BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HELEN MAGEE CRUMLEY and ROBERT CRUMLEY, Petitioners, vs. UNION COUNTY, Respondent, and ALFRED and BONNIE ARNOLDUS, Respondents.	LUBA No. 84-019 FINAL OPINION AND ORDER

Appeal from Union County.

Robert and Helen Magee Crumley, Summerville, filed the Petition for Review. Mark J. Greenfield, Portland, argued the cause on behalf of Petitioners.

Dale Mammen, LaGrande, filed a response brief and argued the cause on behalf of Respondent County.

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee; participated in the decision.

REMANDED 06/28/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Kressel.

NATURE OF THE DECISION

Petitioners appeal the county's allowance of a variance authorizing the division of a 180 acre parcel into parcels of 150 and 30 acres.

FACTS

The land in question is zoned A-1, the county's exclusive farm use designation. The minimum lot size in the A-1 Zone is 160 acres. The comprehensive plan classifies the property as Exclusive Agricultural. The plan and zoning ordinance have not been acknowledged by LCDC.

To the west of the 180 acres are a number of residences on small lots, ranging from 4 to 14.5 acres. To the east, north and south are farms of 208 and 694 acres.

Prior to 1976, the 180 acres were in two ownerships. Respondent Alfred Arnoldus owned approximately 30 acres (Tax Lot 1000). His father owned the adjacent 150 acres (Tax Lot 5800). Evidently the two parcels were used in connection with separate farming activities. Respondent Arnoldus used the 30 acre parcel as a base for a larger farming operation involving nearby lands. His father operated the 150 acres as a separate farm. Each parcel was (and is) occupied by a residence, and various farm buildings.

When respondent's father died in 1976, respondent acquired ownership of the larger parcel. He was informed by county zoning officials in 1983 that the two tax lots were considered

a single lot for zoning purposes.[1] As a result, respondent was prevented from carrying out his plan to convey the 150 acre parcel to his son.

In January 1984, Respondent Arnoldus requested a variance from the minimum lot size requirement in order to redivide the property along the historical lines described above. The planning commission recommended denial of the request on January 23, 1984. However, the county court rejected the recommendation and approved the variance on February 15, 1984. This appeal by adjacent land owners followed.

FIRST ASSIGNMENT OF ERROR

Petitioners claim the land division approved by the county contravenes Statewide Goal 3 (agricultural lands). Specifically, they argue the county was required to, but did not, (1) prepare an inventory of existing commercial agricultural enterprises in the area and (2) make a finding that the variance would result in lot sizes appropriate for the continuation of those enterprises.

The county's brief concedes the challenged decision is subject to review for Goal 3 compliance. However, the county does not directly meet petitioners' Goal 3 claims. Instead, it argues the record shows each parcel created by the variance is in fact an "existing commercial agricultural enterprise." Respondent County's Brief at 2. We note the findings adopted by the county court do not make reference to Goal 3 and do not discuss the nature of the existing commercial agricultural

enterprise in the area.

We must sustain the challenge presented in this assignment of error. Goal 3 expressly requires that the minimum lot size in an exclusive farm use zone must be "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Accordingly, a decision approving a land division in an EFU district must include a finding that this standard is satisfied, unless the lots created conform to an acknowledged plan and zoning ordinance. 1000 Friends of Oregon v. Benton County, 2 Or LUBA 324, 328-329 (1981). Moreover, we have required that such decisions specifically identify the nature of the commercial agricultural enterprise in the area and explain what size parcel is necessary to support that enterprise. Mechau v. Baker County, 2 Or LUBA 371, 373-374 (1981); Meyer v. Washington County, 3 Or LUBA 61, 64 (1981). The county's failure to make appropriate findings in connection with this aspect of Goal 3 necessitates a remand of the decision.[2]

SECOND ASSIGNMENT OF ERROR

Petitioners next challenge the adequacy of the county's findings under Article 28.02 of the zoning, partition and subdivision ordinance. That article contains the following standards for the allowance of a variance:

> "(1) Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same zone or vicinity, which conditions are a result of lot size or shape, topography, or circumstances over which

the applicant has no control;

"(2) The interest of the public will be preserved, and such action(s) will not set a trend;

"(3) That the variance will be the minimum needed to alleviate the hardship on the land, and will not result in an undesirable change in the purposes of this Ordinance and in area land values or property uses, or be otherwise injurious to other property in the area;

"(4) That the hardship on the land is not self-imposed, nor a result from a violation of this Ordinance."

The county's findings with respect to these standards read as follows:

"6. An exceptional or extraordinary condition does exist with this property because the 149.69 acre parcel was separate and distinct in its nature as a farm headquarters. The two pieces were combined prior to the Land Use Plan and planning of 1977.

"7. The interest of the public will be preserved and such action(s) will not set a trend because everything has been divided on the north side of the property.

"8. The variance will be the minimum needed to alleviate the hardship on the land and will not result in an undesirable change in the purposes of this Ordinance and in area land values or property uses, or be otherwise injurious to other property in the area because two separate parcels exist.

"9. That the hardship on the land is not self-imposed nor a result from a violation of this Ordinance because two individual farms are on the property and the history of the land demonstrates the two dwellings have existed and are in place." Record at page 1-2.

The findings as well as the county's brief emphasize the existence of separate farm residences and outbuildings and

separate ownerships of the two tax lots prior to 1976. They imply the merger of the lots is unfair to Respondent Arnoldus. Be that as it may, however, we believe the findings do not correspond to the standards for variance relief appearing in the quoted ordinance. As a result, the variance cannot be sustained. Godfrey v. Marion County 3 Or LUBA 5 (1981).

Subsection (1) of Article 28.02 is not satisfied because the historical events described above do not constitute exceptional or extraordinary circumstances resulting from "lot size or shape, topography, or circumstances over which the applicant has no control." First, Respondent Arnoldus undoubtedly had control over his purchase of the 150 acre parcel in 1976, even though he may not then have foreseen the legal consequences of that acquisition. Second, the zoning treatment of the two lots as a single zoning lot cannot be considered "exceptional or extraordinary circumstances applying only to the property in question." Presumably, the county construes the merger requirement to apply uniformly throughout the zoning district.

For similar reasons, subsections (3) and (4) of Article 28.03 are not satisifed by the county court's findings. We read the phrase "hardship on the land" in those two sections to relate to conditions, inherent in the land itself, which prevent conformance to ordinance requirements. The separate historical status of the two lots does not constitute a hardship inherent in the land. See Godfrey v. Marion County,

supra.

For the foregoing reasons, we must sustain this assignment of error.[3] Accordingly, the county's decision is remanded for further proceedings consistent with this opinion.[4]

REMANDED.

FOOTNOTES

1

Evidently the county relied on ORS 92.010(8) (defining the phrase "partition land") in reaching this conclusion. We express no opinion about the county's construction of the statute.

2

In the Benton County case we remanded a permit authorizing construction of a farm dwelling on a 6.13 acre parcel in an EFU district. We rejected the county's argument, similar to the one made in the county's brief, that Goal 3 was satisfied because the proposal was "a viable agricultural concept." We emphasized the goal requires more than a finding the proposal involves a viable farm use. The finding must state the lot is of sufficient size to continue the commercial agricultural enterprise in the area. 2 Or LUBA at 329. See also Stephens v. Josephine County, __ Or LUBA ___ (LUBA No. 84-006, May 17, 1984).

It merits notice also that the county's description of the lots authorized by the variance as "two existing commercial agricultural enterprises", Brief of Respondents at 2, is not supported by the record. The record indicates the 30 acre lot is not itself a commercial agricultural enterprise, but is rather the headquarters for a larger farm operation. Record at 38. Indeed, the county's brief at times describes both lots as "existing commercial agricultural enterprise headquarters." See e.g., Brief of Respondent County at 1 (emphasis added). We do not read Goal 3 to allow creation of a lot which serves only as the headquarters for a large commercial agricultural enterprise.

3

We express no opinion on the question whether it is possible for the county to authorize the requested variance under the facts of this case.

4

The petition includes a third assignment of error which generally charges the county's findings are inadequate. We read this to reiterate points already covered in the opinion. Therefore, we do not separately discuss this assignment of error. See Perkins v. City of Rajneeshpuram, ___ Or App ___, ___ P2d ___ (Slip Op. at 7) (June 27, 1984).