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

PATRICIA A. WELLS,)
)
Petitioner,)
)
vs.)
)
CLACKAMAS COUNTY,)
)
Respondent.)

LUBA No. 91-120

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Jon S. Henricksen, Gladstone, filed the petition for review and argued on behalf of petitioner.

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

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

REMANDED 06/29/92

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 a county order denying her
4 application for a conditional use permit for a 9 hole golf
5 course in the General Agricultural District (GAD), an
6 exclusive farm use zone.

7 **FACTS**

8 The subject property consists of 59 acres. It is
9 developed with a house, barn, water tower and woodshed. Two
10 acres of the subject property are classified by the U.S.
11 Soil Conservation Service (SCS) as containing Class I soils,
12 five acres are classified as containing Class III soils and
13 the balance of the parcel is classified as containing Class
14 II soils. Most of the property is planted in unmanaged
15 nursery stock. To the north and west the subject property
16 is bordered by roads. To the east and southeast is an 18
17 hole golf course and an approved but unfinished 9 hole
18 addition to that golf course. The properties surrounding
19 the subject parcel are zoned GAD.

20 **FIRST ASSIGNMENT OF ERROR**

21 "The county erred in concluding that the proposed
22 use conflicts with the overriding goal of
23 preserving agricultural lands to the extent [that]
24 the proposed use should be denied."

25 Clackamas County Zoning and Development Ordinance
26 (ZDO) 1203.01 provides several standards applicable to
27 approving a conditional use permit in the GAD zoning

1 district. The challenged decision determines that
2 petitioner's application is consistent with all criteria
3 except one -- ZDO 1203.01E. ZDO 1203.01E requires a
4 determination that:

5 "The proposal satisfies the goals and policies of
6 the Comprehensive Plan which apply to the proposed
7 use."

8 The hearings officer determined the proposal is
9 consistent with some Clackamas County Comprehensive Plan
10 (plan) goals and policies, but that it violates others.
11 Specifically, the hearings officer determined the proposal
12 violates (1) the plan Agricultural goal to preserve
13 agricultural land, (2) the plan Agricultural policy 3
14 requiring "all agricultural areas" to continue
15 "unencumbered" by "activities/land uses" unrelated to
16 agriculture in order to "ensure productive farm land," (3)
17 the plan Historic Landmarks, Districts and Transportation
18 Corridors goal to preserve historic and cultural county
19 resources, and (4) the plan Parks and Recreation plan goal
20 requiring provision of land facilities and programs meeting
21 the recreational needs of the county. Record 5-6. However,
22 the hearings officer gave greatest weight to the plan
23 Agricultural goal to preserve agricultural land, stating:

24 "* * * on balance, this application is not
25 consistent with the Goals and Policies of the plan
26 which are applicable. The proposal is consistent
27 with some applicable Plan provisions, but it is in
28 conflict with others. Most importantly, it is in
29 conflict with the provisions of the Agricultural
30 Sections of the Plan which deal with the

1 preservation and protection [of] agricultural
2 lands. It is appropriate to balance these Goals
3 and Policies which are furthered against those
4 Goals and Policies which are in conflict in order
5 to reach a conclusion as to whether the proposal
6 is consistent, overall. Any such balancing must
7 be done keeping in mind the overriding policy of
8 the land use laws of this state and this county to
9 preserve agricultural lands for agricultural use.
10 Although there is a demonstrated need for
11 additional golf courses to meet the recreational
12 needs of the county, in balancing the competing
13 interests and goals as to this application, this
14 application is in conflict with the most important
15 of the applicable Goals and with the Plan as a
16 whole." Record 6.

17 Petitioner contends these findings give inappropriate
18 emphasis to the plan Agricultural goal to preserve
19 agricultural land, and argues it was inappropriate for the
20 county to consider the plan Agricultural goals and policies
21 in determining whether the proposed golf course should be
22 approved.

23 In Waker Associates, Inc. v. Clackamas County, 111 Or
24 App 189, ___ P2d ___ (1992) (Waker), the Court of Appeals
25 affirmed this Board's determination that identical county
26 findings denying an application for a conditional use permit
27 for a golf course in the county's GAD zoning district, were
28 erroneous. In Waker, the Court of Appeals held:

29 "We agree that the hearings officer's reasoning
30 appears to focus on the first of the agricultural
31 goals -- preservation of agricultural land -- to
32 the exclusion of the others. We, therefore, also
33 agree with LUBA that a remand to the county is
34 necessary for a reinterpretation or reapplication
35 of the goals that demonstrates that due
36 consideration has been given to all of them. * *

1 *" Waker, supra, 111 Or App at 193.

2 Similarly, here the county must reevaluate or reapply
3 the plan goals and policies to establish that "due
4 consideration" is given to all of the applicable plan goals
5 and policies. One final point merits comment.
6 Petitioner argues the county should not have relied on SCS
7 soils data to evaluate whether the subject land is
8 agricultural land to be protected under the plan.
9 Petitioner contends the county should have relied upon the
10 evidence of her expert who relied upon the Land Use
11 Evaluation and Site assessment (LESA) model developed by
12 Oregon State University. Petitioner maintains that while
13 the LESA study of the subject property confirms the soils
14 are good agricultural soils, the LESA study also considered
15 surrounding nonfarm uses¹ and the size of the subject parcel
16 in concluding the parcel is marginal farm land.

17 We disagree with petitioner that the county is required
18 to rely on the LESA study or to determine the subject parcel
19 does not consist of protected "agricultural land." The plan
20 specifically defines agricultural lands as:

21 "* * * those of predominantly Class I-IV soils as
22 identified by the U.S. Soil Conservation Service
23 or as defined in more detailed data; and other
24 lands which are suitable for farm use due to soil
25 fertility, suitability for grazing, climactic

¹In applying the LESA model, petitioner's expert assumed that homes on 20 acre parcels zoned GAD in the area are "nonfarm" dwellings, an assumption the county disputes.

1 conditions, existing or future potential for
2 irrigation, land use patterns, accepted farming
3 practices or are necessary to permit farming
4 practices to be undertaken on adjacent or nearby
5 lands." Plan Land Use Definitions 3.

6 Because the subject parcel consists of primarily Class II
7 soils, with some Class I and Class III soils, the parcel
8 clearly meets at least one of the definitions of
9 agricultural land in the county plan. Further, that
10 petitioner's expert concluded the subject parcel is
11 "marginal" farm land, is not the equivalent of establishing
12 the parcel is not agricultural land under the county
13 definition quoted above. We conclude the county properly
14 determined the subject parcel is agricultural land.

15 The first assignment of error is sustained, in part.

16 **SECOND ASSIGNMENT OF ERROR**

17 "Respondent erred in finding that the proposed use
18 would conflict with the Historic Site Goal of the
19 Comprehensive Plan, and parallel provisions of the
20 ZDO, by (1) basing its decision on inadequate
21 findings, not supported by substantial evidence,
22 and (2) misconstruing the applicable law and
23 acting in violation of the ZDO."

24 Under this assignment of error, petitioner argues the
25 county erroneously concluded the subject property
26 constitutes an "intact farm complex" and, therefore,
27 qualifies as a cultural and historic resource to be
28 protected under the plan Historic Landmarks, Districts, and
29 Transportation Corridors goal to "preserve the historical,
30 archaeological, and cultural resources of the County"
31 (cultural resources goal).

1 The challenged decision determines:

2 "[The structures on the subject parcel] have been
3 included in the Clackamas County Cultural
4 Resources Inventory as the William Koellermeier
5 Farm. Because the County has not determined
6 whether this farmstead should be designated and
7 zoned as an Historic Landmark, [ZDO] 707.04 * * *
8 requires interim protection of the inventoried
9 structures through a review process as set forth
10 in ZDO 707 * * *." Record 3.

11 Concerning the proposal's compliance with the cultural
12 resources goal, the challenged decision determines the
13 following:

14 "[The cultural resources goal is applicable]
15 because of the presence of the William
16 Koellermeier Farm. Although [ZDO] 707 contains a
17 review process to determine the impact of proposed
18 development on historic structures, it is apparent
19 to the hearings officer that the historic
20 significance and value of this property is as a
21 farmstead, and that development of a golf course
22 on this property would diminish that historic and
23 cultural value." Record 6.

24 The cultural resources goal is implemented by specific
25 plan policies requiring the county to inventory historic and
26 cultural resources and to protect those resources. As
27 indicated in the challenged decision, the county has adopted
28 an inventory of historic resources (inventory), and the
29 subject parcel is listed as a historic resource on that
30 inventory. Record 81-94. ZDO 707 establishes a particular
31 process for designating as Historic on the plan map and
32 zoning districts, those areas listed on the inventory as

1 containing a specific historic resource.² Once an area is
2 designated and planned Historic, it is subject to particular
3 protective measures under ZDO 707. In addition, ZDO 707.04
4 provides a specific "review" mechanism to provide interim
5 protection to areas listed on the inventory as having
6 historic significance, but not yet planned and zoned
7 Historic.

8 Thus, while it is not clear how the county's interim
9 protection mechanisms are to function, as a practical
10 matter, it is nevertheless clear that the cultural resources
11 goal is implemented by ZDO 707 and is not intended to
12 independently apply to individual development actions.
13 Consequently, the cultural resources goal does not apply
14 directly to the proposal. Rather, the county must protect
15 inventoried historic and cultural resources, not designated
16 or zoned Historic, through the specific interim protection
17 procedures outlined in ZDO 707.04. Accordingly, we agree
18 with petitioner that it is erroneous for the county to
19 consider the cultural resources goal in the balance of
20 determining whether the proposal complies with plan goals
21 and policies.

22 The second assignment of error is sustained.

23 The county's decision is remanded.

²ZDO 707 contains three Historic plan designations and zoning districts: Historic District," "Historic Corridor," and "Contributing Resource." For convenience, we refer to these collectively in this opinion as simply the "Historic" plan map designation and zoning district.