BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| ROBERT GORACKE and FRIENDS OF BENTON COUNTY, Petitioners, vs. BENTON COUNTY and STANLEY STARR, Respondents. | LUBA No. 82-111 FINAL OPINION AND ORDER |

On Remand from the Court of Appeals.

Richard P. Benner, Portland, filed the petition for review and supplemental memoranda, and argued the cause on behalf of Petitioners.

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

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

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

REMANDED 09/26/84

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 Benton County's approval of a minor partition dividing an 80 acre parcel of agricultural land in an Exclusive Farm Use (EFU) zone into two 40 acre parcels.

JURISDICTION

This land use decision is before the Board for the third time. In Kenagy v. Benton County, 6 Or LUBA 93 (1982), we remanded the approval of the partition, holding in part, that the county had failed to adequately inventory the "existing commercial agricultural enterprise in the area" as required by Statewide Goal 3 (Agricultural Lands). The county then reheard the application and again approved the partition.

Petitioners appealed the county's reapproval of the land division. Goracke v. Benton County, 8 Or LUBA 128 (1983). The final opinion and order in that appeal included a determination by LCDC that the decision again failed to satisfy Goal 3, in particular the goal's lot size standard.[1]

The final order in Goracke v. Benton County, supra, was appealed to the Court of Appeals, which reversed and remanded the case for reconsideration. Goracke v. Benton County, 68 Or App 83, ___ P2d ___ (1984). Of primary concern to the appellate court was an inconsistency in the order brought about by LCDC's disagreement with the Board's recommended opinion. That is, although LCDC rejected our recommendation concerning Goal 3 with respect to one assignment of error, its final

determination left intact other portions of our recommendation which conflicted with the agency's approach. The appellate court explained:

> "The language LCDC deleted from LUBA's recommended order and LCDC's insertion contained diametrically different interpretations of the applicable provisions. LUBA would have construed Goal 3 and OAR 660-05-015 to prohibit any partition that would result in any harm to the existing commercial agricultural enterprise, which LCDC concludes that the goal and the rule do not impose that absolute prohibition but require a balancing of positive and negative impact effects to 'keep the area's commercial agricultural successful***' However, LCDC substituted its interpretation for LUBAs only in connection with the recommended order's discussion of respondents' first contention. LCDC left LUBA's recommended discussion of the second and third contentions undisturbed and thereby allowed that discussion to be included in the final order, although it contained the same interpretation of the goal and the rule that LCDC rejected in the earlier context." 68 Or App at 88. (emphasis in original).

Because the conflicting Goal 3 interpretations reflected in the final order called for different dispositions of the appeal, the appellate court remanded the case for clarification. In doing so, the court also expressed confusion over the meaning of certain terms used by LCDC in its discussion of the Goal 3 issue. The court stated:

> "Petitioners make numerous other assignments. With one exception, their arguments do not require discussion in view of our disposition. The exception is petitioners' argument that the term 'agricultural reason' (emphasis in original), used by LCDC to describe the kind of explanation the county must offer for finding the partition to be 'appropriate,' is inexplicable and constitutes a new policy without a predicate in Goal 3, OAR 660-05-015 or other any promulgated rule. See ORS 197.040(1)(c). It is sufficient for now to note, that, without more explanation than the order offers, we do not find the

questioned term to have any apparent meaning in the context of the order or of the goal and rule." Id at 89.

A jurisdictional question is presented at this stage of the proceeding. Ordinarily, there would be no doubt that disposition of the case on remand from the Court of Appeals would require LCDC's action. Since the case arose when LCDC, not this Board, was empowered to decide challenges arising under the statewide goals, the final determination on goal issues would remain the agency's responsibility. See Section 36(1), ch 827, Or Laws 1983.

In the present case, however, the proper course of action is unclear. This is because Benton County's plan and implementing measures were acknowledged by LCDC as in compliance with the statewide goals during the pendency of the appellate court proceeding. If, as respondents argue, the intervening acknowledement means petitioners' Goal 3 claim must be dismissed as a matter of law, LCDC would be without jurisdiction over the appeal. This Board would have sole authority to dispose of any remaining, non-goal issues.

We believe further consideration of the Goal 3 issue has been foreclosed by the intervening acknowledgement order. See Families for Responsible Government v. Marion County, 65 Or App 8, 670 P2d 615 (1983). In that case, as here, a pre-acknowledgement land use decision was challenged, inter alia, for violation of statwide goals. During the pendency of the appeal, however, the plan and ordinances which the county

had applied in making the challenged decision were acknowledged by LCDC. In light of these circumstances, the court upheld our dismissal of the goal-based challenges, stating:

> "LUBA was correct, at the time it so concluded, that the goal violation allegations were outside the scope of its review. Land use decisions by a local government with an acknowledged comprehensive plan are reviewable for compliance with the plan and with local rules but are generally not reviewable for compliance with the statewide goals. Byrd v. Stringer, 295 Or 311, 666 P2d 1332 (1983); Fujimoto v. Land Use Board, 52 Or App 875, 630 P2d 364 rev den 291 Or 662 (1981)." (footnote omitted). 65 Or App at 10.

Based on the foregoing, we conclude the county's decision no longer is subject to review for compliance with Goal 3. However, we note the substantive concerns raised by petitioner under the goal remain at issue. This is because the petition includes allegations under a provision of Benton County's acknowledged zoning ordinance which replicates the goal's lot size standard. See Petition for Review at 5-14. We proceed on the assumption that the issues raised under the ordinance are before us for decision and that we have jurisdiction to render a final determination thereon. Section 36(1), ch 827, Or Laws 1983.

FACTS

The property is in the North Albany area of Benton County and is presently in farm use. It is leased for grass seed and grain production by a farmer who manages additional acreage in the area.[2]

Most commercial farms in the area are grain and grass seed

operations. Beyond the immediate area are filbert orchards which are components of larger, diversified farms. The purpose of the division in question is to finance establishment of a filbert orchard on half of the 80 acre parcel. The average filbert orchard in Benton County is approximately 26 acres.

The county's inventory indicates the average commercial farm in Benton County is 285 acres. Farms are diversified and are often composed of smaller parcels (leased or owned) located at some distance from farm headquarters. The inventory indicates that field sizes of about 40 acres are common.

Based on these cirumstances, the county concluded the land division would be "appropriate for the continuation of the commercial agricultural enterprise within the area" as required by Goal 3 and §IV.06(1)(a)(1) of the zoning ordinance.[3] The important findings can be summarized as follows:

1. The average commercial farm unit in Benton County is roughly 285 acres. The typical farm in the area near the 80 acres in issue is roughly a 300 acre enterprise.

2. These are not single crop farms, but rather are diversified operations on which a variety of crops are grown.

3. These operations are made up of parcels frequently not contiguous.

4. Field sizes of about 40 acres are common and, in fact, appear to be roughly the median size in the vicinity, with some fields being substantially smaller.

5. Individual 40-acre grass/grain parcels are common, are commercially viable when farmed as parts of larger operations (which is the existing agricultural enterprise in Benton County and the

area), and are profitable enough to be worth traveling several miles to farm.

6. Filbert orchards are well suited to the Willamette Valley. The average filbert orchard in the valley is 26 acres, again part of a diversified operation. The intensified farming investment in a filbert orchard makes it far more likely to remain as productive farm land.

7. After the division, the farmer presently renting the 80-acre parcel would continue to raise a grass seed crop on the remaining 40-acre parcel.

Based on the these findings, the county concluded the Goal 3 and ordinance lot size standard was met for the reasons summarized below:

1. The applicant's proposed 40 acre filbert orchard is larger than the average commercially viable filbert orchard, and is larger than all but one of the examples of viable filbert orchards in the vicinity. The applicant proved the proposed 40 acre filbert operation is commercially viable. It is therefore of a size to continue the existing commercial agricultural enterprise in the area.

2. The 40 acre parcel that is to remain in grass seed production will continue to be leased by a commercial farmer whose operation is across the road. Thus, the 40 acre parcel will continue in commercial production and will "continue the existing agricultural enterprise to the area."

FIRST ASSIGNMENT OF ERROR

The county's order reflects the idea the land division standard is satisfied where the proposed parcels can be considered "commercially viable." Commercial viability, in the county's view, can be established where, as here, there is proof the proposed lots are similar in size to the majority of parcels in the area which are presently farmed as components of

larger operations.[4] In such cases, the county argues, the proposed parcels must be considered "appropriate for the continuation" of commercial agriculture in the area.

Petitioners claim the county has misconstrued its EFU ordinance. They assail the county's reasoning on grounds it gives too much importance to the existing pattern of field sizes (land divisions and/or leaseholds) in the area. In their view, a proposed land division is not "appropriate," in terms of the goal and parallel ordinance, merely because it is consistent with an historical field or lot size pattern. That pattern, they observe, may be brought about by a variety of forces, including forces having little or nothing to do with the needs of the area's agriculture economy. That commercial farmers find it profitable to farm existing acreages of diverse size in conjunction with larger holdings does not alone justify further divisions along the same lines:

> "The County's reliance upon the existence of 40-acre tax lots and fields among area farms misses the point of Goal 3's lot size criterion. It is not the objective of the criterion to 'continue' a pattern of parcelization, however harmful to commercial farming in the area. The objective is to maintain the agriculture. It is the objective of Goal 3 to <u>stop</u> harmful land division patterns. Grass and grain farmers use 40-acre parcels because <u>they have to</u>, just as they have to use 15- and 10-acre parcels. They use them because they are available. That such parcels exist and are in use does not make it 'appropriate' to use them as models for new parcels.
>
> "How does one determine what parcel is 'appropriate for the continuation' of an area's commercial agriculture? The Rule says to study an area's commercial agriculture and determine a parcel size <u>necessary to maintain</u> that agriculture. The size of

farms and the size of tax lots or fields is relevant to that inquiry and may end by being the proper standard for a land division or a minimum lot size, depending on the facts in a particular case. However, the facts must show there is some agricultural reason for the existence of certain farm, tax lot, field or ownership sizes, not a simple parcelization pattern that has nothing to do with agriculture." Petitioners' Mem. (May 13, 1983) at 7-8. (emphasis in original).

In support of their argument, petitioners cite evidence of the negative effects the decision would have on commercial farming. They argue the record contains credible evidence of the following:

1. The division will be harmful to the current lessor of the 80 tract by reducing his commercial grass and grain operation at the site by 50 percent.

2. 40 acre parcels are less efficient to farm than 80 acre parcels.

3. In general larger parcels are less costly to acquire and farm than smaller parcels. In particular, the price per acre of 40 acres in the county's rural areas is between 28 and 37 percent higher than the price for an 80 acre parcel. The price difference reflects a speculative, non-farm value. Creation of 40 acre lots will thus be harmful to farming.

DISCUSSION

We begin with the proposition that, in carrying out our statutory duty to interpret the county ordinance, we should give the governing body's interpretation weight unless it is clearly contrary to the express language and intent of the legislation. Fifth Avenue Corp. v. Washington County, 282 Or 591, 599-600, 581 P2d 50 (1978); West Hills & Island Neighbors

v. Multnomah County, ___ Or App ___, ___ Pd ___ (1984). At the same time, we note the ordinance in question contains language identical to that appearing in Statewide Goal 3 and ORS 215.263(2)(a). The ordinance, as well as the final order at issue here, plainly were written in an attempt to comply with the statewide policy. Accordingly, we believe it is also appropriate to construe the ordinance in light of the various authorities analyzing and applying the statewide enactment, including determinations by LCDC and the state's appellate courts.

Petitioners' criticism of the county's reliance on the existing parcelization pattern to justify this land division finds some support in LCDC's rule interpreting Goal 3. OAR 660-05-015. In pertinent part the rule provides:

> "(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 ***
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> "(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." (emphasis added).

See also, Thede v. Polk County, 3 Or LUBA 336 (1981) (tax lots

should generally not be used as standard for measuring compliance of proposed partitions with Goal 3).

Another portion of the interpretive rules sets forth the objective of the goal's lot size standard in a way which also lends support to petitioners' challenge, particularly in light of the negative-impact evidence referred to above. OAR 660-05-020(1) provides:

> "The Goal 3 standard on minimum lot size standard is applied to the creation of new lots to prevent agricultural land from being divided into parcels or lots which will not contribute to the local commercial agricultural enterprise." (emphasis added).

Although the county found the proposed orchard would operate on a commercial scale and that the remaining 40 acres would continue in commercial grass and grain production, petitioners correctly point out that these benefits are possible without the land division. The question is not whether there are persons willing to farm the land, but whether the division will result in lots appropriate for the continuation of the area's agricultural enterprise.

A literal reading of OAR 660-05-015 seems to warrant outright rejection of the county's defense of this agricultural land division. The interpretive rule, which we believe relevant in interpreting the parallel county ordinance, makes "entire commercial farm units," not components of such units, the reference point for measuring compliance with the lot size standard. The division of an 80 acre component of a commercial

farm unit into two parcels, neither of which will constitute an "entire commercial farm unit," does not seem to be authorized.

Although this reading of LCDC's rule suggests the county's concept of "commercial viability" is flawed, we note the state agency itself took a different approach to the lot size question when this appeal was first decided. In applying OAR 660-05-015 to the facts, LCDC deemphasized the importance of "entire farm units" as the correct measure of farm land divisions. Instead the rule was construed to require balancing the positive and negative impacts the division would have on the area's commercial agricultural enterprise. The agency's final determination stated:

> "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 agricultural successful, will not contribute to the decline.
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> "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.
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> "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 principle commercial agricultural enterprise in the area.
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> "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 will 'maintain' or 'continue' the existing commercial grass seed and grain enterprise in that part of Benton

County." Goracke v. Benton County, 8 Or LUBA 135. (emphasis added).

Although we perform our review function in this case independently of LCDC, we give weight to the agency's interpretation of state policy on the lot size question presented here. Cf 1000 Friends of Oregon v. Wasco County Court, 68 Or App 765, ___ P2d ___ (1984).[5] As we understand that interpretation, the creation of lots smaller than entire commercial farm units in the area is permissible where, as here, (1) the area's commercial agricultural enterprise consists of farm units made up of non-contiguous parcels of diverse size, rather than single, large tracts and (2) given the nature of the agricultural enterprise, the proposed lots are of sufficient size to be profitably farmed as parts of larger operations. However, if there is credible evidence in such cases that the size of the proposed lots is detrimental to commercial agriculture in the area, the county must demonstrate that the benefits to the area's agricultural economy outweigh the negative impacts.[6] See OAR 660-05-020(1). The comparative benefits to the area's commercial agricultural enterprise resulting from denial as well as from approval of the proposed land division should also be considered in the balancing analysis. ORS 215.243(2); Meeker v. Board of County Commissioners of Clatsop County, 287 Or 665, 677, 601 P2d 804 (1979);[7] cf, 1000 Friends of Oregon v. Marion County, 64 Or App 218, 223, 668 P2d 412 (1983).

We apply these tests below in responding to petitioners' first challenge under the county's EFU ordinance.[8]

There is little debate over the first two considerations listed above. Petitioners generally accept the county's characterization of the commercial agricultural enterprise in the area. There is also agreement the proposed 40 acre lots can be farmed profitably in conjunction with larger farm operations. The debate centers on whether the county has adequately responded to the evidence of negative impacts introduced by opponents of the land division. We conclude it has not.

As noted by LCDC and the county itself, the evidence that creation of 40 acre parcels will have negative impacts on the area's agricultural economy is credible. The evidence was provided by experienced farmers as well as by other experts. Respondents answer by pointing out that 40 acre field sizes are common in the area and that there is evidence both proposed parcels will be commercially farmed (i.e., there are "commercially viable" proposals for both lots). However, this does not adequately respond to the question at issue. Neither the county ordinance, the state goal, nor LCDC's interpretive rule authorize continuation of a field size or lotting pattern having negative impacts on commercial agriculture merely because the pattern already exists or because the interests of individuals might be served by the proposal.[9] Such considerations and interests must give way to the broader

objective embodied by the lot size standard - support and continuation of the area's commercial agricultural enterprise. See ORS 215.243(2); Still v. The Board of County Commissioners of Marion County, 42 Or App 115, 600 P2d 433 (1979).

We conclude the county has not adequately demonstrated why, in light of the proof of negative impacts offered by opponents of the partition, the land division remains appropriate for the continuation of the commercial agricultural enterprise in the area. Accordingly, the challenged decision must be remanded.

SECOND AND THIRD ASSIGNMENTS OF ERROR

After the remand by the Court of Appeals, petitioners withdrew their second and third assignments of error. It is therefore unnecessary for us to proceed further.

CONCLUSION

The decision must be remanded on grounds the county has incorrectly interpreted the lot size standard in its EFU Ordinance. ORS 197.835(8)(a)(D); OAR 661-10-070(1)(C)(4).

FOOTNOTES

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1 The legislation then in effect allocated to LCDC the authorty to decide goal issues raised in appeals filed with this Board. In pertinent part, Goal 3 provides:

> "Agriculture (sic) lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space. These lands shall be inventoried and preserved by adopting exclusive farm use zones pursuant to ORS Chapter 215. Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise with (sic) the area."

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2 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" under the goal or ordinance.

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3 The legislature has also enacted this standard. ORS 215.263(2)(a). The statutory enactment lends support to our interpretation of this county zoning provision in light of state policy.

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4 The county concluded as follows:

> "Despite testimony by the opponents that 100-200 acres of filberts would be necessary to form a viable commercial farm unit in and of itself, the testimony on the record indicates that the existing commercial filbert agricultural enterprise is supported not by single crop, 100-acre filbert farms, but by smaller commercial orchards, averaging 26 acres in size, which are farmed as a part of a larger diversified operation. Similarly, grass and grain farming in the area does not take place on large parcels, each a viable commercial agricultural unit, but on smaller

parcels that are part of a larger diversified farm unit. Mr. Goracke, witness for the opponents, testified that a 40-acre grass farm is an efficient, viable commercial farming operation when farmed in conjunction with other properties, and that he had a 5-acre grass parcel that was commercially viable because it was across the road from other operations. The applicant's proposed filbert orchard is larger than the average commercially-viable filbert orchard, and is larger than all but one of the examples of viable filbert orchards in the vicinity *** The applicant has proven that his 40-acre filbert operation is commercially viable ***

"The Board finds that the applicant's proposed 40-acre filbert orchard is of a size to continue the existing commercial agricultural enterprise in the area." Findings of Fact, Conclusion of Law and Order at 9-10.

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[5] Wasco County involved LCDC's direct application of a statewide goal to a contested land use decision. In upholding the agency's interpretation, the court stated:

"Accordingly, if LCDC's interpretation and the reasoning supporting it is clearly expressed in an order or a rule and if that interpretation is plainly consistent with the intent and policy of the goal, a court of review must affirm." 68 Or App 765 at 777 (emphasis in original).

Here, of course, we review a county's application of its zoning ordinance. However, under the circumstances, we believe LCDC's analysis deserves weight because the ordinance uses language identical to the statewide goal. Notably, respondents have cited no provision of the county's enactment which calls for an interpretation different from the one reflected in this opinion.

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[6] We recognize that satisfaction of this standard may present formidable problems of proof. As we see it, however, the balancing test is no more or less demanding (of technical evidence or expert testimony) than is the county ordinance which serves as its point of reference. Both would seem to call for expert testimony on the relationship between the well-being of an area's agricultural enterprise and the size of lots proposed to be created.

[7] In Meeker, petitioners challenged the county's approval of the proposed subdivision of an 82 acre farm into six parcels ranging from 10 to 20 acres. They claimed, among other things, that the approval violated the Goal 3 minimum lot size standard. This challenge was rejected on grounds substantial evidence supported the county's determination the division would result in greater agricultural utilization of the land. 287 Or at 675. As a consequence, the court concluded the county's decision would "continue and support" the commercial agricultural enterprise within the area as required by Goal 3. Id.

LCDC participated as amicus curiae in Meeker. The commission expressed its understanding of the minimum lot size requirement of Goal 3 in a five part test which included the following inquiry:

> "Is the undivided parcel appropriate for the continuation of any such enterprise? Goal 3. If so, then ORS 215.243(3) favors preservation of the maximum amount of the limited supply of agricultural lands 'in large blocks' and any decision whether to allow a partition or subdivision of such a parcel must be in accordance with this policy." ORS 215.263(3).

We believe our disposition of the lot size issue in this appeal is consistent with the court's ruling in Meeker and LCDC's Goal 3 formulation in that case.

[8] We note petitioners do not claim the ordinance completely bars division of farmland into lots smaller than entire commercial farm units. Instead they take the position the ordinance authorizes such divisons where the result supports or contributes to the success of commercial agriculture in the area.

[9] As petitioners point out, the field size pattern includes numerous lots considerably smaller than the proposed 40 acres. The policy underlying the standard mandates preservation of agricultural land in large blocks, ORS 215.243(2), not the perpetuation of an existing pattern.

It bears notice also that the land division proposed is evidently motivated by a landowner's desire to raise capital

for a new agricultural venture. Though the ultimate objective (filbert orchard on 40 acres) is consistent with the policy underlying the county ordinance, it does not reasonably follow that the means of achieving the objective are appropriate. As the final order itself acknowledges, development of a 40 acre filbert orchard on this land is legally permissable without the land division. Final Order at 11.