BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES WOOD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA No. 97-157
CROOK COUNTY,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
GRAY LAND & TIMBER COMPANY,	)	
	)	
Intervenor-Respondent.	)	

Appeal from Crook County.

Peter D. Mostow, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Stoel Rives.

No appearance by respondent.

Edward P. Fitch and Steven D. Bryant, Redmond, filed the response brief and argued on behalf of intervenor-respondent. With them on the brief was Bryant, Emerson & Fitch.

HOLSTUN, Board Chair.

REMANDED 4/15/99

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

Petitioner appeals a county court decision approving an application to divide a farm parcel in an exclusive farm use (EFU) zone.

MOTION TO INTERVENE

Robert Humphrey (intervenor), the applicant below, moves to intervene in this proceeding on the side of respondent. There is no objection to the motion, and it is allowed.[1]

FACTS

The subject property is a 2,011-acre parcel located in the Crooked River Valley southeast of the town of Post. The parcel and the surrounding area are located in the county's EFU-1 zone. Petitioner owns and operates an adjacent ranch.

In 1996, Springfield Forest Products (applicant) filed an application with the county planning department (department) to partition the subject property into a 1,716-acre parcel and a 295-acre parcel. The department approved the application on January 24, 1997, and the county planning commission (commission) appealed that decision sua sponte. The commission held two hearings on the appeal, March 12, 1997, and April 22, 1997. At the end of the April 22, 1997 hearing, the commission voted to reverse the department and deny

---

[1]At oral argument, the parties informed the Board that the subject parcel was an asset in the Springfield Forest Products bankruptcy proceedings. Our Order of April 28, 1998, suspended this appeal until resolution of the bankruptcy proceedings. The parties inform the Board that the bankruptcy proceedings have been concluded. As a result intervenor Humphrey submitted the following statement:

> "Intervenor-Respondent Robert Humphrey hereby assigns all of his right and interest in this land use appeal and all of his right and interest in and to the partition application which is the subject matter of that appeal to Gray Land & Timber Company.
>
> "This assignment is based upon the consideration of the purchase of the underlying real property by Gray Land & Timber Company from the Chapter 11 Trustee in the Springfield Forest Products bankruptcy under the terms of the deed, a copy of which is attached hereto as Exhibit 'A'." Assignment of Interest in Land Use Appeal.

Accordingly, Gray Land and Timber Company is substituted as intervenor for Robert Humphrey.

the application. The commission issued a final written decision on May 14, 1997, that found that the proposed 295-acre parcel is not equal to or larger than the typical agricultural enterprise in the area and is not appropriate for the continuation of the existing commercial agricultural operations in the area.

On May 20, 1997, the applicant appealed the commission's decision to the county court (court). On July 23, 1997, the court reversed the commission on procedural grounds, holding that the commission's appeal was not filed within 10 days of the department's decision as required by the county code. On petitioner's motion for reconsideration, the court reversed its July 23, 1997 decision and held that the commission's appeal was timely filed. On the merits, the court reversed the commission's decision and approved the application on October 22, 1997.

JURISDICTION

Petitioner contends that the court's October 22, 1997 order is a land use decision under ORS 197.015(10) over which this Board has jurisdiction. ORS 197.825(1). Intervenor attacks the "impropriety of the appeal," contending that LUBA lacks jurisdiction, arguing that both the court and the commission lacked jurisdiction over this appeal and that those decisions were a nullity. Intervenor's Brief 3. A challenge to LUBA's jurisdiction may be brought at any time prior to the final decision in an appeal. Elliot v. Lane County, 18 Or LUBA 871, 874 (1990).

Intervenor argues that, because the commission failed to timely appeal the department's decision, LUBA lacks jurisdiction to review the court's decision, and therefore LUBA must dismiss this appeal. We disagree. The court's decision is a final decision applying land use regulations. By definition, such a decision is a land use decision over which LUBA has exclusive jurisdiction. ORS 197.015(10)(a)(A)(iii); 197.825(1). If intervenor's argument were correct, it would provide a basis for reversing the court's decision; it would not provide a basis for dismissing this appeal. Intervenor could have

challenged the court's conclusion by filing its own appeal at LUBA or filing a cross-petition for review in this appeal; however, intervenor failed to do either.

Further, even if intervenor's argument is cognizable as a challenge to the court's conclusion that the commission's appeal was timely filed, we reject that argument for the reasons discussed below.

Crook County Zoning Ordinance (CCZO) 9.110(7) provides in part:

> "The appellate body may review a lower determination or decision upon its own motion by issuing a written order to that effect on the lower body within ten (10) working days of the date of the determination or decision becomes final."

The department's approval notice states that the January 24, 1997 decision "may be appealed in writing to the Crook County Planning Commission no later than **5:00 p.m. on Monday, February 5, 1997**[.]" Record 398 (boldface in original). On February 5, 1997, at 11:00 a.m., the commission submitted a letter to the department that indicated that the commission wished to bring the department's decision "before the [commission] on appeal at the earliest possible date." Record 394. On March 12, 1997, the commission met in a public meeting and voted to ratify the appeal requested in the February 5, 1997 letter.

Intervenor argues that the commission did not meet within 10 working days of the department's decision and that there was no motion or decision to issue a written order appealing the decision within that time. Therefore, intervenor argues, no appeal was properly taken from the department's decision.

Intervenor argued to the court that the commission's appeal is void for failure to comply with the Public Meetings Law, ORS 192.610 to 192.690. The court specifically rejected intervenor's contention that the appeal is void:

> "* * * The Public Meetings Law provides a procedure for curing the violations [intervenor alleged], and provides that the cured decision is retroactive to the time when the defective decision was made. * * * Because the Planning Commission is a governing body as that term is defined in the

> Public Meetings Law, it may and did cure the defective decision by voting to ratify that decision at a properly advertised public meeting." Record 15.[2]

Based on the documents in the record, we agree with the court that the commission acted within 10 working days of the department's decision in compliance with CCZO 9.110(7) and that the commission cured any defect in its decision making by its subsequent ratification under ORS 192.680(1).[3]

Intervenor's objection to this Board's jurisdiction is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner challenges the county's approval of a new 295-acre parcel that petitioner asserts does not satisfy the CCZO requirement that a new parcel be at least as large as the typical commercial agricultural enterprise in the area. CCZO 3.010(7) provides in part:

> "Divisions of land shall be only allowed when consistent with the requirements of this section and the Land Development Ordinance.
>
> "* * * * *
>
> "(B) Substantiation must be provided which shows the proposed parcels are equal or greater in size than the typical commercial agricultural enterprise in the area." (Emphasis added.)

Petitioner contends that the court failed to apply the plain language of CCZO 3.010(7)(B) and that the court's decision must be reversed under ORS 197.835(9)(a)(D).[4]

---

[2]We note that this Board does not have jurisdiction to enforce the Public Meetings Law. Collins v. Klamath County, 32 Or LUBA 338, 345 (1997). The Public Meetings Law provides that it is enforced by instituting an action in circuit court. ORS 192.680.

[3]ORS 192.680(1) provides:

> "A decision made by a governing body of a public body in violation of ORS 192.610 to 192.690 shall be voidable. The decision shall not be voided if the governing body of the public body reinstates the decision while in compliance with ORS 192.610 to 192.690. A decision that is reinstated is effective from the date of its initial adoption."

[4]ORS 197.835(9) provides in part:

> "In addition to the review under subsections (1) to (8) of this section, the board shall reverse or remand the land use decision under review if the board finds:

A. The Court's Interpretation of CCZO 3.010(7) Regarding Parcel Size

The court decided that the proposed partition is consistent with the comprehensive plan and that the commission had misconstrued both the application and the plan. Record 15. The court held:

> "* * * The comprehensive plan * * * recognizes that some division of land is necessary and is not harmful to agriculture as long as the purpose of the division is agricultural and not residential. The large size of the two parcels in this case and the agricultural purposes for the division are consistent with the Comprehensive Plan. The reference from the Comprehensive Plan cited by the Planning Commission indicates that the Planning Commission misconstrued the nature of this application as one creating urban uses, when the application actually involved the continuation of agricultural uses of the property. The Comprehensive Plan is concerned about the establishment of viable agricultural units. Because the 295 acre parcel is a viable agricultural unit (as discussed below), the Comprehensive Plan is satisfied.
>
> "The primary question involved in this case pertains to the minimum size of farm parcels provided in the Crook County Zoning Ordinance. * * *
>
> "The Court interprets [CCZO 3.010(9)(A); 3.010(7)(A) and (B)] to create an initial burden on the applicant to go forward with credible evidence satisfying these requirements. Once that initial burden is met a heavier burden of persuasion is placed on objectors to establish the negative of these elements. The reasoning that underlies this allocation of burdens under the Crook County Ordinance is the Court's interpretation that the Section [3.010.9(A)] establishes a presumption that a 160 acre farm parcel is permitted and constitutes a viable farm parcel, unless an opponent can demonstrate that a larger size is required to maintain a viable agricultural operation.
>
> "As to the first element in [3.010.7(A)], the Commission was in error in finding that the 295 acre parcel was not suitable for commercial agriculture. Testimony presented by the Applicant indicates that the 295 acre parcel in conjunction with the very significant wells on the site would constitute a viable farm operation. That viable operation would include raising livestock and hay, which is the typical type of agricultural operation in the Post-Paulina area. Although evidence was provided by others that this parcel would not be

---

"(a) The local government or special district:

"* * * * *

"(D) Improperly construed the applicable law[.]"

> suitable for independent viable farm operation, the Court finds that the Applicant's evidence is equally, if not more, credible. The opponents therefore have not rebutted the presumption of viability.
>
> "The second element entails an evaluation of size of farm parcels in the area of the subject property. The Court believes that the size of the proposed parcel must be similar to the sizes of other parcels in the area. The 295 acre parcel is smaller than some parcels in the area but also larger than others. Significant evidence was provided as to the size of parcels in the area that show that the significant numbers of ranches were smaller than the proposed 295 acre parcel. Also, the Court finds that the combination of this parcel with the remainder of the parcel through a lease arrangement was consistent with the agricultural practices in the area." Record 15-17 (footnote and record citations omitted).

Petitioner argues that CCZO 3.010(7)(B) requires the county to compare the proposed 295-acre parcel to the sizes of typical commercial agricultural enterprises in the area, whether those enterprises are composed of one or more parcels. Intervenor counters that the court interpreted its code in a manner that is not clearly wrong, and therefore must be upheld by this Board under Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), and Alliance for Responsible Land Use v. Deschutes Cty., 149 Or App 259, 942 P2d 836 (1997), rev dismissed 327 Or 555 (1998). Intervenor argues that the court "took an interpretation based upon the context of this entire code section rather than on each individual word." Intervenor's Brief 7. Intervenor argues that the court interpreted CCZO 3.010(7)(B) to require a shifting of the burden of proof. Intervenor also argues that it is not unreasonable to interpret the words "enterprises" and "parcels" as being identical or similar.

The text of CCZO 3.010(7) mandates that land divisions governed by that section are only allowed when the sizes of the proposed parcels are greater than or equal to the size of typical commercial agricultural enterprises in the area. In its discussion of CCZO 3.010(7)(B), the court stated its belief "that the size of the proposed parcel must be similar to the sizes of other parcels in the area." Record 17 (emphasis added). However, the requirement of CCZO 3.010(7)(B) is that "the proposed parcels are equal or greater in size than the typical commercial agricultural enterprise in the area." (Emphasis added). The

court's stated belief omits the ordinance's requirement that the analysis be of "typical commercial agricultural enterprises in the area" rather than the size of surrounding parcels.

As used in the CCZO, the terms "commercial agricultural enterprise" and "parcel" are not interchangeable. CCZO 1.030(24) defines a "Commercial Agricultural Enterprise" to consist of "farm operations" that contribute in a substantial way to the area's agricultural economy and that maintain processors and farm markets, with a consideration of the product, quantity, and how that product is marketed. That definition is identical to the definition of "Commercial Agricultural Enterprise" found in OAR 660-033-0020(2). "Parcel" is defined as "a unit of land" created in prescribed manners. CCZO 1.030(90). As the record in this case shows, a commercial agricultural enterprise may consist of a number of parcels.

In Still v. Marion County, 22 Or LUBA 331, 337 n 5 (1991), this Board rejected the notion that the term "parcel" is synonymous with commercial agricultural enterprise, noting that:

> "Commercial farms may include diversified agricultural operations producing more than crop. Therefore, the correct focus is on entire commercial agricultural enterprises rather than individual parcels or crops." (Emphasis added).

In Sweeten v. Clackamas County, 17 Or LUBA 1234, 1245-46 (1989), this Board stated that in determining the types of uses in a selected area, a local government may examine lot or parcel sizes but cautioned that:

> "area lot or parcel sizes are not dispositive of, or even particularly relevant to, the nature of the uses occurring on such lots or parcels. It is conceivable that an entire area may be wholly devoted to farm uses notwithstanding that area parcel sizes are relatively small."

The court did not attempt to establish that the size of the subject parcel is equal to or greater than the size of the "typical commercial agricultural enterprises in the area." To the contrary, the court describes the area land use by stating that "[l]ands within a five (5) mile radius of the subject property, which area is within the Post/Paulina planning area, consist predominantly of large farm operations measuring in excess of 2000 acres each[.]" Record

11. The court does find "that the combination of this parcel with the remainder of the parcel through a lease arrangement was consistent with the agricultural practices in the area." Record 17. However, regardless of the accuracy of that finding, such circumstance does not satisfy the requirement of CCZO 3.010(7)(B) that the proposed parcel itself be of a size that is greater than or equal to "the typical commercial agricultural enterprise in the area."

The court applied CCZO 3.010(7)(B) in a manner that is contrary to the enacted language of that ordinance, and in doing so, the court improperly construed the applicable law. ORS 197.835(9)(a)(D). Under ORS 197.829(1) and Clark, the court is entitled to substantial deference when it interprets its land use legislation.[5] However, that deference does not go so far as to permit the court to accomplish by interpretation what it may only accomplish by amending the code language. The court cannot interpret the code to say what it clearly does not say. Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 843 P2d 992 (1992). The court's interpretation of CCZO 3.010(7)(B) is inconsistent with the "express language" of that provision and, for that reason, we reject it.

B. The Court's Interpretation of Burden of Persuasion Under CCZO 3.010(7)

Intervenor argues that the court interpreted the requirement of CCZO 3.010(7)(B) in the context of the entire code section. The court's analysis started with CCZO 3.010(9)(A).

---

[5]ORS 197.829(1) provides:

"The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

"(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

"(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

That section provides:

> "The minimum lot area for farm use permitted by this section shall be 160 acres unless a larger minimum lot size is necessary to satisfy the land divisions requirement under [CCZO 3.010(7)]."

The court interpreted that section to create a presumption that a 160-acre farm parcel is "permitted and constitutes a viable farm parcel[.]" Record 16. The court decided that the applicant has the burden to go forward with credible evidence satisfying the requirements of CCZO 3.010(9) and (7), but that, based upon that 160-acre presumption, an opponent bears the burden of demonstrating that a larger size parcel is required to maintain a viable agricultural operation. Intervenor argues that the court's interpretation that requires a shifting of the burden of proof provides "absolutely no basis upon which either the opponents or this Board could find that such an interpretation is unreasonable." Intervenor's Brief 7.

Intervenor does not explain why the court's interpretation of CCZO 3.010(9)(A), to shift the burden of proof to opponents, is relevant to the court's interpretation of CCZO 3.010(7)(B), equating commercial agricultural enterprises with parcels. To the extent the court's interpretation of CCZO 3.010(9)(A) is relevant, that interpretation is equally erroneous.

The burden of demonstrating compliance with applicable land use approval standards rests generally with the applicant for land use approval. Fasano v. Washington Co. Comm., 264 Or 574, 586, 507 P2d 23 (1973) (stating principle); Murphy Citizens Advisory Comm. v. Josephine County, 28 Or LUBA 274 (1994) (during the local proceedings, the applicant for development approval bears the burden of proof to establish that its application satisfies relevant approval standards). The court's decision impermissibly shifts that burden from the applicant. See Andrews v. City of Prineville, 28 Or LUBA 653 (1995) (a local governing body may not shift the burden of proof from the applicant to the opponents of the subdivision). The applicant has the burden of establishing that the minimum lot size necessary to satisfy the land division requirement under CCZO 3.010(7) is met.

C. Evidence of the Size of Typical Commercial Agricultural Enterprises in the Area

Finally, intervenor contends that the court made a finding, supported by substantial evidence, that the 295-acre parcel is as large as the typical commercial agricultural enterprise in the area. However, intervenor fails to provide any citations to the record identifying where evidence that might support that finding is located. We will not search the record to find supporting evidence.[6] Fjarli v. City of Medford, 33 Or LUBA 451, 456 (1997).

Petitioner argues that the evidence regarding the area's commercial agricultural enterprise in the record does not support the court's finding that the proposed 295-acre parcel is as large as the "typical commercial agricultural enterprise in the area." Petitioner cites to the record at 108-09, 213, 261, 272 for testimony regarding the size of commercial agricultural enterprises within the five-mile area of the proposed parcel and the court's finding that "[l]ands within a five (5) mile radius of the subject property * * * consist predominantly of large farm operations measuring in excess of 2000 acres each[.]" Record 11. Based on the portions of the record cited by petitioner, it appears that the commercial agricultural enterprises in the area are significantly larger than the proposed 295-acre parcel.

Petitioner argues that this Board must reverse the county's decision because it does not meet the requirements of CCZO 3.010(7)(B) and is not supported by substantial evidence. Under OAR 661-010-0071(1)(c)(1995), LUBA must reverse a land use decision when the "decision violates a provision of applicable law and is prohibited as a matter of law." Conversely, LUBA will remand a land use decision when the "decision improperly construes the applicable law." OAR 661-010-0071(2)(d)(1995).

We held above that the county's interpretation of CCZO 3.010(7)(B) is clearly wrong. Based on the record in this appeal, the likelihood on remand that the proposed 295-acre

---

[6]Even if there is evidence in the record such as that described on pages 7-8 of intervenor's brief, that evidence would not support a finding that the disputed parcel is as large as the "typical commercial agricultural enterprise in the area."

parcel could be shown to satisfy the requirement that it be as large as the typical agricultural enterprise in the area is remote. However, we cannot say that the court's decision is prohibited as a matter of law. Accordingly, we remand the decision. OAR 661-010-0071(2)(d)(1995).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner contends that the evidence in the record demonstrates that the proposed 295-acre parcel does not satisfy CCZO 3.010(7)(A).[7] Under that provision, the proposed 295-acre parcel must be appropriate for the continuation of the existing commercial agricultural operations in the area. We take petitioner's argument to be a challenge to whether the findings the court adopted are adequate and whether they are supported by substantial evidence.

Petitioner points out that, with the exception of the one-mile limit, CCZO 3.010(7)(A) is essentially identical to the former OAR chapter 660, division 5 minimum lot size rule under Goal 3 that this Board applied in Still. In that case, the Board set out a three-step test to determine if the proposed parcel size is appropriate to maintain the existing commercial agricultural enterprise within the area:

> "1. The relevant 'area' for analyzing the propriety of a proposed farm parcel partition must be identified. That 'area' must be large enough to accurately represent the existing commercial agricultural enterprise. OAR 660-005-0015(6)(c).
>
> "2. The existing commercial agricultural operations in the area must be identified. A county must distinguish between commercial and noncommercial agricultural operations. OAR 660-005-0015(6).

---

[7] CCZO 3.010(7)(A) provides:

> "The proposed farm parcels shall be appropriate for the continuation of the existing commercial agricultural operations in the area based on an evaluation of the subject property and commercial agricultural enterprises, as defined in section 1.030, located in the same zone within one mile of the subject property."

> Determining whether existing agricultural operations are commercial requires an analysis of 'products produced, value of products sold, yields, farming practices, and marketing practices.' OAR 660-005-0015(6)(b).
>
> "3. Once a county has identified the relevant area and the existing commercial agricultural operations, the county must determine whether the proposed partition will result in parcels of sufficient size to 'maintain' or 'continue' the existing commercial enterprise in the area. In making this determination the county may not assume the partition is appropriate, simply because the resulting parcels are of the same size as the smaller existing commercial agricultural operations in the area. OAR 660-005-0020(6)." Still, 22 Or LUBA at 337-38 (emphasis in original, footnote omitted). See also DLCD v. Yamhill County, 23 Or LUBA 351 (1992) (identical test applied).

The Board also clarified that the above test requires that "the local government to adopt findings adequately explaining why, in the particular circumstances presented, the parcels to be created are of sufficient size to 'maintain' and 'continue' the existing agricultural enterprises in the area." Still, 22 Or LUBA at 338.

We have also explained that findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. Heiller v. Josephine County, 23 Or LUBA 551, 556 (1992); see also, Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-21, 569 P2d 1063 (1977); Vizina v. Douglas County, 17 Or LUBA 829, 835 (1989). Furthermore, findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Heiller, 23 Or LUBA at 556.

In the present case, the county court stated:

> "As to the first element in [3.010.7(A)], the Commission was in error in finding that the 295 acre parcel was not suitable for commercial agriculture. Testimony presented by the Applicant indicates that the 295 acre parcel in conjunction with the very significant wells on the site would constitute a viable farm operation. That viable operation would include raising livestock and hay, which is the typical type of agricultural operation in the Post-Paulina

> area. Although evidence was provided by others that this parcel would not be suitable for independent viable farm operation, the Court finds that the Applicant's evidence is equally, if not more, credible. The opponents therefore have not rebutted the presumption of viability." Record 16.

The court did not make any other findings regarding CCZO 3.010.7(A).

The court relied on testimony presented by the applicant and concluded that that evidence was at least equally credible as contrary evidence. The court's conclusory statements of compliance with CCZO 3.010.7(A), however, do not provide an adequate explanation of the basis for the county's determination of compliance. Cf. Heiller, 23 Or LUBA at 556-57 (holding that a bare finding that an applicable standard is met does not explain the basis for that determination).

The court's finding is not responsive to the inquiry under CCZO 3.010.7(A). While the court concluded that the proposed farm parcels would be viable operations, it did not analyze whether the proposed farm parcels are "appropriate for the continuation of the existing commercial agricultural operations in the area based on an evaluation of the subject property and commercial agricultural enterprises." CCZO 3.010.7(A) (emphasis added). Specifically, the court did not make any finding that the proposed parcel would maintain the existing commercial enterprise in the area. Petitioner raised two issues below regarding the proposed parcel's affect on existing commercial agricultural enterprises: (1) whether existing commercial agricultural enterprises could be conducted on the 295-acre parcel, and (2) whether the proposed parcel would raise the cost of land and its assessed value, adversely impacting existing commercial agricultural enterprises. Record 13. The findings do not respond to the relevant issues raised by petitioner below.

Intervenor argues that the "evidence in the record demonstrates that this parcel will not have any adverse impacts on existing agricultural enterprises in the area." Intervenor's Brief 9. However, intervenor provides no citation to the record. As under the first assignment of error, absent citations to the evidence in the record, this Board will not search the record to find supporting evidence. Fjarli, 33 Or LUBA at 456.

The second assignment of error is sustained.

The county's decision is remanded.