

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

CHARLES WOODS,
Petitioner,

vs.

WALLOWA COUNTY,
Respondent.

LUBA No. 2021-064

FINAL OPINION
AND ORDER

Appeal from Wallowa County.

Charles Earl Woods filed the petition for review and argued on behalf of themselves.

Paige Sully filed a response brief and argued on behalf of respondent.

RYAN, Board Member; RUDD, Board Member, participated in the decision.

ZAMUDIO, Board Chair, did not participate in the decision.

AFFIRMED

11/18/2021

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 board of county commissioners decision denying their application to create two new parcels and to construct a new dwelling on property zoned exclusive farm use.

MOTION TO TAKE EVIDENCE

After filing the petition for review, petitioner filed a motion to take as evidence not in the record a more legible copy of Record 16-2. The county does not object to the motion. The motion is granted.

FACTS

The subject property was formerly part of a 1,157-acre parcel designated as Tax Lot 3300 and zoned exclusive farm use (EFU). In February 1994, the county approved an application for a minor partition of Tax Lot 3300 (the 1994 Partition Decision), for which a partition plat was recorded in August 1995 (the Plat).¹ The Plat created a three-acre parcel designated as Tax Lot 1600 and a 1,154-acre parcel that retained the Tax Lot 3300 designation. The 1994 Partition Decision also approved a conditional use permit to construct a dwelling on Tax Lot 1600. In addition, the 1994 Partition Decision included a condition of approval (the Condition) that no additional nonfarm parcels were allowed to be

¹ Tax Lot 3300 included land in Township 1 South, Range 44 East, Sections 22, 23, 26, 27, and 35. Record 16-2, 16-10. The subject property is located in Section 26.

1 created from the parcel that retained the Tax Lot 3300 designation.² A nonfarm
2 parcel is a parcel that does not meet the minimum parcel size for new parcels in
3 the EFU zone.

4 In 2016, five property line adjustments were recorded that resulted in the
5 current configuration of the subject property and five other parcels, each of which
6 is larger than 160 acres, the minimum parcel size for new parcels in the EFU
7 zone.³ Also in 2016, a dwelling was approved on the subject property.

8 In September 2020, petitioner, who owns the subject property, submitted
9 an application to partition the subject property to create a nine-acre nonfarm
10 parcel and to construct a nonfarm dwelling on the new parcel. In October 2020,
11 petitioner amended their application to seek approval to create two nonfarm
12 parcels and to construct a new nonfarm dwelling on one of the new parcels. The
13 other new parcel would contain the existing dwelling. The planning commission
14 denied the application, and petitioner appealed the decision to the board of county

² The Condition provided, “No further partitioning for a non-farm purpose shall be allowed. Any partitioning of the remaining parent parcel shall meet the minimum lot size of the zone.” Record 31-118.

³ The staff report describes the 2016 actions as “Multiple Lot Line Adjustments based on recognizing underlying discrete parcels resulting in (6) conforming discrete parcels from TL 3300.” Record 31-10. The parties do not otherwise describe the pre-existing or adjusted property lines, and those previous actions are not germane to resolution of the appeal.

1 commissioners. The board of county commissioners denied the appeal and
2 upheld the planning commission's decision. This appeal followed.

3 **ASSIGNMENTS OF ERROR**

4 **A. Introduction**

5 The petition for review contains a section entitled "Assignments of Error"
6 that argues that the board of county commissioners' decision is not supported by
7 substantial evidence in the whole record. ORS 197.835(9)(a)(C). The assignment
8 of error challenges findings of fact that are included in the decision.

9 The board of county commissioners' decision includes a section that sets
10 out facts that the board of county commissioners found "have been proven by
11 substantial evidence" and a section that sets out the board of county
12 commissioners' conclusions of law based on those findings of fact. To the extent
13 that we can ascertain developed challenges to the board of county
14 commissioners' conclusions of law, we address them below.

15 **B. Standard of Review**

16 Before the board of county commissioners, petitioner bore the burden of
17 proving that the applicable criteria for a nonfarm dwelling were met. The board
18 of county commissioners denied petitioner's application on four bases. Record 1-
19 7 to 1-8. In order to reverse a denial on evidentiary grounds, we must conclude
20 that "the proponent of change sustained his burden of proof as a matter of law."
21 *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979);
22 *see also Garre v. Clackamas County*, 18 Or LUBA 877, 880-81, *aff'd*, 102 Or

1 App 123, 792 P2d 117 (1990). “It is not enough for the proponent to introduce
2 evidence supporting affirmative findings of fact and conclusions on all applicable
3 legal criteria. The evidence must be such that a reasonable trier of fact could only
4 say the [proponent’s] evidence should be believed.” *Weyerhaeuser v. Lane*
5 *County*, 7 Or LUBA 42, 46 (1982). A local government’s choice among
6 conflicting evidence will not be disturbed on review as long as the decision is
7 supported by substantial evidence, *i.e.*, evidence that a reasonable person would
8 rely on to make the decision, considering the evidence in the whole record.
9 *Younger v. City of Portland*, 305 Or 346, 752 P2d 262 (1988).

10 **C. The 1994 Partition Decision and the Condition Are Not Void or**
11 **Invalid**

12 Petitioner challenges the board of county commissioners’ conclusion that
13 the Condition applies to petitioner’s application and prohibits the creation of
14 additional nonfarm parcels on the subject property. Petitioner first argues that
15 Tax Lot 3300 is not the “parent parcel” that is referenced in the Condition
16 because, according to petitioner, Tax Lot 3300 is a “tract” as defined in Wallowa
17 County Land Development Ordinance (WCLDO) 1.065.⁴ As such, petitioner
18 argues, the Condition does not apply to the subject property. Petitioner does not
19 dispute that the subject property was part of the 1,154-acre property that retained
20 the Tax Lot 3300 designation when the 1994 Partition Decision was made and

⁴ WCLDO 1.065(154) defines “tract” as “[o]ne or more contiguous lots or parcels in the same ownership.”

1 when the Plat was recorded or argue that the 2016 property line adjustments
2 described above mean that the subject property is not subject to the Condition.

3 The county responds that petitioner's argument that Tax Lot 3300 is a
4 "tract" does not establish that Tax Lot 3300 is not the "parent parcel" for purposes
5 of construing the Condition. The county points to the 1994 Partition Decision's
6 description of the proposal: "Minor Partition to create two parcels, one three acre
7 parcel for the purpose of establishing a non farm dwelling and one 1154.64 acre
8 parcel *which is the parent parcel.*" Record 31-112 (emphasis added). We agree
9 with the county. That Tax Lot 3300 may qualify as a "tract" under WCLDO 1.065
10 has no bearing on whether Tax Lot 3300 is the "parent parcel" for purposes of
11 construing the Condition. The 1994 Partition Decision establishes that the
12 references to "parent parcel" are references to the 1,154-acre property that
13 retained the Tax Lot 3300 designation after the partition was approved.

14 Petitioner also argues that the Condition is "invalid" because the Plat was
15 recorded more than one year after the 1994 Partition Decision became final. The
16 initial application for the 1994 partition and conditional use permit states that
17 "authorization of a conditional use or variance shall be void after twelve (12)
18 months unless substantial construction pursuant thereto has taken place." Record
19 16-2. On September 12, 1994, the planning director sent the applicant a letter
20 stating:

21 "This permit has been approved and is valid for twelve months with
22 the possibility of a twelve month extension, however, *the survey*
23 *must be completed and filed in the office of the Wallowa County*

1 *Clerk within six months of the date of approval.*

2 “Please be aware that perfecting the permit requires that the
3 structure must be in place upon permit expiration.” Record 7-3
4 (emphasis added).

5 The county responds that petitioner’s argument that the Condition is
6 invalid because the Plat was not recorded within six months of the decision, as
7 required by the planning director’s letter, is not supported by any legal authority.
8 We agree. Absent citation to any authority for petitioner’s legal theory, we
9 disagree that the 1994 Partition Decision and the Condition are invalid because
10 the Plat was not recorded within the time frame specified in a planning director’s
11 letter.

12 Finally, petitioner argues that, in the alternative, the Condition is “invalid”
13 because county planning staff voided the 1994 Partition Decision and the
14 Condition by writing “VOID” on the planning department’s copy of the initial
15 application. Record 16-2 is a copy of the initial application to partition Tax Lot
16 3300 (assigned MP 94/22) and for a conditional use permit to construct a nonfarm
17 dwelling on the resulting Tax Lot 1600 (assigned CUP 94/07). In the top right-
18 hand corner of the application, “CUP 94/07” is written in the space for
19 “PERMIT # ____.” “MP 94/22” is written above “CUP 94/07,” a line is drawn
20 through “CUP 94/07,” and “VOID” is written below “CUP 94/07.” Petitioner

1 argues that planning staff “voided” the 1994 Partition Decision when it wrote
2 “VOID” under “CUP 94/07.”⁵

3 The county responds that petitioner has supplied no legal authority for the
4 proposition that county planning staff may *sua sponte* make a final land use
5 decision rendering a partition or a conditional use permit invalid by writing
6 “VOID” on the initial application. We agree, and we are aware of no authority
7 that supports that proposition. Moreover, to the extent that petitioner’s
8 assignment of error is a challenge to the evidence that the board of commissioners
9 relied on to conclude that the Condition remains in effect and applies to the
10 subject property, petitioner has not established that Record 16-2 is not evidence
11 that a reasonable decisionmaker would rely on to reach that conclusion. *Younger*,
12 305 Or 346.

13 **D. Remaining Assignments of Error**

14 Where a local government denies a land use application on multiple
15 grounds, LUBA will affirm the decision on appeal if at least one basis for denial
16 survives all challenges. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or
17 LUBA 256, 266, *aff’d*, 195 Or App 762, 100 P3d 218 (2004), *rev den*, 338 Or 17
18 (2005). In that circumstance, LUBA typically does not address challenges
19 directed at other, alternate bases for denial. Addressing alternate bases for denial

⁵ According to petitioner, the nonfarm dwelling approved on Tax Lot 1600 was constructed in 2018. Petition for Review 6.

1 once LUBA has affirmed at least one valid basis for denial would result in LUBA
2 rendering what are essentially advisory opinions, which is not consistent with the
3 statutory mandate that LUBA's review be conducted pursuant to sound principles
4 of judicial review. ORS 197.805. Accordingly, we do not address the remaining
5 assignments of error.

6 The county's decision is affirmed.