BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES JUST
Petitioner,

vs.

LINN COUNTY,
Respondent,

and

ROBERT MARK COX,
Intervenor-Respondent.

LUBA No. 2009-036

FINAL OPINION
AND ORDER

Appeal from Linn County.

James Just, Lebanon, filed the petition for review and argued on his own behalf.

Eugene J. Karandy, Assistant County Counsel, Albany, represented respondent.

George B. Heilig, Corvallis, represented intervenor-respondent.

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

AFFIRMED 07/23/2009

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county approving an accessory farm dwelling.

FACTS

Intervenor-respondent (intervenor) owns two tax lots, 200 and 301, that comprise a 127-acre property zoned Exclusive Farm Use (EFU). Intervenor applied for a conditional use permit for an accessory farm dwelling on Tax Lot 200.[1] At the time intervenor's application was submitted, Tax Lot 200 contained a manufactured home that was placed on the property by the prior owners of the parcel pursuant to a conditional use permit that was issued by the county in 1993 in conjunction with a dairy farm they operated on the property. At the time of the 1993 permit, the prior owners' main residence was located on the same parcel on which the manufactured dwelling was proposed to be located. The 1993 permit contained two conditions: one required the manufactured home to be removed if the dairy operations on the subject property ceased, and the second limited the allowed dwelling to a manufactured dwelling. Sometime after the 1993 conditional use permit was issued, the dairy operation ceased and intervenor acquired Tax Lot 200 and began farming it as part of a larger grass seed operation.

The planning director approved the application, and petitioner appealed the decision to the planning commission, which also approved the application. Petitioner appealed the planning commission's decision to the board of county commissioners, which also approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner's first assignment of error alleges:

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[1] Intervenor initially applied for a conditional use permit to retain the existing manufactured dwelling located on Tax Lot 200. Supplemental Record, Exhibit A to Application Narrative, 1. At some point after the application was submitted, intervenor clarified that he sought to replace the existing manufactured dwelling with a newer manufactured dwelling. Record 32.

> "[T]he county misconstrued and violated applicable law in denying the request for a replacement dwelling and instead requiring that the existing dwelling be reauthorized as a farm accessory dwelling under current law." Petition for Review 6.

A. The Challenged Decision

In portions of the first assignment of error, petitioner challenges a decision that he alleges the county made that denied intervenor's request for a replacement dwelling. Petition for Review 6, 17-19. However, the appealed decision as described in petitioner's Notice of Intent to Appeal (NITA) is the county's decision approving the requested conditional use permit for an accessory farm dwelling. Petitioner did not appeal any other land use decision made by the county other than the decision described in his NITA. Moreover, there is no evidence in the decision or the record to support petitioner's assertion that the county either received or denied an application for a replacement dwelling. To the extent petitioner attempts in the first assignment of error to challenge a land use decision that is not the subject of his NITA or that the county did not make, that challenge provides no basis for reversal or remand of the decision.

B. The 1993 Conditional Use Permit

Petitioner's arguments in support of the first assignment of error relate to or challenge the 1993 permit. Petitioner argues:

> "* * * The county erred in basing its decision on conditions of approval of the 1993 decision rather than on the standards and criteria set forth in land use regulations and applying to the county as a whole." Petition for Review 17.

First, petitioner argues that the conditions of approval attached to the county's 1993 land use decision were unlawful because the conditions are inconsistent ORS 215.283(1). Petition for Review 7-8. Further, petitioner argues, because the conditions were unlawful, the county erred in applying the 1993 conditions of approval to the 2008 application. Petition for Review 15-17.

Petitioner cites the Oregon Supreme Court's 1995 decision in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995) (uses listed in ORS 215.283(1) may not be subject to local criteria that are more restrictive than the statute) in support of his argument that the conditions were unlawful. The decision in *Brentmar* occurred approximately two years after the county issued the 1993 conditional use permit. The Supreme Court's decision in *Brentmar* did not, as petitioner suggests, automatically invalidate all previous final, unappealed land use decisions or conditions attached to those decisions that are inconsistent with the Court's holding in *Brentmar*.

Just as importantly, the 1993 permit is a final land use decision that was not appealed. Petitioner's challenges to the correctness or validity of the 1993 permit decision amount to an impermissable collateral attack on a final land use decision. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, 296, *aff'd* 195 Or App 763, 100 P3d 218 (2004). Those arguments do not provide a basis for reversal or remand of the 2009 decision that is before us in this appeal.

In responding to the issues raised by petitioner below, the county concluded that the conditional use permit that authorized the 1993 dwelling "was voided." By that, we understand the county to have taken the position that the conditional use permit became void when dairy operations ceased and the manufactured home was not removed within 60 days.[2] Petitioner argues that the county exceeded its authority in finding that the 1993 permit had expired, for a variety of reasons. First, petitioner argues that the circuit courts retain jurisdiction under ORS 197.825(3)(a) to enforce conditions of approval. Second, petitioner argues that the county did not initiate enforcement proceedings or proceedings to revoke the conditional use permit.

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[2] The county found:

> "The use under review was previously permitted by conditional use permit. That permit was voided when the dairy ceased operation on the property." Record 10.

We disagree with petitioner. First, the jurisdiction of the circuit courts to enforce conditions of approval is not relevant where no enforcement action has been brought. Second, we do not think the county was required to initiate an enforcement action or revocation proceedings in order to determine that the dwelling did not comply with a condition of approval attached to the 1993 decision at the time intervenor submitted the application. It is undisputed that the dairy operations on the property ceased, and petitioner does not allege otherwise.

Just as importantly, the county's finding that the 1993 permit had expired has no bearing on any of the applicable approval criteria that govern intervenor's application for an accessory farm dwelling. As explained above, the county determined that the 1993 permit had expired, in response to petitioner's arguments below. The county did not, as petitioner suggests, "* * * bas[e] its decision on conditions of approval of the 1993 decision rather than on the standards and criteria set forth in land use regulations and applying to the county as a whole." Petition for Review 17. Rather, the decision demonstrates that the county based its decision on the applicable approval criteria set forth in the decision, and nowhere in any of the 14 pages of the petition for review that contain argument in support of the first assignment of error does petitioner challenge the county's findings regarding any of those approval criteria or explain why the application does not meet those criteria. As such, petitioner's challenge to what amounts to dicta in the county's decision provides no basis for reversal or remand of the decision.

Petitioner also argues that the existing dwelling that intervenor sought to replace is a nonconforming use under ORS 215.130(5). ORS 215.130(5) provides:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when

> necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted."

In responding to petitioner's arguments below, the county determined that the dwelling was not a nonconforming use because the dwelling had been previously allowed by the 1993 conditional use permit. Thus, the county determined, ORS 215.130(5) did not apply to the application.

We agree with the county. In order to trigger the protection of ORS 215.130(5), petitioner must show that an "enactment or amendment of any zoning ordinance or regulation" has occurred that places the "lawful use of any building, structure or land" into doubt. Petitioner does not allege that the enactment or amendment of any zoning ordinance or regulation created a question as to the lawful status of the existing manufactured dwelling under the 1993 permit. As such ORS 215.130(5) is inapposite.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues that the county erred by imposing conditions of approval when it approved intervenor's application. In approving the application, the county imposed the following condition of approval:

> "Prior to the issuance of any development permit, the applicants shall record a deed restriction on both Tax Lot 200 and Tax Lot 301 * * * that states the accessory farm dwelling is limited to a manufactured dwelling and that it shall be removed from the property when either tax lot is conveyed to another party. This deed restriction shall follow the chain of title for the two properties. * * *. " Record 3.

Petitioner's arguments in support of this assignment of error rely on many of the same arguments that we rejected in our resolution of the first assignment of error, and we reject them here as well.

Petitioner argues that the condition of approval imposed by the county is inconsistent with OAR 660-033-0130(24)(a)(B)(iv), which petitioner quotes in part, and which provides in its entirety that it applies to an accessory farm dwelling that will be sited:

> "On a lot or parcel on which the primary farm dwelling is not located, *when the accessory farm dwelling is limited to only attached multi-unit residential structures allowed by the applicable state building code or similar types of farm labor housing as existing farm labor housing on the farm or ranch operation registered with the Department of Consumer and Business Services, Oregon Occupational Safety and Health Division under ORS 658.750.* A county shall require all accessory farm dwellings approved under this subparagraph to be removed, demolished or converted to a nonresidential use when farm worker housing is no longer required[.]" (Emphasis added.)

Petitioner argues that the condition of approval that requires the manufactured home to be removed when the property is sold is inconsistent with OAR 660-033-0130(24)(a)(B)(iv). However, the portion of the administrative rule that petitioner cites does not appear to apply to the application because the accessory farm dwelling is not "attached multi-unit residential structures" as described in the rule.

Rather, the county appears to have imposed the condition in order to comply with OAR 660-033-0130(24)(a)(B)(iii), which applies to accessory farm dwellings that are sited:

> "On a lot or parcel on which the primary farm dwelling is not located, when the accessory farm dwelling is limited to only a manufactured dwelling with a deed restriction. The deed restriction shall be filed with the county clerk and require the manufactured dwelling to be removed when the lot or parcel is conveyed to another party. The manufactured dwelling may remain if it is reapproved under these rules[.]"[3]

Petitioner does not allege that the manufactured dwelling is proposed to be sited somewhere other than "on a lot or parcel on which the primary farm dwelling is not located." We see nothing inconsistent between the rule quoted immediately above and the condition of approval requiring the manufactured home to be removed if the property is sold, i.e. "conveyed to another party" as set forth in the rule.

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[3] Linn County Code 933.410(B)(2)(c) mirrors the language of the administrative rule. Record 7.

Petitioner also argues that the county erred in failing to consider other alternatives that could have left the manufactured home permanently sited on the property. Petitioner argues that the county should have considered requiring the two parcels owned by intervenor to be consolidated, or requiring intervenor to occupy the primary dwelling on Tax Lot 200. We do not think the county was required to consider such alternatives, absent a request from the applicant to do so. We see no error in the county's decision to impose the condition of approval requiring removal of the dwelling if either of the tax lots comprising the property were sold.

The second assignment of error is denied.

The county's decision is affirmed.