

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

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JACK and PAT NIEMI,)
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 Petitioners,)
)
 vs.)
)
 CLATSOP COUNTY and)
 JOE DEMARSH,)
)
 Respondents.)

LUBA No. 83-052
FINAL OPINION
AND ORDER

Appeal from Clatsop County.

Fred G. Young, Manzanita, filed the Petition for Review and argued the cause on behalf of Petitioners.

W. Louis Larson, Astoria, filed the brief and argued the cause on behalf of Respondent DeMarsh.

No appearance by Clatsop County.

BAGG, Board Member.

Affirmed 10/17/83

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.

1 BAGG, Board Member.

2 STATEMENT OF THE CASE

3 Petitioners seek reversal of a Clatsop County decision
4 approving a major partition. Petitioners argue the decision
5 violates statewide land use planning Goal 3.

6 FACTS

7 A partitioning of this same property was before the Board
8 in Niemi v Clatsop County, 6 Or LUBA 146 (1982). In that case,
9 as here, petitioners sought to partition 39.04 acres into three
10 parcels. The property lies in an area known as the "Clatsop
11 Plains" in Clatsop County east of Neacoxie (Sunset Lake) and
12 west of Highway 101. The soils nearby are predominately SCS
13 Classes VII and VIII, and the subject property consists of
14 mostly Class VI soil. Part of the subject property (about 10
15 acres) is under the water of Neacoxie Lake.

16 Surrounding property uses and sizes vary. There are some
17 agricultural uses in the area, and parcel sizes range from a
18 minimum of one acre to a maximum of 265 acres. Agricultural
19 activities in the area consist of grazing. The subject
20 property was rented for an unspecified period of time for
21 pasture. It has not been used for such purposes since 1975.
22 Record, p. 93.

23 Petitioners herein appealed an earlier grant of a
24 partitioning on this property. The case was remanded to
25 Clatsop County because the Board determined the county decision
26 did not adequately consider the second and third parts of the

1 three part Goal 3 test for agricultural land.¹ Pursuant to
2 the LUBA remand, the matter was reheard by the Clatsop County
3 Planning Commission. The planning commission approved the
4 partitioning in Resolution No. 83-01-4PC issued on January 14,
5 1983. That decision was appealed to the County Board of
6 Commissioners. The county board considered the matter on the
7 record and issued a resolution and order denying the appeal and
8 approving the partition on April 27, 1983. This appeal
9 followed.

10 ASSIGNMENTS OF ERROR

11 Petitioners make two assignments of error. The first is
12 entitled simply "GOAL 3, 'OTHER LANDS TEST.'" The second is
13 entitled "AGRICULTURAL TAX DEFERRALS." The Board will consider
14 petitioners' complaints as one assignment of error, alleging
15 the property qualifies as agricultural land within the meaning
16 of Goal 3 and the county erred in approving the partitioning
17 without first taking a Goal 2 exception to Goal 3.

18 Petitioners say that in order to find property not suitable
19 for agricultural use, "a county must find that the tract cannot
20 be sold, leased, or, by some other arrangement, put to
21 profitable agricultural use." Citing Rutherford v Armstrong,
22 31 Or App 1391, 572 P2d 1331 (1977). Petition for Review at
23 4. Petitioners argue this property is suitable for farm use
24 because of the following facts contained in the record.

- 25 "1. Soil fertility can be supplemented with
fertilizers;
26 "2. Adjacent property owners are farmers;

- 1 "3. The property is suitable for grazing;
- 2 "4. The sand soil is good for wintering cattle;
- 3 "5. Combining tideland pasture in the summer and the
4 drier dune land in the winter would be an
5 advantageous and economical use of the property;
- 6 "6. A nearby neighbor with a similar soil type to
7 that of the applicant's supports a year round
8 cattle operation;
- 9 "7. An adjacent property owner has had its property
10 in farm use for over fifty years;
- 11 "8. For fifteen years prior to the applicant's
12 ownership, the subject property was used for
13 cattle, horses and sheep;
- 14 "9. A nearby 265 acre parcel has been leased for
15 grazing;
- 16 "10. Groundwater could be used for irrigation
17 purposes, if necessary;
- 18 "11. The subject property is bounded on two sides by
19 larger parcels; the one to the north being seven
20 times as large;
- 21 "12. A farmer on similar property nearby is able to
22 support a cattle operation without the need to
23 apply fertilizer;
- 24 "13. A farmer on similar property nearby has grown
25 oats, vetch and potatoes;
- 26 "14. At least five parcels in the area have
agricultural tax deferrals, including the
applicant;
- "15. The area has been used for growing daffodil
bulbs, bent grass seed and over seven hundred
acres had been planted with green peas;
- "16. A member of the Planning Commission and nearby
neighbor grazes and holds cattle on his
property." Petition for Review at 4. See Record
59-64.

19 Petitioners concede this evidence, which consists of
20 suggested findings for denial of the partitioning, is
21 contested; but petitioners believe there is ample and
22 sufficient evidence to show the property is suitable for farm
23 use. Petitioners urge that the fact there is a farm operation
24 on adjoining property "should be sufficient to show the
25 applicant's property is suitable for farm use." Petition for
26 Review, p. 5. See Record, p. 118.

1 Petitioners say the property, at the time of this
2 application, was under agricultural tax deferral. See ORS
3 308.345. Petitioners argue the Board's decision in Hinson v
4 Jackson County, 1 Or LUBA 24 (1980) holds land subject to
5 agricultural tax deferral which has been used for agricultural
6 purposes is agricultural land. Petitioners claim this test has
7 been met, and the county erred in not finding the land to be
8 agricultural land subject to Goal 3 and Goal 2.²

9 Respondent Joe DeMarsh argues the county adequately
10 discussed each of the seven criteria relevant to consideration
11 of whether property qualifies as "other lands" subject to Goal
12 3. The seven criteria included in the goal and discussed by
13 commissioners, according to Respondent DeMarsh, were soil
14 fertility, suitability for grazing, climatic conditions,
15 availability of irrigation water, existing land use patterns,
16 technology and energy inputs required and accepted farming
17 practices. Respondent DeMarsh argues the findings here are
18 more than adequate when considered against findings for a
19 similar purpose which were adopted by Marion County and found
20 acceptable by LUBA in Still v Marion County Board of
21 Commissioners and Lloyd A. Kaufman, 5 Or LUBA 206 (1982).

22 Respondent characterizes petitioners' argument as one
23 claiming that because there is some evidence which might
24 support a finding for a determination of Goal 3 applicability,
25 all other evidence must be disregarded. Repondent argues where
26 conflicting evidence exists, it is the local government's

1 choice as to which evidence is to be believed. Respondent
2 quotes the following from Christian Retreat Center v Board of
3 County Commissioners of Washington County, 28 Or 673, 560 P2d
4 1100 (1977):

5 "Where the record indicates conflicting believable
6 evidence, that conflict is to be resolved not by this
7 Court but by the lower tribunal which may choose to
8 weigh evidence as it sees fit." Id. 28 Or App at 679.

9 Respondent posits that its evidence was "objective" and
10 presented by "disinterested" persons. In contrast with that of
11 petitioners which respondent characterizes as

12 "letters presented by previous and one existing farmer
13 in the area which addressed the general farming
14 potential of the Clatsop Plains area extending back to
15 the mid-19th century. The evidence presented by the
16 petitioners does not address this specific cite and is
17 principally by letter." Brief of Respondent at 14-15.

18 Also, respondent rejects petitioners' characterization of
19 the Hinson v Jackson County case as authority for the
20 proposition that if land enjoyed an agricultural deferral the
21 land was necessarily farm land. According to respondent, the
22 Hinson case was not so limited. In that case, respondent notes
23 correctly, there was nothing substantive advanced to rebut
24 evidence that the land had been used for winter grazing of
25 cattle and had been used in conjunction with a larger ranch
26 operation. The strongest evidence advanced by the proponent
for the petition in the Hinson case was economic loss.
Respondent characterizes the Hinson case as an example of "lack
of substantive evidence by the proponent who wished to

1 determine that his property was not agricultural land. In the
2 Hinson case, the elements indicating that the property was in
3 fact Goal 3 land were not rebutted." Brief of Respondent, p.
4 24. Respondent concludes that in this case, there is
5 substantive evidence to rebut minimal information provided by
6 petitioners that the applicant's property is subject to Goal
7 3.³

8 The county's findings are extensive and discuss each of the
9 criteria in Goal 3 relevant to determining whether a particular
10 piece of property meets the "other lands" test.

11 Soil Fertility

12 The county cited Oregon State University Soil Laboratory
13 tests showing phosphorous, potassium and calcium to be at "low
14 levels" and magnesium to be at "medium levels." Record, p. 3,
15 78-79, 107-113. The county noted that fertilizer could be used
16 to make up deficiencies, but would have to be applied
17 frequently because of the sandy quality of the soil and the
18 fact that any fertilizer applied would drain quickly. Record,
19 p. 4, 70, 87, 107-113. The county noted sheep would have to
20 consume four times normal forage to obtain necessary protein on
21 this property, and the minimum fertilizer requirement would be
22 over \$100 an acre. Of the soils found on the property, Class
23 VI, VII and VIII, it is Class VI soils that at best could be
24 used for pasture and woodlands. Record, p. 4-5, 76-85.

25 Suitability for Grazing

26 The county noted that grazing is suitable only for a

1 quarter to a third of the year without importing feed. Record,
2 p. 5, 55, 56, 107, 133. The county acknowledges farm use on
3 the PP&L property, a 265 acre parcel adjacent and to the north
4 of applicant's property, but the county found the property is
5 used to hold cattle prior to slaughter; it is not used to raise
6 cattle. The county recited the PP&L holding was reviewed by
7 SCS, and PP&L was told the property could support one cow per
8 four acres only four months out of the year. Record, p. 6,
9 56. The county found the previous owner's widow advised that
10 the income off this parcel from 1948 to 1978 did not exceed
11 \$100 per year, and that over \$100 per acre per year in
12 fertilizer would be required. Record, p. 4, 6, 93. From these
13 facts, the county concluded the property was not suitable for
14 grazing.

15 Climatic Conditions

16 The county board referred to testimony of Hugh Seppa, an
17 individual the board found to be familiar with farming in the
18 area, who stated the property was suitable for grazing a
19 quarter to a third of the year without importing feed. Record,
20 p. 8, 133-134. The county board then cites to its own
21 comprehensive plan findings describing the area as suffering
22 from lack of irrigation, lack of sunshine and heavy
23 precipitation.⁴

24 Availability of Irrigation Water

25 The county board found water for irrigation is not
26 available from Neacoxie Lake, according to the State Water

1 Resources Department. Record, p. 9, 55. Also, the county
2 found irrigation would be necessary for a longer time during
3 the year than on non-sandy soils because of the soil
4 characteristics. Record, p. 19, 107, 133. The findings also
5 mention something called the "Clatsop Plains Groundwater
6 Protection Plan." The county notes that pasturing contributes
7 nitrogen to the groundwater, and nitrogen is adverse to the
8 protection of groundwater. Record, p. 10, 133. The
9 Groundwater Protection Plan is not in the record, however, and
10 while the Board may presume the plan protects groundwater, the
11 findings do not explain the relationship between the plan and
12 use of the property for agricultural purposes.

13 Existing Land Use Patterns

14 The county lists uses nearby including the 7.4 acre parcel
15 owned and used for farm purposes to the south of applicant's
16 parcel owned by Petitioners Jack and Pat Niemi. The county
17 finds that the parcel contains "two horses and periodically two
18 beef." Record, p. 10, 96. The county notes that there are
19 homesites between the applicant's parcel and Highway 101 and
20 though "an occasional beef, horse or hog may be found
21 there...no viable farm exists, according to the testimony of
22 Mr. DeMarsh." Record, p. 11, 95, 96, 134, 141. The county
23 acknowledges that grazing is the "only type of farming activity
24 currently undertaken in this area." Record, p. 11, 134.

25 The county also found that if Goal 3 were to apply and the
26 property to be zoned for exclusive farm use, there would be no

1 limit to the intensity of agricultural activities which might
2 occur. The county then mentions that intensive cattle, mink or
3 chicken operations would have the potential of impacting
4 homesites in the area and increasing nitrate affects on
5 groundwater. The county concludes this possibility is
6 detrimental to groundwater. The county also says
7 intensification of animal uses creates a potential for wind
8 erosion when vegetation is eliminated by animal use. Record,
9 p. 12, 66, 70, 107-108, 114-115, 133.

10 Technology and Energy Inputs Required

11 The county finds the poor water holding capacity of the
12 soil causes it to require irrigation for "a longer time during
13 the year than on non-sandy soils." Record, p. 13, 55, 133.
14 The county cites again the testimony of Mr. Seppa testifying it
15 would be necessary to intensify agricultural uses in order to
16 make the property productive. An intensification would require
17 large amounts of fertilizer and heavy irrigation because of the
18 rapidly draining soils. The county notes its own comprehensive
19 plan agricultural lands sections indicating Classes VI through
20 VIII soils are not suitable for cultivation.

21 Accepted Farming Practices

22 The county concludes that the property is not suitable for
23 farm use considering accepted farming practices. The county
24 notes grazing is the only activity undertaken in the area; and
25 while other kinds of farming, "oats, vetch, potatoes, bulbs and
26 herbs, have occurred, none have continued to exist." Record,

1 p. 14, 56, 77-80. The county finds all farmers in the area
2 have outside employment. The county adds that the assessor has
3 placed a low value on the property (\$60 per acre) "in
4 recognition of the low productivity of the land." Record, p.
5 14-15, 86, 87. The county says farm values in the county range
6 from a low of \$10 an acre on bare sand to a high of \$249 an
7 acre. Record, Ibid. The county quotes testimony of Hugh Seppa
8 to the effect that he could graze 10 to 12 cows on 60 acres in
9 the area, but hay had to be brought in as supplemental feed.

10 The county then concludes:

11 "Based upon the accepted farming practices in the
12 vicinity (grazing as established by the testimony of
13 Mr. Hugh Seppa, the applicant, Mr. Robert Reed, Mr.
14 Oberst, manager of PP&L property, Mr. Earl and Mr.
15 Paul See, Registered Geologist) the property
historically and predictably for the future, fails to
meet the single 'profit in money' test implicit in ORS
215.203(2)(a) which is necessary to qualify as goal 3
lands." Record 16-17.⁵

16 The county's conclusion rests in part on its understanding of
17 "farm use" and the role the "profit in money" test plays in
18 determining farm use. The county adopts the statutory
19 standards for assessment of land in agricultural use as a
20 suitable test "for this case" to determine whether or not the
21 property is capable of use to obtain a profit in money. If the
22 land will not support activities capable of producing a profit
23 in money as defined in ORS 308.372(2)(c), the land is not
24 suitable for farm use. The county states the test now required
25 for property of this size is \$2,000 a year for three out of the
26 last five years. ORS 308.372(2)(c).⁶ The county then finds:

1 "The board finds from the evidence provided by Mrs.
2 Searls' letter (predecessor to applicant) that the
3 property historically did not meet the \$500 test. The
4 board finds from applicant's evidence that the
5 property does not meet the current \$2,000 test and is
6 in fact disqualified from tax deferral." Record 18.

7 The county board justifies using the tax deferral test on
8 the basis of the Court's statement in 1000 Friends of Oregon v
9 Benton County, 32 Or App 413, 575 P2d 651 (1978).

10 "Since the legislature did not specify a gross dollar
11 amount required for lands to qualify for exclusive
12 farm use zones under ORS 215.213 it intended that this
13 be a matter of discretion for the counties." Id. 32
14 Or App at 429.

15 This test, and the county's use of it, is not challenged by
16 petitioners. As the test is not challenged and because the
17 county's adoption of the test is in keeping with the court's
18 statement in 1000 Friends of Oregon v Benton County, supra, the
19 Board accepts it as a valid exercise of the county's authority
20 in this case.

21 CONCLUSION

22 The county's findings address each of the required
23 criteria. It is apparent the county discounted any use of the
24 property other than grazing. The Board believes the county was
25 entitled to do so, as the record shows the agricultural
26 activity existing in the area to be that of grazing.⁷ The
27 one individual who is supporting a berry patch, is doing so as
28 part of a garden project. See Record, p. 124, 140-141. The
29 county's conclusion that the property is not suitable for
30 grazing appears to rely heavily on the statement of the

1 Geologist, Paul See. At page 108 of the record Mr. See states:

2 "In summary, the property, under the best
3 circumstances, contains a very fragile and easily
4 eroded topsoil. Previous use of the property has
5 destroyed this soil in several places, leaving
6 deflation scars and bare slopes that will require
7 careful management and very limited livestock grazing
8 to avoid the disastrous growth of the deflated areas."

9 The county recognizes other parcels in the area are used for
10 grazing. The county's conclusion the subject property is not
11 suitable for grazing relies chiefly on Mr. See's analysis of
12 the soil and potential consequences of grazing, the protein
13 analysis of the soil and Mr. Seppa's testimony. This evidence
14 shows the subject property to be not suitable for grazing. The
15 county is the fact finder, and the record concludes sufficient
16 evidence to support the county board's reliance on this
17 evidence. Christian Retreat, 28 Or App 673, supra.

18 Simply because a piece of property may have agricultural
19 potential if fertilized extensively does not mean the property
20 is "suitable" for agricultural use. In this case, the county
21 found the fertilizer required to equal the dollar income of the
22 property for the years 1948-1978. See Record, p. 4, 6, supra.
23 Further, the county found an apparent danger to water supplies
24 by fertilizing the property. See Record, p. 10, 12. Under
25 these circumstances, the Board believes the county was entitled
26 to conclude that the property is not "suitable" for farm use.⁸

The decision of Clatsop County is affirmed.

FOOTNOTES

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"Agricultural Land -- In western Oregon is land of predominantly Class I, II, III and IV soils and in eastern Oregon is land of predominantly Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event.

"More detailed soil data to define agricultural land may be utilized by local governments if such data permits achievement of this goal."

2
The Board does not understand petitioners to argue that this property is subject to Goal 3 because it is "necessary to permit farm practices to be undertaken on adjacent or nearby lands...." See Footnote 1, supra.

3
The Board agrees with respondent's interpretation of the Hinson case. The petitioners are mistaken in their view that agricultural tax deferral and some history of agricultural use of land means the land is forever suitable for farm use. The question requires an examination of all relevant facts, not past events and application of tax law alone.

4
These facts, by themselves, do not control whether the land is suitable for farm use. The Board understands the county to offer them as added evidence about suitability for farm use.

5
ORS 215.203(2)(a) defines "farm use" in the following manner:

1 "As used in this section, 'farm use' means the current
2 employment of land for the primary purpose of
3 obtaining a profit in money by raising, harvesting and
4 selling crops or by the feeding, breeding, management
5 and sale of, or the produce of, livestock, poultry,
6 fur bearing animals or honey bees or for dairying and
7 the sale of dairy products or any other agricultural
8 or horticultural use or animal husbandry or any
9 combination thereof...;

10 "Goal 3 adopts this definition of farm use."

11

6

12 ORS 308.172(2) provides a sliding scale gross income
13 standard:

14 "(a) If the farm unit consists of less than five
15 acres, the gross income amount required by
16 subsection (1) of this section shall be at least
17 \$500.

18 "(b) If the farm unit consists of five acres but does
19 not consist of more than 20 acres, the gross
20 income amount required by subsection (1) of this
21 section shall be at least equal to the product of
22 \$100 times the number of acres and any fraction
23 of an acre of land included.

24 "(c) If the farm unit consists of more than 20 acres,
25 the gross income amount required by subsection
26 (1) of this section shall be at least \$2,000."
ORS 308.372 (2)(a-c).

27 A letter in the record recites the property was never able to
28 earn more than \$100 a year in farm use. See Record, p. 4, 6,
29 93.

30

7

31 The county recognizes that there is conflicting evidence on
32 the suitability of this property for farm use. The county
33 notes in particular letters from past and present farm
34 operators including Mr. Tag, Mr. Robert Reed, Mr. William Reed
35 and Mr. Russell Earl. See Record, p. 72, 118, 119, 122. This
36 testimony is contradicted, according to the county, by the
testimony of Mr. Hugh Seppa and that of Mr. Oberst, the manager
of the Pacific Power and Light Company property. See Record,
p. 55-56, 66. This information is also contradicted by Soil

1 and Water Conservation Service facts about the soils. The
2 county adds that much of the evidence about suitability of the
3 property for farm use is based upon historical use of
4 surrounding properties. There is no evidence about use on the
5 subject site (the Board notes that this finding is different
6 than that in Niemi v Clatsop County, 6 Or LUBA 147 (1982)
7 wherein the Board noted that there were no facts to contradict
8 evidence given by the petitioners that the property had been in
9 agricultural use. 6 Or LUBA at 151). The county board finally
10 concludes the evidence accepted by the planning commission to
11 the effect that the property is not suitable for farm use "is
12 more persuasive because it is more specific, scientifically
13 sound, reliable and based upon current conditions rather than
14 historical activities." Record, p. 23.

8

9 8

The Board notes the word "suitable" means

10 "matching or correspondent (as in character,
11 condition, or kind): LIKE, SIMILAR xxx 2a: adapted to
12 a use or purpose: FIT xxx b: appropriate from the view
13 point of propriety, convenience, or fitness: PROPER,
14 RIGHT xxx c: having the necessary qualifications:
15 meeting requirements: APT, QUALIFIED." Websters 3d
16 New International Dictionary, 1961.

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

JACK AND PAT NIEMI,)	
)	
Petitioners,)	
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v.)	LUBA NO. 83-052
)	LCDC Determination
CLATSOP COUNTY AND JOE DEMARSH,)	
)	
Respondents)	
)	

The Land Conservation and Development Commission hereby approves the recommendation of the Land Use Board of Appeals in LUBA 83-052.

Dated this 14th day of October, 1983.

For the Commission:


James F. Ross, Director