

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

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

OREGON DEPARTMENT
OF FISH AND WILDLIFE,
Petitioner,

vs.

KLAMATH COUNTY,
Respondent.

LUBA No. 2012-037

FINAL OPINION
AND ORDER

Appeal from Klamath County.

Jas. Jeffrey Adams, Attorney-in-Charge, Portland, filed the petition for review. With him on the brief were John Kroger, Attorney General, and Erin Donald, Assistant Attorney General.

No appearance by Klamath County.

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

REVERSED

08/13/2012

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

NATURE OF THE DECISION

Petitioner appeals a decision approving a partition of a 41-acre parcel.

FACTS

The applicants applied to partition their 41-acre property into two approximately 20.5-acre parcels. The subject property is zoned Non-Resource (NR) and is within the county’s Low-Medium Density Deer Winter Range Overlay Zone. The county planning department denied the partition and the applicants appealed. On appeal, the board of commissioners approved the partition. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Klamath County Land Development Code (LDC) 45.040(B) provides that a partition may be approved if it is in conformance with all standards and criteria of the LDC. The minimum lot size in the NR zone is 20 acres. LDC 56.040(A). However, LDC 57.030(B) provides that “[a]ll land divisions in big game habitat shall comply with the standards enumerated in Section 57.070.” LDC 57.070(C)(1)(A)(1) specifies that the minimum parcel size for parcels in the Low-Medium Density Deer Winter Range Overlay is 80 acres.

In its first assignment of error, petitioner argues that the board of commissioners erred in approving the partition and that the partition, which results in two 20.5-acre parcels, is prohibited by LDC 57.070(C)(1)(A)(1). Petitioner argues that the decision should be reversed because it is “prohibited as a matter of law.”¹

¹ OAR 661-010-0071(1)(c) provides in relevant part:

“(1) The Board shall reverse a land use decision when:

“(c) The decision violates a provision of applicable law and is prohibited as a matter of law.”

1 The planning director denied the application because he concluded that although the
2 NR zoning designation of the subject property allows parcels of 20 acres, the partition could
3 not be approved because it did not satisfy the 80-acre minimum parcel size in the deer winter
4 range overlay zone. Record 73-74. On appeal, the board of commissioners approved the
5 application, concluding:

6 “The property is zoned Non-Resource which allows one dwelling per lot or
7 parcel and one additional dwelling for family members if the lot or parcel size
8 is equal to or greater than 20 acres. If the land is divided into two 20 acre
9 parcels, it will allow a possible total of 4 dwellings. With a restriction that
10 only one dwelling can be built on each parcel, which is the same number of
11 dwellings possible prior to the partition, it will maintain the same density and
12 thus meet the intent of the Low-Medium Density Deer Winter Range Overlay.
13 A condition to restrict the number of dwellings has been included * * *.”
14 Record 12.

15 We understand the county to have approved the partition because it conditioned its approval
16 to ensure that the number of dwellings that could be allowed on the property will be the same
17 before and after the partition. However, even if that were the case, we do not understand
18 why the number of dwellings possible before and after partition is legally relevant in
19 determining whether the minimum parcel size that applies to properties within the deer
20 winter range overlay zone is met. There appears to be no dispute that the property is located
21 within the deer winter range overlay zone. The decision does not address LDC 57.030(B) or
22 LDC 57.070(C)(1)(A)(1) and does not explain how the partition satisfies the 80-acre
23 minimum parcel size that applies in that overlay zone. We agree with petitioner that the
24 decision to approve the partition is inconsistent with LDC 57.070(C)(1)(A)(1), which
25 specifies a minimum parcel size of 80 acres for properties located in the deer winter range
26 overlay zone. We also agree with petitioner that LDC 57.070(C)(1)(A)(1) prohibits the
27 partition as a matter of law.

28 In its second assignment of error, petitioner argues that the county’s decision violates
29 various provisions of the county’s comprehensive plan. Because we sustain the first

- 1 assignment of error and conclude that the partition is prohibited as a matter of law, we need
- 2 not address petitioner's arguments under the second assignment of error.
- 3 The county's decision is reversed.