BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ARTHUR LUNG and LYNNE LUNG,	)	
	)	
Petitioners,	)	LUBA No. 91-015
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
MARION COUNTY,	)	
	)	
Respondent.	)	

Appeal from Marion County.

Kathy A. Lincoln, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Churchill, Leonard, Brown & Donaldson.

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

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

REMANDED 06/18/91

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 affirming a decision of the county hearings officer denying conditional use approval for the construction and operation of a landscaping business.

FACTS

Petitioners purchased the subject 17 acre property in November, 1989. The property is within the Salem Area Urban Growth Boundary (UGB) and is designated Residential by the Salem Area Comprehensive Plan. When petitioners purchased the property, it was zoned Residential Agricultural (RA). On May 30, 1990, the zoning of the property was changed to the county's newly adopted Urban Transitional - 10 Acre Density (UT-10) zone. Marion County Ordinance No. 863.

Two and one-half acres of the property are leased to a landscaping business which is owned and operated by petitioners and has 12 to 22 employees. The landscaping business provides landscaping services, e.g., landscape design, installation of and supplies for landscaping, lawn and landscaping maintenance, sprinkler system installation, maintenance and repair. The property is used for storage and maintenance of the business's trucks and landscaping equipment, holding bundled nursery plants grown elsewhere for installation on customers' property, employee parking and dispatching, and a business office. Customers of the

landscaping business rarely come to the subject property.

Petitioners propose to grow some (less than 51%) of the nursery products used in their business on the subject property in the future. However, petitioners did not grow any nursery plants on the subject property between November, 1989, when it was purchased and August, 1990, when the conditional use application was filed.

Petitioners have constructed two buildings on the property -- a business office and an equipment shop.[1] A building permit for the business office, issued by the county on July 17, 1990, states (incorrectly) the property is zoned RA, and describes the subject building as "barn & shop * * * accessory use to dwelling; approved for private non-commercial use only." Record 80. With regard to the equipment shop building, on August 22, 1990, petitioner Arthur Lung filed with the county a "Declaration of Agriculturally Exempt Structure." The declaration states (incorrectly) the subject property is zoned RA, and also states the building "will be used for farm use only," and the declarant understands that if the building is used for commercial purposes, he will be required to obtain all

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[1]When, and under what circumstances, petitioners initiated and completed construction of these buildings is an issue relevant to the fourth and fifth assignments of error, infra. However, it would appear that construction of the business office began prior to May 1, 1990, as there is a building inspection report so dated in the record which states "posted Stop Work order & mandatory to obtain permit for building relating to [petitioners' landscaping business]." Record 79.

necessary building and land use permits. Record 72. The plot plan attached to the declaration describes the equipment shop as "Building #2; Pole Barn Type Const[ruction]." Record 73.

On July 2, 1990, petitioners received a letter from the county enforcement officer warning them to stop use of the property because they were in violation of the UT-10 zone. On August 31, 1990, petitioners filed a conditional use application to construct and operate a landscaping business on the subject property. Record 70. The planning director thereafter issued a decision approving the conditional use, with conditions. Because of disagreement with the conditions imposed, petitioners appealed the planning director's decision to the hearings officer. After holding a public hearing, the hearings officer issued an order denying petitioners' application on December 11, 1990. Petitioners appealed to the board of commissioners, which issued an order affirming the hearings officer's decision on January 10, 1991. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners' conditional use application was reviewed by the county as being for a "commercial activit[y] in conjunction with farm or forest use," a conditional use in the UT-10 zone. Marion County Urban Zoning Ordinance (MCUO) 13.02(b). One basis for the county's denial of the application was the conclusion that the proposed use does

not qualify as a "commercial activity in conjunction with farm use" under the MCUO.[2] Record 8-9.

Petitioners contend the county misconstrued MCUO 13.03(f) in denying their conditional use application. Petitioners argue this Board should find their proposed use qualifies as a "commercial activity in conjunction with farm use" under a correct interpretation of MCUO 13.03(f) and the definitions of "commercial activity in conjunction with farm use" articulated by the appellate courts. Craven v. Jackson County, 308 Or 281, 779 P2d 1011 (1989); Earle v. McCarthy, 28 Or App 539, 560 P2d 665 (1977).

MCUO 13.03(f) provides, in relevant part:

> "In order to qualify as a commercial activity in conjunction with farm or forest use[,] the use or activity must meet one of the following criteria in addition to the criteria in [MCUZO 13.03](a) through (e):
>
> "* * * * *
>
> "(3) Sale of farm products, after primary processing, on a premises where less than 51% of the farm product was raised, and the products sold were raised in Marion County or an abutting county; and, sale of farm products after secondary processing.
>
> "* * * * *"

The relevant county findings state:

> "* * * Under Marion County policies interpreting 'commercial activities in conjunction with farm

[2]Other alleged bases for the county's denial are addressed in the second through fifth assignments of error, infra.

> use,' 51% of the commercial activity must involve land owned or leased by the farmer and products from such lands, or it must be shown that it is not feasible to locate such services in an existing commercial or industrial zone, or 51% of the customers must be Marion County farmers. There is no farm use on the property in conjunction with the business. There may be plans to plant nursery stock on the property but that has not occurred. [Petitioners' landscaping business] does not serve primarily farmers. This is a contract landscaping business serving residences and commercial businesses."[3] Record 8-9.

The county concedes the above quoted findings do not correctly construe or apply MCUO 13.03(f)(3). At oral argument, the county explained this mistake apparently occurred because the hearings officer mistakenly used a draft version of MCUO 13.03(f) which contained language significantly different from the adopted version quoted above. The county argues, however, that under ORS 197.825(9)(b) we may affirm its decision even if its findings are in error, because the evidence in the record clearly supports the decision that the proposed use does not satisfy MCUO 13.03(f)(3).

Both parties contend the interpretation and application of MCZO 13.03(f) to the facts in the record is so clear we should be able to determine, as a matter of law, that the proposed use is (according to petitioners), or is not

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[3]The findings cited in this opinion are from the hearings officer's order. The hearings officer's findings were adopted by the board of commissioners. Record 2.

(according to the county), a "commercial activity in conjunction with farm use" under MCUO 13.03(f). We disagree. While this Board and the appellate courts are finally responsible for the interpretation of local enactments, the county should be the one to interpret MCUO 13.03(f) and apply it to the facts of this case in the first instance. Fifth Avenue Corp. v. Washington Co., 282 Or 591, 599, 581 P2d 50 (1974). Because the county did not interpret and apply the correct version of MCUO 13.03(f) to petitioners' conditional use application, the county's decision must be remanded for it to do so. Mental Health Division v. Lake County, 17 Or LUBA 1165, 1176 (1989); Great Northwest Towing v. City of Portland, 17 Or LUBA 544, 557 (1989).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners contend the following findings demonstrate the county misconstrued MCUO 13.03(e) in denying the conditional use application:

> "The City of Salem responded that this may be a home occupation. However, with nine company vehicles which are stored on the site, one part to full-time office employee, and 12-22 employees, the business is not a home occupation. * * * The [MCUO] specifically requires that the premises be the residence of the persons conducting the home occupation (MCUO 26.20(a)) and that the residence (or premises) not be used as a headquarters or main office for assembly or dispatch of employees to other locations (MCUO 26.20(m))." Record 9.

Petitioners argue the record clearly shows the proposed use

complies with MCUO 13.03(e).

The county contends the challenged decision does not deny petitioners' application on the basis of noncompliance with MCUO 13.03(e). The county argues that because it determined the proposed use is not a "commercial activity in conjunction with farm use" under MCUO 13.03(f), its decision does not address the additional criterion of MCUO 13.03(e). According to the county, the findings challenged by petitioners do no more than state the proposed use is not a home occupation under the MCUO and, therefore, are surplusage.[4]

MCUO 13.03(e) is an approval criterion for a "commercial activity in conjunction with farm use" in the UT-10 zone. MCUO 13.03(f). MCUO 13.03(e) provides:

> "The most restrictive zone used [under] the applicable comprehensive plan designation (other than the UD, UT, or UTF zones) lists the proposed use as a permitted or conditional use; or the city [Salem] concurs and, if the city requests, conditions are imposed which require that the use be brought into conformance with city zoning regulations upon annexation."

We agree with the county that the above quoted findings do not address MCUO 13.03(e), and the challenged decision does not deny petitioners' application on the basis of

[4]The county also points out that petitioners do not contend the proposed use does qualify as a home occupation under the MCUO.

noncompliance with MCUO 13.03(e).[5]

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The county's decision includes the following finding:

> "[The proposed use] is neither a commercial activity in conjunction with farm use nor a rural residential or non-intrusive use for this transition zone." Record 9.

Petitioners contend the proposed use is a non-intrusive use, and argue that the county's finding to the contrary is not supported by findings of fact or substantial evidence in the record.

The county's decision does not rely on the proposed use not being "non-intrusive" as an independent basis for denying petitioners' application. Petitioners do not cite, and we are unaware of, any approval criterion for a conditional use in the UT-10 zone which requires that the use be "non-intrusive." Where findings are not essential to the challenged decision, it is not necessary for LUBA to determine whether those findings are supported by substantial evidence in the record. Schatz v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 90-126, May 13,

[5]Apparently because the county determined the proposed use did not comply with MCUO 13.03(f) and, therefore, had to be denied in any case, the county did not determine compliance of the proposed use with MCUO 13.03(e). Under the first assignment of error, we determined the county's decision must be remanded for it to interpret and apply the correct language of MCUO 13.03(f). If, on remand, the county determines the proposed use satisfies MCUO 13.03(f), it will have to determine whether the proposed use also complies with MCUO 13.03(e).

1991), slip op 19; Moorefield v. City of Corvallis, ___ Or LUBA ___ (LUBA No. 89-045, September 28, 1989), slip op 32; Bonner v. City of Portland, 11 Or LUBA 40 (1984).

The third assignment of error is denied.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

The subject property was zoned RA when petitioners purchased it and initiated development of their landscaping business. The RA zone includes the following permitted uses:

> "The uses, similar to the following operated in conjunction with a farm and not as a separate business or enterprise:
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> "(1) Hop, nut and fruit driers;
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> "(2) Feed mixing and storage facilities;
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> "(3) Hullers;
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> "(4) Mint distillery;
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> "(5) Rendering plant;
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> "(6) Seed processing, packing, shipping, and storage facilities;
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> "(7) Slaughter houses;
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> "(8) Agricultural produce storage, i.e., onion warehouses, grain elevators;
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> "(9) Feed lots;
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> "(10) Vegetable oil processing and refining;
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> "(11) Any other similar processing and allied farm commercial activities (includes farm equipment repair shop)." Marion County Zoning Ordinance (MCZO) 129.010(m).

The RA zone also lists the following as conditional uses:

> "The following allied farm commercial processing and similar activities may be permitted as a separate business or enterprise, not operated in conjunction with a farm:
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> "[List of eleven uses identical to MCZO 129.010(m)(1) through (11).]" MCZO 129.020(a).

The county's decision states:

> "There is no vested right to continue this use in [the UT-10] zone, regardless of whether the use was established prior to the adoption of the MCUO. The use was not a permitted use in the RA zone and accurate building permits were not issued. The applicants applied for a farm building with no commercial use and proceeded to establish a commercial use, a corporate lessee, in the building without land use approval." Record 9.

Petitioners contend they began construction of their landscaping business in early 1990 and by May 31, 1990, when the zone was changed to UT-10, had substantially completed construction and had established "a vested right to continue the development of their property under the RA zone, rather than the UT zone." Petition for Review 19. Petitioners argue the landscaping business being established on the subject property qualified in the RA zone as either a permitted use (MCZO 129.010(m)) or a conditional use (MCZO 129.020(a)) and, therefore, the county erred in determining the use was not permitted in the RA zone. Petitioners further argue they have a vested right to apply for a conditional use permit under the criteria of the RA zone, rather than the UT zone. According to petitioners,

their expenditures prior to May 31, 1991 satisfy the test for a vested right set out in Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973).

Petitioners also contend the county finding that inaccurate building permits were issued to petitioners is not supported by substantial evidence in the record. Petitioners argue further that even if the building permits were erroneously issued, that would not be a proper basis for denying petitioners' vested right to complete development of their business on the subject property, as it is the county's responsibility to ensure the permits it issues are correct.

The county argues that a landscaping business is neither a plant nursery use under MCZO 129.010(i)[6] nor a "similar processing and allied farm commercial activit[y]" "operated in conjunction with a farm" under MCZO 129.010(m) and, therefore, is not a permitted use under the RA zone. The county further argues that even if petitioners' landscaping business could have received a conditional use permit under MCZO 129.020(a), petitioners did not obtain such permit prior to the May 31, 1990 zone change and, therefore, the use was not lawfully established at the time

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[6]MCZO 129.010(i) lists as a permitted use in the RA zone:

> "Crop cultivation or farm and truck gardens, including plant nurseries, greenhouses (any sale of merchandise shall be confined to that raised on the premises)[.]"

of the zone change. According to the county, petitioners cannot acquire a vested right to obtain a conditional use permit under the provisions of the RA zoning district. Jackson v. Clackamas County Comm., 26 Or App 265, 269, 552 P2d 559, rev den 276 Or 211 (1976). The county also argues that the building permit issued to petitioners and declaration of agriculturally exempt structure filed by petitioners do not establish petitioners' landscaping business was a lawful use of the subject property.

Where a use is lawfully established prior to the adoption of a restrictive zoning provision, it may be continued after the effective date of the zoning provision, as a nonconforming use, even though it does not comply with the applicable zoning provision. Clackamas County v. Holmes, supra, 205 Or at 196-97; ORS 215.130(5). In addition, where a use is not actually in existence when the zoning change occurs, but rather is in the process of being established, the property owner may have a "vested right" to complete establishment of the use, depending on whether the property owner has sufficiently commenced development and has incurred substantial costs towards the completion of the development. Clackamas County v. Holmes, supra, 205 Or at 197. However, expenditures considered in determining the existence of a vested right must be made at a time when the proposed development did not require approvals, or at a time when required approvals were given. DLCD v. Curry County,

___ Or LUBA ___ (LUBA No. 90-021, June 5, 1990), slip op 7; see Mason v. Mountain River Estates, 73 Or App 334, 698 P2d 529 (1985).

Where property owners have not applied for and obtained a required conditional use permit prior to the zoning change, they cannot acquire a vested right to complete development of a use which requires conditional use approval under the original zoning. Further, if the property owners file a conditional use application after the zoning change occurs, as is the case here, the standards applicable to that application are those in effect at the time the application is filed. ORS 215.428(3). Thus, we agree with the county that petitioners could not acquire a vested right to obtain a conditional use permit, or to have a conditional use permit application reviewed, under the provisions of the original RA zone. See Jackson v. Clackamas County Comm., supra.

We must next consider whether petitioners established a vested right to complete development of a use permitted outright in the RA zone under MCZO 129.010. The county's decision simply says that petitioners' proposed landscaping business "was not a permitted use in the RA zone * * *." Record 9. We cannot determine from the decision the county's basis for deciding that petitioners' proposed landscaping business is not a permitted use under MCZO 129.010. Further, we cannot decide as a matter of law

that petitioners' proposed use could not qualify as a permitted use in the RA zone under the provisions of MCZO 129.010.

As stated under the first assignment of error, it is the county which should interpret its enactments in the first instance. We, therefore, remand the decision for the county to consider whether the use being developed on the subject property prior to the May 31, 1990 zone change was a permitted use in the RA zone and, if so, whether petitioners established a vested right to establish such use.[7]

The fourth and fifth assignments of error are sustained.

The county's decision is remanded.

[7]We are also unable to determine the significance of the statements in the county's decision regarding "accurate building permits" not being issued to petitioners. It is unclear whether the county intended to find that petitioners' proposed use was not lawfully established or petitioners' expenditures were not lawfully made, because the building permits do not accurately describe the proposed use. On remand, the county should explain the relationship of the building permit "accuracy" issue to its vested right analysis.