

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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,) LUBA No. 90-007
)
vs.) FINAL OPINION
) AND ORDER
COLUMBIA COUNTY,)
)
Respondent.)

Appeal from Columbia County.

Gabriella I. Lang, Salem, filed the petition for review. With her on the brief were Dave Frohnmayer, James E. Mountain, Jr., and Virginia L. Linder.

No appearance by respondent.

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

REMANDED 04/20/90

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 seeks review of an order of the Columbia County Board of Commissioners approving a major variance from the minimum lot size requirements of the Forest/Agriculture - 19 (FA-19) zone. The variance allows division of a 10.25 acre parcel into a 6.25 acre parcel and two 2 acre parcels.

FACTS

The facts, as set out in the petition for review, are as follows:

"[The] Columbia County Board of Commissioners approved [the challenged order] for applicant Clarence Nickel on November 21, 1989. That action allowed Mr. Nickels' [sic] 10.25 acres to be divided into three parcels of 2 acres, 2 acres and 6.25 acres. * * *

"The subject property currently has a single family dwelling which would remain on the largest (6.25 acre) parcel. The subject property is bounded by Kimmel and Pittsburgh Roads.

"The soils on the property are described in the staff report as Class III type soil suitable for commercial agriculture and forest uses. The Soil Conservation Service stated in a letter that the soils were fair agriculture soils, and there are some severe topographic and drainage limitations on parts of the property that substantially limit usage. Mr. Nickel testified that he could not maintain a farm tractor or implements on the sloping lands without slipping. He testified the back part of the property has trees and gradual slope. Mr. Nickel also testified that if he plows it and then it rains, the soil erodes and washes down into the ditch. He testified there are about 5 acres to farm, because the first part was too

steep to farm. The property is described as having a 20 percent grade which is found in other areas of Columbia County.

"There is R-10 zoning and RR-5 zoning in the vicinity. In the area there are homesites of two to five acres. The property is described as close to the St. Helen's urban growth boundary. Maps in the record indicate adjacent property is zoned FA-19." (Citations to the Record omitted.)
Petition for Review 2-3.

ASSIGNMENT OF ERROR

"The county failed to comply with all the requirements for approving a variance. The county's order lacks necessary findings and is not supported by substantial evidence."

Petitioner contends the county's findings are not supported by substantial evidence in the record and are inadequate to demonstrate compliance with two of the criteria applicable to major variances under the Columbia County Zoning Ordinance (CCZO). CCZO 1504.1 provides in relevant part:

Major Variances: The Board of Adjustment may permit and authorize a variance from the requirements of this ordinance when unusual circumstances cause undue hardship in the application of it. The granting of such a variance shall be in the public interest.

"A. A variance shall be made only when all the following conditions and facts exist:

* * * * *

"2. The conditions upon which the request for a variance is based are unique to the property for which the variance is sought and are not applicable generally to other property;

" * * * * *

"5. The granting of the variance will not adversely affect the realization of the Comprehensive Plan nor violate any other provision of the Zoning Ordinance."

Petitioner contends that the county's decision fails to demonstrate that the conditions affecting the property are unique to the applicant's property or that Columbia County Comprehensive Plan (plan) policies are not adversely affected.

A. Unique Conditions

Petitioner contends that although the findings and evidentiary record show portions of the property are affected by severe (20%) slopes, the findings do not establish that such slopes are unique to the subject property. Petitioner argues that while the findings state the property "has never been in trees," evidence in the record shows there are some trees on the property. Record 3. Although the county found the property's agricultural potential is limited by its size, the record shows five acres can be farmed and the county's findings do not explain why the property's size or the other factors mentioned in the findings establish that the property is unique.¹

¹Other findings discuss poor drainage on parts of the property, residential use on neighboring parcels, proximity to the St. Helens Urban Growth Boundary and availability of road access. Petitioner correctly points out that there is nothing in the record to show these factors make the subject property unique.

We agree with petitioner that the county's findings fail to demonstrate compliance with the criterion expressed in CCZO 1504.1.A.2. The findings adopted by the county at most demonstrate that it is impractical or impossible to operate farm equipment on at least part of the subject property and that the parcel as a whole is not well suited for farming purposes. However, the county's findings do not establish that these conditions constitute unique physical conditions compared to other property in the county such that a variance from the FA-19 zone's 19 acre minimum lot size requirements is justified so that two additional lots may be created for residential purposes.

This subassignment of error is sustained.

B. Consistency with the Plan and CCZO

The county identifies in its order the following plan and CCZO provisions as applicable to the requested variance:

"Limit the creation of parcels or lots for non-forest uses." Forest Lands Policy 5.

"Support land division criteria appropriate for the continuation of the existing commercial agricultural enterprise in an area." Agriculture Policy 7.

"Establish minimum lot sizes to assure that productive agricultural land will not be divided into parcels that are too small for commercial farm use." Agriculture Policy 8.

"* * * The purpose of [the FA-19] zone is to protect and promote farm and forest uses on lands which have resource value, but which are not suited for either the farm (PA-38) zone or the Forest (PF-76) zone because of smaller parcel

size, conflicting adjacent uses, adverse physical features, or other limiting factors." CCZO 401.²

Petitioner correctly contends the county makes no attempt to explain why creating two new parcels for non-forest uses is consistent with Forest Lands Policy 5, which requires that the creation of such parcels be limited. We agree with petitioner that findings explaining why the variance complies with Forest Lands Policy 5 are required by CCZO 1504.1.A.5.³

Agriculture Policies 7 and 8, quoted above, appear to be standards to guide adoption of implementing standards which in turn would govern specific requests for divisions of agricultural lands, rather than policies applicable directly to proposals to divide agricultural land. See Bennett v. City of Dallas, ___ Or LUBA ___ (LUBA No. 88-078, February 7, 1989), slip op 8-9, aff'd 96 Or App 645 (1989); McCoy v. Tillamook County, 14 Or LUBA 108, 110-111 (1985). Nevertheless, the county determined in its decision that the variance must be consistent with the cited policies. Assuming, as the county does, that the policies apply to variances that would allow divisions of agricultural land into lots with less than the minimum lot size in the

²The quoted language is the purpose section of the FA-19 zone.

³It may be that the county incorrectly assumed that because the policy is only to limit divisions for non-forest purposes, not to prohibit such divisions, no explanation for why the variance complies with the policy is required.

applicable zone, the policies clearly are designed to protect "commercial agriculture." Although there is evidence in the record which suggests the subject property is not suitable for commercial agriculture, the county's findings that the property is not suited for commercial agriculture are inadequate. The county simply concluded in its findings that the property is not suitable for commercial agriculture based on (1) indication from the Columbia County Soil and Water Conservation District that it did not oppose the variance application; (2) the County extension agent's conclusion that the property is not prime farm land, based on the constraints noted earlier in this opinion; and (3) unspecified testimony by the applicant. The county's findings are inadequate to explain why the variance is consistent with Agriculture Policies 7 and 8. McNulty v. City of Lake Oswego, 14 Or LUBA 366, 373 (1986).

Finally, even if the property is not suited to commercial agriculture, the above-quoted purpose section of the FA-19 zone makes it clear that the zone is intended to apply to smaller farm and forest properties with "adverse physical features and other limiting factors." The county's findings only state that the property is relatively small (10.25 acres), includes soils rated for agricultural and forest uses that are marginal for both purposes, is impacted by severe slopes and poor drainage on part of the property, and is not suitable for commercial agriculture. However,

property in Columbia County that is more appropriate for commercial forest or agricultural uses is zoned PA-38 and PF-76. In essence, the county's findings support a conclusion that the applicant's property is precisely the kind of property that is to be zoned FA-19 "to protect and promote farm and forest uses" under the CCZO. The county's findings are not adequate to show the requested variance is consistent with CCZO 401.

This subassignment of error is sustained.

The county's decision is remanded.