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

SHARON S. FORSTER,)
)
Petitioner,) LUBA No. 91-108
)
vs.) FINAL OPINION
) AND ORDER
POLK COUNTY,)
)
Respondent.)

Appeal from Polk County.
Richard C. Stein, Salem, represented petitioner.
Robert Oliver, Dallas, represented respondent.

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

REMANDED 12/02/91

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order approving a farm
4 dwelling on a 13 acre parcel in the Farm/Forest (F/F) zone.

5 **FACTS**

6 The subject parcel is undeveloped and has Class II
7 agricultural soils. The majority of the parcel is within
8 the 100-year flood plain of a creek adjoining its southeast
9 border, and is designated by the county as a Special Flood
10 Hazard Area.

11 On February 22, 1991, Donna C. Perry (applicant) filed
12 an application to establish a farm dwelling on the subject
13 parcel. Three acres of the property are currently planted
14 in Noble Fir and Grand Fir Christmas tree seedlings. The
15 applicant's farm management plan proposes planting another
16 four acres in Noble Fir and Grand Fir Christmas trees,
17 erecting a pole barn, fencing pasture and maintaining two
18 brood heifers and a brood mare. Record 136.

19 On March 25, 1991, the county planning director
20 administratively approved the application. Petitioner
21 appealed the planning director's decision to the board of
22 commissioners, which upheld the planning director's decision
23 without conducting a de novo evidentiary hearing.
24 Petitioner appealed the board of commissioners' decision to
25 this Board. Following a stipulated remand, the board of
26 commissioners conducted a de novo evidentiary hearing on the

1 subject application. On July 10, 1991, the board of
2 commissioners adopted the challenged order affirming the
3 planning director's decision and approving the proposed farm
4 dwelling.

5 **FIRST ASSIGNMENT OF ERROR**

6 "The findings of the Board of Commissioners
7 inadequately address the criteria of Polk County
8 Zoning Ordinance (PCZO) 138.040(B) and issues
9 raised by opponents."

10 PCZO 138.040(B) establishes criteria for the approval
11 of a farm dwelling on a F/F zoned parcel less than 40 acres
12 in size. Petitioner contends the county's findings are
13 inadequate to demonstrate compliance with PCZO
14 138.040(B)(1)-(4) because they fail to address relevant
15 issues raised by petitioner in the county proceedings.
16 Petitioner also presents additional argument as to why the
17 county's findings are inadequate to demonstrate compliance
18 with PCZO 138.040(B)(2).

19 **A. PCZO 138.040(B)(1)**

20 PCZO 138.040(B)(1) provides:

21 "The applicant must show in [the] farm [dwelling]
22 application that the parcel is capable of
23 producing a yield level as commensurate with the
24 Standards listed in the 'Commercial Agricultural
25 Justification.'"¹

26 There is no dispute that the annual productivity level

¹The "Commercial Agricultural Justification" document (hereafter CAJ) was adopted as part of the Polk County Comprehensive Plan by Ordinance No. 87-26, dated December 23, 1987, of which we take official notice.

1 required for F/F zoned parcels greater than 10 acres and
2 less than 40 acres to qualify for a farm dwelling, as
3 established by the CAJ, is \$10,000 in gross sales. CAJ 16.

4 The CAJ also provides:

5 "* * * the County will use the following formula
6 in determining if the necessary productivity level
7 * * * could be attained on a given parcel:

8 "Average Yield/acre X Average
9 Commodity/Unit Price X Total Acres =
10 Productivity Level" CAJ 18.

11 The relevant county findings provide:

12 "The planting of [Christmas] trees appears to be
13 in substantial compliance with the applicant's
14 farm management plan, and can reasonably be
15 anticipated to satisfy Polk County's [CAJ]."
16 Record 7.

17 "The applicant's farm management plan calls for 7
18 acres of Grand and Noble Fir Christmas trees.
19 Based on soils, planting density, prospective
20 yields and a three year price average, the
21 proposal can exceed the minimum \$10,000
22 productivity potential set forth in the [CAJ].
23 * * *"² Record 117.

24 Petitioner contends the above quoted findings are
25 inadequate because they fail to address the following issues
26 raised by petitioner at the board of commissioners' hearing:

27 "The applicant does not meet the [CAJ] Standards
28 because:

29 "a. Greatly inflated harvest assumptions;

²This finding is from the March 18, 1991 planning staff report, the findings and conclusions of which were adopted by the board of commissioners. Record 7, 8.

- 1 "b. Too short a rotation period;
- 2 "c. Poor site conditions;
- 3 "d. Poor site preparation and maintenance;
- 4 "e. Conflicts with proposed simultaneous livestock
- 5 usage of parcel." (Citations to record
- 6 omitted.) Petition for Review 6.

7 The five above quoted factors are all relevant to
8 determining average annual yield per acre, an essential
9 factor in establishing annual productivity as required by
10 the CAJ and PCZO 138.040(B)(1). Petitioner presented
11 testimony regarding these factors in the county proceeding.
12 Record 70-72. We agree with petitioner that the county's
13 findings are inadequate because they fail to address these
14 relevant issues raised below.³ Norvell v. Portland Metro
15 Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Benjamin
16 v. City of Ashland, ___ Or LUBA ___ (LUBA No. 90-065,
17 November 13, 1990), slip op 7; Highway 213 Coalition v.
18 Clackamas County, 17 Or LUBA 256, 259 (1988); Grovers Beaver
19 Electric Plumbing v. Klamath Falls, 12 Or LUBA 61, 66
20 (1984).

21 The county argues that even if the findings are

³We also note that we are unable to determine from the findings what figure the county actually used for "average [annual] yield/acre" in the calculation required by the CAJ, or how that figure was derived. The same is true of the figure used by the county for "average commodity/unit price," except that the findings state that a "three year price average" was used. Record 117.

1 inadequate, under ORS 197.835(9)(b),⁴ we should affirm this
2 part of the county's decision because there is evidence in
3 the record which clearly supports a determination that the
4 CAJ productivity level requirement is satisfied by the
5 applicant's proposed farm management plan.

6 We have reviewed the evidence in the record cited by
7 the parties concerning the five issues relevant to average
8 annual yield raised by petitioner below. The evidence in
9 the record on each issue either is conflicting or provides a
10 reasonable basis for different conclusions. In such
11 circumstances, the evidence in the record does not "clearly
12 support" a determination of compliance with PCZO
13 138.040(B)(1), as is required by ORS 197.835(9)(b). Blosser
14 v. Yamhill County, 18 Or LUBA 253, 264 (1989); Kellogg Lake
15 Friends v. Clackamas County, 17 Or LUBA 277, 290 (1988),
16 aff'd 96 Or App 536 (1989).

17 This subassignment of error is sustained.

18 **B. PCZO 138.040(B)(2)**

19 PCZO 138.040(B)(2) provides:

20 "The parcel is currently employed for farm use

⁴ORS 197.835(9)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record * * *."

1 where the day-to-day activities are principally
2 directed to the farm use of the land."

3 The relevant county findings state:

4 "Staff visited the site * * * and found that [2-3
5 acres of] the northeastern portion of the property
6 had recently been planted in Christmas trees. The
7 remainder of the parcel appeared to be in pasture.
8 Staff concludes that the use of the parcel is farm
9 related." Record 117.

10 The challenged decision also includes the following
11 condition:

12 "A total of 7 acres of Christmas trees must be
13 planted within one year of this approval. At
14 least 3.5 acres must be planted prior to issuance
15 of building permits, to show that the farm use is
16 substantially in place." Record 115.

17 Petitioner argues the above quoted findings are
18 inadequate because they fail to address relevant issues
19 raised by petitioner in the proceedings below concerning
20 whether (1) the parcel is currently employed for farm use,
21 (2) the day-to-day activities on the parcel are primarily
22 directed to farm use, and (3) a residence is necessary for
23 the proposed farm use of the parcel.

24 According to petitioner, the PCZO 138.040(B)(2)
25 requirement that the parcel is "currently employed for farm
26 use" incorporates the definition of "farm use" found in ORS
27 215.203(2)(a). Petitioner contends the findings fail to
28 demonstrate that the current use of the property satisfies
29 this definition. Petitioner further contends the definition
30 of "accepted farming practice" in ORS 215.203(2)(c) requires

1 the county to find that the proposed residence "is common to
2 farms of a similar nature, necessary for the operation of
3 such farms to obtain a profit in money, and customarily
4 utilized in conjunction with farm use." Petitioner also
5 argues this case is virtually identical to Billington v.
6 Polk County, 8 Or LUBA 201 (1983), in which this Board
7 determined the county was required to show that the proposed
8 farm dwelling was necessary to profitable operation of a
9 farm on the subject property. Finally, petitioner argues
10 the findings are inadequate because they fail to address the
11 PCZO 138.040(B)(2) requirement that the day-to-day
12 activities on the parcel be primarily directed to farm use.

13 The county argues that Billington v. Polk County is
14 distinguishable from this case because the property at issue
15 in Billington was zoned EFU, not F/F. The county further
16 argues that its decision is governed solely by PCZO
17 138.040(B)(2), which imposes no requirement that a farm
18 dwelling be "necessary" to the operation of a farm on the
19 subject parcel.

20 We agree with the county that Billington v. Polk County
21 does not apply to this case, and that there is no
22 requirement in PCZO 138.040(B)(2) for a proposed farm
23 dwelling on a 13 acre parcel in the F/F zone to be
24 "necessary" to farm use of such parcel. Additionally, we do
25 not agree with petitioner that the ORS 215.203(2)(c)
26 definition of "accepted farming practices" imposes a similar

1 requirement on the county. PCZO 138.040(B)(2) does
2 incorporate the definition of "farm use" found in
3 ORS 215.203(2)(a).⁵ However, the only way the term
4 "accepted farming practices" relates to the definition of
5 farm use is that pursuant to ORS 215.203(2)(b)(F), land is
6 currently employed for farm use if it is "* * *" under
7 buildings supporting accepted farming practices."
8 Therefore, ORS 215.203(2)(c) has no relevance to whether an
9 undeveloped parcel is currently in farm use. Thus, the
10 issues related to Billington v. Polk County and
11 ORS 215.203(2)(c) raised by petitioner below are not
12 relevant to the county's decision, and it was not error for
13 the county to fail to address them in its findings.

14 On the other hand, petitioner also raised issues below
15 concerning whether the current use of the subject parcel
16 satisfies the ORS 215.203(2)(a) definition of "farm use" and
17 whether the day-to-day activities on the subject parcel are
18 primarily directed to farm use. Record 72-73. These issues
19 are relevant to the compliance of the subject farm dwelling
20 application with PCZO 138.040(B)(2), and should have been
21 addressed by the county in its findings. The county found

⁵Although the PCZO does not include a definition of "farm use," the county's F/F zone has been acknowledged by the Land Conservation and Development Commission as an exclusive farm use zone in compliance with Statewide Planning Goal 3 (Agricultural Lands). See DLCD v. Polk County, ___ Or LUBA ___ (LUBA No. 91-044, August 14, 1991), slip op 7-8. Because the PCZO does not suggest otherwise, we conclude the county intended the term "farm use" in PCZO 138.040(B)(2) to have the meaning set forth in ORS 215.203(2)(a).

1 only that "the use of the parcel is farm related."
2 Record 117. This is inadequate to address the issues raised
3 by petitioner and demonstrate compliance with PCZO
4 138.040(B)(2).

5 This subassignment of error is sustained in part.

6 **C. PCZO 138.040(B)(3)**

7 PCZO 138.040(B)(3) provides in relevant part:

8 "The dwelling is for the farm operator and there
9 are no other dwellings located on the parcel[.]"

10 The county found that "[t]he proposed dwelling would be the
11 sole dwelling on this parcel and would house the
12 owner/operator of the small farm operation." Record 117.

13 Petitioner argues the county's findings fail to address
14 her contention below that the proposed dwelling would not be
15 the residence of the farm operator but rather the rural
16 residence of an applicant who has full-time employment
17 elsewhere.

18 There is no dispute that the residents of the proposed
19 dwelling will be the persons who carry out the proposed farm
20 management plan. Furthermore, we agree with the county that
21 the mere fact that the residents of the proposed dwelling
22 will have full time nonfarm employment off the subject
23 parcel, in itself, does not mean that the proposed dwelling
24 cannot satisfy PCZO 138.040(B)(3). However, PCZO
25 138.040(B)(3) requires that the proposed dwelling be for the
26 operator of a farm which satisfies the requirements of PCZO

1 138.040(B)(1) and (2). We determine above that the county
2 failed to demonstrate compliance with PCZO 138.040(B)(1) and
3 (2). Therefore, the county's determination of compliance
4 with PCZO 138.040(B)(3) is also inadequate.

5 This subassignment of error is sustained in part.

6 **D. PCZO 138.040(B)(4)**

7 PCZO 138.040(B)(4) provides in relevant part:

8 "The proposed site can support a residential use
9 considering * * * suitability for on-site sewage
10 disposal [and] utilities[.]"

11 The relevant county findings state:

12 "* * * The County Sanitarian indicates the site
13 has been approved for on-site sewage disposal.
14 Water is available from an on-site well. * * * The
15 majority of the parcel is located in a Special
16 Flood Hazard Area (100 year floodplain). The
17 proposed dwelling and septic drainfield should not
18 be located in this area." Record 118.

19 Petitioner contends the county's findings fail to
20 address issues raised below concerning unsuitability of the
21 subject parcel for residential use due to "sewage disposal
22 problems and water supply problems." Petition for Review 6.
23 Petitioner argued below that the County Sanitarian approval
24 of the proposed dwelling site for on-site sewage disposal
25 cited in the above quoted finding initially adopted by the
26 planning director was 11 years old and, therefore, out of
27 date. Petitioner contended that a lake had since been built
28 above the subject parcel and that a new creek traverses the
29 parcel in close proximity to the proposed site of the septic

1 field. Record 62, 74. Petitioner also contended that,
2 contrary to the above quoted finding, there is no well on
3 the subject parcel, and there is reason to be concerned that
4 the drilling of an additional well will affect the quantity
5 and quality of water from other wells in the surrounding
6 area. Record 74, 79.

7 The county's findings fail to address the relevant
8 issues raised below concerning suitability of the subject
9 parcel for residential use with regard to on-site sewage
10 disposal and water supply⁶ and, therefore, are inadequate to
11 demonstrate compliance with PCZO 138.040(B)(4).

12 We have reviewed the evidence in the record cited by
13 the parties. With regard to sewage disposal, the record
14 shows that after petitioner raised this issue, at the board
15 of commissioners July 3, 1991 meeting:

16 "[The] Community Development Director said he
17 reviewed the septic approval. A field inspection
18 confirmed that the approval is still valid. The
19 stream that was described as an intermittent
20 stream, which requires a 50-foot set-back under
21 Department of Environmental Quality (DEQ) rules,
22 allows adequate room for installation of an
23 on-site sewage disposal system." Record 11.

24 We therefore agree with the county that the evidence
25 identified in the record "clearly supports" a determination

⁶Although the parties disagree on the suitability of the subject parcel for residential use, they do not dispute that under ORS 138.040(B)(4), water supply is a consideration relevant to this issue, and we assume that water is included in the term "utilities" as it is used in this PCZO provision.

1 of compliance with PCZO 138.040(B)(4) with regard to
2 suitability of the subject parcel for on-site sewage
3 disposal.

4 However, we are cited to no evidence in the record
5 establishing that the subject parcel is suitable for
6 residential use with regard to water supply. Therefore, the
7 evidence identified in the record does not "clearly support"
8 a determination of compliance with PCZO 138.040(B)(4) with
9 regard to this issue.

10 This subassignment of error is sustained in part.

11 The first assignment of error is sustained in part.

12 **SECOND ASSIGNMENT OF ERROR**

13 "The Board of Commissioners' findings purporting
14 to show compliance with PCZO 138.040(B) are not
15 supported by substantial evidence in the whole
16 record."

17 Under this assignment of error, petitioner contends the
18 county's findings of compliance with PCZO 138.040(B)(1), (2)
19 and (3) are not supported by substantial evidence in the
20 record.

21 We determine above the county's findings of compliance
22 with PCZO 138.040(B)(1)-(3) are inadequate. No purpose
23 would be served by reviewing the evidentiary support for
24 inadequate findings. Benjamin v. City of Ashland, supra,
25 slip op at 14-15; DLCD v. Columbia County, 16 Or LUBA 467
26 (1988).

27 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 "The Board of Commissioners misconstrued the
3 applicable law pertaining to the establishment of
4 a farm dwelling in the Farm/Forest zone."

5 Under this assignment of error, petitioner merely
6 reiterates the arguments with regard to the applicability of
7 Billington v. Polk County, supra, and ORS 215.203(2)(c) in
8 determining compliance with PCZO 138.040(B)(2) which we
9 rejected above under subassignment B of the first assignment
10 of error.

11 The third assignment of error is denied.

12 The county's decision is remanded.