LAND USE
BOARD OF APPEALS
DEC 23 12 51 PM '87

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRANKLIN and SHIRLEY WAITE, SAMUEL and MARIA VALVERDE, JESSE OWRE, MARIAN THOMPSON, NORENE UPPENDAHL, SHIRLEY TRINGAS, ED CROSBY, BILL and BETTY ROSE, WALTER SIERP, ALVINA BROWN, WILLIAM A. BROWN NINA E. BROWN, GARY SIMON, DIANE SIMON, and ELIZABETH SONNEN, Petitioners, and NANCY KIRSKEY, TONY CAROGOL, ELIDA SIFUENTEZ, FRED KYSER and LARRY MINARD, Petitioner-Participants vs. MARION COUNTY, OREGON, Respondent.	LUBA No. 87-069 FINAL OPINION AND ORDER

Appeal from Marion County.

Wallace W. Lien, Salem, filed a petition for review and argued on behalf of petitioners.

Robert C. Cannon, Salem, filed a response brief and argued on behalf of Respondent Marion County. With him on the brief was Jane Ellen Stonecipher, Salem.

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

REMANDED 12/23/87

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners seek review of a lot line adjustment affecting two parcels.

FACTS

Marion County owns a 98 acre parcel zoned Public (P) on which it operates a landfill. An adjacent 138 acre parcel is zoned EFU. At the request of the county and the owner of the adjoining 138 acre parcel, the Marion County Community Development Department granted administrative approval for a lot line adjustment on June 12, 1987. As a result of the lot line adjustment, the 138 acre parcel was reduced in size to 52 acres and the 98 acre parcel owned by the county was increased to 184 acres. The zoning was not affected by the county's decision. Therefore, although no additional parcels were created, the decision established (1) a 184 acre parcel containing 98 acres zoned P and 86 acres zoned EFU (Parcel A) and (2) a 52 acre parcel zoned EFU (Parcel B). One of the conditions of approval is that documents transferring title to the county be recorded by July 29, 1988.

There is no dispute that the county intends to use a portion of the 86 acres as a source of cover soil for its landfill operation on the 98 acre portion of Parcel A. In addition, the county apparently plans at some future date to dispose of cannery waste and ashfill leachate on the 86 acres.

Petitioners filed an appeal of the administrative approval

on June 25, 1987. On July 2, 1987, the board of county commissioners (commissioners) assumed original jurisdiction over the appeal rather than allow the appeal to be heard by a county hearings officer. A public hearing was held before the commissioners on July 13, 1987, and on July 29, 1987, the commissioners approved the lot line adjustment. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "Actual bias was present in the decisionmakers at the time the order was entered rendering it null and void. Where the same governmental entity is both the applicant and the decisionmaker, actual bias exists and the matter should be reversed."

Petitioners claim they were denied the right to a fair and impartial tribunal. We understand petitioners to argue the record in this case shows there was actual bias on the part of the commissioners.

Petitioners argue the county decided months ago that it needed additional land for the landfill operation, located property it felt was appropriate and joined in the application. Petitioners argue this shows the county had already decided what should happen and what was going to happen before the requested lot line adjustment was even filed.

Petitioner then argues that whenever a decisionmaker is also the applicant, there is prejudgement and prejudice in favor of the application which requires disqualification. According to petitioner, the county could have avoided the prejudgement and bias problem by allowing the appeal to be

heard by the county hearings officer.[1] Petitioners say failure to use the county hearings officer in this case was reversable error.

Finally, petitioners argue the county's decision to bypass the hearings officer and its decision to expedite the appeal demonstrates actual bias and prejudgement. Petitioners point to the county's mistaken mailing of notice of the commissioners' hearing on the appeal before the commissioners had assumed original jurisdiction.

Respondent first answers that the petitioners never raised the bias issue below where it could have been addressed by referring the appeal to the hearings officer. Citing Higginson v. Yamhill County, 2 Or LUBA 314 (1981), respondent argues the petitioners should not be allowed to raise the issue for the first time now.[2]

In Higginson the alleged error was failure to declare a potential conflict of interest. We noted in that case that ORS 244.130 only requires such conflicts to be declared and expressly provides that failure to declare a conflict of interest will not result in the decision being remanded. We concluded the alleged error in Higginson was procedural, and that petitioner could not raise the issue for the first time on appeal to the Board.

We are not at all certain the error petitioners allege in this case is a procedural error that is waived by failing to raise it below. Though it is not clear, petitioners apparently

argue their right to an unbiased tribunal is a constitutional right.[3] We assume petitioners argue the commissioners' decision in this case violated their right to due process under the 14th Amendment to the United States Constitution. We do not believe petitioners waived their right to assert a violation of their constitutional rights as error in this appeal by failing to do so below.[4]

The participants in quasi-judicial land use proceedings are entitled to an impartial tribunal. Fasano v. Board of County Commissioners of Washington County, 264 Or 574, 588, 507 P2d 23 (1973). However, it is clear that the requirements for an impartial tribunal have not been applied in the literal judicial sense to elected governmental officials serving as decisionmakers in quasi-judicial land use proceedings. See, Eastgate Theatre v. Bd. of County Comm'rs., 37 Or App 745, 751, 588 P2d 640 (1978). We have rejected arguments that a local government must be presumed to be partial if it is also the applicant for land use approval. Gordon v. Clackamas County, 10 Or LUBA 240, 245 (1984). Indeed the presumption is exactly the opposite, i.e., public bodies are presumed to perform their duties properly. Christie v. Tillamook Co., 5 Or LUBA 256 (1982); 3 McQuillan, Munincipal Corporations, Section 12.126 (Third Ed. 1973). In Lima v. Jackson Co., 3 Or LUBA 78, 81-82, aff'd 56 Or App 619, 643 P2d 355 (1982) we said

> "The concern over the fact that the Board of Commissioners themselves initiated proceedings leading to the zoning eventually used on this property does

not show prejudice. Commissioners and city council members must be free to initiate changes they feel are appropriate, and the fact that they must sit in judgement over the changes they propose is nothing more than a fact of procedure as the law has it in this state."

We also disagree with petitioners that the facts of this case show actual bias or prejudgement. At most, the record shows the county was anxious to reach a final decision and wished to avoid the delay of an intermediate hearing and decision by the hearings officer. We do not equate a desire for speed with bias and prejudgement. The burden is on petitioners to show the commissioners in this case did not reach their decision by applying applicable standards based on the evidence and arguments supplied. See, Schneider v. Umatilla County, 13 Or LUBA 281, 283-284 (1985) (and cases cited therein). The evidence cited by petitioners is not sufficient to meet this burden.

Finally, we do not believe 1000 Friends of Oregon v. Wasco County Court (Wasco County Court), supra, cited by both petitioners and respondent requires a different result. In that case the Supreme Court declined to impose a judicial "appearance of fairness" requirement on local governments stating

> "* * * Invalidation for appearance alone * * * aims to preserve public confidence, and it does so regardless whether the decision in fact was both correct and fair. The price of such invalidation is delay of what, but for appearances, is a proper application of public policy, at potentially heavy cost to an innocently successful proponent as well as to the agency.

> "Public confidence in judicial institutions is given such priority over efficiency even in a fair and correctly decided case. Even for decisions of elected boards that, as we have said, are more 'quasi' than judicial, this priority for public confidence may be the desireable choice. But it is not a choice for this court to impose in the name of public policy." Id. at 85.

In addressing the requirement for no actual bias under the due process clause of the 14th Amendment, the Court explained that

> "The cases do not easily yield a single, simple rule, but it seems that 14th Amendment standards for disqualification tighten with three separate variables: first, the more the office or agency porports to act as a court * * *; second, the closer the issues and interests at stake resemble those in traditional adjudications, * * *; and third, as the disqualifying element moves from appearances through possible temptation and generic self interest * * * to actual personal interest in the outcome of a decision * * *. In the present case each element is at the low end of the scale." Id. at 88.

In Wasco County Court, the county's decision was to approve an election on a petition to incorporate a city. At issue was the county judge's failure to disclose his earlier sale of cattle, on favorable terms, to proponents of the incorporation. Applying the first and second variables, the role of the Wasco County Court was perhaps more legislative in nature than the role played by the Marion County Commissioners in the lot line adjustment. With regard to the final variable, we believe the disqualifying element petitioners assert is at most a problem of appearance. The case presented in this proceeding is also at the low end of the scale. We find no legal basis for invalidating the decision on the grounds

alleged in the first assignment of error, and, accordingly, the first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The order appealed herein constitutes an unlawful expansion of a conditional or non-conforming use in violation of subsection III of the Marion County Subdivision and Partitioning Ordinance by not complying with the Marion County Zone Code requirements."

Petitioners argue the county erred by not complying with the requirements of MCZO Chapter 120.300, Solid Waste Disposal sites.[5] Petitioners' argument is based on their position that the county's planned removal of soil from part of the 86 acre portion of Parcel A constitutes an expansion of the existing landfill, and planned spraying and tilling of ashfill leachate and cannery waste on the property constitutes disposal of solid waste as that term is defined in MCZO 120.315(c).

Respondent counters that the order adopted by the county only approved a lot line adjustment. According to the respondent it did not approve removal of soil from the 86 acres, or use of the property for spray irrigation or tilling of cannery waste.

The county argues that the provisions of its EFU zone do not control an owner's use of the soil. The county then argues that "whether spray irrigation and tilling of cannery waste in conjunction with its farm use might or might not comport with the * * * zone" is properly addressed through an abatement action under ORS 215.185. Respondent's Brief 5. We understand

the county's position to be as follows:

> (1) The land the county will take title to by virtue of the lot line adjustment remains zoned EFU;
>
> (2) Any use of the property must be consistent with its EFU zoning;
>
> (3) If the county attempts to use the property for uses not permitted in the EFU zone, an action to abate such use under ORS 215.185 is available; and
>
> (4) Since the county's lot line adjustment order does not authorize the site to be used for any particular purpose, petitioners' challenge is either premature or filed in the wrong forum.

Resolution of the second assignment of error requires us to determine what the county's order approves. In its brief the county argues for a narrow interpretation of the order, i.e., that the order only approves a lot line adjustment, not particular uses of the parcels. This interpretation is supported by the following language in the order:

> "4. This approval is granted under the provisions of the Marion County Subdivision and Partitioning Ordinance and does not constitute approval for any particular use. Uses of the property are regulated by the Marion County Zoning Ordinance." Record 4.

Petitioners' argument that the order can be read to do more than simply approve the lot line adjustment is supported by language in the findings adopted in support of the order. In those findings, the county determined its proposed use of part of the 86 acre portion of Parcel A for cover soil was a farm use and spray irrigation and tilling of cannery waste into the soil was a "secondary use." The county's finding can be read to say that such uses are permissible in the EFU zone without

additional approvals.

The county appears to argue we may view the findings and conclusions that suggest the county views the proposed uses as permitted in the EFU zone as surplussage. Because the language in the order quoted above expressly states no particular use is being approved, we accept the county's interpretation of its order and deny the second assignment of error.

THIRD ASSIGNMENT OF ERROR

> "The Findings of Fact and Conclusions of Law stated in the order appealed herein are not supported by substantial evidence in the record."

A. Proposed Uses

Petitioners in their first subassignment of error dispute the following finding adopted by the county:

> "1. * * * Soil excavation, spray irrigation, and tilling in of cannery waste are standard farm practices which are permitted as incidental, accessory or secondary uses in the EFU zone."[6] Record 5.

Petitioners question whether this is a finding of fact or a conclusion of law, but claim, in any event the finding is not supported by substantial evidence in the record.

The county answers by repeating its position that the lot line adjustment was exactly that -- a lot line adjustment without approval of specific uses. The county apparently takes the position that whether the uses it intends are farm uses is a question properly addressed at a later time and possibly in a different forum. See ORS 215.185. The county argues the findings petitioners dispute regarding the county's view that

soil excavation, spray irrigation and tilling in of cannery waste are permissible EFU zone uses are "[f]indings on irrelevant issues * * * not a basis for remand or reversal," citing Pac. Motor Truck Co. v. Bur. of Labor, 64 Or App 361, 368, 668 P2d 446 rev den 295 Or 773 (1983). Reply Brief 7.

We agree with the county that irrelevant findings provide no basis for remand or reversal even if those findings are erroneous as a matter of law or unsupported by substantial evidence. See, Bonner v. City of Portland, 11, Or LUBA 40 (1984). However, we are not certain the finding is entirely irrelevant. For example, if the proposed use is a nonfarm use, then arguably the county's decision should have been governed by MCZO 136.070(b)[7] rather than MCZO 136.070(a)[8].

The county appears to argue that when applicants seek a lot line adjustment in an EFU zone for farm parcels, the question whether the uses they intend are really "farm uses" need not be answered. That is, if the proposed lot line adjustment can be approved by applying the standards applicable to creation of farm parcels, the application may be approved irrespective of the applicant's subjective intent. The applicants may then put the resulting parcels to any farm use allowed in the EFU zone. If opponents, such as petitioners, believe the use they actually implement is not a use allowed in the EFU zone, they may challenge that action under ORS 215.185.[9]

We think the county's argument goes too far. The question whether the proposed use is a farm use is at least relevant to

the threshold determination whether it is the standards of MCZO 136.070(b) or 136.070(a) which apply. However, under this assignment of error petitioners only challenge the county's findings applying MCZO 136.070(a), not the county's failure to apply MCZO 136.070(6).[10] The only provison of MCZO 136.070(a) which arguably requires consideration of proposed use of the parcels is paragraph (3). See footnote 8, supra. However, petitioners do not assign as error the failure of the county to require a site development and management program for Parcel B. Because the petitioners do not direct our attention to any applicable legal standard in the county zoning ordinance which would be violated if their theory about the nature of the proposed uses is correct, we deny this subassignment of error.

B. Parcel Sizes

Petitioners claim in their second subassignment of error the county's finding that the parcels are "appropriate for the continuation of commercial, agricultural enterprise of the * * * area" is not supported by substantial evidence in the record.[11] We limit our review of the county's findings of compliance with the farm parcel standard in MCZO 136.070(a)(1) to the four defects identifed by petitioners in their brief. Those alleged defects are as follows:

(1) There is no evidence in the record addressing the nature of commercial agricultural activities in the area.

(2) The record does not demonstrate that the parcels which were surveyed were in commercial agricultural use.

(3) The record does not support the findings that the property has been used in the past for row crop production.

(4) There is insufficient soils information in the record to support the findings that the soils of Parcel B are suitable for filberts, row crops, nursery stock and berries.

The county adopted the following relevant findings:

"4. Surrounding uses consist of the I-5 Freeway to the east beyond which commercial farm operations dominate on lands zoned EFU. To the north small farm, commercial farm, and woodlot uses dominate on lands zoned EFU. On the west and south sides of the subject properties commercial farm operations and woodlot uses dominate on lands zoned EFU."

* * * * *

"11. * * * The record shows that the planning staff identifed all common ownerships within 1/2 mile of the Wurdinger property and determined that the average ownership size was 55 acres There were two ownerships significantly larger than the average (one of which is the Wurdinger property) with the remainder being less than 50 acres in size. This indicates that whether they represent independent commercial farms or one of several 'fields' in a farm, the proposed 52 and 71 acre farm units were large enough to support commercial agricultural operations.

"The soils on Parcel B and the 71 acre portion of parcel A are rated as predominantly SCS Class II agricultural soils. These soils are suited to many different types of farming. The less extensive crops are pasture and grains. The more intensive types are filberts, row crops, berries and nursery stock. The evidence indicates that Parcel A and B can support these more intensive crops and produce the same crop yields as other farm lands in the vicinity.

" * * * No special processing or marketing practices would be necessary for the crops common to the area. No one providing testimony at the hearing contended that either parcel was too small to maintain a commercial farm operation. The Board concludes that the criteria in Section 136.070(A)(1) have been satisfied.

* * * * *

"13. Section 136.070(a)(3) and (4) establish a 60 acre farm parcel guideline on lands that are predmoninantly Class II and III agricultural soils and provide that farm parcels shall generally be larger than the guideline. The 71 acre portion of Parcel A satisfies this criteria. Parcel B is eight acres smaller than the guideline. When smaller than the guideline the criteria provides that the parcel must be shown to be appropriate for commercial agricultural enterprises more intensive than the typical commercial farms in the vicinity. As noted in finding number 11 the Wurdinger property has been used in the past for, and is capable of supporting, a row crop operation. The soils are suitable for filberts, nursery stock, and berries, any one of which would qualify Parcel B as a commercial agricultural enterprise. The Board concludes that Parcel B is not significantly smaller than the applicable guideline; and, because the parcel is primarily composed of Class II soils, there are enough cropping options on the property that a site development and management program is not necessary to insure that Parcel B will continue as part of a commercial farm operation." Record 5-8.

Addressing petitioners first two arguments set forth above, the county cites documents contained in the record from the county assessor's office which show parcel sizes within one-half mile of the parcels affected by the lot line adjustment. The county also argues there is evidence in the record showing consideration of agricultural enterprises in the area. The county cites to:

1. The minutes of the commission meeting on July 13, 1987;
2. Findings adopted by the planning director in support of his approval;
3. A letter submitted by petitioners and;
4. A letter submitted by the county solid waste division.

The general procedure a county must follow in determining whether proposed land divisions will result in parcels appropriate for continuation of the existing commercial agricultural enterprise in the area is as follows:

> "It is our view that the county was required to determine what current agricultural operations made up the agricultural enterprise of the county. From that inquiry, the county must determine what size parcel is necessary to constitute a 'commercial agricultural operation.' Once those two decisions are made, the county may then determine what agricultural activities are suitable on the subject property. The next step, as we understand commission policy, is to determine whether or not given the agricultural activities which are suitable, the particular land division proposed will result in parcels large enough to maintain the county's commercial agricultural enterprise." Kenagy v. Benton County, 6 Or LUBA 93, 104 (1982). See, Sane Orderly Development v. Douglas County Board of Commissioners, 2 Or LUBA 196 (1981).

Marion County did not follow the approach quoted above. We therefore must determine whether the analysis the county did perform is sufficient to demonstrate compliance with the standard in MCZO 136.070(a).[12]

While several different types of agriculture are mentioned in the findings quoted above, the county did not determine what types of agricultural operations currently make up the commercial agricultrual enterprise of the area. The county's findings, at most suggest the commercial agriculture in the area includes wheat, row crops, filberts, nursery stock and berries. The county did not identify the size parcels used in these commercial agricultural enterprises in the area. The county identified the average ownership size in the area as 55

acres with all but two ownerships being smaller than 50 acres, indicating these ownership sizes could represent either the size of independent commercial farming operations or the size of fields that are used by such commercial farm operations. The county found that the 86 acre portion of Parcel A and the 52 acre Parcel B equaled or exceeded this average ownership size and concluded on that basis they were large enough to support commercial agriculture.

Finally the county concluded that the 52 acre Parcel B is very close to the 60 acre general parcel size guideline of MCZO 136.070(a)(4) and, therefore, concluded Parcel B was capable of farm use as a commercial agricultural enterprise by itself or in conjunction with other parcels. The county cites evidence in the record that the parcel has been used in the past for row crops.

The record does not include an inventory of commercial agricultural enterprises in the area. Neither the findings nor the record reveal whether the county's survey of ownerships was limited to ownerships in commercial agricultural use. Thus, while the county's findings can be read to suggest the area contains commercial agricultural enterprises, it is not possible to determine from the county's findings, or the record, which of the ownerships is devoted to agriculture or how many of the ownerships devoted to agriculture are devoted to commercial agriculture. Without this information, it is impossible for us to determine whether there is substantial

evidence in the record to support the conclusion that the lot line adjustment results in parcels sufficient for the continuation of commercial agricultural enterprise in the area.[13]

Finally, petitioners' last two alleged defects attack the county's reliance on testimony by the county solid waste division regarding past use of the property for row crops and allege the record lacks soils information. The county counters first that the testimony was not challenged in the hearings below and argues petitioners have failed to show the testimony is not substantial evidence the county was entitled to rely on. We agree with the county. See, Home Builders. v. Metro Service Dist., 54 Or App 60, 633 P2d 1320 (1981). Secondly, the county argues the record shows it was undisputed below that the soils on the two parcels are predominantly Class II.

We are not sure the petitioners and county are arguing the same issue. It may be that petitioners argue that without soils information, the testimony of the solid waste division cannot be considered substantial evidence. If that is their argument, we disagree. We do not believe soils maps are a necessary precondition for credible testimony of prior use of the property.[14] Petitioners do not link their alleged lack of soils information to any legal standard they believe is violated. We will not supply a legal theory for petitioner. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

To summarize, we deny petitioners' first subassignment of error that the county committed reversable error by finding its proposed uses are farm uses. We uphold in part petitioners' second subassignment of error in which they argue the county's findings of compliance with MCZO 136.070(A) are not supported by substantial evidence.

The third assignment of error is upheld in part.

The county's decision is remanded.

FOOTNOTE

1

Presumably petitioners would also argue that if the hearings officer denied the requested action, the county could not exercise the right all other parties would have under the zoning ordinance to appeal the hearings officer's decision to the board of county commissioners.

2

We have held on numerous occasions a party waives procedural error if they fail to raise such error below so the local government may have an opportunity to correct the error. See e.g., Dobaj v. Beaverton, 1 Or LUBA 237, 241 (1980); Metropolitan Service District v. Washington Co., 1 Or LUBA 282, 288-289 (1980).

3

Though petitioners do not clearly articulate a constitutional basis for their right to an unbiased tribunal they do cite the Oregon Supreme Court's recent decision in 1000 Friends of Oregon v. Wasco County Court, 304 Or 76, 742 P2d 39 (1987). In that case the court discussed the analysis required to determine when a decisionmaker's failure to disqualify himself from a decision would violate due process requirements of the 14th Amendment to the U.S. Constitution.

4

It is not entirely clear whether a procedural error that impinges upon a constitutional right need not be raised below. Cf. Marbet v. Portland Gen. Elect., 277 Or 447, 456, 561 P2d 154 (1977). But see, Saxon v. Div. of State Lands, 31 Or App 511, 514, 570 P2d 1197 (1977); Hughs v. Adult and Family Services, 58 Or App 478, 484, 648 P2d 1324 (1982). We note in this case petitioners were not represented by counsel before the county. For purposes of this appeal, we will not consider petitioners to have waived their right to argue in this proceeding that the procedure followed by the county violated their rights to due process under the 14th Amendment.

5

MCZO 120.300 establishes procedures and standards for conditional use permits for solid waste disposal sites.

[6] Petitioners also challenge the county's findings that "spraying wastewater from the ash fill" and "tilling cannery wastes into the soil" are "accepted farming practices." Record 9.

[7] MCZO 136.070(b) provides standards for division of non-farm parcles as follows:

"(1) If the proposed parcel is intended for a non-farm use and is located on Class I through IV agricultural soils, it shall only be as large as necessary to accommodate the use and any buffer area needed to ensure compatibility with adjacent farm uses.

"(2) The criteria in Section 136.040 applicable to the proposed use of the parcel shall apply to the creation of the parcel.

"(3) The partitioning of an existing dwelling from a farm parcel may be permitted if it is shown that (a) the dwelling will not be needed to house farm help, (b) the dwelling was constructed prior to EFU zoning or was added to the property through land consolidation, and (c) requirements (1) and (2) above are met.

"(4) A new non-farm parcel shall not be approved for a use that will have a significant adverse impact on timber production, grazing land, watersheds, fish and wildlife habitat, soil and slope stability, air and water quality and outdoor recreation activities."

[8] MCZO 136.070(a) provides standards for division of farm parcels as follows:

"(a) Requirements for farm parcels. All new farm parcels shall satisfy the following requirements:

"(1) Any proposed parcel intended for farm use must be appropriate tothe continuation of the existing commercial agricultural enterprise of the particular area based on the evaluation prescribed in 136.040(g). The evaluation shall include the subject property and commercial agricultural enterprises located in the same zone within one-half mile of the subject property.

"(2) The parcel shall meet the requirements of ORS 215.243.

"(3) New parcels intended for farm use shall generally be larger than the guidelines in (4) below. Proposed farm parcels smaller than the applicable guideline must be shown to be appropriate for commercial agricultural enterprises more intensive than the typical commercial farms in the vicinity. In addition, a site development and management program for the proposed commercial farm use shall be provided. The County may request an evaluation of the evidence and the management program by an Agricultural specialist to determine if the proposed farm parcel meets the criteria in (1) and (2) above. Reasonable commitments may also be required to ensure that a good faith effort is made to implement the management program.

"(4) Parcel size guideline: Parcels intended for farm use shall generally be: 40 acres or more in area if predominantly Class I soils; 60 acres or more if predominantly Class I or III soils; 80 acres or more if predominantly Class IV soil; and 100 acres if predominantly Class V - VIII soils.

"(5) New parcels located within a major or periferal [sic] big game habitat area as identified in the Comprehensive Plan shall not permit development of dwellings exceeding the density recommendation in the Fish and Wildlife policies of the Comprehensive Plan."

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[9] If the zoning ordinance has provision for declaratory rulings, that might also provide a procedure for challenging the proposed use. The parties have not cited any such provision in the Marion County Zoning Ordinance and we have found none.

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[10] Petitioners explicitly stated at oral argument that it was not their position that the county should have applied MCZO 136.070(b) which provides standards for divisions for nonfarm uses.

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[11] MCZO 136.070(a)(1) provides as follows:

"Any proposed parcel intended for farm use must be appropriate to the continuation of the existing commercial agricultural enterprise of the particular area based on the evaluation prescribed in 136.040(g). The evaluation shall include the subject property and commercial agricultural enterprises located in the same zone within one-half mile of the subject property."

MCZO Section 136.040(g) provides:

"(g) Commercial Farm Determination: When determining whether and [sic] existing or proposed parcel is a commercial farm enterprise, the following factors shall be considered:

> "Soil productivity, drainage, terrain, special soil or land conditions, availability of water, type and acreage of crops grown, crop yields, number and type of livestock, processing and marketing practices, and the amount of land needed to constitute a commercial farm unit. Specific findings shall be made in each case for each of these factors."

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[12] The requirement that new parcels be of sufficient size to preserve existing commercial agriculture is worded substantially the same in MCZO 136.070(a) and Goal 3.

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[13] Had the county inventoried the existing commercial agricultural enterprise in the area to determine the types and scale of such enterprises, it may be the county could then demonstrate the existing average parcel size is sufficient to constitute either a commercial farm unit or a field that can be used as part of a commercial farm unit. But see, Goracke v. Benton County, 12 Or LUBA 128, 136-138 (1984) (suggesting historic parcelization patterns may not mean existing average size parcels are sufficient to be productively farmed as part of commercial farming operations and requiring local governments to demonstrate benefits to the area's agricultural economy outweigh any negative impacts, provided there is credible evidence the proposed lots would be detrimental to commercial agricultural enterprises in the area). Petitioners do not argue the lot line adjustment would result in parcels detrimental to commercial agriculture in the area nor is there evidence in the record in support of that argument.

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[14] Petitioners appear to take issue with the county's conclusion that the soils are suited to many different types of intensive agriculture. We believe the letter submitted by the county Solid Waste Division is sufficient to show the property is at least suitable for wheat and row crops. Record 29.