

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

McKAY CREEK VALLEY ASSOCIATION, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 ) LUBA No. 90-106  
 WASHINGTON COUNTY, )  
 ) FINAL OPINION  
 Respondent, ) AND ORDER  
 )  
 and )  
 )  
 ALISTAIR ALLAN and LUCY ALLAN, )  
 )  
 Intervenor-Respondent. )

Appeal from Washington County.

John Ostrander, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Tooze Shenker Holloway and Dunn.

David C. Noren, Hillsboro, filed a response brief, and argued on behalf of respondent.

Gregory S. Hathaway and Virginia Gustafson, Portland, represented intervenors-respondent.

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

REMANDED 04/01/91

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 a decision of the Washington County Planning Department to issue a building permit for a single family dwelling on land zoned Agricultural Forestry - 20 (AF-20), an exclusive farm use zone.

**MOTION TO INTERVENE**

Alistair Allan and Lucy Allan move to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

**FACTS**

The subject property is approximately 21 acres in size and is zoned AF-20.

Without holding a hearing and providing notice of the hearing to persons entitled to such notice, the county issued a building permit to intervenors to construct a dwelling on the subject property. At some point, one of petitioner's members observed cement trucks upon the property and, upon inquiry, was informed by the county that a building permit had been issued.

Petitioner filed a notice of intent to appeal with this Board within 21 days of one of its members "observing such construction activity."<sup>1</sup> Petition for Review 3.

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<sup>1</sup>There is no dispute regarding the timeliness of the notice of intent to appeal.

**Decision**

The county concedes that approval of a dwelling on land zoned AF-20 can only occur after proper notice and a hearing and that neither was provided in this case. The county requests that this Board remand the challenged decision. Thus, the only issue we must resolve is whether the county's decision should be reversed or remanded.

Petitioner argues that we should reverse the challenged county decision to issue the building permit because the record submitted by the county does not reflect an evidentiary basis upon which the county could approve the subject dwelling. Specifically, petitioner argues there is no evidentiary basis to conclude the proposed dwelling could be constructed in the AF-20 zoning district as a modification to a nonconforming use, a nonfarm dwelling or a farm dwelling.

Under ORS 197.835(7)(a), we are authorized to reverse or remand a decision if:

"The local government \* \* \*

\* \* \* \* \*

"(C) Made a decision not supported by substantial evidence in the whole record.

\* \* \* \* \*"

There is no dispute that the evidentiary record submitted by the county in this appeal is inadequate to support a determination that the subject dwelling may be

approved under any of the theories advanced in the parties' briefs. OAR 661-10-071(1)(c) provides the circumstances under which we reverse a local decision. Specifically, OAR 661-10-071(1)(c) provides we are required to reverse a local decision if it "violates a provision of applicable law and is prohibited as a matter of law." Because we cannot tell from the record on what basis the dwelling was approved by the county or on what basis a dwelling could be approved on the subject AF-20 zoned property, we cannot say that the county's decision is prohibited as a matter of law.

Under these circumstances, it is appropriate to remand the county's decision. OAR 661-10-071(2)(b).<sup>2</sup>

The county's decision is remanded.

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<sup>2</sup>OAR 661-10-071(2)(b) provides that we may remand a challenged decision if the decision is "not supported by substantial evidence in the whole record."