BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARY BELL O'BRIEN, DAWN PAVITT,
and TERRENCE A. RYAN JR,
Petitioner,

vs.

LINCOLN COUNTY,
Respondent,

and

RALPH HIBBS
and JENNIFER HIBBS,
Intervenors-Respondent.

LUBA No. 2012-007

FINAL OPINION
AND ORDER

Appeal from Lincoln County.

Mary Belle O'Brien, Seal Rock, filed the petition for review and argued on her own behalf. With her on the brief was Dawn Pavitt and Terrence A. Ryan Jr, Newport.

Wayne Belmont, Lincoln County Counsel, Newport, filed a joint response brief and argued on behalf of respondent.

Douglas R. Holbrook, Newport, filed a joint response brief and argued on behalf of intervenors-respondent.

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

AFFIRMED 05/16/2012

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

Petitioners appeal a county ordinance that adopts an amendment to the comprehensive plan map designation for an 8.5-acre parcel from farm land to forest land, and a corresponding zoning map amendment from Agricultural Conservation (A-C) to Timber Conservation (T-C).

MOTION TO INTERVENE

Ralph Hibbs and Jennifer Hibbs (intervenors), the applicants below, move to intervene on the side of the county. There is no opposition to the motion and it is allowed.

MOTION TO STRIKE PORTIONS OF PETITION FOR REVIEW

Intervenors move to strike Exhibits I-IV attached to the petition for review, along with argument in the petition for review regarding those exhibits, contending that the documents therein are not in the record and that the argument based on those documents should not be considered.

Initially, intervenors move to strike references in the petition for review to Ordinance 39, arguing that a complete copy of Ordinance 39 is not in the record. The record includes a copy of Ordinance 39, but apparently does not include maps that were adopted along with the ordinance in 1974. However, as far as we can tell the petition for review cites only the portions of Ordinance 39 that are in the record, not to the maps. Intervenor does not explain why references to an incomplete document in the record should be stricken because a complete copy of the document is not in the record.

Exhibit I is a copy of county Ordinance No. 34, adopted in 1974. LUBA may take notice of county "ordinances and similar legislative enactments." Oregon Evidence Code 202(4). Although petitioners do not request that we take official notice of Ordinance No. 34, we will do so, to the extent it is relevant to any issue in this appeal.

Exhibits II-IV are copies of deeds that are not in the record. Petitioners suggest no basis for LUBA to consider Exhibits II-IV. The motion to strike is granted with respect to Exhibits II-IV; otherwise the motion to strike is denied.

FACTS

The subject property is a vacant 8.5-acre parcel designated farm land and zoned A-C. The parcel was created by deed in 1979, with several subsequent correction deeds recorded between 1979 and 1982. Around that time the county issued a septic system permit and a manufactured dwelling was placed on the property; the dwelling was later removed. Approximately 7.5 acres of the property are assessed for forest uses. Soils on the subject parcel are Class VI non-agricultural soils. At various times in the past the subject property was used for grazing in conjunction with other adjacent lands.

The property is located in the Beaver Creek valley. The valley floor is generally zoned A-C, and developed with scattered dwellings on larger parcels in farm use. The hills surrounding the valley are either federal forest lands or private lands zoned T-C. The subject property is triangular in shape, with North Beaver Creek Road forming its northern boundary. Beaver Creek bisects the property from east to west, paralleling the road. A smaller unnamed creek flows north to south to meet Beaver Creek. Most of the property lies south of Beaver Creek, has slopes of 15 to 35 percent, and is covered with brush and stands of alder trees. The adjoining property to the south is part of a federal forest.

Intervenors applied to the county to redesignate and rezone the property from farm use to forest use, apparently to facilitate a future application for a dwelling type allowed in forest zones. The county planning commission recommended approval of the plan map and zoning map amendments. Petitioners appealed the planning commission recommendation to the county board of commissioners, which held a hearing. On October 26, 2011, the board of commissioners voted to approve the plan and zoning amendments. On January 11, 2012, the

county adopted Ordinance No. 465, approving the plan and zoning amendments, adopting the planning commission's findings and supplemental findings of its own. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Lincoln County Code (LCC) 1.1235 provides criteria for quasi-judicial plan map and zoning map amendments. An amendment may be justified, in relevant part, by findings either that (1) there has been a substantial change in the character of the area, or (2) "[z]oning previously adopted for the area was in error." The county concluded that there had not been a substantial change in the character of the area, but that the A-C zoning had been imposed on the subject parcel in error, due to its soils, size, characteristics, and topography.

Petitioners first argue that the county erred in considering only the subject parcel instead of the surrounding "area" for purposes of determining that the previous zoning had been applied in error. According to petitioners, LCC 1.1235(2) allows a quasi-judicial plan map or zoning map amendment only for an "area," not individual parcels. Further, petitioners contend that the county's finding there has been no substantial changes in the "area" undermines the conclusion that the "area" was zoned in error. According to petitioners, evidence in the record shows that the valley floor "area" including the subject property has from the beginning of county zoning reflected a stable agricultural land use pattern, with parcels continuously used for grazing, woodlot harvest and other agricultural uses.

The planning commission rejected iterations of that argument below, and the board of commissioners adopted the planning commission findings. The county reasoned that because LCC 1.1225 allows an "owner of land or agent" to apply for a quasi-judicial plan map or zoning map amendment, the relevant "area" for purposes of LCC 1.235(2) is the property for which the map amendment is sought, whether that property is a single parcel or multiple parcels. That interpretation is more than plausible, and we affirm it. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 255, 243 P3d 776 (2010). Much of petitioners'

argument under this assignment of error is premised on the assertion that the county must evaluate whether the subject property *and* the surrounding parcels were zoned in error. Because we sustain the county's contrary interpretation, we reject such arguments without further discussion.

The remaining arguments under this assignment of error are scattershot and difficult to follow. Petitioners disagree with the county's conclusion that, due to the parcel's small size, steep topography, non-agricultural soils and other factors, the subject property should not have been zoned A-C in the first place. Petitioners argue that the preponderance of evidence in the record demonstrates that the subject parcel was correctly zoned for farm use, like the larger A-C zoned parcels on the valley floor that historically and to this date remain in farm use. However, it is not LUBA's role to re-weigh the evidence. LUBA may reverse or remand a land use decision if the decision is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C). Substantial evidence is evidence that a reasonable person could rely upon. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). Based on the evidence cited to us, some of which is discussed below under the second assignment of error, the county's conclusion that the subject property was zoned A-C in error is supported by substantial evidence

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

The county's finding under (LCC) 1.1235(2) that "[z]oning previously adopted for the area was in error" depended in part on the fact that the soils on the subject property are Class VI soils, and the county code does not identify Class VI soils as agricultural soils.

LCC 1.1115(5), which implements and is consistent with Goal 3 and OAR 660-033-0020, defines "Agricultural Land" as "land of predominantly Class I, II, III and IV soils[.]"[1]

Petitioners argue, however, that the county failed to properly consider whether the subject property qualifies as "agricultural land" under the remainder of the LCC 1.1115(5) definition, as "other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices." According to petitioners, the fact that the subject property has in the past been grazed in conjunction with adjoining A-C zoned parcels demonstrates that it is suitable for grazing and hence qualifies as agricultural land under the "other lands" prong of the definition.

The county adopted extensive findings addressing the factors listed under the "other lands" language in LCC 1.1115(5). Record 28-29. With respect to suitability for grazing, the county concluded that the 8.5-acre parcel could accommodate two animal units per month, equivalent to a lease value of approximately $30 per month, yielding less revenue than the annual property taxes. Petitioners offer no focused challenge to these or other findings, which led the county to conclude that, after consideration of all the factors listed in LCC 1.1115(5), the property does not qualify as agricultural land under the "other lands" language in LCC 1.1115(5). Petitioners have not demonstrated that the county's findings

[1] LCC 1.1115(5) provides:

> "'**Agricultural land**' means land of predominantly Class I, II, III and IV soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices. Also, lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands."

that the subject property is not agricultural land as defined in LCC 1.1115(5) are inadequate or not supported by substantial evidence.

The second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

Ordinance 465 includes an emergency clause, making the plan map and zoning map changes effective immediately rather than 90 days after passage. Petitioners dispute that there exists any "emergency" or that the ordinance must become effective immediately in order to preserve public peace, health and safety, as the emergency clause states.

The county and intervenors respond that extreme deference is paid to a local government's declaration that an emergency exists, warranting an earlier effective date for an ordinance. *Greenberg v. Lee*, 196 Or 157, 248 P2d 324 (1952). We agree with respondents that petitioners have not demonstrated that the emergency clause is invalid for any reason. In addition, even if the emergency clause is invalid, the only apparent consequence is that the ordinance became effective 90 days after adoption rather than immediately, in which case it is not clear why any error the county committed in declaring an emergency warrants reversal or remand. *Waste Not of Yamhill County v. Yamhill County*, __ Or LUBA __ (LUBA No. 2011-091, April 5, 2012) slip op 18.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

ORS 215.030(5) provides in relevant part that "[n]o more than two voting members [of a county planning commission] shall be principally engaged in the buying, selling or developing of real estate for profit, as individuals, or be members of any partnership or officers or employees of any corporation that is engaged principally in the buying, selling or developing of real estate for profit."

Petitioners contend that on March 14, 2011, the date the county planning commission voted to recommend adoption of the requested plan map and zoning map amendments, two

of the commissioners held active real estate licenses, and two others were engaged in the building trade in some capacity. These four commissioners constituted a majority of the seven commissioners present, and their vote in favor of recommending adoption prevailed, four to three. Petitioners argued to the board of commissioners that the planning commission was improperly constituted and the planning commission recommendation was invalid. The board of commissioners summarily rejected this argument. Record 59.

Respondents concede that on March 14, 2011, two of the commissioners held active real estate licenses, but dispute that any other commissioners were "principally engaged" in "developing" real estate, within the meaning of ORS 215.030(5). In any case, respondents argue, the decision before LUBA is the board of commissioners' final decision to adopt the requested plan and zoning map changes, not the planning commission's decision to *recommend* adoption. Respondents argue that any problem with the constituency of the planning commission is not a basis to invalidate the board of commissioners' final decision.

In *Jackson v. City of Tillamook*, 29 Or LUBA 391, 401 (1995), we held that it is not within LUBA's scope of review to address a challenge that more than two planning commission members were nonresidents of the city, contrary to city ordinance. While *Jackson* did not concern an alleged violation of ORS 215.030(5), we believe that the alleged violation of ORS 215.030(5) in the present case similarly may not be within LUBA's scope of review in an appeal of the county's final land use decision.

ORS 215.030 does not state that a *decision* by a planning commission that is constituted in violation of the statute is *invalid.* The statute is silent regarding the consequences and potential remedies for violation of the membership requirements of ORS 215.030(5), as well as what forum such violations should be adjudicated. We note also that it will seldom be clear from the record of a land use decision whether a planning commissioner is "principally engaged" in real estate sales or development. The fact that a planning commissioner possesses an active real estate license does not necessarily mean the

commissioner is "principally" engaged in real estate sales, as opposed to other economic pursuits. Resolution of that question would require fact-finding that LUBA is poorly situated to conduct.

In any case, we agree with respondents that even if a violation of ORS 215.030(5) is potentially within LUBA's scope of review on review of a final land use decision rendered by a *planning commission*, in the present case the county's final land use decision was made by the board of commissioners. Petitioners do not explain why any impropriety in the constituency of the planning commission or in its recommendation to the board of commissioners means that the board of commissioners' decision is invalid. *See Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 8, 569 P2d 1063 (1977) (potential impropriety in the planning commission vote recommending a comprehensive plan amendment to the board of commissioners does not deprive the board of authority to consider the plan amendment).

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

As noted, the subject parcel was created in 1979 by deed. During the proceedings below, petitioners contended that the parcel was not "legally" created. Both the planning commission and the board of commissioners rejected this argument, concluding first that none of the criteria for amending the comprehensive plan and zoning map require that the city determine that the parcel was legally created. In the alternative, the county adopted findings concluding that that the parcel was legally created in 1979.

On appeal to LUBA, petitioners challenge the county's alternative findings that the parcel was legally created in 1979. However, petitioners do not address the county's primary finding that the comprehensive plan and zone map amendment criteria do not require that the county determine whether the affected parcel was legally created. Respondents argue, and we agree, that nothing cited to us in the code criteria governing the plan and zoning

amendments require a determination whether the property to be redesignated and rezoned was lawfully created. Therefore, any error the county committed in its alternative findings that the parcel was legally created does not provide a basis for reversal or remand of the challenged decision.[2]

The sixth assignment of error is denied.

The county's decision is affirmed.

[2] We understand petitioners to be concerned with the precedential effect that the county's alternative findings might have in a subsequent conditional use permit application to approve a dwelling on the subject parcel under the T-C zoning, and that one purpose of the sixth assignment of error is to preserve petitioners' ability to challenge any determination in such a permit application that the parcel was lawfully created or is a legal parcel. Because we do not consider petitioners' challenge to those alternative findings in this appeal, the issue of whether the parcel was legally created is not resolved in this appeal.