

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

3  
4 NASARIO RODRIGUEZ and LUCILA     )  
5 RODRIGUEZ,                            )  
6    )  
7                    Petitioners,        )  
8    )  
9            vs.                            )  
10   )  
11 MARION COUNTY,                        )  
12   )  
13                    Respondent,        )  
14   )  
15            and                            )  
16   )  
17 ARTHUR SCHWAB,                        )  
18   )  
19                    Intervenor-Respondent.                                    )

LUBA No. 93-077  
FINAL OPINION  
AND ORDER

20  
21  
22            Appeal from Marion County.

23  
24            M. Chapin Milbank, Salem, filed the petition for review  
25 and argued on behalf of petitioners.

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27            Jane Ellen Stonecipher, Assistant County Counsel,  
28 Salem, filed the response brief and argued on behalf of  
29 respondent. With her on the brief was Robert C. Cannon.

30  
31            Kathy A. Lincoln, Salem, represented intervenor-  
32 respondent.

33  
34            KELLINGTON, Chief Referee; SHERTON, Referee; HOLSTUN,  
35 Referee, participated in the decision.

36  
37                    REVERSED    10/04/93

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county order determining that a  
4 1981 county decision did not approve a nonfarm dwelling, and  
5 denying a conditional use permit for a nonfarm dwelling.

6 **MOTION TO INTERVENE**

7 Arthur Schwab moves to intervene on the side of the  
8 respondent in this appeal proceeding. There is no objection  
9 to the motion, and it is allowed.

10 **FACTS**

11 The subject two acre parcel is zoned exclusive farm use  
12 (EFU). In 1981, the county approved a lot line adjustment  
13 reducing the size of an existing seven acre parcel to create  
14 the subject two acre parcel (1981 decision).<sup>1</sup> The balance  
15 of the original seven acre parcel was included in a larger  
16 farm unit.

17 In 1992, petitioners installed a domestic water well on  
18 the subject property and began construction of an  
19 outbuilding. Thereafter, the county issued a stop work  
20 order on the construction of the outbuilding. The planning  
21 department instructed petitioners to apply for a conditional  
22 use permit for a nonfarm dwelling, in order to complete the  
23 construction of the outbuilding and to begin construction of  
24 a proposed dwelling. Petitioners insisted that nonfarm

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<sup>1</sup>The parties dispute whether the 1981 decision also granted<sup>4</sup> nonfarm dwelling approval for the subject two acre parcel.

1 dwelling approval was given in the 1981 decision, and that  
2 they should not be required to seek approval again.  
3 Apparently, the parties agreed that the best vehicle for  
4 determining the legal status of the parcel in this regard  
5 was for petitioners to apply for a conditional use permit.<sup>2</sup>

6 As instructed, petitioners applied for a conditional  
7 use permit and the planning department found the following:

8 "In 1981, the subject property was formed through  
9 a lot line adjustment that reduced an existing  
10 parcel from 7 acres to its current 2 acre size.  
11 In [the 1981 decision] Planning Staff concluded  
12 that the parcel[,] although in farm use, was an  
13 independent parcel, and it would be possible to  
14 approve a nonfarm dwelling. [S]taff also approved  
15 a nonfarm dwelling for the [subject] 2 acre  
16 parcel.

17 [S]taff finds that the 1981 decision has been  
18 substantially exercised and approval of the  
19 conditional use is justified." Record 46.

20 Intervenor appealed the planning department's decision  
21 to the hearings officer. The hearings officer reversed the  
22 planning department and denied conditional use permit  
23 approval, finding that the 1981 decision had not given  
24 nonfarm dwelling approval because no specific application  
25 had been submitted in 1981 for a nonfarm dwelling. This  
26 appeal followed.

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<sup>2</sup>There is no dispute that it is appropriate for this Board to reach petitioners' assignments of error in this appeal challenging whether a conditional use permit for the proposed nonfarm dwelling is required at all.

1 **FIRST ASSIGNMENT OF ERROR**

2 "Respondent erred in concluding that a non-farm  
3 dwelling placement was not granted to petitioners  
4 in the 1981 lot line adjustment case (LLA 81-18)."

5 The issue under this assignment of error concerns the  
6 county's determination that the 1981 decision did not grant  
7 conditional use approval for a nonfarm dwelling on the  
8 subject property. The challenged decision states:

9 "The [1981 decision] described the 2 acre parcel  
10 as a non-farm parcel and discussed placement of a  
11 non-farm dwelling on the property. However, the  
12 application was for a lot line adjustment only; it  
13 did not include a non-farm dwelling application.  
14 Although the order discussed a non-farm dwelling  
15 permit, the lot line adjustment application could  
16 not grant such a permit because no application or  
17 approval for a non-farm dwelling was sought."  
18 Record 6-7.

19 Petitioners contend the 1981 decision does in fact  
20 approve a nonfarm dwelling, and that the record does not  
21 support the conclusions stated in the challenged decision.

22 In 1981, the Marion County Zoning Ordinance (MCZO)  
23 provided that nonfarm dwellings were conditional uses in the  
24 EFU zoning district. MCZO 136.040(1981).  
25 MCZO 136.070(b)(2)(1981) was applicable to the creation of  
26 "Non-farm Parcels"<sup>3</sup> and provided:

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<sup>3</sup>Concerning the scope of MCZO 136.070(1981), that provision stated the following:

"\* \* \* The following regulations shall apply when lot line adjustments and partitionings within an EFU zone \* \* \* are proposed." (Emphasis supplied.)

1 "The criteria in [MCZO] 136.040 [(1981)]  
2 applicable to the proposed use of the parcel shall  
3 apply to the creation of the parcel." (Emphasis  
4 supplied.)

5 MCZO 136.040(1981) provided conditional use permit standards  
6 for nonfarm uses, including nonfarm dwellings.

7 While captioned "Lot Line Adjustment \* \* \*" (Supp.  
8 Record 4), the 1981 decision goes on to state the following:

9 \* \* \* \* \*

10 \* \* \* The applicant intends to sell the northern  
11 5 acres of the small parcel and retain the  
12 [subject 2 acre parcel] for a homesite.

13 \* \* \* \* \*

14 \* \* \* In effect, instead of a 7 acre non-farm  
15 homesite, the proposal will reduce the amount of  
16 land to be withdrawn from farm use to allow for  
17 the proposed dwelling.

18 "A new non-farm parcel is not being created, but  
19 the criteria in [MCZO] 136.060 [(1981)] must be  
20 satisfied when allowing the dwelling and the lot  
21 line adjustment should bring the property more  
22 into conformance with these standards to show that  
23 the proposed lot line adjustment is an improvement  
24 over current circumstances. The proposed two acre  
25 parcel will be adjacent to a similar parcel  
26 immediately south and several acreage homesites  
27 across the highway. The dwelling location can be  
28 limited by special setbacks to reduce the  
29 potential for conflict with nearby farm  
30 operations. Based upon comments received,  
31 adequate services are available and no conflict is  
32 evident with timber operation, grazing land, fish  
33 and wildlife habitat, soil and slope stability,  
34 air and water quality, and outdoor recreation. \*  
35 \* \*

36 "Based upon available information, the lot line  
37 adjustment and proposed nonfarm dwelling are  
38 consistent with the purpose of the EFU zone. The

1 proposal will increase the size of a[n adjacent]  
2 commercial farm and reduce the amount of land that  
3 would receive little management if it was kept as  
4 part of a large homesite.

5 "Although the proposed lot line adjustment and  
6 dwelling are appropriate, the county requires that  
7 a declaratory statement be recorded with the  
8 property deed. This serves to notify the  
9 applicant and subsequent owners that there are  
10 farm operations nearby and that a compatible  
11 relationship is necessary to promote the  
12 continuation of the commercial farm operations in  
13 the area. Also, the dwelling should maintain a  
14 100 foot setback from the northern property line  
15 and should be within 100 feet of the Highway 214  
16 right-of-way." (Emphasis supplied.) Supp.  
17 Record 4-5.

18 The 1981 decision also imposes four conditions of  
19 approval. Only one of those conditions of approval relates  
20 to the lot line adjustment. The three other conditions of  
21 approval relate to approval of a dwelling. Specifically,  
22 those conditions require (1) septic approval, (2) that the  
23 dwelling maintain a 100 foot setback from the northern  
24 property line, and (3) "concurrence in filing of the  
25 declaratory statement in [MCZO 136.050(b)(1981)]." Record  
26 5.

27 While the application itself does not indicate approval  
28 is sought for anything other than a lot line adjustment, the  
29 county application form requires the submission of an  
30 application narrative explaining the reasons for the  
31 proposed lot line adjustment and an explanation of why the  
32 proposal will comply with relevant standards. The  
33 application narrative attached to the application, which

1 lead to the 1981 approval, states in relevant part:

2 "If this adjustment is granted, [the applicant]  
3 will construct a house for his own use on the  
4 proposed two acre parcel. \* \* \* He would have two  
5 acres to maintain his own small 'hobby farm'  
6 activity on his own property while constructing a  
7 family dwelling." Supp. Record 10.

8 The county treated the 1981 application as one for both  
9 a lot line adjustment and nonfarm dwelling.<sup>4</sup> Further, it is  
10 clear from MCZO 136.070(2)(b)(1981), that to approve a lot  
11 line adjustment for a nonfarm dwelling in 1981, the county  
12 was required to apply the conditional use permit criteria  
13 applicable to nonfarm dwellings. We agree with petitioners  
14 that the 1981 decision approves a nonfarm dwelling on the  
15 subject parcel pursuant to an application request for the  
16 same.

17 The first assignment of error is sustained.

18 **SECOND ASSIGNMENT OF ERROR**

19 "Respondent erred in concluding that in 1983,  
20 applicants were given only until February 27, 1984  
21 to meet the conditions of LLA 81-18."

22 The challenged decision states an additional basis for  
23 denial of the application:

24 "In 1983, the applicants sought an extension of  
25 time in which to fulfill the lot line approval.  
26 They were given until February 27, 1984 to meet  
27 the conditions. The extension was granted subject  
28 to the two acre parcel being removed from special

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<sup>4</sup>Nothing in the record or MCZO(1981) suggests that in 1981 a separate application was required by the county to grant conditional use approval for a nonfarm dwelling in connection with a lot line adjustment.

1 farm assessment and deferred taxes being paid.  
2 The property is still specially assessed.  
3 Therefore, its conditions of approval were not  
4 met." Record 7.

5 There is no condition of approval in the 1981 decision  
6 requiring the subject parcel to be disqualified from special  
7 farm assessment. In a 1983 letter from the planning  
8 department to petitioners' predecessor in interest, the  
9 planning department extended the deadline for compliance  
10 with the four conditions of approval outlined in the 1981  
11 decision.<sup>5</sup> That letter went on to state the following:

12 "This extension is also subject to compliance with  
13 ORS 215.236 which affects the placement of all  
14 non-farm dwellings. This provision requires that  
15 the 2.0 acre parcel must be removed from the  
16 Special Farm Assessment Program and any deferred  
17 taxes must be paid prior to placement of [the]  
18 non-farm dwelling." (Emphasis in original.)  
19 Supp. Record 2.

20 However, this statement in the 1983 letter simply requires  
21 disqualification from special farm assessment before a

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<sup>5</sup>The conditions of approval in the 1981 decision are the following:

- "1. Deeds accomplishing the lot line adjustment be recorded within six (6) months.
- "2. Septic approval be obtained on unimproved parcels prior to submitting the partitioning map to the Planning Department. \* \* \*
- "3. The dwelling shall maintain a 100 foot setback \* \* \*
- "4. Concurrence in filing of the declaratory statement \* \* \*." Supp. Record 6.

1 nonfarm dwelling is placed on the subject property.<sup>6</sup> It  
2 says nothing about any particular period of time by which  
3 such disqualification must occur.

4 The second assignment of error is sustained.

5 **THIRD ASSIGNMENT OF ERROR**

6 "Respondent erred in failing to rule on  
7 petitioners' objection that opponent's arguments  
8 as to incompatibility with farming practices were  
9 untimely."

10 The challenged decision determines:

11 "The proposed non-farm dwelling would interfere  
12 with accepted farm practices on adjacent  
13 properties. These properties are used for growing  
14 row crops that require aerial spraying. A  
15 dwelling in the middle of these properties would  
16 interfere with this aerial spraying." Record 7.

17 Petitioners argue that all issues concerning the  
18 proposed nonfarm dwelling's compliance with conditional use  
19 permit standards, including compatibility between, and  
20 interference from, a nonfarm dwelling on the subject parcel  
21 and neighboring farm operations were resolved by the 1981  
22 decision. Petitioners also argue that persons dissatisfied  
23 with the 1981 decision were required to appeal it and cannot  
24 now collaterally attack it in this proceeding.

25 MCZO 136.040(i)(1) is identically worded to  
26 MCZO 136.040(c)(1981), and requires a determination that the

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<sup>6</sup>There is no suggestion in the challenged decision that anything other than the 1983 letter requires disqualification from special farm assessment during any particular period of time.

1 proposed nonfarm dwelling will be compatible with farm uses  
2 and will be consistent with ORS 215.243 (stating the  
3 purposes of the EFU zone). MCZO 136.040(i)(2) is  
4 identically worded to MCZO 136.040(d)(2)(1981), and requires  
5 a determination that the proposed nonfarm dwelling "does not  
6 interfere seriously with farming \* \* \* practices on adjacent  
7 lands."

8 The 1981 decision acknowledges that "non-farm parcels  
9 and non-farm dwellings are generally considered incompatible  
10 [sic] with continuation of commercial agricultural activity  
11 in the EFU zone." Supp. Record 4. However, the 1981  
12 decision determines that:

13 "[t]he dwelling location can be limited by special  
14 setbacks to reduce the potential for conflict with  
15 nearby farm operations. \* \* \*

16 " \* \* \* \* \*

17 " \* \* \* The lot line adjustment and proposed  
18 nonfarm dwelling are consistent with the purpose  
19 of the EFU zone.

20 " \* \* \* \* \*" Supp. Record 4-5.

21 Further, the decision concludes by finding that even though  
22 the proposed dwelling is "appropriate," a declaratory  
23 statement is required to notify the applicant and subsequent  
24 owners:

25 "that there are farm operations nearby and that a  
26 compatible relationship is necessary to promote  
27 the continuation of the commercial farm operations  
28 in the area. \* \* \*" Record 5.

29 The 1981 decision is not subject to review in this

1 appeal proceeding. Petitioners contend the unappealed 1981  
2 decision approves a nonfarm dwelling on the subject property  
3 and the county has not given any reason for subjecting their  
4 proposal to another review now, under the standards  
5 identical to those against which it was reviewed in 1981.

6 The county agrees that if the 1981 decision approved a  
7 nonfarm dwelling, then petitioners are correct that "no new  
8 conditional use permit was needed." Respondent's Brief 5.

9 Accordingly, because we determine the 1981 decision  
10 approved a nonfarm dwelling on the subject property, the  
11 county erred by re-reviewing the proposed nonfarm dwelling  
12 against the standards it was reviewed against in 1981.

13 The third assignment of error is sustained.

14 The county's decision is reversed.