

BEFORE THE LAND USE BOARD OF APPEALS Oct 5 3 52 PM '81
OF THE STATE OF OREGON

3	MARILYN STRINGER,)	
)	
4	Petitioner,)	
)	LUBA NO. 81-068
5	v.)	
)	FINAL OPINION
6	POLK COUNTY,)	AND ORDER
)	
7	Respondent.)	

8 Appeal from Polk County.

9 Mark Greenfield, Portland, filed a brief and argued the
cause for Petitioner. With him on the brief was Mark Irick.

10 Diane W. Spies and Douglas Fowler, Portland, filed a brief
11 and Douglas Fowler argued the cause for Respondent/Applicant
Byrd.

12 Cox, Referee; Reynolds, Chief Referee; Bagg, Referee;
13 participated in the decision.

14 Reversed. 10/5/81

15 You are entitled to judicial review of this Order.
16 Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a).

1 COX, Referee.

2 NATURE OF DECISION

3 Petitioner seeks review of the land use decision of
4 Respondent Polk County entitled "In the Matter of the Issuance
5 of a Building Permit to Virginia and Clarence Byrd." The
6 Byrd's requested a building permit for a residential dwelling
7 on an existing 1.02 acre parcel in an F/F Zone (Farm-Forest).
8 The property located near Monmouth, Oregon, is specifically
9 described as Tax Lot 700, Section 16, T8S and R5W.

10 ASSIGNMENTS OF ERROR

11 Petitioner sets out the following three assignments of
12 error:

13 "The Board's decision violates provisions in Polk
County's comprehensive plan and zoning ordinance."

14 "The Board's decision violates Goal 3 because the
15 applicants' parcel of land is not appropriate for the
16 continuation of the existing commercial agricultural
enterprise within the area."

17 "The Board's decision violates ORS 215.243."

18 FACTS

19 This is the third time this matter has been before the Land
20 Use Board of Appeals. The first case resulted in a reversal of
21 the county's decision. The second case resulted in a remand of
22 the county's decision. The facts as we found them the first
23 time this matter appeared before the Board in Stringer v. Polk
24 County, 1 Or LUBA 104 (1980) are as follows:

25 "Respondent Clarence Byrd made application to the
26 Polk County Planning Department on October 15, 1979,
for a conditional use permit to allow placement of a

1 non-farm dwelling on an 1.02 acre parcel of land held
2 in his ownership. The zoning on the subject land is
3 agricultural forest (AF) and the parcel is composed of
4 class II and III soils. The record reveals that
5 various types of agricultural activities have taken
6 place on the subject property in the past with
7 specific reference being made to the raising of
8 cattle. On October 15, 1979, when the original
9 application for the conditional use permit was filed,
10 Respondent Byrd owned and resided on a 4.6 acre parcel
11 which was separated from the subject property by a
12 county road.

13 "The Polk County Planning Commission denied
14 Respondent's application for a conditional use on
15 November 2, 1979, based on a finding that the
16 conditional use would not be compatible with the
17 agricultural activity of the surrounding property. On
18 November 8, 1979, Respondent Byrd appealed the
19 planning commission's decision to Respondent Polk
20 County. Subsequent to the November 8th appeal Mr.
21 Byrd, on December 7, 1979, sold the 4.6 acre parcel
22 upon which he had been residing. On January 7, 1980,
23 Respondent Polk County Board of Commissioners issued a
24 written opinion approving Mr. Byrd's application for
25 conditional use.

26 "Throughout the proceeding, petitioner opposed
27 the requested conditional use on the grounds that the
28 proposed dwelling would interfere with the
29 agricultural activity on her neighboring cherry
30 orchard. Petitioner's orchard is adjacent to and
31 directly east of the subject parcel and is zoned EFU.
32 Petitioner alleged throughout the proceeding that
33 respondent's proposed dwelling would be directly in
34 line with the path used by airplanes which apply spray
35 to her orchard. The record indicates that this aerial
36 spraying takes place at least eight times a year
37 during which insecticides, chemicals, and fertilizer
38 are applied. Petitioner's concern centers on
39 restrictions to her orchard activity which could
40 result if the conditional use is permitted. More
41 specifically the feared restrictions take the form of
42 legal action to stop the aerial spraying and damage
43 suits resulting from the drifting spray falling on the
44 proposed residence. In addition, complaints are
45 feared due to the noise created during the aerial
46 spraying activity." (Emphasis added).

1 On May 2, 1980, we issued our final opinion and order
2 reversing the county's decision in Stringer, supra. We held
3 that Polk County's failure to require the applicants to deal
4 with each element of ORS 215.213(d) and to make findings
5 thereon was a mistake. We also found no evidence in the record
6 that the applicants had attempted to sell, lease or otherwise
7 put the subject property to profitable agricultural use citing
8 Rutherford v. Armstrong, 31 Or App 1319, 1324, 1327 (1977).

9 On June 2, 1980, the Byrds (Respondent) reapplied to the
10 Polk County Planning Commission for a conditional use permit
11 (No. 80-24) to once again construct a nonfarm dwelling on their
12 1.02 acre parcel. On July 22 and August 19, 1980, the Polk
13 County Planning Commission held public hearings on this, the
14 Byrd's second request for a conditional use permit to allow the
15 nonfarm dwelling. At those hearings, as she had done in the
16 first case, petitioner caused to be introduced into the record
17 evidence that the proposed dwelling on the subject parcel would
18 interfere with agricultural activities on her property. At
19 that time petitioner also introduced into the record a letter
20 which had been written to the Byrds offering to lease the 1.02
21 acre parcel. At these hearings the Byrd's testified that while
22 they intended to utilize the property for some agricultural
23 uses they stated that the property was partially covered with
24 oak trees and it would cost more to have the trees removed than
25 could be gained from farming it. The planning commission
26 approved the nonfarm conditional use request. That decision

1 was appealed by the petitioner herein to the Polk County Board
2 of Commissioners. Again, petitioner caused to be introduced
3 testimony that a dwelling on the parcel would interfere with
4 spraying on petitioner's property and that through her husband
5 she had offered to purchase the property or lease it at a
6 reasonable rate. The record indicates that the lease offer was
7 equal to or better than the market rate for leased farm
8 property elsewhere in the county. At this hearing Mr. Byrd
9 testified that due to the existence of two leach fields¹
10 which cover about three quarters of the 1.02 acre tract, that
11 portion of the property can not be farmed with any heavily
12 rooted crops. Furthermore, Mr. Byrd stated that the remaining
13 approximately one-quarter acre contained about 140 oak trees
14 which could not be profitably removed. Specifically, Mr. Byrd
15 stated:

16 (Pointing at map) Right in here approximately like
17 this, this lower corner, there are two leach fields.
18 Both of them have been put in and approved for seven
19 years. That takes up quite a bit of the property.
20 Due to that there can be no farming with any heavy
21 roots or anything because of those leach fields. On
22 the balance of the property there are 140 oak trees.
23 To take the stumps out and clear it you would never be
24 able to come out with any profit on farming that
25 ground because the expense would be so heavy getting
26 cleared up. There is also a driveway comes in right
in along here like this (pointed) up here and little
bit of clearing done right in here where I intended to
build. That takes up approximately all together half
of it is gone in these leach fields and the driveway
and this clearing site in here which doesn't leave
enough for any farm animal or anything else to speak
of. That is to support it. So, there is one of the
main reasons it will not be farmable. This corner
(pointed) of this property has been divided by this
road for over 110 years. So, this property has been

1 divided, set aside to its self for that long and I
2 don't know how much longer."

3 At the same time Mrs. Byrd stated as follows:

4 "We are going to do some farming, if you can call it
5 that. We are going to raise some rabbits and we are
6 raising chickens. We have our own eggs. We have a
7 horse on the place and we have already raised and
8 butchered a sheep and a beef, but it would not handle
9 any extensive farming. But, if you farm for your own
purpose and ocaasionally sell on the outside, I
presume that would constitute a small amount of
farming. Now, I don't know, but I can only reiterate
we would like very much to build our house there. We
have had all of our plans made for it for a long
time." (LUBA No. 80-167, Record 36-37)

10 On October 1, 1980, the Polk County Board of Commissioners
11 adopted a motion that the request for the conditional use
12 permit to allow a nonfarm dwelling be set aside. The basis for
13 the motion was the proceeding should be treated as a request
14 for a dwelling in conjunction with farm use since the Byrds
15 plan to raise rabbits, chickens and some livestock. The Polk
16 County Board of Commissioners instructed its counsel to draw up
17 findings consistent with its decision. On October 8, 1980,
18 however, the Board postponed adopting the findings in order to
19 hold another hearing on the matter. The county decided to hold
20 the additional hearing in order to allow the parties an
21 opportunity to present evidence on whether the dwelling would,
22 in fact, be in conjunction with farm use. This additional
23 hearing was held on October 29, 1980. At the hearing,
24 petitioner introduced evidence, through opinion testimony of a
25 Polk County extension agent, that the Byrd property was too
26 small to constitute a commercial agricultural enterprise as

1 defined by LCDC. In addition, petitioner's attorney introduced
2 a survey of farms in a five-square mile area surrounding the
3 Byrd property. The survey indicated that the average size of a
4 non-woodlot unit in the area was 45.08 acres. It also showed
5 that the predominant agricultural uses in the area of the Byrd
6 property are grazing (pasture) and orcharding. According to
7 the survey, the orchards range in size from ten to 86 acres and
8 average 47.38 acres. Pasture land, according to the survey,
9 ranges from eight to 310 acres in size, and averages 74.71
10 acres. The survey identified that no commercial poultry or
11 vegetable farms were located in the area. However, one farm
12 contained berries. The berry operation was in conjunction with
13 an 84.75 acre orchard. According to evidence introduced by the
14 petitioners, the 1978 census of agriculture indicated that the
15 average size farm in Polk County was 192 acres.

16 At the October 29 hearing, Mrs. Byrd stated that:

17 "Somehow or another, in the letter we got from the
18 County, I believe, they said that it was a farm
19 dwelling that we were applying. Well that is what we
20 originally wished to apply for, but the question arose
21 that the property was too small to constitute a farm.
22 In checking around since then, there is no law in the
23 state of Oregon that states what size a farm may be.
24 It can be a big one or it can be a little one. A
25 little one that is in active use can be just as
26 productive for its size as a large one that isn't in
use. There are quite a few acres around there that
could be used as farming use...put into use as farms,
but they just lay idle. So, we have our raspberries
ordered and they will be ready this next month. We
are planting them on the leach field which will
support them beautifully in as much as they are
shallow rooted and will in no way interfere with
anything. We are getting our place ready for rabbits
which as you know you can tier 3-4 high as long as

1 they are kept clean, well fed and warm. There is a
2 ready market in Salem for them. I believe the current
3 rate is 67¢ a pound live weight. I don't know what
4 more we could do or say that would attest to our
5 sincerity in what we wish to do. * * * " (LUBA No.
6 80-167, Record 10).

7 "We are going to raise as much of our own food as we
8 can. We definitely are going to raise raspberries. I
9 don't think we will go into sheep because that would
10 be incompatible. We have been talking it over. We
11 are going to raise rabbits. Rabbits take a very...now
12 we are not going to do it on a 1000 acre plan. No
13 way. We are going to do it and we will make a
14 profit. It has been established that we can. We have
15 already talked to the rabbit people about it. Even,
16 oh say, a thousand dollars a year is a good supplement
17 to Social Security. And yes we are planning. We are
18 not going to raise thousands of chickens. I can't
19 stand the smell."

20 Mrs. Byrd then went on to testify that the property now
21 contains approximately 50 fowl, including chickens, ducks and
22 turkeys. Mrs. Byrd indicated that they are not going to go
23 into commercial chicken (fowl) raising. She stated they are
24 going to use the chickens and eggs for their own purposes and
25 will sell a few eggs on the side.

26 The Polk County extension agent who was called to testify
27 by petitioners indicated that a full-time commercial rabbitry
28 could not be operated on one acre unless the land was cleared,
29 open, and without a dwelling, driveway, or other nonrabbitry
30 related buildings. He based his opinion on a consideration of
31 the number of female rabbits (does), feed storage requirements,
32 space for processing rabbit feces, building and handling
33 facility requirements and water storage facilities.

34 On November 12, 1980, Polk County Board of Commissioners

1 approved the Byrd's request as being one for a dwelling in
2 conjunction with farm use. On December 8, petitioners filed
3 with this Board a notice of intent to appeal that decision.
4 Thereupon the parties agreed, at the request of the Byrds' new
5 attorney, to stipulate to a remand of the matter to the county
6 for further proceedings. On February 3, 1981, this Board
7 issued an order to that effect (LUBA No. 80-167). Meanwhile,
8 in November, 1980, Polk County adopted the Farm/Forest (F/F)
9 Zone to replace the then active Agricultural Forestry (A/F)
10 Zone. The Byrd's property was rezoned from agricultural
11 forestry to farm/forest. On March 25, 1981, LCDC issued an
12 order acknowledging Polk County's comprehensive plan and
13 implementing measures as being in compliance with the statewide
14 goals.

15 On April 16, 1981 and April 23, 1981, Polk County held
16 public hearings to consider the remanded Byrd matter. At the
17 hearings, the Byrds submitted an affidavit and farm management
18 plan to Polk County Board of Commissioners. The affidavit
19 states that Mr. Byrd is an experienced farmer who intends to
20 engage in intensive full time farming of his 1.02 acre parcel.
21 The farm mangement plan shows that the applicants intend to
22 produce raspberries, rabbits, eggs, garden vegetables, lambs,
23 and beef on the property. More specifically, the applicants
24 intend to breed 60 female and 3 male rabbits, netting about
25 \$3,000 per year. According to the record, Terrace Hill Farms
26 of Springfield, Oregon has offered to purchase all of the

1 rabbits the Byrds produce. The applicants also plan to grow
2 200 raspberry bushes on one-quarter acre, raise 14 chickens and
3 sell excess eggs, sell surplus garden vegetables, raise a bull
4 in a small feedlot and raise and sell several lambs. Mr. Byrd
5 testified again at the April, 1981 hearings and indicated that
6 the rabbitry that he proposes would be housed within a 26 by 36
7 foot building and he would spend "an hour or so a day" taking
8 care of the rabbitry. He indicated that the feed for his
9 various animals would be obtained elsewhere than from the
10 property in question.

11 The Polk County extension agent called by petitioners
12 testified it is unlikely that a commercial cannery would be
13 interested in the small quantity of excess raspberries produced
14 by the Byrds' two hundred plants. In addition, petitioner
15 attempted to counter some of the evidence introduced by Mr.
16 Byrd by stating that while the Byrds quoted a front end cost of
17 \$2,000 to get the rabbitry started, Terrace Hill Farms had
18 quoted Mr. Stringer a price of \$50 per doe. For 60 does, Mr.
19 Stringer testified, that would amount to \$3,000 plus costs for
20 the male rabbits (bucks) and the various housing structures
21 needed for the bucks and the baby rabbits. In addition, Mr.
22 Stringer testified, that "a tremendous amount" of worms (20
23 pounds per doe) is needed to break down the 1000 pounds of
24 feces produced by the rabbits each year. He testified that
25 amount of land necessary for or the cost of processing the
26 feces had not been considered by applicant. Stringer also

1 estimated the time involved in all the activities necessary to
2 run the rabbitry was approximately 4 1/2 hours per day based on
3 his discussions with Terrace Hill Farms operators. He
4 questioned whether the number of hours necessary to operate the
5 rabbitry, raspberry vines and other activities proposed on the
6 1.02 acre site were within the capability of retired citizens.

7 Following the hearing on April 23, the Polk County Board of
8 Commissioners voted to approve a dwelling in conjunction with
9 farm use on the subject property. The Board then adopted its
10 findings of fact and conclusions of law on May 6, 1981.

11 DECISION

12 Petitioner asserts that the Polk County Board's decision to
13 approve a "farm dwelling" on the subject property violates
14 provisions of the county's acknowledged comprehensive plan and
15 zoning ordinance. Petitioner also contends the findings and
16 conclusions that Polk County's decision complies with
17 applicable plan policies and implementing measures are not
18 supported by substantial evidence in the whole record.

19 As was noted in the fact section, the Polk County
20 comprehensive plan and implementing zoning ordinances were
21 acknowledged by LCDC on March 25, 1981 to be in compliance with
22 the statewide goals. The criteria, therefore, against which we
23 must measure the county's decision is contained not in the
24 statewide goals but rather is found in the "acknowledged"
25 comprehensive plan and implementing ordinances and Oregon
26 Revised Statutes. Thus, we dismiss petitioner's second

1 assignment of error.

2 As of November, 1980, the subject property was zoned
3 Farm/Forest (FF).² According to Polk County Ordinance No.
4 274 dated November 19, 1980,

5 "it is the intent of the Farm/Forest designation to
6 provide an opportunity for the continuance of and
7 creation of large and small scale commercial farm and
8 forestry operations. It is also intended that the
9 addition and location of new structures and
10 improvements will not pose limitations upon the
11 existing farm and forest practices in the area or
12 surrounding areas; * * * *" (Emphasis added).

13 In addition, the legislative findings in Chapter 138
14 (Farm/Forest zone) of the county zoning ordinance state:

15 "In Polk County, there are lands suitable for either
16 agricultural or forest uses which are employed in a
17 variety of ways, ranging from small woodlots to large
18 scale timber management; from small scale intensively
19 managed commercial family farms to larger acreages of
20 grazing land, to the marginal land." (Emphasis
21 added).

22 Section 138.030 of the Polk County Zoning Ordinance
23 provides that no building shall be erected in an F/F zone
24 except for a use permitted outright by section 136.020 of the
25 ordinance. The Polk County Board of Commissioners concluded
26 that a single-family dwelling in conjunction with farm use is
permitted outright under Section 136.020 of the Polk County
Zoning Ordinance.³

27 Petitioner and Respondent agree that the Polk County
28 Comprehensive Plan does not establish, in terms of a specific
29 number of acres, what the minimum lot size in exclusive farm
30 use zones shall be.⁴ Rather than specifying predetermined

1 minimum number of acres per lot in its comprehensive plan, Polk
2 County decided to meet the requirements of Statewide Goal 3 by
3 relying on stated agricultural lands policies.⁵ Such an
4 approach is apparently satisfactory to LCDC since it
5 acknowledged Polk County's Comprehensive Plan.

6 The thrust of petitioner's argument is that in light of the
7 Statewide Goal No. 3 requirement that "such minimum lot sizes
8 as are utilized for any farm use zone shall be appropriate for
9 the continuation of the existing commercial agricultural
10 enterprise with (sic) the area," the Byrd's permission to build
11 a residence on the subject 1.02 acre parcel is dependent upon a
12 showing that the 1.02 acre parcel is sufficiently large to
13 allow for the "continuation of the existing commercial
14 agricultural enterprise within the area." Petitioner states
15 that Polk County's plan and zoning ordinances regarding F/F
16 zoned land (supra) refer to "commercial" farm uses but do not
17 define "commercial." Consequently, reasons petitioner, this
18 Board must presume that LCDC properly exercised its
19 acknowledgment review function when it reviewed Polk County's
20 plan and ordinances for compliance with Goal 3. From this
21 petitioner contends that when LCDC saw the undefined word
22 "commercial" it interpreted it to mean "appropriate for the
23 continuation of the existing commercial agricultural enterprise
24 with (sic) the area" in order to be consistent with the
25 requirements of statewide goal no. 3.

26 Respondent takes issue with petitioner's position, pointing

1 to Polk County Ordinance 138.010 entitled "Legislative
2 Findings," which states

3 "In Polk County, there are lands suitable for either
4 agricultural or forest uses which are employed in a
5 variety of ways, ranging from small woodlots to large
6 scale timber management; from small scale intensively
7 managed commercial family farms to larger acreages of
8 grazing land, to marginal lands. The farm/forest (FF)
9 zone is designed to provide for the full range of
10 agricultural and forest uses for such lands * * * *

11 "Further, consistent with the diverse character of
12 this zone there shall be no minimum lot size,
13 recognizing that the actual and potential land use
14 conditions vary from intensive to extensive
15 cultivation and use. Polk County will review land
16 divisions and non-natural resource uses allowed
17 outright in this zone. Finally, the Board of
18 Commissioners has adopted this zone to deal with a
19 myriad of potential uses, while recognizing the
20 primary orientation of this zone towards farm and
21 forest uses." (Emphasis added).

22 Respondent argues that use of the terms "intensively
23 managed" and "farm and forest uses" recognizes that smaller
24 part-time farms exist in areas designated farm/forest.
25 Respondent contends that the explicit intent of the farm/forest
26 zone is to provide for a variety of farm uses, including small
27 scale farms. Respondent argues that the Polk County Board of
28 Commissioners found as a matter of fact and law that the Byrds'
29 proposed dwelling would be in conjunction with a farm use and
30 such findings and conclusions are all that are required by the
31 Polk County Comprehensive Plan and its implementing
32 ordinances. Respondent supports this argument by citing to
33 page 7, Exhibit C of the LCDC compliance acknowledgment order
34 for Polk County which states:

1 ** * * 1000 Friends objects that new farm dwellings
2 in the EFU and F/F zones are allowed on existing lots
3 without a showing that such lots are appropriate for
4 the continuation of the commercial agricultural
5 enterprise in the area. The EFU and F/F zones require
6 that new dwellings must be in conjunction with a farm
7 use (Section 136.020)." (Emphasis added).

8 The respondent, therefore, contends that in response to an
9 objection identical to petitioner's first assignment of error,
10 the LCDC acknowledgment order plainly states that new dwellings
11 in the F/F zone need only be in conjunction with a "farm use,"
12 and specifically rejected the notion that new dwellings must be
13 "appropriate for the continuation of commercial agricultural
14 enterprise with (sic) the area."

15 Respondent next argues that even if the continuation of the
16 commercial agricultural enterprise in the area standard were
17 applicable, as petitioner contends, it doesn't apply to this
18 fact situation because petitioners are not contesting a
19 division of property. The purpose of Goal 3 and its reference
20 to ORS 215, argues respondent, is to protect and maintain farm
21 land in large blocks. Since this is an existing lot, argues
22 respondent, petitioners reliance on goal 3 language is
23 misplaced.

24 Finally, Respondent notes that the Polk County Board of
25 Commissioners made findings of fact and a conclusion of law
26 that the proposed farm use is commercial. Respondents here are
27 referring to the projected income to be derived from use of the
28 property.

29 In summary, we determine that the Polk County decision to

1 allow the construction of a single-family residence on a 1.02
2 acre parcel in an F/F zone violates the purposes, intent, and
3 language of the F/F zone. Since Polk County's plan and zoning
4 ordinance does not contain a definition of "commercial" farm
5 use, we must interpret its meaning as being consistent with the
6 statewide goals. To construe it otherwise would cause the plan
7 and zoning ordinances to conflict with Goal 3, a result to be
8 avoided here since the plan and ordinances have been
9 acknowledged. We assume that when LCDC saw the word
10 "commercial" utilized in the county's comprehensive plan and
11 implementing zoning ordinance it interpreted the word to be a
12 short-cut term for the phrase "appropriate for the continuation
13 of the existing commercial agricultural enterprise with [sic]
14 the area" as set forth in Statewide Goal No. 3. As part of
15 this conclusion, we also determine that LCDC did not mean to
16 imply that the applicable standard for new dwellings in an F/F
17 zone need only be a finding the dwelling is to be used in
18 conjunction with "farm use." Next, we determine that the
19 necessity to protect agricultural land by only allowing
20 residences to be built on lots which are of a sufficient size
21 to continue the existing commercial agricultural enterprise in
22 the area applies regardless of when those lots were created.

23 Considering the language of ORS 215 and LCDC's past
24 practices in applying Statewide Goal 3, the decision on whether
25 or not to allow construction of a single family residence on
26 this parcel of property must transcend the property owner's

1 good intentions, the inequities imposed on that property owner,
2 and the well-meaning and emotionally supported desires of that
3 property owner. As above noted, respondent cites this Board to
4 the terms "farm use" in the Polk County ordinances as well as
5 to what appears to be some comment by LCDC that new dwellings
6 need only be in conjunction with "farm use." Such a standard
7 can not have been the intention of LCDC when it acknowledged
8 Polk County's Comprehensive Plan and Zoning Ordinances. Using
9 the term "farm use" as respondents would have this Board,
10 ultimately requires us to look only to the intent of the person
11 wishing to build a residence on the property and ignores the
12 size of the parcel upon which the residence is to be built. We
13 addressed this "intent" concept in Sane Orderly Development v.
14 Douglas County Bd of Comm'rs, 2 Or LUBA 196, 203 (1981),
15 wherein we stated and LCDC concurred:

16 "If this Board were to buy respondent's argument that
17 'intent' to obtain profit is all that need be shown, a
18 parcel as small as one acre would fit within the
19 definition of commercial agricultural enterprise
20 provided a well-intentioned but poorly informed
21 individual 'intended' to conduct for profit an
22 agricultural enterprise on that parcel."⁶

23 The fallacy in using the intent of a particular person or
24 persons to determine whether or not "legitimate" agricultural
25 activity can take place on a 1.02 acre parcel is clear in the
26 context of this case. Even if we were to accept that the Byrds
can achieve what they intend, there is no indication future
purchasers of the property will be able to continue the intense
agricultural activities proposed by this couple. If the Byrds

1 or future owners of the 1.02 acre lot are unable to use this
2 property as they intend, the probable result will be a single
3 family residence with a large yard in the middle of
4 agricultural land and activity. Such a result is what the
5 goals and statutes were designed to guard against. In Taber v.
6 Multnomah County, 1 Or LUBA 230, 234 (1980), we pointed out,
7 with LCDC concurring, that it is important for a local
8 governing body to take into consideration the possibility that
9 after the present owners of the property no longer are able to
10 farm it, the land may be used for purposes wholly unrelated to
11 or inappropriate for continuation of the commercial
12 agricultural enterprise in the area. Such consideration does
13 not appear in this record.

14 As regards respondent's contention that the "continuation
15 of the commercial agricultural enterprise with (sic) the area"
16 standard does not apply to an existing lot, that question was
17 answered in 1975 by LCDC in the case of 1000 Friends v. Marion
18 County, LCDC No. 75-006 (1975). In that case the concept of
19 the old "fruit farm" subdivisions which exist on paper
20 throughout the state but have never been developed was
21 addressed.

22 "The use of undeveloped and uncommitted
23 agricultural lands for nonfarm use purposes is much
24 more serious. These are the lands which have not been
25 committed and which the legislature in ORS 215.243 and
26 the commission in statewide planning goal 3 expect to
be maintained for farm use unless there are compelling
reasons for their nonfarm uses. * * * * This
justification is especially necessary if the
historical attitude towards agricultural lands is to

1 be changed. It is not to be viewed generally as
2 space, available for development but as the basic
3 resource upon which a major segment of Oregon's
4 economy rests. As the nonreplaceable foundation for
5 crops and livestock, it is to be viewed as a primary
6 source of its own rights.

7 "The purpose of this resource must be weighed
8 carefully taking all factors into account required by
9 goals 2 and 3 within the total area. * * * * The
10 locations of acreage homesites on agricultural land
11 can not be justified simply on the basis that they
12 relate to farm use in some peripheral sense. The
13 primary purpose of such sites is to provide a
14 homesite, although livestock may be kept and crops
15 raised as a secondary, but important activity of the
16 homesite. ORS 215.213(3) is very clear that such
17 homesites may be permitted in the EFU zones under only
18 very strict conditions, so as to insure compatibility
19 with the farm practices used in the exclusive farm use
20 area and to keep the exclusive farm use area free from
21 development."

22 The facts indicate that the Byrds plan to use the subject
23 property for the exact purposes which LCDC was warning
24 against. The Byrds have, throughout this odyssey, indicated
25 that their primary purpose was to use the 1.02 acre lot as a
26 homesite with their animal husbandry and berry raising as an
27 important but secondary goal.

28 IS THE "COMMERCIAL" AGRICULTURE STANDARD MET?

29 As we have just indicated, the use of the word "commercial"
30 in Polk County's F/F zone can only be interpreted as a
31 short-cut term for the Goal 3 standard that the minimum lot
32 sizes "shall be appropriate for the continuation of the
33 existing commercial agricultural enterprise with [sic] the
34 area." This Board has held that there must be evidence in the
35 record which will indicate of what the commercial agricultural

1 enterprise in the area consists. Eugene v. Lane County, 1 Or
2 LUBA 265 (1980), aff'd _____ Or App _____, (1981). In addition,
3 we decided in the case of Sane Orderly Development v. Douglas
4 County, supra, the Goal 3 requirement that the existing
5 commercial agricultural activity in the area be maintained is a
6 minimum standard. Therefore, the county must have determined
7 first, the existing commercial agricultural enterprise within
8 the area, and second, whether the proposed action would, at a
9 minimum, maintain that commercial agricultural enterprise.

10 The record does not indicate that the county conducted an
11 inventory of the commercial agricultural enterprise within the
12 area. The only indication of the type of agriculture activity
13 taking place in Polk County relates to a survey done by the
14 petitioner. The survey reveals that the land within five
15 square miles of the subject property is used as pasture
16 (average 74.71 acre tracts) and for orchards (average 47.38
17 acre tracts). While this survey of vicinity activity may not
18 constitute a study of the "area" as contemplated by Statewide
19 Goal 3, it does indicate that 1.02 acre tracts used for rabbit,
20 berry and vegetable raising do not seem to be common.

21 Contrary to Respondent Byrds' contention we do not believe
22 that application of the continance of existing commercial
23 agriculture activity in the area standard in this case prevents
24 the introduction of new or innovative agricultural activities.
25 Those new activities, such as rabbit raising, can still be
26 undertaken. However, they must be undertaken on tracts of land

1 which are large enough to be used for "maintaining" the
2 "existing commercial agricultural enterprise." That way if the
3 "new" venture fails for whatever reason, the land can still be
4 used for the more "traditional" agricultural purposes. (ORS
5 215.243, 1000 Friends v. Douglas County, 1 Or LUBA 42 (1980),
6 aff'd 50 Or App 263 (1981).

7 Reversed.

FOOTNOTES

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3 1
4 Although we could not find a definition of leach field in
5 the record, we assume the reference is to a sewage disposal
6 system.

7
8 2
9 When the Byrds first applied for a nonfarm dwelling on
10 October 15, 1979, their property was not designated as
11 agricultural land but as rural land. At that time, their
12 property was among 41,000 acres for which the county was taking
13 a general exception to Goal 3. As described in the planning
14 division's document entitled "Amendments to the Polk County
15 Comprehensive Plan, September, 1979" at page 8, "it is the
16 intent of the rural lands planned designation to provide an
17 opportunity for a segment of the population to obtain acreage
18 homesites in a rural area; while at the same time encouraging
19 and protecting agriculture and forestry. Areas designated as
20 Rural Lands will be implemented with the Acreage Residential
21 (AR-5) or the Agriculture-Forest Zone (AF).

22 The above mentioned document noted, however:

23 "For those areas granted an exception by LCDC, the
24 designation of rural lands will remain. For those
25 areas currently designated as rural lands and in which
26 an exception is denied, the plan designation will
change to agriculture or forest and be implemented
through the Exclusive Farm Use (EFU) Zone, the Timber
Conservation (TC) Zone or the Agriculture/Forest (AF)
Zone."

27 In November, 1980, after LCDC denied the county's 41,000
28 acre general exception, the county adopted a Farm/Forest (FF)
29 Zone, repealed the AF zoning provisions, and rezoned the Byrd's
30 property FF.

31 3
32 We were not provided a copy of Polk County Zoning Ordinance
33 Sec. 136.020.

34 4
35 Statewide Goal 3 states:

36 "Agriculture lands shall be preserved and
maintained for farm use, consistent with existng and

1 future needs for agricultural products, forest and
2 open space. These lands shall be inventoried and
3 preserved by adopting exclusive farm use zones
4 pursuant to ORS Chapter 215. Such minimum lot sizes
5 as are utilized for any farm use zones shall be
6 appropriate for the continuation of the existing
7 commercial agricultural enterprise with [sic] the
8 area. Conversion of rural agricultural land to
9 urbanizable land shall be based upon consideration of
10 the following factors: (1) environmental, energy,
11 social and economic consequences; (2) demonstrated
12 need consistent with LCDC goals; (3) unavailability of
13 an alternative suitable location for the requested
14 use; (4) compatibility of the proposed use with
15 related agricultural land; and (5) the retention of
16 Class I, II, III and IV soils in farm use. A
17 governing body proposing to convert rural agricultural
18 land to urbanizable land shall follow the procedures
19 and requirements set forth in the Land Use Planning
20 goal (Goal 2) for goal exceptions." (Emphasis added).
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As the findings show (Record 9), Polk County's plan includes a number of policies that are intended to preserve agricultural lands and protect them from nonfarm uses. These agricultural policies include:

"1.3 Polk County will discourage the development of nonfarm uses in agricultural areas.

"1.4 Polk County will permit those nonfarm uses in agricultural areas for which it can be demonstrated that the uses:

"a. are compatible with established farm uses in the area;

"b. do not interfere with established farming practices;

"c. do not alter the stability of the overall land use pattern of the area;

"d. are situated upon land unsuitable for the production of farm crops and livestock ***.

* * *

"1.6 Polk county will protect with exclusive farm use zoning lands designated as agriculture on the

1 comprehensive plan map.

2 "1.7 Polk County will limit residential use in
3 agricultural areas to one dwelling unit per owner
4 or operator of the farming activity."

4
5 6

5 The cross-reference in Statewide Goal No. 3 to ORS 215
6 places the reader into the definition of farm use under
7 215.203(2)(a). It is interesting to note that intent to do
8 something in the future with property does not seem to
9 constitute "farm use" within the definition contained therein.
10 As it states in 215.203(2)(a)

8 "As used in this section, 'farm use' means the current
9 employment of land for the primary purpose of
10 obtaining a profit in money by raising, harvesting and
11 selling crops or by feeding, breeding, management and
12 sale of, or the produce of, livestock, poultry, fur
13 bearing animals or honey bees or for dairying or the
14 sale of dairy products or any other agricultural or
15 horticultural use or animal husbandry or any
16 combination thereof." (Emphasis added).

13 "Current employment" is further defined but it is not
14 defined in a way that would easily allow a person in applying
15 the definition to presume that the future intended use of a
16 piece of property is "current employment" of the land.
17 Therefore, it appears that farm use as used in 215 does not
18 allow for the future intended employment of that land but
19 rather refers to the current employment of the land.

17 In 1000 Friends v. Benton Co., 32 Or App 413, 575 P2d 651
18 (1978), rev den by opinion, 284 Or 41, the Court of Appeals
19 stated that "current employment of the land" is a term whose
20 source is a part of a legislative program to provide tax relief
21 for certain farm lands.

20 Even if our analysis of 'current' employment is
21 inappropriate because it is a tax related term, the confusion
22 created by its use only points to the fallacy of using tax
23 related terms and measurements to make land use decisions. The
24 ends sought when making tax laws are often different than those
25 sought when making land use laws. The confusion surrounding
26 land use law should not be perpetuated by mixing tax law
(apples) and land use law (oranges).

OCT 24 4 22 PM '83

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

3	MARILYN STRINGER,)	
)	
4	Petitioners,)	LUBA NO. 81-068
)	
5	v.)	CA A22578
)	
6	POLK COUNTY BOARD OF)	
	COMMISSIONERS,)	
7)	
	Respondent.)	

* * * * *

Submitted on reversal and remand from the Oregon Court of Appeals, October 27, 1982. The Supreme Court affirmed on July 19, 1983.

Judicial Review from the Land Use Board of Appeals.

IT IS HEREBY ORDERED that the previous opinion dated March 28, 1980 is vacated and the decision of Polk County is affirmed consistent with the opinion and order of the Court of Appeals in Byrd v. Stringer, 60 Or App 1, 652 P2d 1276 (1982), and the Supreme Court, ___ Or ___, ___ P2d ___ (Slip Opinion, July 19, 1983).

Dated this 25th day of October, 1983.