BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL L. WALKER, WAYNE McKY
and HAL ANTHONY,
Petitioners,

vs.

JOSEPHINE COUNTY,
Respondent.

LUBA No. 2003-204

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Michael L. Walker, Wayne McKy and Hal Anthony, Grants Pass, filed the petition for review.

No appearance by Josephine County.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 04/30/2004

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners challenge a county decision that approves a variance to a minimum lot size standard and a partition that creates a five-acre parcel and a 4.67-acre parcel in a rural residential 5-acre minimum (RR-5) zone.

FACTS

At the time the RR-5 zoning designation was placed on the subject property, the property included a little over ten acres and was improved with a single-family dwelling. In 1988, the applicant's predecessor-in-interest conveyed a small portion of the subject property to neighbors to the south. The purpose of the 1988 conveyance was to eliminate an encroachment onto the subject property by the neighbor's garage. As a result of the 1988 conveyance, the subject property was reduced to 9.67 acres.

In March 2003, the planning director approved a variance to the RR-5 zone five-acre minimum parcel size requirement and granted tentative partition plat approval to allow the property to be divided into a five-acre parcel and a 4.67-acre parcel, with the existing dwelling being located on the 4.67-acre parcel. As a result, the five-acre parcel can be developed with a dwelling in accordance with local zoning provisions. The variance and partition approval was appealed to the board of county commissioners. The board of county commissioners affirmed the planning director's decision in November 2003. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The county considered intervenor's application pursuant to Rural Land Development Code (RLDC) 44.030.[1] Petitioners contend that the RLDC 44.030 variance provisions cannot be applied

---

[1]The county's findings state, in relevant part:

> "The Board [of Commissioners] note[s] that the creation of a lot smaller than the minimum zoning size is only authorized when a variance is approved subject to compliance with variance standards. The [RLDC] provides for the approval of variances to provide relief to

to allow a new parcel to be created that does not satisfy the applicable minimum parcel size.[2] First, petitioners argue that such a process is not consistent with Josephine County Comprehensive Plan (JCCP) policies that provide that minimum parcel sizes are adopted for rural residential zones to ensure that rural densities and service levels are maintained.[3] Petitioners argue that, contrary to the county's findings, RLDC 13.010.B-D and 71.010.A provide limited exceptions to minimum parcel

---

persons seeking land use approvals when it can be shown that the request adequately addresses the applicable criteria. * * *" Record 9.

[2] RLDC 44.030 provides:

"Applications for variances shall comply with the following criteria:

"A. The reason for the variance arises from one or more special conditions or circumstances related to the property to be developed, such as lot size or shape, topography, the location of existing structures or facilities, vegetation, the presence of development restrictions (wildlife habitat, wetlands, special setbacks, etc.) or hazardous conditions (erosion, fire, flooding, etc.), or some other similar condition or circumstance.

"B. Strict adherence to the development standard(s) will result in a hardship to the property owner by substantially preventing or denying a development option contemplated by the applicable zoning district. The hardship shall not be self-imposed, but adverse economic or financial consequences may be used to support the hardship as long as the consequences result from a condition in the land, as described in criterion A above.

"C. The approved variance will result in the minimum departure from the development standard(s) needed to alleviate the hardship.

"D. The location, size, design and use of the proposed structure or facility will not result in a significant impact(s) on the neighborhood that cannot be reasonably mitigated through the imposition of special conditions of approval by the review body."

[3] For example, JCCP Goal 10, Policy 1.E provides, in relevant part:

"Rural Residential * * * include[s] those areas that are committed to non-resource uses, or [are] determined to be non-resource in capability; and used primarily for residential development. The rural character of these areas shall be preserved by appropriate lot sizes to insure that uses do not exceed the physical capability of the land and services shall be provided to the extent necessary to maintain a rural lifestyle."

RLDC 61.060.B, which petitioners contend implements JCCP Goal 10, Policy 1.E, provides that the minimum parcel size for properties zoned RR-5 is five acres.

size standards.[4] Petitioners argue that the exceptions found in RLDC 13.010.B-.D and 71.010.A are the *only* circumstances where a parcel that does not meet the minimum parcel size for the zone may be created. Petitioners contend that the variance procedures at RLDC 44.030 may not be used to expand the circumstances where smaller parcel sizes may be created, without undermining the minimum parcel size scheme as a whole.

Second, in the first assignment of error petitioners argue that RLDC 44.030 permits variances only when the "variance avoids unnecessary hardships due to special conditions or circumstances inherent in the property to be developed by permitting construction of a building * * * or on-site improvements * * * that would otherwise be prohibited." Petition for Review 6. Petitioners argue that RLDC 44.030 does not apply to circumstances where, but for the minimum parcel size standard, a use permitted by the zone could be established in compliance with all

---

[4] RLDC 13.010.B provides that "No lot area * * * shall be reduced in area, dimension or size below the minimum required by this code." However, RLDC 13.010.C and .D provide:

> "C. The general lot size or width requirements of this code shall not apply when a portion of a tax lot under single ownership is located in an area subject to an exception from statewide planning goals and is isolated from the part of the property by a public road.
>
> "D. When the lot size deficiency is entirely the result of a portion of the original parcel having been removed for public roadway purposes, or bona fide survey defects, the owner may partition the parcel into 2 or 3 lots of nearly equal size, provided the septic site evaluation is satisfactory and all other lot requirements are met. For the purposes of this subsection, the records of the County Assessor's Office or an independent survey by a property owner shall be used to establish acreage figures."

RLDC 71.010.A provides, in relevant part:

> "All proposed * * * parcels in a * * * partition * * * shall not be divided to a size less than the minimum requirements for the zone the * * * parcel is located in. Lots or parcels containing less than the minimum lot size requirements may be approved provided that:
>
> "1. Not more than 20 percent of the lots, up to a maximum of five (5) deficient lots or parcels, are created from an original tract; and
>
> "2. The area deficiency is contained within the public road right-of-way; and
>
> "3. The applicant provides a written statement from the Department of Environmental Quality stating that the smaller lots do not constitute a public health, safety, and welfare hazard."

development standards. Petitioners argue that RLDC 44.030 must be read in context with the purpose statement set out at RLDC 44.010 as well as the code definitions of "variance;" "hardship;" and "on-site improvements."[5] If those provisions are read together, petitioners argue, the code clearly does not allow for variances to minimum parcel size standards to be approved pursuant to RLDC 44.030.

For these reasons, petitioners argue that the county's conclusion that, notwithstanding the prohibitions set out in RLDC 13.010, 71.010.A, a smaller parcel size may be approved under RLDC 44.030 is contrary to both the text and relevant context of the JCCP and RLDC and, therefore, the county's decision must be reversed. ORS 197.829(1).[6]

---

[5] RLDC 11.030 defines "variance" as "[a] grant of relief from the requirements of this code [that] permits construction in a manner that would otherwise be prohibited by [the RLDC]."

RLDC 11.030 defines "hardship" as:

> "For the purpose of obtaining a variance, it is a condition which arises out of the land which may make it difficult for a person to construct a building or install improvements which are in compliance with the provisions of this code."

RLDC 11.030 defines "on-site improvements" as:

> "Public or private facilities, including but not limited to sanitary sewer systems, water systems, storm drainage systems, streets, and irrigation systems located within the boundary lines of the lot or parcel[.]"

[6] ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

While petitioners present a plausible reading of the ordinance provisions, we do not agree with petitioners that their reading is compelled by the provisions they cite. Nothing in RLDC 44.030.A or elsewhere directed to our attention expressly or impliedly prohibits an applicant from seeking a variance to the RLDC minimum lot size standards. Further, we note that "lot size" is one of the reasons that can justify a variance, which lends some support to the county's apparent view that lot size variances are not absolutely prohibited. The county could interpret RLDC 44.030 to allow variances to parcel standards where the general variance standards are met, in addition to the limited circumstances that petitioners identify where parcels that do not meet minimum size requirements are allowed by right without a variance.[7]

The first and second assignments of error are denied.

THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioners challenge the county's conclusions that (1) the inability to partition the subject property into two smaller parcels is a "hardship" as that term is defined in the county code, (2) the "hardship" prevents a development option contemplated by the zoning district, and (3) the "hardship" was not self-imposed.

A. Hardship

In the third assignment of error, petitioners argue that the county's finding that the applicant's inability to partition his property into two parcels that meet the minimum parcel size standard is a hardship is inconsistent with the code definition of "hardship." *See* n 5. In the fourth assignment of error, petitioners also argue that to the extent minimum parcel size does prevent the proposed division of land, the county has not established that (1) the existing parcel size prevents development of the property in accordance with the code and (2) that the special circumstances that apply to the applicant's property do not similarly apply to other RR-5 zoned property in the area.

The county found:

[7] We note that the county has proposed amendments to its development code to clarify that lot sizes may be varied provided that RLDO 44.030.A-.D have been satisfied.

> "Evidence in the form of testimony, maps, narration and an approved property line adjustment was presented to establish that the property was of a size and shape that would be available for a partitioning of the property in full accordance with the size and shape requirements of the Development Code except for the fact that an adjoining property owner constructed a building across a property line creating a situation that would either require the structure to be removed or that property be granted to place ownership of the land to coincide with the location of the structure. This act of construction was not under control of the property owner of the subject property and such action created a hardship for development that would be consistent with the requirements of the Development Code and the densities established in the Comprehensive Plan. * * *
>
> "Testimony was provided to establish that a hardship exists that would deprive the property owner of the ability to develop the land consistent with the provisions of the Development Code and the character of the area and that the denial of the partitioning of the property would substantially prevent the development of the property that is contemplated by the RR-5 zoning district that has a five acre lot size. * * * The Board [of County Commissioners] finds that the strict application of zoning requirements would cause an economic hardship to [the applicant] if he were not allowed to divide the property in a manner that is consistent with other parcels in the area. * * *." Record 9-10.

In other words, the county found that (1) the existing parcel size is the result of a property line adjustment that eliminated a neighbor's encroachment, (2) the encroachment and hence the property line adjustment were not under the applicant's control, (3) the proposed parcel sizes are more consistent with the five-acre minimum parcel size in the zone than the existing 9.67-acre parcel, and (4) the five-acre minimum parcel size is barrier to the realization of the applicant's economic interest in developing the property in a manner that is more consistent with the RR-5 zoning.

We agree with petitioners that those findings do not demonstrate that there is a "hardship" that prevents development in accordance with the provisions of the development code. The decision does not explain how any of those factors "aris[e] out of the land." Rather, the hardship is a consequence of a code standard that requires a five-acre minimum parcel size in the zone, and is not a consequence "arising out of the land."

The third and fourth assignments of error are sustained.

B. "Self-Imposed" Hardship

RLDC 44.030.B permits a variance where it is demonstrated that the hardship identified by the applicant is not "self-imposed." The board of county commissioners concluded that "the inability to create lots meeting the minimum size was not self-imposed but was caused by the encroachment of structures built on the property which necessitated the reduction of size to below the threshold to meet minimum lot size." Record 10. The board of county commissioners also concluded that the applicant's hardship was not self imposed because the "applicant performed due diligence to inquire about the division of the property prior to purchase [of the subject property] and that an option of variance was available to cure the lot size deficiency as indicated by conversations with Planning Department staff." Record 14.

In the fifth assignment of error, petitioners argue that the county's findings are inadequate to explain why the county believes that the applicant's hardship was not self-imposed. Petitioners dispute that the prior encroachment of structures caused the "inability to create lots meeting the minimum parcel size." In petitioners' view, the action that limited further partitioning of the subject property was the property line adjustment that eliminated the encroachment. Petitioners argue that nothing prevented the applicant's predecessor-in-interest from requiring that the property line adjustment reconfigure the subject property to retain the original number of acres. Petitioners also argue that the applicant purchased the subject property knowing that the property was zoned RR-5 and at least 10 acres were needed to partition the property pursuant to RLDC 71.010.A. Petitioners contend that the applicant was not required to purchase the subject property and, therefore, any hardship that comes with owning a 9.67-acre parcel in a zone that requires that new parcels include at least five acres is self-imposed. Finally, petitioners argue that even if the county adequately explained what RLDC 44.030.B requires, and why the hardship is not self-imposed in this case, the county's findings are not supported by substantial evidence.

The county's decision does not explain its view that it was the construction of the encroaching building that constitutes the "hardship" that prevents full development of the subject

property. As petitioners point out, the act of constructing the encroaching building did not reduce the subject parcel below ten acres. There is no dispute that the property line adjustment reduced the property below ten acres in size. Moreover, there is no explanation for the county's related view that the encroachment "necessitated" reducing the size of the subject property. The findings themselves acknowledge that the encroaching structure could have been removed. In addition, as petitioners point out, if the property owner was willing to enter into a property line adjustment, there appears to be no reason why that adjustment had to be done in a way that reduced the size of the subject property below ten acres. The county's decision offers no reason why the property owner's choice to enter into a property line adjustment that reduced the size of the subject property to less than ten acres can be viewed as anything other than self-imposed.

We do not understand the county to implicitly interpret RLDC 44.030.B to be satisfied if the applicant demonstrates that the hardship was not the result of the *applicant's* own actions, even if that hardship was the result of a predecessor-in-interest's self-imposed choice. To the extent it does, the decision does not explain why the applicant's decision to purchase a parcel that he knew did not meet the minimum area requirements to allow a partition was not a self-imposed hardship.

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

RLDC 44.030.D permits a variance to be approved if

> "The location, size, design and use of the proposed structure or facility will not result in * * * significant impacts on the neighborhood that cannot be reasonably mitigated through the imposition of special conditions of approval by the review body."[8]

[8] RLDC 11.030 defines "significant (adverse) impact" as:

> "A criterion used to determine whether proposed land use activities will inappropriately affect the use or quality of other properties or public facilities. Impacts are significant when they cause serious adverse effects to, or conflict with, other properties in ways that cannot be reasonably mitigated through the imposition of conditions of development or operation. The review body shall judge the significance of impacts based on what a reasonable person would consider serious given the facts and circumstances of the application."

RLDC 52.050.D provides in relevant part that "the following information will be reviewed in order to determine [that a proposed] partition complies with county standards:"

"* * * * *

"D. The carrying capacity * * * is adequate for the proposed density of development[.]"[9]

Opponents testified that the proposed partition and variance would adversely affect the neighborhood, in that development of the parcel would add to traffic congestion in the vicinity, would contribute to diminished air quality, would present a wildfire hazard, and would adversely affect the availability of groundwater. Petitioners argue that the county misconstrued RLDC 44.030.D and 52.050.D, because the county only considered the impact the proposed land division would have on immediately adjacent properties, and did not consider impacts on the neighborhood as a whole. Petitioners further argue that the findings are inadequate because they do not respond to issues petitioners raised regarding the capacity of a local I-5 interchange to accommodate additional vehicle trips that will be generated by development on the subject property, or address issues raised regarding the carrying capacity of the land and infrastructure to support additional residential development.

We do not believe that either RLDC 44.030.D or 55.040.D require the county to consider the overall cumulative impact of development within an area when considering a variance and partition application for one 9.67-acre parcel. Fairly read, the standards require that the county consider the incremental impact of the proposed development on the neighborhood, and do not require a comprehensive review of cumulative development that is only incidentally affected by a

[9] RLDC 11.030 defines "carrying capacity" as:

> "The ability of land to support proposed development as determined by an evaluation of suitability for sewage disposal, the adequacy of the domestic groundwater supply (quantity and quality), the presence of adequate off-site roads, the suitability of soil and terrain to support on-site roads, the presence or absence of flood, fire or erosion hazards, and the applicability of other special land use concerns (e.g., watershed protection, protection of wildlife and fishery habitat, the presence of scenic easements, airport flight paths, the availability of emergency services, etc.)."

particular proposal. The county found that the development that would be permitted as a result of the variance and partition would not significantly increase traffic on local roads, would not measurably diminish air quality, and that sufficient groundwater is available to provide domestic water for one additional single-family dwelling. The county also found that opponents' testimony was focused on the cumulative impact of development within the area, and did not specifically identify any particular significant impacts arising from the proposed variance and partition that would affect the neighborhood or would exceed the carrying capacity of the area. The county further found that, to the extent opponents had identified areas of concern, such as wildfire hazards, those concerns were not legitimate. Those findings are adequate to demonstrate that the county considered impacts to the area that are likely to be generated by development on the subject property, and those findings are supported by substantial evidence.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

RLDC 52.050.H provides in relevant part that "the following information will be reviewed in order to determine [that a proposed] partition complies with county standards:"

"* * * * *

"H. The proposed development is compatible with the existing land use pattern in the area[.]"

The county concluded that this standard was satisfied, finding in relevant part:

"The subject property is in an area that has residentially zoned land with lots that are generally improved with single family dwellings. The sizes of the lots are highly variable with a number of lots within the 5-acre zoning district less than 5 acres in size. A parcel that is zoned RR-5 that is located northerly of the subject property was granted a variance and partition to create a lot smaller than 5 acres. While approval of another variance does not set a preceden[t], the Board [of County Commissioners] recognizes that slightly less than one half of the 30 lots in the vicinity of the subject property are smaller than five acres in size. The Board [of County Commissioners] finds that the analysis of the character of the area as presented by the applicant's representatives is accurate and clearly represents the nature of development (which includes a significant number of existing parcels that are below the minimum lot size.) The Board [of County Commissioners] finds that the

approval of this request to be consistent with the established character of the area." Record 10-11.

Petitioners argue that "consistency" with the "established character of the neighborhood" does not necessarily mean that the proposed development is *compatible* with the existing land use pattern, as is required by RLDC 52.050.H. Petitioners argue that in order to determine whether the proposed partition is compatible with the existing land use pattern of the area, the county must consider more than just the property in the area that is zoned RR-5. According to petitioners, approximately 63 percent of the property within a one-quarter mile radius of the subject property is zoned for resource use. Petitioners contend that the fact that the proposed development may be consistent with past land divisions within the rural residentially zoned areas does not necessarily mean that such a land division is compatible with nearby resource use. Petitioners argue that the county must identify the study area, examine the types of uses that exist and are allowed within the study area, and then draw a conclusion as to whether the proposed development is compatible with the existing land use pattern in the area.

Petitioners' argument is based on the analysis required to site a non-farm dwelling on agricultural lands. *See Sweeten v. Clackamas County*, 17 Or LUBA 1234, 1245-1246 (1989); OAR 660-033-0130(3) and (4) (setting out test for approving non-farm dwellings). We have held that local approval criteria that have similar compatibility standards but do not implement Goal 3 (Agricultural Lands) provisions need not be interpreted as strictly as the non-farm dwelling standards. *Ray v. Douglas County*, 36 Or LUBA 45, 51 (1999). Here, petitioners do not argue that the partition standards implement OAR 660-033-0130(3) and (4), and we do not see that they do. Therefore, so long as the county's findings identify the area that it considered relevant and identify facts that demonstrate that the partition of the subject property is compatible with the existing land use pattern of the area, RLDC 52.050.H is satisfied.

The county relied on evidence presented by the applicant that describes the relevant study area, including existing parcelization and rural residential development patterns. That evidence is found at Record 301. Petitioners do not explain why the area the county relied upon is not indicative

of the existing rural residential development pattern in the area, or otherwise explain why that evidence is inadequate to demonstrate that RLDC 52.050.H is satisfied. Therefore, petitioners' argument provides no basis for reversal or remand.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioners argue that the county's decision must be remanded for the county to adopt findings that respond to arguments that petitioners raised regarding the applicability of certain comprehensive plan policies.

Petitioners are correct that the county must respond to issues raised below that pertain to relevant approval criteria. *Knight v. City of Eugene*, 41 Or LUBA 279, 293 (2002); *McCoy v. Linn County*, 16 Or LUBA 295, 302 (1987) *aff'd* 90 Or App 271, 752 P2d 323 (1988). However, in this case the county did address the issues petitioners raised. The county found that the RLDC implements the relevant portions of the JCCP and, therefore, plan policies do not apply directly as approval criteria that must be satisfied before a variance and partition may be approved. Petitioners do not raise a cognizable challenge to those findings. Accordingly, the eighth assignment of error provides no additional basis for reversal or remand.

The eighth assignment of error is denied.

The county's decision is remanded.