BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALLEN WOOSLEY and KAY WOOSLEY,	)	
	)	
Petitioners,	)	LUBA No. 92-053
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
MARION COUNTY,	)	
	)	
Respondent.	)	

Appeal from Marion County.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioners.

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

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

AFFIRMED 11/13/92

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 major partition.[1]

FACTS

The subject property consists of 19.32 acres of SCS Agricultural Class II and III soils, and is zoned Exclusive Farm Use (EFU). In 1989, petitioners sold 8.99 acres of the subject property to a third party, believing that portion of the property to be separate from the remaining 10.33 acres. The 10.33 acre portion of the subject property is developed with two mobile homes, one is occupied by petitioners and the other by an elderly relative. In addition, the 10.33 acre portion of the property is improved with a barn and a shop building. Chickens and livestock are raised on the 8.99 acre portion of the property.

In 1991, petitioners sought permission to replace their existing mobile home. On June 14, 1991, the county sent a letter to petitioners (June 14, 1991 letter) stating that it would not process their replacement dwelling request as it believed the 10.33 acres, on which the mobile homes are located, had been unlawfully divided from the 8.99 acres

[1]We resolve infra the parties' dispute concerning whether petitioners' request for a replacement dwelling was also denied by the challenged decision.

many years before.[2] The June 14, 1991 letter also stated that partitioning approval must precede approval of a replacement dwelling. Record 60.

Thereafter, on August 23, 1991, petitioners submitted an application for partitioning approval. On September 19, 1991, the planning department denied the partition application. Petitioners appealed that decision to the hearings officer. After a public hearing, the hearings officer affirmed the decision of the planning department and denied petitioners' partition application. Petitioners appealed the hearings officer's decision to the board of commissioners, and the board of commissioners denied the appeal without further hearings on the matter. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The county misconstrued the applicable law when it compelled the petitioners to apply for a major partitioning, instead of granting the originally requested permit for a replacement dwelling in an EFU zone."

A. Nature of the Challenged Decision

Petitioners argue the challenged decision erroneously denies their request for a replacement dwelling on the basis

[2]In 1972, apparently without petitioners' knowledge, the relative who lives in the second mobile home on the 10.33 acre portion of the property, applied for county recognition that the 8.99 acre portion is lawfully separate from the 10.33 acre portion. This request was denied by the county, and no appeal was pursued.

that the property had been unlawfully divided.[3] Petitioners maintain the challenged decision provided their first opportunity to appeal a county decision on their replacement dwelling permit application. Petitioners argue the June 14, 1991 letter was not an appealable decision, as it simply stated that the county would not consider a replacement dwelling request until partitioning approval was given.

The county argues the June 14, 1991 letter was an appealable decision denying a replacement dwelling permit. The county contends that petitioners may not challenge, in this proceeding, its June 14, 1991 refusal to consider petitioners' request for a replacement dwelling on the 10.33 acre portion of the property. According to the county, the June 14, 1991 letter was a separate decision from the challenged decision and it could have been, but was not, appealed.

Unquestionably, the challenged decision is the only county decision the Board may review in this appeal proceeding. However, in determining whether the challenged decision denies petitioners' request for a replacement dwelling, the language of (1) the June 14, 1991 letter, (2) petitioners' application for a major partition, and (3) the challenged decision are instructive.

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[3]Petitioners make it clear they do not challenge the county's determination that the parcel was unlawfully divided and, similarly, do not contend the 19.32 acre parcel is divided at all.

The June 14, 1991 letter states in relevant part:

> "You have applied for a building permit and in checking our files we find that the following actions or materials are needed from you before the permit can be issued.
>
> "* * * [B]oth the 8.99 acre parcel and the 10.33 acre parcel are not recognized as legally separate lots. It is the policy of Marion County Planning Division not to approve any permits on property that was created without proper authorization. For this reason, the Planning Division cannot sign off on your building permit application to replace the primary mobile home on the 10.33 acres. * * *" Record 60.

We read this letter to advise petitioners that they must take certain steps before the county will consider their request for a building permit for a replacement dwelling. We do not read this letter to deny petitioners' request for a replacement dwelling. However, the June 14, 1991 letter does specifically defer county consideration of the replacement dwelling request until partitioning approval is secured.

The next event in the local record is petitioners' application for a "major partition." The explanation portion of that application states the following concerning the nature of the application:

> "* * * * *
>
> "The primary home site (mobile home) is being requested to be replaced. A permit application was submitted in June 1991 to the Marion County Building Department for a mobile home to replace the 20 year old existing mobile home (primary dwelling.) The Marion County Planning Department

> denied the permit. The [June 14, 1991 letter] is incorrect, no serious consideration was [given] to the request to replac[e] the primary dwelling. * * * Again, the applicants are requesting the primary[,] 20 year old dwelling [be] allowed to be replaced, as in accordance with zoning regulations.
>
> "* * * * *
>
> "In conclusion, both requests, replacing the primary dwelling (mobile home) and partitioning parcels 10.33 and 8.99 are justified requests and would ratify [that] parcel 10.33 [is] separate from the parcel 8.99 since [it was] purchased by [petitioners] in 1972." Record 57-59.

The challenged decision refers to the application to be decided as the application for partitioning approval. In addition, the decision concludes:

> "It is hereby found that the applicants have failed to meet the burden of proving the relevant standards and criteria and therefore, this application for major partitioning is denied." Record 9.

However, the decision also contains the following language:

> "* * * This application originated as a request to replace the primary dwelling, the existing mobile home[,] with a new, larger unit. * * *" Record 6.
>
> "* * * <u>This proposal would allow replacement of an existing mobile home and would not introduce a new dwelling into the area</u>. However, with the partitioning, for land use purposes the dwelling would be considered nonfarm use and this is a change of use.
>
> "* * * <u>the residence has existed in the area as a farm residence for a number of years. It is currently in need of upgrading</u>. While land was consolidated for land use purposes, the residents of the dwelling hold title to the 10.33 acre parcel and not the whole.

> "The property is 10.33 acres with pasture and a temporary hardship mobile home. Given the size of the parcel the proposed dwelling has sufficient buffer area to be compatible with adjacent farm uses." (Emphasis supplied.) Record 8.

The decision refers to the "proposal" as the replacement of the existing mobile home. It recognizes that the proposed dwelling is dilapidated and requires replacement. The June 14, 1991 letter states that petitioners' replacement dwelling request will not be considered by the county until partitioning approval is secured. The application for major partition makes it clear that it contains both a request for partitioning approval and for approval of a replacement dwelling. The parties clearly were aware that the replacement dwelling request was central to petitioners' application, and they spent a great deal of time arguing about it below.[4] Further, the decision addresses that issue. Under these circumstances, we believe the challenged decision denies petitioners' request for a

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[4]In petitioners' notice of appeal from the planning department's decision, they stated the following:

> "[The planning department] did not address applicants' issues.
>
> "* * * * *
>
> "Applicants' request to replace primary dwelling was well within the guidelines according to state statute." Record 40.

Further, petitioners' written testimony before the hearings officer focuses, in large part, on the county's refusal to grant the replacement dwelling request. Record 30-36. Petitioners' appeal statement to the board of commissioners similarly focuses, in large part, on the replacement dwelling issue. Record 11-15.

replacement dwelling.

B. Legitimacy of the Bases for Denial of the Replacement Dwelling Request

The county denied the replacement dwelling request on the basis that, in the absence of partitioning approval to cure a prior unlawful division of the subject land, the replacement dwelling cannot be approved because the prior land division violates Marion County Zoning Ordinance (MCZO) provisions. The issue under this assignment of error is whether the county has authority to deny the requested replacement dwelling on this basis.

Petitioners contend the county has no authority to deny their replacement dwelling request on the basis of the policy stated in the June 14, 1991 letter, of not approving permit applications where there is an outstanding zoning violation existing on the subject property. Petitioners argue the only standard which may be applied to the approval of the replacement dwelling request is that standard expressed by MCZO 136.060. MCZO 136.060 provides:

> "Legally established dwellings existing when the EFU zone is applied shall be considered in conformance with the EFU zone and may be repaired, altered or enlarged. The primary dwelling may also be replaced."

Petitioners contend their replacement dwelling request satisfies this standard.

The county points out that the policy cited in the June 14, 1991 letter as justification for not considering

the replacement dwelling request is not a mere unwritten policy, but rather is specifically stated in Ordinance No. 778. The county argues it does not matter that the county did not cite the specific ordinance provision that underlies the policy. The county contends it is enough that the substance of the requirement of Ordinance No. 778 was stated, and that Ordinance No. 778 requires the replacement dwelling request to be denied because of an existing zoning violation.

Ordinance No. 778 provides the following:

> "No building or site permit shall be issued if the parcel of land or the use of the land on which the building, structure or mechanical installation is to be placed, erected, altered, equipped or used is in violation of any Marion County Ordinance."

The substance of the requirement of Ordinance No. 778 was stated by the county in the June 14, 1991 letter, and was disputed by the parties below. We believe the county's failure to specifically identify Ordinance No. 778 as the source of its "policy" is a procedural error which does not prejudice petitioners' substantial rights and, therefore, furnishes no basis for reversal or remand of the challenged decision. ORS 197.835(7)(a)(B).

There is no dispute that the prior division of the subject property violates the MCZO.[5] Accordingly, the

[5]The Board sought clarification on this point at oral argument and was assured that the unlawfulness of the prior division of the subject property is not disputed.

county is correct that, under Ordinance No. 778, no building permit for a replacement dwelling was required to be issued, due to the prior unlawful division of the subject property.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The county misconstrued the applicable law when it failed to apply the proper criteria to the partition application."

THIRD ASSIGNMENT OF ERROR

> "The respondent county failed to make adequate findings of fact to support the denial of the partition application."

FOURTH ASSIGNMENT OF ERROR

> "There is not substantial evidence in the record to support the findings that petitioners' 10 acre parcel doesn't meet the Non-Farm Parcel criteria."

Under these assignments of error, petitioners challenge the county's decision denying partitioning approval. Petitioners argue the county adopted no findings addressing the requirements of MCZO 136.070(a), regarding divisions of land for farm parcels, or that the findings are inadequate and not supported by substantial evidence. Petitioners also argue the county's findings regarding MCZO 136.070(b)(3) concerning divisions of land for nonfarm parcels, are inadequate and not supported by substantial evidence.[6]

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[6]There is a great deal of confusion about whether petitioners proposed to create two farm parcels, two nonfarm parcels, or one farm and one nonfarm parcel. The challenged decision treated the proposal as one to create one farm parcel and one nonfarm parcel, and this interpretation of petitioners' request is reasonable. However, as explained below, the

It is well established that where the challenged decision denies a proposed development, the local government 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). Further, in challenging a denial decision on evidentiary grounds, petitioners have the burden of establishing compliance with each and every criterion 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); Morley v. Marion County, 16 Or LUBA 385, 393 (1987); McCoy v. Marion County, 16 Or LUBA 284, 286 (1987).

MCZO 136.070(a) provides, in part, the following requirements applicable to partitioning requests for the creation of farm parcels in the EFU zone:

> "(1) Any proposed parcel intended for farm use must be appropriate to the continuation of the existing commercial agricultural enterprise of the particular area * * *.
>
> "(2) The parcel shall meet the requirements of ORS 215.243.
>
> "* * * * *"

Petitioners have not established that their partition application and the evidence submitted in connection with

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evidence in the record does not establish that the proposal satisfies the standards for the creation of either two farm parcels or two nonfarm parcels, in any case.

that application satisfies MCZO 136.070(a)(1) and (2) as a matter of law.

For the creation of a nonfarm parcel, MCZO 136.070(b) requires establishing compliance with the standards for approval of nonfarm dwellings. In this regard, MCZO 136.040(c) requires that the nonfarm dwelling:

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

There is no dispute that the subject parcel is situated on SCS Class II and III soils and consists of 19.32 acres. Further, there is evidence that at least a portion of the parcel (the 8.99 acre portion) is currently employed for raising chickens and livestock. Accordingly, petitioners have not established as a matter of law that the subject parcel is generally unsuitable for farm use, as required by MCZO 136.040(c).

The second, third and fourth assignments of error are denied.

The county's decision is affirmed.