BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LOIS ENDRESEN, Petitioner, vs. MARION COUNTY, JOHN KLOPFENSTEIN, HARRY KLOPFENSTEIN, DONALD BEALE, ERNEST KLOPFENSTEIN, DARRELL BROWN, SAUNDRA BROWN, SHARON KLOPFENSTEIN, FRED KLOPFENSTEIN, JANICE MITCHELL, and BUDD MITHCHELL, Respondents.	LUBA No. 86-031 FINAL OPINION AND ORDER

Appeal from Marion County.

Donald M. Kelley, Silverton, filed the petition for review and argued on behalf of petitioner. With him on the brief were Kelley & Kelley.

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

Richard C. Stein, Salem, filed a response brief and argued on behalf of Respondents Klopfenstein, et al. With him on the brief were Ramsay, Stein, Feibleman & Myers.

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.

Opinion by Bagg.

NATURE OF THE DECISION

Petitioner appeals an order of the Marion County Board of Commissioners denying her application for a nonfarm dwelling in an exclusive farm use zone.

FACTS

The subject 12.4 acre parcel was created after petitioner's daughter, Julie Burch, and her husband, failed to make payments on a promissory note to purchase a 23 acre parcel. The promissory note was secured by a mortgage on this 12.4 acre portion of the larger lot. Petitioner filed for foreclosure in May of 1983, and a default judgment was issued in September. This 12.4 acre parcel subsequently sold at a sheriff's sale to Lois Endresen, petitioner.

The parcel has no dwelling on it. It is divided by Drift Creek with about two or three acres on one side of the creek. It is this two or three acre area which is proposed for the homesite. The property is zoned for exclusive farm use and is outside the City of Silverton Urban Growth Boundary.

This application for a nonfarm dwelling was first approved by the planning director in June of 1985. His decision was appealed, and on February 4, 1986, the Marion County Hearings Officer overruled the planning director. The hearings officer's decision was appealed to the county board of commissioners which sustained the denial on April 29, 1986. This appeal followed.

ASSIGNMENT OF ERROR No. 1

> "The commissioners erred by interpreting MCZO 136.040(c) in such a way as to require that an entire subject parcel of land be unsuitable for farm use as a prerequisite to granting a non-farm dwelling conditional use in Marion County's EFU zone."

ASSIGNMENT OF ERROR No. 2

> "The commissioners erred in that there was no substantial evidence in the record to support their finding that a significant portion of the subject property is suitable for farm use."

The Marion County Zoning Ordinance (MCZO), Section 136.040(c) requires that a single family dwelling not in conjunction with farm use may be located on

> "generally unsuitable land for farm use considering terrain, adverse soil or land conditions, drainage and flooding, location and size of the parcel."

The county found petitioner had not met this requirement, noting that sheep were grazed on a significant portion of the 12 acres. Grazing is a farm use, and the county board reasoned that the land was therefore suitable for farm use.

Petitioner argues that the county board's interpretation, if followed, would make it impossible to "ever grant such a conditional use application in Marion County." Petition for Review at 5. Petitioner insists that the county reads the ordinance to require that no significant portion of the 12 acre parcel may be capable of grazing, a reading petitioner states is erroneous. Petitioner claims the ordinance does not require that one address the soil capability of the overall parcel. To petitioner, only the property to be occupied by the house

should be considered when reviewing whether MCZO 136.040(c) is satisfied. Petitioner argues that the record clearly shows that the property is not suitable for farm use because the 12.4 acres are cut (by Drift Creek) into two tracts or portions of 10 and 2 acres each, and the two acre portion is steep and brushy. Petitioner claims further that

> "the mere presence of an undetermined number of sheep on small part of the subject property does not indicate that this property is not generally unsuitable for farm use within the meaning of the ordinance." Petition for Review at 8.

Respondent correctly notes that MCZO 136.040(c) makes consideration of the size of the parcel important in determining whether a particular parcel is suitable or unsuitable for farm use. Respondent focuses on this language in aid of its view that it is entitled to interpret its ordinance to require that the farm use capability of the whole parcel, and not just the land under the proposed nonfarm dwelling, must be considered in applying MCZO 136.040(c). Respondent argues that petitioner's proposal does not separate the homesite from other farmable ground, and the county's inclusion of the whole property in its consideration is therefore reasonable. See Alluis v. Marion County, 64 Or App 478, 668 P2d 1242 (1983).[1]

We agree that the county must consider suitability of the whole parcel for farm use under this criterion. See Lemmon v. Clemens, 57 Or App 583, 646 P2d 633 (1982); Flurry v. Land Use Board of Appeals, 50 Or App 263, 623 P2d 67 (1981); Meyer v.

Lord, 37 Or App 59, 586 P2d 367 (1978), rev den (1979). This review is only a threshold inquiry, however. If it can be shown that a portion of the property is not suitable for farm use "considering terrain, adverse soil or land conditions, drainage and flooding, [and] location and size of the parcel," then the county may consider this criterion as satisfied even though the majority of parcel is suitable for farm use. We note MCZO 136.040(c) parallels ORS 215.283(3). We do not believe the legislature intended that nonfarm land in a large farm parcel could not be considered a potential site for a nonfarm dwelling simply because the greater part of the parcel is suitable for farm use providing the criteria in ORS 215.283(3)(a) through (c) are satisfied. Therefore, we agree with petitioner that the county erred in insisting that the whole parcel be found unsuitable for farm use before the county could proceed with consideration of the other criteria under MCZO 136.040.[2]

We disagree with petitioner's second charge that there is insufficient evidence in the record to support the conclusion that at least the upland portion of the property is suitable for farm use. There is evidence in the record that the property is capable of supporting grazing activity. See Record a 69, 70 and 105. Substantial evidence is that evidence a reasonable person would accept as sufficient to support a conclusion. Home Builders v. Metropolitan Service District, 54 Or App 60, 633 P2d 1320 (1981). We believe the evidence cited

qualifies under this standard. Because we are not certain about the county's conclusion with respect to the suitability of the two acre homesite for agricultural use, we are unable to answer petitioner's claim that there is no substantial evidence to support a conclusion that the homesite is suitable for farm use.

The first assignment of error is sustained, the second assignment of error is denied.

ASSIGNMENT OF ERROR NO. 3

> "The commissioners erred in that there is no substantial evidence in the record to support their finding that there is a potential adverse impact created by the proposed dwelling on the Drift Creek flood plain and the corresponding fish and wildlife habitat."

MCZO 136.040(d)(2) requires that a nonfarm dwelling must

> "not interfere seriously with farming or forest practices on adjacent lands...."

Petitioner quarrels with the county's finding that the proposed dwelling presented a potential adverse impact upon the flood plain, and the fish and wildlife habitat. Petitioner argues the only evidence in the record regarding the flood plain issue is that the proposed dwelling would be above the flood plain area. See Record at 17.[3] Petitioner posits that even if the proposed dwelling were within the flood plain, a flood plain development permit would be required prior to building, and if the conditions of the permit are met, the proposal would have no adverse impact on watershed, fish or wildlife habitat.

The county's findings quote a report in the inventory to its comprehensive plan stating that "all rivers and streams with either perennial or intermittent flows are considered sensitive areas." The county's findings go on to state that there is

> "[T]herefore, a potential adverse impact created by the proposed dwelling on the Drift Creek flood plain and the corresponding fish and wildlife habitat." Record at 6.

This finding does not explain how the proposed dwelling may interfere seriously with farming or forest practices on adjacent lands. It is not even clear what "adverse impact" the county is talking about. We agree with petitioner, therefore, that the county's finding does not present a showing that petitioner's application does not meet MCZO 136.040(d)(2).

Such is not to say, however, that the applicant has met this criterion. Therefore, while we sustain petitioner's challenge based on adequacy of the findings, our action does not mean that the county is required to find petitioner meets this criterion.

ASSIGNMENT OF ERROR NO. 4

> "The commissioners erred in that there is no substantial evidence in the record to support their finding that approval of this dwelling would materially alter the land use pattern of the area."

MCZO 136.030(d)(3) requires that a proposed nonfarm dwelling

> "not materially alter the stability of the overall land use pattern of the area...."

The county order states

> "In 1979 when the RAR zone in the subject area was changed, the County determined that the partitioning and development of homesites within the Drift Creek canyon was altering the land use pattern by increasing the ratio of non-farm to farm uses and as a result, increasing the likelihood of conflicts between non-farm and farm uses. The provisions making it possible to approve non-farm dwellings in the EFU zone are included in the EFU zone so dwellings can be allowed on preexisting legally established small acreages, or where a precedent for allowing additional non-farm dwellings would not be established. In this case the Board is concerned that dwelling approval would set a precedent of allowing a foreclosure to modify the original intent in approving a partition, and also that it will encourage others with poor soils in the canyon to request divisions creating new non-farm parcels. The Board concludes that approval of the dwelling would materially alter the land use pattern of the area. There was also testimony suggesting that additional dwellings in the canyon could increase conflicts with farm or timber management." Record at 7.

Petitioner claims that no new parcel is being created, and therefore, the existing land use pattern will be maintained. We understand petitioner to argue that because no land division will occur, existing lot size patterns will not be affected. Petitioner also states that other nonfarm parcels already have homes on them, and there is no evidence of any nonfarm parcel without a dwelling on it in the immediate vicinity. Petitioner states:

> [I]n any case, Marion County would have the opportunity to review and approve or disapprove on a case by case basis each application for the creation of a new parcel or conditional use." Petition for Review at 11.

We find no error as alleged. The county described the existing land use pattern in the area and stated that inclusion of an additional dwelling will encourage similar requests on

other properties. The county is entitled to consider the effect of each application against possible future applications. It is not, as petitioner suggests, limited to reviewing each request in isolation. Also, the mere fact that other similar acreage homesites exist in the area, which also includes commercial farms (Record 15), does not mean that another such homesite will have no effect on the land use pattern. In that regard, although the mortgage foreclosure was not a partition pursuant to ORS Chapter 92, a dwelling on this property creates a 12.3 acre nonfarm dwelling site. The land use pattern may not have been altered when the 12.3 acres of farm land was divided out. It is another matter to create a 12.3 acre homesite.

Assignment of Error No. 4 is denied.

ASSIGNMENT OF ERROR No. 5

> "The commissioners erred in that there is no substantial evidence in the record to support their findings that additional dwellings in the canyon could increase conflicts with farm or timber management."

MCZO 136.030(b)(5) requires that a proposed nonfarm dwelling

> "not have a significant adverse impact on timber production, grazing, land, watersheds, fish and wildlife habitat, soil and slope stability, air and water quality and outdoor recreation activities...."

Petitioner quarrels with the county's finding that the proposed dwelling will have such adverse impact. Petitioner says the closest commercial agricultural enterprise is a quarter of a mile away. Record at 17, 93-95. Also, adjacent parcels

include acreage homesites and other uses. Record at 15, 62. Petitioner claims another dwelling will have no adverse impact on this area.

Respondent argues that its findings are supported by evidence that conflicts exist between local farm useage and nonfarm dwellings. Specifically, spray, smoke and odors from farm uses settle at the location of the proposed homesite. See Record 19, 68-69. This evidence is sufficient, according to respondent, to conclude the criterion is not satisfied.

We agree with respondent. Petitioner has not shown as a matter of law that the proposed dwelling will create no conflict. Jurgenson v. Union Co. Court, 42 Or App 505, 600 P2d 1241 (1979). Evidence in the record suggests that similar uses create conflicts between farm use and nonfarm dwellings. This evidence is a sufficient basis for the county's conclusion that the proposed use presents more such conflicts.

The fifth assignment of error is denied.

ASSIGNMENT OF ERROR NO. 6

> "The commissioners erred in interpeting the effect of the decision in major partitioning 79-141 in such a manner that it is considered a restriction which runs with the land."

A restriction was placed upon this property in connection with major partitioning 79-141. The restriction limited the number of dwellings on the 23 acre parcel which includes the subject 12.4 acre parcel. Petitioner argues that a restriction imposed by a land use decision does not "run with the land" and

thereby become binding upon future owners. Also, petitioner argues the condition included in the partitioning applies only to the 23 acre parcel. The 23 acre parcel no longer exists, according to petitioner, because of the foreclosure effectively dividing the property into 12.4 acres and 12.6 acres. Therefore, the condition no longer exists.

We find the county's reliance on the condition in its earlier order is appropriate. The restriction was imposed on a single 23 acre lot. While this lot no longer exists by nature of the recent judicial partitioning, restrictions on the 23 acres are not defeated simply because the lot is divided. To hold otherwise would allow a landowner to evade undesirable conditions by simply dividing the property. Certainly no public purpose would be served by such a holding. Indeed, the restriction was imposed to limit the number of dwellings that could be constructed in the area, and to agree with petitioner would completely undo the county's condition.[4]

We deny this assignment of error.

ASSIGNMENT OF ERROR NO. 7

> "The commissioners erred in failing to approve petitioner's application once the criteria of the ordinance were met."

Petitioner claims that it has met all of the requirements in the Marion County Zoning Ordinance and is entitled to a nonfarm dwelling. Essentially, petitioner repeats the arguments made in Assignments of Error 1 - 5.

Because we conclude that the county appropriately denied

the application based on MCZO 136.040(d), (2), (3) and (5), we deny this assignment of error.

Because we sustained the county on several of its reasons for denying this proposal, the decision is affirmed. Marracci v. City of Scappoose, 26 Or App 131, 552 P2d 552 (1976), rev den; Weyerhauser v. Lane County, 7 Or LUBA 42 (1982).

FOOTNOTES

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1 Respondent further correctly notes that the application for a nonfarm dwelling is on a 12.4 acre parcel, not on a smaller parcel divided from the 12.4 acre parcel.

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2 The matter of farm use suitability of this particular property is a separate issue. The county found the upland portion of the property is suitable for farm use. Record at 6. It is not clear that the county found the two acre parcel, the proposed site for the dwelling, is also capable of farm use. The county said

> "The non-farm dwelling criteria are intended to discourage placement of new non-farm dwellings unless it is clear that the parcel is unsuitable for farm use, there will be no serious interference with nearby farm activity, and the land use pattern in the area will not be materially altered. The two acre portion of the subject parcel where the dwelling is proposed is somewhat isolated from the remainder of the parcel. That section includes Class IV and VI soils that have very marginal suitability for farm use. The bulk of the property is higher ground between the creek and the road. In an ealier case the application submitted evidence by soil scientist showing that the upland area was Class VI soil instead of Class II as indicated in the Marion County Soils Survey. However, many Class 6 soils are suitable for farm use. In viewing the site, the Board found the upland portion of the applicant's property in use for sheep grazing indicating that a significant portion of the 12 acres is suitable for farm use. The fact that a 12+ acre parcel has some soils unsuitable for farm use does not satisfy the criteria. Criteria 136.040 (c) has not been met."

While a fair reading of this finding suggests that the two acre parcel is not capable of farm use because it has "very marginal" soils, the finding is not a clear indication that the county believes that the two acres are indeed unsuitable for farm use. Therefore, the county can not apply MCZO 136.040(c). Without a finding that petitioner's homesite is indeed not suitable for farm use, the county's conclusion that MCZO 136.040(c) is not satisfied has no factual basis in the county's decision.

[3] The only evidence in the record regarding potential impact on wildlife consists of a letter by the Oregon Department of Fish and Wildlife. The letter simply states that the Department does not object to the proposal.

[4] Petitioner claims the condition is not effective because of a defect in notice. As we understand the claim, petitioner believes that restriction running with the land must be created by adoption of a general land use ordinance or recorded "in the public records."

Petitioner does not allege that the county failed to record the May 1, 1980 order placing this restriction on the property. Further, we note ORS 93.040 puts potential buyers on notice that a conveyance of land does not allow uses in violation of applicable land use regulations.

Further, the county's use of the term "runing with the land" does not control. The condition imposed by the county affects the 23 acres by the terms of the order allowing the portion in 1979. Petitioner has not alleged she is a bona fide purchaser without knowledge of the condition.