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. 84-100 FINAL OPINION AND ORDER

Appeal from Benton County.

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

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

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

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

REMANDED 04/04/85

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioners appeal approval of a minor partition dividing an 80 acre parcel of agricultural land into two 40 acre parcels. The land is zoned for exclusive farm use (EFU).

FACTS

This land use decision is before us for the fourth time. The facts are outlined in our most recent Goracke opinion, Goracke v. Benton County, ___ Or LUBA ___ (LUBA No. 82-111, Slip Opinion of 9/26/84) hereinafter cited as Goracke I.[1] The property is presently in farm use. This past year, the parcel was devoted to a wheat crop. There is evidence in the record to support the county's finding that grass seed and grain operations similar to those on the subject parcel typically involve parcels of varying sizes collected into larger farm enterprises.[2] Parcels making up these holdings are both contiguous to each other and separated by other parcels. The average commercial farm in Benton County is 285 acres, and within the 285 acre total, the county's inventory shows that field sizes of about 40 acres are common. There are smaller parcels in agricultural use in the area also. See generally Goracke I, Record, 7-8.

Respondent Stanley Starr seeks to divide the property roughly in half. A new filbert operation would be established on the westerly 40 acre parcel. Record, 6-7. Respondent Starr would sell or lease the easterly portion. Id.

STANDARD OF PARTITION APPROVAL

In Goracke I, we articulated what we believed to be the appropriate standard to apply whenever agricultural land is to be divided into lots which are smaller than entire commercial farm units. Based on our understanding of policy previously expressed by LCDC on the subject, we said

> "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. 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." Goracke I, Slip Opinion at 13.

We noted this test might "present formidable problems of proof." Ibid, Footnote at 17-18. We also noted, however, that in Meeker v. Board of County Commissioners of Clatsop County, 287 Or 665, 601 P2d 804 (1979), the court upheld a division of agricultural land where it was shown the division would result in greater agricultural utilization of the land. We further suggested the analysis required might call for expert testimony on the relationship between the well being of an area's commercial agricultural enterprise and the lot sizes created by

the land division.

The county's most recent order relies heavily on expert testimony and applies a balancing test in order to show this land division satisfies Goal 3 and the county zoning ordinance, i.e., creates lots appropriate for the continuation of the existing commercial agricultural enterprise in the area.[3] Petitioners claim the county's decision is unsupported by substantial evidence and that its application of the balancing test is flawed. We hold, as we did in the prior appeal, that petitioners have presented credible evidence to show that the size of the proposed lots is detrimental to the commercial agricultural enterprise in the area. Because credible evidence has been presented showing harm, the county was obligated to demonstrate that the benefits to the area's agricultural economy would outweigh the negative impacts of the land division. We conclude the county has failed to meet this test.

The county's analysis can be summarized as follows:

1. The commercial agricultural enterprise in the area will not be adversely affected by increased difficulty in farming two 40 acre parcels as opposed to one 80 acre parcel;

2. There will be no increase in price per acre for purchase or lease of farm land as a result of the proposed land division.

3. If any harm in 1. or 2. above does exist, the harm is inconsequential.

4. The benefits from the establishment of a new filbert crop greatly outweigh any detriment to the existing commercial agricultural enterprise in the area.

Petitioners make five assignments of error as follows:

ASSIGNMENT OF ERROR No. 1

"Respondent's Findings and Conclusions about the Effect of the Division on Efficiency of Grass Seed and Grain Farming is (sic) Not Supported by Substantial Evidence."

ASSIGNMENT OF ERROR No. 2

"Respondent Misapplied the Goracke I Test and Section IV.06(1) of its EFU Ordinance"

ASSIGNMENT OF ERROR No. 3

"Respondent's Conclusion that the Partition Will Have Minimal Impact on the Price Per Acre of Farmland is Not Supported by Findings or Evidence in the Record"

ASSIGNMENT OF ERROR No. 4

"Respondent's 'Benefit' Conclusion is Not Supported by Substantial Evidence in the Record; The Conclusion Misapplies Respondent's EFU Ordinance"

ASSIGNMENT OF ERROR No. 5

"Repondent Violated Section IV.06(1) of its EFU Ordinance by Approving a Partition Inappropriate for the Existing Commercial Agricultural Enterprise in the Area"

In Assignments of Error Nos. 1 through 3, petitioners claim the county's conclusion that no harm will result to the commercial agricultural enterprise within the 1/2 mile area is not supported by substantial evidence in the record. In addition, the petitioners assert here, as they did in Goracke I, that there is credible evidence of harm to the commercial agricultural enterprise in the area. The fourth assignment of error claims the county's application of the balancing test articulated in Goracke I is flawed because there is no benefit

to the existing commercial agricultural economy from the creation of a filbert crop. The last assignment of error is best described as a catch-all saying, in sum, that the county has not met the requirements of its own ordinance by its failure to properly apply the partitioning test to this proposed land division.

The petitioners' concern about substantial evidence is somewhat misplaced. In Goracke I, we stated that if credible evidence exists to show harm to agriculture within an area, the county is obliged to show how that harm is outweighed by the benefits to agriculture resulting from the partitioning. In Goracke I, we found credible evidence of harm to exist. We have seen nothing in the county's findings in this case to suggest that our conclusion about harm was mistaken. As in the last case, petitioners have presented evidence showing that it is less efficient to farm two 40 acre parcels than one 80 acre parcel. The petitioners have presented evidence showing that generally, as the number of acres decreases, the market price for those acres increases. Indeed, petitioners presented evidence showing that within the 1/2 mile inventoried around Respondent Starr's property, a sale of land occurred demonstrating this relationship between price and acreage. Petitioners state:

> "[W]ithin the same year respondent Starr paid $2,500 an acre for the subject 80 acres of Class II soil, a Mr. Throop, a doctor, paid $3,309 an acre for 36.47 acres of Class II soil, only 1,300 feet from respondent Starr's 80 acres. Rec. 62; Goracke I Tr.

97, 98, 109; Goracke I Rec. 49." Petition for Review page 25.

Petitioners also presented evidence that there exists a "friction of distance" which comes into play whenever existing large farm holdings are divided into parcels which then become part of other farming operations. Petitioners explain that "friction of distance" is the difficulty encountered by farmers in managing diverse parcels. The evidence showed that farmers tend to favor farming single unified farms as compared to diverse holdings because (1) the time and cost of farming diverse holdings is greater, (2) diverse holdings entail more wear and tear on equipment and more difficulty in managing farm labor help, and (3) there is more difficulty to plan farming operations and more potential hazards in moving equipment from place to place when a farm is made up of numerous, non-contiguous parcels. Goracke I, pp. 88-89, 93-95, 104.

We believe this evidence is credible; and, for that reason, the county was obliged to apply the test we outlined in Goracke I.[4] In applying the test, the county found a benefit to result from the division in that

> "it is more likely that farming operations will continue on the property if the division is approved because of the greater profits that can be realized from the production of filberts." Record, 16-17.

The county went on to describe the financial rewards to be realized by a successful filbert crop and contrasted this projected benefit with lesser benefit realized by a successful

wheat crop.

As petitioners point out, there is nothing in the record to show why this property must be divided in order to establish the filbert crop. The record demonstrates the landowners desire to sell a portion of the 80 acres in order to finance the filbert crop, but we do not believe the county has shown that the division results in a benefit to the agricultural economy of the area. Evidence that other crops are more profitable than crops presently grown does not show a land division is beneficial to the agricultural economy. The result of the division is to remove land devoted to grass seed and grain crops and divert it to a new crop. Less acreage is then available for use in the existing grass seed and grain enterprise. A farmer seeking to continue a grass seed and grain enterprise utilizing the remaining 40 acres of the 80 acre parcel will be required to expend effort to achieve a smaller return because of a smaller crop. Also, should the filbert enterprise for some reason not be initiated or should it fail, the existing commercial agricultural enterprise suffers from a land division which is harmful to grass seed and grain farming.[5]

We must therefore agree with petitioners that the county has not shown sufficient benefit as a direct result of this land division to overcome petitioners' credible evidence showing the harm to the existing commercial agricultural enterprise in the area. Given the test we understand to have

been established by LCDC, and which we explained in Goracke I, we must remand the decision. OAR 661-10-070(1)(c)(1 and 4).

REMANDED.

FOOTNOTES

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1 Our citation to the third of our four Goracke cases as Goracke I follows petitioners' citation form. The first time this partition was before us the case was entitled Kenagy v. Benton County, 6 Or LUBA 93 (1982).

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2 The county and petitioners agree the "area" used to determine the nature of the existing commercial agricultural enterprise is the land within a circle with a 1/2 mile radius from the Starr property.

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3 Goal 3:

> "Agriculture 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 lots 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. Conversion of rural agricultural land to urbanizable land shall be based upon consideration of the following factors: (1) environmental, energy, social and economic consequences; (2) demonstrated need consistent with LCDC goals; (3) unavailability of an alternative suitable location for the requested use; (4) compatibility of the proposed use with related agricultural land; and (5) the retention of Class I, II, III and IV soils in farm use. A governing body proposing to convert rural agricultual land to urbanizable land shall follow the procedures and requirements set forth in the Land Use Planning goal (Goal 2) for goal exceptions."

This requirement is echoed in the Benton County Zoning Ordinance at Section IV.06(1).

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4 We believe it appropriate to note that had petitioners been unable to present credible evidence of harm to the commercial

agricultural enterprise within the area studied by the county, there would be no need to discuss the Respondent County's conclusion that the area's agricultural economy will be benefitted by this land division. However, because credible evidence of harm has been presented in the form of increased price per acre of land, the county is obliged to discuss how it is that the land division will result in a benefit to the area's agricultural economy. As discussed on page 3, supra, the task before the county is a formidable one. We do not believe it is an impossible task, however. In Meeker, supra, the county was able to show that agricultural activity would increase (and thereby benefit the area's agricultural economy) as a result of division of otherwise unused farm land. Here, the subject property is already in farm use. Therefore, the burden to show a benefit is greater.

Petitioners have suggested that the test is not impossible for another reason. In a memorandum submitted during the course of our consideration of the case on remand from the Court of Appeals, petitioners posited the following hypothetical circumstance which would allow a division:

> "It is conceivable that the size of parcels or fields in farming area reflects only agricultural initiatives. For example, 80-acre tax lots may be common because 80 acres is the right size for a corn field or because it is a common unit of exchange among grass seed farmers, or because it is the minimum size to justify farm equipment of a certain type. If a county chooses, as Benton County did in this case, to rely on an average of component parcels and field sizes, it is incumbent upon the county to determine from its inventory and to explain in its order why parcels or fields exist in the area. It must show the phenomenon as something to do with agriculture, not with the pattern of earlier land divisions unrelated to agricultural. Only then is the county in a position to conclude that the parcel of field size is 'appropriate for the continuation' of an area's commercial agriculture." Petitioners' Memorandum on Remand, July 17, 1984, pages 5 and 6.

We do not understand the parties in this case to argue that the 40 acre lot sizes proposed here meet petitioners' suggested land division criterion.

We express no opinion as to whether petitioners' suggested test is appropriate or would satisfy the Land Conservation and Development Commission as an appropriate implementing measure under Goal 3 and similar language in the county's ordinance at Section IV.06. The only clear example meeting what we

understand to be LCDC's test, and the one we recognized in Goracke I, is the circumstance occurring in Meeker.

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[5] This situation is quite unlike that in Meeker, supra, in which the applicant was able to demonstrate that land otherwise unused for farming purposes would be used for farming purposes if the division were to occur. There is no such cause and effect relationship in the instant case.