BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHERRY LANE, INC., JAMES E. NORTH, Petitioners, vs. JACKSON COUNTY, Respondent.	LUBA No. 85-010 FINAL OPINION AND ORDER

Appeal from Jackson County.

Diane Spies, Portland, filed the petition for review and argued the cause on behalf of petitioners. With her on the brief were Diane Spies and Associates, P.C.

E. R. Bashaw, Medford, filed a response brief and argued the cause on behalf of respondent.

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

AFFIRMED 09/04/85

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 denial of a proposed plan and zoning map amendment. The proposal would redesignate a 75 acre parcel from Exclusive Farm Use (EFU) to Farm-Residential (F-5) (five acre minimum lot size).

FACTS

The property is irregular in shape and lies outside the acknowledged Medford Urban Growth Boundary. Eighty percent of the property consists of Class IV soils and is therefore agricultural land as defined by the county's acknowledged comprehensive plan and Statewide Goal 3 (Agricultural Lands). The remaining 20 percent of the property consists of Class VI soils. The plan classifies this area as agricultural land also, because of its proximity to a large commercial farm.[1]

Properties to the north of the 75 acres in question are zoned for rural residential use. The land to the east, west and south is zoned Exclusive Farm Use.

The application was filed in May, 1983. The county planning commission reviewed it at a public hearing in December, 1983. The planning commission evaluated the application under criteria in the acknowledged comprehensive plan and land development ordinance. The statewide planning goals were also considered applicable because an amendment to the acknowledged plan was proposed.

The application was denied at the conclusion of the

planning commission's hearing. The commission's order was signed on February 13, 1984.

Petitioners appealed the planning commission's order to the county governing body. After a hearing at which the parties were allowed to supplement the record made before the planning commission, the appeal was denied. The final order was adopted by the governing body on January 2, 1985.

FIRST ASSIGNMENT OF ERROR

Petitioners first charge that a member of the planning commission who voted for denial of the application was biased. The charge is based on the undisputed fact that the commissioner resides in close proximity to the property and was entitled to mailed notice of the hearing. Petitioners add that the commissioner displayed her inability to hear the case on the merits by becoming argumentative when certain witnesses testified for the applicant. According to petitioners, the planning commissioner's conduct was prejudicial because (1) the planning commission would not have had a quorum and therefore could not have taken action without her participation and (2) the governing body based its decision on the action taken by the planning commission.

We reject this challenge. Even if we assume that the planning commissioner's ownership of adjacent property constituted disqualifying bias, the critical fact is that the land use decision challenged by petitioners was made by the county governing body, not the planning commission.

Petitioners remind us that the record of the planning commission hearing (including the allegedly argumentative comments of the planning commissioner) was before the governing body at the hearing on the appeal. However, this fact does not establish that the governing body failed to consider the case on the merits. Petitioners do not contend that they were prevented from introducing evidence at the planning commission hearing or at the later hearing conducted by the governing body. Nor do they contend the governing body did not exercise independent judgement in reviewing the record. Under these circumstances, we fail to see how the planning commissioner's personal interest in the matter (if such was the case) could justify remand or reversal of respondent's decision. Cf. South of Sunnyside Neighborhood League v. Board of Commissioners of Clackamas County, 280 Or 3, 7-9, 569 P2d 1063 (1977).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners next argue that the county's decision was improperly influenced by the planning department staff, which advocated denial of the proposal. We construe this claim to be one of prejudicial procedural error. ORS 197.835(8)(a)(B).

In support of this challenge, petitioners present no legal argument. Instead, they propound various rules for the conduct of planners in the quasi-judicial decisionmaking process. Petitioners state the rules as follows:

"The role of staff in a quasi-judicial land use

> proceeding should be to present factual information from the prespective (sic) of the local jurisdiction Comprehensive Plan and implementing ordinances in order to provide an accurate data base to the decisionmaking body. Staff should not assume an adversarial role of any nature; nor should it attempt to provide professional analysis of evidence, outside the scope of its expertise; nor should it make a recommendation regarding the legal status of the application; and certainly staff should not be so presumptious as to present an order of denial as an Exhibit in advance of the public evidentiary hearing itself." Petition at 15.

Whatever currency these principles might have in the professional debate over "advocacy planning," see P. Davidoff, Advocacy and Pluralism in Planning, 31 Journal of Amercian Institute of Planners, No. 4, p. 331-37 (November, 1965), they provide no legal basis for granting relief in this appeal. The petition cites no constitutional, statutory or other provision of law prohibiting county planners from recommending approval or denial in any land use proceeding. We therefore deny this assignment of error.

THIRD ASSIGNMENT OF ERROR

Petitioners next contend the county's decision violates Article I, Section 18 of the State constitution and the Fifth and the Fourteenth Amendments of the United States Constitution. The claim is that by refusing to replace the exclusive farm use designation of the property with the more permissive F-5 designation, the county has taken the property for a public use without paying the constitutionally required compensation.[2]

One who alleges that a land use regulation is confiscatory

has the burden of proving that the designation permits no beneficial use of the property. Fifth Avenue Corp. v. Washington County, 282 Or 591, 581 P2d 50 (1978); Suess Builders Company v. City of Beaverton, 294 Or 254, 656 P2d 306 (1982); Joyce v. City of Portland, 24 Or App 689, 692, 546 P2d 1100 (1976). As we noted in Mobile Crushing Company v. Lane County, LUBA No. 83-092 (1984), one who challenges a zoning regulation as a taking of property for public use has a heavy burden of proof.

We first take up a threshold question raised by respondent in connection with the taking claim. The argument is that the time period for challenging the constitutionality of the EFU designation of the property expired in 1982, when that designation was first applied by the county. Respondent contends that the taking claim is beyond our jurisdiction in this appeal, because the decision before us merely maintains the existing EFU zoning (i.e., by refusing to substitute the F-5 designation sought by petitioners).

We are unpersuaded by the jurisdictional claim. As we understand petitioners' argument, the EFU zoning of the property ripened into a compensable taking only after the county refused to approve the rezoning application at issue here. That argument is premised on the doctrine of exhaustion of administrative remedies, a doctrine we agree is pertinent in this case. Fifth Avenue Corp. v. Washington County, supra. Because a taking may not be ascertainable until after the

allegedly confiscatory restriction (here, EFU zoning) is imposed, we conclude that petitioners' claim is at least cognizable in this appeal.

This is not to say, however, that the taking claim is now ripe for review. We find merit in respondent's contention that petitioners have not yet explored the full spectrum of uses permitted in the EFU district and therefore have prematurely presented the taking claim.

As stated above, the courts have held that a prerequisite to judicial review of a taking claim is the exhaustion of available administrative remedies, including the remedy of amending the land use regulation at issue so as to remove the confiscatory impact. See Fifth Avenue Corp. v. Washington County, supra; Suess Builders Company v. Washington County, supra. Accordingly, the validity of a taking claim may not be ascertainable until a series of decisions have been made, culminating in the locality's final determination of the permitted uses of the property. In Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, ___ US ___ 105 S. Ct. 3108 (1985), the US Supreme Court expressed this doctrine as one relating to the "ripeness" of a taking claim for judicial review, rather than as a matter pertaining to the exhaustion of administrative remedies, as discussed in the cited Oregon cases. The Court stated:

> "As in Hodel, Agins, and Penn Central, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its

> property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although '[t]he question of what constitutes a 'taking' for the purposes of the Fifth Amendment has proved to be a problem of considerable difficulty,' Penn Central Transp. Co. v. New York City, 438 U.S., at 123, 98 S.Ct., at 2659, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Id, at 124, 98 S.Ct., at 1659. See also Ruckelshaus v. Monsanto Co., ___ U.S., at ___, ___, 104 S.Ct., at 1875; Prune Yard Shopping Center v. Robins, 447 U.S., at 83, 100 S.Ct., at 1041; Kaiser Aetna v. United States, 444 U.S., at 175, 100 S.Ct., at 390. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 105 S. Ct. Rptr. at 3119.

Applying the foregoing authorities, we conclude that although there is no jurisdictional bar to the the taking claim, the claim must be rejected as premature. The decision on appeal represents a single action by the county, i.e., refusal to replace the EFU zoning of the property with an F-5 designation. Assuming, arguendo, that the property has no value for agricultural use, the question remains whether the non-farm uses allowable in the EFU zone would permit beneficial use of the property. This critical inquiry cannot be answered until (1) the county has determined whether any of the non-farm uses permissible[4] in the EFU zone will be allowed on petitioners' property and (2) petitioners demonstrate that the allowable uses are so limited as to have confiscatory impact. As we see it, the preconditions for review of a "taking"

challenge to EFU zoning of petitioners' property have yet to be satisfied.

Apart from the finality problem discussed above, we also believe petitioners have failed to establish that the property has no beneficial use for agricultural production. Petitioners' claim rests heavily on the assumption that the property is not irrigable. Their citations to the record, however, do not persuade us that the assumption is warranted. Indeed, as we understand the record, the property is within the Talent Irrigation District and is potentially irrigable. Although the District's distribution system cannot presently serve the property, and it may be costly to construct the necessary improvements, petitioners have not demonstrated that the cost is so prohibitive as to deprive the property of all beneficial farm use. See Fifth Avenue Corp. v. Washington County, supra. As noted earlier, 80 percent of the property consists of Class I through IV soils. Statewide Goal 3 (Agricultural Lands) designates soils in this classification as agricultural land, to be preserved for agricultural use. Petitioners have alleged but not proved that the soils in this case are valueless for agricultural production.[5]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In this assignment of error, petitioners argue that neither the planning commission nor the governing body of the county articulated reasons supporting the challenged decision. We

cannot agree. The record reflects extensive findings of fact and conclusions of law adopted by both decisionmaking bodies. Petitioners' complaint seems to be that the decisionmakers did not frame the findings themselves, but relied on staff assistance to complete this process. However, we find nothing inappropriate in such an approach. Petitioners present no legal argument that the approach is flawed. Accordingly, the assignment of error cannot be sustained.

The decision of Jackson County is affirmed.

FOOTNOTES

1

The comprehensive plan, like Statewide Goal 3, classifies as agricultural land those properties that are "necessary to permit farm practices to be underaken on adjacent or nearby lands."

2

After this appeal was filed, both parties requested the opportunity to present additional evidence on the constitutional issue raised by petitioners. We granted the motions. We noted, however, that we did not construe our statutory authority to permit us to award monetary damages for a regulatory taking, as requested by petitioners. Our authority is limited to affirming, remanding or reversing challenged land use decisions. ORS 197.835(1). After we advised the parties of the foregoing, petitioners withdrew their request for an evidentiary hearing. Respondent produced a single exhibit at the evidentiary hearing conducted on August 8, 1985. The exhibit, which was not objected to, consists of records of the Talent Irrigation District. The records indicate property in question is within the district. In response to this exhibit petitioners offered affidavits of the following persons: Duane Culbertson, Walter Hoffbuhr, Richard Stevens, Diane Spies, and Janie Burcart.

Respondent objected to the affidavits of Spies and Burcart. The affidavits consist of statements by petitioners' attorneys as to conversations they had with other persons. We did not rule on respondent's objections at the hearing, but we do so now.

Respondent's objections are sustained. Respondents are entitled to cross-examine adverse witnesses at evidentiary hearings before this Board. OAR 661-10-045(3)(b). They could not exercise this right with regard to the persons whose testimony was reported in the affidavits of Spies and Burcart. The objections are therefore well-taken.

The remaining affidavits submitted by petitioners were not objected to and are accepted as part of our record.

3

That authority extends over the procedural and substantive constitutional questions, Ackerley Communications, Inc. v.

Multnomah County, 72 Or App 617, 696 P2d 1140 (1985), and includes "taking" claims under the Just Compensation Clause. Martin v. City of Lake Oswego, 69 Or App 170, 172, 684 P2d 28 (1984).

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[4] The county's EFU district permits the following non-farm uses (among others) in the exclusive farm use district as conditional uses: Commercial activities in conjunction with farm use, geothermal resource mining and exploration, aggregate and other mineral resource extraction, private hunting and fishing preserves, personal use airports, forest products, processing, utility facilities. See Section 218.030-050 Jackson County Zoning Ordinance.

We assume the procedures used by the county in considering requests for these uses are fair and therefore present no constitutional problem despite the fact that they may be time-consuming. See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 105 S. Ct. at 3125-27 (Stevens, concurring).

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[5] Petitioners cite testimony to the effect that the property has little or no farm use value. The record also includes appraisals of similar EFU parcels, values ranging from $75,000 to $150,000. See Record at 326-327. Petitioners argue these parcels are not comparable to the property in question because they are irrigated. However, as noted in our opinion, petitioners have not demonstrated that their property is in fact limited to dryland farming.