

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

3
4 KENNETH HICK,
5 *Petitioner,*

6
7 vs.

8
9 MARION COUNTY,
10 *Respondent.*

11
12 LUBA No. 2002-092

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Marion County.

18
19 Barry Adamson, Lake Oswego, filed the petition for review and argued on behalf of
20 petitioner. With him on the brief were Susan Snell and Martin, Elliott and Snell.

21
22 Jane Ellen Stonecipher, Assistant County Counsel, Salem, filed the response brief and
23 argued on behalf of respondent. With her on the brief was Michael J. Hansen, County
24 Counsel.

25
26 HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,
27 participated in the decision.

28
29 AFFIRMED

01/17/2003

30
31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a board of county commissioners decision that denies his request for approval to operate a construction cleanup business as a home occupation in the county's exclusive farm use (EFU) zone.

FACTS

The relevant facts are set out in respondent's brief:

"The subject property comprises 2.0 acres. It is zoned [EFU] and designated high-value farmland. In August 2001, the Marion County Enforcement Officer notified petitioner that there were zoning violations on the subject property. Inoperable vehicles and solid waste were stored on the property and were visible from the roadway and adjoining property.

"There were two enforcement issues on the property. Petitioner was using the property as a disposal site for materials left in his mini-storage facility and the occupant of the property, Michael Salanti, was operating a cleanup business for petitioner's business of foreclosing and repossessing real property.

"Petitioner's use of the property as a disposal site for abandoned property from the mini-storage business has been discontinued. Petitioner sought to remedy the other violation by applying for a conditional use permit for a home occupation for a construction cleanup and maintenance business.

"The planning director granted the conditional use permit; his decision was appealed to the Marion County Hearings Officer.

"The cleanup business involves transporting reusable and recyclable materials from apartment buildings and houses that petitioner repossesses. The materials that are brought onto the property include old tires, wood waste, used appliances, inoperable cars, trucks and trailers, used furniture, toys and other household articles. The appliances accumulate on the property until the operator has enough to take a trailerload to the appliance recycler. The wood waste accumulates until there is enough to justify a trip to the chipper. The operator removes the tires from the rims, but has difficulty disposing of them. The vehicles remain on the property at least 60 days, as that is the minimum time required to process them through the Department of Motor Vehicles. Much of the 2.0 acre property is covered with the accumulated materials.

"The only structures on the property are a manufactured dwelling and a 36 foot by 24 foot pole barn. Persons other than the resident of the property have been seen working on the property.

1 “The hearings officer determined that the application did not meet the criteria
2 for a conditional use as a home occupation and denied the application. The
3 petitioner appealed the hearings officer’s decision to the board of
4 commissioners. The board denied the appeal, affirmed the hearings officer’s
5 decision and adopted its findings and conclusions. Respondent’s Brief 2-3
6 (citations to record, appendices and transcript omitted).

7 **FIRST ASSIGNMENT OF ERROR**

8 **A. General Conditional Use Approval Criteria**

9 Marion County Rural Zoning Ordinance (MCRZO) 136.050(e)(1) lists home
10 occupations as a conditional use in the EFU zone. MCRZO 136.060(a) sets out general
11 approval criteria that apply to all conditional uses in the EFU zone. With one exception, the
12 county found that the application satisfied all of the general conditional use criteria. The
13 county found that the applicant failed to demonstrate that it was feasible for the proposed
14 home occupation to satisfy MCRZO 136.060(a)(2), which requires that “[a]dequate fire
15 protection and other rural services are, or will be, available when the use is established.” In
16 its brief, the county concedes that the application “appears to meet” MCRZO 136.060(a)(2).¹
17 With that concession by the county, the first assignment of error is sustained.²

18 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

19 MCRZO 136.060(c) sets out specific approval criteria for home occupations. In his
20 second and third assignments of error, petitioner challenges the county’s findings that the
21 applicant failed to carry his burden to demonstrate compliance with MCRZO 136.060(3)
22 and (4). Those criteria require that the home occupation be operated substantially inside a

¹ The county argues that its decision should nevertheless be affirmed because there are other sustainable bases for denial, which we discuss later in this decision.

² Petitioner combines his statement of the first three assignments of error and combines his arguments under those assignments of error. We understand the first assignment of error to be directed at the county’s findings concerning MCRZO 136.060(a)(2).

1 dwelling or other buildings and not unreasonably interfere with other uses.³ The county's
2 findings concerning those criteria include the following:

3 "The property contains a dwelling that can be used as an office, and an
4 accessory structure that could be used for unloading, separating and storing
5 materials. The accessory building is a type of structure common to the [EFU]
6 zone, but materials and operations are not restricted to these buildings.

7 "Cars, barrels, tires, wood, metal, camp trailers, camper shells, lawn mowers,
8 bicycles, wheel barrows, signs, a portable toilet, gas cans, propane tanks, and
9 other items are scattered throughout the property, along with shipping
10 containers full of materials for recycling. It is not clear that the operation can
11 be contained in the outbuilding, or that other buildings can or will be provided
12 to house the business. MCRZO 136.060(c)(3) is not met.

13 *** **

14 "The biggest complaint about the 'clean up' business is with the accumulation
15 of material on the subject property. A condition of approval can require the
16 property to be cleaned up, but there is no proof that the business can operate
17 indoors, and it is highly likely that the material will accumulate again. No
18 operations plan was provided for an evaluation of feasibility. Applicant has
19 not carried the burden of proving that the proposed conditional use will not
20 unreasonably interfere with residential or other EFU zone uses.
21 MCRZO 136.060(c)(4)." Record 27-28.

³ The relevant MCRZO 136.060(c) standards for home occupations in the EFU zone are as follows:

- "(1) A home occupation shall be operated by a resident of the property on which the business is located.
- "(2) A home occupation or bed and breakfast inn may employ on the site up to three full-time or part-time persons, except on high-value farmland, in which case only residents of the home may be employed.
- "(3) It shall be operated substantially in:
 - "(A) the dwelling; or
 - "(B) other buildings normally associated with uses permitted in the zone in which the property is located.
- "(4) It shall not unreasonably interfere with other uses permitted in the zone in which the property is located. * * *

1 Petitioner contends that the county improperly converted MCRZO 136.060(c)(3)
2 and (4) into unforeseeable “feasibility” standards and found they were not met without
3 giving petitioner fair notice of the county’s interpretation of those standards or a chance to
4 demonstrate compliance with that interpretation. Petitioner explains:

5 “[T]he county erred by:

6 “▼ speculating about non-explicit issues that neither the pertinent
7 approval criteria, nor the County, nor the opponent’s appeal, nor the
8 Planning Director’s administrative approval had identified in advance
9 of the final evidentiary hearing;

10 “▼ effectively interpreting [MCRZO] §§ * * * 136.060(c)(3), and
11 136.060(c)(4) as impliedly incorporating specific ‘feasibility’ elements
12 not otherwise apparent from those approval criteria;

13 “▼ declaring those conjectural ‘feasibility’ issues to be pertinent for the
14 first time in the DECISION; and

15 “▼ finding that Petitioner had not demonstrated the requisite ‘feasibility’
16 of compliance due to the absence of evidence with respect to
17 conjectural issues that Petitioner could not have known would be
18 outcome-determinative.” Petition for Review 11.

19 We agree with the county that petitioner inaccurately characterizes the county’s
20 findings. The county did not, as petitioner repeatedly alleges, blindsides the applicant with a
21 “feasibility” standard that has no basis in the adopted approval criteria. Those findings
22 simply explain, based on the county’s understanding of the nature of the proposed
23 construction cleanup business, that the applicant failed to produce sufficient evidence to
24 demonstrate that the business will be substantially limited to existing or new buildings on the
25 property. That failure, in turn, led the county to find that the applicant had not carried his
26 burden to demonstrate that the proposed business would not unreasonably interfere with
27 nearby uses.⁴

⁴ The references to “feasibility” in the county’s decision generally appear in places where the county considers whether it is feasible to impose a condition of approval and thereby ensure that particular approval criteria will be met. In fact, the county concludes that a condition of approval will suffice to ensure compliance

1 Finally, we note that petitioner faults the county for considering past and existing
2 conditions of the property in reaching its decision and argues that the county should have
3 approached these criteria as though the property were vacant. Petitioner’s point might have
4 some force if the subject property were vacant. However, we do not agree that the county
5 committed legal error in considering the past and current state of the property and the manner
6 in which operations on the property have been conducted in the past in concluding that the
7 applicant failed to carry his burden regarding MCRZO 136.060(c)(3) and (4). The applicant
8 was free to submit evidence to demonstrate that the criteria would be met, notwithstanding
9 existing conditions, and that past activities that might be inconsistent with those criteria
10 would not be repeated in the future. Petitioner makes no attempt in the petition for review to
11 identify such evidence.

12 The second and third assignments of error are denied.⁵

13 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

14 MCRZO Chapter 119 is the “Conditional Uses” chapter of the MCRZO. It is four
15 pages long, and MCRZO 119.070 is entitled “Findings of the Director, Planning Commission
16 or Hearings Officer.” As relevant, MCRZO 119.070 provides:

17 “Before granting a conditional use, the Director, Planning Commission or
18 Hearings Officer shall determine:

19 “* * * * *

with some approval criteria. Record 26. There is certainly nothing wrong with exploring the feasibility of imposing conditions of approval to ensure compliance with approval criteria. In fact, ORS 197.522 *requires* that conditions of approval be considered as an alternative to denial of a permit application in some circumstances. However, while it may be permissible or necessary to consider conditions of approval as a feasible way of ensuring compliance with approval criteria, there is nothing impermissible about concluding that conditions of approval are not a feasible way of ensuring that a mandatory approval standard will be met, provided such a conclusion is supported by substantial evidence. The record in this matter includes evidence that a reasonable person would rely on to conclude that the proposed business will not be carried out substantially inside buildings on the property.

⁵ The county’s decision to deny the application need only be supported by a single valid basis for denial. *West v. Clackamas County*, 20 Or LUBA 433, 435 (1991). Therefore, our denial of the second and third assignments of error requires that the county’s decision be affirmed.

1 “(b) That such conditional use, as described by the applicant, will be in
2 harmony with the purpose and intent of the zone[.]”

3 The hearings officer adopted the following finding concerning MCRZO 119.070(b):

4 “In theory, Mr. Salanti’s business provides a valuable service; items are
5 reused or recycled, and kept out of the waste stream.^[6] In practice, the subject
6 property is covered with accumulated solid waste, and solid waste disposal is
7 not allowed in the EFU zone. Applicant has not met the burden of proving
8 that the proposed use is in harmony with the purpose and intent of the EFU
9 zone. [MCRZO] 119.070(b) is not met.” Record 29.

10 Petitioner argues that MCRZO 119.070(b) is “aspirational” and that the county erred
11 by applying it as a mandatory criterion in this case. Petitioner also contends that the county
12 failed to give him fair notice that it would be applied as a mandatory approval criterion. We
13 reject both arguments.

14 The county’s notice of public hearing identifies “Land Use Decision Criteria.”
15 Record 71. In addition to identifying the general conditional use criteria at MCRZO
16 136.060(a) and the specific approval criteria for home occupations at MCRZO 136.060(c),
17 the notice identifies “Chapter 119 of the Marion County Rural Zoning Ordinance.” *Id.*
18 Given the shortness of the chapter and the reasonably clear identification in MCRZO Chapter
19 119 that MCRZO 119.070 requires specific findings, we do not agree that a more precise
20 identification of MCRZO 119.070 in the notice of hearing was required. Petitioner’s
21 argument that MCRZO 119.070(b) is aspirational is without merit. Although MCRZO
22 119.070 is highly subjective, there is nothing aspirational about the language of MCRZO
23 119.070. The county did not err by interpreting and applying MCRZO 119.070(b) as it did.

24 The fourth and fifth assignments of error are denied.

25 **SIXTH ASSIGNMENT OF ERROR**

26 MCRZO 136.060(c)(1) limits operators of a home occupation in the EFU zone to “a
27 resident of the property on which the business is located.” *See* n 3. MCRZO 136.060(c)(2)

⁶ As noted earlier, Mr. Salanti resides on the property and would operate the proposed home occupation.

1 provides an exception to that limit and allows employment of “up to three full-time persons
2 except on high-value farmland, in which case only residents of the home may be employed.”

3 *Id.* The county adopted the following findings to address MCRZO 136.060(c)(1) and (2):

4 “11. The proposed business is run by the applicant’s renter, Michael
5 Salanti, who resides in the dwelling on the subject property.
6 [MCRZO] 136.060(c)(1) is satisfied.

7 “12. The subject property * * * is high-value farmland. [R]esidents of the
8 dwelling must be the only employees. Mr. Salanti does not have
9 employees on his payroll, but workers, identified as Mr. Hick’s
10 subcontractors, come to the subject property in the morning, park their
11 vehicles, and then take one of Mr. Salanti’s vehicles to a work site.
12 The vehicles are returned in the evening, and the workers often help
13 Mr. Salanti unload items from the vehicles. Mr. Salanti also stated
14 that his daughter and her boyfriend sometimes help out with the
15 business, but did not state whether they live on or off-site. That the
16 workers may not technically be employees of Mr. Salanti or Mr. Hick,
17 does not negate the fact that they work on or from the subject property.
18 [MCRZO] 136.060(c)(2) is not satisfied.” Record 27.

19 Petitioner argues that MCRZO 136.060(c)(2) only excludes non-resident *employees*
20 from assisting Mr. Salanti in operating the home occupation on high-value farmland and says
21 nothing about assistance Mr. Salanti may be receiving from non-resident non-employees.
22 Petitioner contends that because the county found that the subcontractors, daughter and
23 boyfriend are not employees, their assistance could not violate MCRZO 136.060(c)(2).

24 Both petitioner and the county misread MCRZO 136.060(c)(1) and (2), which must
25 be read together. The key provision is MCRZO 136.060(c)(1), which limits the people who
26 may operate a home occupation to “a resident.” MCRZO 136.060(c)(2) is a limited
27 exception to MCRZO 136.060(c)(1). The limited exception that is provided by MCRZO
28 136.060(c)(2) is even more limited if the home occupation is to be operated on high-value
29 farmland. The limited exception that is provided by MCRZO 136.060(c)(2) allows up to
30 three employees to help operate the home occupation, but that exception for three employees
31 is limited to resident employees if the home occupation is located on high-value farmland.

1 If, as appears to be the case, petitioner is technically correct that the subcontractors,
2 daughter and boyfriend are not the resident operator's employees, that simply means the
3 exception that MCRZO 136.060(c)(2) provides to MCRZO 136.060(c)(1) does not apply at
4 all and the limitation that is imposed by MCRZO 136.060(c)(1) applies with full force. As
5 noted, MCRZO 136.060(c)(1) limits permissible home occupation operators to the resident,
6 in this case Mr. Salanti. The assistance that Mr. Salanti receives and apparently plans to
7 continue to receive from non-resident non-employees in operating the business violates
8 MCRZO 136.060(c)(1) rather than MCRZO 136.060(c)(2). The county's finding that
9 MCRZO 136.060(c)(2) is violated is erroneous, but so is its finding that MCRZO
10 136.060(c)(1) is satisfied. Given that we have already sustained other independent bases for
11 the county's denial of the application, a remand for the county to correctly apply MCRZO
12 136.060(c)(1) and (2) and correctly identify MCRZO 136.060(c)(1) as an additional reason
13 for denial of the application, rather than MCRZO 136.060(c)(2), would serve no purpose.

14 The county's decision is affirmed.