

FEB 23 12 39 PM '87

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

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3
4 REX DAVIS,
5 Petitioner,
6 vs.
7 MARION COUNTY,
8 Respondent.

)
)
) LUBA No. 86-083
)
) FINAL OPINION
) AND ORDER
)
)

9 Michael J. Martinis, Salem, filed a Petition for Review and
10 argued on behalf of Petitioner. With him on the brief were
Webb & Martinis.

11 Robert C. Cannon, Salem, filed a Response Brief and argued
12 on behalf of Respondent, Marion County.

13 KRESSEL, Referee; DuBAY, Chief Referee; and BAGG, Referee;
participated in the decision

14 AFFIRMED 02/23/87

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

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 The county governing body denied an application for a major
4 partition in a Timber Conservation (TC) zone. The partition
5 would divide a 217 acre parcel into parcels of 1 acre and 216
6 acres. The proposed one acre parcel includes a residence.

7 FACTS

8 Petitioner owns 217 acres in the TC zone. The Little North
9 Fork of the North Santiam River divides the property.
10 Forty-seven acres are on the north side of the river. The
11 remaining 170 acres are on the south side.

12 Petitioner plans to develop the 170 acre portion as the
13 "Elkhorn Woods recreational facility." The facility would
14 include a campground, recreational areas, and vacation
15 dwellings. Some development has already taken place, although
16 the details are not in the record. The conditional use permit
17 necessary to authorize the recreational facility has not yet been
18 granted.

19 There are two dwellings on the 47 acre parcel. Both were
20 constructed in 1968, prior to the zoning of the property.
21 Petitioner resides in one and rents out the other. The rental
22 unit is known as "the gatehouse." The gatehouse, two storage
23 buildings and a landscaped area occupy about one acre. A paved
24 county road is just to the north of the gatehouse. A small
25 parcel abutting the road is zoned for public facility use and is
26 occupied by a fire district substation.

1 Most of the surrounding area consists of large timber tracts
2 that are planned and zoned TC. However, about 25 small-acreage
3 parcels line the river. The nearest parcel is about 1000 feet
4 from the gatehouse. Some of these parcels are improved with
5 dwellings, although the exact number is not disclosed by the
6 record.

7 In June, 1986, petitioner proposed to divide the gatehouse
8 property from the remainder of the 217 acres. The application
9 was denied by the Planning Director. Petitioner appealed to the
10 County Hearings Officer, who also denied the application. Upon
11 further appeal to the county governing body, the denial was
12 upheld.

13 FIRST ASSIGNMENT OF ERROR

14 Among the criteria governing the application is the following:

15 "(3) the proposed use does not interfere seriously
16 with farming or forest practices on adjacent lands."
Section 138.040(d)(2), Marion County Zoning Ordinance.

17 In connection with this criterion, the county's final order
18 states:

19 "The proposed one acre parcel would be located in such
20 a way to be completely surrounded by a forest parcel.
21 In fact, according to the record, applicant has an
22 option to purchase an additional 100 acres of adjacent
23 forestland to add to the subject 217 acre parcel. The
24 State Forestry Department is opposed to the proposal
25 creating a non-forest parcel in this area because it
26 is found that such parcels are often incompatible with
the management of nearby lands for commercial timber
production. Generally, conflicts between commercial
timber management and residential uses increase as
more non-forest residential parcels increase.
Commercial timber management involves logging, noise,
dust, smoke from slash burning, log truck traffic and
chemical spraying. Such activities create serious

1 conflicts with residential uses in these areas. Since
2 the primary purpose of the TC zone is to preserve and
3 protect commercial forest lands, however, conflicting
4 uses such as non-forest residential use is
5 discouraged." Record at 12.

6 Petitioner claims the quoted finding is unsupported by
7 substantial evidence in the whole record. He supports the claim
8 with these arguments: (1) the record contains no evidence that
9 residents of the immediate vicinity (including the renter of the
10 gatehouse) have complained about logging activities, (2) the
11 person who intends to purchase the gatehouse will sign a statement
12 to the effect that complaints about logging will not be filed and
13 (3) the gatehouse is buffered from nearby commercial logging
14 activity.

15 The record includes a transcript of the hearing on the
16 application conducted by the county hearings officer. The
17 transcript includes the following testimony by a county planner:

18 "Creation of a one acre parcel would allow its sale at
19 any time to someone who was not familiar with, and may
20 object to customary timber management practices,
21 including chemical spraying, timber cutting noise,
22 visual effects, slash burning, smoke, dust, and log
23 truck traffic. The State Forestry Department
24 indicates they now receive complaints from occupants
25 of nonforest related dwellings along the Little North
26 Fork about these kinds of customary logging
activities, and the more nonforest related ownerships
there are in the area, the more difficult it is for
commercial timber management.

* * *

27 "[T]he majority of the area is occupied by large
28 forested parcels. The nearest nonforest, nonfarm
29 related dwelling to the [sic] proposed new nonforest
30 dwelling on the one acre parcel is approximately 1,000
31 feet away." Transcript of June 25, 1986 Hearing at 5.

1 The planner's testimony is substantial evidence for the
2 challenged finding. Petitioner would have us read the
3 criterion in question to require approval of a partition unless
4 the record contains proof that occupants of the land to be
5 partitioned, or land in the immediate vicinity, have complained
6 about forest management practices. That is too narrow a
7 construction of the ordinance. Proof of complaints from
8 occupants of nonforest dwellings along the river, and that such
9 complaints make timber management more difficult, is sufficient
10 to support the county's determination.¹

11 Petitioner's other arguments in opposition to the quoted
12 finding ask us to reweigh the evidence presented to the county
13 decisionmakers. Respondent was obviously not persuaded by
14 petitioner's proposal to include a "non-remonstrance" provision
15 in the documents conveying the gatehouse. Nor was the
16 governing body persuaded by the claim that the gatehouse is so
17 well buffered from nearby logging operations that complaints
18 about those operations would be unlikely. It is not our
19 function to reweigh the persuasiveness of the evidence offered
20 by Petitioner. The critical question is whether the evidence
21 relied on meets the substantial evidence test. We hold that it
22 does.

23 SECOND ASSIGNMENT OF ERROR

24 Among the criteria governing the application is the
25 following:

26 "(c) It [the partitioning] does not materially alter

1 the stability of the overall land use pattern of the
2 area." Section 138.040(d), Marion County Zoning
Ordinance.

3 The final order describes the land use pattern in the area as
4 follows:

5 "4. To the immediate south of the 47 acres lie
6 approximately 25 small acreage timber and pasture
7 parcels, which contain several residences and
8 recreational dwellings. These parcels are also zoned
9 TC. The rest of the surrounding properties to the
10 north and south are large commercial timber tracts.
11 The property lying north of County Road 960 has been
12 clearcut to a depth of approximately one quarter mile
13 along the road and has not yet been replanted."
14 Record at 10-11.

15 The order then concludes that

16 "Creating a one acre non-forest parcel in the middle
17 of a 217 acre forest parcel would seriously and
18 materially alter the stability of the overall land use
19 pattern of the area, particularly where the subject
20 parcel is bordered primarily by commercial timber
21 operations." Record at 14

22 Petitioner claims the county's determination is not
23 supported by substantial evidence. He argues that the one acre
24 parcel is not in the middle of the parent parcel, as the
25 county's order states, but is near the western boundary and
26 only a short distance north of a group of small-acreage parcels
in individual ownerships. Petitioner then asserts that "the
land use pattern in the area as evidenced by the record is such
that the majority of the property in the immediate vicinity of
the subject parcel is recreational property. Indeed, the only
commercial timber property actually used as such is to the west
of the subject property across County Road 960." Petition at
14.

1 We read the petition to argue that the land use pattern in
2 the immediate vicinity of the subject parcel is heavily
3 influenced by small, residential/recreational parcels and that
4 the partition would merely continue that pattern. However, the
5 principal defect in this argument is that it ignores the size
6 of the parent parcel surrounding the gatehouse site and the
7 large timber tracts that abut the parent parcel on the north
8 and to the west, across County Road 960. The approval standard
9 requires consideration of the "land use pattern in the area."
10 Clearly, these large holdings must be included in the analysis,
11 along with the group of smaller parcels to the south. When the
12 nearby large holdings are taken into account, the county's
13 conclusion that partitioning of the gatehouse parcel would
14 materially alter the stability of the overall pattern in the
15 area is reasonable. The county reasonably concluded that the
16 group of small parcels to the south should not be the
17 justification for further parcelization to the north in the TC
18 zone. Schaad v. Clackamas County, ___ OR LUBA ___ (No. 86-042,
19 October 17, 1986, Slip Op at 10-11); Endresen v. Marion
20 County, ___ Or LUBA ___ (LUBA No. 86-031, October 14, 1986,
21 Slip Op at 8-9).

22 Petitioner's second argument in this assignment of error is
23 that, because the gatehouse already exists, the partition of
24 the land it occupies would not seriously undermine the overall
25 land use pattern of the area. We agree that the county's
26 position would be somewhat stronger if the proposed one acre

1 parcel was unimproved. Nonetheless, the fact remains that the
2 proposal is a significant departure from the overall
3 parcelization pattern in this rural resource area. We bear in
4 mind that the area is planned and zoned for resource use and
5 that small acreage residential development is discouraged in
6 the TC district.² Given this fact, the county could conclude
7 that creation of a new, one acre parcel at this location would
8 be an undesirable expansion of the small acreage development to
9 the south, and that the overall land use pattern could best be
10 preserved by denying the partition.

11 Based on the foregoing, the second assignment of error is
12 denied.

13 THIRD ASSIGNMENT OF ERROR

14 Under respondent's zoning ordinance, the partitioning of an
15 existing dwelling can be approved, if, among other things, the
16 dwelling "will not be needed to house forest help." Section
17 138.070(b)(3), Marion County Zoning Ordinance. The county
18 found that the application did not meet this criterion.

19 The final order states:

20 "Applicant asserts that the subject property has never
21 been used in a commercial forest operation. There are
22 52.11 acres assessed at market value, 5 acres assessed
23 at market value covering the two homesites, and 159.91
24 acres under special forest land assessment. Although
25 the applicant has never used the subject property for
26 commercial forest production, the soil classification,
special forestland tax assessment, and the zoning of
the property document that the subject property is
suitable for such commercial forest production. Given
the capability and potential for the subject property
for commercial forest production, the mere fact that
the subject property is not currently in production

1 does not preclude its future use as commercial
2 timberland. Therefore, the Hearings Officer cannot
3 find that the second dwelling situated on the one acre
4 parcel would not be needed to house forest help should
5 the property be put to its highest and best use under
6 the current zoning." Record at 12.

7
8 Petitioner attacks the finding on grounds that it
9 improperly construes Section 138.070(3)(a) and is not supported
10 by substantial evidence. He contends that the finding
11 interprets Section 138.070(3)(a) more strictly than the zoning
12 text requires, i.e, the finding demands proof that, as
13 petitioner puts it, "...at no possible time in the future will
14 the property ever be used for forest help." Petition at 17.

15
16 The county answers that petitioner's evidence was not
17 considered sufficient to satisfy Section 138.070(3)(a). Its
18 brief states:

19
20 "Since petitioner has failed to establish that either
21 the property will conclusively not be used for
22 commercial timber, or that if it is so used the house
23 will not be needed, there is in fact substantial
24 evidence to support the Hearings Officer's conclusion,
25 since in essence the Hearings Officer's conclusion is
26 that the petitioner has not met his burden of proof,
and satisfied the Hearings Officer based on the other
conflicting evidence that in fact the house would not
be used to house forest help." Respondent's brief at
13.

27
28 We find merit in petitioner's claim that the final order
29 too strictly construes Section 138.070(3)(a). The order does
30 seem to say that since the property might someday be used for
31 timber production, the gatehouse might also be needed to house
32 forest workers. Practically speaking, this interpretation
33 dictates denial of any proposal to partition an existing dwelling

1 located on forest land, notwithstanding that the zoning
2 ordinance clearly authorizes approval of such a partition under
3 some circumstances.

4 The zoning standard is difficult to construe. We share
5 petitioner's view that Section 138.070(3)(a) contemplates
6 consideration of the present use of the property, and perhaps
7 the probable uses of it in the near future. Further, we note
8 that even if the property is suitable for timber production,
9 and is now used for that purpose, it does not automatically
10 follow that a dwelling in conjunction with that use is or will
11 be needed. See 1000 Friends of Oregon v. LCDC (Lane County) 80
12 Or App 278, 283, ___ P2d ___ (1987) ("For a forest dwelling to
13 be necessary and accessory to wood fiber production, it must,
14 at the least, be difficult to manage the land for forest
15 production without the dwelling. The purpose of the dwelling
16 must be to make possible the production of trees which it would
17 not otherwise be physically possible to produce.")

18 The county's order construes Section 138.070(3)(a) more
19 strictly than is warranted by the ordinance. This does not
20 mean, however, that petitioner is entitled to relief. We have
21 already rejected challenges to other portions of the final
22 order that are sufficient in themselves to support denial of
23 the application. We also agree with Respondent that petitioner
24 does not challenge certain parts of the order that provide
25 additional grounds for denying the application.³

26 Therefore, although we find merit in the last assignment of

1 error, we must affirm the county's decision.

2 Affirmed.

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1 FOOTNOTES

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4 The final order notes that there is no evidence of serious
5 conflicts between the parcel at issue and farming or forest
6 practices on adjacent lands. However, the order states:

7 "It must be noted, however, that the subject dwelling has
8 always been a secondary dwelling under the ownership of a
9 large TC parcel. The owner can thus control the use of
10 such a secondary dwelling and any potential conflicts,
11 which would not be the case should the subject dwelling lie
12 in separate ownership." Record at 14.

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15 "The primary purpose of the forest land designation and TC
16 zoning is to protect the forest resource, recognizing that
17 timber production is the highest priority for forest land use.
18 The Forest Land Policies call for strict criteria in
19 considreing non-forest related uses and parcels. Dwellings on
20 forest lands are considered a non-forest use and should be
21 discouraged unless it can be demonstrated that the dewlling is
22 integral to proper management of the forest use. The Hearings
23 Officer finds that the proposal does not adhere to the intent
24 of the Forest Land Policies in the Comprehensive Plan or the
25 intent of the TC zoning." Record at 15.

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28 For example, the ordinance states that a non-forest
29 dwelling "shall be situated on generally unsuitable land for
30 farm or forest use considering the terrain, adverse soil or
31 land conditions, drainage or flooding, location and size of
32 parcel." Section 138.030(c), Marion County Zoning Ordinance.
33 The county found this section was not met by the proposal, but
34 the petition does not assail the finding.