BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BO WEST,	)	
	)	
Petitioner,	)	
	)	LUBA No. 90-130
vs.	)	
	)	FINAL OPINION
CLACKAMAS COUNTY	)	AND ORDER
	)	
Respondent.	)	

Appeal from Clackamas County.

Bo West, Clackamas, filed the petition for review and argued on his own behalf.

Gloria Gardiner, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 02/08/91

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 Clackamas County Hearings Officer denying an application to divide an Exclusive Farm Use 20-Acre (EFU-20) zoned parcel and establish a nonfarm dwelling.

FACTS

The subject parcel consists of approximately 9.33 acres, contains Agricultural Class II and III soils, and is zoned EFU-20. There is an existing residence on the subject parcel. Properties to the north and west are zoned for exclusive farm use and at least some of those parcels are in farm use. Properties to the south and east are zoned Rural Residential Farm/Forest 5-Acres. There are a number of nonfarm dwellings in the vicinity of the proposal.

Petitioner submitted an application to divide the subject property into two parcels, each consisting of approximately 4.66 acres, and to place a nonfarm dwelling on the undeveloped parcel.

The hearings officer conducted a public hearing regarding the proposal on September 5, 1990, and on October 12, 1990, issued a written decision denying the application.[1]

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[1]While it is not evident from the record, petitioner apparently requested that the hearings officer reconsider his decision and the hearings officer denied that request.

This appeal followed.

ASSIGNMENTS OF ERROR

As we understand it, petitioner argues that the hearings officer's decision is based on inadequate findings and is not supported by substantial evidence in the whole record. Petitioner argues the hearings officer erroneously refused to reconsider his decision. We consider these arguments separately below.

A. Adequacy of Findings and Evidentiary Support

It is important to understand that the challenged decision is one to deny a development proposal. It is well established that in denying an application, the county need only adopt findings demonstrating that one or more of the applicable approval standards are not met. Garre v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-131, February 27, 1990), aff'd, 102 Or App 123 (1990); Douglas v. Multnomah County, ___ Or LUBA ____ (LUBA No. 89-086, January 12, 1990), slip op 16; Van Mere v. City of Tualatin, 16 Or LUBA 671, 687 n 2 (1988).

Further, to overturn on evidentiary grounds a local government's determination that an applicable approval criterion is not met, it is not enough 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 petitioners' 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 of proof of compliance with applicable criteria as a matter of law. Consolidated Rock Products, Inc. v. Clackamas County, 17 Or LUBA 609, 619-120 (1989); see Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979). A single basis for denial, supported by substantial evidence, is sufficient to support a local government's decision. Van Mere v. City of Tualatin, supra; Kegg v. Clackamas County, 15 Or LUBA 239, 244 (1987); Weyerhauser v. Lane County, supra.

The parties agree that the relevant county approval standards are set forth in Clackamas County Zoning and Development Ordinance (ZDO) 401.05.[2] ZDO 401.05(A)(4) provides that the county must find the following to approve a nonfarm dwelling in the EFU-20 zone:

> "[The proposed nonfarm dwelling is] situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain,

[2]In several of his assignments of error, petitioner suggests the proposed dwelling and land division should be considered as being for farm rather than nonfarm use. However, the subject application states that its purpose is to gain permission to divide the subject EFU zoned parcel to locate a nonfarm dwelling. Additionally, petitioner has not submitted a farm management plan to establish a farm dwelling as required by ZDO 401.04(A), and ZDO 401.09(B)(1) provides that in the EFU-20 zone, divisions of land for farm use must create lots consisting of at least 20 acres. Accordingly, there is no basis for us to conclude that the county erred in treating the proposal as one for a division of land to create nonfarm parcels and to establish a nonfarm dwelling.

adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract."

The county findings addressing this criterion state:

"The applicant must establish that the subject property is generally unsuitable for the production of farm crops or livestock, considering the terrain, adverse soil or land conditions, drainage or flooding, vegetation, location or size of the tract.

"The slope of the property ranges from 0 to 12 percent. These slopes are mapped in detail on the map included with the soils report submitted * * * on behalf of the applicant. While the higher slopes (8 to 12 percent) may impose some minor limitation to the suitability of the property for agricultural purposes, they do not preclude several possible farm uses on the property.

"The subject property contains Jory Silty Clay Loam soils, with an agricultural capability classification of Classes II and III, depending upon the slope. These soils are considered to be good agricultural soils and are capable of supporting various agricultural crops * * *.

"The record identified land conditions which do limit the suitability of the property for some agricultural uses. There is a wet area located in the south-central portion of the property, and a drainageway from this wet area extending northwesterly through the existing home site area to the north boundary of the property. The extent of the limitation resulting from these conditions is not clear from the record, as there is no indication of efforts to tile and control the wet area and much of the currently affected area runs through the existing home site. However, the record does not demonstrate that these land conditions make the property unsuitable for farm use.

"There is no evidence of flooding or vegetative cover which imposes any limitation on the

potential farm uses of the property"

"The location of the property does limit its suitability. * * * [T]he property is located within a general area containing several rural residential dwellings. The proximity of these nonfarm dwellings will inevitably result in complaints as to farm uses which require aerial spraying, or which result in the creation of substantial dust, smoke, noise or odors. Additionally, the Schuebel School is located a short distance to the north. The Superintendent of the Schuebel School District has written to express concerns as to certain potential farm uses which would result in dust problems for the school. * * *

"On the other hand, the location also contributes to the suitability of the property for farm use. The property is located in an area, which according to this record, allows agricultural uses to function in the presence of substantial rural residential development. There is no substantial evidence in this record that agricultural activities are precluded because of the existence of these rural residential uses. Additionally, the subject property is located immediately adjacent [to] parcels on the west which are large, zoned for farm use and permit the potential of combining with the subject property, or portions thereof, for farm use.

"The size of the subject property does limit its suitability for farm use, particularly as to those farm uses which are land intensive. The approximately 9.33 acre subject property is not suitable for all crops which might be produced on the property. However, the property can be utilized for intensive farm uses, or specialty crops, which are not land intensive. For example, [a neighbor] testified that he is currently developing his property as a nursery with greenhouses on land with approximately the same acreage available for farm use. Furthermore, as discussed above, the subject property can be combined, in whole or in part, with the property to the west, and possibly with the property to the

north for agricultural production.

> "In summary, this property suffers from conditions which limit its suitability for farm use. However, the Hearings Officer concludes that none of those limitations, either individually or in combination, are sufficient to render the property generally unsuitable for farm uses. Primarily because of the good agricultural soils, the ability to utilize the property for non-land intensive farm uses and the potential for farming the property in combination with adjacent properties, the subject property is found to be generally suitable for the production of farm crops or livestock." Record 3-4.

Petitioner does not provide a specific explanation of why these findings are inadequate. In the absence of such an explanation, we conclude these findings are adequate to establish that the subject property is not generally unsuitable for the production of farm crops and livestock. See Stefan v. Yamhill County, ___ Or LUBA ___ (LUBA No. 89-118, February 16, 1990).

Petitioner's evidentiary challenge focuses on the characteristics limiting farm use of the property, as described in the above quoted findings. These characteristics include the size of the subject parcel, its proximity to a school, and the existence of certain "wet" areas. Petitioner does not specifically challenge the evidentiary support for the county's findings that the subject property can generally be put to farm use despite

these limitations.[3] Further, with only one exception, petitioner does not disagree with or dispute the facts stated in the county findings quoted above.[4]

As we understand it, petitioner argues that the characteristics of the subject property make it only marginally productive farm land, and that the property is better suited to residential development. In other words, petitioner draws a different conclusion from the evidence in the record than does the county. However, it is well established that the choice between different reasonable conclusions belongs to the county. Von Lubken v. Hood River County, ___ Or LUBA ___ (LUBA No. 89-023, September 8, 1989), slip op 23. We believe the county's conclusion regarding the suitability of the subject parcel for farm use is a reasonable one, based on the evidence in the whole record. Under these circumstances, we may not disturb the

[3]Additionally, petitioner states in the petition for review that the subject "land is good grazing land in the dry part of the summer." Petition for Review 7.

[4]The exception is petitioner's assertion that because the adjoining landowner to the west does not desire to use or purchase the subject property, the subject property cannot be put to use in conjunction with adjoining productive farm land. However, petitioner cites no evidence in the record to support his contention regarding the intentions of the property owner to the west. Under these circumstances, there is no basis to question whether the subject property can be put to farm use in conjunction with that property. More importantly, the record does not demonstrate that the subject parcel cannot be used for farm use in conjunction with other farm parcels in the vicinity.

county's determination in this regard.[5]

Because we determine that one of the county's bases for denial is supported by adequate findings and by substantial evidence in the whole record, there is no need to examine the adequacy of the findings and evidentiary support for other county findings.

The first through ninth, eleventh, twelfth, thirteenth, fifteenth and sixteenth assignments of error are denied.

B. Refusal to Reconsider Decision

Petitioner contends the hearings officer erroneously refused to reconsider his decision, and suggests that the purpose of petitioner's request for reconsideration was to offer additional evidence.

ZDO 1304.03(A) governs requests for reconsideration and provides in relevant part:

> "The Hearings Officer may rehear a matter before it either on its own motion or upon a petition for rehearing by an aggrieved party submitted within ten (10) days of mailing of its written decision. * * *" (Emphasis supplied.)

It is true that if the hearings officer elects to rehear a particular matter, a party would have an

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[5]Under the fifteenth assignment of error, petitioner asserts "[t]he hearings officer did not weigh [the application] on its own merits. He is obviously opposed to any land divisions which is apparent in reading his decision on page 3 paragraph 2." Petition for Review 9.

We see nothing in the hearings officer's decision to establish that the hearings officer was biased against land divisions to the extent that he could not render a fair and impartial decision.

opportunity to submit new evidence (ZDO 1304.03(B)).[6] However, ZDO 1304.03(A) is written in nonmandatory terms. ZDO 1304.03(A) imposes no obligation on the hearings officer to grant a request for rehearing. Consolidated Rock Products v. Clackamas County, 17 Or LUBA at 631. Petitioner does not explain in what way the hearings officer erred by refusing to rehear the matter and we do not understand that he did.

The tenth and fourteenth assignments of error are denied.

The county's decision is affirmed.

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[6]ZDO 1304.03(B) provides:

> "If rehearing is granted, the application shall be heard as a new review except that all testimony and evidence theretofore received shall be included in the record."