BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARILYN ALLEN,
Petitioner,

vs.

GRANT COUNTY,
Respondent,

and

STEVE PARSONS and DOROTHY PARSONS,
Intervenors-Respondent.

LUBA No. 2000-133

FINAL OPINION
AND ORDER

Appeal from Grant County.

Foster A. Glass, Bend, filed the petition for review and argued on behalf of petitioner.

No appearance by Grant County.

Michelle T. Timko, Canyon City, filed the response brief and argued on behalf of intervenors-respondent.

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

REMANDED 12/13/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a nonfarm dwelling on a 20-acre parcel created by partition of a 200-acre parcel zoned Multiple Use Range (MUR), 160-acre minimum parcel size.[1]

MOTION TO INTERVENE

Steve Parsons and Dorothy Parsons (intervenors), the applicants below, move to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 200-acre parcel developed with a dwelling and used for seasonal grazing for approximately 40 pairs of cattle. The property has no irrigation rights; its soils consist of Tub clay loam, class VIe. Surrounding property is also zoned MUR.

On March 31, 2000, intervenors applied to the county to partition 20 acres from the subject property and site a nonfarm dwelling on the 20 acres. A staff report was prepared, and a hearing conducted before the planning commission. The planning commission denied the application, based on Grant County Land Development Code (LDC) 66.090(B)(2)(a).[2]

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[1]The MUR zone is an exclusive farm use zone.

[2]LDC 66.090(B) provides in relevant part:

> "The minimum parcel size for uses not in conjunction with a farm or forest use, including non-farm dwellings, shall be limited to the size reasonably necessary for the proposed use. The requirements for a non-farm division of land are:
>
> "1. A parcel may be created for a dwelling, existing and new, when the following are met:
>
> "* * * * *
>
> "c. The application is in conjunction with an application for a non-farm dwelling and both are approved;
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> "d. In no case shall the parcel be smaller than two acres in size;

Intervenors appealed to the county court, which conducted a hearing on July 19, 2000. The county court reversed the planning commission, effectively approving the application.

This appeal followed.

JURISDICTION

Intervenors move to dismiss this appeal on the grounds that petitioner has failed to demonstrate that the challenged decision is subject to LUBA's jurisdiction. The jurisdictional statement of the petition for review filed in this case states only that "[the] Board has appellate jurisdiction over this matter pursuant to the provisions of OAR 661-010-0000 through 661-010-0075." Petition for Review 2. Intervenors contend that nothing in LUBA's rules provides a basis for jurisdiction over the instant appeal, and that petitioner's jurisdictional statement fails to establish any predicate to the Board's jurisdiction.

There is no question in this case that the challenged decision is a "land use decision" subject to LUBA's jurisdiction. ORS 197.825(1); 197.015(10). Intervenors are correct that the jurisdictional statement in the petition for review fails to satisfy OAR 661-010-0030(4)(c), which requires the petition for review to state why the challenged decision is

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"* * * * *

"2. The following criteria shall be considered when approving a non-farm land division and in establishing the parcel size:

"a. Preserve the maximum area of the agricultural base of Grant County for farm use;

"b. Buffer adjoining farm uses from residential encroachment;

"c. Utilize natural features and topography which would otherwise hinder normal farm activities;

"d. Ensure that the proposed division will not materially alter the stability of the land use pattern of the area;

"e. The parcel being created is situated on the portion of the parent parcel that is least suitable for farm uses;

"f. If the proposed parcel is located within the Big Game Combining Zone, [LDC] 69.2, all requirements for that Zone must be met[.]"

subject to the Board's jurisdiction. Nonetheless, that failure is a technical violation of LUBA's rules that, insofar as intervenors have demonstrated, does not affect the substantial rights of the parties. OAR 661-010-0005.[3] We decline to dismiss the appeal for what amounts to a pleading error, when intervenors do not and cannot dispute that the challenged decision is subject to our jurisdiction.

OTHER MATTERS

Intervenors identify other deficiencies in the petition for review that, intervenors argue, should result in dismissal of the appeal or summary affirmance of the county's decision. First, intervenors argue that petitioner failed to serve a copy of the petition for review on intervenors contemporaneously with filing the petition with LUBA, as required by OAR 661-010-0030(1) and 661-010-0075(2)(b)(A). Second, intervenors argue that petitioner failed to attach a copy of the challenged decision to the petition for review, as OAR 661-010-0030(4)(e) and ORS 197.830(12) require, and that the petition for review fails to state the date of the decision, as ORS 197.830(12)(b) requires. Third, intervenors argue that the petition for review seeks only the *reversal* of the county's decision, notwithstanding that the only relief available for the errors alleged in the petition, if they are sustained, is remand.

Failure to timely serve the petition for review on other parties is a technical violation of LUBA's rules, absent a showing of prejudice to those parties' substantial rights. *Allen v. Grant County*, ___ Or LUBA ___ (LUBA No. 2000-133, Order, November 15, 2000), slip op

[3]OAR 661-010-0005 provides in pertinent part:

> "These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. * * *"

2. Intervenors received a copy of the petition for review by fax and, pursuant to a requested extension of time, had adequate time thereafter in which to file their response brief. Intervenors have made no attempt to demonstrate prejudice to any substantial right. Similarly, intervenors have not demonstrated that the other defects of the petition for review prejudice their substantial rights, significantly hamper the Board's review or otherwise provide a basis to dismiss the appeal or affirm the decision. *DLCD v. Coos County*, 24 Or LUBA 137, 140, *aff'd in part/rev'd in part on other grounds*, 117 Or App 400, 844 P2d 907 (1992). Finally, failure to specify the relief requested, as required by OAR 661-010-0030(4)(b)(A), is not a basis to dismiss the appeal, absent prejudice to a party's substantial rights. *Robinson v. City of Silverton*, 37 Or LUBA 521, 525-26 (2000). *A fortiori*, a misdirected claim for relief that does not prejudice any party's rights is also not a basis for dismissal.[4]

ASSIGNMENT OF ERROR

Petitioner argues that the county's decision fails to "establish the necessary finding[s] of fact" demonstrating compliance with LDC chapter 60. Petition for Review 2.

The bulk of petitioner's argument under this assignment is unfocused. Nonetheless, it is reasonably clear that petitioner challenges the adequacy of the county's findings to demonstrate compliance with LDC 66.090(B)(2)(a) through (e). Petitioner argues with particular emphasis that the county's findings regarding the impact of the proposed nonfarm dwelling on the stability of the agricultural land use pattern in the area are inadequate to demonstrate compliance with LDC 66.090(B)(2)(a) and (d) and OAR 660-033-0130(4)(a).[5]

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[4]In concluding that petitioner's numerous failures to comply with our rules do not *significantly* hamper our review, we do not mean to say that these failures have not complicated our review or made intervenors' efforts to respond to the petition for review more difficult. We simply conclude that those failures are not sufficient to warrant summary dismissal of this appeal.

[5]OAR 660-033-0130(4)(a)(D) allows a nonfarm dwelling on agricultural land where, *inter alia*:

Petitioner contends that if the proposed nonfarm dwelling is approved under the county's application of these standards, there is no reason why a number of similar dwellings and partitions cannot also be approved under the same standards on the subject property and nearby agricultural lands, to the detriment of the agricultural base in the county.

Adequate findings must (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion that the request satisfies the approval standards. *Le Roux v. Malheur County*, 30 Or LUBA 268, 271 (1995). In the present case, it is impossible to resolve petitioner's findings challenges, because as far

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> "The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of possible new nonfarm dwellings and parcels on other lots or parcels in the area similarly situated. To address this standard, the county shall:
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> "(i) Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other, adjacent agricultural areas. Findings shall describe the study area, its boundaries, the location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard. Lands zoned for rural residential or other urban or nonresource uses shall not be included in the study area;
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> "(ii) Identify within the study area the broad types of farm uses (irrigated or nonirrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, nonfarm, hardship, etc.), and the dwelling development trends since 1993. Determine the potential number of nonfarm/lot-of-record dwellings that could be approved under subsections (3)(a), (3)(d) and section (4) of this rule, including identification of predominant soil classifications, the parcels created prior to January 1, 1993 and the parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings under ORS 215.263(4). The findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible nonfarm dwellings under this subparagraph;
>
> "(iii) Determine whether approval of the proposed nonfarm/lot-of-record dwellings together with existing nonfarm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area[.]"

as we can tell the challenged decision contains no findings of compliance with *any* applicable criteria. The decision of the county court consists of two pages of procedural recitals, and merely concludes in relevant part that "[a]fter considering all of the evidence and testimony, and taking into account personal knowledge of the Court Members concerning the subject matter, the Court did take action to reverse the subject Planning Commission Decision." Record 3. The county court's decision does not adopt or incorporate any other documents as findings. The planning commission decision merely states in relevant part that "[d]enial was based upon regulations found in [LDC] 66.090(B)(2)(a)." Record 17.

Neither the county court's nor the planning commission's decision purports to adopt or incorporate the staff report as findings. Even assuming that the county court intended to adopt the staff report as its explanation for why the relevant facts demonstrate compliance with applicable criteria, the staff report is clearly inadequate to do so. The only discernible statements in the staff report addressing LDC 66.090(B) and OAR 660-033-0130(4)(a) are the following:

> "* * * Placement of a dwelling will not alter the land use or have any impact on the agricultural economy of this area.
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> "Planning Staff could identify no way in which a dwelling would interfere with farming practices on adjacent lands.
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> "There are no wetlands present on the proposed site.
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> "Within the 1 mile study area there are 10 MUR Zoned parcels. 6 of these parcels have existing dwellings, and 3 are 20 acres or smaller. 5 of the parcels could be subject to non-farm applications in the future." Record 27.

Intervenors respond that the county court discussed and found compliance with applicable criteria, as reflected in the tape of the hearing before the county court. Our review of the record indicates that members of the county court discussed applicable provisions of the LDC during their deliberations below. However, oral comments by members of the governing body are not part of the final written decision that LUBA reviews, and such comments do not constitute findings demonstrating compliance with applicable criteria.

Johnson v. Tillamook County, 16 Or LUBA 855, 868 n 10 (1988) (LUBA will not consider oral testimony as findings of fact); *see also Derry v. Douglas County*, 26 Or LUBA 25, 29 (1993) (LUBA reviews the local government's final written order, not oral comments made by the local decision maker during its deliberations); *Bruck v. Clackamas County*, 15 Or LUBA 540, 542 (1987) (same).

Intervenors also argue that there is substantial evidence in the record supporting the county court's conclusion that the proposal satisfies applicable criteria. Whether or not that is the case, the county court failed to adopt adequate findings as part of its final written decision explaining why the relevant facts demonstrate compliance with applicable criteria. Remand is necessary for the county to do so.

The assignment of error is sustained.

The county's decision is remanded.