BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STEVE TOGNOLI, Petitioner, vs. CROOK COUNTY, Respondent, and MAYNARD ALVES and JACOLYN AVLES, Intervenors-Respondent.	LUBA No. 95-074 FINAL OPINION AND ORDER

Appeal from Crook County.

Vivian Raits Solomon and Frank Parisi, Portland, filed the petition for review. With them on the brief was Lane Powell Spears Lubersky. Vivian Raits Solomon argued on behalf of petitioner.

No appearance by respondent or intervenors-respondent.

GUSTAFSON, Referee; HANNA, Referee, participated in the decision.

REMANDED 01/03/96

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

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Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the county court's land partition approval.

MOTION TO INTERVENE

Maynard and Jacolyn Alves, the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

This is the second appeal of the county's approval of the applicant's partition application. The facts are largely set forth in Tognoli v. Crook County, 28 Or LUBA 527 (1995). Briefly, the applicants applied for a partition of 720 contiguous acres (two 360 acre parcels) into two parcels of 500 and 220, respectively. The property is located in an EFU-zone. It is listed as a 1B aggregate site on the county's Goal 5 inventory. In 1979 the county approved a conditional use application for use of the property for aggregate mining. The 1979 conditional use permit is not part of the record and there is no evidence in the record that any activity occurred on the property pursuant to that conditional use permit.

After numerous hearings, the county court approved a three lot partition rather than the two lots requested in the application. The county did not provide petitioner an

opportunity to comment on the partition as modified and approved. On appeal, petitioner assigned error to the county's failure to provide him an opportunity to be heard on the modified partition, as well as to the county's failure to adequately address its partitioning approval criteria. We remanded the county's decision, both to allow petitioner to be heard on the modified partition, and to allow the county to respond to petitioner's numerous allegations that the partition request did not satisfy relevant standards governing partitions of land in the EFU zone.

On remand, the applicant sought another modified partition, requesting partitioning of only one of the 360 acre parcels into two parcels of 160 and 200 acres, respectively. The record does not reflect any change in the intended use of the parcels. After additional hearings, the county again approved the application, as modified. This appeal followed.

ASSIGNMENTS OF ERROR

In his four assignments of error petitioner again contends the county's findings are inadequate and not supported by substantial evidence. In particular, petitioner contends the county's findings do not establish compliance with the following four requirements of Crook County Land Development Ordinance (CCLDO) 5.030:

> "Requirements for Approval. No application for partitioning shall be approved unless the

following requirements are met:

> "* * * * *
>
> "(3) Each parcel is suited for the use intended or offered.
>
> "(4) Proposal is compatible with adjoining and area land uses.
>
> "(5) All required public services and facilities are available and adequate, or are proposed to be provided by the petitioner.
>
> "(6) Proposal will not have any adverse impacts on adjoining or area land uses, public services and facilities, and natural resource carrying capacities."

Petitioner challenges the county's compliance with each of these standards on numerous grounds. However, petitioner's threshold argument with each is that the county failed to evaluate the proposed use or, to the extent the county purported to evaluate the proposed use, it erroneously relied on the 1979 conditional use permit and the site's 1B designation on the County's Goal 5 inventory as authorizing use of the site for aggregate mining.

The county did not appear to defend its decision. The decision itself disputes petitioner's contention that the county must evaluate the proposed use of the property. Rather, the county determined it need not evaluate the "proposed use" and interpreted "proposal" as it is used in the partitioning ordinance to mean only the division of land. The county's decision describes its evaluation of the

proposed use as follows:

> "The County does not require an applicant for a partition meet [sic] all the requirements in the partition application that would be required under a later application. Section 5.020(3) requires a finding that each parcel is "suitable" for the intended use.[1] A land partition by itself does not create a use. In most situations a subsequent application is required at the time the intended use is proposed to be enacted. The request is for an agricultural partition with potential aggregate use.
>
> "* * * * *
>
> "The purpose of the partitioning is to allow for the eventual transfer of ownership by the creation of the parcel. Partitioning does not create the use unless specifically required, such as for a non-farm partitioning, which by Statute, requires the use to be approved at the same time.
>
> "* * * * *" Record 4-5.

With regard to the code requirements for evaluation of the "proposal," the county found:

> "The [county] Court must make a determination of whether the 'proposal' is compatible with adjoining and area land uses. By 'proposal' the most reasonable interpretation would be the proposed partitioning and not the proposed use of the divided parcels. This review is limited to the extent that parcel creation can influence adjoining uses by increasing density and change of land use patterns in the area. The County by Ordinance, as well as the State by ORS 215.780,

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[1]CCLDO 5.020 states the "Filing Procedures and Requirements" for land partitions. It lists seven submission requirements, but does not require any findings. Our copy of the CCLDO does not contain a section 5.020(3). Section 5.030(3) requires that "[e]ach parcel is suited for the use intended or offered" and requires findings of compliance. Presumably, it is section 5.030(3) to which the county refers in this finding.

> have made a finding that parcels of 160 acres are appropriate and sufficient not to impact agricultural activities. As mentioned above, the County decides what effect a proposed use will have on adjoining parcels when it receives an application for that use. All uses, besides outright uses in a EFU-2 zone, go before the Planning Commission. Thus, any use which has a potential impact on adjacent lands, receives a separate hearing specific to that use. Uses which are determined to be compatible by ordinance, agricultural uses, do not need a hearing. It is a reasonable interpretation that when discussing the proposal, the Ordinance means the proposal to partition the land and not the proposed uses of the land.
>
> "In the alternative, even if the Court interprets 'proposal' to mean the proposed use of the land and not partition, the Court still comes to the conclusion that agricultural and aggregate mining is compatible with adjoining uses. The area is zoned for agricultural use and testimony has been received about agricultural practices in the area. The determination of whether aggregate use is appropriate has been made through the Goal 5 process which listed the site as a '1B' site and through the prior conditional use approval. A legislative determination has been made, as found in the County Ordinances, that aggregate sites can be place [sic] in EFU land as a conditional use. The property has previously received a conditional use permitting the aggregate site. Therefore, we determine the proposed uses as compatible [sic] with adjoining uses." Record 6.

A local governing body's interpretation of its own enactment is entitled to deference, and LUBA is required to affirm the local interpretation unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment

implements. ORS 197.829; Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992); Zippel v. Josephine County, 27 Or LUBA 11 (1994); Melton v. City of Cottage Grove, 28 Or LUBA 1 (1994), aff'd 131 Or App 626, 887 P2d 359 (1995).

In this case, the local government's interpretation that the actual proposed use need not be evaluated at the time of partitioning, notwithstanding the code's language, directly contravenes the code requirements. Likewise, the county's finding that the intended or proposed use is not the proposal is inconsistent with the language and substantive code requirements.

CCLDO 5.020 and 5.030 specifically and expressly mandate that the county evaluate the proposed use intended: CCLDO 5.020 lists the requirements for the Tentative Plan, and includes

> "(F) Statement regarding past, present and intended use of the parcel(s) to be created, or the use for which the parcel(s) are to be offered."

The requirements for approval listed in CCLDO 5.030 require evaluation of the intended use, specifically requiring in CCLDO 5.030(3) and 5.030(4) that each parcel "is suited for the use intended or offered" and that the "proposal is compatible with adjoining land uses." The county's partitioning application form mirrors the requirements of 5.020 and 5.030, and requires the applicant to list the intended use of the property. Under the category "Parcel

Use Intent", the applicant must answer "For what use or uses are the parcels intended?"[2] The county's interpretation that the proposal referred to in the partitioning ordinance refers only to the proposed partitioning and not the proposed use of the divided parcels is in direct contravention with the language of these requirements.

The county's findings do acknowledge the possibility that its code requirement for evaluation of the proposal refers to the actual proposal. However, the county's findings do not adequately evaluate the proposal. Rather, the county relies on a 1979 conditional use permit and the site's 1B classification on the county's Goal 5 inventory to summarily conclude an aggregate use is allowed on the site, without any evaluation. The county found:

> "The Court does not have to determine whether this site has an active conditional use. Suffice it to say that this property was listed in the Comprehensive Plan Mineral and Aggregate Inventory during the County's periodic review. The issue of "whether" to mine has been made. The issue of the conditional use permit is beyond the scope of this land partitioning." Record 4.

This summary conclusion is both legally incorrect and does not evaluate the intended use of the parcels against the county's partitioning approval criteria. If the county intends to rely on the 1979 conditional use permit, it must

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[2]The applicant responded to this application form requirement with the statement "Separate Two Different Aggregate Operations." Original Record 96.

make affirmative findings that the permit is valid. The evidence in the record to which petitioner has cited indicates the county could not make such affirmative findings. However, that is the county's evaluation to make in the first instance.

Moreover, the county cannot rely on its Goal 5 inventory to conclude that the proposed use satisfies each of the approval criteria. The site is listed on the Goal 5 inventory as a 1B site. A 1B designation means that inadequate information exists on the site to determine its nature, and that the county must complete the Goal 5 process in the future. OAR 660-16-000(5)(b); See Zippel, 27 Or LUBA at 33. It does not, as the county suggests, mean that aggregate uses are allowed outright on the site. In addition, even if the site was designated as an aggregate extraction site on the Goal 5 inventory, that designation would not excuse the county from substantively applying its partitioning ordinance to this application.

Petitioner makes numerous, specific objections to each of the four standards to which he assigns error. Petitioner's objections are well taken. However, before any meaningful evaluation can be completed regarding the county's compliance with the four challenged standards of CCLDO 5.030, the county must first identify the intended use and evaluate that use against those four standards, as mandated by its ordinance.

Petitioner's four assignments of error are sustained.

The decision is remanded.