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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

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KENNETH A. BROWN and)
SAMUEL E. BROWN,)
Petitioners,)
vs.)
MARION COUNTY,)
Respondent.)

LUBA No. 86-059
FINAL OPINION
AND ORDER

Appeal from Marion County.

Kenneth A. Brown, Gervais, filed the petition for review and argued on his own behalf. With him on the brief was Samuel E. Brown.

Janet S. McCoy, Salem, filed a response brief and Daryl Garrettson, Salem, argued on behalf of respondent.

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

AFFIRMED 10/14/86

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal Marion County's denial of their request
4 for a conditional use permit to place an additional mobile home
5 in conjunction with farm use on property in Marion County.

6 FACTS

7 In February, 1986, petitioners applied for a conditional
8 use for a dwelling in conjunction with farm use in addition to
9 two existing dwellings. The proposed dwelling is a mobile
10 home. This particular site was occupied by a mobile home for
11 some years, but has remained unoccupied for over one year.

12 Petitioners' property consists of about 150 acres. The
13 site is improved with connections for a septic tank, water and
14 electricity. Soil classes are SCS II, III and IV, and the
15 property is zoned for exclusive farm use.

16 The county planning director denied the application.
17 Petitioners appealed the request to the Marion County Hearings
18 Officer. The hearings officer also denied the request, and his
19 denial was upheld by the county board of commissioners. This
20 appeal followed.

21 ASSIGNMENT OF ERROR

22 Petitioners argue that the county's decision violates the
23 Fifth Amendment of the United States Constitution. Petitioners
24 claim the county's action deprives them of their property
25 without due process of law. Petitioners base their argument on
26 their view that the economics of farming dictates change, from

1 time to time, in farm help requirements. The need for
2 additional help dictates the need for housing. According to
3 petitioners

4 "[T]his particular mobile home site has been kept in
5 readiness for just a situation as now exists on our
6 farm. Petitioners believe that no so-called planner
in his city office is competent to properly assess the
needs on the area of farms." Petition for Review at 4.

7 As we understand the argument, refusal to grant the permit
8 unconstitutionally deprives petitioners of a needed use of
9 their property.

10 We also understand petitioners claim the county erred in
11 failing to consider petitioners' need for this additional
12 dwelling. That is, petitioners argue the facts of this case
13 warrant the permit, and there is no valid reason to refuse to
14 issue it.

15 Marion County Zoning Ordinance (MCZO) 136.030 requires that
16 any farm-related dwelling must meet the requirements of MCZO
17 136.040(b) as a conditional use. MCZO 136.040(b) requires,
18 among other things, that

19 "(3) Operation of the farm, in accordance with
20 accepted farming practices, requires that the
occupants of the proposed dwelling reside on the
21 farm; and

22 "(4) All dwellings located on the farm, except those
permitted pursuant to 136.030(c) are occupied by
23 households that perform a significant amount of
farm work throughout the year and

24 "(5) The household residing in the proposed dwelling
25 will perform a significant amount of farm work
throughout the year that other households on the
26 farm could not accomplish...." MCZO
136.040(b)(3)(4) and (5).¹

1 The hearings officer found that the Applicant, Kenneth
2 Brown, lives in a house across from the subject parcel, and his
3 brother occupies one of the dwellings on the parcel. The
4 existing mobile home is occupied by a friend with no ownership
5 interest in the farm and who, at the time of the county's
6 consideration of the application, was not involved in farm
7 activities.² The hearings officer found there was no dispute
8 that the farm operation constitutes an existing farm enterprise
9 as defined in the county ordinance, but the hearings officer
10 found the applicant had not shown compliance with MCZO
11 136.040(b)(3) (4) and (5). Specifically, the hearings officer
12 found the applicant failed to show that additional farm help
13 must reside on the farm and that all dwellings on the farm were
14 occupied by households (we believe the ordinance means persons)
15 which perform a significant amount of farm work throughout the
16 year. The hearings officer also found the resident of the
17 existing mobile home does not work at all on the farm.

18 Therefore,

19 "although the occupant of the proposed mobile home
20 would devote nearly a full time effort to farm work,
21 the existing mobile home resident contributes nothing
22 to the farm operation. Therefore, one additional
23 dwelling on the subject property might be justified
24 for farm help, a second mobile home cannot be
25 justified when the resident of the first mobile home
26 is not actually working on the farm." Record at 13.

24 Petitioners do not challenge the facts as determined by the
25 hearings officer.

26 The hearings officer added that he did not doubt the

1 "sincere intent of the applicants to farm their property, or
2 the need for additional farm help." Id. We agree, but we are
3 not entitled to alter the terms of the ordinance in order to
4 fit the circumstances in this case. We therefore must uphold
5 the county on its application of the zoning ordinance.

6 Petitioners' claim the county took their property in
7 violation of the constitution must also fail. First, zoning
8 regulations do not result in a taking of petitioners' property
9 unless it can be shown that petitioners are deprived of all
10 beneficial use of their property. Fifth Avenue Corp. v.
11 Washington County, 282 Or 591, 581 P2d 50 (1978); Suess
12 Builders v. City of Beaverton, 56 Or App 573, 642 P2d 361
13 (1982). In this case, petitioners are not deprived of all
14 beneficial use.

15 Second, we do not agree that the existence of a
16 once-occupied mobile home site entitles petitioners to use the
17 site for a dwelling despite current regulations requiring a
18 conditional use permit. The site, while improved with septic
19 hookup, electricity and water is unoccupied and has been so for
20 over one year. Record at 6. It therefore no longer qualifies
21 as a nonconforming use dwelling. See MCZO Section 114.050.³
22 The county was entitled to review the proposed dwelling for
23 conformance with current ordinance criteria. Had the mobile
24 home not been removed from the site, and had it been in
25 continuous use as a dwelling, the result might be different.

1 We must reject petitioners' constitutional challenges.
2 The decision of the Marion County Board of Commissioners is
3 sustained.

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FOOTNOTE

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MCZO 136.030(c) concerns temporary residences for hardship purposes.

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Petitioners state the occupant will help with restoration of an "historic house" on the property and with orchard maintenance during the winter.

3

MCZO Section 114.050 provides:

"If the actual operation of a nonconforming use of a building ceases for a continuous period of one year, such building in the land of which it is located shall then be subject to all of the regulations, except required setback and offstreet parking specified in this ordinance for the zone in which such land and building is situated. In case the nonconforming use of land where no building is involved ceases for a period of 30 days then such land will be subject to all regulations specified for the zone in which the land was located. Nonconforming land includes land used for the grazing or keeping of livestock." MCZO 114.050.

1 CERTIFICATE OF MAILING

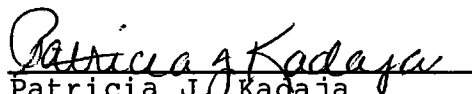
2 I hereby certify that I served the foregoing Final Opinion
3 and Order for LUBA No. 86-059, on October 14, 1986, by mailing
4 to said parties or their attorney a true copy thereof contained
in a sealed envelope with postage prepaid addressed to said
parties or their attorney as follows:

5 Kenneth A. Brown
6 12837 Portland Rd. NE
Gervais, OR 97026

7 Samuel E. Brown
8 12878 Portland Rd., NE
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9 Janet S. McCoy
10 Marion County Counsel
11 Daryl Garrettson
12 Marion County Counsel
Marion County Courthouse
100 High Street, NE
Salem, OR 97301

13 Dated this 14th day of October, 1986.

14
15 
16 Patricia J. Kadaja
17 Administrative Assistant
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