BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN C. PLATT and ROBERT C. BEDICHEK, Petitioners, vs. WASHINGTON COUNTY, Respondent.	LUBA No. 87-051 FINAL OPINION AND ORDER

Appeal from Washington County.

Jack L. Landau, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Lindsay, Hart, Neil & Weigler.

Jack L. Orchard, Portland, filed a response brief and argued on behalf of Respondent-Participants. With him on the brief were Ball, Janik & Novack.

No appearance by Washington County.

BAGG, Referee; DuBAY, Chief Referee; HOLSTUN, Referee; participated in the decision.

REMANDED 10/09/87

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 a Washington County Board of Commissioners' Resolution and Order granting a major partition. Petitioners ask us to reverse the decision.

FACTS

The 68 acre property is zoned for exclusive farm use with a minimum lot size of 40 acres. Some 22 acres of the land is devoted to woodlot management, and the balance is cleared and includes a single family dwelling. The county previously approved this dwelling as a "farm related dwelling on a woodlot." Limited cattle grazing occurs on the property. Slopes on the land range from 12 to 30 percent.

The major partition creates three parcels: one of approximately 2.9 acres, one of approximately 2.1 acres and the remainder of approximately 63.06 acres.

FIRST ASSIGNMENT OF ERROR

> "Washington County's decision violates ORS 215.213(3) and Section 430-85 of the Washington County Community Development Code in that it fails to make findings showing approval of the major land partition 'will not force a significant change in or significantly increase the cost of accepted farming practices on nearby land' and that the non-farm dwellings will be 'situated upon generally unsuitable land for the production of farm crops and livestock."

ORS 215.213(3), adopted by the county in Washington County Development Code Section 430.85, permits a single family nonfarm dwelling in an exclusive farm use zone upon the following showing:

> "(a) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming practices on nearby lands devoted to farm use.
>
> "(b) The dwelling is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage, and flooding, location and size of the tract. A lot or parcel shall not be considered unsuitable solely because of its size or location if it can reasonably be put to farm use in conjunction with other land."

There is no dispute that the property consists of SCS class III and IV soils and qualifies as farm land under the county's regulation.

Petitioners complain the county failed to make findings showing compliance with the statute and the county code. Petitioners say the findings do not show there will be no significant impact on the cost of accepted farming practices on nearby land. Petitioners say the only related finding by the county concludes there is

> "no evidence that two non-farm dwellings will force a significant change in or significantly increase the cost on nearby lands devoted to farm use." Record 15.

This finding misses the point, according to petitioners. The issue is not whether evidence shows significant impact, but whether the county has affirmatively demonstrated there will be no such significant impact.

Respondent argues the county's findings set forth evidence in the record supporting the conclusion that code requirements are met. Specifically, the county claims the two parcels are in an area surrounded almost entirely by other property owned

by the applicants, and, therefore, the proposed sites are separated by topography from the limited farm uses existing nearby. Respondent also points to evidence about topography to support the finding that the nonfarm dwellings will not cause a significant change in or increase the cost of nearby lands devoted to farm use.

We agree with petitioners that the lack of evidence showing a significant impact does not address the county ordinance standard. It is not up to opponents to give evidence proving there will be a significant impact on nearby farm use. The burden is on the applicant to show the land use action will force no significant change in farm uses and on the county to so find. Vincent v. Benton Co., 2 Or LUBA 422 (1981).

Resondent's arguments about evidence do not answer petitioners' challenge to the findings. Even if we were to consider the evidence above, respondent's arguments fail. The citations to the record provided by respondent and claimed to support the findings consist of a description of the property, some comment as to topography and size of and uses on nearby lands and the availability of public services. The evidence does not relate these factors to nearby farming use. A map in the record shows the location of the proposed parcels, but it does not establish that uses on those proposed parcels will not force a significant change on neighboring farm property. In order to make such a showing, there must be evidence about the nearby uses and an analysis of how the proposed use impacts

these properties. This analysis is missing from the findings, and we are cited to no such analysis in the record.

Finally, we are cited to no evidence showing that the lots created by this action will have minimal impact on the remainder of the applicant's property devoted to farm use. We believe it appropriate to analyze the effect of the newly created parcels on the remaining parcel, some of which continues in active farm use. It does not appear from the county findings and the record that the county made this analysis.

As a second part of the first assignment of error, petitioners argue the county failed to make findings adequately showing the land is unsuitable for the production of farm crops and livestock. Petitioners note the county staff report, which was adopted as findings, does include a description of the soils and slopes which may be found on the parcel. However, the report does not address the question whether the parcels could reasonably be put to farm use in conjunction with other land, according to petitioners.

Also, petitioners question a reference in the report to evidence submitted on similar cases allegedly showing that forested sites can not be brought into profitable farm production. Neither these cases nor any other basis for the conclusion are identified, according to petitioners.

The county argues the petitioners misunderstand the findings. Respondent states:

"Petitioners' argument shows a misunderstanding of the findings and record with regard to the establishment of the 68-acre parcel as a woodlot designation. Specifically, petitioners inaccurately state that the partitioned parcels will be established by clearing forested land and thereby reducing 'the existing productive farming capacity' of respondents' property. (Pet. Br., p. 11.) Based on this inaccuracy, petitioners conclude that the two smaller parcels have been previously classified as suitable for farm use.

"The evidence is unrefuted that respondents' 68-acre parcel was approved as a woodlot, based on 22 acres of forested land and the planting of 625 Christmas trees. (R. 9, 226.) Because of the reduction in acreage as a result of the partition, that partition approval is conditioned upon a demonstration of compliance with the woodlot designation by submitting a new woodlot plan showing that the remaining 63+ acres meets the woodlot requirements. (R. 9, 21.) This condition of approval relates to the 63+ acre parcel and will be incorporated in the future use of this larger tract. It does not involve the smaller parcels. It certainly does not dictate or even imply that Parcels 'A' and 'B' are suitable for farm use in conjunction with the other land. The large remaining parcel itself is generally unsuitable for farm use because of topography and the woodlot use (R. 213), and the county so found." (R. 16.)

The county also says that topography, soils and terrain of the parcels preclude farm use. Respondent also apparently relies on the size of the parcels. That is, the county appears to rely in part on the notion that small parcels are unsuitable for farm use. Respondent County claims the record "specifically demonstrates" this assertion but gives us no citation to the record.

The county's findings are as follows:

"Approximately 1.2 acres (41%) of Parcel 'A' are defined as Class IIIe-4 soils and are used for pasture. The slopes range from 12% to 20%. These

soils have moderate limitations that reduce the choice of plants or require moderate conservation practices.

"Approximately 1.7 acres (59%) of Parcel 'A' and approximately 2.1 acres (100%) of Parcel 'B' are defined as Class IVe-1 soils and are used for pasture. The slopes range from 20% to 30%. These soils have very severe limitations and require careful management in order to control erosion and slippage.

"The site is composed of Cascade series. Agricultural Productivity Ratings for Soils of the Willamette Valley (1982, OSU Extension Service) indicates that the Class III soils have a native productivity of 13, a maximum rating of only 37 with or without irrigation. Therefore, both parcels are composed of soils having a low rating which reduces the usefulness of the site for farming cultivated crops.

"The soils are only useful for pasture. The applicant does use Tax Lot 100 for livestock grazing (currently ten head of cattle are on the site). Both parcels are mostly forested. Only a small amount of both parcels are cleared and useful for cattle grazing. Staff believes that due to the very low productivity and the small acreage involved, that the non-farm parcels can include the small clearing areas. Due to steep slopes, these areas appear to be the only areas where a dwelling could be easily located.

"On forest land there has been substantial evidence submitted into the record on previous cases that it is not currently economically feasible for a reasonable farmer to clear forested sites and bring them into farm production and still make a profit on such marginal land." Record 15-16.

What is missing from the county's findings and its record is a showing that the smaller parcels are indeed not suitable for farm use. The size of the small parcels is a direct result of their being carved out of a larger parcel. Therefore, we do not believe the size of the parcels to be created by the partition illustrates their unsuitability for farm use. Secondly, we see nothing in the county's findings (and we are

cited to nothing in the record) to show that the soils, slope, topography and terrain prevent all farm use of the property. Indeed, the property was used for grazing purposes, and the county recognizes the soils are suitable for grazing. While topography and other physical features may illustrate that the property is not suitable for growing all farm crops, that does not mean the property cannot successfully support grazing activity. The findings do not show the property is not suitable for farm use, particularly when left as part of the larger parent parcel. See Code Sec. 430.85(b), supra.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "Washington County's findings III.C.1.A., III.C.1.B., III.C.1.C., III.C.3., Sec 430.85(A) and III.C.3, Sec 430.85(B) are not supported by substantial evidence in the record as a whole."

Petitioners first challenge the evidentiary support for the county's finding that

> "the proposed partition will not have significant adverse impacts on property values in the area. The applicant is proposing to create three parcels, which will result in two non-farm dwellings. The dwellings will not significantly impact property values in the area." Record 10.

Petitioners claim there is no evidence of current property values in the area and no evidence that farm land values will not be adversely affected. In support of their claim, petitioners point to testimony that placing non-farm dwellings in a farm area is likely to decrease the value of the surrounding land for farming. Record 144, 151.

Respondent argues the record shows the partitioning will not significantly impact farm uses in the area or change property values. The county's rationale is that the parcels to be established by this partition are shielded from adjoining properties by the remaining forested acreage and topography. In addition, respondent notes the record shows other non-farm dwelling units in the area. Respondent concludes the introduction of two additional "isolated dwellings will not affect the area...." Brief of Respondent at 15.

We are cited to no evidence in the record about area property values. The county's rationale, that the parcels are isolated, does not address the question raised by petitioners, viz. whether partitioning and the addition of two non-farm dwellings will have an effect on farm costs. While the county's argument may make sense, we are not cited to evidence in the record to support that argument.

Petitioners next challenge the county's finding that

> "the proposed parcels are similar to other parcels in the area. Therefore, the request will not unduly conflict with the character of the area." Record 10.

Petitioners claim this finding is not supported by evidence in the record. They also argue there is no description of other parcels in the area beyond the mere conclusion that other parcels are similar to the small lots to be created.

In support of their argument, petitioners cite to a map which they claim shows that most of the parcels in the immediate vicinity are larger than those to be created by this

partitioning decision.

Respondent says the record shows the proposed parcels are similar in "zoning designations" to others in the area and that the proposed parcels are similar in use to others. Respondent claims the parcels are "characterized by their natural state, rural residences or as forested acreage or grazeland." Respondent's Brief at 16. Again, respondent argues that the location of the two small parcels within a larger holding is sufficient reason to conclude that any impact on petitioners' properties will be negligible.

Respondent claims the record indicates the proposed parcels are similar to nearby parcels and will not unduly conflict with the character of the area. However, respondent does not cite us to any evidence in the record so showing. We will not search the record for evidence respondent believes supports the decision. 1000 Friends of Oregon v. Washington Co., 14 Or LUBA 416 (1986).[1]

Next, petitioners challenge the evidentiary support for the county's finding, that the proposed parcels "conform to the standards of the code," and therefore support the public interest. Further, petitioners argue this finding suggests that if technical requirements in the code are followed, the public interest is fully served by this development.

Respondent argues that the record shows the area will be adequately served with public facilities and services. Respondent also argues that the addition of two non-farm

dwellings will not result in negative impact on police, fire, or school services. Respondent says that evidence in the record shows that water, sewer and adequate roadways already serve the property. We understand respondent to interpret the code to allow a finding that a project is in the public interest when such services are available and the other ordinance criteria are met.

Washington County Code at Section 202-3.4(c) provides that the county may deny development where

> "the public interest is not served by permitting the proposed development to occur on the proposed site at the proposed time. Development proposed to serve significant portions of the county may be evaluated for its impacts on the entire area to be served."

We do not believe the county is required to evaluate a proposed development against a public interest standard other than the standards already contained in the code. That is, while the county may consider the overall public interest of the development as part of its evaluation, we do not believe the county is required to articulate a public interest separate from the provisions of its comprehensive plan and implementing ordinances when granting a proposal. Here, petitioners point to no evidence in the record that they raised the matter of public interest. Without focused testimony on this issue, we do not find the county under any obligation to discuss public interest as a separate criterion. City of Wood Village v. Portland Metropolitan Area Local Government Boundary Comm., 48 Or App 79, 616 P2d 528 (1980). Therefore, we do not find fault

with the county's apparent conclusion that the public interest is served because it believed all applicable criteria were satisfied.

Next, petitioners challenge the county's finding that "there is no evidence that two non-farm dwellings will force a significant change in or significantly increase the cost on nearby lands devoted to farm use." Record 15. Petitioners claim the county finding is defective, and that it attempts to shift the burden of proof to petitioners to show there will be an increase in the costs of farming. In addition, petitioners argue the finding is not supported by evidence in the record. Specifically, petitioners claim the county made no evaluation of the nature of farm practice in the area or an examination of how the new non-farm dwellings may impact that farm practice.

As discussed under assignment of error number one, we believe this finding incorrectly places the burden on petitioners. It is up to the applicant to show and the county to find that the land use decision will not result in a significant change in or increase the cost of farm activities. The finding is, therefore, defective for this reason alone.

Lastly, petitioners attack the county's finding that (1) the proposed non-farm dwellings will be situated on land generally not suitable for farming and (2) that the land cannot reasonably be put to farm use in conjunction with other land. Petitioners claim that there is no evidence to support these conclusions, particularly since the two parcels were at one

time part of the larger parcel apparently suitable for farming.

We agree with petitioners that the county did not show the land is generally not suitable for farm use. We have already discussed the inadequacy of this finding, particularly with respect to the potential use of the property as pasture land. We conclude, with petitioners, that the finding is not adequately supported by substantial evidence.

The second assignment of error is sustained.

This decision is remanded to Washington County for proceedings not inconsistent with this opinion.

FOOTNOTES

[1] 1987 Or Laws, Ch 729 provides LUBA may affirm a decision, notwithstanding inadequate findings, when the parties cite us to evidence which "clearly" shows applicable criteria are satisfied. We are not cited to such evidence in this case.