

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

DAN LOWRIE,)
)
Petitioner,)
)
vs.)
) LUBA No. 89-149
POLK COUNTY,)
)
Respondent,) FINAL OPINION
) AND ORDER
)
and)
)
DENNY WILFONG and MARTIN STOTT,)
)
Intervenors-Respondent.)

Appeal from Polk County.

Vincent Salvi, Portland, filed the petition for review and argued on behalf of petitioner.

Robert Oliver, Dallas, filed the response brief and argued on behalf of respondent.

Denny Wilfong and Martin Stott, Dallas, represented themselves.

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

AFFIRMED 07/25/90

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 Polk County Board of Commissioners approving a conditional use permit to conduct a cottage industry home occupation on a parcel zoned for exclusive farm use.

MOTIONS TO INTERVENE

Denny Wilfong and Martin Stott move to intervene on the side of the respondent in this appeal proceeding. There is no objection to the motions, and they are allowed.

FACTS

Intervenor-respondent Wilfong owns a 135 acre parcel which is zoned Exclusive Farm Use. Intervenors-respondent (intervenors) applied for approval to locate, on an approximately 20 acre portion of Wilfong's 135 acre parcel, a "cottage industry" consisting of the "manufacture of air freight containers for perishable agricultural products."¹ Record 7.

The county hearings officer approved intervenors' application and petitioner appealed to the board of commissioners. The board of commissioners affirmed the

¹It is disputed whether the 20 acre portion of intervenor Wilfong's property, on which intervenors propose to locate their cottage industry, is a separate parcel. The parties' contentions regarding this issue are discussed under the second assignment of error, infra. It is also disputed whether the portion of the property on which the "cottage industry" is proposed to be located is actually 20 acres. This issue is also discussed under the second assignment of error.

decision of the hearings officer, and approved intervenors' application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

"The County erred in rendering its Order No. 89-035 in that it violated Petitioner's fundamental right to due notice and an opportunity to be heard. The County violated Petitioner's due process rights by informing him he need not attend the October 25th meeting of the Board."

In this assignment of error, petitioner seeks to establish he has standing to appeal the challenged county decision to this Board. However, in Lowrie v. Polk County, ___ Or LUBA ___ (LUBA No. 89-149, Order on Motion for Evidentiary Hearing, June 11, 1990), we determined petitioner has standing to appeal the challenged decision to this Board and that an evidentiary hearing is unnecessary to establish petitioner's standing. Respondent asks that we reconsider that decision.

We decline to reconsider our previous determination that petitioner has standing to appeal to this Board. Because we have already determined that petitioner has standing to bring this appeal, and the first assignment of error is presented solely to establish petitioner's standing, we do not consider the first assignment of error further.

SECOND ASSIGNMENT OF ERROR

"In granting the conditional use on the 20 acre parcel described in the application, the County made a decision not supported by substantial evidence in the whole record."

The challenged decision states the following:

"The subject parcel was legally created and contains substantially the same acreage as claimed by appellants." Record 8.

"An opponent testified in opposition to the Cottage Industry Home Occupation maintaining that this was not a legally created 20-acre parcel and that the opponent objected to the applicant's securing a Farm Home Administration Loan for the purchase of this property and now for this home occupation. * * * Staff reports that the parcel was legally created by survey. The survey is of record with the Polk County Clerk's office." Record 18.

As we understand it, petitioner argues these findings are not supported by substantial evidence. According to petitioner, the approximately 20 acre portion of the 135 acre parcel on which the proposed cottage industry is to be located is not a lawfully created parcel.²

This Board may only reverse or remand a county decision on the basis of inadequate findings if the challenged findings are necessary to the county's decision. Vestibular Disorders Consultants v. Portland, ___ Or LUBA ___ (LUBA No. 89-112, April 6, 1990). We do not understand how the

²Petitioner also argues that the portion of the property on which the activities are authorized by the approved conditional use permit, is less than 20 acres. According to petitioner, this fact establishes that the proposal violates Polk County Zoning Ordinance 136.230 and 136.290 regarding divisions of EFU zoned land. As no land division was approved by the county's decision, we do not believe PCZO 136.230 and 136.290 are applicable here. The challenged decision only purports to authorize a conditional use permit for an approximately 20 acre area. Petitioner's contention regarding the size of the area on which the proposed use may be located does not furnish a basis upon which we may reverse or remand the county's decision.

challenged statements and findings are necessary to the decision. In this case, even if we assume petitioner is correct that no lawful partition of the 20 acres from the 135 acre parent parcel ever occurred, that would not result in reversal or remand of the challenged decision. The fact that the 20 acre portion has not been partitioned from the parent 135 acre parcel would simply mean that the challenged approval is for the location of a cottage industry on a particular 20 acre portion of the 135 acre parent parcel. Accordingly, we believe the county's statements and findings regarding whether the 20 acre portion of the parcel was lawfully created are surplusage. Furthermore, petitioner does not offer any explanation why the proposed cottage industry could not be approved on the 135 acre parcel or some smaller portion of that parcel. It is petitioner's responsibility to provide a basis upon which we might grant relief. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982). Petitioner has not done so here.

The second assignment of error is denied.

The county's decision is affirmed.