

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MELVIN FIEGI, )  
Petitioner, ) LUBA No. 91-084  
vs. ) FINAL OPINION  
CLACKAMAS COUNTY, ) AND ORDER  
Respondent. )

## Appeal from Clackamas County.

Gary K. Kahn, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Reeves, Kahn & Eder.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of respondent.

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

REMANDED 10/16/91

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 county hearings  
4                   officer denying an application for nonfarm dwelling  
5                   approval.

6                   **FACTS**

7                   The subject parcel is 4.2 acres in size and is zoned  
8                   Exclusive Farm Use (EFU). The subject property is  
9                   unimproved and wooded. A tributary of Deep Creek runs along  
10                  the property's northern border. The property has never been  
11                  put to farm use, although there are farm uses in the  
12                  vicinity of the subject property, including the production  
13                  of nursery stock, production of Christmas trees, and the  
14                  grazing of livestock.

15                  Petitioner submitted an application for nonfarm  
16                  dwelling approval. The planning department denied  
17                  petitioner's application. Petitioner appealed to the  
18                  hearings officer. The hearings officer affirmed the  
19                  decision of the planning department and denied petitioner's  
20                  application.<sup>1</sup> This appeal followed.

21                  **FIRST ASSIGNMENT OF ERROR**

22                  "Respondent misconstrued the requirements of the  
23                  Clackamas County Zoning and Development Ordinance

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<sup>1</sup>The county determined the application for the proposed nonfarm dwelling met all applicable county standards, except for one. The only standard the challenged decision determines is unmet is ZDO 401.05(A)(3), quoted in the text, infra.

1           (ZDO),   Section   401.05(A)(3),   by   failing   to  
2   properly   identify   the   existing   land   use   pattern   of  
3   the   area."

4           ZDO  401.05(A)(3)  provides  the  county  may  approve  an  
5  application  for  a  nonfarm  dwelling  if  it  determines  the  
6  proposed  dwelling:

7           "[d]oes  not  materially  alter  the  stability  of  the  
8  overall  land  use  pattern  in  the  area."

9           The  county  findings  regarding  the  proposal's  compliance  with  
10 ZDO  401.05(A)(3)  include  the  following:

11           "Both  the  information  from  the  Planning  Division  
12  staff  and  the  aerial  photograph  establish  that  
13  this  area  is  generally  comprised  of  larger  
14  properties  in  some  for[m]  of  agricultural  use.  
15  [T]his  record  fails  to  show  any  nonfarm  dwellings  
16  within  this  area.  \*  \*  \*  The  applicant  has  pointed  
17  to  the  residential  development  southerly  of  
18  Boitano  Road,  along  Cottonwood  Drive,  as  
19  consistent  with  this  application.  Those  
20  properties  are  zoned  RRFF-5,  and  cannot  be  
21  considered  in  this  analysis.  \*  \*  \*  Record  3.

22           Petitioner  contends  these  findings  lack  sufficient  
23  detail  to  establish  the  land  use  pattern  of  the  area.  
24  Petitioner  complains  the  county  should  have  specifically  
25  identified  in  its  findings  those  parcels  on  which  dwellings  
26  are  located  and  indicate  whether  such  dwellings  support  
27  nonfarm  or  farm  uses.

28           Petitioner,  as  the  applicant  for  the  nonfarm  dwelling  
29  approval,  bears  the  burden  of  establishing  the  proposed  
30  nonfarm  dwelling  will  "not  materially  alter  the  stability  of  
31  the  overall  land  use  pattern  in  the  area"  under  ZDO  
32  401.05(A)(3).  Here,  the  county's  findings  indicate  it

1 examined and selected an area for consideration shown on an  
2 aerial photograph. The findings also indicate the county  
3 (1) excluded from the area it considered those parcels zoned  
4 RRFF-5, (2) examined the types of uses occurring on the land  
5 in the area it considered, and (3) concluded those uses were  
6 "generally" agricultural. See Sweeten v. Clackamas County,  
7 17 Or LUBA 1234, 1244-46 (1989); see also Morley v. Marion  
8 County, 16 Or LUBA 385, 389 (1988). The findings also  
9 indicate the applicant did not furnish sufficient  
10 information to conclude whether any nonfarm dwellings are  
11 present in the area.

12 We note at the outset the county properly excluded from  
13 its consideration residential development on land zoned for  
14 residential use. Schaad v. Clackamas County, 15 Or LUBA 70  
15 (1986). Further, we believe the challenged findings are  
16 adequate to establish there are no nonfarm dwellings in the  
17 area considered. The county adopted the challenged findings  
18 on the basis of evidence the applicant submitted to it. The  
19 county is not required to develop additional evidence to  
20 support a denial decision. It may, based upon the evidence  
21 submitted by the applicant (and others), conclude the  
22 applicant has not carried his burden of establishing the  
23 proposal complies with relevant approval standards, as the  
24 county did in this case.

25 We agree with the county that its findings are adequate  
26 to establish that properties within the area surrounding the

1 subject property, as represented on an aerial photograph  
2 (and excluding parcels zoned RRFF-5), consist of large  
3 parcels generally in agricultural use, and that there are no  
4 nonfarm dwellings in this area.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 "Respondent misconstrued the requirements of the  
8 ZDO, Section 401.05(A)(3), by adopting findings  
9 which are inadequate to explain how the proposed  
10 nonfarm dwelling will materially alter the  
11 stability of the land use pattern of the area."

12 **THIRD ASSIGNMENT OF ERROR**

13 "Respondent erred in failing to address the  
14 balance between resource and nonresource use after  
15 Petitioner produced evidence of no impact on that  
16 balance."

17 **FOURTH ASSIGNMENT OF ERROR**

18 "There is not substantial evidence in the record  
19 to support a finding of noncompliance with ZDO  
20 Section 401.05(A)(3)."

21 Petitioner challenges the adequacy of, and evidentiary  
22 support for, the following findings of noncompliance with  
23 ZDO 401.05(A)(3):

24 " \* \* \* Approval of this nonfarm dwelling would be  
25 out of character with this agricultural area and  
26 would add pressure for further residential  
27 development on those wooded parcels with limited  
28 agricultural potential. Approval of this  
29 application would constitute a break in the  
30 stability of this development pattern. \* \* \*"  
31 Record 3.

32 These findings determine that adding one nonfarm  
33 dwelling to the area will, in itself, violate the

1 "stability" standard. However, we have stated in Morley v.  
2 Marion County, supra, that such an interpretation of the  
3 "stability" standard is incorrect. We stated:

4       "If finding that a nonfarm parcel or dwelling  
5 would be added to an area zoned EFU in itself  
6 justifies a conclusion that the approval would  
7 materially alter the stability of the area's land  
8 use pattern, there would be no point in using the  
9 'stability' standard as an approval criterion, as  
10 no division or conditional use permit would ever  
11 satisfy it." Id. at 390.

12       The above quoted findings also state the "stability"  
13 standard is violated by approving the proposed nonfarm  
14 dwelling because the proposed dwelling would create pressure  
15 for further nonfarm development in the area. In Morley v.  
16 Marion County, supra, 16 Or LUBA at 390-91, this Board  
17 reiterated that under a "stability" standard such as  
18 ZDO 401.05(A)(3), denial of a nonfarm dwelling based on its  
19 precedential effect requires a county to determine there is  
20 a "history of progressive partitioning and homesite  
21 development in the area" or there are "other similarly  
22 situated properties in the area for which similar nonfarm  
23 dwelling applications would be encouraged." See also Stefan  
24 v. Yamhill County, 18 Or LUBA 820, 835-38 (1990).

25       Here the county adopted no findings determining there  
26 is a history in the area of progressive partitioning and  
27 homesite development or that there are similarly situated  
28 properties in the area. Therefore, the county did not  
29 establish an adequate basis for determining noncompliance

1 with ZDO 401.05(A)(3), based on the proposed nonfarm  
2 dwelling's precedential effect.

3 We do not reverse or remand a denial decision if there  
4 is any applicable approval standard for which there are  
5 findings of noncompliance supported by substantial evidence  
6 in the challenged decision. In the challenged decision, the  
7 county determined that all of the standards applicable to  
8 nonfarm dwelling approval are met except for the "stability"  
9 standard discussed above. Under these circumstances, our  
10 conclusion that the county incorrectly interpreted and  
11 applied ZDO 401.05(A)(3) requires that we remand the  
12 challenged decision.

13 One final point warrants discussion. In petitioner's  
14 third assignment of error, he cites Stefan v. Yamhill  
15 County, supra, 18 Or LUBA at 837-38, and Grden v. Umatilla  
16 County, 10 Or LUBA 37, 46-47 (1984), and argues the county  
17 erred by failing to determine whether the proposal would  
18 "affect the balance between resource and nonresource  
19 use[s]." We note there is nothing in Stefan or Grden  
20 establishing that determining whether a nonfarm use proposal  
21 would change the balance between nonresource and resource  
22 uses in the area, is necessary to application of a  
23 "stability" standard in all instances. The language in  
24 those cases concerning whether a nonfarm use proposal will  
25 change the balance between nonresource and resource uses is  
26 simply another way of expressing the overall "stability"

1 standard. What the county must determine under the  
2 "stability" standard, in order to find noncompliance based  
3 on precedential effect, is whether there is a history of  
4 progressive partitioning and development in the area and  
5 whether there are any similarly situated parcels in the  
6 area. The challenged decision fails to do so and,  
7 consequently, it must be remanded.<sup>2</sup>

8 The county's decision is remanded.

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<sup>2</sup>Under these circumstances, no purpose is served in resolving petitioner's fourth assignment of error challenging the evidentiary support for inadequate findings.