

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

REID GIESY,)
)
Petitioner,)
)
vs.)
) LUBA No. 92-111
BENTON COUNTY,)
) FINAL OPINION
Respondent,) AND ORDER
)
and)
)
ROBERT C. MONTGOMERY and)
DEBORAH S. MONTGOMERY,)
)
Intervenors-Respondent.)

Appeal from Benton County.

Steven M. Claussen, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Williams, Fredrickson, Stark & Weisensee.

Janet S. McCoy, Corvallis, filed a response brief and argued on behalf of respondent.

Robert C. Montgomery and Deborah S. Montgomery, Philomath, filed a response brief. Robert C. Montgomery argued on his own behalf.

KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

REMANDED 12/08/92

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the board of county
4 commissioners approving an application for a farm dwelling
5 on a 40.17 acre parcel zoned Exclusive Farm Use (EFU).

6 **MOTION TO INTERVENE**

7 Robert C. Montgomery and Deborah S. Montgomery move to
8 intervene on the side of respondent in this appeal
9 proceeding. Petitioner does not object to the motion, and
10 it is allowed.

11 **FACTS**

12 Intervenors own both the subject parcel and an adjacent
13 80.38 acre parcel also zoned EFU. Both the subject and
14 adjacent parcel are used for agricultural operations,
15 including Christmas tree and hay production, as well as
16 livestock pasture.

17 The proposal is to allow the contract purchasers of the
18 subject property, the applicants below, to construct a
19 dwelling on the subject property. The applicants propose to
20 establish on the subject parcel a livestock operation
21 involving the raising of purebred sheep and cattle.

22 The planning commission approved the application.
23 Petitioner appealed to the board of commissioners. The
24 board of commissioners affirmed the decision of the planning
25 commission, and this appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 "The county failed to make adequate findings in
3 concluding [Benton County Zoning Ordinance] BZO
4 Sec. 55.110(3)(b), which requires consideration of
5 'the median size of commercial farms which operate
6 management units within one-half mile of the
7 proposed site of the farm dwelling,' did not apply
8 to this application."

9 BZO 55.110(3) requires an applicant to establish that
10 the size of the farm unit on which a farm dwelling is
11 proposed is "consistent with the size of existing commercial
12 farms in the area when considering":

13 * * * * *

14 "(b) The median size of commercial farms which
15 operate management units within one-half
16 (1/2) mile of the proposed site of the farm
17 dwelling as reported by the Oregon State
18 University extension service, agricultural
19 conservation and stabilization services or
20 other similar source.

21 "(c) If the type of farm products produced on the
22 applicant's farm is not represented within
23 the area surveyed under subsection (b) of
24 this section, [then the county shall
25 consider] the median size of farms reported
26 in the 1982 Census of Agriculture Special
27 Tabulations primarily engaged in the
28 production of similar products within Benton
29 County, or within Oregon District 2 if data
30 is suppressed for Benton County.

31 * * * * *

32 The county determined the type of products to be
33 produced on the subject property are not represented in the
34 one-half mile area surrounding the property and, therefore,
35 that the median farm size determination should be made under

1 BZO 55.110(3)(c) rather than under BZO 55.110(3)(b).
2 Specifically, the county determined the proposed farm
3 operation is distinguishable from commercial farm operations
4 within the one-half mile area because:

5 "The single purebred cattle operation adjacent [to
6 the subject property] is not comparable because
7 the "operator leased the property, there are no
8 sheep, and there is a lesser intensity of breeding
9 techniques. There are no combination purebred
10 cattle and sheep breeding operations of this
11 degree of intensity in the area. * * *" Record
12 14.

13 The dispute under this assignment of error is whether
14 the county correctly concluded, pursuant to BZO
15 55.110(3)(c), that the type of farm products to be produced
16 on the proposed farm unit is unrepresented in the one-half
17 mile area surveyed pursuant to BZO 55.110(3)(b). If the
18 county is correct, the proposed farm unit is not required to
19 be consistent with the 126 acre median commercial farm unit
20 size found in that one-half mile area.

21 The exception contained in BZO 55.110(3)(c) is based on
22 the products to be produced on a proposed farm unit. The
23 products to be produced on this proposed farm unit are
24 purebred sheep and cattle. The uncontroverted evidence in
25 the record establishes that commercial farm units producing
26 purebred cattle and purebred sheep exist within the one-half
27 mile area surrounding the subject property. The county
28 interprets the exception in BZO 55.110(3)(c) to apply

1 because the methods of management¹ for producing the
2 proposed farm products will be different from the method of
3 management used by the commercial farm units in the area
4 that are producing the same products. This is clearly
5 contrary to the express words used in BZO 55.110(3)(c).
6 Clark v. Jackson County, 313 Or 508, 515, ____ P2d ____
7 (1992). BZO 55.110(3)(c) requires that there be no
8 commercial farm operations in the area producing
9 representative farm products, not that there be no farm
10 operations employing precisely the same farm management
11 techniques.

12 Further, we also believe the county's interpretation of
13 BZO 55.110(3)(c), that area farm units are not
14 representative of the proposed farm unit because area farm
15 units produce purebred cattle or sheep, rather than a
16 combination of purebred sheep and cattle, is also clearly
17 contrary to the express terms of BZO 55.110(3)(c).
18 Regardless of the fact that the proposed farm operation will
19 involve raising both purebred sheep and cattle, those farm
20 products, viz, sheep and cattle, are produced on farm units
21 within the one-half mile area.

22 The first assignment of error is sustained.

23 **SECOND ASSIGNMENT OF ERROR**

24 "Even if it were proper for the county to apply

¹The applicant proposes to engage in specialized herd management techniques including embryo transfer for the conception of young.

1 BZO Sec. 55.110(3)(c), rather than Sec.
2 55.110(3)(b), it misconstrued the applicable law,
3 failed to make adequate findings and made a
4 decision not supported by substantial evidence in
5 concluding the proposed 40 acre farm size would be
6 consistent with the size of existing commercial
7 farm operations in the county."

8 This assignment of error assumes that the challenged
9 decision correctly concludes the area farm units are not
10 representative of the proposed farm unit, and that the
11 county correctly analyzed the farm unit size question under
12 BZO 55.110(3)(c), rather than BZO 55.110(3)(b). However, we
13 determine above that the county's determination in this
14 regard is erroneous.

15 The second assignment of error is denied.

16 **THIRD ASSIGNMENT OF ERROR**

17 "The county failed to make adequate findings and
18 made a decision not supported by substantial
19 evidence in concluding the proposed dwelling will
20 provide for a farm use compatible with surrounding
21 farm enterprises."

22 BZO 55.110(3)(d) requires the county to consider the
23 following, as a prerequisite to approval of a proposed farm
24 dwelling:

25 "The extent to which the proposed dwelling will
26 provide for the establishment or expansion of farm
27 uses which can be integrated or will be compatible
28 with surrounding farm enterprises."

29 The challenged decision determines:

30 "The applicant's management plan provides that
31 livestock water will be obtained from a domestic
32 well to be drilled prior to the construction of a
33 dwelling. The neighbors to the north and south

1 have good wells, and a local well driller has
2 informed them that there have been no serious
3 problems with water in the immediate area.
4 Irrigation of the pasture is probably not
5 feasible, and none is planned. Information
6 provided by the Benton County Extension Service
7 shows that water consumption is 6-12 gallons per
8 day for cattle, 6-8 gallons per day for calves,
9 and 10-12 gallons per day for two year old cattle.
10 Sheep consume 1 gallon of water per day, except
11 when nursing, and then it may be 1.5 gallons per
12 day. Lambs consume 0.5 gallon per day. There are
13 wells in the area that support similar uses. The
14 adjacent property to the north * * * has a well
15 which produces five gallons per minute by pump
16 test. The adjacent property to the south, owned
17 by [intervenor] has a well which produces twenty
18 gallons per minute by pump test. There is
19 sufficient water to support the proposed use."
20 Record 14-15.

21 "The proposed dwelling would provide for the
22 establishment of a new farm use that would be
23 compatible and complementary to surrounding farm
24 enterprises in that adjacent farm uses include:
25 Pasture for sheep and cattle, and hay and
26 Christmas tree production. The establishment of a
27 purebred cattle and sheep farm would produce
28 breeding stock of a value to other commercial
29 producers in the area. Therefore, the
30 establishment of a dwelling will enable a
31 significant intensification and expansion of
32 cattle breeding farm uses * * *." Record 17.

33 Under this assignment of error, petitioner argues the
34 county's findings that the proposed farm dwelling is
35 compatible with surrounding farm enterprises are inadequate
36 and not supported by substantial evidence in the whole
37 record. Specifically, petitioner contends the challenged
38 decision fails to establish compliance with BZO 55.110(3)(d)
39 because it envisions providing water for livestock and

1 domestic use from wells drilled for those purposes or from
2 springs. Petitioner argues that this could have an adverse
3 effect on area water users. We address these questions
4 separately below.

5 **A. Adequacy of Findings**

6 Petitioner argues the challenged findings are
7 inadequate because they do not establish the county
8 independently verified the facts expressed in the challenged
9 decision concerning the proposal's impacts on water and
10 compatibility with farming enterprises in the area.

11 We disagree that the county is required to establish it
12 independently verified the evidence submitted by the
13 applicant for development approval below. That the findings
14 fail to establish such an investigation occurred provides no
15 basis for reversal or remand of the challenged decision.

16 This subassignment of error is denied.

17 **B. Evidentiary Support**

18 We have reviewed the evidence cited by the parties.
19 While there is evidence in the record that some area wells
20 are experiencing water shortages, there is also evidence in
21 the record that not all area wells are experiencing such
22 shortages, and that some area wells are functioning without
23 difficulty. Further, there is no dispute that regardless of
24 whether a dwelling is constructed on the subject property, a
25 well could be drilled or a spring could be used to water
26 livestock. The relevant question is whether there is

1 evidence that the proposed dwelling will be compatible with
2 area farm enterprises, not whether the proposed farm use
3 will be compatible with area farms. Thus, while we agree
4 with petitioner that water impacts on area farm operations
5 are relevant to determining compatibility, the relevant
6 water quantity impacts on area farm operations are those due
7 to the proposed dwelling.

8 Further, that certain domestic wells in the area may be
9 experiencing water shortages is not in itself a basis under
10 the BZO for determining the proposed farm dwelling is
11 incompatible with area farm operations. Again, the relevant
12 question is whether the proposed dwelling will have adverse
13 impacts on area farm operations, not domestic water users.
14 Of the evidence cited by petitioner, only one person who
15 testified concerning area water shortages is identified as a
16 "farmer." While one could infer from the evidence cited by
17 petitioner that the proposed dwelling could be incompatible
18 with area farming enterprises because it would add another
19 water user, the evidence in this regard is general. The
20 evidence cited by the county includes testimony of a well
21 driller to the effect that the area does not have any
22 significant water quantity problems, and the testimony of
23 intervenors that their adjacent property has no water
24 quantity problems. Petitioner's evidence does not so
25 undermine the evidence relied upon by the county as to make
26 it unreasonable for the county to rely upon it.

1 The evidence cited by the parties supports both
2 petitioner's and the county's positions. Where there is
3 conflicting believable evidence, the choice of which
4 evidence to believe belongs to the county. Wissusik v.
5 Yamhill County, 20 Or LUBA 246, 260 (1990). We conclude a
6 reasonable decision maker could determine, as the county
7 did, that the proposed farm dwelling would not be
8 incompatible with area farm enterprises. We will not
9 disturb the county's choice here.

10 This subassignment of error is denied.

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 "The county acted in violation of state standards
14 for lot sizes."

15 OAR 660-05-025(1) provides that the Statewide Planning
16 Goal 3 (Agricultural Lands) minimum lot size standard is to
17 be applied to the "approval of farm dwellings on preexisting
18 lots to prevent increased development from interfering with
19 neighboring farms." OAR 660-05-025(1) establishes that to
20 approve a farm dwelling, the property on which such dwelling
21 is proposed to be situated must "mee[t] the minimum lot size
22 standard." We assume the "minimum lot size standard"
23 referred to is that described in OAR 660-05-015. OAR 660-
24 05-015 ("Minimum Lot Size Standard") provides as follows:

25 "(1) Goal 3 states, 'such minimum lots sizes as
26 are utilized for any farm use zones shall be
27 appropriate for the continuation of the
28 existing agricultural enterprise within the

1 area.' This Goal phrase is the required
2 minimum lot size standard to be used to
3 determine appropriate lot sizes in EFU zones.
4 It is applied when approving both the
5 creation of new lots and farm dwellings on
6 pre-existing lots.

7 "(2) Goal 3 does not require a specific acre size
8 * * *.

9 "(3) The Goal 3 minimum lot size can be applied in
10 various ways, including but not limited to
11 the following:

12 * * * * *

13 "(c) To determine performance standards,
14 which are used to decide appropriate lot
15 sizes for farm and nonfarm uses on a
16 case-by-case basis.

17 "(4) Counties shall apply the Goal 3 standard on
18 minimum lots sizes in the way which best
19 meets their local needs. * * * The standard
20 shall be applied in a way adequate to
21 maintain continuation of the existing
22 commercial agriculture in the area.

23 * * * * *

24 OAR 660-05-015(6) provides the following methodology for
25 applying the minimum lot size requirements expressed above:

26 "(a) The minimum lot size(s) needed to
27 maintain the existing commercial
28 agricultural enterprise shall be
29 determined by identifying the types and
30 sizes of commercial farms in the area.
31 When identifying commercial farms,
32 entire commercial farms shall be
33 included, not portions devoted to a
34 particular type of agriculture. The
35 identification of commercial farms may
36 be conducted on a county wide or
37 subcounty basis.

38 "(b) Commercial agricultural operations to be

1 identified should be determined based on
2 type of products produced value of
3 products sold, yields, farming
4 practices, and marketing practices.

5 "(c) Local governments which apply Goal 3's
6 minimum lot size standard on a case-by-
7 case basis may satisfy the commercial
8 agricultural identification requirement
9 in subsection (6)(a) of this rule by
10 identifying the sizes and other
11 characteristics of existing commercial
12 farms in an area which is large enough
13 to represent accurately the existing
14 commercial agricultural enterprise
15 within the area containing the
16 applicant's parcel.

17 * * * * *

18 BZO 55.110(3)(b) provides requirements similar to
19 OAR 660-05-015(6) for the identification of the appropriate
20 minimum lot size for an agricultural area. The only
21 significant difference between the farm size identification
22 methodologies in BZO 55.110(3)(b) and OAR 660-05-015(6), is
23 that the county allows the quest for existing commercial
24 agricultural operations to be limited to a one-half mile
25 area surrounding the subject property. However, in a
26 similar circumstance, we stated that a one-half mile radius
27 provided in a county ordinance was a minimum standard, and
28 if no representative agricultural operations are found in
29 that minimum area, then the county must broaden the inquiry.
30 Still v. Marion County, ___ Or LUBA ___ (LUBA No. 91-092,
31 November 15, 1991), slip op 10-11. This is essentially what
32 BZO 55.110(3)(c) requires.

1 Both OAR 660-05-015(6) and BZO 55.110(3)(b) require the
2 county to determine (1) the agricultural area to be
3 analyzed, (2) the nature of the "existing" commercial
4 agricultural enterprises in that area, and (3) the "lot"
5 size appropriate for the continuation of the identified
6 existing commercial agricultural enterprises. Here, as
7 explained under the first assignment of error, there are
8 existing purebred sheep and cattle agricultural operations
9 in the one half-mile area. Accordingly, the challenged
10 decision is inconsistent with both OAR 660-05-015(6) and BZO
11 55.110(3)(b) because it fails to determine and apply to the
12 subject application for a farm dwelling a lot size
13 appropriate to the continuation of the existing commercial
14 agricultural purebred cattle and sheep enterprises in the
15 one-half mile area surrounding the subject parcel.

16 The forth assignment of error is sustained.

17 The county's decision is remanded.