

LAND USE
BOARD OF APPEALS

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

DEC 15 11 56 AM '87

INA I. MCCOY and)
ROBERT N. MCCOY,)
)
Petitioners,)
)
vs.)
)
MARION COUNTY,)
)
Respondent.)

LUBA No. 87-063
FINAL OPINION
AND ORDER

Appeal from Marion County.

Jossi Davidson, Silverton, filed a petition for review and argued on behalf of petitioners. With him on the brief was Gracey & Davidson.

Jane Ellen Stonecipher, Salem, filed a response brief. With her on the brief was Robert C. Cannon. Daryl S. Garrettson, Salem, argued on behalf of Respondent County.

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

AFFIRMED 12/15/87

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 This is an appeal of the county's denial of petitioners'
4 request for a minor partition and permission to construct a
5 single family dwelling on one of the new parcels.

6 FACTS

7 Petitioners own a ten acre parcel in the rural Farm/Timber
8 (FT) zone. Petitioners' 10 acre parcel was created in 1980,
9 when a 30 acre parcel was proposed to be divided into a 20 acre
10 parcel and two five-acre parcels. However, in approving the
11 partition request in 1980, the planning commission required the
12 two five-acre parcels to be combined into one 10 acre parcel.
13 It is this 10 acre parcel the petitioners seek to partition
14 into two five acre parcels. Record 31.

15 Uses surrounding petitioners' property include commercial
16 forest operations, small farm and forest operations and acreage
17 homesites. There are 24 parcels of less than 10 acres within
18 one mile of petitioners' property, as well as a subdivision
19 containing 11 five-acre lots. Record 30. The property
20 contains steep slopes and includes two flat areas. Two small
21 creeks intersect the property. The property is Class IV
22 Agricultural Soil and the soil rating for Douglas Fir is Site
23 Class III.

24 In addition to the requested partition, petitioner sought
25 approval for a single family dwelling not in conjunction with
26 farm or forest use to be placed on one of the new five acre

1 parcels. An existing dwelling on the other five acre parcel is
2 to be retained. Record 40.

3 ASSIGNMENT OF ERROR

4 "Marion County erred in its application of the
5 relevant zoning criteria and its decision is not
6 supported by substantial evidence."

7 In the above-quoted assignment of error, petitioners assert
8 both improper application of relevant criteria and a lack of
9 substantial evidence to support the county's findings. In
10 reviewing a local government's decision to deny a requested
11 approval or permit, we perform our review function by examining
12 the decision to determine whether there are findings supporting
13 a conclusion that any one of the required approval criteria is
14 not met. Portland City Temple v. Clackamas County, 11 Or LUBA
15 70, 78 (1984); Weyerhaeuser v. Lane County, 7 Or LUBA 42, 46
16 (1982). If there are adequate findings regarding noncompliance
17 with a required approval criterion and those findings are
18 supported by substantial evidence in the record, the denial
19 will be affirmed. In such cases affirmance is required even if
20 the local government's findings on other applicable criteria
21 are erroneous or unsupported by substantial evidence in the
22 record. This is an extremely heavy burden for petitioners to
23 overcome.

24 As we explained in Weyerhaeuser, supra at 46, the
25 petitioner challenging a denial generally must show the denial
26 was erroneous as a matter of law. Therefore, it is not
sufficient for petitioners to argue there is evidence

1 supporting their position on all applicable criteria. Rather,
2 the "evidence must be such that a reasonable trier of fact
3 could only say the [petitioners'] evidence should be
4 believed." Id. Finally, in Weyerhaeuser we also noted that
5 this heavy burden increases as the applicable standards become
6 more subjective. Id. We review petitioners' allegations with
7 this scope of review in mind.

8 Petitioners challenge the county's findings of
9 noncompliance with four of the applicable criteria. Each of
10 these four criteria is addressed separately below.¹

11 A. General Unsuitability

12 MCZO 139.040(c) requires that nonfarm dwellings

13 "shall be situated on generally unsuitable land for
14 farm or forest use considering the terrain, adverse
15 soil or land conditions, drainage and flooding,
16 location and size of the parcel."

17 Petitioners claim

18 "The county has misapplied the law. The parcel
19 might indeed be intensively managed to establish and
20 maintain a woodlot. But if any land upon which
21 firewood trees will grow is considered to be generally
22 suitable for forest use, then the only land that could
23 ever be partitioned is at the bottom of a lake.

24 "The hearings officer's construction of MCZO
25 139.040(c) is simply extreme and unreasonable.
26 Reasonably applied, that subsection poses no bar to
petitioners' application." Petition for Review 11-12.

27 Petitioners also argue that the record shows the soil is
28 rocky and drainage is poor, and there was testimony that
29 "merchantable fir trees will only grow to approximately one
30 foot in diameter and then die." Record 11.

1 The county responds that the general unsuitability for farm
2 or forest use standard cannot be met by showing the property is
3 unsuitable for commercial farm or forest use. Rutherford v.
4 Armstrong, 31 Or App 1319, 572 P2d 1331 (1977), rev den 281 Or
5 431 (1978). Woodlots are both a farm and forest use. MCZO
6 110.223; 110.228; ORS 215.203(2)(b)(D). According to the
7 county, the hearings officer's conclusion that the property
8 could be used as a woodlot is supported by the petitioners'
9 statements submitted with the application. In the application,
10 petitioners stated:

11 "The land is too steep for farm use, suitable only for
12 trees * * * it is covered with a mixture of fir and
13 alder with hazelnut and blackberry underbrush. Except
14 for about six Douglas Fir to be removed to clear the
15 building site, it is planned to maintain the existing
16 timber and to plant new trees in open areas." Record
17 38.

18 We do not believe the county's application of MCZO
19 139.040(c) is unreasonable. The county first acknowledged the
20 evidence in the record showing the property's limitations for
21 farm and forest use. The county then found the property can be
22 used as a woodlot, noting the petitioners apparently plan to
23 put the property to such use. Record 11. Because we can find
24 no reason to fault the county's application of the general
25 unsuitability standard in this case, and because we find that
26 its conclusion of noncompliance with the standard is supported
27 by substantial evidence in the record, one of the required
28 approval standards is not satisfied. Therefore, we are
29 required to affirm the county's denial. Portland City Temple

1 v. Clackamas County, supra; Weyerhauser v. Lane County, supra.

2 Our conclusion regarding MCZO 139.040(c), if correct, is
3 sufficient to resolve this appeal. However, the county's
4 findings of noncompliance with other approval criteria may
5 provide separate bases to affirm the county. We will examine
6 each of the standards discussed by the county in its brief.

7 B. Compatibility With Farm Or Forest Use
8 And Consistency With The Intent of the FT Zone

9 MCZO 139.040(d) (1) requires that the proposed use be

10 "compatible with farm or forest uses and * * *
11 consistent with the intent of the FT Zone."²

12 Petitioners argue that the requirement for compatibility in
13 MCZO 139.040(d) (1) does not require them to show the proposal
14 will have "no impact on farm or forest uses." The petitioners
15 argue they showed the requested use would not seriously
16 interfere with any surrounding uses. Petitioners note an
17 adjoining farm operator and others testified in favor of the
18 proposed use. Petitioners complain the county cited no
19 contrary evidence and made a factually unsupported finding that
20 "the creation of nonfarm/forest parcels in an area dominated by
21 commercial farm and forest operations increases the chances for
22 conflicts with commercial, farm and timber management of nearby
23 lands." Record 12. Petitioners complain this finding was
24 based on personal philosophy rather than evidence in the
25 record. Petitioners further argue that MCZO 139.010
26 "recognizes acreage homesites as an existing use in the FT
Zone, and as an integral part of the mixture of land ownership

1 and uses in the zone intended to serve as a transition between
2 large farms and EFU Zones and large commercial timber
3 operations in TC Zones." Petition for Review 13.

4 We agree with petitioners' argument that "compatibility,"
5 as used in the planning and zoning context, does not require a
6 showing of no adverse impact or interference of any type. What
7 is required is that uses be capable of co-existing
8 harmoniously. See, La Pine Pumice Company v. Deschutes County,
9 13 Or LUBA 242, 248, aff'd 75 Or App 691, rev den 300 Or 704
10 (1986); Vincent v. Benton County, 5 Or LUBA 266, aff'd 60 Or
11 App 324 (1982); ORS 197.732(2); OAR 660-04-020(2)(d). However,
12 the permissibility of some impact or interference says nothing
13 about the intensity or type of impact or interference that is
14 permissible without upsetting the requirement for harmonious
15 co-existence. While the subjective nature of the compatibility
16 requirement is obvious, the other part of MCZO
17 139.040(d)(1)--"[consistency] with the intent of the FT
18 Zone"--suggests the compatibility standard is a difficult one
19 to satisfy in this context.³

20 While acreage homesites and owner resident timber tracts
21 are mentioned in the purpose section of the FT zone, the zone
22 "is intended to be a forest zone consistent with the objectives
23 of the forest land goal." MCZO 139.010. The forest land goal
24 and policies quoted at footnote 2, supra, show that land
25 divisions for nonforest residences are discouraged.

26 "5. Subdivision development and other land divisions

1 resulting in new non-timber residences are not
2 compatible with the protection and efficient
3 management of Forest Lands and Farm/Timber lands and
4 should be discouraged. Strict criteria should be
5 applied to insure that any permitted non-timber
6 dwellings or uses will not interfere with accepted
7 forest management practices on adjacent lands, alter
8 the overall land use pattern, increase fire hazards or
9 overtax rural service systems." (Emphasis added.)
10 Marion County Comprehensive Plan Forest Land Policies.

11 It is possible to read the county's order in this case to
12 say the county legislatively determined that nonfarm dwellings
13 are a conflicting (and therefore an incompatible) use in the FT
14 zone. In its brief the county argues

15 "Respondent's finding regarding increased
16 conflicts caused by creating non-farm/forest parcels
17 in areas dominated by commercial farm and timber
18 operations has been determined as a matter of law by
19 the Marion County Comprehensive Plan (Pages 19-20,
20 30-31). In addition, the plan states that 'the FT
21 designation does not encourage the creation of small
22 acreage homesites' (Page 30)." Respondent's Brief 4.

23 Pages 19-20 of the plan state nonfarm residences are a
24 "secondary use"--"almost always inappropriate." As noted
25 earlier, the forest lands policy on page 30 of the plan says
26 nonforest dwellings are to be discouraged.

1 We agree with petitioner that the applicable plan language
2 falls short of a legislative determination that nonforest
3 dwellings are incompatible with farm and forest uses and
4 inconsistent with the intent of the FT zone in all cases.
5 Rather, we believe the applicable plan language establishes a
6 very heavy burden on applicants to demonstrate compatibility
7 and consistency.

8 Nearby landowners submitted a letter in which they

1 contended the small size of the proposed parcels together with
2 the removal of additional area from forest use to accommodate
3 the proposed residential use and accessory uses, shows the
4 proposal is incompatible with farm and forest use.⁴ In
5 addition, the property owners contend the unimproved county
6 road serving this area is "narrow, windy * * * [and] dangerous
7 * * * and additional points of ingress and egress will only
8 increase the hazard." Record 25. While the letter is
9 admittedly less than overwhelming evidence to support the
10 conclusion that the proposed division and non-farm/forest
11 dwelling are incompatible with farm and forest use and
12 inconsistent with the intent and purposes of the FT zone, it is
13 evidence a reasonable person could rely on to decide as the
14 county did. See e.g. Younger v. City of Portland, 86 Or App
15 211, 7390 P2d 50, rev allowed ___ Or ___ (1987). We therefore
16 deny this subassignment of error.

17 C. Interference With Farm Or Forest
18 Practices on Adjacent Land

19 MCZO 139.040(d)(2) requires that the applicant demonstrate
20 the proposed use will "not interfere seriously with farming or
21 forest practices on adjacent land." Petitioner contends there
22 is no evidence in the record that their proposed use will
23 interfere seriously with farm or forest practices on adjacent
24 lands. Petitioners again accuse the county of relying on
25 abstract hypothetical conflicts. Petitioners note the record
26 shows the county road serving the properties could be

1 considered dangerous, but dispute the proposed partitioning
2 would therefore seriously interfere with farm or forest
3 practices on adjoining properties. Petitioners cite testimony
4 in the record that the road is adequate for the proposed use
5 and that use of the adjoining roads for farm and forest use is
6 slight.

7 The county responds that the petitioners merely have
8 created a basis from which one could infer no interference with
9 farm or forest uses on adjoining properties. The county cites
10 to the letter from adjoining property owners regarding the
11 dangerous condition of the county road serving the property and
12 argues the record shows such interference exists.⁵

13 We agree with petitioners that the evidence regarding road
14 safety and the historic conflicts between residential and
15 commercial farm and forest uses provides a slender basis upon
16 which to conclude the applicants failed to demonstrate
17 compliance with MCZO 139.040(d)(2). However, a substantial
18 evidence challenge of a denial of development approval under
19 ORS 197.835(8)(a)(C) will not be upheld unless we can say the
20 applicants have sustained their burden of proof as a matter of
21 law. Chemeketa Industries Corp. v. City of Salem, *supra*,
22 163-164; Jurgenson v. Union County, *supra* at 510. In this
23 case, the applicants submitted evidence to the county in
24 support of their position that no such serious interference
25 would result. Applicants noted that land in the immediate
26 vicinity is devoted to acreage homesites and that some property

1 owners adjoining such homesites perceive no conflict. The
2 applicants also submitted evidence which shows the property
3 slopes in a way that makes it not visible from some adjoining
4 properties.

5 We are not certain the letter relied on by the county is
6 evidence a reasonable person would rely on to conclude the
7 proposed partition and dwelling would interfere seriously with
8 farming or forest practices on adjacent land. However, the
9 evidence submitted by the applicant that the proposed use would
10 not interfere seriously with farming or forest practices on
11 adjacent lands, when viewed with that letter, falls short of
12 showing that MCZO 139.040(d)(2) is satisfied as a matter of
13 law. The conflicting evidence requires exercise of judgement
14 by the county, and we cannot say the county erred as a matter
15 of law. Accordingly, we deny this subassignment of error.

16 D. Stability Of The Overall Land Use
17 Pattern Of The Area

18 MCZO 139.040(d)(3) requires that the applicants demonstrate
19 the proposed use will "not materially alter the stability of
20 the overall land use pattern of the area." Petitioners argue
21 the record shows there are a significant number of small
22 acreage homesites in the vicinity of their property.

23 Petitioners complain the hearings officer distorted the
24 evidence in finding there were fewer than a half dozen parcels
25 less than 10 acres in size near the subject property.

26 Petitioners further complain the hearings officer improperly

1 concluded that their testimony lacked credibility.

2 The county answers that the record clearly demonstrates
3 there are a significant number of acreage homesites in the
4 area. The county also notes the parent parcel from which the
5 property at issue was originally divided has been divided seven
6 times. Citing our decision in Endresen v. Marion County, ___
7 Or LUBA ___ (LUBA No. 86-031, October 14, 1986), the county
8 argues it is entitled to consider the effect of continuing
9 divisions of properties and how the "progressive partitioning
10 of the property seriously threatens the stability of the land
11 use pattern in the area."

12 The county's position apparently is that in view of the
13 number of small parcels in the area and the past divisions of
14 the parent parcels, the continuation of parcelization
15 represented by the proposed division would materially alter the
16 stability of the land use in the area. We find no error in the
17 county's reasoning, and the evidence relied on by the county is
18 sufficient to support its conclusion that MCZO 139.040(d)(3) is
19 not met. This subassignment of error is denied.

20 Affirmed.

1 areas designated farm/timber in the Marion County
2 Comprehensive Plan. It is intended to be a forest
3 zone consistent with the requirements of the Forest
4 Land Goal."

5 The Forest Land Goal and Forest Land Policies are as follows:

6 "FOREST LAND GOAL

7 "To protect and maintain the forest resource by
8 designating appropriate areas for continued timber
9 production, watershed, wildlife habitat, recreation
10 and other similar compatible uses.

11 "FOREST LAND POLICIES

- 12 "1. Protect the resource values of those areas
13 designated as Forest Lands or Farm/Timber Lands
14 by applying an appropriate Timber Conservation
15 zone and a Farm/Timber zone respectively.
- 16 "2. Encourage the multiple use of forest lands in
17 Marion County while recognizing that timber
18 production is the highest priority for forest
19 land use in most areas.
- 20 "3. Recreational use of forest lands should be
21 limited to designated areas that minimize the
22 adverse impacts on productive timber lands,
23 watersheds and wildlife habitat.
- 24 "4. Division of forest lands into farm or forest
25 parcels smaller than 80 acres in forest lands
26 areas and 40 acres in farm/timber areas shall be
permitted only if the proposed parcels are
consistent with the size of commercial farm or
timber producing parcels in the vicinity and the
management plan proposed by the owner assures the
long-term commercial productivity of the parcel.
- "5. Subdivision development and other land divisions
resulting in new non-timber residences are not
compatible with the protection and efficient
management of Forest Lands and Farm/Timber lands
and should be discouraged. Strict criteria
should be applied to ensure that any permitted
nontimber dwellings or uses will not interfere
with accepted forest management practices on
adjacent lands, alter the overall land use
pattern, increase fire hazards or overtax rural
service systems.