filed the Petition for Review and argued the cause on behalf of Petitioners.

Richard T. Ligon, Corvallis, filed the brief and argued the cause on behalf of Respondent Benton County.

Peter L. Barnhisel, Corvallis, filed the brief and argued the cause on behalf of Respondent Stanley Starr. With him on the brief were Fenner, Barnhisel, Morris & Willis.

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

Remanded. 6/22/82

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).