BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIL RANCH ENTERPRISES, Petitioner, vs. WALLOWA COUNTY, Respondent.	LUBA No. 83-108 FINAL OPINION AND ORDER

Appeal from Wallowa County.

Roland W. Johnson, Wallowa, filed the Petition for Review and argued the cause for petitioner.

D. Rahn Hostetter, Enterprise, filed a brief and argued the cause for Respondent County.

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee participated in the decision.

REMANDED 04/03/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

Opinion by Kressel.

NATURE OF DECISION

Petitioner appeals denial of a conditional use permit for a residence in a Timber/Grazing Zone.

FACTS

Prior to April 1983, petitioner owned a 6,054 acre parcel in Wallowa County. The parcel was designated "Timber/Grazing" by the comprehensive plan and zoning ordinance. In September 1982, petitioner applied for approval to divide the parcel into a 60 acre lot and a 5,994 lot. The partition proposal was treated by the county as one to authorize a single family, non-forest residence on the 60 acre lot.

The county court approved the partition in April, 1983. The county's findings indicated the 60 acre lot was separated by a road from the larger parcel, had no timber and was not suitable for raising crops or grazing livestock. The county also found the 60 acre lot size was appropriate for the proposed residential use and was sufficient to maintain "a reasonable balance with forest uses should such use ever be made." Record at 30-32.

Thereafter, petitioner applied for the permit at issue in this appeal. The purpose of the permit was to authorize a second, non-resource residence (a mobile home) on the partitioned 60 acre lot. However, the application was denied by the planning commission. On October 19, 1983 the county court affirmed the planning commission's decision.

In acting on the application, the county court applied the criteria for conditional use permit approval in §3.130(5) of the Wallowa County Zoning Ordinance. That section reads:

"Single-family residential dwellings may be established upon a finding by the commission that each such proposed dwelling:

"(a) Is compatible with the provisions of the state of Oregon's Forest Practices Act and any amendments thereto; and

"(b) Does not interfere seriously with accepted logging or farming practices; and

"(c) Will not create an economic hardship on the county due to required road maintenance or other needed public services; and

"(d) Is situated upon generally unsuitable land for the production of timber or farm crops; and

"(e) Complies with such other conditions as the commission considers necessary."

The county's final order reads, in pertinent part, as follows:

"II. BASIC FACTS

"The Court adopts the following findings of fact:

"1. The 60 acre parcel is located on Camp Creek Road approximately 1/2 mile from the Imnaha Highway.

"2. The 60 acre parcel has a dwelling located on the parcel which predated the Wallowa County Zoning Ordinance.

"3. The parcel is zoned Timber/Grazing.

"4. The dwelling for which JIL has submitted this application is a mobile home which has been moved onto the property with no prior zoning, sewerage, or building permits. No such permits have yet been granted.

"III. CONCLUSIONS

"A. Applicant has failed to state any specific grounds for appeal. Rather, applicant relies on general statements of "fairness." The Court will not search the record for the applicant in an attempt to find error.

"B. The Court finds that allowance of a second non-farm dwelling on the 60 acre parcel is inconsistent with the intent, purposes and requirements of the WCZO. Such dwellings interfere with the intended use and preservation of such resource lands."

ASSIGNMENTS OF ERROR

Petitioner raises several assignments of error. They can generally be divided into two categories: (1) challenges to the adequacy of the county's findings and (2) arguments the county failed to give appropriate weight to the decision made previously in connection with the partition of the same land. As discussed below, we conclude the county's findings are inadequate. Accordingly, we remand this case to the county. We hold we do not have jurisdiction over petitioner's argument that approval of the minor partition also constituted approval of the mobile home. Finally, we do not sustain the related argument that the findings in support of partition approval are binding on the county for purposes of the conditional use application.

THE FINDINGS

Petitioner's challenges to the county's findings make two points. First, it is claimed the findings are overly vague and do not relate to the applicable criteria for permit approval, in violation of ORS 215.416(7). Second, it is claimed the

findings attempt to establish new criteria for non-resource dwellings in the Timber/Grazing Zone on an ad hoc basis, in violation of ORS 215.416(6).

ORS 215.416(7) reads as follows:

> "Approval or denial of a permit shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

We agree with petitioner that the statute's requirements are not satisfied in this instance. The county's findings, actually labeled "conclusions" in the final order, identify ordinance criteria relevant to the decision, but they do not explain the justification for the decision based on those criteria. Instead, the findings justify the decision on more general grounds, i.e, that a second, non-resource dwelling on the 60 acre parcel is "...inconsistent with the intent, purposes and requirements" of the county zoning ordinance. We find nothing in the pertinent ordinance criteria, quoted above, authorizing the county to base a permit decision on the relationship of the proposal to the intent, purposes and requirements of the zoning ordinance.

The legislature has mandated that land use permit decisions, whether they approve or deny permit applications, must be based on the criteria set forth in the zoning ordinance or other appropriate regulation. ORS 215.416(6). Here, the county failed to directly apply the criteria which it

recognized as applicable to the case. A remand of the decision is in order. ORS 197.835(8)(a)(D).

Even if we were to somehow construe the findings to relate to the approval criteria in the zoning ordinance, we would still be required to remand this decision. This is because the findings do not set forth any facts or provide any justification for the conclusion the proposal is inconsistent with the purposes and requirements of the ordinance.

The finding that "allowance of a second, non-farm dwelling on the 60 acre parcel is inconsistent with the intent, purposes and arguments of the WCZO" (the ordinance) is conclusional at best. The additional finding that "such dwellings interfere with the intended use and preservation of such resource lands" may present a reasonable argument for denial of an application in theory, but in this case more analysis is required. Here, the county has already determined the land in question is unsuitable for resource uses. A finding along these lines was made in connection with approval of the minor partition. That finding is in the record of this appeal. Record at 31-32. In such a case, a decision to deny another proposal for non-resource use of the land on grounds of interference with the "...intended use and preservation of such resource lands" must be explained in greater detail. Missing from the findings is discussion of the extent to which any nearby lands are in resource use, the parcel sizes involved, and an explanation of why the proposed second residence on this parcel would be

inconsistent with the preservation of resource lands.[1]

Petitioner's second challenge does not relate to the adequacy of the county's findings per se, but instead charges the findings constitute an attempt by the county to create an ad hoc zoning standard. Petitioner reads the findings to announce a general policy that in the Timber/Grazing Zone only one non-resource dwelling per parcel is permitted. Under ORS 215.416(6), argues petitioner, such a policy cannot serve as the basis for county action on a permit request unless it is embodied in the zoning ordinance or other county regulation.

We do not read the county's findings to establish general policy with regard to the number of non-resource dwellings permissible on parcels in the Timber/Grazing Zone. Instead, we read the findings to say that allowance of the second dwelling on the 60 acre parcel at issue is inconsistent with the zoning ordinance. Although we have previously indicated this finding is too general to support the challenged decision, we do not read it to constitute an ad hoc zoning standard. That is, we do not read the findings to indicate the county's belief that only one non-resource dwelling is permissible on parcels, regardless of their size, in the Timber/Grazing Zone.[2] Accordingly, we do not sustain this aspect of the petition.

In summary, we sustain the challenge to the findings relied on by the county to deny the permit. The findings do not relate to the pertinent approval criteria and are overly general.[3] This is not to say the county must approve the

requested permit. Indeed, the county may well be in a position to deny it under Section 3.130(5) and 3.140 (lot size criterion). Whatever permit action is taken, however, must be based on a final order which meets the requirements of ORS 215.416(7). We hold only that the present order does not do so.

RELATIONSHIP BETWEEN THE PARTITION APPROVAL AND THE DECISION ON THE CHALLENGED PERMIT

Petitioner makes two arguments concerning the relationship between approval of the partition in April, 1983 and denial of the permit at issue in this appeal. In one argument, it is claimed partition approval also constituted approval of the mobile home application, thus making it unnecessary that a permit be sought for the mobile home. This argument is predicated on the contention respondent was aware there were two dwellings (a conventional residence and the mobile home) on the 60 acre parcel when it approved the partition:

> "It is the petitioner's contention, that, in the circumstances, no conditional use permit was required. The mobile home was installed at the time the partition was granted and this was known to all parties and a matter of record in the partition proceeding. No exception or reservation on this issue was contained in the county's decision document approving the partition. Petition at 31.

Regardless of whether petitioner is correct about the facts surrounding the partition decision, we cannot consider its argument that the permit at issue in this appeal was made unnecessary by that decision. Pursuant to the notice of intent

to appeal, the subject of this proceeding is the county's decision denying Application No. 83-6 for a second residence on the 60 acre parcel. Arguments to the effect no such application was required are not within our jurisdiction.

A case in point is Damascus Community Church v. Clackamas County, 32 Or App 3, 573 P2d 726 (1978). In that case, application was made for a conditional use permit to operate a parochial school on land previously approved for church use. After the county denied the permit, the applicant filed a writ of review in Circuit Court. Among the arguments raised in that proceeding was the claim that original approval of the church use also authorized operation of a parochial school. The court was invited to declare, as we are in this case, that no conditional use permit was required for the second use.

The Circuit Court refused to consider this theory and the Court of Appeals agreed. As the appellate court pointed out, by making the permit application for the parochial school and then seeking review of permit denial by way of a writ of review, petitioner had in effect conceded a permit was required. As former Chief Judge Schwab stated:

> "We cannot reach, in this appeal, petitioner's second contention that its proposed school is an integral part of church facilities and thus is covered by the original conditional use permit issued to the church in 1967. By applying for a conditional use permit for its school, the petitioner in effect concedes that, for the purpose of this proceeding, its proposed use was not permitted by the original permit. See Anderson v. Peden, 30 Or App 1063, 1067, 569 P2d 633 (1971)." 32 Or App at 6-7.

Although we do not operate under the writ of review statute, ORS 34.010-34.100, the principle recognized in Damascus Community Church, supra, is equally applicable in proceedings before this Board. Our review in this appeal is limited to whether the county committed error in denying petitioner's conditional use application permit. Jurisdiction to issue a declaratory ruling that such a permit was not actually required is in the Circuit Court. ORS 197.825(4)(a).

In the second argument concerning the relationhip between the previously approved partition and the permit at issue here, petitioner claims the county was obligated to make the same findings in the permit case it made in the partition case because the same parcel was involved. We reject this claim.

Petitioner's claim is at odds with the express language of the Wallowa County Zoning Ordinance. Section 3.130(5) of the ordinance, under which the application in question was considered, requires separate analysis of each proposed residence in the Timber/Grazing Zone in terms of the stated criteria. As respondent points out, if petitioner's theory is correct, approval of the partition in April, 1983 would amount to carte blanche approval of a limitless number of residences on the same parcel. We decline to adopt such an unreasonable approach.[4]

CONCLUSION

Based on the foregoing, the county's decision is remanded

for further proceedings. State law requires that the county's decision be based on the applicable criteria in the zoning ordinance. As required by ORS 215.416(7), the final order must contain a brief statement explaining the relevant criteria, stating the facts relied upon and setting forth the reasons justifying the decision in terms of the relevant criteria.

Remanded.

FOOTNOTES

1

We note the county has not adopted a minimum lot size for any use in the Timber/Grazing Zone. Instead, the zoning ordinance sets forth a series of general lot size criteria geared to the anticipated use. §3.140 of the Ordinance states that the size of a lot shall not be less than what is necessary to:

> "(1) Support the necessary facilities and utilities provided in the conjunction with the use such as sewer and water; and
>
> "(2) Conform to the general provisions of the county's comprehensive land plan and the purposes of this ordinance and zone; and
>
> "(3) Maintain a reasonable balance of forest uses.

Given this circumstance the county must explain its rationale for the proposition that two non-resource dwellings on a 60 acre parcel are inconsistent with ordinance intent.

The county's brief urges us to accept the vague findings made in this case on grounds petitioner presented virtually no facts justifying a detailed response. Brief of Respondent at 6-7. We have held detailed findings are not required when there is no conflicting evidence concerning a criterion for permit approval. Publisher's Paper Co. v. Benton County, 6 Or LUBA 182, 189 (1982). However, we have never held that findings which do not address the pertinent approval criteria, or address them only in a very general sense, are adequate. This is the problem in the present case.

2

Were we to agree with petitioner's characterization of the findings, its argument under ORS 215.416(6) would appear to have merit. The statute requires permit decisions to be based on standards and criteria set forth in the zoning ordinance or other applicable pertinent ordinance or regulation. We find no provision in the county zoning ordinance, and the county has cited none, which sets forth a rule limiting the number of non-farm dwellings to one per parcel in the Timber/Grazing Zone. As the preceding footnote indicates, the county has not adopted a minimum lot size for uses in the Timber/Grazing Zone.

Of course, this is not to say the county's ordinance

compels approval of the proposal for a second dwelling on this parcel. The criteria in Section 3.130(5) leave ample room for the exercise of discretion, as do the lot size criteria in Section 3.140. At this point, however, the county has not relied on either section to take action on the request.

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[3] Petitioner raises another claim against the findings but we read the claim to reiterate the argument that the governing criteria were not considered. In this argument, petitioner attacks Conclusion A in the final order, (see page 4, supra). In petitioner's view, the conclusion represents an attempt by the county to dispose of the application without reference to the pertinent legal criteria. We agree the county failed to apply the criteria. Therefore, it is unnecessary to further discuss this claim.

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[4] As we noted earlier, however, some aspects of the county's findings in connection with partition approval reinforce our conclusion that the very general findings relied on to support permit denial are inadequate. See page 5, supra.