BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL D. TESTA and
SHARON C. TESTA,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

SAMUEL HALE and
LESLIE HALE,
Intervenors-Respondent.

LUBA No. 2003-006

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Paul D. Testa and Sharon C. Testa, Molalla, filed the petition for review. Sharon C. Testa argued on her own behalf.

Michael E. Judd, Clackamas County Counsel, Oregon City, filed a response brief and argued on behalf of respondent.

James L. Buchal, Portland, filed a response brief and argued on behalf of intervenors-respondent.

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

AFFIRMED 04/18/2003

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a county decision that approves a dwelling on a 20.10-acre parcel located in the county's Agriculture/Forest (AG/F) district.

MOTION TO INTERVENE

Samuel Hale and Leslie Hale (intervenors), the applicants below, move to appear on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

In 2002, intervenors applied for a dwelling to be sited on the subject property, pursuant to county code provisions adopted to implement ORS 215.750. The pertinent county provisions permit a dwelling to be sited on property zoned for farm or forest uses, provided: (1) at least part of seven parcels lawfully created prior to January 1, 1993 are located within a 160-acre square that is centered on the center of the subject property; (2) at least four permanent dwellings that legally existed on January 1, 1993 are located on those parcels; and (3) none of the seven parcels is larger than 80 acres.[1]

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[1] Clackamas County Zoning and Development Ordinance (ZDO) 407.05(B)(2) provides, in relevant part:

> "[T]he Planning Director may allow a dwelling * * * when the lot was lawfully created and a.-g. below are met:
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> "* * * * *
>
> "b. The parcel on which the dwelling would be located is composed primarily of soils which are:
>
> "* * * * *
>
> "2. Capable of [producing] 50 to 85 [cubic feet per acre per year (cf/ac/yr) of wood fiber] and where at least part of seven (7) other parcels lawfully created prior to January 1, 1993 exist within a 160-acre square area, when centered on the center of the subject tract. The 160-acre square must remain in a fixed position during this test. And, at least four (4) permanent dwellings legally existed on January 1, 1993 on the other parcels; or

The planning director approved the application. Petitioners appealed the planning director's decision to the county hearings officer. The hearings officer also approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer's finding that the soils on the subject parcel are not capable of producing more than 56 cf/ac/yr of wood fiber is not supported by substantial evidence.[2] According to petitioners, the county's soil study identifies Kinney Cobbly as the predominant soil on the subject property. The county's soil survey states that Kinney Cobbly soil has a production capability of 164 cf/ac/yr. In addition, petitioners cite to evidence in the record that the property has been logged in the past and the property is subject to reforestation requirements under the Oregon Forest Practices Act. According to petitioners, the fact that the property does not currently contain harvestable timber is the consequence of improper and inadequate resource management, and is not indicative of the productive capability of the soils. Petitioners further argue that the evidence relied upon by the hearings officer to conclude that the subject property is capable of only 56 cf/ac/yr of wood fiber production was generated by a soils consultant hired by intervenors, and contains

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> "3. Capable of [producing] above 85 cf/ac/yr and where at least part of eleven (11) other parcels lawfully created prior to January 1, 1993 exist within a 160-acre square area, when centered on the center of the subject tract. The 160-acre square must remain in a fixed position during this test. And a least five (5) permanent dwellings legally existed on January 1, 1993 on the other parcels[; and]
>
> "* * * * *
>
> "5. Neither parcels larger than 80 acres, nor dwellings on parcels [larger than] 80 acres shall be used to satisfy the eligibility requirements of [ZDO] 407.05(B)(2)(b)(1), (2) or (3)."

[2] This finding is important because it determines whether ZDO 407.05(B)(2)(b)(2) or ZDO 407.05(B)(2)(b)(3) applies. If the former applies, only seven parcels and four dwellings must exist within the relevant 160-acre template area. If the latter applies, eleven parcels and five dwellings must exist within the template area.

evidentiary conclusions that, according to petitioners, are questioned by the county's soil scientist.

Intervenors concede that the county's soils scientist disputed a portion of their consultant's soil report. However, intervenors note that the disputed evidence pertains to their consultant's opinion regarding the geomorphic origins of the soils in the area, and not to the consultant's methodology for extracting soil samples on the property, or his conclusions based on those soils samples. According to intervenors, the county soils scientist concluded that intervenors' consultant used standard techniques for soil sampling, and had the relevant experience to make reasonable conclusions regarding soil productivity based on that sampling. Intervenors argue that their evidence is based on on-site studies, and is not the aerial-based analysis used to identify general soil types in the area that is included in the county's soil study. Finally, intervenors note that at the time the subject property was logged, it was part of a larger parcel. According to intervenors, petitioners rely on evidence of tree harvesting on the larger parcel, including the area comprising the subject property, to show that the subject property contains soils that can produce merchantable tree species. Intervenors contend that the forest productivity of the larger parcel cannot be attributed to the subject property, because some of the soils that are located on the subject property are different than the soils on the larger parcel, and to the extent the soils on the two parcels are the same, the percentage of poor quality soils is greater on the subject property.

We are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed and determine whether, based on that evidence, the local decision maker's conclusion is

supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

We agree with intervenors that the evidence relied upon by the hearings officer is sufficient to support his conclusion that the subject property is capable of 56 cf/ac/yr of wood fiber production. That conclusion is based on the report from intervenor's expert, and on testimony by the county's soil scientist. The evidence proffered by petitioners does not undermine the evidence relied upon by the hearings officer. Accordingly, the first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A. Definition of "Parcel"

Petitioners argue that the hearings officer erred in using a county definition of "lot of record" to identify "parcels" located within the 160-acre template. According to petitioners, ORS 215.750(1) and ZDO 407.05(B)(2)(b) clearly limit the units of land that may be counted for the purposes of satisfying ZDO 407.05(B)(2)(b) to "parcels."[3] Petitioners contend that "parcels," as that word is used in ORS 215.750(1) and ZDO 407.05(B)(2)(b) is a term of art

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[3] ORS 215.750(1) provides, in relevant part:

> "In western Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:
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> "* * * * *
>
> "(b) Capable of producing 50 to 85 cubic feet per acre per year of wood fiber if:
>
> "(A) All or part of at least seven 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
>
> "(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels[.]"

and only those units of land that are created by partitioning qualify as parcels. ORS 92.010.[4] Petitioners contend that fewer than seven units of land located within the 160-acre template are "parcels" as that term is defined in ORS 92.010 and, therefore, the intervenors have failed to demonstrate that ZDO 407.05(B)(2)(b) is satisfied.

The county and intervenors respond that the definition of "parcel" found in ORS 92.010 is not the applicable definition of that word. According to the county, the applicable definition of "parcel" is found in ORS 215.010(1) and in ZDO 202.[5] Both the statute and the ZDO define "parcel" to include units of land that are created by deed or land sale contract, so long as the conveyance that created the unit of land occurred at a time when approval of a partition plat was not required. According to the county, until very recently, land could be divided within the county's farm and forest zones without approval of a partition plat.

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[4] ORS 92.010 defines "parcel" as a "single unit of land that is created by a partitioning of land."

[5] ORS 215.010(1) provides, in relevant part:

> "The terms defined in ORS 92.010 shall have the meanings given therein, except that 'parcel':
>
> "(a) Includes a unit of land created:
>
> "(A) By partitioning land as defined in ORS 92.010;
>
> "(B) In compliance with all applicable planning, zoning and partitioning ordinances and regulations; or
>
> "(C) By deed or land sales contract, if there were no applicable planning, zoning or partitioning ordinances or regulations."

ZDO 202 defines "parcel" as:

> "A unit of land created by a partition of land. For the purposes of this Ordinance, parcel includes * * * [a] lot of record * * *."

ZDO 202 defines "lot of record" as including:

> "A lot, parcel or other unit of land, or combination thereof, that conformed to all zoning and Subdivision Ordinance requirements and applicable Comprehensive Plan provisions in effect on the date when a recorded separate deed or contract creating the lot, parcel or unit of land was signed by the parties to the deed or contract * * *."

Petitioners do not argue otherwise. Therefore, the fact that some of the units of land considered by the hearings officer were not created by the approval of a partition plat does not mean that they are not parcels within the meaning of ZDO 407.05(B)(2)(b).

We agree with respondents that petitioners have not demonstrated that the hearings officer's consideration of parcels of land that were created by deed rather than by partitioning was error. Neither ORS 215.010 nor ZDO 202 limit parcels to units of land that were created by partition. Therefore, the fact that some of the parcels that were counted as "legally created parcels" for the purpose of compliance with ZDO 407.05(B)(2)(b) were not created by partition plat approval provides no basis for reversal or remand.

B. Application of the Template Test

1. Section 9, Tax Lot 100 and Section 4, tax lots 600 and 601

Petitioners argue that the hearings officer erred in counting parcels and dwellings for the purpose of satisfying ZDO 407.05(B)(2)(b). According to petitioners, the hearings officer incorrectly counted three tax lots (tax lots 100, 600 and 601) as including two parcels (tax lots 100 and 600 comprising one parcel; tax lot 601 comprising the second parcel), with one dwelling located on the parcel made up of tax lots 100 and 600.[6] Petitioners contend that the disputed tax lots are all owned by the same person, and must be counted as one parcel. If

[6] A map, not to scale, is included on the following page and depicts the tax lots discussed in this assignment of error. The existence of a second tax lot 601 and the location of the noted dwelling on tax lot 600 presents the possibility for significant confusion. The tax lot 601 that the hearings officer found to be a separate parcel from tax lots 100 and 600 is located outside the template area and for that reason was not counted as a separate parcel by the hearings officer for purposes of applying ZDO 407.05(B)(2)(b). A second, unrelated tax lot 601 was counted by the hearing officer in conjunction with other tax lots. This second tax lot 601 is one of the five tax lots mentioned in our discussion under C., below.

Returning to tax lots 100 and 600, the location of the dwelling that the hearings office counted on tax lot 600 is also a potential source of confusion. Tax lot 600 is located entirely outside the 160-acre template area. A dwelling is located on tax lot 600 and, therefore, the dwelling is outside the 160-acre template area. However, under ZDO 407.05(B)(2)(b), the critical first question is whether any "part" of a "parcel" is within the 160 acre template area. If it is, then any dwelling on that parcel may be counted without regard to whether the dwelling is located inside the 160-acre template area. There is no dispute that tax lot 100 is partially inside the 160-acre template area. If tax lot 100 and tax lot 600 are properly viewed as a single parcel, as the hearings officer found, then the parcel made up of tax lots 100 and 600 and the dwelling on that parcel were properly counted under ZDO 407.05(B)(2)(b).

considered as one parcel, the combined tax lots exceed 80 acres and, therefore, pursuant to ZDO 407.05(B)(2)(b)(5), that parcel cannot be counted to establish eligibility for a dwelling on the subject property. *See* n 1. In the alternative, petitioners argue that the disputed tax lots must all be counted as separate parcels, in which case the dwelling cannot be counted for purposes of ZDO 407.05(B)(2)(b), because it is located on tax lot 600, which is outside the template.

The county responds that the hearings officer correctly identified tax lots 100 and 600 as a single parcel with one dwelling located on that parcel. According to the county, there is evidence in the record to show that tax lots 100 and 600 were never separately conveyed. Therefore, the fact that tax lots 100 and 600 were described with tax lot 601 in a single deed that conveyed the three tax lots to the present owner in 2001 does not result in a conflation of those two separate parcels into one aggregate parcel. And, the county argues, the fact that tax lots 100 and 600 have not been separately conveyed means that they are properly considered one unit of land or "parcel" for purposes of satisfying ZDO 402.05(B)(2)(b). Therefore, the county argues, the hearings officer did not err in his calculation of parcels and dwellings with respect to tax lots 100, 600 and 601.

ORS 92.017 provides, in relevant part, that a "parcel lawfully created shall remain a discrete * * * parcel, unless the * * * parcel lines are vacated * * *." Petitioners have not demonstrated that the act of conveying two discrete parcels in one deed has the legal effect of vacating the parcel line between them to make those two parcels a single parcel. Further, petitioners have not demonstrated that tax lots 100 and 600 have been divided into two separate parcels, such that a dwelling on tax lot 600 may not be counted as a dwelling on a "parcel" for the purposes of ZDO 407.05(B)(2)(b). Therefore, we agree with the county that the hearings officer did not err by considering tax lots 100 and 600 separately from tax lot 601, or by counting the dwelling located on tax lot 100, because it is located on one parcel comprised of tax lots 100 and 600.

C. Section 9, Tax Lots 302, 401, 402, 500 and 601

Petitioners also argue that the hearings officer improperly concluded that five other tax lots comprise two parcels, when in fact the five tax lots are one parcel for purposes of applying ZDO 407.05(B)(2)(b). The county concedes that the hearings officer erred in this respect, but argues that even if the five tax lots are counted as a single parcel, the hearings officer found that there are enough parcels and dwellings located on those parcels to satisfy ZDO 407.05(B)(2)(b).

Petitioners' challenge to the hearings officer's findings only eliminates two parcels from the tally of parcels that may be counted to satisfy the minimum number of parcels established by ZDO 407.05(B)(2)(b). The hearings officer found that a total of 12 parcels are located within the 160-acre template. Therefore, as the county argues, there are still ten parcels within the template, three more than is necessary to satisfy ZDO 407.05(B)(2)(b) and, accordingly, the hearings officer's error provides no basis for reversal or remand.

The second assignment of error is denied.

The county's decision is affirmed.