BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HENRY E. ALLUIS and JUDY F. ALLUIS, Petitioners, v. MARION COUNTY, Respondent.	LUBA NO. 82-074 FINAL OPINION AND ORDER

Appeal from Marion County.

Donald M. Kelley, Silverton, filed a petition for review and reply brief and argued the cause for petitioners. With him on the brief were Kelley & Kelley.

Robert C. Cannon, Marion County Counsel, Salem, filed a brief and argued the cause for respondent.

Cox, Board Member; Bagg, Board Member; participated in the decision.

REVERSED 12/22/82

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), as amended by Oregon Laws 1981, ch 748.

COX, Board Member.

NATURE OF PROCEEDING

Petitioners seek review of the August 9, 1982 Marion County decision which adopted a hearings officer's order and findings. The decision denies petitioners' request to partition a 2.03 acre parcel into two parcels of 1 and 1.03 acres each.

ALLEGATIONS OF ERROR

Petitioners set forth three allegations of error as follows:

1. "The commissioners erred by interpreting rural residential policy no. 8 of the Marion County Comprehensive Plan in such a way as to render the one (1) acre minimum lot size of the Marion County Zoning Ordinance 128.090 without affect."

2. "The commissioners erred in that there was not substantial evidence to support their finding of fact, adopted by the hearings officer's decision, that granting petitioners' application would violate Marion County Comprehensive Plan Rural Residential Policy No. 8 by creating an overall density for this area of less than 1.5 acres per dwelling."

3. "The commissioners erred in that there was not substantial evidence to support their finding, adopted from the hearing's officer's decision, that the soil conditions on the subject property are of such a nature as to require imposing a minimum lot size in excess of the one (1) acre minimum called for in the Marion County Zoning Ordinance 128.090."

FACTS

The subject property lies outside the urban growth boundary of the City of Silverton. The property is designated as "Rural Residential" in Marion County's comprehensive plan and is zoned "Acreage Residential" (AR). The history of the property shows

that in September, 1980, then owner of a 4.82 acre parcel, a Mr. Roy A. Slate, requested partitioning of that parcel into three parcels each of 1.9 acres, 1.9 acres and 1 acre. The property at that time was designated in the comprehensive plan as Rural Residential and zoned as it is today, (AR). Mr. Slate was allowed to partition his property, but instead of getting the requested three parcels, the county allowed only two parcels of at least two acres each. One of the parcels created was subsequently sold to the petitioners herein, and it is that 2.3 acre parcel which is the subject of this appeal.

Petitioners' request met with denial by the Marion County Planning Department, by a Marion County Hearings Officer and subsequently by the Marion County Board of Commissioners when it adopted the hearings officer's order and findings.

Marion County adopted its comprehensive plan by Ordinance 601 on May 13, 1981. That plan has been acknowledged by the Land Conservation and Development Commission for all portions relevant to this case. On the same day, the Board of Commissioners had before it and passed Ordinance 602 which, among other things, amended Marion County Zoning Ordinance Chapter 128. Chapter 128 governs the AR zone within which the subject property is located. Ordinance 602 amended portions of Chapter 128 but did not change the minimum lot size in the AR zone. The minimum lot size in an AR zone after adoption of Ordinances 601 and 602, remained one acre. The amendment to the AR zone and the comprehensive plan created by Ordinance 602

adoption was a part of a single scheme of land use regulations.

DECISION

Assignment of Error No. 1

The thrust of this assignment of error is whether the Marion County Comprehensive Plan or the Marion County Zoning Ordinance controls the creation of the requested two parcels of 1 and 1.03 acres respectively. Marion County's Zoning Ordinance 128.090 dealing with AR zoned property states as follows:

> "The maximum density for subdivisions and plan developments is 1.5 acres per dwelling. The minimum lot size is one acre, except in plan developments the minimum lot size shall not apply. The recommended lot area standard is 1.5 to 3 acres. When a density suffix has been applied to the AR zone, the maximum density and minimum lot size shall conform to the density designation. In any case, parcels shall be large enough to provide a stable dwelling site free from flooding with adequate water supply and wastewater disposal facilities, that do not adversely affect adjacent property or the public." (Emphasis added).

Petitioners read that ordinance to allow them to divide their property into the requested 1 and 1.03 acre lots. The Respondent County supports its denial by pointing to its comprehensive plan as well as arguing statutory interpretation. The respondent's position relies on a section of the comprehensive plan starting at page 36 where the following language is found:

> "It is also the intent of the Plan to insure that the type of residential use locating in the rural residential area is of a type which can not readily be supplied in an urban area. That is, the residential use should be for the purpose of providing housing in

a low-density residential environment. In this Plan, 1.5 acres per dwelling unit is generally considered as the maximum density. In areas that have development limitations, lower densities may be required to minimize the potential for adverse impacts of development on public health and quality of the environment * * *

"Therefore, in areas without environmental limitations, the optimum lot size will be from 1.5 acres to 3 acres.

"Rural Residential Policies

"8. Since there is a limited amount of land designated Rural Residential, efficient use of these areas shall be encouraged. The overall density of rural residential areas shall not be less than 1.5 acres per dwelling, allowing for a range of parcel sizes from 1.5 to 3 acres in size unless environmental limitations require a larger parcel." Appendix B of Respondent's Brief. (Emphasis added).

Another way of stating the issue facing this Board is as follows: Where terminology in the comprehensive plan is permissive and a subsequent zoning ordinance is passed providing for a specific minimum lot size, may the Board of Commissioners, in the course of a quasi-judicial proceeding, disregard the zoning ordinance and instead apply a heretofore unannounced interpretation of its comprehensive plan with regard to a minimum lot size for the zone?

When a properly promulgated zoning ordinance is unambiguous, there is ordinarily no need to refer to the comprehensive plan for the purpose of construing its terms. Cf, Schoen v University of Oregon, 21 or App, 494, 500, 535 P2d 1378 (1975). But when the ordinance on its face seems to conflict with applicable provisions in the comprehensive plan,

the comprehensive plan must be examined to assure that the zoning ordinance is consistent with it. See, ORS 215.050(2); ORS 197.175(2)(b); Baker v City of Milwaukie, 271 Or 500, 514, 533 P2d 772 (1975); Fasano v Board of Commissioners, 264 Or 574, 582, 507 P2d 23 (1973).

Marion County Zoning Ordinance 128.090 (which went unchanged by amendments enacted by Ordinance 602) states in precise and unambiguous terms that in an AR zone "the minimum lot size is 1 acre." Ordinarily, this language would raise no problem of interpretation. But where the comprehensive plan for the county states that "1.5 acres per dwelling unit is generally considered as the maximum density" and "the overall density of rural residential areas shall not be less than 1.5 acres per dwelling," it must be determined whether the zoning ordinance is in accord with the plan.

The plan provides for residential uses "of a type which cannot readily be supplied in an urban area." It does not say that 1.5 acres per dwelling is the absolute maximum density, but only that such density is "generally considered" to be the maximum density in rural residential areas. The plan also provides that "the optimum" lot size will be 1.5 to 3 acres - it does not say that these lot sizes are absolute.

Under the rural residential policies heading, the plan provides for an "overall density" of rural residential areas that "shall not be less than 1.5 acres per dwelling, allowing for a range of parcel sizes from 1.5 to 3 acres..." (Emphasis

added). Here again, the densities are not stated in absolute or precise terms. They only state overall and allowable densities over an entire rural residential area - not specific densities for individual parcels.

Marion County seems to be arguing that Ordinance 601 repeals by implication the 1 acre minimum lot size of Ordinance 128.090 and that the interpretation which must be considered is the one made in the course of this quasi-judicial proceeding. Again, that interpretation was that the plan sets an absolute 1.5 acre minimum lot size in AR zones for each individual parcel. Therefore, the 1 acre minimum zoning ordinance has no effect.

The problem becomes one of interpreting the permissive language contained in the plan and determining whether the zoning ordinance can be reconciled with it. Where there exists permissiveness or ambiguity in the plan, the county commissioners should, in the first instance, "have the power and right to interpret local enactments." Fifth Avenue Corp. v Washington Co., 282 Or 591, 599, 581 P2d 50 (1978). The commissioners' interpretation "is entitled to some weight unless it is clearly contrary to the express language and intent of the [plan]." Id at 599-600.

One method of defining the scope and applicability of a comprehensive plan is to look at the zoning ordinances that were enacted to implement the plan. The purpose of a zoning ordinance is to carry out or implement the comprehensive plan.

In Fasano, the court held that

> "the plan...and the zoning ordinance enacted by the county governing body are closely related; both are intended to be parts of a single integrated procedure for land use control. The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles." 264 Or at 582.

The Oregon Court of Appeals has said it will defer to a local government's interpretation of its own comprehensive plan, provided the interpretation is reasonable. Miller v City Council of Grants Pass, 39 Or App 589, 594, 592 P2d 1088 (1979). The board's interpretation of its comprehensive plan, as manifested by its actions in adopting Ordinance 602 (which dealt with the AR zone), is that the density objectives in rural residential zones can be met by 1 acre minimum lot sizes. As long as the overall density of a rural residential area does not exceed 1.5 acres per dwelling, allowing some 1 acre lots in an AR zone would seem to be a reasonable interpretation of the plan. The county apparently so interpreted the meaning of its comprehensive plan when it adopted Ordinance 602. This conclusion is supported by the fact the county was under a duty to conform its zoning ordinances with the comprehensive plan (Ordinance 601). Baker, supra, 271 Or at 514.

Since we find that Chapter 128 (AR Zone) reasonably interprets the comprehensive plan, there is no conflict between the zoning ordinance and the plan. Where there is no such

conflict, the ordinance governs. Damascus Comm. Church v Clackamas Co., 32 Or App 3, 9, 573 P2d 726 (1978). Furthermore, policies contained in a comprehensive plan cannot be used to defeat uses of land designated by the plan and zoned for that use. Philippi v City of Sublimity, 59 Or App 295, 301, ___ P2d ___ (1982). Therefore, we sustain the first assignment of error.

Assignment of Error No. 2

Here petitioners argue there is no substantial support for the county's finding that granting of petitioners' application would violate Marion County Comprehensive Plan Rural Residential Policy No. 8 (supra) by creating an overall density for this area of less than 1.5 acres per dwelling.

We are not entirely clear as to which of the county's findings petitioners are referring. A review of the findings document does not indicate the county believes that by allowing this partition the overall density in the area would become less than 1.5 acres per dwelling. The finding that most closely addresses the issue petitioners raise states in pertinent part:

> "The 1.5 acre standard constitutes the minimum lot size in an AR zone. Policy No. 8 quoted in part above is mandatory in nature. The word shall when used in laws or regulations is generally understood as mandatory. * * * There are sound reasons for the 1.5 acre standard identified in the MCCP, including an intent to provide a low density residential environment, consideration of soil and slope conditions which require large parcels, and consideration of the desirability of open space. The 1.5 acre standard has been identified as the optimum

lot size in areas without environmental limitations." Respondent does not directly respond to this assignment of error but rather relies on the outcome of petitioners' assignment of error no. 1 to be controlling not only in assignment of error no. 2 but also in assignment of error no. 3, infra. This Board tends to agree with respondent that our holding on assignment of error no. 1 gets to the heart of petitioners' arguments. However, this assignment of error deserves some discussion. As we held in answering assignment of error no. 1, the portion of the above quoted finding that states "the 1.5 acre standard constitutes the minimum lot size in the AR zone" is incorrect. The minimum lot size stated in the AR zone is one acre.

In addition, the county's findings on other issues regarding suitability of a 1.0 acre size lot, which include capacity to dispose of wastewater, freedom of natural hazards, adequate access, and no significant evidence of inability to obtain suitable domestic water, have been met by the applicant.[1] The other standard which must be addressed by the county is that of the adequacy of sewage disposal. Finding no. 2 states in pertinent part relating to sewage disposal:

> "Applicant is familiar with the history of septic systems in the area, and is unaware of any septic system failures in the area. Second, applicant alleges that bedrock on the subject property is at 5 to 9 feet average depth, becoming more shallow as one approaches Forest Ridge Road, and that the soil on the subject property is at least 3 feet deep. This testimony is undisputed. This particular parcel of property would appear to have capacity for wastewater

disposal and, of course, no dwelling could be constructed without prior septic approval." (Emphasis added).

Based on the materials before this Board, we find the county in essence limited its decision to whether or not the 1 or 1.5 acre minimum lot size was the controlling factor. Our holding in assignment of error no. 1 is that one acre per dwelling is the standard that is applicable to the county's decision and not the 1.5 acre standard argued by respondent. There appear to be no problems with the site, at least at this stage of the procedure, to prohibit the reguested partitioning.

A further reason for this Board not being able to accept the standard the County decided it would apply is the fact that there has been no definition or finding addressing the perimeters of the "area." Without this knowledge, a reviewing body does not know what the county took into consideration in order to determine if the standard "the overall density of the rural residential area shall not be less than 1.5 acres per dwelling" has been met. The record includes some plat maps with the subject parcel marked off. If we were to assume the property covered by those maps is what the county believed to be the "area," we still have inadequate information upon which to base our review. There is no indication of exactly what the county found to be the average density in the "area." The "area" covered in the maps consists of many parcels considerably larger in size than the subject property. Without

this basic information, this Board is unable to determine whether the county really has ruled that the average density in the area will be reduced below the 1.5 acre standard by the granting of petitioners' requested partitioning.

Assignment of Error No. 3

Here petitioners claim there was not substantial evidence introduced to support the county's finding that the soil conditions on the subject property are of such nature to require imposing a minimum lot size in excess of the 1 acre minimum. This assignment of error has been answered in part in our discussion of assignment of error no. 2. The quoted findings above and in footnote one indicate that soil conditions do not require the imposition of a lot size in excess of one acre. Except for the sewage the findings indicate the proposal meets all the other standards. The sewage issue was addressed in the findings, and the county basically found there was no evidence to contradict petitioner's evidence that the ground would sustain a properly designed septic system. Furthermore, the County said in its findings that before any kind of building permit would be granted, a septic permit would need to be approved. From our review we agree with petitioners' assertion that not only is there no substantial evidence in the present record, there exists no findings to indicate that the soil conditions on the subject property require a minimum lot size in excess of one acre.

For the reasons stated, we reverse Marion County's decision.

FOOTNOTE

[1] County Finding #2 states in pertinent part:

"The Marion County Comprehensive Plan Rural Residential Policy No. 8 and MCZO 128.090, permit partitioning for a dwelling site only if the proposed site has sufficient capacity to dispose of wastewater, is free of natural hazards, has adequate access, and there is no significant evidence of inability to obtain suitable domestic water. Applicant has met these minimum conditions." (Emphasis added).