BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORBERT HINZPETER, Petitioner, vs. UNION COUNTY and ANNA MAE FLOWER, Respondents.	LUBA No. 87-039 FINAL OPINION AND ORDER

Appeal from Union County.

Barbara Haslinger, Bend, filed a petition for review and argued on behalf of petitioner. With her on the brief were McCord and Haslinger, P.C.

Steven L. Pfeiffer, Portland, filed a response brief and argued on behalf of Respondent Union County. With him on the brief were Stoel, Reeves, Boley, Jones & Grey.

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

REMANDED 09/23/87

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 a Union County decision granting a variance and allowing the partition of 31 acres into two parcels, one of approximately five acres and another of approximately 25 acres.

FACTS

The property is in two zones. The land subject to the variance and the partition is part of an approximate 9 acre portion zoned R-3, a residential zone requiring a 10 acre minimum lot size. A house exists on a portion of the land zoned R-3 (but the house is not on the proposed 5 acre lot to be created by this decision). The proposed 5 acre lot is wet and swampy. Additionally, there is a seasonal creek, irrigation ditch and a spring on the property. The remaining property, about 25 acres, is zoned A-1, an exclusive farm use zone having a 160 acre minimum parcel size.

The applicant, Anna Mae Flower, made application in 1986 to divide this parcel into three lots: a 21 acre parcel and two five acre parcels. The request was granted, and an appeal to this board followed. The appeal resulted in a remand at the county's request. Hinzpeter v. Union County Court, ___ Or LUBA ___ (LUBA No. 86-061, October 3, 1986).

On remand, the county court did not reopen the evidentiary record, but made new findings and an order allowing the partition into 2 lots and a lot size variance.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The court's conclusion that the westerly proposed five-acre parcel is subject to a hardship and to exceptional or extraordinary circumstances not generally applicable to other properties in the same zone or vicinity is not supported by substantial evidence in the record."

Under the Union County Zoning Ordinance, a variance may be granted only upon a showing that

> "1. Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same zone or vicinity, which conditions are a result of lot size or shape, topography, or other circumstances over which the applicant has no control; and
>
> "2. The interest of the public will be preserved, and such action(s) will not set a trend; and
>
> "3. That the variance will be the minimum needed to alleviate the hardship on the land, and will not result in an undesirable change in the purposes of this Ordinance and in area land values or property uses, or be otherwise injurious to other property in the area.
>
> "4. That the hardship on the land is not self-imposed, nor a result from a violation of this Ordinance. (Union County Zoning, Partition and Sub-division Ordinance, section 30.02.)"

The county found the 5 acre parcel was divided by springs and otherwise adversely affected by topography, surface water and drainage conditions. The county said these conditions existed prior to any human impact on the land, and concluded that the first of the four variance criteria was met.

Petitioner argues, however, that the record does not show the property is subject to exceptional or extraordinary

circumstances. Petitioner argues that oral and written testimony in the record shows other properties in the same area are subject to similar swampy conditions.

Also, petitioner complains that the county failed to consider the right land when finding extraordinary circumstances existed. Petitioner argues the entire holding, including the new 5 acre lot to be established and the remaining 25 acres, must be reviewed to see if the entire 31 acres is subject to conditions warranting a lot size variance. Because the record does not show the entire property is subject to such conditions, petitioner states the variance may not be allowed.

Petitioner adds there is evidence in the record that both of the previously proposed five acre parcels are in pasture use. Record 93. The property, therefore, is in farm use; and a finding of hardship is unwarranted, according to petitioner.[1] Petitioner cites Bowman Park v. Albany, 11 Or LUBA 197 (1984) for the proposition that it is only where unique physical conditions make it virtually impossible to meet code requirements and put the land to resonable economic use will a variance be allowed.

Respondent complains that petitioner's argument is based upon a different view of existing evidence. Respondent reminds us that we may not reweigh the evidence but must confine our inquiry to whether the record contains evidence a reasonable mind could accept as adequate to support the findings and

conclusions made by the local government. Citing Younger v. City of Portland, 86 Or App 211, ___ P2d ___ (1987), respondent notes that petitioner does not really dispute the physical conditions existing on the property as described in the county's order. These conditions, according to respondent, are sufficient to meet ordinance variance requirements.

Respondent asserts the county's interpretation of the code, to consider the physical properties of the small lot to be divided separately from the rest of the ownership, is reasonable and must be sustained.

The 31 acre parcel is divided into two zoning districts. The county's order discusses nothing about the whole property which would justify a variance for the entirety of the parcel. We find nothing in the code permitting the county to consider applicability of the variance code to only a part of the affected property. Indeed, the code requires consideration of the variance criteria "to the property." The code does not limit its application only to the "affected portion" of the property. We conclude, therefore, the county was incorrect to consider only the new 5 acre lot against the variance criteria.

Further, there is nothing in the county's order, or the record, to show that other properties in the vicinity are not subject to similar natural conditions, that is, having a portion inundated with water or otherwise unusable. The county's order states the property suffers from "atypical" conditions, but the order does not describe other properties or

state that other properties in the area are free from water inundation. To adopt the county's view and permit a division of land to remove undesireable land from the whole would be, in our view, to open the door to variances for creation of small lots anywhere adverse geographic conditions occur. We do not believe the county's variance standards may be interpreted in this fashion.

We believe the zoning code requires that there be exceptional or extraordinary circumstances which apply to the property viewed as a whole. That condition is not met here.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "The determination that in granting the requested variance the interest of the public will be preserved and such action will not set a trend is not supported by substantial evidence in the record."

Petitioner complains area inhabitants expressed concern over sewage, water quality and adverse traffic conditions and states that these concerns were not addressed or were inadequately addressed. The result, according to petitioner, is that the county failed to show the requested variance is in the public interest. Therefore, according to petitioner, the second of the four county ordinance variance criteria remains unmet. See page 3, supra. As part of this argument, petitioner challenges testimony offered by the applicant's expert, Dr. Ward, who testified that adequate water supply was available for domestic use. Petitioner says the evidence is

not reliable because Dr. Ward's qualification to testify on water availability was not established and because his evidence gathering was not complete.

Petitioner also cites evidence in the record that granting the variance would set a trend, therefore violating the second of the four variance criteria at Section 30.02 of Zoning Ordinance.

Respondent replies that there is evidence in the record supporting the county's findings regarding water supply and sewage treatment. Respondent notes that Dr. Ward is a geologist at Eastern Oregon State College, and his testimony should be given credibility. Respondent cites the testimony of Dr. Ward for the proposition that adequate septic tank drain fields are feasible. See Record 105. In addition, respondent cites testimony of Dr. Ward regarding the availability of adequate water and concludes that the testimony provides substantial evidence to support the county's findings.

In addition, the respondent disputes petitioner's claim that a trend will be set by this decision. Respondent points to the finding recognizing that there are similar substandard parcels in residential use in the area.

The county found as follows

> "The 5 acre parcel contains some higher ground, running from the former homesite adjacent to Igo lane back to the northwest. This higher ground is composed of very rocky, poor quality soils and is an ideal site for a well-planned septic tank drain field. Additionally, installation of new septic systems on substandard parcels must comply with rigid Deoartment

[sic] of Environmental Quality (DEQ) requirements and Environmental Protection Agency (EPA) standards. A sand filter septic system can be required, and would produce effluent cleaner than that from La Grande's sewage treatment plant, thereby avoiding any possibility of bacterial contamination of wells and/or surface water of other parcels in the area from septic tank effluent produced on the 5 acre parcel. Finally, the 5 acre parcel and its homesite are at a lower elevation than other homes in the area, and thus poses minimal possibility of septic tank drainage problems being created for other properties in the area.

The springs on the 5 acre parcel are an existing source of a domestic water supply for a future rural home on the parcel. Water is currently transmitted by pipe from Canfield Spring to a 10,000 gallon concrete water holding tank. The flow rate from this spring has not been measured, but the volume of the creek passing across the parcel from that spring suggests that it is more than an adequate flow for the purpose of domestic use. This water source, which was used for household purposes in the past, has been recently inspected and cleaned. This existing surface water source eliminates the need to drill a well to serve a future dwelling on that parcel, and therefore negates any concern over further depletion of groundwater supplies in the area being caused by the approval of this variance.

Neighboring residents also expressed concerns that the presence of an additional residence on Igo Lane would create traffic and road maintenance or noise problems in the area. However, Igo Lane and Mt. Glenn Road have the capacity to absorb the additional traffic due to one or more residence without the level of service or maintenance being decreased to unacceptable levels. Furthermore, as the only effect of this variance on the uses allowable on the subject property is to open the possibility of having one additional rural residence on the 5 acre parcel, the variance will not result in noise problems in the area, as a rural residence is not expected to be a source of noise pollution." Record at 46-48.

We do not fault the county's reliance on Dr. Ward's testimony. Whether Dr. Ward is an "expert" in the field is not determinitive if his testimony is credible, to the point and

believed by the decision maker. As we discuss below, his testimony was so found by the county, and the county was, therefore, within its bounds under the substantial evidence rule to rely on it. See Younger v. City of Portland, supra. With respect to the septic tank issue, we are cited to testimony which respondent characterizes as showing that it "will be feasible to provide an adequate drain field." Respondent's Brief at 10. This evidence, consisting of comments by Dr. Ward and Mr. Flower, the applicant's son, addresses the septic tank issue. Dr. Ward testified that he believed the site was "ideal" for a drain field because of its slope. Mr. Flower made similar testimony. There is, however, no Department of Environmental Quality evalutaion of the site for septic system suitability.

This testimony, while certainly not as detailed as it might be, is sufficient to show that a septic system on the property is feasible. We don't believe the county is required to do more, and we conclude the evidence presented is substantial evidence to support the county's decision that a septic system is possible for the site. Margulis v. City of Portland, 4 Or LUBA 89 (1981). However, our finding does not settle the issue of whether a new septic system on this property is "in the public interest" as required by the county ordinance.

There is testimony in the record from nearby residents that surface water interferes with domestic water supply. According to that testimony, drainage in the area, along with additional

sewer systems, will aggravate an already hazardous condition. See Record 24, 25, 26. The county does not respond to this concern. We find the county must address this issue. The testimony is sufficient to raise an important issue of public safety and, therefore, a question as to whether this proposal is in the "public interest." See Hillcrest Vineyard v. Board of Commissioners of Douglas Co., 45 in App 285, 608 P2d 201 (1980) Without findings addressing this matter, it is not clear that the project meets the "public interest" criterion. This failure requires a remand.

With respect to the domestic water supply issue, there is testimony by Dr. Ward that an adequate domestic water supply is available. See Record 105 and testimony of Flower, 95, 100, 102. We find Dr. Ward's testimony to be sufficient to support the county's conclusion that adequate domestic water is available to the site. This issue is, however, separate from the "public interest" issue discussed above.[2]

The county's finding on the traffic issue says there will be one additional rural residence on the new 5 acre parcel. The county concludes that this use will not result in increased traffic noise. While we are cited to no evidence to support this conclusion, we do not believe that the conclusion of an opponent that one additional residence will result in additonal noise problems is sufficient to trigger a detailed response by the county. The assertion that one new house will create a traffic problem is not self evident, and without an explanation

of how so small a change can result in a problem, we will not find the county obliged to address the issue.

We sustain this assignment of error, in part.

The decision of Union County is remanded.