BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LESTER D. THATCHER, Petitioner, vs. CLACKAMAS COUNTY, Respondent.	LUBA No. 92-125 FINAL OPINION AND ORDER

Appeal from Clackamas County.

James H. Bean, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Lindsay, Hart, Neil & Weigler.

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

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

REMANDED 11/02/92

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

Petitioner appeals a county hearings officer's decision denying his application to change the zoning of a 48 acre parcel from Farm/Forest, 10 acre minimum lot size (FF-10), to Rural Residential Farm/Forest, 5 acre minimum lot size (RRFF-5).

FACTS

The subject parcel contains a farm residence, barns and several outbuildings.[1] The subject parcel is designated Rural on the Clackamas County Comprehensive Plan (plan) map. Land to the east and south of the subject parcel is also zoned FF-10. Land to the west and north of the subject property is zoned RRFF-5.

In 1988, petitioner applied to the county to change the zoning of the 52 acre parent parcel of the subject parcel from FF-10 to RRFF-5. The county denied petitioner's application. In 1990, petitioner applied for, and the county approved, a lot line adjustment and flexible lot size partition allowing the creation of three small parcels (each 1.15 to 1.25 acres in size) in the northwest corner of the

[1]The parcel is comprised of two tax lots. The southern tax lot (approximately 36 acres) is subject to the county's Historic Landmark (HL) overlay district, due to the presence of a historic farm. The HL overlay designation for this tax lot is not proposed to be changed. Record 109.

parent parcel, as well as the 48 acre subject parcel.[2] Record 109.

On June 28, 1991, petitioner filed an application to change the zoning of the subject 48 acre parcel from FF-10 to RRFF-5. After a public hearing, the hearings officer denied petitioner's application. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

ZDO 1202.01(A) requires a zone change to be consistent with the plan. Plan Rural Policy 13 provides in relevant part:

> "The [RRFF-5 and FF-10] zoning districts maintain the character of Rural areas and implement the goals and policies of this Plan for residential uses in Rural areas; these zoning districts * * * should be applied in Rural areas. These zones shall be applied as follows:
>
> "* * * * *
>
> "[2.] A five-acre zone shall be applied when all the following criteria are met:
>
> "a. Parcels are generally five acres.
>
> "* * * * *"

The challenged decision denies the zone change

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[2]Under Clackamas County Zoning and Development Ordinance (ZDO) 1014.04(B) (Flexible Lot Size Developments), land divisions may create lots or parcels smaller than the minimum lot size permitted by the applicable zoning district if, among other things, the average area per dwelling is consistent with the requirements of the zoning district. However, we note that on December 12, 1990, the county added a provision to ZDO 1014.04(B)(3) stating that flexible lot size developments are not allowed in the FF-10 zone. Niedermeyer v. Clackamas County, ___ Or LUBA ___ (LUBA Nos. 92-065 and 92-089, June 23, 1992), slip op 4.

application for failure to comply with Rural Policy 13.2(a) and ZDO 1202.01(A). The decision finds:

> "In looking at lot sizes of all the property within the confines of the contiguous FF-10 zoned land (approximately 3 1/2 miles), 58.8% are five acres or less in size. This * * * demonstrates an overall change in size downward since 1988 of about 8%[.] However, this ratio of about 60/40 cannot be considered to be 'Generally' an area of five acres or less in size.
>
> "* * * * *
>
> "Based upon the above findings [and] prior decisions in this general area, and * * * even though some smaller parcelization has occurred in the 3 1/2 mile area surrounding this subject property, there has not been a 'significant' number of zone changes or [amount of] smaller parcelization to justify this zone change request. Further, * * * the word 'Generally' as it is applied to this matter means more than a simple majority, but rather means that a preponderance of the parcels in the affected [area] should be 5 acres or less in size. A legislative definition to lend clarity to the word 'Generally' is sorely needed, as well as a limit to the area that can be considered." Record 2-3.

Petitioner challenges the county's interpretation of Rural Policy 13.2(a). Petitioner disagrees with the county's choice of the area to be considered in applying Rural Policy 13.2(a), and with the county's interpretation of "generally."

A. Area Considered

During the proceedings leading to acknowledgment of the county's plan and land use regulations by the Land Conservation and Development Commission under ORS 197.251,

an area approximately 3 1/2 miles in length, which included the subject parcel, was considered as one resource goal "exception" area. This exception area was designated Rural and was zoned FF-10. There is no dispute that this is the area referred to in the challenged decision as the "contiguous FF-10 zoned land" and the "3 1/2 mile area surrounding the subject property," which the county finds not to be composed of parcels generally five acres or less and upon which the county based its determination of noncompliance with Rural Policy 13.2(a).

Petitioner argues that the county's use of the entire 3 1/2 mile long area zoned FF-10 during the legislative rezoning leading to acknowledgment to determine compliance of the proposed zone change with Rural Policy 13.2(a) is "unreasonable, arbitrary and irrational." Petition for Review 14. Petitioner argues that because "general" is defined in Black's Law Dictionary as relating "to the whole kind, class or order," the county should have considered the numerous smaller RRFF-5 zoned parcels adjacent to the subject parcel. Petitioner also contends the county should have limited the FF-10 zoned area considered to that portion of the FF-10 zoned area east of Beavercreek Road, where most of the smaller parcels are located. Petitioner also argues the county's use of the entire FF-10 zoned area to determine compliance with Rural Policy 13.2(a) is in error because the county used different "areas" to determine compliance with

Rural Policy 13.2(b)-(d).[3]

The county argues that the area it used to determine compliance of the proposed zone change with Rural Policy 13.2(a) was reasonable. The county points out the record shows the same area was used in reviewing petitioner's 1988 zone change request and another recent request to change the zoning of a parcel in the same FF-10 zoned area. The county also argues that the challenged decision does not indicate the county used a different area in determining compliance with Rural Policy 13.2(b)-(d).

We must defer to a local government's interpretation of its own plan or code, so long as the proffered interpretation is not "clearly contrary to the enacted language," or inconsistent with express language of the ordinance or its apparent purpose or policy." Clark v. Jackson County, 313 Or 508, 514-15, ___ P2d ___ (1992). The county's interpretation of Rural Policy 13.2(a) to require consideration of the entire FF-10 zoned area that includes

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[3]Rural Policy 13.2 provides in relevant part:

"A five-acre zone shall be applied when all the following criteria are met:

"* * * * *

"(b) The area is affected by development.

"(c) There are no serious natural hazards and the topography and soils are suitable for development.

"(d) Areas are easily accessible to a Rural Center or incorporated city." (Emphasis added.)

the subject parcel, and that was the subject of the county's prior legislative zone change proceeding during the acknowledgment process, is not "clearly contrary" to the terms of, or "inconsistent with the express language" or "apparent purpose or policy" of, Rural Policy 13.2. Therefore, the county's interpretation provides no basis for reversal or remand.[4]

This subassignment of error is denied.

B. Interpretation of "Generally"

The challenged decision states that an area where 58.8% of the parcels are five acres or less in size is not an area where parcels are "generally" five acres or less in size. Petitioner argues the county's interpretation of "generally" is arbitrary and irrational. Petitioner points out the Oregon Supreme Court has held that "primarily" means "'chiefly' or 'principally' but that it does not necessarily mean 'over 50 percent.'" Industrial Refrigeration and Equipment Co. v. State Tax Commission, 242 Or 217, 220, 408 P2d 937 (1965). Petitioner argues that "generally" is less restrictive than "primarily."

Neither the plan nor the ZDO defines "generally." In

[4]The decision states that "findings could be made in support of the remaining three criteria set forth in [Rural] Policy 13.2 of the Plan." Record 3. We agree with the county that the decision does not indicate what "areas" the county considers relevant in determining compliance with Rural Policy 13.2(b)-(d). However, we note there is no inherent reason why the "area" considered to determine compliance with each of the four criteria set out in Rural Policy 13.2 must be the same.

the absence of any definition or evidence of a contrary legislative intent, the word "generally" must be construed in accordance with its plain and ordinary meaning. Sarti v. City of Lake Oswego, 106 Or App 594, 597, 809 P2d 701 (1991); Clatsop County v. Morgan, 19 Or App 173, 176, 526 P2d 1393 (1974). "Generally" is defined as:

> "* * * as a whole: collectively; * * * with respect to all: universally; in a reasonably inclusive manner: in disregard of specific instances and with regard to an overall picture; * * * on the whole: as a rule." Websters Third New International Dictionary 945 (1981).

The above quoted definition is open ended and does not provide a clear basis for determining the percentage of parcels that must be five acres or less in size to satisfy Rural Policy 13.2(a).

As explained earlier in this opinion, when a local government interprets its own code, we must defer to that interpretation so long as it is not inconsistent with the express terms of the code or its "apparent purpose or policy." Clark v. Jackson County, supra. However, it is the county which, in the first instance, should interpret its own enactment. Fifth Avenue Corp. v. Washington Co., 282 Or 591, 599, 581 P2d 50 (1984); J.C. Reeves Corp. v. Clackamas County, ___ Or LUBA ___ (LUBA No. 91-072, November 20, 1991), slip op 10-11, aff'd 111 Or App 452 (1992); Mental Health Division v. Lake County, 17 Or LUBA 1165, 1176 (1989). Here the challenged decision simply

states that a total of 58.8% (or possibly even 60%) of the parcels in the relevant area being five acres or less does not satisfy the requirement of Rural Policy 13.2(a) that "parcels are generally five acres." The decision does not interpret what Rural Policy 13.2(a) does require, and its meaning is not clear to us. Without an explanation from the county of what Rural Policy 13.2(a) requires, and of the basis for its interpretation, we cannot determine whether the challenged decision is consistent with Rural Policy 13.2(a).

This subassignment of error is sustained.

The first and second assignments of error are sustained, in part.

THIRD ASSIGNMENT OF ERROR

The challenged decision includes a statement that "there has not been a 'significant' number of zone changes or [amount of] smaller parcelization to justify this zone change request." Record 3. Petitioner argues there is no legal requirement that there have been a significant change in the relevant area in order to approve the proposed zone change. Petitioner also argues the evidence in the record demonstrates that there has been a significant amount of parcelization and development in the area surrounding the subject parcel.

The parties do not identify any provision in the county plan or ZDO requiring the subject zone change application to

be supported by a determination that there has been a "significant number of" zone changes or land divisions within the relevant area over some period of time.[5] In the absence of such an approval standard, the findings challenged under this assignment of error do not provide a basis for denying petitioner's zone change application. Where findings are not essential to the challenged decision, it is not necessary for us to determine whether those findings are supported by substantial evidence in the record. Schatz v. City of Jacksonville, 21 Or LUBA 149, 163-64 (1991); Moorefield v. City of Corvallis, 18 Or LUBA 95, 119 (1989).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

For the most part, this assignment of error repeats arguments addressed under the third assignment of error, supra, that the county improperly required petitioner to demonstrate "significant" or "substantial" changes had occurred in the area of the subject parcel. However, we

[5]At oral argument, the county pointed out ZDO 1303.13(A) provides that if an application for an administrative action is denied, as was petitioner's 1988 application for a zone change for the 52 acre parent parcel of the subject parcel, the applicant may refile the same or substantially similar application if the planning director finds that one of three listed criteria is met. All three criteria refer to certain types of "changes" or "substantial changes" in the plan, ZDO, subject property, adjacent property or surrounding area. However, the challenged decision does not mention ZDO 1303.13(A), and we do not understand the decision to refuse to consider petitioner's application due to noncompliance with ZDO 1303.13(A).

also understand petitioner to argue that the county generally applied a higher burden of proof than is required under the plan and ZDO.

It is well established that the applicant for a zone change has the burden of establishing compliance of the proposed zone change with the applicable approval standards. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 18, 569 P2d 1063 (1977); Hess v. City of Portland, ___ Or LUBA ___ (LUBA No. 92-051, June 17, 1992), slip op 3; see Forest Park Estate v. Multnomah County, supra, 20 Or LUBA at 341. We see nothing in the challenged decision indicating the county applied an incorrect burden of proof.

The fourth assignment of error is denied.

The county's decision is remanded.