BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENNETH SOUDERS and CAROLYN SOUDERS, Petitioners, vs. MARION COUNTY BOARD OF COMMISSIONERS, Respondent.	LUBA No. 81-138 FINAL OPINION AND ORDER

Appeal from Marion County.

J. Harlan Boldt, Woodburn, filed the Petition for Review and argued the cause on behalf of Petitioners.

Marilyn J. Harbur, Assistant Legal Counsel for Marion County, filed the brief on behalf of Respondent. Marion County made no appearance at oral argument.

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

AFFIRMED 4/12/82

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.

INTRODUCTION

Petitioners appeal Marion County's denial of their request to partition their 55 acre parcel into two parcels of 35 acres and 20 acres. Petitioners contend that the county's denial constitutes a misapplication of the applicable law as contained in the Marion County zoning ordinance and ORS 215.203.

STATEMENT OF FACTS

Petitioners own 55 acres zoned EFU in Marion County. One parcel under their request is 20 acres in size, flat and consists of Class II soil. It is presently leased to an area farmer and is used for row crop production. The farmer to whom the land is leased also farms an additional 80 acres in the area. The purpose of the partition would be to sell this 20 acres to the present renter. The other parcel under their request has slopes of 20% in some places. This portion of the property is used by petitioners for a dairy operation.

OPINION

Petitioners' first assignment of error is that the county lacked authority to deny petitioners' application for minor partitioning. Petitioners argue in their petition for review there is no provision in the Marion County subdivision and partitioning ordinance which relates to minor partitionings. Because the hearings officer, whose order the County Board of Commissioners approved, found that a minor partitioning required the county's approval, petitioners argue the hearings

officer and, hence, the county improperly construed the county subdivision and partitioning ordinance. At oral argument petitioners modified their position. They asserted the county lacked authority to require that petitioners obtain a minor partitioning approval prior to selling 20 acres of their property.

Marion County answers petitioners' first assignment of error by referring to Marion County Subdivision and Partitioning Ordinance (MCSPO) 540(18) which defines "minor partition" as:

> "A partition that is subject to approval by a county under regulation or ordinance adopted pursuant to ORS 92.046, as amended, and that does not include the creation of a public or private road or street.***"

The partitioning process in Marion County is set forth in the MCSPO 540(VII)(2). An application for a partitioning must be filed with the planning department unless the partitioning is to take place in a zone exempted from the partitioning process The EFU zone is not a zone exempted from the partitioning process. Accordingly, under the Marion County procedure, an application must be filed with the Marion County Planning Director and approval ultimately obtained. The county argues its procedure is consistent with ORS 92.046 which allows a county by ordinance to establish procedures governing minor partitions.

To the extent petitioners are arguing that Marion County does not require approval before a person may partition land in

an EFU zone, we disagree. Marion County Zoning ordinance (MCZO), Section 136.050 sets forth the requirements which must be met for the division of land in an EFU zone. Section 136.050 specifically states that the regulations contained therein "shall apply when lot line adjustments and partitionings of land within an EFU zone subject to the provisions of the Marion County Subdivision and Partitioning Ordinance are proposed." The procedure for partitioning land is set forth in MCSPO 540, Section VII. Subsection 2 of Section VII provides that when an area or tract of land "is to be partitioned an application shall be filed with the department provided that this section shall not apply to minor partitioning in the RD, RL, RM, CO, CR, CG, IC, ID, IP, IL or IH zones." The procedure calls for final decision by the administrator, with appeal available to the planning commission or hearings officer and ultimately to the Board of Commissioners. We believe MCZO Section 136.050 and MCSPO 540, Section VII, when read together, clearly require that minor partitions in EFU zones require approval of the county.

We do not know exactly how to respond to petitioners' contention that Marion County lacked authority to require a minor partitioning approval prior to petitioners being able to sell 20 acres of their property. Suffice it to say that we believe petitioners are, by statute, precluded from selling any portion of their 55 acre parcel without first obtaining approval from the county because the county has, as determined

above, adopted a minor partitioning process. ORS 92.016(2) prohibits the sale of

> "...any parcel in a major partition or minor partition for which approval of a tentative plan is required by any ordinance or regulations adopted under ORS 92.044 or 92.046, respectively, prior to such approval."

Petitioners' second assignment of error is that the county adopted an overly restrictive definition of the term "parcel" in concluding that the 20 acres did not meet the minimum lot size in an EFU zone for Class II soil. Petitioners' argument appears to be in two parts. First, petitioners argue the county placed too much emphasis on parcel sizes in denying the partition. Petitioners argue minimum parcel sizes adopted by the county are only guidelines and "not meant to be automatic parcel size minimum acreage figures," citing the Marion County Comprehensive Plan at page 19. Petitioners argue the hearings officer's decision does not take into account this "flexibility of approach...as he does not consider criteria sufficient to evidence such consideration." Petition for Review at 8.

Second, petitioners argue the county should have considered the fact that the purchaser of the 20 acres would be using the 20 acres in connection with an additional 80 acres.[1] Thus, according to petitioners, the actual "parcel" created by this partitioning would be a 100 acre parcel rather than simply a 20 acre parcel. Because the minimum lot size for Class II soil in Marion County is 40 acres, petitioners say the parcel actually created under petitioners' interpretation of the term fits

within the minimum lot size requirement of the Marion County Comprehensive Plan and zoning ordinance. Petitioners say the hearings officer failed to consider whether this partition would further the overall purpose of the EFU zone, which is "to maintain agricultural land in that use, with parcel size only a consideration to ensure this continues." Petition for Review at page 8. Petitioners go on to say:

> "The hearings officer's order concedes the use would remain unchanged. Where, in this case, there is no actual use but merely a change in ownership to an area farmer who is going to keep the land in exactly the same use, there is no public purpose served in denying the petitioners the opportunity to go through with this minor partitioning." Petition for Review at pages 8-9.

The county argues in response to petitioners' second assignment of error that it properly applied the Marion County zoning ordinances in denying petitioners' partitioning request. MCZO Sections 136.000 to 136.120 govern divisions of land. The following provision applies to farm parcels:

> "(1) Any proposed parcel intended for farm use must be appropriate to the continuation of the existing commercial agricultural enterprise of the particular area. This requirement can be satisfied as provided in (2) and (3) below or by satisfying the requirements in subsection (d)." MCZO Section 136.050(a)(1).

Subsection 2 of Section 136.150(a) sets forth the criteria which are to be considered in determining appropriate parcels sizes:

> "(2) In determining appropriate parcel sizes the following factors concerning the subject property and surrounding areas shall be considered: soil productivity, drainage, terrain, special soil or land

conditions, availibility of water, type and acreage of crops grown, crop yields, processing and marketing practices, and the amount of land needed, based on area characteristics, to constitute a commercial farm unit."

Subsection 3 of 136.150(a) also allows parcel sizes to be determined based on guidelines contained in 136.050(c). Those guidelines are as follows:

> "Parcels intended for farm use shall generally be: 40 acres or more if area is predominantly Class I and II soils; 60 acres or more if predominantly Class III soils;..."

Section 136.050(d) authorizes parcels to be created which do not meet the above criteria if it is found that:

> "(1) The commercial farm use or forest use of the parcel will be increased compared to the production that can be achieved by using accepted farming practices or forest management practices on the undivided property; and
>
> (2) The proposed parcel will not materially alter the stability of the overall land use pattern of the area; and
>
> (3) The applicant has provided a site development and management program for the proposed commercial farm use or forest use.***"

The county argues that the hearings officer properly determined that the minor partitioning would not create parcels appropriate for the continuation of existing commercial agriculture enterprises in the area. The hearings officer found

> "***appropriate parcel sizing is the key issue in any land division in a farm zone.
>
> "Appropriate parcel sizing is determined by using a combination of soil factors and other parcel sizing in the area. As a general rule farm parcels containing predominantly Class I and II soil types require a minimum of 40 acres to be considered to be a

> viable commercial, economic, agricultural unit. MCZO 136.050(c). Smaller parcels can be justified (as an exception) only if it is shown that the smaller lot size will not materially alter the stability of the overall land use patterns in the area, MCZO 136.050(d)(2), or that the use is intensified in such a way that local experts (Extension Agents) agree to the necessity. MCZO 136.050(d)(1), (3).

Applying the above criteria, the hearings officer found that smaller lot sizes than those identified in the zoning ordinance were not warranted. Everyone conceded the use of the property would not change. Because the existing farm use would continue, the hearings officer found smaller lot sizes were not needed for intensive agricultural use. The hearings officer also found that there was a "very grave danger of altering the stability of the overall land use patterns in the area." He found parcels in the area ranged from 30 to 100 acres "with most parcels managed with other parcels to create much larger farm units." He concluded

> "***Allowing farms to be divided according to crop type or usage may set a precedent for other fields on other farms in the area to also be separated, thereby lowering the average parcel size considerably with the attendant potential for additional dwellings and population density increase."

The hearings officer also addressed MCZO Section 136.050(a)(2) which allows smaller parcel sizes

> "[I]f certain soil factors require it, including soil productivity, drainage, terrain, special soil or land conditions, irrigation, type and acreage of crops, crop yields, processing and marketing practices."

The hearings officer found that those factors did not require smaller parcel sizing even though there were topographical

differences between the 20 acres (basically flat) and the 35 acres (basically sloping). Again, the hearings officer found that the uses on the property would continue in the future. The hearings officer noted the 20 acre parcel "in and of itself is not a viable economic unit. It must be farmed in conjunction with other parcels." The hearings officer concluded the fact the parcel would not be an economic farm unit by itself justified requiring that the 20 acres be retained with the 35 acres as one parcel.

Finally, the hearings officer concluded that the agricultural policies contained in the Marion County Zoning Ordinance as well as statewide goals would best be achieved by retaining the 20 acres with the 35 acres as a single parcel. The hearings officer did not believe the "facilitation of a land sale" was a sufficient basis for allowing the partitioning, when to do so would not be consistent with the county's and statewide agricultural policies.

The county argues that the only justification presented by the petitioners for allowing the partitioning is that the 20 acres would be retained in farm use by the purchaser. The county argues that this is, in essence, an "intent of the partitioner" argument and that intent should not be used as a basis for allowing partitionings. The county cites Taber v Multnomah County, 1 Or LUBA 230 (1980), where we rejected use of "intent" as a basis for allowing a partitioning, as well as our recent decision in Stringer v Polk County, LUBA No. 81-068.

We do not believe the county adopted an interpretation of the term "parcel" in its ordinance which is more restrictive than permitted by its comprehensive plan. The minimum parcel sizes set forth in the county's zoning ordinance are not the only bases upon which the county may allow a partitioning of land in an EFU zone. There is at least one additional means by which a person may obtain a partition, and that is to satisfy the criteria in MCZO Section 136.050(d). The minimum lot sizes are not, therefore, mandatory but only guidelines or as the hearings officer stated, "general rules" for partitioning land. The county's ordinance does not conflict with the county's comprehensive plan.

Moreover, the hearings officer addressed all of the criteria contained in the county's zoning ordinance which might possibly allow a partitioning of land to occur. The hearings officer concluded that the criteria in MCZO Section 136.050(d) as well as the criteria in Section 136.050(a)(2) would not be met by petitioners' application. Petitioners do not challenge the adequacy of the hearings officer's findings on these criteria or the sufficiency of the evidence to support the findings. Petitioners' primary argument is that notwithstanding these criteria, the partitioning should have been allowed because the record demonstrates the intent of the applicant and the purchaser is to keep the property in farm use. Intent, however, is not one of the criteria in the county's zoning ordinance. We cannot, therefore, say that the

county took an overly restrictive view of its zoning and partitioning ordinance in denying petitioners' partitioning request.

Petitioners' third assignment of error is that the hearings officer's interpretation of an exclusive farm use zone is at variance with the definition of "farm use" in ORS 215.203. Again, petitioners attach significance to the fact there will be no change in use of the property after the partition. In essence, petitioners are arguing that to deny a partition where the property will remain in exclusive farm violates ORS 215.203.

Responding to petitioners' third assignment of error, the county argues that it has the authority and, in fact, the duty under Goal 3 to establish criteria for minimum lot sizes in EFU zones. The fact that land may be continued in farm use is not, by itself, a justification for partitioning. Therefore, establishing minimum lots sizes which are greater than the minimum necessary to enable a person to keep property in "farm use" within the meaning of ORS 215.203 does not, argues the county, violate that statute.

Again, we agree with the county. To adopt petitioners' argument would require that a county grant a partition whenever the record disclosed that parcels to be created by the partition would be of a size appropriate for "farm use" as defined in ORS 215.203. Nothing in ORS 215.203 requires this result. The county correctly notes that Goal 3 requires that any lots created in an EFU zone must be consistent with

statewide Goal 3. As stated in Jurgensen v Union County Court, 42 Or App 505, 600 P2d 1241 (1979):

> "In order to satisfy Goal 3, an owner seeking to partition land has the burden of proving: (1) The predominant soil classes are other than agricultural land within the Goal 3 definition,...or (2) The lot size created by the partition will be sufficient for the continuation of the existing agricultural enterprise in the area; or (3) The factors set out in ORS 215.213, and incorporated by reference into Goal 3, relevant to permitting non-farm uses - using meaning residential use - on agricultural land are met..." 42 Or App 505 at 511.

To be consistent with Goal 3's requirements, the county's ordinance must require at least that which Goal 3 requires. The county has determined that as a general rule a 40 acre parcel is the minimum parcel size which will satisfy Goal 3. Petitioners do not challenge this determination.

For the foregoing reasons, the decision of Marion County is affirmed.

FOOTNOTE

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[1] Petitioners stated at oral argument that the additional 80 acres is not adjacent to the 20 acres.