LAND USE
BOARD OF APPEALS
SEP 11 1 43 PM '85

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 RAY STEPHENS and CAROLE CANEVARI,	
4 Petitioners,	
5 vs.	LUBA No. 85-024
6 JOSEPHINE COUNTY, and ANTON and SHIRLEY BOTWINIS,	
7 Respondents.	FINAL OPINION AND ORDER
8	
9 DONALD R. MCINTOSH,	
10 Petitioner,	LUBA No. 85-025
11 vs.	
12 JOSEPHINE COUNTY,	
13 Respondent.	

14 Appeal from Josephine County.

15 Richard v. Kengla, Grants Pass, filed the petition for review and argued the cause on behalf of Petitioners Stephens
16 and Canevari.

17 Joseph S. Voboril and Jeffrey H. Keeney, Portland, filed the petition for review and argued the cause on behalf of
18 Petitioner McIntosh. With them on the brief were Tonkon, Torp, Galen, Marmaduke & Booth.

19

Anton and Shirley Botwinis, Cave Junction, filed a response
20 brief and argued the cause on their own behalf.

21 No appearance by Josephine County.

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

23

REMANDED 09/11/85

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

26

Opinion by Bagg.

NATURE OF THE DECISION

Petitioners challenge a decision of the Josephine County Board of Commissioners to permit the partitioning of a 232 acre parcel into three smaller parcels.[1]

FACTS

This land division is before us for the second time. In Stephens v. Josephine County, 11 Or LUBA 154 (1984), we considered this same proposed partitioning and remanded it to the county to determine whether the division complied with Land Conservation and Development Commission (LCDC) Goal 3, the agricultural lands goal. We also remanded the decision because the county's findings were not adequate to meet certain county ordinance requirements. Pursuant to our order of remand, the county hearings officer conducted further hearings. After these, he denied the partitioning request, and the applicants, Mr. and Mrs. Botwinis, filed an appeal with the county board. The county board considered the appeal and issued a decision on March 18, 1985, approving the partitioning.

The tract is zoned for Exclusive Farm Use, and the minimum lot size applicable is 80 acres.[2] The proposed division would create three parcels of 57.97, 71.9 and 102 acres and would follow existing tax lot lines. Most of the property includes soil types which qualify for agricultural lands protection under Statewide Goal 3.[3] Also, the property has 146 acres of water rights, with separate rights belonging to

1 each of the three tax lots. There are also 10 wells on the
2 property.
3 Agriculture is the predominate land use in the area.
4 Agricultural activities include cattle grazing and hay
5 production. Portions of some parcels have been planted in
6 grapes.
7 STANDING
8 Respondents Botwinis challenges the standing of Petitioner
9 Stephens and Petitioner McIntosh. Respondents claim
10 petitioners' assertion of aggrievement over the decision by the
11 county board is not substantiated "by any factual or
12 substantive evidence." Brief of Respondents in LUBA No. 85-024
13 at 1.
14 It is not necessary that the record show an evidentiary
15 basis for petitioners' standing. Friends of Benton County v.
16 Benton County, 4 Or LUBA 112 (1981). Mr. Stephens and Ms.
17 Canevari allege in their petition for review that each is an
18 adjacent landowner to the subject property. These assertions
19 are not denied by respondent. An adjacent property owner is
20 presumed to have sufficient interest in the uses on his
21 neighbor's land to bring an appeal. We so held in Stephens v.
22 Josephine County, 11 Or LUBA 154 (1984). See also Duddles v.
23 City of West Linn, 21 Or App 310, 555 P2d 583 (1975). We find
24 Petitioners Stephens and Canevari have standing to appeal the
25 county's decision.
26 The challenge to Petitioner McIntosh is similarly grounded

on respondent's belief that petitioner has failed to support his assertion of aggrievement with "any factual substantive evidence." Respondent also says Petitioner McIntosh was not present at the hearing before the county commissioners and did not submit written testimony.

Petitioner McIntosh appeared before the hearings officer on June 27, 1984. The June 27, 1984 hearing was conducted pursuant to our remand. ORS 197.830(3)(b) simply requires an appearance before "the local government."[4] It does not require an appearance before the county governing body. Warren v. Lane County, 297 Or 290, 296-298, 686 P2d 316 (1984). We believe, therefore, that Petitioner McIntosh has made the requisite appearance because he appeared during the course of the county's remand proceedings. Also, petitioner alleges he is owner of a farm adjacent to the subject property. This undenied fact is sufficient interest to grant him standing. Stephens v. Josephine County, supra.

ASSIGNMENTS OF ERROR

Two petitions for review have been submitted. Petitioners Stephens and Canevari join in a petition which includes two assignments of error. Petitioner McIntosh filed a petition with three assignments of error. In sum, two broad claims emerge: (1), that the decision violates Statewide Planning Goal 3 in that the partitioning does not provide for the maintenance of the "existing commercial agricultural enterprise" within the area of the partitioning; and, (2), that

1 the decision violates Josephine County Zoning Ordinance,
2 Section 19.040. For convenience, we will discuss each of these
3 two major issues including therein the points raised by
4 petitioners in their separate petitions.[5]

5 ASSIGNMENT OF ERROR No. 1

6 The decision violates LCDC Goal 3 because it fails to
maintain the existing commercial agricultural
7 enterprise within the area.

8 Pursuant to our remand in Stephens v. Josephine County,
9 supra, the county conducted an inventory of farm enterprises in
10 the area of the Botwinis' property. The inventory included all
11 farm operations in the Illinois Valley and concluded with a
12 determination of average farm parcel size. The county
13 established the following average farm sizes within the area:

14 "1. Hay and pasturage: 51.77 acres

15 "2. Dairy farms: 60-100 acres; Viticulture: 10-20
acres."

16 The inventory was limited to irrigated parcels. The data
17 included in the county's inventory, however, shows that of the
18 total 9,271 acres in the inventory area, the total average
19 parcel size is 98.6 acres. Also, if one excludes parcels less
20 than 15 acres in size, the average parcel size becomes 114
21 acres.

22 Petitioners complain the county's inventory fails to
23 distinguish between parcel size and commercial farm unit size.
24 Petitioners cite an LCDC interpretive rule, OAR 660-05-015(7),
25 requiring inventories of commercial farm units to include
26

entire farm units, not simply portions of farm units devoted to a particular kind of agriculture. OAR 660-05-015(6)(a). Further, the rule requires that the minimum lot size calculations take into account entire farm units and not individual tax lots.

Petitioners say the record does not show the county utilized this required standard in making its inventory.

Petitioners also argue that inclusion of all parcels in the inventory results in a faulty average minimum lot size. Petitioners assert this average may not be used to justify land divisions because the average does not represent the average lot size for commercial agricultural enterprises in the area. That is, the county's average includes commercial and non-commercial farms.

We agree with petitioners. OAR 660-05-015(6)(a) requires that minimum lot sizes to maintain the existing commercial agricultural enterprise

> "shall be determined by identifying the types and sizes of commercial farm units in the area." (Emphasis added).

The county apparently considered any parcel within the exclusive farm use zone to be a commercial farm unit. There is nothing in the county's inventory (and we are cited to nothing in the record) to show that the county distinguished between commercial farm units and non-farm units. Further, it is not even clear that the county distinguished between tax lots and ownerships in its inventory. See our discussion in Kenagy v.

Benton County, 6 Or LUBA 93 (1982). See also Thede v. Polk County, 3 Or LUBA 336 (1981).

The flaw in the county's method was discussed by this Board in Sane and Orderly Development v. Douglas County, 2 Or LUBA 196 (1981). In that case, we found failure to distinguish between small parcels and large commercial farm operations will result in an artificially low average parcel size. That low average parcel size provides false justification to further reduce large blocks of agricultural land. The resultant divisions can result in the destruction of commercial farm operations in the area. Here, as in the Douglas County case, use of the county's method could result in reduction of commercial farm lots into the lowest common average lot size denominator. While small parcels in agricultural use may provide

> "an element of production to the total agricultural activity...they do not 'maintain' the commercial agricultural enterprise.
>
> * * *
>
> "These small parcels when aggregated with a large clearly commercial operation result in an artificially low 'average' parcel size which can then be used to further reduce the large blocks of land. This results in eventual chopping up and destruction of one of the basic economic resources of the state. (See also Justice Holman's concurring opinion in Meeker, supra.)" Sane and Orderly Development v. Douglas County Board of Commissioners, 2 Or LUBA 96, 203 (1971).

The county is required to identify the commercial agricultural enterprises in the area.[6] The county's method suggests it attached too much significance to whether a parcel

was under tax deferral and too little to whether the parcel supported a commercial agricultural enterprise. Whether or not the parcels enjoy tax deferral status under the provisions of ORS Chapter 308, does not necessarily mean the parcels constitute commercial agricultural enterprises. The commercial agricultural enterprise consists of those farm operations which

> "(a) Contribute in a substantial way to the area's existing agricultural enterprises;
>
> "(b) Help maintain agricultural processes and established farm market; and
>
> "(c) While determining whether a farm is part of a commercial agricultural enterprise, not only what is produced, but how much and how it is marketed shall be considered." OAR 660-05-005(2).

See also Common Questions About Goal 3, Agricultural Lands: Minimum Lot Sizes in EFU Zones and Sane and Orderly Development, supra, at 200-202. The findings and the record simply do not show the county utilized this definition.[7]

One other of petitioners' complaints regarding the county's inventory bears mentioning. Petitioners' quarrel with the county's identification of viticulture as a commercial agricultural enterprise. Petitioners correctly point out the record reveals that grape-growing exists in Josephine County only as a part of other farm activities. That is, of the total acreage in agricultural use, only a small percentage of land on a few farms is devoted to viticulture. While the county's findings recite and the record shows there is a market for

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grapes, it is not clear this particular kind of agricultural activity forms a "commercial agricultural enterprise" as the term is defined in LCDC's rule. Therefore, to consider the acreage devoted to viticulture as a standard minimum lot size is to violate the administrative rule and, we believe, the goal.

We hasten to add that it is not sufficient to find a small agricultural enterprise within a given area, even one which qualifies under the LCDC rule, and use the size of that enterprise as justification for breaking apart other larger holdings. The goal requires maintenance of the existing commercial agricultural enterprise, including all of its parts. Activities on the larger holdings must be considered as part of that enterprise. It is the activity on the larger holdings which must be maintained under Goal 3. The fact that other activities exists on smaller parcels does not mean that the agricultural enterprise in the area is maintained by reducing all the parcels in the area to the size of the smallest common commercial agricultural denomination where other commercial agricultural enterprises are conducted on larger parcels. See Still v, Marion County, 5 Or LUBA 206 (1982) and Meeker v. Board of Commissioners of Clatsop County, 287 Or 665, 601 P2d 804 (1979).

Because the county's inventory fails to properly identify the existing commercial agricultural enterprise in the area, the county's finding that the division complies with Goal 3 is

error. The first assignment of error is sustained.

ASSIGNMENT OF ERROR No. 2

> "The decision violates Josephine County Ordinance Section 19.040."

Josephine County Zoning Ordinance sets standards for divisions of agricultural parcels below the minimum lot size of 80 acres. The ordinance provides that an inventory of "all farm operations" shall be taken within a representative geographical area. The ordinance then requires conformity with ORS 215.243. ORS 215.243 is a legislative policy statement.[8] However, the county ordinance adopts the statutory call for preservation of agricultural land in "large blocks" as a standard. Here, petitioners argue that because the inventory is flawed in the matter discussed in the first assignment of error, the county has not protected agricultural parcels in large blocks. Specifically, petitioners complain that the county's attempt to show viticulture as a commercial agricultural enterprise is based on more speculation than fact. Petitioners complain that it is uncertain whether any of the viticulture operations of the county is commercially viable.

We agree with petitioners for the reasons expressed in our discussion of Assignment of Error No. 1. The county's method does not insure maintenance of farm land in "large blocks."

This decision is remanded to Josephine County for (1) an adequate inventory of the commercial agricultural enterprise in

1 the area as required by OAR 660-05-015; and, (2) proper
2 application of Statewide Planning Goal 3 and the county's
3 ordinance.[9]
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FOOTNOTES

[1] The two cases are consolidated for our review. OAR 661-10-055.

[2] In our prior Stephens v. Josephine County case, the minimum lot size was 120 acres. The county has since amended the zone to provide for the smaller 80 acre minimum.

[3] In western Oregon, soils with U.S. Soil Conservation Service Classes I-IV are "agricultural lands" under Goal 3.

[4] ORS 197.830(3) states:

> "(3) Except as provided in ORS 197.620 (1), a person may petition the board for review of a quasi-judicial land use decision if the person:
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> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section;
>
> "(b) Appeared before the local government, special district or state agency orally or in writing; and
>
> "(c) Meets one of the following criteria:
>
> > "(A) Was entitled as of right to notice and hearing prior to the decision to be reviewed; or
> >
> > "(B) Is aggrieved or has interests adversely affected by the decision."

[5] Petitioners Stephens and Canevari allege as follows:

> "Assignment of Error No. 1
>
> "The Findings of the Board of County Commissioners do not set forth sufficient facts to determine whether the County properly concluded the partition created

parcels in accordance with the Goal #3 minimum lot size standard.

"Assignment of Error No. 2

"The Findings of the County do not set forth sufficient facts to determine whether the County properly concluded that the partition created parcels in accordance with Josephine County Zoning Ordinance 19.040, incorporating ORS 215.243."

Petitioner McIntosh alleges as follows:

"First Assignment of Error

"The decision of the commissioners was based upon an inventory which was flawed in several respects. As a result, the decision failed to accurately identify the minimum lot size appropriate for the continuation of the existing commercial agricultural enterprises in the area.

"1. The Inventory failed to distinguish between parcel size and farm unit size.

"2. The Inventory incorrectly included all parcels in the Exclusive Farm Use and Greenbelt zones whether or not such parcels were commercial farm units.

"3. The Inventory established viticulture as a commercial agricultural enterprise without presenting substantial evidence to support such a conclusion.

"4. The Inventory incorrectly decreased the sizes of existing farm units by including only irrigated acreage.

"5. As a result of using a flawed Inventory, the decision failed to accurately identify the minimum lot size appropriate for the continuation of the existing commercial agricultural enterprises in the area.

"Second Assignment of Error

"The decision of the commissioners in effect used the farm size of viticulture as the measure for new parcels. Goal 3 and the Josephine County Exclusive Farm Use Ordinance require that if there is more than

1 one commercial agriculture enterprise in an area, the enterprise with the larger parcel size should be
2 protected.

3 "Third Assignment of Error

4 "The decision of the commissioners failed to present substantial evidence showing that the findings of fact
5 required by Goal 3 were satisfied."

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[6] For a discussion of how to conduct such an inventory, see
8 Kenagy v. Benton County, 6 Or LUBA 93, 104 (1982).

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[7]
10 We are not moved by respondent's claim that this information is "confidential." Confidentiality may prohibit
11 the county's assessor from revealing information on a farmer's claim for tax deferral, but there is no prohibition on county's
12 gathering the needed data from other sources. See ORS 308.375(2)(c).

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14 [8]
ORS 215.243 states:

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The Legislative Assembly finds and declares that:

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17 "(1) Open land used for agricultural use is an efficent means of conserving natural resources that constitute an important physical, social,
18 aesthetic and economic asset to all of the people of this state, whether living in rural, urban or
19 metropolitan areas of the state.

20 "(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary
21 to the conservation of the state's economic resources and the preservation of such land in
22 large blocks is necessary in maintaining the agricultural economy of the state and for the
23 assurance of adequate, healthful and nutrituous food for the people of this state and nation.

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25 "(3) Expansion of urban development into rural areas is a matter of public concern because of the
26 unnecessary increases in costs of community services, conflicts between farm and urban

activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.

"(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones."

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9 We note, in this regard, that Section 19.040's call for an inventory of all farm land will not satisfy the LCDC rule on Goal 3. The county is not relieved from the requirement of a proper inventory under the goal simply because its own ordinance proscribes a different inventory standard.