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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

KENT GAMBEE and ALPINE MANAGEMENT, LLC,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent,

and

FRIENDS OF YAMHILL COUNTY,
Intervenor-Respondent.

LUBA No. 99-057

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Christian E. Hearn, Ashland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Davis, Gilstrap, Hearn, Saladoff & Smith, P.C.

Fredric Sanai, McMinnville, filed a response brief and argued on behalf of respondent.

Charles Swindells, Portland, filed a response brief and argued on behalf of intervenor-respondent.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 06/28/2000

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

NATURE OF THE DECISION

Petitioners appeal a decision by the board of county commissioners denying their application for a forest template dwelling.

MOTION TO INTERVENE

Friends of Yamhill County (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject 34.6-acre parcel is located on the east side of Dupee Valley Road and is zoned AF-80. The AF-80 zone is a mixed farm/forest zone. The subject property is one of three parcels constituting tax lot 1200, and is known as Parcel 1.¹ Parcel 1 is described in a deed as being:

“The Northwest one-quarter of the Southeast one-quarter of Section 6, Township 5 South, Range 5 West, of the Willamette Meridian, Yamhill County, Oregon, EXCEPTING THEREFROM

“the North 122.00 feet of even width.” Record 154.

In 1998, petitioners submitted an application for a forest template dwelling on Parcel 1. One of the requirements for a forest template dwelling is that no other dwelling may currently exist on the property. ORS 215.750(1)(c) and ORS 215.750(4)(d); Yamhill County Zoning Ordinance (YCZO) 403.03(P)(1).² A dwelling exists on or near the boundary between Parcel 1 and the property abutting Parcel 1 to the south (Parcel 2). However, the

¹The three parcels contained in tax lot 1200 were once a commonly owned tract. However, at the time of petitioners’ application, the three parcels were in separate ownership.

²ORS 215.750(1)(c) permits a dwelling to be sited on the subject property if the applicant demonstrates that all or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract and at least three other dwellings existed on January 1, 1993 on the other lots or parcels. However, ORS 215.750(4)(d) provides that a dwelling is not allowed under these circumstances if the tract on which the dwelling is to be located contains a dwelling. YCZO 403.03(P) implements these statutory provisions.

1 location of that boundary was disputed. During the proceedings before the board of county
2 commissioners, petitioners submitted testimony from a registered surveyor, who opined that
3 deed references to the “Northwest one-quarter of the Southeast one-quarter” were inaccurate
4 and took the position that the proper southern boundary line was measured from a donation
5 land claim (DLC) line located to the north of the 1/16 section boundary. According to the
6 surveyor’s testimony, early surveyors missurveyed the 1/16 section and, as a result,
7 references to the 1/16 section line are not reliable. The surveyor also testified that references
8 in a deed for Parcel 2 are based on references to the DLC line. As a result, the surveyor
9 concluded that the proper measuring reference, notwithstanding the language in the deed to
10 Parcel 1, was to the DLC line, and not to the 1/16 section line. The surveyor testified that if
11 the DLC line is used as the southern boundary of Parcel 1, the existing dwelling is located on
12 Parcel 2. The resident of the contested dwelling, neighbors, and other opponents of the
13 application submitted testimony to the contrary.

14 The planning director approved the application, subject to conditions. Intervenor
15 appealed the planning director’s decision to the board of commissioners.

16 The board of commissioners concluded that the applicant had failed to demonstrate
17 that the subject property satisfied the requirement that no other dwelling be located on it. The
18 commissioners upheld the appeal, and denied the application.

19 This appeal followed.

20 **ASSIGNMENT OF ERROR**

21 Petitioners argue that the county’s conclusion that petitioners failed to establish that
22 the subject property does not currently contain a dwelling is not based on substantial
23 evidence in the record.

24 The county’s findings addressing the criteria are as follows:

25 “At issue is the location of the property line between parcels 1 and 2, and the
26 location of a dwelling in relation to that property line. * * *

1 “County practice has been to rely on property lines as shown on Tax Assessor
2 maps. However, in this case the property line has not been mapped by the
3 Assessor[.] The Assessor’s map does show the M. McDonald Donation Land
4 Claim (DLC) line. Although there are no metes and bounds indicated on the
5 [DLC] lines, a scaled measurement of the line shows it as being 150 feet north
6 of the line between the north half and south half of the southeast quarter of the
7 section.

8 “Because the property line was not shown on the Assessor’s map, the staff
9 relied on the legal description of the parcels to determine the location of the
10 property line. * * * Copies of deeds recorded in 1936 and 1998 have been
11 submitted into the record. Parcel 1 is described as the north half of the
12 southeast quarter of section 6. The beginning point of parcel 2 is described as
13 the 1/16 [section] corner (which is the same point as the southeast corner of
14 parcel 1). The deeds do not reference [DLC] lines.

15 “* * * * *

16 “Based on the foregoing, staff recommended and the Board agrees, that the
17 property line between parcels 1 and 2 should be based on the section lines, as
18 described in the deeds, and not the [DLC] line.

19 “There is conflicting evidence as to the location of the dwelling in relation to
20 the property line. In the June 16, 1998 incompleteness letter to the applicant,
21 staff specifically requested that a survey showing the exact location of the
22 dwelling in relation to the property line between parcels 1 and 2 be submitted.
23 The applicant submitted a letter from Keenon Land Services dated October
24 28, 1998, which states: ‘I now have a measured location on the house to
25 [verify] that it is within the boundary of [Parcel 2]. I did determine that the
26 North line lies some 15 feet north of the house[.]’ Based on this letter, staff
27 assumed that the property line had been surveyed, and relied on this
28 information when writing the findings in the staff report. On December 11,
29 1998, staff contacted Keenon Land Services, who verified that the
30 measurement had been based on the 1/16 section line described in the deed [to
31 Parcel 2], and not the [DLC] line. However, in the February 3, 1999 letter * *
32 * Keenon states the opinion that the person creating [Parcel 2] intended the
33 line to be based on the DLC [line], not the 1/16 section. That letter states that
34 they did a ‘survey tie to the DLC Line as restored by the County Surveyor.
35 This line lies 109.5 feet North of the house[.]’ If the Assessor’s map is relied
36 upon, as has been county practice in the past, the house would thus lie
37 approximately 40 feet north of the 1/16 section line, placing it within the north
38 half of the southeast quarter, or parcel 1.

39 “Moreover, opponents have submitted testimony and evidence, including
40 maps, a statement from a previous property owner, and a video showing
41 measurements being taken of what the opponents believe to be the western

1 property line of parcel 2. This evidence supports the argument that the house
2 is on parcel 1.

3 “Based on the conflicting evidence and testimony, including conflicting
4 statements by the applicant’s surveyor, and lacking evidence in the form of an
5 actual survey showing the exact location of the dwelling in relation to the
6 property line between parcels 1 and 2, staff concluded and the Board hereby
7 agrees and finds, that the application does not comply with [YCZO]
8 403.03(P)(1) because there is a lack of substantial evidence that there is no
9 dwelling on the subject tract.” Record 6-8.

10 Petitioners argue that the board of commissioners’ reliance on staff testimony is
11 unsupportable considering that, if staff’s conclusions are to be believed, the result will not be
12 a closed geometric figure. Petitioners further argue that the board of commissioners was
13 unduly influenced by the testimony of neighboring property owners, who do not have any
14 professional credentials to support their testimony regarding the location of the dwelling.

15 To overturn, on evidentiary grounds, a local government determination that an
16 applicable approval criterion has not been met, petitioners must demonstrate that they
17 sustained their burden to establish compliance with that criterion as a matter of law. *Garre v.*
18 *Clackamas County*, 18 Or LUBA 877, *aff’d* 102 Or App 123, 792 P2d 117 (1990). In
19 reviewing such a challenge, where there is conflicting believable evidence in the record and
20 LUBA cannot say a reasonable decision maker could believe only the evidence cited by
21 petitioners, LUBA will reject the challenge. *Joyce v. Multnomah County*, 23 Or LUBA 116,
22 120 (1992).

23 We cannot say that a reasonable decision maker would rely only on the testimony
24 presented by petitioners to find that the disputed dwelling is located on Parcel 2 rather than
25 Parcel 1. The evidence is conflicting at best, and does not compel a finding that the dwelling
26 is on Parcel 2.

27 The assignment of error is denied.

28 The county’s decision is affirmed.