BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

McKAY CREEK VALLEY ASSOCIATION,)
)
Petitioner,)
)
vs.)
) LUBA No. 91-191
WASHINGTON COUNTY,)
) FINAL OPINION
Respondent,) AND ORDER
)
and)
)
LANE BLAKESLEE and MARY BLAKESLEE,)
)
Intervenors-Respondent.)

Appeal from Washington County.

F. Blair Batson, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

David B. Smith, Tigard, filed the response brief and argued on behalf of intervenors-respondent.

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

REVERSED 04/02/92

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 a Washington County Board of Commissioners order approving a farm dwelling on a parcel in the Exclusive Forest and Conservation (EFC) zone.[1]

MOTION TO INTERVENE

Lane Blakeslee and Mary Blakeslee, the applicants below, move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

This is the second time a county decision to approve a farm related dwelling on the subject property has been appealed to this Board. In McKay Creek Valley Assoc. v. Washington County, 18 Or LUBA 71, 73 (1989) (McKay I), we stated:

> "The subject parcel [is] part of the undeveloped 32-lot Overlook Acres subdivision, which was recorded in 1916. [The parcel] is 7.9 acres, comprised of 4.7 wooded acres and 3.2 acres planted with strawberries. The proposed dwelling would be sited in the wooded portion of [the parcel]. * * *" (Footnotes omitted.)

In McKay I, 18 Or LUBA at 81-82, we remanded the county's decision, on the grounds that the county had

[1]The EFC zone is intended "to provide for forest uses" and "to meet Oregon Statutory Requirements for forest lands." Washington County Community Development Code (CDC) 342-1. The EFC zone is not an exclusive farm use zone.

approved a "permit," as defined by ORS 215.402(4), without providing the hearing or notice of decision and opportunity for hearing required by ORS 215.416(3) and (11). We also found the county had not properly determined compliance with the standards for farm dwellings in the EFC zone established by CDC 430-37.2A,[2] and failed to address the requirements of OAR 660-05-030(4). Id. at 82-87.

After we remanded the county's first decision, the board of commissioners remanded the subject application to the county hearings officer. After a public hearing, the hearings officer issued a decision denying the application. Intervenors appealed that decision to the board of commissioners. After a partial de novo review,[3] the board of commissioners issued an order approving the application. This appeal followed.

FOURTH ASSIGNMENT OF ERROR

> "The county misconstrued the applicable law, failed to make adequate findings, and made a decision not supported by substantial evidence in the record as a whole in concluding the farm dwelling would be located on a parcel planted in

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[2]Under ORS 215.428(3), approval or denial of the subject application must be based on the standards and criteria applicable at the time the application was first submitted to the county. The parties agree that the 1986 CDC was in effect when the subject application was submitted, and is applicable to the appealed decision. Therefore, all references in this opinion are to the 1986 CDC.

[3]The board of commissioners' review was limited to the record of the hearings officer's proceeding, except that the board of commissioners allowed the hearing to be reopened for submittal of new evidence concerning the "day-to-day activity requirements [of] OAR 660-05-030(4)." Record 92.

perennials capable of producing upon harvest an average of at least $10,000 in gross income."

CDC 430-37.2A(1)(b)[4] requires that a farm dwelling in the EFC zone be located on a lot or parcel "managed as part of a farm operation" which:

> "Has produced at least $10,000 in annual gross farm income in two (2) consecutive calendar years out of the three (3) calendar years before the year in which the application for the dwelling was made, or is planted in perenials [sic] capable of producing upon harvest, an average of at least $10,000 in gross annual income[.]" (Emphasis added.)

As emphasized in the above quote, CDC 430-37.2(A)(1)(b) establishes alternative standards for approval of a farm dwelling. In this case, no party contends the subject parcel is managed as part of a farm operation which has produced at least $10,000 in annual gross farm income in certain prior years, as is required by the first standard. See Record 328. Rather, the challenged decision concludes the proposed farm dwelling satisfies the second standard (hereafter "perennial standard"), stating:

> "[Intervenors'] parcel is planted in perennials, which if managed in accordance with accepted farming practices, including replanting, are capable of grossing, upon harvest, at least $10,000 in annual farm income. * * *" Record 11.

The county's findings explain:

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[4]Alternative standards for the approval of a farm dwelling in the EFC zone are found in CDC 430-37.2A(1)(a) and (c). However, in this case there is no contention that the proposed dwelling does satisfy or could satisfy these alternative standards.

> "[T]he parcel currently is planted in 3.2 acres of strawberries, although the strawberries are not in commercial production. Evidence was introduced to show that it is an accepted farming practice to replant strawberry plants approximately every 5 years to restore strawberry fields to commercial productivity, and that [intervenors] must replant their 3.2 acres of strawberries to achieve the required production and income levels.
>
> "* * * * *
>
> "* * * Given the yields of which the parcel is capable, and [the cannery] price, the Board [of Commissioners] finds the [intervenors'] site is capable of annual gross farm income of at least $10,000 from strawberries.
>
> "* * * * *
>
> "One objector asserted [intervenors'] parcel must be planted in the specific perennials for which * * * approval of a [farm dwelling] is being sought. Since the replanting of strawberries periodically is an accepted farming practice, and meeting the farm income standard is predicated on the conduct of accepted farming practices, [intervenors'] parcel is planted in perennials capable of meeting the farm income standard as required by [CDC] 430-37.2A(1)(b)." (Emphasis added.) Record 7-8.

Petitioner contends the county misinterpreted the perennial standard. Petitioner contends the perennial standard requires the county to find that the strawberry plants currently planted on the subject parcel are capable of producing, upon harvest, an average gross annual income of at least $10,000. According to petitioner, the county found only that the site is capable of producing an average of $10,000 in gross annual income. Petitioner argues the findings themselves indicate that new strawberry plants must

be planted on the subject parcel in order to achieve the income level required by the perennial standard.

Petitioner further argues that there is no evidence in the record that the planted strawberries are capable of producing any income on harvest. Petitioner contends the record shows that strawberries have been planted on the subject parcel since the farm dwelling application was originally submitted in 1988, but that intervenors have never engaged in accepted farming practices regarding those plants and the plants are not capable of producing a harvest. Petitioner argues intervenors' agricultural consultant testified in a letter dated May 18, 1990:

> "I visited the land on April 12, 1990 and made a visible inspection of the current crop and soil. The cleared land of some 3 acres is planted [in] strawberries but they have not been tended to and will need to be replanted." (Emphasis added.) Supp. Record 102.

Intervenors concede the parcel will have to be replanted with new strawberry plants in order to achieve the $10,000 gross annual income standard. However, intervenors argue the parcel is "planted in perennials," as required by the perennial standard, because there are 3.2 acres of existing strawberry plants on the parcel. Intervenors further argue it is undisputed that replanting is an accepted farming practice in strawberry farming. According to intervenors, it is therefore the replanted strawberry plants to which the $10,000 gross annual income test of the

perennial standard should be applied.[5] Intervenors also argue that the operative term in the perennial standard is "capable" and, therefore, that determining a site is "capable" of meeting the $10,000 gross annual income test does not require any assessment of past agricultural practices or the probability of future agricultural performance.

The perennial standard does not require that the subject site be capable of producing an average of $10,000 in gross income, but rather that the perennials planted on the site be capable of producing, upon harvest, an average of $10,000 in gross income. Here, it is undisputed that the strawberry plants currently planted on the subject parcel are not capable of producing, upon harvest, the required income. Regardless of whether replanting strawberry plants every five years is an accepted farming practice, the county's determination that perennials which might be planted on the subject parcel in the future could produce $10,000 in annual gross income, even if supported by the

[5]Intervenors also argue that in Rebmann v. Linn County, 19 Or LUBA 307 (1990), this Board similarly found that a county could rely on a particular type of farm use not yet in existence to justify approval of a farm help dwelling. However, Rebmann v. Linn County has no relevance to this case, as the ordinance and administrative rule standards at issue in Rebmann do not contain language similar to that of the perennial standard at issue here.

record, does not satisfy the perennial standard.[6] We therefore agree with petitioner that the county erred in determining the subject application complies with the perennial standard.

The fourth assignment of error is sustained. Under the correct interpretation of the perennial standard and the undisputed relevant facts in this case cited above, the subject application cannot satisfy CDC 430-37.2A(1)(b). Accordingly, the county's decision must be reversed. OAR 661-10-071(1)(c).

The county's decision is reversed.[7]

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[6]We note that an ongoing strawberry farming operation which has produced an average of $10,000 in gross annual income in past years, but cannot satisfy the perennial standard at a particular point in time simply because the strawberry plants are at the end of their five year cycle and must be replanted, would be able to satisfy the alternative standard established by CDC 430-37.2A(1)(b), of having produced at least $10,000 in gross income in two of the three prior calendar years. However, in this case, it is undisputed that the strawberry plants actually planted on the subject parcel have neither produced the required income in the past nor are presently capable of producing, upon harvest, the required income.

[7]In view of our disposition of the fourth assignment of error, resolution of petitioner's other assignments of error could have no effect on our decision to reverse the county's decision or on the county's disposition of the subject application. Therefore, we do not address petitioner's other assignments of error.