BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ARTHUR VAN VELDHUIZEN and MARY VAN VELDHUIZEN,	)	
Petitioners,	)	LUBA No. 93-168
vs.	)	FINAL OPINION AND ORDER
MARION COUNTY,	)	
Respondent.	)	

Appeal from Marion County.

Rose M.Z. Freeby, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Evans & Zeeb.

Jane Ellen Stonecipher, Assistant County Counsel, Salem, filed the response brief and argued on behalf of respondent. With her on the brief was Robert C. Cannon, County Counsel.

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

AFFIRMED 02/01/94

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision denying their request to partition a 110 acre exclusive farm use (EFU) zoned parcel into parcels of 50 and 60 acres.

FACTS

Petitioners own a 194 acre EFU zoned parcel on which they operate a dairy. In November, 1989, petitioners purchased an adjoining 60 acre parcel from the Oregon Department of Veterans Affairs. In March, 1990, petitioners purchased a 50 acre parcel from the Oregon Department of Veterans Affairs. The 50 acre parcel adjoins both the 194 acre parcel and the 60 acre parcel. A bull-calf operation is carried out on the 50 acre parcel. The 60 acre parcel is improved with a home, currently occupied by petitioners' son. Fifty acres of the 60 acre parcel are used to grow silage and petitioners propose to establish a heifer-calf operation on the 60 acre parcel.

The land sales contracts for the 60 and 50 acre parcels identify both petitioner Arthur Van Veldhuizen and petitioner Mary Van Veldhuizen as the buyers. Marion County Zoning Ordinance (MCZO) 136.130 provides as follows:

> "In the EFU zone contiguous lots or parcels of land under one ownership shall be considered as a single lot or parcel except that parcels or lots approved under the provisions of the Marion County Subdivision and Partitioning Ordinance shall retain the right to be exercised subject to the conditions [of] approval."

In subsequent discussions between petitioners and the county following purchase of the 50 and 60 acre parcels, petitioners argued they did not intend the original land sales contracts to designate both petitioners as buyers. However, the county took the position that MCZO 136.130 operates to combine all three of petitioners' parcels for land use regulation purposes.

In October, 1990, petitioners filed a request to partition the 304 acres into the former 194, 50 and 60 acre parcels. In December, 1990, the county denied this request, but approved partition of the 304 acres into a 194 acre parcel (comprised of the former 194 acre parcel) and a 110 acre parcel (comprised of the former 50 and 60 acre parcels).

Documents entitled "Correction to Land Sale Contract" were recorded in January, 1991. Those documents, by amending the original land sales contracts and executing quitclaim deeds, designate petitioner Arthur Van Veldhuizen as the sole buyer of the 50 acre parcel and designate petitioner Mary Van Veldhuizen as the sole buyer of the 60 acre parcel. In an April 8, 1991 letter, the county office of legal counsel advised petitioners' attorney that the corrected land sales contracts would not be recognized as sufficient to establish the 50 and 60 acre parcels as parcels separate from the 194 acre parcel, without "independent" evidence establishing that the original land

sales contracts mistakenly identified both petitioners as buyers. Record 224-25. In September, 1992, pursuant to the county approval granted December, 1990, petitioners recorded a plat dividing the 304 acres into two parcels of 194 and 110 acres.

In November, 1992, petitioners filed a request to partition the newly established 110 acre parcel. Through this partition, petitioners seek to reestablish the 50 and 60 acre parcels as separate parcels. The request was denied by the planning director. The planning director's decision was appealed to the county hearings officer, and a public hearing was held on March 24, 1993. The hearings officer issued an order denying the request on August 17, 1993. By letter dated August 27, 1993, petitioners appealed the hearings officer's decision to the board of county commissioners. At a regularly scheduled meeting on September 8, 1993, the board of commissioners voted to deny petitioners' appeal.

Neither petitioners nor their attorney received written notice that the appeal of the hearings officer's decision would be considered by the board of commissioners on September 8, 1993. On September 29, 1993, petitioners requested that the board of commissioners reconsider its decision. By letter dated September 29, 1993, petitioners were advised that the board of commissioners' written order denying their appeal had been signed and filed with the

county clerk on September 28, 1993. Petitioners were advised that their request for reconsideration would not be considered. This appeal followed.

SIXTH ASSIGNMENT OF ERROR

Petitioners contend MCZO 136.130, quoted in full supra, directly conflicts with ORS 92.017. As relevant, MCZO 136.130 provides "[i]n the EFU zone contiguous lots or parcels of land under one ownership shall be considered as a single lot or parcel * * *." ORS 92.017 provides as follows:

> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are changed or vacated or the lot or parcel is further divided, as provided by law."

Petitioners further contend the board of commissioners erred in affirming the hearings officer's determination that any question of conflict between ORS 92.017 and MCZO 136.130 regarding petitioners' 304 acres is rendered moot by the recording of a plat in 1992 dividing petitioners' 304 acres into a 194 acre parcel and a 110 acre parcel.

We agree with respondent that the recording of the plat in 1992 divided the 304 acres into two parcels -- one parcel of 194 acres and one parcel of 110 acres. The recording of that plat had the legal effect of "vacating" the line dividing the 50 acre and the 60 acre parcels, leaving them a single parcel, even if petitioners are correct that MCZO 136.130 conflicts with ORS 92.017. The challenged

finding is legally correct and, therefore, provides no basis for reversal or remand.

Petitioners argue they relied "upon representations by Marion County's counsel that the recording of the plant would not prejudice Petitioners, and would make resolution of the partition of the 110-acre parcel back into the 50 and 60 acre parcels earlier [sic] to deal with." Petition for Review 25.

Even if the county could be estopped from arguing the 1992 plat makes any conflict between MCZO 136.130 and ORS 92.017 in this case moot, had the county made the representations described above, petitioners cite no evidence in the record showing the county counsel made such a representation.[1]

The sixth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

A. Appeal and Request to Submit New Evidence

Marion County Subdivision and Partitioning Ordinance (MCSPO) sec. 7, para. 10 provides, in relevant part, as follows:

> "* * * The decision of the * * * Hearings Officer may be appealed to the Board [of Commissioners] no later than 10 days after the decision on a minor partition is rendered * * *. The Board [of Commissioners] may sustain the decision or decide

[1]At oral argument, petitioners cited the April 8, 1991 letter from the office of legal counsel at Record 224-25, noted supra in the text. That letter does not make the representations petitioners claim it does.

> the appeal with or without a further public hearing. If a public hearing is held it shall conform with Chapter III of the [MCZO]. * * *" (Emphasis added.)

Petitioners complain there is no standard in the above quoted MCSPO provision explaining how the board of commissioners decides whether to allow additional evidence. Therefore, petitioners contend, they were unable to know how to request that the board of commissioners consider additional evidence. Petitioners argue the county improperly denied them an opportunity to submit additional evidence and then, at least in part, denied their application based on a finding that there was not sufficient evidence to demonstrate certain approval criteria are satisfied.

When petitioners appealed the hearings officer's decision in this matter, they had already received three local decisions and one public hearing.[2] Petitioners' right of appeal from the hearings officer's decision is a limited one. MCSPO sec. 7, para. 10 specifically provides that a public hearing need not be held. Therefore MCSPO sec. 7, para. 10 itself provides notice that an appeal may be

[2]Petitioners' partition application, along with supporting material, was first considered and denied by the planning director. The planning director thereafter reconsidered and adhered to his original decision. The planning director's decision following reconsideration was appealed to the county hearings officer. The county hearings officer conducted a public hearing, at which petitioners were entitled to and did present evidence and argument in support of their application in this matter.

decided on the record established by the hearings officer without an additional public hearing. That is what occurred here when the board of commissioners voted at their September 8, 1993 regular public meeting to affirm the hearings officer's decision.

While MCSPO sec. 7, para. 10 does not extend to petitioners a right to a pubic hearing to submit additional evidence and argument, it does offer that possibility. Petitioners' notice of appeal requests an opportunity to submit "additional information and comment * * *." Record 24. However, that request does not identify the information or evidence petitioners proposed to submit. Although it is true that MCSPO sec. 7, para. 10 does not include standards governing whether a second public hearing will be allowed, we do not see why a decision governing whether to provide a second public hearing so that petitioners could have a second chance to submit evidence and argument in support of their application must be governed by standards in the MCSPO. Petitioners had already received the notice and public hearing they were entitled to by statute. See ORS 215.416(3). MCSPO sec. 7, para. 10 makes it clear that the public hearing before the hearings officer may be an applicant's last local opportunity to present argument and evidence in support of an application, and that provision of any additional opportunity for a public hearing is solely within the discretion of the board of commissioners.

In sum, while the board of commissioners could have elected to allow petitioners to submit additional argument and evidence, MCSPO sec. 7, para. 10 imposes no legal requirement that it do so, and the board of commissioners committed no error in concluding petitioners failed to demonstrate that an additional public hearing was warranted.

This subassignment of error is denied.

B. Reconsideration

Petitioners next contend the board of commissioners erred because there is no adopted procedure for reconsideration of board of commissioners' decisions.

We have explained in other cases that where local provisions for reconsideration provide no standards for determining whether reconsideration will be allowed, the local decision maker has absolute discretion to deny or allow reconsideration. See West v. Clackamas County, 20 Or LUBA 433, 439 (1991); Consolidated Rock Products v. Clackamas County, 17 Or LUBA 609, 631 (1989). Here the county has even stronger grounds for denying a request for reconsideration, since it has not adopted regulations explicitly providing for reconsideration of decisions by the board of commissioners. Apparently the board of commissioners will entertain requests for reconsideration of its tentative oral decisions, if such requests are received prior to the time the board of commissioners signs its final order and the decision becomes a final decision appealable

to LUBA. In this case, petitioners' request for reconsideration was received after the decision was signed and became final. The county committed no error by failing to grant petitioners' request for reconsideration.

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In order to approve a partition of a farm parcel in an EFU zone, MCZO 136.070(a) requires that the new farm parcels satisfy a number of requirements, including the following:

> "Any proposed parcel intended for farm use must be appropriate to the continuation of the existing commercial agricultural enterprise of the particular area based on the evaluation prescribed in [MCZO] 136.040(g).[3] The evaluation shall include the subject property and commercial agricultural enterprises located in the same zone within one-half mile of the subject property." MCZO 136.070(a)(1).

In Still v. Marion County, 22 Or LUBA 331, 340 (1991), we explained the analysis required under MCZO 137.040(g) and

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[3]MCZO 136.040(g) provides as follows:

> "Commercial Farm Determination: When determining whether an existing or proposed parcel is a commercial farm enterprise, the following factors shall be considered:
>
> "Soil productivity, drainage, terrain, special soil or land conditions, availability of water, type and acreage of crops grown, crop yields, number and type of livestock, processing and marketing practices, and the amount of land needed to constitute a commercial farm unit. Specific findings shall be made in each case for each of these factors."

137.070(a)(1), which are in substance identical to MCZO 136.040(g) and 136.070(a)(1), as follows:

> "The evaluation required under [MCZO 137.040(g) and 137.070(a)(1)] is to be performed for both the subject parcel and other commercial farms in the area. The purposes of the required evaluation are to permit the county to distinguish commercial and noncommercial farms in the relevant area, determine the size of existing commercial agricultural enterprises in the area, and then determine whether, based on the characteristics of the subject property, the proposed division will result in parcels appropriate for the continuation of existing commercial agricultural enterprise in the area."

Petitioners argue the county's findings fail to perform this analysis and that the county's decision should, therefore, be remanded.

As respondent correctly notes, Still involved county approval of a partition. Therefore, the county's findings in Still were required to establish that the approved partition complied with all applicable criteria. Here, the challenged decision is denial of a partition, and as the applicants, petitioners must carry the burden of demonstrating compliance with all applicable criteria. See Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 213 (1973); Billington v. Polk County, 13 Or LUBA 125 (1985); Bobbit v. Wallowa County, 10 Or LUBA 112 (1984). Had petitioners submitted sufficient evidence to carry that burden with regard to MCZO 136.070(a)(1), the county would be obligated to adopt the kind of findings described in our

decision in Still to demonstrate that the proposed partition complies with 136.070(a)(1). However, as we have explained on numerous occasions, the county's findings obligation is much more limited where, as here, the county concludes that the applicants have failed to carry their burden of proof as to one or more approval standards. McCoy v. Marion County, 16 Or LUBA 284, 286 (1987); Portland City Temple v. Clackamas County, 11 Or LUBA 70, 78 (1984); Weyerhaeuser v. Lane County, 7 Or LUBA 42, 46 (1982). In such circumstances, the county's decision must be affirmed if the county finds the applicants failed to carry their burden to demonstrate that all applicable approval standards are met. Id. Provided the evidentiary record supports a finding that the applicants failed to carry their burden concerning any of the relevant approval standards, such a finding is sufficient to sustain a decision denying the application. Id.

The county found that although petitioners submitted evidence concerning the agricultural activity on the subject property, they did not submit evidence concerning the agricultural enterprises in the area. Respondent contends that without such evidence, the county could not adopt findings providing the analysis required to demonstrate compliance with MCZO 136.070(a)(1).

Petitioners do not identify evidence in the record concerning commercial agricultural enterprises in the area

surrounding the subject property. We conclude the county's finding concerning the lack of such evidence is supported by the evidentiary record. The findings required by Still and MCZO 136.070(a)(1) therefore could not be adopted, and the decision denying the requested partition on that basis must be sustained. McCoy v. Marion County, supra.

The second assignment of error is denied.

REMAINING ASSIGNMENTS OF ERROR

Petitioners' remaining assignments of error challenge other aspects of the county's decision, in which the county concludes other approval criteria are not satisfied. We do not consider the remaining assignments of error, because the county's decision would have to be affirmed in any event, in view of our resolution of the second assignment of error, supra.

The county's decision is affirmed.