BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT GORACKE and FRIENDS OF BENTON COUNTY, INC., Petitioners, vs. BENTON COUNTY and STANLEY STARR, Respondents.	LUBA No. 82-111 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.

Jeffrey G. Condit, Corvallis, filed the brief and argued the cause on behalf of Respondent County.

Peter L. Barnhisel, Corvallis, filed the brief and argued the cause on behalf of Respondent Stanley Starr.

REMANDED 6/08/83

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), as amended by Oregon Laws 1981, ch 748.

NATURE OF THE DECISION

Petitioners appeal Benton County's approval of a minor partition dividing an 80 acre parcel of agricultural land in an exclusive farm use zone into two 40-acre parcels. This same partition was before the Board in Kenagy v. Benton County, 6 Or LUBA 93 (1982). In that case, we remanded the land division to Benton County. The county reheard the case, approved the partitioning, and petitioners appeal for the second time.

FACTS

The property is in the North Albany area of Benton County and is presently in farm use. The property is leased for grass seed and grain growing by a farmer who farms an additional 299 acres in the area.[1]

Most commercial agricultural enterprises in the area are grain and grass seed growing operations. The purpose of the division is to allow the sale of one 40-acre parcel if necessary in order to raise money for the establishment of a filbert orchard on the second 40-acre parcel. The average filbert orchard in Benton County is some 26 acres in size but is typically part of a larger diversified farm. The county's inventory suggests the average commercial farm in Benton County is 285 acres, is diversified and may be composed of smaller parcels that may be scattered in various places around a given area. The county's inventory generally found that field sizes of about 40-acres are not uncommon and appear to be the median size in the vicinity of this proposed division.

ASSIGNMENT OF ERROR NO. 1

"A. Respondent Benton County Misapplied the Minimum Parcel Size Criterion in Goal 3 and at Section IV.06(1) of Respondent's EFU Ordinance."

In this three-part assignment of error, the petitioners first argue Goal 3 requires that land divisions must be appropriate for the continuation of existing commercial agricultural enterprise within the area. That is, in testing whether or not a given property division is appropriate for the continuation of the commercial agricultural enterprise, farming, the county may not look to component parcels of farms in the area, but must rather look at the farm operations as diversified entities to see what parcel sizes will help make them successful. Petitioners say that Goal 3, OAR 660-05-015[2] and prior opinions of this Board and the commission

> "tell the counties there is no mechanical test, that they must collect information about commercial farms in an area, determine how the size of parcels affects them, and then set a parcel size that will help keep them successful." Petition for Review at 6.

Petitioners argue the county failed to inquire as to what makes farms in the area successful and what role parcel size plays in keeping them successful. Petitioners advise that evidence was introduced showing that division of 80-acre parcels into two 40-acre parcels is harmful because it tends to drive up the cost of farmland. The division is, therefore, not conducive to commercial farming.

According to petitioners, the county must ask whether the division is "appropriate" for the continuation of the area's commercial agriculture. They argue a necessary question to be answered by the local decider is, does the division help farms or hinder them? Petitioners argue the record does not show the division of 80 acres into two 40-acre parcels is conducive to or supportive of grass or grain seed farming in the area.[3] Petitioners say that the term "appropriate" as it appears in Goal 3 does not mean the counties may duplicate existing parcel sizes without regard to the harm that may result from such land divisions. Divisions of farmland should be limited to those that are shown "conducive to, supportive of, helpful to, 'appropriate' for commercial agriculture." Petition for Review at 14.

Petitioners add that OAR 660-05-015, supra at footnote 2, requires any land division to "maintain" the existing commercial agricultural enterprise. "Maintain" means

> "to keep in a state of repair, efficiency, or validity: preserve from failure or decline...." Websters 3rd International Dictionary (1961).

Petitioners point to evidence in the record showing the total farm enterprise in the area will suffer damage as a result of this proposed division. Such damage means the enterprise is not being maintained as required by the rule.

The county disagrees with petitioners. The county argues it is not a matter of whether or not the division itself is

appropriate for the continuation of the existing agricultural enterprise in the area, but whether or not the resulting parcel is appropriate. The Goal 3 standard, according to the county, imposes a constraint that lot sizes be appropriate for continuation of the farm enterprise; Goal 3 does not impose a requirement that the division of property itself be so appropriate. The county reminds us the standard in Goal 3 is that

> "[s]uch mininum lot sizes as are utilized for any farm use zone shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area." LCDC Goal 3.

According to the county, the goal is to be applied to meet local needs, and its focus is on whether the parcels resulting from the division are large enough to continue the existing agricultural enterprise in the area. The county argues it is illogical to assume that Goal 3 requires a more difficult standard to be imposed on counties which apply Goal 3 to partitions on a case-by-case basis than the standard imposed on those counties that have established an absolute minimum lot size by ordinance. Respondent County characterizes petitioners' argument as a requirement that counties show an affirmative benefit would accrue to a commercial agricultural enterprise before permitting a lot division. The county posits that such a theory is erroneous because the standard is not whether the parcels will benefit the agricultural enterprise, but whether the parcels are appropriate for continuation of the

commercial agricultural enterprise.

The county admits it discounted evidence presented by petitioners about the harm the subject division could occasion. It did so because petitioners did not present evidence that 40-acre parcels would not continue "the existing agricultural enterprise within the area." The county does not agree the Goal 3 standard and OAR 660-05-015 require no adverse impact whatever on a farm enterprise. Respondent urges a logical extension of petitioners' argument is to conclude all land divisions harm the agricultural enterprise. As all divisions harm the agricultural enterprise, no divisions of farmland should be allowed at all under petitioners' reading of the goal and the rule.

As we understand the goal, any lot size that results from a division of agricultural land must be such that the lots created are appropriate for the continuation of the existing agricultural enterprise in the area. We do not understand the word "appropriate" to require improvement in the enterprise. In Websters 3d New International Dictionary (1961), "appropriate" means

"specially suitable: fit; proper...."

In other words, the lot sizes created must be suitable for the continuation of the enterprise, not necessarily of increased benefit to the existing agricultural enterprise in the area. The county's findings show it conducted an inventory of the commercial agricultural enterprise in the area. That

inventory consisted of a measurement of existing agricultural enterprises within a one-half mile radius of the subject property. Petitioner does not challenge the adequacy of this study area. This limited geographical measurement was, as we understand from the parties, approved by DLCD staff as being an adequate study area for the purposes of establishing the existing commercial agricultural enterprise.[4] When comparing the existing agricultural enterprise in the area to this proposed partition, the county concluded the resultant parcels would be large enough to continue the existing commercial agricultural enterprise.[5] The findings show the county was aware of petitioners' fears about cost of land and other potentially detrimental effects of a parcelization, but these potential adverse effects were not deemed so injurious as to make the lot sizes created no longer appropriate or fit to maintain the commercial agricultural enterprise in the area.

> "[a]lthough the division of Mr. Starr's 90-acre parcel into two 40-acre parcels may raise the per-acre price on the parcels, this per-acre price will not be any greater than the average per-acre price of agricultural land in the area, given the fact that the average size of the parcels in the area is slightly smaller and given the ownership patterns and farming practices in the area." Record, p. 12.

In concluding that the subject parcel was large enough to maintain the existing commercial agricultural enterprise in the area, the county found as follows:

> "The average commercial farm unit in Benton County is 285 acres. Mr. Carstens, the only complete commercial farm unit in the immediate one-half mile area, farms

> 339 acres. Mr. Kenagy and Mr. Hathaway farm a similar amount of ground. Thus it is the opponents' apparent contention that the county cannot grant Mr. Starr's request unless it results in parcels roughly 300 acres in size a piece. The Board rejects such a definition. Such a definition is not logical as it would contradict the basic Goal 3 requirement that a partition 'continue the existing commercial agricultural enterprise in the area,' and would cause conflicts within the Goal 3 administrative rule. OAR 660-05-015(6) does not state that the minimum lot size shall be determined by the size of commercial farm units in the area. Rather, the rule requires that 'The types and sizes' of commercial farm units shall be 'identified', and based upon this survey it shall be determined whether the division will continue the existing agricultural enterprise of the area." Record, p. 9-10.

The county went on to say that "the type of commercial farm unit in the area" is roughly 300-acres and is made up of parcels which are less than 40-acres, not necessarily under the same ownership and not necessarily contiguous. Further, diversified crops are grown on these lots or parcels. We understand the county to conclude, therefore, that to maintain the existing commercial agricultural enterprise in the area is to maintain a diversity of crops on parcels of varying size.[6]

Given the test required by Goal 3, and prior opinions of this Board including Thede v. Polk County, 3 Or LUBA 336 (1981) and Kenagy v. Benton County, 6 Or LUBA 93 (1982), the county used the proper method to evaluate this proposed division. The county did not consider tax lots alone, but considered a hypothetical whole agricultural enterprise consisting of one filbert enterprise and a grass or grain enterprise. It based its conclusion that these hypothetical units would maintain the

existing commercial agricultural enterprise on the basis of an inventory limited in geographical scope to within one-half mile of the subject property but enlarged in the sense that the county considered the average size of all farm parcels in the county. The county's findings and the record support the county's conclusion that farm parcels in the area (and the county generally) are made up of different kinds of crops. Commercial agricultural enterprises in their area, then, consist of diversified crops and parcel sizes or sizes devoted to those crops. Based upon that analysis, the county concluded that 40-acres was sufficient for filberts and sufficient for grass and grain. In short, the county identified

> "The sizes and other characteristics of existing commercial agricultural units in an area which is large enough to represent accurately the existing commercial agricultural enterprise within the area containing the applicant's parcel." OAR 660-05-015(6)(c).

We find no error in this method.

The LCDC Determination issued June 7, 1983 required the following language to be inserted in this opinion:

> "There remains the issue of the application of OAR 660-05-015. The Rule directs counties to look at whole commercial farms, not component lots or fields:
>
> "'(6)(a) * * * When identifying commercial farm units, entire farm units shall be included, not portions devoted to a particular type of agriculture.
>
> "'* * *
>
> "'(7) The minimum lot size standard of Goal 3 refers to an entire farm unit and should not be confused with individual tax lots. A

single farm unit may consist of any number of contiguous tax lots * * * which are managed jointly as a single farm unit.'

"This means that a county must not rely on the size of parcels or fields alone as the standard for land divisions. There must be some agricultural reason beyond the fact that a certain parcel or field size exists among area farms.

"The Rule also tells counties to use their inventories to identify a parcel size 'needed to maintain the existing commercial agricultural enterprise * * *' in an area. As used in the Rule, 'maintain' is synomymous with 'continue' in Goal 3 itself. These terms mean counties must choose parcel sizes that will not contribute to decline of the commercial agriculture in an area. Stated as a positive, Goal 3 and the Rule tell counties to choose parcel sizes that will help keep area farms successful.

"We do not understand 'maintain' or 'continue' to mean a parcel size must have no adverse effects whatsoever on an area's agriculture. Such an interpretation would probably halt most land divisions. 'Maintain' and 'continue' imply a balance.

"Land divisions often have both positive effects and negative effects on an area's agriculture. The county's task is to ensure that a chosen parcel size, on balance, considering positive and negative effects, will keep the area's commercial agriculture successful, will not contribute to the decline.

"In the case before use [sic], there is evidence in the record that a 40-acre parcel size will have adverse effects on commercial grass seed and grain farming. Petitioners put on evidence that 40-acre parcels reduce efficiency and increase the price of land per acre considerably beyond what a grass seed and grain farmer is willing to pay for it.

"The county dismisses these adverse effects as insignificant. However, the county offers no agricultural reason why 40-acre parcels will, in spite of these adverse effects, "maintain" or "continue" the principal commercial agricultural enterprise in the area.

"We conclude that the county has misappled Goal 3 and the Rule by failing to explain how, in the face of

evidence of adverse effects, a 40-acre parcel size will "maintain" or "continue" the existing commercial grass seed and grain enterprise in that part of Benton County."

"B. Respondent Benton County's Conclusion that 40-acre Parcels Are 'Appropriate' Is Not Supported By Substantial Evidence."

Petitioners argue that while there may be evidence to show grass and grain seed is grown commercially on parcels of 40-acres and smaller (as part of large farms), and while there is evidence to show 40-acres of grass or grain land can be economically farmed as part of a diversified farming operation, there is no evidence to support the conclusion the subject 40-acre parcels are "appropriate" for commercial grass and grain farming in the area. Petitioners argue the record does not show 40-acre parcels are <u>better</u> than 80-acre parcels and, therefore, "appropriate." Petitioners add there is no evidence that 40-acre parcels are <u>necessary</u> and in short supply and, therefore, "appropriate." Further, petitioners say there is no evidence to show that it is appropriate to create any new 40-acre filbert orchards. Petitioners look to testimony that shows a 25-35 acre parcel of filberts would allow a "comfortable living." Petitioners say this evidence was based on testimony of a farmer who enjoys "Malabon" soils. See Transcript Record at 37. Petitioners assert there is no such soil on the subject property. Further, there was no analysis of the applicant's debt load and whether or not he might be able to make a profit at all on a newly created 40-acre

parcel. Petitioners would have Benton County resolve what they view as conflicts in the evidence by explaining why it happened to chose one set of proposed facts over others.

The county defends against petitioners' complaints by repeating that the standard is not whether the division will continue an existing agricultural enterprise or whether 80-acre parcels are better than 40-acre parcels; the standard is whether or not the lot sizes resulting will be appropriate for the continuation of the existing agricultural enterprise in the area. Respondent County dismisses petitioners' arguments about Mr. Starr's business decisions as being irrelevant. The county argues that any discussion about whether or not 25-35 acre filbert orchards can support a person misconstrues the county's findings. The county claims it did not find that 25-35 acres of filberts would be sufficient as a person's sole means of support, but rather that a profitable commercial level of filbert production could occur on a 40-acre parcel. See record at 5. The county reminds the Board it held in Kenagy v. Benton Co., supra, that there was no requirement in Goal 3 that land divisions need be as large as existing farm units.

> "We do not believe Goal 3 requires that every division of farm property result in parcels that are as large as the existing farms in the area.
>
> "Goal 3 requires the maintenance of the existing agricultural enterprise within the area. We believe it is incumbent 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." 6 Or LUBA at 101.

We believe the question that must be answered under this assignment of error is whether or not a 40-acre parcel size will in fact maintain commercial and grass seed and grain farming in the area. Petitioners do not appear to be challenging the creation of a 40-acre filbert enterprise. As noted by the petitioner, there is evidence in the record that shows that the price of farmland rises as the size drops. The county rejects this assertion on the ground that the per acre price for any 40-acre parcel will not be any greater than the average per acre price for agricultural land in the area generally because the average size of farm parcels in the area is less than 40-acres. We understand the county's use of "parcels" here to be non-contiguous lots in single ownership.

> "Indeed, it is possible that since the division will increase the number of 40-acre parcels on the market, the average price for those 40-acre parcels will decrease." Record, p. 13-14.

We understand the county to argue that since every rise in price harms farmers and every land division arguably promotes a further division and perhaps even an increase in price, no land divisions at all would be permitted on agricultural land because they would result in some harm to the farmer.

The county also acknowledges larger parcels are more

efficiently farmed, but the county argues the standard for lot divisions is not the ideal of commercial agricultural enterprise but the maintenance of the existing enterprise. See record, p. 12.

We conclude that while Goal 3's requirement that minimum lot sizes be "appropriate for the continuation of the existing agricultural enterprises within the area," OAR 660-05-015(6)(a) further defines the word appropriate to mean "needed to maintain" that agricultural enterprise. In this case, there is evidence that the division will change, to some small degree, the agricultural enterprise in that immediate area. This change can be the result of slightly increased farmland prices and some reduced efficiency in farming two 40-acre parcels as opposed to one 80-acre parcel. As we understand the rule to require that any new lots maintain the enterprise, in the sense that there is no harm done to the enterprise no matter how small or speculative, this partitioning appears to fall short of the standard. The county has not sufficiently explained how the partitioning will maintain the existing enterprise in the face of evidence that some harm may come to the existing commercial agricultural enterprise as a result of the partitioning.

This subassignment of error is sustained.

"C. The Division of Respondent Starr's 80-Acre Tract into Two 40-Acre Parcels Is Not Appropriate to Continue the Existing Commercial Agricultural Enterprise in the Area and Violates Goal 3 and Benton County's EFU Ordinance."

Petitioners again argue that "loss of an 80-acre parcel and creation of two 40-acre parcels from it will be harmful to commercial grass and grain farming in the area." Petitioners view such harm to be inappropriate for the continuation of the existing agricultural enterprise in the area and, therefore, in violation of Goal 3. Because LCDC agrees with petitioners that the word "appropriate" in Goal 3 is explained by OAR 660-05-015 means "maintain" in the sense that no damage be done, we sustain this subassignment of error.

The decision of Benton County is remanded for further proceedings not inconsistent with this opinion.

COX, Board Member, Dissenting.

In reviewing this case, the Land Conservation and Development Commission must use caution to not lose sight of the effect interpreting Goal 3 as proposed by petitioners will have on the longterm viability of this state's agricultural base. If petitioners' view is carried to its logical conclusion, two things will likely occur. First, eventually only large corporate or previously amassed family farms will exist in Oregon. There will be fewer and fewer opportunities to enter into farming as a primary vocation because the liklihood of finding smaller (40-acres in this case), commercially viable farm tracts will decrease. As the opportunity to find the "incubator farms" decreases so will the opportunity and the independence that has heretofore been enjoyed by existing farmers. It is interesting as well as enlighting to review the testimony Petitioner Goracke gave at an evidentiary hearing held on the question of his standing. At that hearing, Mr. Goracke related how he had developed one of the premiere farming operations in the Willamette Valley. Mr. Goracke stated that he had started farming shortly after the end of World War II on a 40-acre parcel. Over the following years he acquired many other parcels of land of like size and larger, some contiguous, some not, until he presently controls over 5,000 acres of farm land. Under petitioner's theory and argument of how Goal 3 should be interpreted, I question whether Mr. Goracke's success story could be repeated

in the future, i.e., where would he obtain the original 40-acre parcel?

The second result or occurrence which flows from petitioner's argument is that the very lease hold interests that are a major part of Oregon's farming operations will be restricted if not eliminated. Stated in the form of a question, what effect does the petitioner's interpretation of Goal 3 have on the leasing out of the individual 40-acre or smaller parcels that presently exist in larger individual agricultural enterprises. Petitioners' theory would prohibit leasing to another farmer, for farm use, a 40-acre parcel presently used in Goracke's 5,000 acre operation. Such a conclusion must be reached for if under petitioner's theory such a lease were treated differently than the proposed division then Goal 3 would become a basis for discrimination in method of ownership and property management. I submit that such an interpretation and therefore use of Goal 3 was neither contemplated by the drafters of the goal nor the legislative assembly which delegated them that responsibility. In addition, it is very likely that such discrimination in methods of farm ownership control and property management would find itself in violation of the U.S. and Oregon Constitutions.

While the Land Conservation and Development Commission has the ultimate responsibility to interpret its goals and rules based thereon, those interpretations must be reasonable. Once again, I caution that petitioners' argument does not lead to

the protection of farm land but rather to the protection of large corporate and previously amassed family farms.

The above portion of my dissent was before LCDC when it considered LUBA's redrafted opinion. The opinion was redrafted because LCDC did not like the original. The new LCDC "determination" that an "agricultural reason" must be shown as the basis for a decision to divide agriculture land introduces an unprecedented and undefined factor into the already confused requirements for meeting Statewide Goal 3. See Kenagy v. Benton County, 6 Or LUBA 93, 104, et seq. (1982). One wonders when consistency and predictability will become a major consideration in LCDC's attempts to fashion Oregon land use laws.

FOOTNOTES

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[1] The "area" is defined by Benton County to be a circle one mile in radius from the subject property. This method of defining "area" for land use inventory purposes is the result of discussions between Benton County and the Department of Land Conservation and Development. Petitioners do not challenge the definition of "area."

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[2] OAR 660-05-015 states:

> "(1) Goal 3 states, 'such minimum lots sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area.' This Goal phrase is the required minimum lot size standard to be used to determine appropriate lot sizes in EFU zones. It is applied when approving both the creation of new lots and development on pre-existing lots.
>
> "(2) Goal 3 does not require a specific acre size (e.g., a 40-acre minimum lot size). Needs for agricultural acreage vary from large wheat ranches to small intensive farming operations. A specific minimum lot size adopted at the state level would be impractical.
>
> "(3) The Goal 3 minimum lot size standard can be applied in various ways, including but not limited to the following:
>
> "(a) To determine one specific acre size, which is used for both farm and nonfarm uses, or for only farm uses, with the size for nonfarm uses decided case-by-case;
>
> "(b) To determine different acre sizes, which are used for farm and nonfarm uses, different types of farms (crops and practices), or different areas of the county; or
>
> "(c) To determine performance standards, which are used to decide appropriate lot sizes for farm and nonfarm uses on a case-by-case basis.

"(4) Counties should apply the Goal 3 standard on minimum lot sizes in the way which best meets their local needs. The application may vary from different farm areas within the county. The only constraint is that the standard shall be applied in a way adequate to maintain appropriate lot sizes for the continuation of the existing commercial agriculture in the area.

"(5) While a certain minimum lot size may be appropriate for the continuation of commercial agriculture (as required by Goal 3), it may be adequate to comply with Goal 5 requirements to protect wildlife resources. Counties should refer to Goal 5 and OAR 660-16-000 for application requirements.

"(6)(a) The minimum lot size(s) needed to maintain the existing commercial agricultural enterprise shall be determined by identifying the types and sizes of commercial farm units in the area. When identifying commercial farm units, entire commercial farm units shall be included, not portions devoted to a particular type of agriculture. The identification of commercial farm units may be conducted on a countywide or sub-county basis.

"(b) Commercial agricultural operations to be identified should be determined based on type of products produced, value of products sold, yields, farming practices, and marketing practices.

"(c) Local governments which apply Goal 3's minimum lot size standard on a case-by-case basis may satisfy the commercial agricultural identification requirement in subsection (6)(a) of this rule by identifying the sizes and other characteristics of existing commercial agricultural units in an area which is large enough to represent accurately the existing commercial agricultural enterprise within the area containing the applicant's parcel.

"(7) The minimum lot size standard in Goal 3 refers to an entire farm unit and should not be confused with individual tax lots. A single farm unit may consist of any number of contiguous tax lots (including tax lots separated only by a road or highway), which are managed jointly as a single

farm unit.

"(8) The type and value of products produced and how they are marketed are key factors in identifying the existing commercial agricultural enterprise. Owner characteristics, such as percent of income from farming and primary occupation, do not necessarily define a commercial farmer or a commercial farm unit. Commerical agriculture in Oregon is supported, in part, by less than full-time farmers.

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[3] There is testimony in the record that sales of similar farmland show that prices in the 40-acre range sell for $700-$800 more an acre than parcels in the 80-acre range. There is also testimony that 40-acre parcels are inferior to 80-acre parcels in that they are not as easily farmed. Two 40-acre parcels increase the number of corners farm machinery must turn, and separate 40-acre parcels require a half mile more of fire guard than one single 40-acre piece. Therefore, burning a 40-acre parcel is more dangerous than burning an 80-acre parcel because there is less time to catch a fire that may go out of control.

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[4] An area of one mile radius of the subject property was found by this Board (and concurred in by the Commission) to be inadequate in Kenagy v. Benton County, 6 Or LUBA 93 (1982). In that case, we held that this immediate area about the subject parcel may be important in determining agricultural enterprise, but we stated that a first step must be a determination of what the agricultural enterprise is within the county. 6 OR LUBA at 104.

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[5] To illustrate the important facts and conclusions made in the county order, Respondent County's brief lists the findings in summary form as follows:

"1. The average commercial farm unit in the area and in Benton County is roughly 300 acres in size. Findings, Record at 4, Appendix at 3.

"2. These are not single crop operations, but rather diversified operations on which a variety of crops are grown. Record at 4, Appendix at 3.

"3. These operations are made up of parcels frequently not contiguous. Record at 4, Appendix at 3.

"4. Field sizes of around 40 acres for these crops are not uncommon and, in fact, appear to be roughly the median size in the vicinity, with some fields being substantially smaller. Record at 3, Appendix at 2.

"5. Individual 40-acre grass/grain parcels are not uncommon, are commercially viable when formed as parts of larger operations (which is the existing agricultural enterprise in Benton County and the area), and indeed are profitable enough to be worth traveling several miles to farm. Record at 5, Appendix at 2.

"6. Filbert orchards are well suited to the Willamette Valley. Record at 5, Appendix at 2. Ready markets exist through the Lebanon Nut Growers Association. Id. The average filbert orchard in the valley is 26 acres, again part of a diversified operation. Id. Further, the intensified farming investment in a filbert orchard makes it far more likely to remain as producive farm land. Record at 14, Appendix at 13.

"7. Upon division, the farmer presently renting the 80-acre parcel would continue to rent the 40-acre parcel and continue raising grass and grain on it." Record at 6. Brief of Respondent County at 2-3.

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[6] In a supplemental memorandum, Respondent Benton County denies that it is using a tax lot analysis to determine the 40-acre parcel sizes were appropriate. The county considered the 40-acre parcels as commercial farm units, not as tax lots that were arbitrarily created under the provisions of ORS 311.280.

STATE OF OREGON INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION

DATE: 5/25/83

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: GORACKE v BENTON COUNTY
LUBA No. 82-111

Enclosed are two versions of Goracke and Friends of Benton County, Inc. v Benton County. The first version remands the decision because of our construction of the word "maintain" as it appears in OAR 660-05-015. As we understand the word as it appears in the rule, Goal 3 is to be interpreted such that there may be no decline of the efficiency of the agricultural enterprise of an area in any manner. As such, the rule appears to go beyond the "appropriate" language in Goal 3. If one wishes to say that the rule simply interpretes the goal, then the Goal 3 standard becomes one requiring any potential partition to be supported by findings that show that there will be no degradation or decline of the existing agricultural enterprise in the area whatsoever. It is difficult to conceive of a circumstance where such might occur.

We have furnished a second version which says, in effect, the word "maintain" does not require such a high standard. We believe this is a viable approach when one considers the goal's standard to be the maintenance of the existing agricultural enterprise in a whole area, not just on a particular piece of property.

A third alternative is to make use of the original proposed opinion and order.

The Board is of the opinion that oral argument will 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 be allowed.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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Peter L. Barnhisel, Corvallis, filed the brief and argued the cause on behalf of Respondent Stanley Starr.

BAGG, Board Member; COX, Board Member, Dissenting.

REMANDED 5/25/83

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), as amended by Oregon Laws 1981, ch 748.

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

ROBERT GORACKE AND FRIENDS OF BENTON COUNTY, INC.	)	
Petitioners,	)	LUBA No. 82-111
v.	)	LCDC DETERMINATION
BENTON COUNTY AND STANLEY STARR,	)	
Respondents.	)	

The Land Conservation and Development Commission hereby approves the proposed Remand opinion and order in LUBA 82-111, with the following modifications.

Delete the text starting on page 9, line 19, through page 10, line 6, and substitute the following:

> "There remains the issue of the application of OAR 660-05-015. The Rule directs counties to look at whole commercial farms, not component lots or fields:
>
> > '(6)(a) *** When identifying commercial farm units, entire farm units shall be included, not portions devoted to a particular type of agriculture.
> >
> > ***
> >
> > (7) The minimum lot size standard of Goal 3 refers to an entire farm unit and should not be confused with individual tax lots. A single farm unit may consist of any number of contiguous tax lots *** which are managed jointly as a single farm unit.'

This means that a county must not rely on the size of parcels or fields alone as the standard for land divisions. There must be some agricultural reason beyond the fact that a certain parcel or field size exists among area farms.

The Rule also tells counties to use their inventories to identify a parcel size "needed to maintain the existing commercial agricultural enterprise..." in an area. As used in the Rule, "maintain" is synomymous with "continue" in Goal 3 itself. These terms mean counties must choose parcel sizes that will not contribute to decline of the commercial agriculture in an area. Stated as a positive, Goal 3 and the Rule tell counties to choose parcel sizes that will help keep area farms successful.

We do not understand "maintain" or "continue" to mean a parcel size must have no adverse effects whatsoever on an area's agriculture. Such an interpretation would probably halt most land divisions. "Maintain" and "continue" imply a balance.

Land divisions often have both positive effects and negative effects on an area's agriculture. The county's task is to ensure that a chosen parcel size, on balance, considering positive and negative effects, will keep the area's commercial agriculture successful, will not contribute to the decline.

In the case before use, there is evidence in the record that a 40-acre parcel size will have adverse effects on commercial grass seed and grain farming. Petitioners put on evidence that 40-acre parcels reduce efficiency and increase the price of land per acre considerably beyond what a grass seed and grain farmer is willing to pay for it.

The county dismisses these adverse effects as insignificant. However, the county offers no agricultural reason why 40-acre parcels will, in spite of these adverse effects, "maintain" or "continue" the principal commercial agricultural enterprise in the area.

We conclude that the county has misapplied Goal 3 and the Rule by failing to explain how, in the face of evidence of adverse effects, a 40-acre parcel size will "maintain" or "continue" the existing commercial grass seed and grain enterprise in that part of Benton County."

DATED THIS 7 DAY OF JUNE 1983.

FOR THE COMMISION:

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

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