BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARTIN BARBER and DONNA BARBER, Petitioners,	)	
vs.	)	LUBA No. 91-182
MARION COUNTY, Respondent.	)	FINAL OPINION AND ORDER

Appeal from Marion County.

James Stuart Smith, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Davis, Wright & Tremaine.

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

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

AFFIRMED 03/19/92

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

Petitioners appeal an order denying their application for a conditional use permit for a golf course on a parcel zoned Exclusive Farm Use (EFU), and Special Agriculture (SA).[1]

FACTS

The subject parcel is approximately 400 acres in size. The proposed golf course would be located on 190 acres of the subject parcel, of which approximately 168 acres are currently in farm use (cultivation of Christmas trees). This 190 acre portion of the subject parcel consists of Class I, II and III soils. Further, these 190 acres are located in the middle of the subject parcel.

Petitioners applied for a conditional use permit for an 18 hole private golf club, including a "clubhouse of 20,000-25,000 square feet, locker rooms, dining room, lounge/bar facilities, and a pro shop." Record 32.

The hearings officer conducted a public hearing and denied the application. Petitioners appealed to the board of commissioners. The board of commissioners affirmed the decision of the hearings officer and denied the application without conducting further hearings. This appeal followed.

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[1]For purposes of resolving this appeal, the relevant local standards are the same for the EFU and SA zones. For simplicity, we refer to the standards of the EFU zone in this opinion.

MOTION FOR EVIDENTIARY HEARING

Petitioners move for an evidentiary hearing pursuant to ORS 197.830(13)(b)[2] and OAR 661-10-045.[3] Petitioners contend:

> "At some time after the hearing * * * a citizen approached one member of the Marion County Commission and inquired about the result. The Commissioner replied that any applications in east Marion County were going to be denied for the foreseeable future, because the Commission had already determined that the next golf course it approved would be in north Marion County. The Commissioner also indicated that [the subject] proposal was a good one, but it was simply made three years too soon. Thus, rather than indicating the application of facts to criteria by

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[2]ORS 197.830(13)(b) provides:

> "In the case of disputed allegations of unconstitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record which, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. * * *"

[3]OAR 661-10-045(1) and (2) provides:

> "(1) Grounds for Hearing: The Board may, upon written motion, conduct an evidentiary hearing in the case of disputed allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *
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> "(2) Motions for Hearings: A motion for an evidentiary hearing shall contain a statement explaining with particularity what facts the moving party will present at the hearing and how those facts will affect the outcome of the review proceeding. Whenever possible such facts shall be presented by affidavit with the motion." (Emphasis supplied.)

> an impartial tribunal, [the subject application] had been prejudged without reference to the approval criteria. Therefore, it is likely [petitioners] were deprived of procedural due process required under Oregon law." Motion for Evidentiary Hearing 1-2.

Under OAR 661-10-045(2) petitioners must establish that the facts to be presented at the evidentiary hearing will affect the outcome of the hearing. In addition, OAR 661-10-045(2) provides that whenever possible an affidavit presenting those facts be submitted with the motion for evidentiary hearing. Here, petitioners have not submitted any such affidavit and do not explain why it is not possible to provide one. The motion for evidentiary hearing does not state (1) when the alleged statements were made, (2) whether the commissioner was referring to prospective golf course applications generally or to the subject golf course application, or (3) when, according to the commissioner, the commission had decided that golf courses would not be approved in east Marion County. In the absence of an affidavit or a more detailed motion explaining what facts would be provided in an affidavit, we will not presume that the commissioner was admitting to having prejudged the golf course application at issue in this appeal.

The above quoted statements in the motion for evidentiary hearing can reasonably be read to say that after the proceedings concerning the subject golf course application, and after the commissioner reviewed the

evidence in the record concerning the subject golf course application proposed for east Marion County, that particular county commissioner believed future golf courses would not be approved in east Marion County, rather, they would be approved in north Marion County. We do not believe this establishes that such commissioner's vote concerning the decision on the subject golf course application, or the vote of the entire commission, was the result of prejudgment or bias.

Petitioners' motion for evidentiary hearing is denied.

TWELFTH ASSIGNMENT OF ERROR

> "The county erred by misinterpreting MCZO 136.040(e)(1) to read 'and' rather than 'or,' thereby improperly completing the balancing test that is needed."

THIRTEENTH ASSIGMENT OF ERROR

> "The county's conclusion that there is no substantial need for a private golf facility for the general public is unsupported by the facts on the record."

FOURTEENTH ASSIGNMENT OF ERROR

> "The county's conclusion that the potential of the farmland is unlimited is not supported by the facts on the record."

Marion County Zoning Ordinance (MCZO) 136.030(p) lists "[g]olf courses meeting the criteria in 136.040(d) and (c) or (e)" as conditional uses in the EFU zone.[4]

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[4]MCZO 136.040(d) consists of several standards not at issue under these assignments of error.

MCZO 136.040(c) states that the proposed use:

> "* * * shall be situated on generally unsuitable land for farm use considering the terrain, adverse soil or land conditions, drainage and flooding, location and size of the parcel."

MCZO 136.040(e) provides that if MCZO 136.040(c) "cannot be satisfied," then the following alternative standards apply:

> "(1) There is a demonstrated need that the use will satisfy for area residents or the general public which outweighs the need for, or benefits of, the existing or potential farm or forest use; and
>
> "(2) There is no other feasible location for the proposed use that would satisfy 136.040(c); and
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> "(3) It will not cause adverse long term environmental, economic, social and energy consequences for the area, the region or the state."

In these assignments of error, petitioners contend the challenged decision erroneously concludes the subject parcel is not "generally unsuitable for farm use." In the alternative, petitioners argue that even if the proposal "cannot" meet the "generally unsuitable" standard of MCZO 136.040(c), the county erroneously concluded that the alternative standard provided in MCZO 136.040(e)(1) is not satisfied. We address these arguments separately below.

A. MCZO 136.040(c)

At the outset we note that in order to overturn on evidentiary grounds a local government's determination that

an applicable approval criterion is not met, it is not sufficient for petitioners to show 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, 16 Or LUBA 385, 393 (1987); McCoy v. Marion County, 16 Or LUBA 284, 286 (1987); 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. Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979); Consolidated Rock Products v. Clackamas County, 17 Or LUBA 609, 619 (1989).

The evidence in the record establishes that, at worst, the soils on the 400 acre parcel require a system for drainage which could require the installation of tile or some other drainage device for successful farm use. In this regard, there is an abundance of evidence that with adequate drainage the subject 400 acre parcel could be put to farm use. Petitioner has not established as a matter of law that the subject property satisfies MCZO 136.040(c).

This subassignment of error is denied.

B. MCZO 136.040(e)

MCZO 136.040(e) provides that if property cannot satisfy MCZO 136.040(c), then the proposed use may nevertheless be approved, so long as all three of the

standards in MCZO 136.040(e)(1)-(3) are satisfied. If the applicant fails to establish compliance with any one of those standards, we must sustain the county's decision. MCZO 136.040(e)(1) requires a determination that:

> "There is a demonstrated need that the use will satisfy for area residents or the general public which outweighs the need for, or benefits of, the existing or potential farm or forest use[.]"

Petitioners argue the county incorrectly applied the balancing test required by MCZO 136.040(e)(1).

The county determined:

> "Evidence of the need for golf course facilities is in the record. There is evidence that golf is growing in popularity nationally and in Marion County. Currently, there is one private golf facility [in Marion County].
>
> "The facility is proposed as a members-only facility. The need satisfied for the general public and area residents will be minimal. Letters of support in the file are concentrated from the medical and professional community, many of whom already enjoy private club membership, and few of whom live in the Turner-Aumsville area.
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> "The existing farm use is Christmas trees. The potential farm use is unlimited. The applicants were aware of the limitations on the property for Christmas trees prior to purchasing it. The property has standing water which interferes with crop success. This condition would be managed by tiling the area for golf development. The applicants assert tiling is not economical for Christmas tree production. * * *
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> "However, the potential for farm use, once the property is tiled, is unlimited. Tiling of bottom lands is a normal and accepted farming process. The potential farming use must be evaluated, as the property would be improved for the conditional

> use -- in this case tiled and irrigated. The demonstrated need for area residents and the general public in no way outweighs the benefit of the potential farm use of the subject property.
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> "* * * * *" Record 32-33.

Petitioners contend that because the challenged decision states the proposal does not satisfy a demonstrated need for area residents and the general public, it is clear the county required the "need" to be established for both groups, rather than for one or the other as is required by MCZO 136.040(e)(1).

We do not read the challenged decision to misapply the balancing test required by MCZO 136.040(e)(1). We understand the challenged decision to determine there is a need for more golf courses in Marion County, whether or not that need is created by area residents or the general public, but that the value of the subject property for farmland outweighs that need. Read in this way, the findings correctly apply MCZO 136.040(e)(1).

Petitioners also argue the conclusion in the challenged decision that the subject land has "unlimited" potential for farm use if tiled, is not supported by substantial evidence in the whole record. Regardless of whether the decision correctly concludes the property has "unlimited" value for agriculture, as stated above, the evidence supports a conclusion that the property is suitable for agriculture if tiled, the subject parcel is a very large agricultural

parcel and the proposed golf course would be in the middle of that parcel.

Where there is evidence both that there is a need by area residents and the general public for the proposed use, and that the subject site has considerable potential for farm use, MCZO 136.040(e)(1) requires the county to weigh the need for the proposed golf club against the benefits of the existing or potential farm use, a necessarily subjective determination. See Simmons v. Marion County, ___ Or LUBA ____ (LUBA No. 91-184, February 28, 1992), slip op 13. In this case, we cannot say as a matter of law that the county's conclusion, that the benefit of potential farm use of the property outweighs the need for the proposed golf club, is erroneous.

Because the challenged decision is one to deny the proposed development, the county need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. Garre v. Clackamas County, 18 Or LUBA 877, aff'd 102 Or App 123 (1990). For the reasons explained above, we conclude the the challenged decision's findings that the application does not satisfy the standards of MCZO 136.040(c) or MCZO 136.040(e)(1) are supported by substantial evidence.

This subassignment of error is denied.

The twelfth through fourteenth assignments of error are denied.

The county's decision is affirmed.