BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES NELSON, Petitioner, vs. BENTON COUNTY, Respondent, and MELVIN B. WOOD, ERMA JEAN WOOD, and MARYS PEAK GROUP SIERRA CLUB, Intervenors-Respondent.	LUBA No. 92-035 FINAL OPINION AND ORDER

Appeal from Benton County.

George B. Heilig, Corvallis, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hill, Huston, Benedict, Haagensen & Ferris.

Janet S. McCoy, Corvallis, filed a response brief and argued on behalf of respondent.

Jacquelyn Corday, Portland, filed a response brief and argued on behalf of intervenors-respondent Wood. With her on the brief was Miller, Nash, Wiener, Hager & Carlsen.

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

AFFIRMED 06/26/92

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

Petitioner appeals the county's denial of his request for approval of a dwelling not provided in conjunction with farm use (nonfarm dwelling) on a 1.37 acre parcel.

MOTION TO INTERVENE

Melvin E. Wood and Erma Jean Wood and Marys Peak Group Sierra Club move to intervene on the side of respondent in this appeal. There is no opposition to the motions, and they are allowed.

FACTS

The subject parcel is zoned Exclusive Farm Use (EFU) and designated Agriculture by the county comprehensive plan. The parcel is wooded and has not been farmed recently. The entire parcel is within the Willamette River 100 year floodplain, and the southern portion of the property is within the Willamette River Greenway. Although less than one acre of the total 1.37 acres is usable for farm use, there is evidence in the record that the parcel was used in the past as part of a larger cherry orchard. The soils on the property are rated by the Soil Conservation Service as Class II and are suitable for a variety of agricultural crops, including a number of crops currently being raised on adjacent and nearby properties.

The adjoining property to the north includes 10.6

acres, seven acres of which is planted in blueberries.[1] Approximately .25 acres of the adjoining .88 acre parcel to the east is planted in blueberries in conjunction with the 10.6 acre parcel to the north of the subject property. The 1.6 acre parcel to the west is not presently in farm use and is improved with a dwelling. The Willamette River adjoins the subject property on the south.

Beyond the adjoining properties, there are some parcels in nonfarm use in the surrounding area. However, there also are a large number of parcels in a variety of farm uses, including a number of parcels devoted to intensive, high crop value farm uses. The decision states the surrounding area is "characterized by small acreage farms, as well as by farm operations which utilize non-adjacent parcels." Record 8.

INTRODUCTION

Under Benton County Code (BCC) 55.220(1), nonfarm dwellings may be approved, if certain standards are satisfied.[2] The county found that the proposed dwelling fails to comply with four of the required criteria, including BCC 55.220(1)(d). BCC 55.220(1)(d) imposes the

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[1]The owner of this adjoining parcel apparently has offered to purchase or lease the subject property for agricultural purposes in conjunction with the existing blueberry farm operation.

[2]BCC 55.220(1)(a) through (d) are nearly identical to the statutory criteria set out in ORS 215.213(3) and 215.283(3) for approval of nonfarm dwellings in EFU zones.

following standard:

> "[The proposed dwelling must be] situated on land generally unsuitable for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract * * *[.]

The county planning commission concluded that the applicant adequately demonstrated compliance with BCC 55.220(1)(d). In reversing the planning commission's decision, the board of county commissioners adopted the following findings:

> "The subject parcel is suitable for farm use. The property is limited for farm purposes because it has less than an acre of arable land and it is bordered by the Willamette River to the south. However, the parcel could be farmed in conjunction with the commercial farm operation to the north and east, and it could be utilized for related farm purposes by non-adjacent farmers who farm scattered non-adjacent parcels. The arable portion of the property has prime Class II agricultural soils, is gently sloping and has water available. The occasional flooding of the property does not make the land unsuitable for farm use. Area farmers successfully cultivate crops within the Floodplain of the Willamette River. Therefore, the parcel is not generally unsuitable for farm use notwithstanding the small size and riverbank location and does not comply with BCC 55.220(1)(d)."

Under his first and second assignments of error, petitioner challenges the county's findings of noncompliance with BCC 55.220(1)(d). In his first assignment of error, petitioner contends that the county's determination that his property is suitable for farm use, based on the ability of

the subject property to be farmed in conjunction with adjoining and nearby properties, results in an unconstitutional taking of his property. In his second assignment of error, petitioner challenges the evidentiary support for the county's finding of noncompliance with BCC 55.220(1)(d). We consider the second assignment of error, before considering petitioner's constitutional challenge.

SECOND ASSIGNMENT OF ERROR

> "There is no substantial evidence in the record to support a finding that the Nelson property is suitable for farming."

Petitioner argues that the county must apply each of the considerations stated in BCC 55.220(1)(d) and explain why, based on those factors, the parcel is generally suitable for the production of farm crops or livestock. Petitioner complains that the sole basis for the county's finding of noncompliance with BCC 55.220(1)(d) is the finding that the parcel can be used in conjunction with other parcels for farm purposes.

As an initial point, we agree with respondent and intervenors-respondent (respondents) that petitioner incorrectly suggests the county has the burden of proof to demonstrate noncompliance with BCC 55.220(1)(d). The burden to demonstrate compliance with BCC 55.220(1)(d) is petitioner's. Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 213 (1973); Strawn v. City of Albany, 20 Or LUBA 344, 350 (1990); Billington v. Polk County, 13 Or LUBA 125,

131 (1985). Although the above quoted findings are in the form of an explanation of the reasons why the county believes the subject parcel is generally suitable for production of farm crops and livestock, the burden remains on petitioner to demonstrate the parcel is generally unsuitable for such purposes. In effect, the above quoted findings are a determination by the county that petitioner failed to carry his burden to demonstrate compliance with BCC 55.220(1)(d).

In challenging on evidentiary grounds the county's finding that petitioner failed to carry his burden to demonstrate compliance with BCC 55.220(1)(d), petitioner must demonstrate that he carried that burden as a matter of law. Adams v. Jackson County, 20 Or LUBA 398, 403 (1991); Van Mere v. City of Tualatin, 16 Or LUBA 671, 683 (1988). Beyond citing the planning commission's conclusion that the proposed dwelling satisfies BCC 55.220(1)(d), petitioner makes no attempt to argue that the evidentiary record establishes as a matter of law that the subject parcel satisfies the BCC 55.220(1)(d) generally unsuitable standard.

To the extent petitioner argues the evidentiary record in this case demonstrates as a matter of law that the subject property is generally unsuitable for production of some farm crops, we reject the argument. The record shows that, aside from limitations associated with the small size

of the property, the property is suitable for the production of farm crops and livestock.[3]

Petitioner's only real complaint appears to be against the finding concerning the subject parcel's size limitations for the production of farm crops or livestock. The county found the small size of the subject parcel is insufficient to make the parcel generally unsuitable for such purposes, because the parcel (1) is otherwise suitable for such purposes, and (2) can be farmed in conjunction with adjoining and nearby farming operations. Although petitioner questions the evidentiary support for that finding, we conclude it is supported by substantial evidence in the record.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

> "The Board erred in finding that the property is suitable for farm use. Suitability for farming of this property, based solely on its ability to be incorporated with an adjacent farm is unconstitutional."

A. The Rutherford Analysis

We assume the generally unsuitable standard imposed by BCC 55.220(1)(d) is intended to comply with 215.283(3)(d),

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[3]There is substantial evidence in the record supporting the county's findings that the property is generally suitable for farm use, although the property's small size limits its suitability for such purposes. The county found the property includes Class II soils and is gently sloping. The county also found the location of the property in the floodplain does not make the land unsuitable for farm use.

which imposes an identical standard. In Stefan v. Yamhill County, 18 Or LUBA 820, 838 (1990), we explained that the statutory generally unsuitable standard, and local standards adopted to comply with that statutory standard, must be applied consistently with the Court of Appeals' decision in Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331 (1977), rev den 281 Or 431 (1978). Under Rutherford, small size does not render a parcel unsuitable for the production of farm crops and livestock, where the parcel is otherwise suitable for such purposes, "unless it is also shown that the parcel could not be leased, or by some other arrangement put to agricultural use." Stefan v. Yamhill County, supra, 18 Or LUBA at 825. We further explained that the Rutherford analysis is required unless the county finds that a parcel is generally unsuitable for farm use, regardless of parcel size. Id. at 828. Petitioner does not seriously contend the subject parcel is generally unsuitable for farm use, without regard to its small size. To the extent he does so, the record does not support that contention. Therefore, the county was correct to apply the Rutherford analysis in determining whether the proposal complies with BCC 55.220(1)(d).

B. State and Federal Constitutional Claims

Petitioner's constitutional claims under this assignment of error may be summarized as follows. Petitioner first argues he is extended a right under

relevant code and statutory provisions to build a house on his property, provided all appropriate approval standards are satisfied. Petitioner argues that under relevant county approval standards there are only two ways provided by the code and relevant statutes to obtain approval to construct a house on the subject property. Petitioner contends the parcel is too small to permit approval of a dwelling customarily provided in conjunction with farm use.[4] This leaves approval as a nonfarm dwelling pursuant to BCC 55.220(1) as the only available means to obtain approval for a dwelling on the subject parcel. In applying BCC 55.220(1)(d), petitioner argues the county's application of the analysis required by Rutherford results in an unconstitutional taking of his property under Article I, section 18, of the Oregon Constitution and the Fifth Amendment to the U.S. Constitution, made applicable to the county by the Fourteenth Amendment.

Petitioner provides no argument and cites no cases in support of his claim that the challenged application of the Rutherford analysis results in a violation of Article I, section 18, of the Oregon Constitution. Petitioner appears to rely entirely on his arguments that the county's decision constitutes a taking under the Fifth Amendment. We therefore do not consider petitioner's state constitutional

[4]Respondent's do not challenge this argument, and for purpose of this opinion we will assume petitioner is correct in this contention.

claim further. See Constant v. Lake Oswego, 5 Or LUBA 311, 327 (1982).

The only case petitioner cites in direct support of his federal taking claim is Nollan v. California Coastal Commission, 483 U.S. 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987). That case is of questionable relevance in this appeal, because it dealt with the propriety of government conditioning a request for permit approval on dedication of an easement that would otherwise require an exercise of eminent domain. Governmental actions involving actual physical invasions or appropriations of property interests are more readily found to be takings. No physical invasion or requirement for dedication is at issue in this case.

In considering the federal takings claim in Nollan, the court cited its decision in Agins v. City of Tiburon, 447 US 255, 100 S Ct 2138, 65 L Ed2d 106 (1980) as explaining the relevant inquiry in considering challenges that a land use regulation constitutes an improper taking under the Fifth Amendment. In Agins, the court explained that a land use regulation does not constitute a taking under the Fifth Amendment, if the regulation "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." Id., 447 US at 260; See also Penn Central Transportation Co. v. New York City, 438 US 104, 127, 98 S Ct 2646, 57 L Ed2d 631 (1978). In Nollan, the court found the first standard was not met

because there was no nexus between the required easement and the governmental interest the required easement was to serve.

In making his federal taking claim, petitioner does not argue he is left without economically viable use of his property.[5] Rather, petitioner's taking claim rests solely on his contention that requiring consideration of the potential for his property to be used in conjunction with adjacent and nearby farms, in applying the generally unsuitable standard, fails to substantially advance a legitimate state interest. We have some question whether petitioner's claim is correctly cast as a regulatory taking, rather than a substantive due process claim. See Nectow v. City of Cambridge, 277 US 183, 48 S Ct 447, 72 L Ed 842 (1928). In Nollan, the court explained that the nature of the inquiry under the takings clause, concerning whether there exists the required nexus between a land use regulation and the legitimate state interest it furthers, is not necessarily the same as the nature of inquiry required concerning that nexus in considering due process or equal protection claims. Id., 483 US at 834 n3. However, as

[5]Were that the basis for petitioner's taking claim, we would agree with respondents that petitioner's taking claim is not ripe, for the reasons explained in our decisions in Dority v. Clackamas County, ___ Or LUBA ___ (LUBA No. 91-209, June 24, 1992) and Dolan v. City of Tigard, 20 Or LUBA 411 (1991). Additionally, petitioner makes no attempt to show his property is not suited for any of the uses allowable under the EFU zone. See Schoonover v. Klamath County, 105 Or App 611, 616, 806 P2d 156 (1991).

explained below, under any formulation of the required nexus between a legitimate state interest, on the one hand, and the generally unsuitable standard and the Rutherford analysis, on the other, we conclude such a nexus exists.

Petitioner's argument that the Rutherford analysis fails to advance a legitimate state interest is based on an incomplete and incorrect reading of the Agricultural Land Use Policy stated in ORS 215.243(2). That statute provides as follows:

> "The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate healthful and nutritious food for the people of this state and nation." (Emphasis added).

Petitioner focuses exclusively on the portion of ORS 215.243(2) emphasized above. Petitioner argues the state's Agricultural Land Use Policy is to preserve "large blocks of land" and to "discourage partitioning of large blocks of resource land." Petition for Review 13. Because such partitioning of a large parcel of agricultural land is not proposed here, petitioner argues the Rutherford analysis fails to advance the state's Agricultural Land Use Policy.

We question the accuracy of petitioner's argument that the Rutherford analysis has no immediate or direct connection with the policy of preserving large blocks of agricultural land. As we explained in Stefan, supra, 18 Or

LUBA at 827, the effect of the requirement stated in Rutherford is to make small, but otherwise suitable, parcels larger by encouraging their management for farm purposes in conjunction with adjoining or nearby parcels where it is reasonable to do so. However, even if petitioner were correct in this argument, the Rutherford analysis clearly is consistent with and furthers the first clause in ORS 215.243(2), which states that "[t]he preservation of the maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources[.]" It is hard to imagine a more obvious and direct nexus than the nexus that exists between standards and criteria designed to limit construction of nonfarm dwellings on agricultural land and a public purpose to preserve agricultural land for agricultural use.[6]

Additionally, we question petitioner's apparent assumption that each regulatory section of the county's code and ORS chapter 215 must be explicitly embraced by the Agricultural Land Use Policy stated in ORS 215.243. While that statute is a very broad expression of the state's Agricultural Land Use Policy, it does not purport to be an exclusive listing of public purposes the EFU zoning statutes are adopted to further. As the Court of Appeals explained

[6]We also note that ORS 215.243(1), (3) and (4) state additional Agricultural Land Use Policies which the generally unsuitable standard and Rutherford analysis arguably further.

in Hopper v. Clackamas County, 87 Or App 167, 172, 741 P2d 921 (1987), rev den 304 Or 680 (1988) "there is an overriding statutory and regulatory policy to prevent agricultural land from being diverted to non-agricultural use. See also McCaw Communications, Inc. v. Marion County, 96 Or App 552, 555, 773 P2d 779 (1989).

Finally, we note that ORS 215.213(3)(d) codifies the analysis required by Rutherford as part of the generally unsuitable standard imposed by that section.[7] Therefore, the legislature apparently believes that the Rutherford analysis furthers a legitimate state interest. Petitioner offers no explanation for why the legislature would have imposed a requirement that the Rutherford analysis be applied under ORS 215.213(3)(d), if it furthers no legitimate state interest.

The first assignment of error is denied.

REMAINING ASSIGNMENTS OF ERROR

Petitioner's remaining assignments of error challenge the county's findings that three other criteria in BCC 55.220(1) and certain comprehensive plan goals are violated by the proposal. Because we reject petitioner's arguments concerning the county's finding of noncompliance with BCC

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[7]ORS 215.213(3)(d) provides in part, as follows:

> "* * * A lot or parcel shall not be considered unsuitable [for the production of farm crops and livestock] solely because of its size or location if it can reasonably be put to farm use in conjunction with other land."

55.220(1)(d), that finding is sufficient to sustain the challenged decision to deny the requested approval regardless of the merits of petitioner's remaining challenges. Douglas v. Multnomah County, 18 Or LUBA 607, 618-19 (1990). We therefore do not consider petitioner's remaining assignments of error.

The county's decision is affirmed.