BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RODRICK LEABO and CATHERINE LEABO, Petitioners,	
vs.	LUBA No. 92-202
MARION COUNTY, Respondent.	FINAL OPINION AND ORDER

Appeal from Marion County.

Eric Yandell, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief was Heltzel, Upjohn, Shaw, Williams, Yandell & Pearsall.

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

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

AFFIRMED 02/12/93

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 a decision of the Marion County Hearings Officer denying their request for a setback reduction.

FACTS

The subject parcel is 7.02 acres in size and is zoned Acreage Residential (AR). Petitioners applied for permission to reduce the 100 foot setback from an adjacent Special Agriculture (SA) zoned parcel, to 25 feet. Petitioners wish to establish a dwelling on the subject parcel on the 25 foot setback line. The adjacent parcel serves as, or has served as, pasture for a small number of livestock.

PRELIMINARY ISSUE

Petitioners have already placed a mobile home on the subject property consistent with a 100 foot setback requirement. However, petitioners eventually wish to construct a conventional dwelling within 25 feet of the adjacent SA zoned parcel in place of the existing mobile home.

During oral argument in response to questions from the Board, the county orally moved to dismiss this appeal on the ground that it is moot. The basis for the county's motion is petitioners' placement of a mobile home on the subject property in compliance with the 100 foot setback. However,

because petitioners' application includes a request to place a conventional dwelling on a 25 foot setback line, this appeal is not moot.

FIRST ASSIGNMENT OF ERROR

> "The county misinterpreted [Marion County Zoning Ordinance (MCZO)] 128.040(a) * * *."

SECOND ASSIGNMENT OF ERROR

> "The county erred in failing to make a finding whether a 100-foot setback is necessary in this instance to protect against conflict with potential uses of the Jordan Parcel. * * *"

THIRD ASSIGNMENT OF ERROR

> "The county erred in failing to conclude that the proposed 25-foot setback was sufficient to minimize potential conflicts with farm uses on the Jordan Parcel and in denying petitioners' application."

MCZO 128.040(a) provides as follows:

> "Any new dwelling in the AR zone shall be required to maintain a special setback from any parcel in the * * * SA * * * zon[e] when necessary to minimize potential conflicts with farm or forest use. A 100-foot setback is the usual standard adjacent to farm use, and 200 feet is the standard setback from forest uses."[1]

The challenged decision determines the setback standard expressed in MCZO 128.040(a), quoted above, is not satisfied.

Petitioners challenge the county's interpretation of

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[1]The MCZO allows the approval of a variance to setback requirements, under certain circumstances. However, no variance was sought below.

MCZO 128.040(a), and the evidentiary support for the county's determination that the proposal fails to comply with MCZO 128.040(a). Petitioners first argue that MCZO 128.040(a) does not require a 100 foot setback. Rather, petitioners contend MCZO 128.040(a) provides that a 100 foot setback is simply "the usual standard adjacent to farm uses." Second, petitioners argue that even if MCZO 128.040(a) requires a 100 foot setback to minimize conflicts with farm uses, because the SA zone does not provide for intensive farm uses, parcels zoned SA do not deserve special setback protection; and the county erred in applying the special setback here. Finally, petitioners argue that even if MCZO 128.040(a) is properly interpreted to require a 100 foot setback from SA zoned land on which there is any farm use, in order to minimize potential conflicts with that farm use, the record lacks substantial evidence to establish there are farm uses on the SA zoned parcel adjacent to the subject parcel.[2]

This Board may not interpret a local government's ordinances in the first instance, but rather must review the local government's interpretation of its ordinances. Weeks v. City of Tillamook, 117 Or App 449, ___ P2d ___ (1992). Further, a local government interpretation must be adequate

[2]Petitioners also argue that the county incorrectly concluded that they failed to carry their burden of proof. For the reasons explained, infra, we disagree.

for our review, and:

> "[a] conclusory statement does not suffice as an interpretation of the provisions. It says and explains nothing about the meaning of the [local ordinances]. * * * A bare recitation that the decision complies with the local provision does not constitute an interpretation of the provisions that is adequate for review." Larson v. Wallowa County, 116 Or App 96, 104, ___ P2d ____ (1992).

While it is a close question, we believe the challenged decision expresses an interpretation of MCZO 128.040(a) adequate for our review. The challenged decision identifies and applies MCZO 128.040(a). Further, reasonably read, the hearings officer's decision expresses an interpretation of MCZO 128.040(a) that where an AR zoned parcel is next to a SA zoned parcel that is even minimally in farm use, a 100 foot setback is deemed necessary to minimize conflicts between the AR and SA zoned parcels. Record 11-12.

We are required to defer to a local government's interpretation of its code, so long as the 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, 836 P2d 710 (1992). The Court of Appeals has stated that under Clark, the question for this Board to resolve is not whether a local government interpretation of its own code is "right," but rather whether it is "clearly wrong." Goosehollow Foothills League v. City of Portland, 117 Or App 211, 217, ___ P2d ___ (1992); West v. Clackamas

County, 116 Or App 89, 92-93, ___ P2d ___ (1992).

The county determined a 100 foot setback is required where a dwelling is proposed on AR zoned land adjacent to SA zoned land in farm use. However, the MCZO 128.040(a) description of the 100 foot setback as a "usual standard" is troubling.[3]

The setback requirements applicable to dwellings in the SA and EFU zones do not have this nebulous language. Nevertheless, the setback requirements applicable to dwellings in the EFU and SA zones utilize words which have a nearly equivalent meaning to the interpretation the challenged decision ascribes to MCZO 128.040(a). Both MCZO 136.050(1990) (EFU zone) and MCZO 137.050(1990) (SA zone) state:

> "* * * a special setback of 200 feet from any abutting parcel in farm use * * * is required."

To complicate matters, MCZO 136.050 and 137.050(1990), as they existed before 1990, both included the identical language to that in MCZO 128.040(a)(1990).[4] While the county removed the "usual standard" language referring to the 100 foot setback from MCZO 136.050 and 137.050, and

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[3]The MCZO was amended in 1990. There is no dispute that the 1990 MCZO provisions governing the EFU, SA and AR zones apply to the application at issue in this appeal.

[4]Pre-1990 MCZO 136.050 and 137.050, as relevant here, both provided "[a] special dwelling setback from any abutting parcel in farm use * * * shall be provided. The usual standard is a 100-foot setback from farm uses * * *."

replaced it with mandatory language for setbacks from abutting property in farm use, the county did not similarly amend MCZO 128.040(a). However, regardless of the fact that MCZO 128.040(a) was not amended in 1990, as MCZO 136.050 and 137.050 were amended, MCZO 110.680(1992) (Administration of the Ordinance) establishes a process for "administrative reviews" and refers to all special setbacks from parcels in resource use as if each establishes mandatory setback standards capable of modification through the administrative review process.[5] Specifically, MCZO 110.680(1992) provides in relevant part, that modifications may be granted to:

> "* * * the special setbacks in Sections 128.040(a), 136.050(a), 137.050(a) * * *." (Emphasis supplied.)

From this, one could infer the county considers the disputed special setback provision of MCZO 128.040(a) to establish a mandatory setback standard, just like its counterparts in resource zones, standards that are capable of modification only through established administrative review procedures.

Turning to the words of MCZO 128.040(a) itself, in the second sentence of MCZO 128.040(a), the words "usual standard" make it clear that a 100 foot setback is not required in all circumstances. However, read in context with the first sentence of MCZO 128.040(a), the county's

[5]There is no dispute that the 1992 amendments to MCZO 110.680 apply to the application at issue in this appeal.

interpretation that a 100 foot setback is required where there is an adjacent SA zoned parcel in farm use, is plausible. The first sentence of MCZO 128.040(a) requires a "special setback" where a dwelling is proposed on an AR parcel "from any parcel in the * * * SA * * * zon[e] when necessary to minimize potential conflicts with farm or forest use." The second sentence of MCZO 128.040(a) goes on to state that "[a] 100-foot setback is the usual standard adjacent to farm use." Reading these two sentences together, the county determined the special setback required to minimize conflicts with farm use to be 100 feet, and that the special setback applies wherever there is an adjacent SA zoned parcel in farm use, to minimize conflicts between such farm use and a proposed dwelling on AR zoned land.

Although the question is a close one, we believe MCZO 128.040(a) is capable of more than one interpretation. While the 1990 amendments to MCZO 136.050 and 137.050 might support an interpretation that MCZO 128.040(a) does not provide for a mandatory 100 foot setback as a necessary protection to minimize conflicts where there is an adjacent SA zoned parcel in farm use, petitioners have not demonstrated the county's contrary interpretation of MCZO 128.040(a) is "clearly wrong."[6] We conclude the

[6]Likewise, petitioners' assertion that the SA zone is less deserving of the protection of a 100 foot setback, is not well taken. The express terms of MCZO 128.040(a) state that the special setback requirements apply where there is an adjacent SA zoned parcel in farm use.

county's interpretation is not clearly contrary to the express words of MCZO 128.040(a), or its apparent purpose or policy, and we defer to it. Clark v. Jackson County, supra.

Petitioners also contend the county's determination that the adjacent SA zoned parcel is in farm use, is not supported by substantial evidence in the record. There is substantial evidence in the record that the adjacent SA zoned property is a pasture for livestock and that poison oak is burned to retain the pasture. While the evidence is minimal on the subject, we cannot say that the county unreasonably concluded the SA zoned parcel is in farm use. Further, because the challenged decision is a decision to deny the proposed setback modification, petitioners must establish as a matter of law that the proposed setback modification meets all relevant approval standards. McCoy v. Marion County, 16 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982); 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). Petitioners have not done so here.

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

The county's decision is affirmed.