

SEP 11 4 55 PM '84

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

| | | | |
|---|------------------|---|-----------------|
| 3 | FRANCES C. PROW, |) | |
| | |) | |
| 4 | Petitioner, |) | LUBA No. 84-052 |
| | |) | |
| 5 | vs. |) | |
| | |) | FINAL OPINION |
| 6 | MARION COUNTY, |) | AND ORDER |
| | |) | |
| 7 | Respondent. |) | |

8 Appeal from Marion County.

9 Wallace W. Lien, Salem, filed the Petition for Review and
10 argued the cause on behalf of Petitioner. With him on the
brief were Rhoten, Brand and Lien.

11 Robert C. Cannon, Salem, filed the response brief and
12 argued the cause on behalf of respondent.

13 BAGG, Chief Referee; DuBAY, Referee; KRESSEL, Referee;
14 participated in this decision.

15 REMANDED 09/11/84

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

18
19
20
21
22
23
24
25
26

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals the denial of her application to
4 partition land in Marion County. Petitioner asks that we
5 reverse the denial or, in the alternative, remand the decision
6 to Marion County.

7 FACTS

8 The property is 27.59 acres and bears a plan and zone
9 designation of "Special Agriculture" (SA). The parcel consists
10 predominately of SCS Class III and IV soils, with approximately
11 15 percent Class VI soil.

12 In August of 1983, petitioner applied to partition the
13 property into two parcels, one of 2.04 acres and the remainder
14 of 25.55 acres. The application was denied by the Marion
15 County planning director, and his decision was appealed to the
16 Marion County hearings officer. The hearings officer issued an
17 order denying the application on March 12, 1984. Petitioner
18 appealed this decision to the Marion County Board of
19 Commissioners, and on March 28, 1984, the county commissioners
20 voted to uphold the hearings officer's order. There was no
21 specific personal notice to petitioner or to petitioner's
22 counsel prior to the action of the county commission.

23 This appeal followed.

24 ASSIGNMENT OF ERROR NO. 1

25 "Marion County's Final Order violated Petitioner's
26 Constitutional right to due process and Ordinance
122.120(c) in that it was made at a meeting (and with

1 discussion) without giving specific notice and
2 opportunity to be heard to Petitioner."

3 Petitioner argues the procedure utilized by the county
4 commission violated petitioner's right to due process of
5 law.¹ Petitioner complains no notice was given to her prior
6 to the commission's decision. She adds that one commissioner
7 discussed the nature of the application and whether it met
8 applicable criteria with the county planning director at the
9 governing body's meeting. Petitioner complains it is unfair
10 and prejudicial not to be given advance notice of such a
11 meeting. Petitioner claims she should have been afforded the
12 opportunity to provide rebuttal testimony.

13 Petitioner adds a separate argument that Marion County
14 Zoning Ordinance provisions controlling appeals of land use
15 decisions to the county governing body were violated.
16 Petitioner says because there was discussion between a member
17 of the county commission and the planning director about the
18 application, county ordinance provisions governing appeals to
19 the county board were violated.

20 The Marion County subdivision and partitioning ordinance
21 (MCSPO) and the Marion County zoning ordinance (MCZO) control
22 this application. Because the land division is located in the
23 SA zone and a non-farm parcel is to be created, the application
24 is processed as a conditional use. It must meet the
25 requirements listed in MCZO 137.070(b)(2) and MCZO 137.040. An
26 approval or denial of an application can be appealed to the

1 county board of commissioners under MCZO 122.120(c). MCZO
2 122.120(c) gives the county commission express authority to
3 "summarily" affirm the decision of the hearings officer or the
4 planning commission if the county commission finds that the
5 facts do not warrant a further hearing. We believe this
6 ordinance controls petitioner's challenges and requires us to
7 uphold the county in this assignment of error.

8 The ordinance specifically provides for just the kind of
9 procedure used by the county commission in this case. The
10 record indicates a member of the county commission engaged in a
11 brief discussion with the planning director on the history of
12 the application. Record at 4. There is no indication the
13 county commission reopened the record for argument or for the
14 taking of new evidence. Without a clear showing the discussion
15 in question was prejudicial to petitioner, or that the due
16 process guarantee in the federal constitution entitled
17 petitioner to a procedure other than that provided by the
18 county, we have no basis on which to sustain the challenge.
19 Compare, McCrystal v. Polk County, 1 Or LUBA 145 (1980) and
20 Lower Lake Subcommittee v. Klamath County, 3 Or LUBA 55 (1981).

21 We find no violation of petitioner's federal constitutional
22 right to due process of law or of the Marion County zoning
23 ordinance as alleged.

24 The first assignment of error is denied.²

25 ASSIGNMENTS OF ERROR NOS. 2, 3 and 4

26 Each of the last three assignments of error arise from

1 petitioner's view Marion County erred in finding that the
2 application does not meet the criterion in MCZO
3 137.040(d)(3).³ That provision requires the county to make a
4 finding that a proposed partition will "not materially alter
5 the stability of the overall land use pattern of the area."
6 Petitioner claims the county failed to identify the "area"
7 under consideration. Moreover, Petitioner claims the findings
8 do not support a conclusion the pattern will be materially
9 altered because the pattern is principally rural residential in
10 nature. The county's finding in this regard is as follows:

11 "b. Most critically, the proposed nonfarm parcel must
12 not materially alter the stability of the overall
13 land use pattern of the area, and the proposed
14 use must comply with the purpose and intent of
15 the agricultural policies of the Marion County
16 Comprehensive Plan. The proposed 2.04 acre
17 parcel would allow for the establishment of a new
18 nonfarm homesite. As such, it could set a
19 precedent for many more nonfarm homesites in the
20 SA zone. There are many wooded areas with Class
21 I through IV soil in the Special Agricultural
22 zone. They have the potential for grazing,
23 limited forestry activities, growing of Christmas
24 trees, and other resource uses. To allow these
25 to be parcelized for acreage homesites would be
26 inconsistent with the SA zone and the
Comprehensive Plan." Record at 17.

20 First, we do not accept petitioner's claim the county has
21 not defined the area. The findings discuss the borders of the
22 property, and the uses immediately surrounding it. In addition
23 to the above-quoted finding, the county noted:

24 "To the southeast is a 2 acre rural homesite with a
25 dwelling and further south are two rural residential
26 parcels, both with dwellings and each less than 5
acres in size. To the southwest are two parcels, the
first approximately 3 acres in size and generally open

1 and unimproved. The second is approximately 4 acres
2 in size and has a dwelling, several outbuildings, and
a pasture area, otherwise the parcel is idle.

3 "The subject property is bordered to the west by River
4 Road S. and a railroad right-of-way, beyond which lie
5 two parcels: One rural residential homesite which is
6 2.54 acres in size; the second parcel is 1.21 acres
and is currently unimproved. Immediately west of
these parcels is the Willamette River, which is the
boundary between and Marion and Polk Counties."
Record at 14.

7
8 We believe these two paragraphs, taken together, show the
9 county defined the "area" when it considered this application.
10 However, as petitioner points out, what emerges from these
11 findings appears to be a pattern of rural residential
12 development, not a mix of rural residential development and
13 farm uses. The stable pattern in the area, then, seems to be
14 rural residential development. The only finding discussing
15 farming says there are wooded acres in the SA zone which

16 "have the potential for grazing, limited forestry
17 activities, growing of Christmas trees, and other
resource uses." Record at 17.

18 There is no finding that the particular "area" in which this
19 parcel exists has such farm potential. The proposal for a
20 small parcel for a dwelling is consistent with the land use
21 pattern in the area as described in the findings. Therefore,
22 petitioner is correct that the county's findings do not
23 demonstrate that the proposed use does not comply with MCZO
24 137.040(d)(3).⁴

25 While petitioner's complaint under MCZO 137.040(d)(3) is
26

1 well-taken, it does not require us to reverse or remand the
2 decision if there are other findings which may sustain the
3 denial. Weyerhaeuser v. Lane County, 7 Or LUBA 42, 46 (1982).

4 The finding explaining the reason for denial addresses more
5 than the "land use stability" criterion in MCZO
6 137.030(d)(3).⁵ The county also states that to allow further
7 parcelization would be inconsistent with the SA zone and the
8 comprehensive plan because parcelization "could set a precedent
9 for many more non-farm homesites in the SA zone."⁶ Record at
10 17. This conclusion may be valid, but at this stage we can not
11 say it is sufficient to support the decision.

12 First, we note that consistency with the SA zone is not a
13 criterion for approval under MCZO 137.030(d). Manifestly,
14 approval or denial of an application must rest upon criteria in
15 the ordinance, and it does not appear that conformity to a
16 broad policy statement is such a criterion.

17 The remaining criterion is MCZO 137.040(b)(6), requiring
18 conformity with the comprehensive plan. The county's claim the
19 parcelization is inconsistent with the comprehensive plan
20 suffers because we are not told in the final order what
21 specific policies of the plan prohibit the parcelization under
22 review here. We conclude the petitioner's challenge is well
23 taken because the county has not adequately demonstrated how
24 the application fails to meet applicable criteria.

25 Petitioner also argues the finding is not supported by
26 substantial evidence in the record. She asserts she introduced

1 considerable evidence that her property was similar to other
2 property in the area (which she defines). She believes this
3 evidence shows her proposal is in keeping with, and not
4 different from, the overall land use pattern in the area.⁷
5 The evidence petitioner states should have been completely
6 addressed by the county includes evidence of parcelization and
7 dwelling units existing on property not only in the SA zone,
8 but also in the Acreage Residential (AR) zone. The AR zone
9 allows development of acreage homesites on land unsuitable for
10 farm or forest use. Therefore, even if the county were to have
11 an obligation to address the evidence introduced by petitioner,
12 which we question, see Morse v. Clatsop County, LUBA No.
13 84-026, August 31, 1984, it appears the evidence upon which
14 petitioner relies is, in large part, not relevant.

15 The second, third and fourth assignments of error are
16 sustained insofar as they allege the county's decision fails to
17 show a violation of the criteria in MCZO 137.040(b).

18 The decision of Marion County is remanded for application
19 of MCZO 137.040(b).

20
21
22
23
24
25
26

FOOTNOTES

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

1 We assume the claim arises under the federal constitution. The state constitution contains no due process clause, as Justice Linde has pointed out. Linde, Without Due Process, 49 Or Law Rev 125 (1970).

2
ASSIGNMENT OF ERROR NO. 2
"Marion County's Order is insufficient and improper in that it did not address evidence which conflicts with the conclusion reached in that Order."

3
ASSIGNMENT OF ERROR NO. 3
"Marion County's Order is inadequate and unlawful in that the Order does not define the 'area' used in its determination that the application does not meet criteria found at MCZO 137.040(d)(3)."

4
ASSIGNMENT OF ERROR NO. 4
"Marion County's decision to deny Petitioner's application is not supported by substantial evidence in the record."

3
We note petitioner does not claim that Marion County ordinance providing for such summary disposal of appeals violates any constitutional guarantees.

4
It is not precisely clear that the county is saying the proposal will alter the stability of the area. However, the wording of the finding suggests the application does not meet the "stability" criterion.

5
MCZO 137.030(d)(1-6) provides as follows:

"(1) The use is compatible with farm or forest uses and is consistent with ORS 215.243; and

- 1 "(2) It does not interfere seriously with farming or
2 forest practices on adjacent lands; and
- 3 "(3) It does not materially alter the stability of the
4 overall land use pattern of the area; and
- 5 "(4) Adequate fire protection and other rural services
6 are available; and
- 7 "(5) Will not have a significant adverse impact on
8 timber production, grazing land, watersheds, fish
9 and wildlife habitat, soil and slope stability,
10 air and water quality and outdoor recreation
11 activities; and
- 12 "(6) The proposed use complies with the purpose and
13 intent of the agricultural policies in the Marion
14 County Comprehensive Plan."

15

16 6 The purposes section of the SA zone is relevant to this
17 inquiry.

18 "The SA zone is applied in areas characterized by
19 small farm operations or areas with a mixture of good
20 and poor farm soils where the existing land use
21 pattern is a mixture of large and small farm units and
22 some acreage homesites. The farm operations range
23 widely in size and include grazing of livestock,
24 orchards, grains and grasses, christmans trees and
25 specially crops. The range in size of management
26 units present no significant conflicts and allow
27 optimum resource production from areas with variable
28 terrain and soils. It is not deemed practical or
29 necessary to the continuation of the commercial
30 agricultural enterprise that contiguous ownerships be
31 consolidated into large parcels suitable for large
32 scale management. This zone allows the flexibility in
33 management needed to obtain maximum resource
34 production for these lands. It emphasizes farm use
35 but forest use is allowed in areas designated Special
36 Agricultural in the Marion County Comprehensive Plan.

37 "The SA zone retains Class I through IV soils in
38 commercial farm units comparable to those in the
39 vicinity or in small scale or specialty commercial
40 farms where the land is especially suited for such
41 farming. The zone also allows the segregation of
42 certain areas of Class V through VIII soils not
43 suitable or needed for farm use and permits the use of

1 such areas for rural residential homesites if
2 compatible with nearby farm and forest uses. The SA
3 zone is intended to be a farm zone consistent with ORS
4 215.203."

4 7
5 We understand her to argue that no reasonable person would
6 agree with the county given her evidence. See Miles v.
7 Clackamas Co., 48 Or App 951, 618 P2d 985 (1980).
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26