BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

G.L. and RETA BAUGHMAN, and STEVE and LINDA MAPLETHORPE, Petitioners, vs. MARION COUNTY, Respondent.	LUBA No. 88-117 FINAL OPINION AND ORDER

Appeal from Marion County.

Con P. Lynch, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief was Douglas, Carson, Dickey & Lynch, P.C..

Jane Ellen Stonecipher and Robert C. Cannon, Salem, filed a response brief and Jane Ellen Stonecipher argued on behalf of respondent.

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

AFFIRMED 04/12/89

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal an order of the Marion County Board of Commissioners denying a conditional use permit for a dwelling in conjunction with farm use in the Exclusive Farm Use (EFU) zone.

FACTS

Petitioners' EFU-zoned 73 acre parcel is used as a commercial Christmas tree farm. Harvesting of Christmas trees will begin in 1989. The parcel contains one permanent dwelling which petitioners rent to Larry and Kimberly Gunn (the Gunns). The Gunns are employed full-time off the farm, but perform part-time work on the farm as their job schedules allow. The subject parcel also contains one mobile home. The mobile home was placed on the property without county approval.[1] Petitioners seek conditional use permit approval to use the mobile home as a dwelling in conjunction with farm use.

Petitioners own and operate a commercial retail Christmas tree business in Las Vegas, Nevada. Petitioners intend to make their retail business more profitable by growing their own Christmas trees in Oregon. In addition to the subject 73 acre parcel, petitioners' Christmas tree farming operation includes a 60 acre parcel owned by petitioners G.L. and Reta Baughman (the Baughmans) and their son, 30 acres of which are currently planted in Christmas trees, and a 24 acre parcel leased by the Baughmans and planted in Christmas trees. The 60 and 24 acre

parcels are not contiguous to the subject 73 acre parcel.

From October through January the Baughmans live in Nevada and manage the retail end of petitioners' Christmas tree business. From February through September the Baughmans live in the mobile home on the subject property. Petitioner Reta Baughman is unable to perform any physical labor on the Christmas tree farm because she is "recovering from a heart condition." Record 44. Petitioner G.L. Baughman performs some labor on the Christmas tree farm, but is "62 years old, semi-retired and unable to perform all the work necessary to properly maintain and operate the farm." Record 41. In addition to the part-time labor provided by the Gunns and G.L. Baughman, petitioners hire independent contract laborers to do shearing, trimming and pruning. Record 42.

On May 27, 1988, petitioners applied for the conditional use permit. The county planning director denied the application, and petitioners appealed that decision to the county hearings officer. After a hearing, the hearings officer adopted an order denying the application. Petitioners appealed this decision to the board of commissioners, which issued an order affirming the hearings officer's decision on November 30, 1988. This appeal followed.

ASSIGNMENT OF ERROR

> "The Marion County Hearings Officer erred in applying the relevant zoning criteria, and the Hearings Officer's decision is not supported by substantial evidence in the record."

In the first five sections of the argument under their assignment of error, petitioners specifically challenge the evidentiary support for portions of county findings 3, 5, 6, 7 and 10 (Record 18-20).

We are authorized to reverse or remand the county's denial of the requested conditional use permit if the county made a decision not supported by substantial evidence in the whole record. ORS 197.835(8)(a)(C); Sellwood Harbor Condo Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 87-079 and 87-080; April 1, 1988). If a challenged finding is not critical to the county's decision, whether or not it is supported by substantial evidence is of no consequence. Territorial Neighbors v. Lane County, ___ Or LUBA ___ (LUBA No. 87-083, April 27, 1988), slip op 22; Bonner v. City of Portland, 11 Or LUBA 40, 52 (1984). In Territorial Neighbors v. Lane County, supra, we stated:

> " * * * Where petitioners attack certain findings as being unsupported by substantial evidence, the attack must include an explanation of why the challenged findings are critical to the decision. In the absence of such an explanation, we will not review the record for evidentiary support, since a determination that the challenged finding was not supported would not by itself provide us with a sufficient basis for reversing or remanding the decision. * * * " Id. slip op at 22-23.

In this case, petitioners do not identify the criteria to which the portions of the five findings challenged in the first five sections of their argument apply, or explain why the challenged findings are essential to the county's determination

of compliance with such criteria. Therefore, we will not review the evidence cited in the record to determine whether there is substantial evidence to support the challenged findings.

In the sixth and final section of their argument, petitioners claim that there is substantial evidence in the record to establish that their proposed additional farm dwelling meets the criteria of MCZO 136.040(b)(3)-(5).[2] However, before considering petitioners' arguments attacking the evidentiary support for the county's determinations of noncompliance with these criteria,[3] we note that in challenging a local government's decision to deny a requested permit on evidentiary grounds, petitioners bear an extremely heavy burden.

In order to overturn a local government's determination that an applicable approval criterion is not met, it is not sufficient for petitioners to show that there is substantial evidence in the record to support their position. Rather, the "evidence must be such that a reasonable trier of fact could only say petitioners' evidence should be believed." Morley v. Marion County, ___ Or LUBA ___ (LUBA No. 87-095, February 3, 1988), slip op 12; McCoy v. Marion County, ___ Or LUBA ___ (LUBA No. 87-063, December 15, 1987), slip op 3-4; Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982). In other words, petitioners must demonstrate that they sustained their burden of proof of compliance with applicable criteria as a matter of

law. Consolidated Rock Products, Inc. v. Clackamas County, ___ Or LUBA ___ (LUBA No. 88-090, April 10, 1989), slip op 13; see Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979).[4]

In addition, where the local government's denial is based on determinations of noncompliance with more than one applicable approval standard, petitioners must successfully challenge every determination of noncompliance. A single basis for denial, supported by substantial evidence, is sufficient to support a local government's decision. Van Mere v. City of Tualatin, ___ Or LUBA ___ (LUBA No. 88-006, May 2, 1988), slip op 23; Kegg v. Clackamas County, 15 Or LUBA 239, 244 (1987); Weyerhauser v. Lane County, supra. Thus, if petitioners fail in their evidentiary challenges to any of the three bases for the county's denial of the requested conditional use permit, the denial must be upheld.

Petitioners first challenge the county's determination of noncompliance with MCZO 136.040(b)(3). This approval criterion states:

> "Operation of the farm, in accord with accepted farming practices, requires that the occupants of the proposed dwelling reside on the farm * * * "

Petitioners argue that the presence of the Baughmans is necessary to the operation of the farm. Petitioners assert that the county correctly found that one full-time worker is required for every 60 acres planted in Christmas trees. Record 18. Petitioners argue that their farm includes the

subject 73 acre parcel and two noncontiguous parcels totalling 84 acres and, therefore, effectively has a total of 157 acres, necessitating at least two full-time workers. Petitioners argue the record shows the Gunns are equivalent to one full-time worker, and G.L. Baughman performs the balance of the work required, except when outside labor is employed at times of high intensity labor requirements. Record 38, 42. Petitioners contend the necessity of the labor of both the Gunns and G.L. Baughman requires two dwellings on the subject parcel.

Petitioners also contend the record shows the Baughmans currently reside on the farm eight months of the year, during which time G.L. Baughman performs a significant amount of necessary labor, such as trimming, shearing, and fertilizing. Record 18, 26. Petitioners assert that beginning in 1989, the Baughmans will reside on the farm ten months per year, due to additional requirements for harvesting trees. Record 27. Petitioners argue the record shows Christmas tree farming is a labor intensive industry which requires skilled work and skilled oversight and, therefore, the presence of the Baughmans is required. Petitioners argue "the proposed dwelling will facilitate that presence," and "the extensive and necessary involvement of the Baughmans in the operation of the farm requires that they have a dwelling on the farm in which to reside." Petition for Review 10, 7.

The county agrees that one full-time worker is required for

every 60 acres of Christmas trees. However, the county contends the "farm" referred to in MCZO 136.040(b)(3) consists only of the 73 acre parcel where the proposed additional farm dwelling would be sited, and does not include the two noncontiguous parcels which are managed as part of petitioners' Christmas tree operation. According to the county, simple calculation demonstrates that only 1.2 full-time workers are needed to operate petitioners' 73 acre farm in accordance with accepted farming practices. The county argues that if petitioners' position that the Gunns provide the equivalent of one full-time worker is correct, then petitioners' evidence itself establishes that accepted farming practices do not require another household on the 73 acre farm.

The county also argues that there is no evidence in the record that tree farm management activities require an on-site residence. The county points out that petitioners argue they cannot operate a tree farm from Nevada, but submitted no evidence to support their contention that the Baughmans' Oregon dwelling must be located on the subject 73 acre parcel.

In this case, the county determined that the "farm" referred to in MCZO 136.040(b)(3)-(5) consists of the subject 73 acre parcel, and does not include the noncontiguous 60 and 24 acre parcels which are managed as part of petitioners' Christmas tree operation. MCZO 136.040(b) does not define "farm" or reference a definition of "farm" elsewhere in the MCZO. However, MCZO 136.040(b)(1) states that only "the

subject property and contiguous property in the same ownership" are to be considered in determining whether the subject property is in farm use and whether a proposed dwelling is in conjunction with farm use. Interpreting the criteria of MCZO 136.040(b) together, we believe it is reasonable and correct for the county to interpret "farm," as used in MCZO 136.040(b)(3)-(5), to include only the subject parcel and contiguous property in the same ownership. See McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988).

Under this interpretation, the "farm" to be considered in this case is the subject 73 acre parcel alone, as the 60 and 24 acre parcels are neither contiguous to it nor in the same ownership. Thus, we agree with the county that the evidence in the record cited by petitioners supports only a conclusion that 1.2 full-time workers are needed to operate the farm, and that only 0.2 full-time workers in addition to the Gunns, who already reside on the farm, are required. This evidence does not prove as a matter of law that operation of the farm requires the location of another dwelling on the farm.

More importantly, we also agree with the county that there is no evidence in the record that operation of the farm in accord with accepted farming practices requires that the Baughmans, in addition to the Gunns, reside on the subject parcel. Such evidence is essential to prove, as a matter of law, that the proposed additional farm dwelling complies with MCZO 136.040(b)(3).

Because we deny petitioners' challenge to the county's determination of noncompliance with MCZO 136.040(b)(3), we must affirm the county's decision. Therefore, no useful purpose would be served by reviewing petitioners' challenges to the county's determinations of noncompliance with MCZO 136.040(b)(4) and (5).

The county's decision is affirmed.

FOOTNOTES

[1] Under the county's EFU zone, the subject parcel and any contiguous property in the same ownership may contain one single-family dwelling or mobile home customarily provided in conjunction with farm use as a permitted use. MCZO 136.020(c), 136.040(a). Any additional dwellings or mobile homes in conjunction with farm use are allowable only if a conditional use permit is obtained. MCZO 136.030(a).

[2] Marion County Zoning Ordinance (MCZO) 136.030(a) provides that additional dwellings in conjunction with farm use may be allowed as conditional uses in the county's EFU zone if they meet the criteria of MCZO 136.040(b). MCZO 136.040(b) sets out seven criteria for the approval of such additional farm dwellings, five of which are applicable to the appealed decision:

> "(1) The subject property and contiguous property in the same ownership is in farm use and the dwelling is in conjunction with the farm use based on 136.040(f); and
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> "(2) Based on an evaluation of the factors in 136.040(g) the property constitutes a commercial farm enterprise; and
>
> "(3) Operation of the farm, in accord with accepted farming practices, requires that the occupants of the proposed dwelling reside on the farm; and
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> "(4) All dwellings located on the farm, except those permitted pursuant to 136.030(c), are occupied by households that perform a significant amount of farm work throughout the year; and
>
> "(5) The household residing in the proposed dwelling will perform a significant amount of farm work throughout the year that other households on the farm cannot accomplish; and
>
> " * * * * * * "

The county concluded that petitioners' proposed additional farm dwelling failed to meet MCZO 136.040(b)(3), (4) and (5). Record 20.

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In so doing, we will consider arguments made and evidence cited by petitioners in the first five sections of their argument which are clearly relevant to petitioners' attacks on the evidentiary support for the county's determinations of noncompliance with MCZO 136.040(b)(3)-(5).

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In Jurgenson v. Union County Court, supra, the court explained, with regard to the then requirement of ORS 34.040(3) that a local government's denial of quasi-judicial land use approval be supported by substantial evidence in the record:

> "In a local land use proceeding the proponent of change has the burden of proof. * * * Could not a local government deny a land-use change on the sole basis that the proponent did not sustain his burden of proof because his evidence was not credible? If so, in what sense would we be expected to say that denial was supported by substantial evidence?
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> " * * * * *
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> " * * * A denial is supported by substantial evidence within the meaning of ORS 34.040(3) unless the reviewing court can say that the proponent of change has sustained his burden of proof as a matter of law." Id. at 510.