BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GREGG ADAMS, Petitioner, vs. JACKSON COUNTY, Respondent, and VERN R. HARPER and VERTA OPAL HARPER, Intervenors-Respondent.	LUBA No. 90-096 FINAL OPINION AND ORDER

Appeal from Jackson County.

Patrick G. Huycke, Medford, filed the petition for review and argued on behalf of petitioner. With him on the brief was Robertson & Huycke.

Georgia Daniels, Medford, filed a response brief and argued on behalf of respondent.

Karen C. Allan, Medford, filed a response brief and argued on behalf of intervenors-respondent. With her on the brief was Foster, Purdy, Allan, Peterson & Dahlin.

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

AFFIRMED 01/10/91

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals an order of the Jackson County Board of Commissioners denying his application for a nonfarm dwelling.

MOTION TO INTERVENE

Vern R. Harper and Verta Opal Harper move to intervene on the side of respondent in this appeal proceeding. There is no objection to the motion, and it is allowed.

FACTS

The subject parcel is an unimproved, 14 acre parcel zoned Exclusive Farm Use (EFU), consisting of U.S. Soil Conservation Service Agricultural Class II, III and IV soils. Antelope Creek, a seasonal creek, flows through the property. The parcel is completely surrounded by intervenors-respondent's (intervenors') 220 acre cattle ranch. Access to the subject parcel is provided by an easement from Antelope Road, across intervenors' property.

Petitioner purchased the subject parcel from Jackson County in 1985. During the period the county owned the parcel, it permitted intervenors to use the parcel for ranching purposes. During this period, intervenors irrigated and raised hay on a portion of the parcel, and grazed cattle on the parcel.

The county planning director tentatively approved petitioner's application, and intervenors appealed the

planning director's decision to the board of commissioners. The board of commissioners denied petitioner's application. This appeal followed.

THIRD ASSIGNMENT OF ERROR

> "Respondent failed to produce evidence that approval of Petitioner's nonfarm dwelling application would violate a substantive provision of Jackson County's Comprehensive Plan or Land Use Regulations, and, therefore, Respondent had no choice but to approve Petitioner's application."

A. ORS 215.428(7)

Petitioner argues that because the county's decision was not made within the 120 day period provided in ORS 215.428(7),[1] the county has the burden of establishing the application should not be approved rather than the applicant having the burden to establish that the application satisfies all applicable approval criteria.[2]

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[1]ORS 215.428(7) provides:

> "If the governing body of the county or its designate does not take final action on an application for a permit or zone change within 120 days after the application is deemed complete, the applicant may apply in the circuit court of the county where the application was filed for a writ of mandamus to compel the governing body or its designate to issue the approval. The writ shall be issued unless the governing body shows that the approval would violate a substantive provision of the county comprehensive plan or land use regulations as defined in ORS 197.015." (Emphasis supplied.)

[2]At oral argument, petitioner stated that he had filed a mandamus proceeding in the circuit court. Apparently, the circuit court mandamus proceeding was filed before the county had reached a final decision on the development application. No information regarding the mandamus proceeding is contained in either the petition for review or the record. However, petitioner does not argue the county lost jurisdiction over the development

The applicant for development has the burden of establishing compliance with applicable approval standards. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 18, 569 P2d 1063 (1977); Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979); see also 1000 Friends of Oregon v. Benton County, ___ Or LUBA ___ (LUBA No. 90-066, September 14, 1990).

The portion of ORS 215.428(7) emphasized in n 1 imposes a burden on a local government in a mandamus proceeding initiated in the circuit court, to demonstrate that approval of a development application after the expiration of the 120 day period would violate a substantive provision of a comprehensive plan or land use regulation. ORS 215.428(7) does not purport to shift the applicant's burden of proof in the local proceedings on a development application, regardless of whether the 120 day period provided in ORS 215.428(7) expires. Consequently, we believe that notwithstanding ORS 215.428(7), petitioner had the burden of establishing his application met all relevant approval criteria during the local proceedings below.

This subassignment of error is denied.

B. JCLDO 285.020(1)

Petitioner also argues that Jackson County Land Development Ordinance (JCLDO) 285.020(1) shifts the burden

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application after the mandamus proceeding was filed. See Simon v. Board of Co. Comm. of Marion Co., 91 Or App 487, 491 n 2, 755 P2d 741 (1988).

of proof to the county to establish that a development application should not be approved when the county fails to act on an application within the 120 day limit imposed by ORS 215.428(7). JCLDO 285.020(1) provides:

> "Subject to the limitations below contained, the Board of Commissioners may on its own motion review any decision of the Department, Hearings Officer, or Planning Commission for the purpose of determining whether:
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> "(A) The decision is based on a violation of or an improper interpretation of a stated policy or order of the Board, the applicable ordinances, or other law; or
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> "(B) Improper procedures were followed; or
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> "(C) There is no authority or jurisdiction to render the decision.
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> "If the Board [of Commissioners] assumes jurisdiction, it shall do so by board order no later than 14 days after the date of the decision to be reviewed, and, in no event shall the Board assume jurisdiction or take any action under this section which would violate the 120 day time limit imposed by ORS 215.428. After giving the affected parties reasonable notice and an opportunity to be heard on the existing record, the Board [of Commissioners] may reverse or modify the decision."

The above quoted JCLDO section applies only to situations where the board of commissioners reviews a decision of the planning director (or others) on its own motion. It does not purport to apply to appeals initiated by persons other than the board of commissioners, as is the case here. Accordingly, JCLDO 285.020(1) does not shift the burden to the county to establish that the application

should not be approved. As we explain above, during the local proceedings the applicant has the burden of establishing that the proposal meets all relevant approval standards.

This subassignment of error is denied.

The third assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

> "Respondent's findings are not supported by the evidence."

SECOND ASSIGNMENT ERROR

> "Respondent improperly considered the intervenors/respondents' use of petitioner's property as justification for findings supporting the denial of petitioner's application."

Petitioner contends that the challenged decision is not supported by substantial evidence.

At the outset it is important to recognize that the challenged decision is one to deny the proposed nonfarm dwelling. To overturn the county's determination that the applicable approval criteria are not met, on evidentiary grounds, it is not sufficient for petitioner to show that there is substantial evidence in the record to support his position. Rather, the "evidence must be such that a reasonable trier of fact could only say petitioner's evidence should be believed." Morley v. Marion County, 16 Or LUBA 385, 393 (1988); McCoy v. Marion County, 16 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982). In other words, petitioner must

demonstrate that he sustained his burden to establish 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; Van Mere v. City of Tualatin, 16 Or LUBA 671, 683 (1988); see Jurgenson v. Union County Court, supra. In Jurgenson v. Union County Court, 42 Or App at 510, 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."

In addition where, as here, a denial decision is based on determinations of noncompliance with more than one applicable approval standard, petitioner 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, 16 Or LUBA at 675 n 2 (1988); Kegg

v. Clackamas County, 15 Or LUBA 239, 244 (1987); Weyerhauser v. Lane County, supra. Thus, if petitioner fails in his evidentiary challenges to any of the bases for the county's denial of the requested permit, the denial must be upheld.

The county determined that the proposed nonfarm dwelling does not comply with JCLDO 218.120(1)(A), (B) and (C).[3] Petitioner challenges the evidentiary support for the

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[3]JCLDO 218.120(1) provides:

> "The first nonfarm dwelling and parcel may be approved by the Planning Director, provided that the application proposing such use conforms to all of the following standards and procedures:
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> "(1) To approve an application for a nonfarm dwelling or nonfarm parcel the Planning Director must find that:
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> "(A) The nonfarm dwelling or nonfarm parcel will be located on/contain predominantly soil capability classes IV through VIII as determined by the Agricultural Capability Classification System in use by the United States Department of Agriculture Soil Conservation Service on October 15, 1983.
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> "(B) The nonfarm parcel or dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming practices on nearby lands devoted to farm use.
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> "(C) The nonfarm dwelling parcel is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions drainage and flooding, vegetation, location and size of the existing tract. A lot or parcel shall not be considered unsuitable solely because of its size or location if it can reasonably be put to farm use in conjunction with other land.
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> "* * * * *"

findings in support of the county's determination of noncompliance with each of these JCLDO provisions.

The findings that the proposed nonfarm dwelling does not comply with JCLDO 218.120(1)(A) state:

> "The Board [of Commissioners finds that the proposal does not conform with this standard because the nonfarm dwelling site will be located on the Camas-Newberg-Evans complex of soils which has a nonirrigated agricultural capability rating that varies from Class III to Class IV." Record 4.

With regard to the county's determination of noncompliance with JCLDO 218.120(1)(A), the county and intervenors (respondents) cite a United States Department of Agriculture Soil Conservation Service Map (map) which shows that the proposed nonfarm dwelling will be located on Agricultural Class III and IV soils.[4]

Petitioner does not dispute that the map establishes that the nonfarm dwelling will be located on Agricultural Class III and IV soils. However, petitioner argues the map is not site specific and covers a large area, whereas petitioner provided site specific testimony regarding the soils on the property. Petitioner cites evidence in the record that the proposed nonfarm dwelling "may" be located on Agricultural Class VII soils, and the "area for the homesite is gravel with little or no grass." Record 13, 15.

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[4]The challenged order also states that some of the soils on the subject property are Agricultural Class II. Record 2.

Petitioner also points out that during the local proceedings he stated "he would testify from his experience as a person who has evaluated soils for the last 15 years, that it would be rated much worse than Class IV [and] would probably be rated as river wash." Record 16.

JCLDO 218.120(1)(A) requires a determination that the "[t]he nonfarm dwelling * * * will be located on * * * predominantly soil capability classes IV through VIII." As respondents correctly point out, this standard requires that the entire parcel on which the proposed nonfarm dwelling will be located consists of predominantly Agricultural Capability Class IV-VIII soils. See Smith v. Clackamas County, 103 Or App 370, 375-376, ___ P2d ___, rev allowed 310 Or 791 (1990).

Petitioner's evidence only purports to establish the nature of the soils found on the particular portion of the subject parcel upon which the nonfarm dwelling is proposed to be located, and not the nature of the soils found on the entire 14 acre parcel. The U.S. Soil Conservation Service map on which the county relies, on the other hand, evaluates the soils on the entire 14 acre parcel.[5] We believe the

[5]We note that even if JCLDO 218.120(1)(A) only required that the soils at the proposed nonfarm dwelling site be predominantly Agricultural Capability Class IV-VIII, petitioner's evidence does not establish what the predominant Agricultural Capability Class of the nonfarm dwelling site is. Rather, petitioner's evidence speculates about what the soil classification "may" be, indicates that there is gravel, "little or no grass," and probably "riverwash" on the parcel, and states that he believes the soils would be rated "much worse" than Agricultural Capability Class IV.

U.S. Soil Conservation Service map is substantial evidence to support the county's finding that JCLDO 218.120(1)(A) is not satisfied.

The county also determined that the proposal does not comply with JCLDO 218.120(1)(C) as follows:

> "The Board [of Commissioners] finds that the proposed nonfarm dwelling parcel is land which is generally suitable for the production of livestock. This land may reasonably be put to farm use in connection with other land. It has, in fact, been put to use in connection with other adjoining farm lands and has been used for the commercial production of cattle. * * *
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> "* * * * *
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> "The proposed nonfarm dwelling site and the parcel as a whole, have been used as a part of a commercial cattle operation for over forty years. Some of the land on the 14 acres is clearly and unequivocally suitable for grazing. The land proposed for the septic system is currently irrigated grazing land. There is no question that the parcel, as a whole, is suitable for livestock production * * *. In addition, the parcel has been in the past and can be in the future put to farm use in conjunction with other surrounding land." Record 5.

Petitioner argues the evidence the county relied upon to establish the subject property is generally suitable for grazing livestock, is evidence of intervenors' "illegal" farming activities on petitioner's property. Petitioner states that any farm uses intervenors make of the subject parcel are without his permission and constitute a trespass. Accordingly, petitioner argues evidence of intervenors' farm use of the subject property cannot constitute substantial

evidence of the subject property's suitability for farm use. Because the county relies upon evidence of intervenors' current allegedly illegal farm use, petitioner contends the findings regarding JCLDO 218.120(1)(C) are not supported by substantial evidence.

Respondents argue that even if the evidence of intervenors' current use of petitioner's property for grazing and haying is disregarded, the county's findings that JCLDO 218.120(1)(C) is not satisfied are nevertheless supported by substantial evidence. Respondents cite evidence of intervenors' use of the subject property for grazing livestock and the raising of hay with the permission of the prior owner, before petitioner's purchase of the property in 1985, as establishing that the subject parcel is suitable for those purposes.

We agree with respondents. Regardless of intervenors' current use of the subject property for farming purposes without the permission of petitioner, there is ample evidence in the record that intervenors have used the subject property for grazing and for the raising of hay prior to petitioner's purchase of the subject property. Petitioner does not contend there is evidence in the record establishing that anything about the land itself has changed since his purchase which makes the land generally unsuitable for the farm purposes to which it had been put prior to his purchase.

We conclude that there is substantial evidence in the whole record to support the county's findings that the subject parcel is not generally unsuitable for the production of livestock.

Because we determine that two of the county's bases for denial are supported by substantial evidence, we need not review the evidentiary support for the other basis for denial. Garre v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-131, February 27, 1990), slip op 8 n 4, aff'd 102 Or App 123 (1990).

The first and second assignments of error are denied.

The county's decision is affirmed.