BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARLENE GODFREY, Petitioner, vs. MARION COUNTY, Respondent, and WILLIAM and JANICE HAMMOND, MARLOWE and MARILYN KROHN, Intervenors.	LUBA No. 80-104 FINAL OPINION AND ORDER

Appeal from Marion County.

Edward J. Sullivan, Portland, filed the Petition for Review on behalf of Petitioner.

William and Janice Hammond, Aumsville, filed the brief on their own behalf.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

REMANDED 4/14/81

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

REYNOLDS, Chief Referee.

NATURE OF THE PROCEEDINGS

Petitioner appeals Marion County's approval of a major partitioning and variance which allowed the division of a 6 acre parcel into two parcels of 4.5 acres and 1.5 acres on Shaw Square Road near Aumsville. A variance to the minimum lot area requirements was necessary because the zoning on the property at the time of the county's decision was AR-3 (3 acre minimum).

ASSIGNMENTS OF ERROR

Petitioner alleges the partitioning decision violates certain statewide planning goals as well as variance criteria contained in the county's zoning ordinance. Petitioner contends Goal 3 (Agricultural Lands) was violated because the county failed to take a proper exception as required by Goal 2 and failed to comply with the requirements in ORS 215.213(3). Petitioner contends the county failed to comply with Goal 4 because it failed to determine whether the subject parcel was forest land and failed to take a proper exception to Goal 4. Petitioner contends Goal 1 was violated because the county failed to provide petitioner and other citizens with adequate opportunities for involvement in its process of considering exceptions to the statewide planning goals. Finally, the petitioner argues that the county erred in concluding that the partitioning request met the county's requirements for a lot size variance.

SUMMARY OF HOLDING

The Board concludes that the county failed to comply with the requirements for obtaining a variance from the minimum lot size requirements of its zoning ordinance. Because the partitioning decision requires the county to comply with its variance criteria, and because we conclude the county did not so comply, the Board must remand the partitioning decision to the county.

STATEMENT OF FACTS

The applicants, William and Janice Hammond, applied to Marion County for a major partition to divide their 6.04 acre parcel into two parcels consisting of 4.50 acres and 1.54 acres. The procedural history of their application is summarized in an order of this Board dated January 12, 1981. At the time the major partition application was filed with Marion County and approved by the Marion County hearings officer, the zoning on the property was AR. Lot sizes in the AR zone were to average 1.5 to 3 acres. When the AR zoning was invalidated by this Board in the case of 1000 Friends of Oregon v. Marion County, 1 Or LUBA 33 (1980), the zoning on the applicants' property reverted to the previous zoning designation, AR-5. That zoning remained on the property until July of 1980 when Marion County, following adoption of amendments to its comprehensive plan, rezoned the property to AR-3, the AR-3 designation has a 3 acre minimum lot size requirement. These changes in zone occurred pending the appeal

of the Marion County hearings officer's decision to the Board of County Commissioners. The Board of County Commissioners specifically decided to delay its consideration of the appeal in this case until the zoning for the area had been settled.

The applicants' parcel, prior to approval of the partition, was rectangular in shape with 243 feet of frontage on Shaw Square Road. The parcel extended back from Shaw Square Road over 1,000 feet. Exhibit "B" is a map in the record (the pertinent portion of which is reproduced in Appendix "A" to this opinion) which indicates that approximately 400 feet back from Shaw Square Road begins a "very steep slope" (actual slope unstated) of approximately 150 feet in length. This slope appears to divide the parcel roughly in half.

The applicants purchased the 6.04 acre parcel in 1972. In 1978 or 1979 the applicants constructed their "dream home" between the slope and Shaw Square Road. The applicants' partition request, as approved by Marion County, would divide the 6 acre parcel at a point between the applicants' home and Shaw Square Road. (See Appendix "A"). An easement along one side of the property would provide the applicants with ingress to and egress from their home.

It appears from the map that had the applicants sought to partition their property at a point approximately in the middle of the steep slope that two 3 acre parcels could have been created from this 6.04 acre parcel.

The county's findings in support of the variance to the 3

acre minimum lot area requirement are as follows:

"14. The subject property is large enough to be divided into two 3+ acre parcels that would comply with both the intent and the literal requirements of the present AR-3 zone. However, due to the placement of the existing well and dwelling on the parcel, the proposed 1.54 acre parcel could not be increased in size. Division and placement of a dwelling on the south portion of the parcel would be further away from the committed and developed area and encroach into the area used and zoned for farmland to the south. Creation of a second homesite from this 6+ acres on the north, although of smaller size, would serve to minimize potential conflicts with farm uses to the south while not increasing the actual residential density of the property over and above what it could be if the property were divided into two 3+ acre parcels as would be permitted in the present zone. It would result in the efficient use of this developed and committed rural residential land while minimizing potential conflicts with agricultural zones, as required in the Rural Residential policies of the Comprehensive Plan, without increasing the actual permissible density.

"15. The location of the existing improvements of the property in relation to its configuration and terrain, the proximity of residential development on the north compared to the farm uses on the south are unusual circumstances applying to this land that do not apply generally. These circumstances present an unnecessary hardship and practical difficulty in complying with the literal requirements of the AR-3 zone in that, while the same residential density would result from this division, the literal three acre minimum lot size cannot reasonably be complied with.

"16. The proposed partitioning is in harmony with the intent and purpose of Section 122.010 and 122.020 and Section 128.010 of the Marion County Zoning Ordinance. It is in compliance with the Rural Residential policies of the Comprehensive Plan.

"17. Granting this particular partitioning application, notwithstanding the literal requirements of the AR-3 zone, would not be materially detrimental to the public welfare or adversely affect health, safety, propety [sic] or improvements in the area.

"18. The applicants applied for this

partitioning under a zone which would have permitted it. Through legal actions and changes in ordinances, and through no act of the applicants, the partitioning is now, on its second appeal, subject to different standards than those under which it was filed and decided below. This, in itself, is a most unusual circumstance applying in this case that distinguishes it from past and future partitionings in the area. This circumstance also creates an unreasonable hardship on the applicants to comply with requirements which have been retroactively imposed on their application through no action of their own."

OPINION

Section 122.020 sets forth the conditions for granting a variance as follows:

"The Planning Commission or Hearings Officer may permit and authorize a variance when it appears from the application, and the facts presented at the public hearing, and by investigation:

"(a) That there are unnecessary, unreasonable hardships or practical difficulties which can be relieved only by modifying the literal requirements of the ordinance;

"(b) That there are exceptional or extraordinary circumstances or conditions applying to the land, buildings, or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings, or uses in the same zone; however, nonconforming land, uses or structures in the vicinity shall not in themselves constitute such circumstances or conditions;

"(c) That granting the application will not be materially detrimental to the public welfare or be injurious to property or improvements in the neighborhood of the premises;

"(d) That such variance is necessary for the preservation and enjoyment of the substantial property rights of the petitioner;

"(e) That the granting of the application will not, under the circumstances of the particular case, adversely affect the health or safety of persons working or residing in the neighborhood of the

property of the applicant; and

> "(f) That granting of the application will be in general harmony with the intent and purpose of this ordinance and will not adversely affect any officially adopted comprehensive plan."

Comparing the conditions set forth in 122.020 with the findings of fact made by the county, we conclude that the conditions for granting a variance have not been met. Section 122.020(a) requires a showing that there be "unnecessary, unreasonable hardships or practical difficulties which can be relieved only by modifying the literal requirements of the ordinance." The county believed this requirement was complied with because of (a) existing improvements on the parcel and (b) existance of residential development to the north of the parcel compared with farm uses on the south of the parcel. Marion County's zoning ordinance does not provide a specific definition of "unnecessary hardship" or "practical difficulties." As petitioner points out in her brief, this Board and the Oregon Appellant Courts

> "have followed the rules subscribed to by most jurisdictions that the hardship which must be shown to obtain a variance must itself arise out of conditions inherent in the land that distinguish it from other land in the general neighborhood. Erickson v. City of Portland, 9 Or App 256, 262, 496 P2d 726 (1972); Lovell v. Planning Commission of the City of Independence, 37 Or App 3, 586 P2d 99 (1978); Standard Supply Company v. City of Portland, LUBA No. 80-018, Final Opinion and Order of September 8, 1980, page 7. Furthermore the Oregon Courts and LUBA have generally held that the variance must be the minimal variance necessary to make use of the property. Id. Thus, practical difficulties and unnecessary hardships must be conditions which, without a variance, are shown to result in the virtual uselessness of the property.

Erickson, page 262; Fasono v. Washington County Commission, 262 Or 574, 507 P2d 23 (1973)."

Marion County erred in concluding that the location of the applicants' newly constructed home on the property and the well which serves the applicants' property were conditions on the land which gave rise to a "unnecessary hardship" or "practical difficulty." These are not conditions "inherent on the land" but are ones which the applicants themselves have created. Moreover, the county found that it would be more suitable to allow a division of the land between the applicants' present dwelling and Shaw Square Road than in the middle of the parcel because future development would be located further away from the farm uses presently existing to the south of the 6 acre parcel. This expression of suitability or preference does not give rise to an "unnecessary, unreasonable hardship or practical difficulty."[1]

There is simply no finding by the county that the steep slope which appears to naturally bisect the applicants' 6 acre parcel is so steep that a road could not be extended from Shaw Square Road to the southern half of the applicants' parcel to enable the 6 acre parcel to be divided into roughly equal parts, thereby complying with the 3 acre minimum lot size requirement in the AR-3 zone. In the absence of such a finding, the county cannot conclude that there is an unnecessary hardship or practical difficulty inherent in the 6 acre parcel which prevents the parcel from being divided into

two 3 acre parcels.

Subsection (d) of section 122.020 of Marion County's zoning ordinance also requires that the variance be "necessary for the preservation and enjoyment of the substantial property rights of the petitioner." We conclude the variance is not necessary in this respect for at least three reasons. First, the applicants in this case purchased a 6 acre parcel upon which they erected their home. The applicants do not need to divide their 6.04 acre parcel in order to enjoy a substantial property right: they are already enjoying it. Second, the fact that the property has been zoned in such a way that, at least theoretically, two 3 acre parcels may be created from the 6 acre parcel does not give the applicants a "property right" to have two parcels created. Zoning laws do not give rise to "property rights" as such. (See Anderson, American Law of Zoning, sec 4.27). Third, as previously stated, there is no adequate showing that it is not possible to partition this property in the middle of the parcel, thereby creating two 3 acre parcels and avoiding the necessity for a variance.

In Finding No. 18 set forth in the Statement of Facts, supra, the county urges as a basis for granting the variance the fact that different standards applied to the granting of the variance when it was before the Board of Commissioners than when the request was first heard by the hearings officer. We know of no authority which would hold that a change in the zoning designation for one's property is justification for

granting a variance to zoning requirements pertaining to minimum lot areas which exist at the time the county finally considers the request. As petitioner noted in her brief, the changes in zoning on the applicants' property are not unique to the applicants' property but apply equally to all residents in the Shaw Square area.

The applicants in this case have been through a long and arduous process attempting to partition their land. While this process is understandably unsettling to one whose use of his or her land depends upon the outcome of the process, it is not a justification for avoiding application of legal requirements once those legal requirements are finally settled. We conclude, accordingly, that while Marion County may have been sympathic to the applicants' situation in this case, its sympathy was not grounds for granting a variance to the minimum lot area requirements contained in the county zoning ordinance.

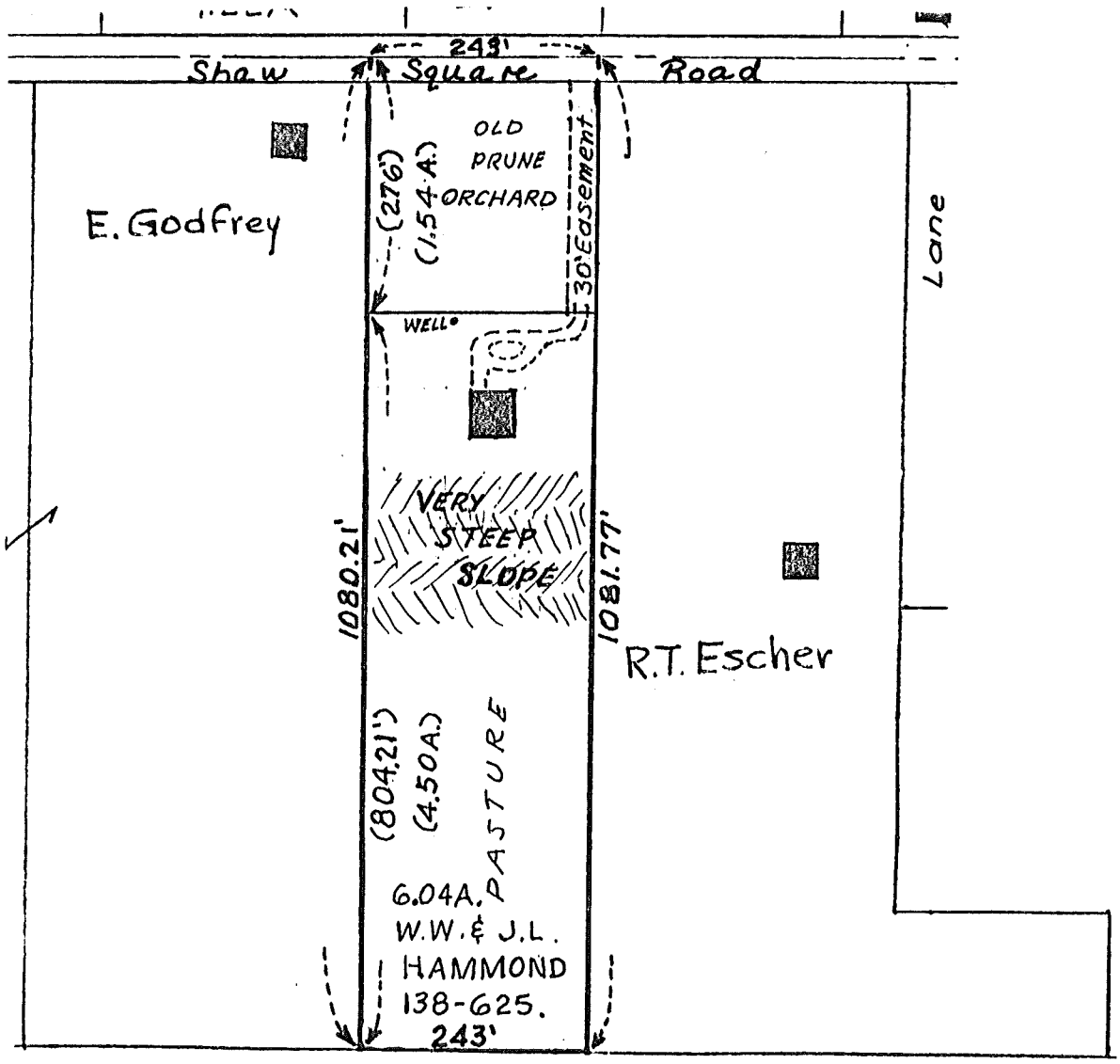
For the foregoing reasons, this Board concludes that Marion County failed to properly apply its variance criteria in granting the applicants a variance from the minimum lot area requirements in the AR-3 zone. The decision of Marion County is, accordingly, remanded for further proceedings consistent with this opinion.[2]

FOOTNOTES

[1] If the county believes that this 6 acre parcel should not be divided in half because placement of a dwelling on the southern 3 acres of the parcel so divided would present a conflict or be incompatible with farm uses bordering such parcel, then it appears that the county should not have zoned this parcel for 3 acre minimum lot sizes in the first place.

[2] Marion County's Comprehensive Plan is, we understand, soon to be re-examined by LCDC to determine whether it should be acknowledged as in compliance with the statewide goals. Because of the possiblity that the plan will be acknowledged and the goal issues will be moot when the county reconsiders this partitioning request, we express no opinion as to petitioner's assignments of error involving alleged violations of the statewide goals.

APPENDIX "A"


243'
Shaw Square Road
OLD PRUNE ORCHARD
(276')
(1.54 A.)
30' Easement
E. Godfrey
WELL
Lane
VERY STEEP SLOPE
1080.21'
1081.77'
R.T. Escher
(804.21')
(4.50A.)
PASTURE
6.04A.
W.W. & J.L. HAMMOND
138-625.
243'