BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STEPHEN G. KRIEGER, Trustee, and WILLIAM L. OAKES, Petitioners, vs. WALLOWA COUNTY, Respondent, and ELDON L. McFERRIN and IRMA J. McFERRIN, Intervenors-Respondent.	LUBA No. 95-184 FINAL OPINION AND ORDER

Appeal from Wallowa County.

D. Rahn Hostetter, Enterprise, filed the petition for review and argued on behalf of petitioners. With him on the brief was Mautz Baum Hostetter & O'Hanlon.

No appearance by respondent.

Ronald D. Schenck, Enterprise, filed the response brief and argued on behalf of intervenors-respondent.

LIVINGSTON, Chief Referee; GUSTAFSON, Referee, participated in the decision.

REMANDED 04/05/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioners appeal a decision of the county court approving a conditional use permit to construct a non-farm dwelling in the county's Timber/Grazing (T/G) zone.

FACTS

The subject property consists of 12.66 acres zoned T/G. The surrounding zoning is T/G to the south and east, Exclusive Farm Use (EFU) to the north and Wallowa Whitman National Forest (WWNF) to the west. The soil class on a steeply sloped portion of the property is 6E. The soil class on the balance of the property is 6S.

The property owner harvested all marketable timber on the property in 1993. The property then lost its timber deferral tax status, pending completion of a reforestation program.

On August 31, 1994, Win Beakey (Beakey) filed a conditional use permit application for a non-farm dwelling, with the county planning department. Record 60-65. After a hearing, the planning commission approved the application on June 13, 1995. Petitioners appealed to the county court, which adopted the planning commission's findings and decision on August 14, 1995.

This appeal followed.

MOTION TO INTERVENE

On September 20, 1995, Eldon L. McFerrin and Irma J.

McFerrin (the McFerrins) moved to intervene on the side of the respondent. Petitioners objected to the motion to intervene, on the basis that the McFerrins never appeared in the local government proceedings, either in person or through any agent. In support of their objection, petitioners referred to the list of those who were mailed notice of the decision by the county, apparently because they wished to call our attention to the absence of the McFerrins from the list. However, the McFerrins were in fact on the list.

In our Order on Motion to Intervene, dated October 30, 1995 and issued prior to receipt of the record, we granted the motion to intervene, based in part on what appeared to be petitioners' misplaced reliance on the county notice list and in part on the McFerrins' own statement that they had "appeared before the Wallowa County Planning Commission and the Wallowa County Court on this matter thru General Land Office." Motion to Intervene 2.

In the petition for review, petitioners renew their objection to the motion to intervene, pointing out that, as applied to the facts of this appeal, ORS 197.830(6)(b) limits intervenor status to either the applicant below or persons who appeared before the local government orally or in writing; and OAR 661-10-050(2) requires that statements in support of intervenor status be supported with

affidavits, citations to the record or other proof.[1]

The application to the county states that the legal owner of the subject property is Roy Price (Price). Record 60. Throughout the record, in comments submitted by third parties, documents prepared by the county planning staff, and the planning commission findings ultimately upheld by the county court, the applicant is referred to as Beakey, and the owner as Price.

The applicant's sole representative at the local hearings was a real estate agency employee (employee) whose office apparently brokered a sale of the subject property. Record 55. The employee stated at the hearing before the

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[1]ORS 197.830(6)(b) provides, in relevant part:

> "* * * [P]ersons who may intervene in and be made a party to the review proceedings [at LUBA] are:
>
> "(A) The applicant who initiated the action before the local government, special district or state agency; or
>
> "(B) Persons who appeared before the local government, special district or state agency, orally or in writing."

OAR 661-10-050(2) provides, in relevant part:

> "Motion to Intervene: In the interest of promoting timely resolutions of appeals, a motion to intervene shall be filed as soon as practicable after the notice of intent to appeal is filed * * * . The motion to intervene shall:
>
> "(a) State whether the party is intervening on the side of the petitioner or the respondent;
>
> "(b) State the facts which show the party is entitled to intervene, supporting the statement with affidavits, citations to the record or other proof;
>
> "(c) Be served upon [LUBA] and all parties."

county court that he represented "the applicant who's attempted to buy this property for over a year." Record 19. The only applicant shown in the record is Beakey. The record contains no mention of the McFerrins.

Both petitioners and the McFerrins refer to an affidavit which was apparently mailed to LUBA on October 3, 1995. The affidavit apparently asserts that the employee was in touch with the McFerrins during the local proceedings, and believed himself to be appearing on their behalf.

The affidavit was never delivered to LUBA. Even if it had been, it would not change our view that the McFerrins did not appear during the local proceedings, as required by ORS 197.830(6)(b). We do not believe that the employee's quietly held view, not shared with the local decision makers or the other parties to the local proceedings, that he was representing the McFerrins constitutes an appearance by the McFerrins.

Upon reconsideration, we conclude the McFerrins' motion to intervene must be denied.[2]

FIRST ASSIGNMENT OF ERROR

A. OAR 660-33-130(4)(c)(B)

Petitioners contend the challenged decision fails to

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[2]Because the McFerrins filed a brief in reliance on our Order on Motion to Intervene, we consider their brief and also the arguments they made at oral argument.

address OAR 660-33-130(4)(c)(B), while identifying it as a relevant approval criterion.[3] Record 6-7.

Where a local government identifies a particular provision as an applicable approval standard, it must demonstrate in its findings that the application complies with the identified standard. Gettman v. City of Bay City, 28 Or LUBA 116 (1994). Petitioners are correct that the challenged decision contains no findings that address OAR 660-33-130(4)(c)(B).

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[3]OAR 660-33-130(4)(c)(B) provides, in relevant part:

> "[In counties outside the Willamette Valley, findings are required to the effect that] [t]he dwelling is situated upon a lot or parcel, or a portion of a lot or parcel, that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land. * * * A lot or parcel is not 'generally unsuitable' simply because it is too small to be farmed profitably by itself. If a lot or parcel can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch, it is not 'generally unsuitable.' A lot or parcel is presumed to be suitable if, in Western Oregon it is composed predominantly of Class I-IV soils or, in Eastern Oregon, it is composed predominantly of Class I-VI soils. Just because a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use. * * * "

In Lane County v. LCDC, 138 Or App 635, ___ P2d ___ (1996), the Court of Appeals held OAR 660-33-130 invalid. Id. at 646. However, the court's opinion does not address OAR 660-33-130(4)(c)(B) at all. The dissent appears to reflect an understanding that the majority opinion is limited to certain provisions of OAR 660-33-130 that are inconsistent with ORS 215.213(1). Id.

Even if all of OAR 660-33-130 is invalid, ORS 215.284(2)(b) states a "general unsuitability" standard essentially the same as that in OAR 660-33-130(4)(c)(B). The county must address the standard in its findings.

The decision does contain findings ostensibly made in connection with Wallowa County Zoning Articles (WCZA) 9.020(5), which requires that the site be suitable to accommodate the proposed use. Those findings touch on soil capabilities and suitability for management as a farm use:

> "Soil capabilities for crop production have been calculated as 6E. However, it may be determined by the traditional land use pattern of the area that a parcel of this size is unsuitable to be managed as a commercial farm unit, in itself or as part of an established commercial farm unit. Furthermore; while managing the parcel for farm uses is feasible, the subject parcel is not of sufficient size nor soil classification to be capable of generating farm revenue on a consistent basis. * * *" Record 8

Even if this finding had been made in relation to OAR 660-33-130(4)(c)(B), it would be inadequate. The challenged decision contains no factual findings which establish what the "traditional land use pattern of the area" actually is or why it makes the subject property generally unsuitable for the production of farm crops and livestock or merchantable tree species. Moreover, the county's finding that "a parcel of this size is unsuitable to be managed as a commercial farm unit, in itself or as part of an established commercial farm unit," even were it supported by substantial evidence, does not satisfy the "generally unsuitable" standard. See Sweeten v. Clackamas County 17 Or LUBA 1234, 1237-39 (1989). There is no finding, as required by OAR 660-33-130(4)(c)(B), addressing whether the subject property can reasonably be put to farm or forest use in conjunction

with other land. Finally, the challenged decision fails to identify evidence that would overcome the presumption, stated in OAR 660-33-130(4)(c)(B), that by virtue of its soil class, the subject property is suitable for the production of farm crops and livestock or merchantable tree species.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners contend the county's approval of a conditional use permit for a non-farm dwelling violates WCZA 16.020(1)(D), which requires that "[t]he lot or parcel upon which the dwelling is to be established has existing public improved access." The challenged decision addresses WCZA 16.020(1)(D) as follows:

> "Access to the subject parcel is via Eagle Lane which is a private easement. The Commission was concerned that the criteria of Section 16.020(1)(d) required existing 'public' improved access. Subsequently, the Commission began proceedings outside the auspices of this application to remove the word 'public.' The Commission found a variance to these standards appropriate and found a hardship to exist. Requiring 'public' improved access would preclude this property owner use of his property and could represent a 'taking' of his property rights. The criteria of 16.020(1)(d) requiring existing public access is hereby varied and found to be satisfied." Record 8.

The "proceedings outside the auspices of this application" have no bearing on the application, because approval or denial must be based on the standards and

criteria that were applicable at the time the application was first submitted. ORS 215.428(3). Furthermore, as petitioners point out, the finding that a variance is appropriate cannot be made without addressing the variance standards in WCZA Article 10.

The second assignment of error is sustained.

The county's decision is remanded.