BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RAYMOND McNULTY,	)	
	)	
Petitioner,	)	LUBA No. 90-055
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
MARION COUNTY,	)	
	)	
Respondent.	)	

Appeal from Marion County.

Robert L. Engle, Woodburn, filed the petition for review and argued on behalf of petitioner.

Jane Ellen Stonecipher, Salem, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 07/26/90

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals an order of the Marion County Board of Commissioners denying an application for a nonfarm dwelling on land zoned for exclusive farm use.

FACTS

The subject property is an unimproved eight acre parcel zoned Exclusive Farm Use (EFU). The subject parcel was once a part of a large farm which was originally owned by petitioner. The subject parcel was separated from the original farm pursuant to state condemnation proceedings to accommodate construction of State Highway 211. After the condemnation proceedings, petitioner sold the larger farm parcel and kept the subject parcel. The subject parcel is located on the north side of Highway 211. Petitioner engages in farming activity on the subject parcel.

Four acres of the subject parcel are considered "tillable." The remaining four acres have been used for orchard and pasture. One acre of the subject property is relatively steep, and some difficulty with drainage is experienced on this portion of the property. The subject parcel is specially assessed for farm use, and is bordered by commercial farming operations. At least 50% to 60% of the soils on the subject property are Agricultural Class I and II. The remaining soils on the subject property are Agricultural Class IV.

The hearings officer denied petitioner's application to construct a nonfarm dwelling on the subject parcel. Petitioner appealed the hearings officer's decision to the board of commissioners. The board of commissioners affirmed the decision of the hearings officer. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The Hearings Officer misconstrued the applicable law, failed to make adequate finding[s] and made a decision not supported by substantial evidence in the record as a whole in concluding that the parcel is generally suitable for farm use."

To approve a nonfarm dwelling, Marion County Zoning Ordinance (MCZO) 136.040(c) requires a determination that the proposed nonfarm dwelling will be located on land:

> "* * * generally unsuitable for farm use considering the terrain, adverse soil conditions, drainage and flooding, location and size of the parcel."

The challenged decision includes the following findings regarding the suitability of the subject parcel for farm use:

> "The subject property consists of Class I-IV soils, soils generally suited for farming. The Class IV soils, one acre or less, are not select farming soils * * * [.] [T]he applicant asserts that since the majority of the farming activity on the property involves cultivation of row crops that the area unavailable for [cultivation of row crops], those acres in pasture, and where orchard stock has been removed[,] are generally unsuitable for farming. These areas are not generally unsuitable for farm use, even if they are generally unsuitable for a particular farm use, i.e., cultivation. Pasture, and orchard use are recognized farm uses, and these areas are

generally suited for these farm uses."

"An additional consideration in determining whether a parcel is generally suitable for farm use is its size and location. The parcel is separated from other farm property by Highway 211 and is small in size. These are inconveniences in the farming of the property and there are hazards with crossing the highway with machinery and livestock. However, the applicant's intention, to continue current farm practices on the parcel is substantial evidence that the parcel is generally suitable for farming." Record 5-6

Petitioner argues the county's findings are inadequate because:

"No facts are cited by the Hearings Officer to establish the percentage of the parcel which is in cultivation or the percentage which is in pasture. No facts are cited to establish what portion had previously been in orchard.

"* * * the Hearings Officer should either state that there is no evidence in the record to support the position or cite specific findings of fact which support her conclusion that the application should be denied.

"* * * The Court of Appeals in Wes Linn Land Company v. Board of County Commissioners, 36 Or App 39, 42-43 (1978), describes the nature of the findings which must support a conclusion in a land use case. As noted by the Court of Appeals, it must determine whether the findings of fact are supported by substantial evidence. Where the findings are so fragmentary and vague that they fail to state a factual basis for the decision, the reviewing body is totally unable to review for substantial evidence supporting the non-specific findings.

"* * * Factual references made by the Hearings Officer are so vague that they could be used as easily to support a conclusion that the criteria had been met as to support the conclusion that the

> criteria had not been met. These findings and conclusions, being wholly inadequate, the Board must reverse and remand the land use decision as required by ORS 197.835(7)." Petition for Review 4-5.

The county contends its findings are adequate to establish the parcel is not generally unsuitable for farm use as required by MCZO 136.040(c). The county argues the detailed findings called for by petitioner, regarding precisely what portion of the subject property has been used as orchard, pasture or for cultivation, are not required. While the county concedes that one acre of the subject parcel is "unfarmable by reason of terrain and drainage," it argues that this does not disqualify the entire parcel from being considered generally suitable for farm use.[1] Respondent's Brief 3. The county also contends to the extent its findings may be inadequate, there is evidence in the record "clearly supporting" the county's determination that the subject property is not generally unsuitable for farm use. ORS 197.835(9)(b).[2] Specifically, the county

---

[1]We express no opinion on the accuracy of the county's concession regarding the suitability of the one acre portion of the parcel for farm use. See Platt v. Washington County, 16 Or LUBA 151 (1987); Clark v. Jackson County, ___ Or LUBA ___ (LUBA No. 88-114, March 31, 1989); on remand Clark v. Jackson County, ___ Or LUBA ___ (LUBA No. 90-004, May 25, 1990); Stefan v. Yamhill County, ___ Or LUBA ___ (LUBA No. 89-118, February 16, 1990); Smith v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-156, May 15, 1990).

[2]ORS 197.835(9)(b) provides in relevant part:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to

cites evidence in the record that:

> "* * * approximately one-half of the property is tillable, that 90% of the property contains Class I and II soils, that three acres are currently in pasture * * * ."[3] Respondent's Brief 3.

At the outset we note that in denying the application, the county need only adopt findings demonstrating that one or more approval standards are not met. Douglas v. Multnomah County, ___ Or LUBA ____ (LUBA No. 89-086, January 12, 1990), slip op 16; Garre v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-131, February 27, 1990), aff'd 102 Or App 123 (1990).

The county's findings are adequate to explain that the subject parcel consists of "agricultural land," because the soils are all Agricultural Class I-IV. Statewide Planning Goal 3.[4] Additionally, the evidence in the record "clearly supports," and it is not disputed that, at least half of the

---

> identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or a part of the decision supported by the record * * *."

[3]Petitioner claims the evidence in the record does not support the statement in the county's brief that the soils are 90% Agricultural Class I and II soils. Petitioner contends that the evidence in the record supports a finding that the soils on the property are between 50-60% Agricultural Class I and II soils. However, for purposes of resolving this assignment of error, it makes no difference whether the soils are between 50-60% or are 90% Agricultural Class I and II.

[4]Admittedly, whether the subject land is "agricultural land" under Goal 3 is a separate question from whether land is generally unsuitable for farm use. Hearne v. Baker County, 89 Or App 282, 287, 748 P2d 1016 (1988). However, the classification of the soil types found on the subject parcel is a relevant consideration under MCZO 136.040(c).

soils on the property are premium Agricultural Class I and II soils. The evidence also "clearly supports" a finding that at least seven acres of the subject parcel's eight acres have been, and continue to be, utilized for various farm uses.[5] Petitioner offers no explanation why the subject parcel cannot continue to be actively farmed, whether with row crops or cattle grazing.

The issue is whether the eight acre parcel, viewed as a whole, is generally unsuitable for farm use. Hearne v. Baker County, supra; Smith v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-156, May 15, 1990). We believe the evidence in the record "clearly supports" a finding that the parcel is not generally unsuitable for farm use.

The first assignment of error is denied.[6]

SEVENTH ASSIGNMENT OF ERROR

> "Marion County erred in permitting a staff member of the Marion County Counsel's office to act as a Marion County Hearings Officer in a quasi-judicial land use hearing."

Petitioner argues that this Board should reverse or remand the county's decision because a member of the county counsel's office acted as the hearings officer during the

---

[5]Petitioner stated below that he plans to continue farming at least the "tillable" portion of the subject parcel. Aside from the four "tillable" acres, petitioner has pastured cattle on the three "nontillable" acres.

[6]Because we sustain one of the county's bases for denial under this assignment of error, we need not address petitioner's arguments in the second through sixth assignments of error which challenge other bases for the county's denial. Douglas v. Multnomah County, supra, slip op at 24.

proceedings below. Petitioner appends Informal Ethics Opinion No. 89-33, issued by the Oregon State Bar Association after the hearings officer rendered her decision. Petitioner contends that this informal ethics opinion:

> "* * * is directly relevant to this case and supports the right of the applicant to be heard before an impartial and unbiased hearings officer who has no confidential or attorney client relationship with county staff who has rendered an adverse recommendation." Petition for Review 9.

Petitioner asserts, without explanation, that the informal ethics opinion establishes that the challenged decision of the board of commissioners (adopting the hearings officer's findings), was biased and based in part on ex parte contacts.

We do not believe the cited informal ethics opinion, in itself, establishes that petitioner was denied an unbiased decision maker in this case. Specifically, petitioner has not explained how the hearings officer or the board of commissioners was biased against him. Petitioner has not explained why he asserts that improper ex parte contacts necessarily occurred between (apparently) the hearings officer and the board of commissioners. Petitioner has not provided a basis upon which we might grant relief. Dickas v. City of Beaverton, 16 Or LUBA 574, aff'd 92 Or App 168 (1988).

The seventh assignment of error is denied.

The county's decision is affirmed.