BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARY BELLE O'BRIEN, GLEN OLSON, NEDENE OLSON, and MIA CRAIG, Petitioners, vs. LINCOLN COUNTY, Respondent, and LEE LYON, Intervenor-Respondent.	LUBA No. 95-215 FINAL OPINION AND ORDER

Appeal from Lincoln County.

Mary Belle O'Brien, Seal Rock, filed the petition for review and argued on her own behalf.

No appearance by respondent.

Dennis L. Bartoldus, Newport, filed the response brief and argued on behalf of intervenor-respondent.

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

REMANDED 06/10/96

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a conditional use permit for a nonfarm dwelling on property zoned agricultural conservation.

MOTION TO INTERVENE

Lee Lyon (intervenor), the applicant below, moves to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

The subject property, described as tax lot 4402, is apparently a 7.75-acre parcel in the AC-40 (Agricultural Conservation) zone for which the minimum parcel size is 40 acres.[1] Tax lot 4402 is separated from tax lot 4400 by a county road. The two tax lots were originally one tax lot which was apparently segregated sometime in 1993.[2] There is already a dwelling on tax lot 4400.

On October 17, 1994, approximately 7 acres of the subject parcel were removed from forestland special assessment for the 1994-95 tax year.[3] On October 21, 1994, the county administratively approved intervenor's application for a nonfarm dwelling on tax lot 4402. The

[1]There is confusion over the actual size of the subject property. It was identified in the record as between 8 and 18 acres in size. The challenged decision identifies the parcel as being 7.75 acres in size.

[2]It is not clear from the record how the two tax lots were created.

[3]Because there is confusion over the actual size of the subject property, it is unclear how much of the subject property remains in special assessment.

administrative approval was appealed by petitioners to the planning commission. On May 22, 1995, the planning commission voted to deny the appeal and on July 24, 1995, approved the application. The planning commission's approval was appealed to the board of commissioners. After a public hearing on the matter, the board of commissioners denied the appeal and upheld the planning commission's approval in an order dated September 27, 1995. This appeal followed.

ASSIGNMENT OF ERROR

Petitioners assert that the challenged decision violates state statutes, administrative rules and local land use regulations, fails to make adequate findings and is not supported by substantial evidence in the whole record for approval of a nonfarm dwelling. Petitioners' general assignment of error may be broken down into discrete subassignments of error.[1]

A. Creation of Tax Lot 4402

Petitioners assert that "[g]ranting a conditional use permit to establish a non-farm dwelling on an unlawfully created parcel is not permitted by law[.]" Petition for Review 8. Essentially, petitioners argue that tax lot 4402 is not eligible for a nonfarm dwelling because it was not created in accordance with ORS 92.010(7)(d) and 92.012. To support this contention, during the county proceedings

[1]Intervenor urges this Board to strike petitioners' assignment of error on the grounds that it is overbroad and vague. As we are able to discern the individual subassignments of error, we deny this request.

petitioners submitted property records and what appears to be an undated plat sketch. The plat sketch reveals that tax lots 4400 and 4402 were at one time a single 38-acre tax lot.

Intervenor responds that under Lincoln County Land Use Code (LCC) 1.1115(52) a lot cannot be divided by a public road or alley and because tax lots 4400 and 4402 are so separated, they are two distinct legal lots, each entitled to a dwelling.[1]

Findings must address issues raised in the local proceedings that are relevant to compliance with applicable approval standards. See Hillcrest Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 285, 293, 608 P2d 201 (1980); Skrepetos v. Jackson County, 29 Or LUBA 193, 208 (1995). The county made no findings concerning the legal creation of tax lot 4402 as a separate lot or parcel for planning purposes distinct from tax lot 4400.[2] Specifically, the

[1]Both petitioner and intervenor appear to argue that OAR 660-33-130(3)(a) is applicable to this case. That section requires that in order to approve a nonfarm dwelling, the lot or parcel must have been lawfully created. OAR 660-33-130(3)(a) implements ORS 215.705. Both provisions pertain to lot of record dwellings, and have no bearing on the present case. However, lawful creation of a lot or parcel is germane to this appeal. ORS 215.284 permits only one nonfarm dwelling per lot or parcel. Further, ORS 92.012 provides that no land may be subdivided or partitioned except in accordance with ORS 92.010 to 92.190. When ORS 92.012 and ORS 215.284 are read together with ORS 92.017, which states that lots or parcels lawfully created remain discrete parcels until further divided as provided by law, it is possible that tax lots 4402 and 4400 comprise a single parcel, as that term is used in ORS chapters 92 and 215.

[2]There is a conflict between the county's definitions of "lot" and "parcel" and the definitions of those terms found in ORS chapters 92 and 215. We use the county's definitions when we apply them to LCC provisions. However, when measuring compliance with state standards, we adhere to the definitions found in ORS chapters 92 and 215.

county has not determined whether tax lot 4402 was legally created as a lot or parcel for the purposes of ORS 215.284. Whether and to what extent ORS 215.284(2)(c) or 215.284(3)(c) is applicable under the facts in the present case is a question for the county to answer in the first instance.

This subassignment of error is sustained.

B. Significant Change in Accepted Farming and Forest Practices

Petitioners claim that the county's findings regarding compatibility between the approved use and nearby farming and forest uses are "not adequate or supported by substantial evidence in the whole record." Petition for Review 9.

The county determined that OAR 660-33-130(4)(c) was applicable to the application. It states, in pertinent part:

> "(A) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby land devoted to farm or forest use.
>
> "* * * * *"

This standard requires that the county "discuss what the existing and potential accepted farming practices are on [nearby] lands, and * * * explain why the approval of this nonfarm dwelling will not interfere with those identified practices." Sweeten v. Clackamas County, 17 Or LUBA 1243,

1248 (1989).[1]

There are five other dwellings located on parcels adjoining the subject property. However, the acreage encompassing the five dwellings was not described by the county. The county identified the surrounding land uses as rural residential in character. In addition, the county made nine specific findings. Findings 1 and 8 state that there is no "commercially viable farm activity" on nearby parcels. Record 5. However, OAR 660-33-130(4)(c) does not contain a "commercially viable" standard. Therefore, these findings, which discount uses on nearby land that the county does not consider commercially viable, are inadequate because they narrow the scope of the rule and, thereby, do not address the correct standard. Blosser v. Yamhill County, 18 Or LUBA 253, 258 (1989). The other challenged finding contains references to farming practices on nearby lands but fails to explain the farm uses involved, their location or how the proposed dwelling will be compatible with them.

This subassignment of error is sustained.

C. Unsuitability Standard

Petitioners claim that the county's findings are inadequate to satisfy the unsuitability standard contained in OAR 660-33-130(4)(c)(B). The county identified that

[1]OAR 660-33-130(4)(c)(A) codifies the historical standard used to implement ORS 215.283(3)(c). Case law that addresses the former standard continues to be relevant. See DLCD v. Crook County, 26 Or LUBA 478, 482-83 nn. 3-4 (1994).

standard as applicable. It provides:

> "[The general standard] The 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.
>
> "[Size] 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.
>
> "[Forest assessment] If the parcel is under forest assessment, the dwelling shall be situated upon generally unsuitable land for the production of merchantable tree species recognized by the Forest Practices Rules, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the parcel.
>
> "[Farm use] 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 predominately of Class I-IV soils * * *. Just because a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use.
>
> "[Forest assessment] If a lot or parcel is under forest assessment, the area is not 'generally unsuitable' simply because it is too small to be managed for forest production profitably by itself. If a lot or parcel under forest assessment can be sold or leased, rented or otherwise managed as part of a forestry operation, it is not 'generally unsuitable'. If a lot or parcel is under forest assessment, it is presumed suitable if, in Western Oregon, it is composed predominantly of soils capable of producing 50 cubic feet of wood fiber per acre per year * * *. If a lot or parcel is under forest assessment, to

> be found compatible and not seriously interfere with forest uses on surrounding land, it must not force a significant change in forest practices or significantly increase the cost of those practices on the surrounding land.[1]

While the challenged decision identifies OAR 660-33-130(4)(c)(B) as applicable, it does not address all of OAR 660-33-130(4)(c)(B). In particular, finding "8(b)" appears to be taken verbatim from LCC 1.1373(5) which contains similar criteria, but does not include the phrase "or merchantable tree species." The county provided no explanation for this discrepancy. To comply with OAR 660-33-130(4)(c)(B), the county must determine whether the subject property is suitable for the production of merchantable tree species.[2]

Of the five findings made by the county regarding the above criterion, only two concern the suitability of land for the production of farm crops. They state:

> "3) There was no testimony or evidence in the record that the upland property above the county road was suitable for commercial agricultural use. Testimony indicated that the agricultural use occurring on the upland side of the county road is not commercial in nature.
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> "4) The soils on the subject property are rated as capability VIe, which is below the standard assumed suitable for farm use, which is class IV.

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[1]To aid analysis, we have reformatted subparagraph (B) of OAR 660-33-130(4)(c)(B) into defined segments.

[2]The county is correct that there are specific portions of 660-33-130(4)(c)(B) which pertain exclusively to property in special forest assessment. Those sections are distinct from, and in addition to, the requirement that the subject property not be suitable for the production of merchantable tree species.

> In addition, steep slopes of 35 to 60% are not be [sic] conducive to farm crops or livestock." Record 7.

Neither of the above findings justify the conclusion that the subject property is unsuitable for the production of farm crops, livestock or merchantable tree species. Moreover, it is not clear whether the findings that were made relate to the subject property or property north of the county road in general.

In addition, the findings regarding property north of the county road refer to "commercial agricultural use." Record 7. OAR 660-33-130(4)(c)(B) does not impose a commercially viable standard. For the county to so narrow the rule is error.

Blosser v. Yamhill County, 18 Or LUBA 258.

The other three findings discuss the fact that the subject property is no longer receiving forest assessment. The county concluded that because the subject property was, at the time of the decision, not receiving any special assessment, "suitability for forest use is not required." Record 7. There appears to have been some confusion at the local level whether the county was required to assess the suitability of the subject property for forest uses.[1] The county must resolve this confusion in conformance with OAR

[1]The minutes of the September 13, 1995 public hearing indicate that the commissioners were unable to determine whether such an inquiry was necessary. The public hearing was continued in order to resolve the issue of whether the county had to determine the suitability of the subject property for merchantable tree species. Record 18-19. Neither the September 20, 1995 minutes nor the decision indicate whether the commissioners came to a resolution of the issue.

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

This subassignment of error is sustained.

D. Stability of the Overall Land Use Pattern

Petitioners contend that the county's findings regarding the stability of the overall land use pattern are inadequate. OAR 660-33-130(4)(c)(C) provides:

> "The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated. If the application involves the creation of a new parcel for the nonfarm dwelling, a county shall consider whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area[.]"

The county adopted two findings in response to this criterion:

> "1) There are already at least five (5) dwellings on adjoining parcels and in the immediate vicinity of the subject property.
>
> "2) The proposed dwelling is consistent with the development pattern in the area. It will not be precedent setting or constitute new residential development encroaching into an undeveloped region." Record 8.

In deciding whether a nonfarm dwelling will materially alter the overall land use pattern of the area, a three step inquiry is required:

> "First, the county must select an area for consideration. The area selected must be reasonably definite including adjacent land zoned for exclusive farm use. Second, the county must examine the types of uses existing in the selected area. * * * Third, the county must determine

> that the proposed nonfarm dwelling will not materially alter the stability of the existing uses in the selected area." Sweeten v. Clackamas County, 17 Or LUBA at 1245-46.

The county findings are inadequate because they do not describe the size of the area encompassing the adjoining parcels or describe what the "immediate vicinity" includes. Neither do they examine all of the types of uses in the selected area. While the findings do indicate that there are five dwellings in the area, such findings do not describe the development pattern, that is, when the existing dwellings were constructed or the history of development in the area. Finally, the challenged decision fails to conclude that the proposed dwelling will not materially alter the stability of the existing uses.

This subassignment of error is sustained.

The assignment of error is sustained.

The county's decision is remanded.