BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RUSSELL A. NEWCOMER, Petitioner, vs. CLACKAMAS COUNTY, Respondent.	LUBA No. 87-107
	FINAL OPINION AND ORDER

Appeal from Clackamas County.

John Casey Mills, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Miller, Nash, Wiener, Hager & Carlsen.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of Respondent Clackamas County.

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

REMANDED 04/08/88

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 seeks review of a Clackamas County decision approving construction of a single-family residence in conjunction with farm use in an Exclusive Farm Use, 20 acre minimum lot size (EFU-20) zone in Clackamas County.

FACTS

The subject property is comprised of two tax lots, Tax Lot 1505 (1.37 acres) and Tax Lot 1501 (8.96 acres). In 1974, a deed of trust was executed, encumbering Tax Lot 1505. Tax Lot 1505 was subjected to a second deed of trust in 1979. Tax Lot 1505 remains subject to both deeds of trust.

In 1982, the county planning department made a determination that Tax Lot 1505 and Tax Lot 1501 are "separate, legal lots of record." The county apparently did so because of the deeds of trust affecting Tax Lot 1505.

On June 11, 1987, Spencer Waite and Rexene Waite requested approval for construction of a single family dwelling on Tax Lot 1501, the larger of the two tax lots. A farm management plan accompanied the proposal. The plan calls for installation of a drain tile system and irrigation well, along with planting of two acres of nursery stock. The plan also calls for planting of additional areas with nursery stock over a four year period. The county planning department approved the application, but petitioner, and others, appealed the planning department's decision to the county board of commissioners.

The county board approved the request, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The Order violates Ordinance Sections 401.04A and 902.02 because it approves the development of a residence on a lot that is not a legal lot of record."

Petitioner advises that Clackamas County Zoning and Development Ordinance (ZDO) Section 401.04A allows development of a single family residence in conjunction with commercial farm use only on a pre-existing legal lot of record. Under ZDO 902.02, a legal lot of record is defined as follows:

> "A. A parcel is a legal lot of record for purposes of this Ordinance when the lot conformed to all zoning requirements, Subdivision Ordinance requirements, and Comprehensive Plan provisions, if any, in effect on the date when a recorded separate deed or contract creating the separate lot or parcel was signed by the parties to the deed or contract,
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> * * * * *
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> "D. A lot created for mortgage purposes which does not satisfy the provisions under 902.02A, above, shall not be considered a lot of record under this Ordinance unless such lot is sold under the foreclosure provisions of Chapter 88 of the Oregon Revised Statutes."

Petitioner argues that Tax Lot 1501 is not a legal lot of record. According to petitioner, a deed of trust is not an effective means to divide property, the deed simply creates a lien on real property. ORS 86.705(3). See also Sam Paulson Masonry Co. v. Higley, 276 Or 1071, 557 P2d 676 (1976).

Respondent county advises that prior to the first scheduled hearing before the board of commissioners, the petitioner and others argued that the two tax lots comprised only a single lot

of record. The hearing was postponed, and during that time arguments on both sides of this issue were presented to the board. At the eventual hearing before the board of commissioners, the attorney for petitioner and other opponents advised the county commissioners that "we are now resolved of the fact that there are two legal lots of record * * *." Record 12.

The county complains that petitioner, while now represented by a different attorney, should not be allowed to raise the legal lot of record issue in this review proceeding. Petitioner made an affirmative representation to the county that the legal lot of record issue was not an issue that the county needed to consider.

In the alternative, the county argues that two legal lots of record were created by the 1974 trust deed. ZDO 902.02D is not applicable in this case, according to respondent county, because both tax lots met plan, zoning and subdivision requirements applicable in 1974, and therefore fall under the provisions of ZDO 902.02A.

In Twin Rocks Water Dist. v. Rockaway, 2 Or LUBA 36, 41-42, (1980), this Board held that a petitioner was not precluded from raising an issue, on the merits, for the first time before LUBA. Here, however, the situation is rather different. In this case petitioner's counsel announced to the county board that an issue in the case was settled. The county did not address the issue further. Petitioner now assigns the same

issue (the lot of record issue) as error.

Petitioner had every opportunity to pursue the lot of record issue before the county. Petitioner was represented by counsel, the issue was briefed before the county board, and petitioner had every opportunity to continue to press the issue. We believe, under these circumstances, failure to do so creates a waiver. Cf. Mill Creek Glen Protection Assoc. v. Umatilla County, 88 Or App 522, 526-28; Hearne v. Baker County, 89 Or App 282, 288, ___ P2d ___ (1988).

In case we are mistaken on the waiver of the lot of record issue, we will consider petitioner's argument.

A trust deed encumbers property by conveying legal title to a trustee, it does not create a separate lot or parcel or result in a division of land. ORS 86.705(3). Other than ZDO 902.02A, we are cited to nothing in the county's ordinance or elsewhere to suggest that a trust deed is effective in Clackamas County to create a legal lot of record. We conclude that ZDO 902.02A does not support the county's position that Tax Lots 1501 and 1505 are separate legal lots of record.

ZDO 902.02D specifically provides that a lot created for mortgage purposes which does not satisfy the requirements of ZDO 902.02A is not considered a lot of record unless the lot is sold under foreclosure provisions of Oregon law. The tax lots subject to the trust deeds were created for mortgage purposes. The trust deeds have not been foreclosed, and ZDO 902.02D therefore does not justify legal lot of record status for Tax Lots 1501 and 1505.

If we were to reach the issue, we would, therefore, conclude that the county erred in approving a residence in conjunction with farm use on Tax Lot 1501, because that tax lot is not a legal lot of record.

The First Assignment of Error is denied.[1]

SECOND ASSIGNMENT OF ERROR

"The Order violates Ordinance Section 401.04A in that the Board failed to make appropriate findings."

Petitioner argues that the county failed to make the findings required by ZDO 401.04A. ZDO 401.04A provides in pertinent part:

> "A. Principal Dwelling In conjunction With A Principal Use: The development of a single family residence in conjunction with a commercial farm use on a pre-existing legal lot of record larger than five (5) acres in size may be approved by the Planning Director, subject to review with notice pursuant to 1305.02, when the applicant provides a farm management plan, as provided under 401.10, and other evidence as necessary to demonstrate all the following criteria are satisfied:
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> "1. The lot is as large as the acreage supporting the typical commercial farm unit in the area ('area' for the purposes of Section 401.04 is defined as the land within a one-mile radius of the subject property), or the proposed principal use is a commercial farm use of greater intensity (such as a nursery) than commercial farms in the area;
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> * * * * *
>
> "4. Development of the property will not adversely affect or limit the existing or potential commercial farm uses in the area;
> * * *"

Petitioner explains that the board did not find the parcel

is as large as the acreage supporting the typical commercial farm unit in the area. Petitioner points to evidence in the record showing that it takes 40 acres to support the typical commercial farm. Petitioner also complains the board did not make the alternative finding that the proposed principal use of the property is as a commercial farm of greater intensity than area commercial farms. Petitioner says the board found the proposed use was more intensive than the typical farm unit in the area, but the board did not state whether the proposed use was more intensive than "commercial" farms in this same area.

Petitioner points out that the board found the proposed residence should have no adverse impact on existing or potential commercial farm uses in the area. However, petitioner characterizes this finding as speculative and not satisfying the ZDO 401.04A(4) standard requiring that development "will not adversely affect * * * existing or potential commercial farm uses * * *." (Emphasis supplied.)

With regard to the findings required by ZDO 401.04A(1), respondent counters that the planning department simply failed to cite the magic term "commercial farms." In other words, the county says it was mere inadvertence which resulted in the substitution of "typical farm unit" for "commercial farm unit" in the county's decision.[2]

ZDO 401.04A(1) requires a finding that the lot is as large as the acreage "supporting the typical commercial farm unit in the area * * *." The finding on this issue is as follows:

> "1. The parcel size is as large as a number of parcels in the area supporting similar intensive agricultural uses. The area in which the subject property is located contains a diverse mixture of intensive agricultural uses on parcels generally ranging from approximately 5 acres to approximately 20 acres, medium intensity agricultural uses on parcels ranging from approximately 10 acres to approximately 40 acres, extensive agricultural uses on parcels upward to approximately 60 acres, rural residential homesites on parcels as small as 2 acres, and mixtures or rural residential homesites and extensive agricultural uses, generally on parcels ranging form [sic] approximately 5 acres to approximately 10 acres. The use proposed for the subject property and the income generation identified by the applicant is more intensive than the typical farm unit in this area, particularly in terms of income generation per acre." Record 134.

This finding does not establish that the lot is as large as the typical commercial farm unit in the area. The typical commercial farm unit in the area is not defined. What is defined is what agricultural uses exist on certain sizes of property in the area. There is no discussion of whether these properties are commercial farm units or something other than commercial farm units. An analysis of commercial farm units in the area is required before the county can make a finding that ZDO 401.04A(1) is satisfied.

In the alternative, the county argues this assignment of error should be denied even if the findings are incomplete because there is evidence in the record which supports the decision. ORS 197.835(10)(b). The county points to testimony by the applicant that the proposed use is of "greater intensity than commercial farms in the area." Record 146. The county

cites a memo from the planning department that typical commercial farms include filberts, Christmas trees, grains, field crops and livestock, and argues that all such uses are "obviously less intensive than nursery stock." Record 95; Respondent's Brief 9.[3] Respondent also notes that it has approved other farm management plans providing for less intensive uses than that proposed (Record 81, 86), and that one of the applicants testified that there is a need to live on the property to irrigate and care for the nursery (Record 46-47). Other nurseries include dwellings, according to the county. Record 49.

Under ORS 197.835(10)(b) this Board is required to overlook defective findings and affirm the county's decision if "the parties identify relevant evidence in the record which clearly supports the decision." None of the evidence to which we are cited by respondent county is sufficient to show compliance with ZDO 401.04A. The evidence shows this property may not be atypical when compared to other properties in the vicinity, but the evidence does not show that the property is as large as commercial farm units in the area.[4]

As to petitioner's argument that ZDO 401.04A(4) is not met, the county replies that its finding clearly states that the development "will not adversely affect or limit existing or potential farm uses in the area." The fact that the county later states that the use "should have no adverse impact on farm uses to the north and west * * *" does not detract from

the county's clear finding that the use will not have such adverse impact.

The county's finding is as follows:

> "4. The proposed residential development will not adversely affect or limit existing or potential farm uses in the area. The proposed single family residence will be located approximately 70 feet from the nearest property line. This area of the property will also be used for the storage of farm equipment and the establishment of a greenhouse building for the propagation of nursery stock. This agriculturally related use of this portion of the property should mitigate the potential for any adverse impacts from the presence of a residence on the property, particularly since the proposed greenhouse, a clear agricultural use, will be located nearer to the south and east property lines than the proposed residence. The presence of a residence on the property should have no impact on farm uses to the north and west, since the residence will be separated from these areas by both distance and the nursery stock crop." Record 134-135.

We do not find fault with this finding as alleged. Petitioner's complaint is limited to the county's use of "should" rather than "will." In this case, the finding, read as a whole, shows the county believed the development "will not adversely affect existing or potential farm uses."[5]

The Second Assignment of Error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

"The Order violates ORS 215.203(2)(a)."

Under this assignment of error, petitioner argues that in order for the parcel to be considered in "farm use," the land must be currently employed for the primary purpose of obtaining a profit in money from farm activities. See ORS

215.203(2)(a).[6] Petitioner claims the first phase of the farm management plan provides for planting only two of the eight acres. Petitioner concludes that the parcel, as a whole, will not be in farm use when construction begins. In support of this view, petitioner cites the Matteo v. Polk County, 14 Or LUBA 67 (1985) (Matteo II) holding that a parcel must be wholly devoted to farm use before a permit for a dwelling in conjunction with farm use is approved. Petitioner discounts installation of drain tiles and a water well because there is no showing that these improvements are used only for commercial farms.

The county replies that it attached a condition requiring that the irrigation well and the drain tiles be installed along with planting two acres of the property before any permit for a dwelling is issued. The county notes that estimates submitted by the applicant show the irrigation well will cost $4,335, and the drain tile will cost another $3,300. See Record 187, 189. The county states whether the drain tile might have some purpose other than farm use does not warrant further discussion. According to the county, these efforts, along with planting two acres of the property in nursery stock, are sufficient to qualify for a farm dwelling permit under Matteo II.

The county cautions that Matteo II, should not be interpreted to require that every square foot of a site be in active production before a dwelling may be allowed. In this

case, the county argues that a substantial expenditure would be wasted if the farm management plan is not implemented and any danger that dwellings would be constructed prior to implementation of the farm management plan does not exist in this case.

In Matteo II, this Board held:

> " * * * It is, therefore, our view that to be entitled to a 'dwelling customarily provided in conjunction with farm use,' the applicant must show and the county must find that the dwelling will be cited [sic] on a parcel wholly devoted to farm use. To hold otherwise would be to open the door to allowance of dwellings which save [sic] other than farm uses. * * *." 14 Or LUBA 73.

Even if we assume the county is correct that our holding in Matteo II does not require that every square foot of the property must be "wholly devoted" to farm use, we are still left with the conclusion that the activities on this property do not satisfy the standard announced in Matteo II. We do not doubt the good faith of the applicant, but we do not believe the installation of drain tile, construction of an irrigation well and planting of one-quarter of the total acreage sufficiently places this property in farm use to satisfy the standard announced in Matteo II. The drain tile admittedly may make some farm use more feasible, efficient or convenient, but the installation of drain tile does not show the property is wholy devoted to farm use. The county does not explain whether the irrigation well was constructed to serve the whole property, in farm use, or whether the irrigation well simply serves a portion of the property. In any case, the

construction of an irrigation well does not place the property itself in "farm use." The facts in this case do not show the improvements place even a majority of the land on the subject property in farm use, let alone all of the property in farm use.

The Third Assignment of Error is sustained.

The decision of Clackamas County is remanded.

FOOTNOTES

[1] Petitioner asks that we take administrative notice of the following fact:

> "A January 22, 1988, warranty deed between Glenda L. McDonald, as grantor, and Harold Eubanks and Judith L. Eubanks, as grantees ("the Deed"), conveying tax lot 1505 and part of tax lot 1501 was recorded on January 28, 1988, in the real property records of Clackams County as document number 88-03833."

LUBA is an administrative agency. Presumably petitioner refers to official notice under ORS 183.450(4).

Petitioner requests we consider the deed in determining whether or not Tax Lots 1505 and 1501 are separate legal lots of record. Petitioner goes on to argue that, even if we assume the tax lots are legal lots of record, the deed shows the dwelling will not be built upon either tax lot.

The execution of the warranty deed followed the board of commissioners' decision on appeal. LUBA reviews land use decisions on the record established before the local government. ORS 197.837(11)(a). The deed is not part of the county's record. Petitioner has not moved for an evidentiary hearing and has not alleged a procedural error or violation of constitutional law justifying an evidentiary hearing. See ORS 197.830(11)(c).

The request that we take administrative notice is denied.

[2] The county board adopted the planning department's "notice of decision" as part of its findings. The notice refers to typical farm unit, not to commercial farms. See Record 134.

[3] We note, however, that the planning department's letter provides that the typical farm unit in the area is 40 acres and larger.

[4] Similarly, we do not find evidence that other properties with similar uses include dwellings is sufficient to show that

a dwelling is customarily provided in conjunction with uses of this type. Petitioner complains that such a finding is necessary under Matteo v. Polk Co., 11 Or LUBA 259, aff'd without opinion, 70 Or App 179 (1984) (Matteo I).

We do not fault the county for failure to make a finding that a dwelling is customarily provided in conjunction with the proposed farm use under these circumstances. ZDO 401.04A does not require such a finding.

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[5] Petitioner does not argue the finding is not supported by substantial evidence.

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[6] ORS 215.203(2)(a) provides a definition of farm use. ORS 215.283(1)(F) discusses dwellings in "conjunction with farm use."