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

3	MARILYN STRINGER,)	
)	
4	Petitioner,)	LUBA NO. 80-006
)	
5	vs.)	
)	
6	POLK COUNTY,)	
)	
7	Respondent,)	FINAL
)	OPINION AND ORDER
8	and)	
)	
9	CLARENCE BYRD,)	
)	
10	Respondent.)	

11
12 Appeal from Polk County.

13 Mark Irick, Dallas, argued the cause for Petitioner
14 Marilyn Stringer. With him on the brief were Kenneth
15 E. Shetterly and Hayter, Shetterly and Weiser.

16 Dennis McCaffrey, Polk County Counsel, did not file a brief
17 or argue the cause for Respondent Polk County.

18 John Sassor, Dallas, argued the cause and filed a brief on
19 behalf of Respondent Clarence Byrd.

20 Cox, Referee; Reynolds, Chief Referee; Bagg, Referee;
21 participated in the decision.

22 Reversed. 5/2/80

23 You are entitled to judicial review of this Order.
24 Judicial review is governed by the provisions of Oregon
25 Laws 1979, ch 772, § 6(a).
26

1 COX, Referee

2 NATURE OF PROCEEDING

3 Petitioner seeks a reversal of the land use decision of
4 Respondent Polk County, entered on January 7, 1979, entitled
5 "Conditional Use 79-81" in which respondent approved Respondent
6 Clarence Byrd's application to place a non-farm dwelling on
7 property zoned agriculture-forestry.(AF)

8 STANDING

9 Respondents do not contest petitioner's standing to appeal
10 to this Board the subject decision.

11 ALLEGATIONS OF ERROR WHICH PETITIONER SEEKS TO HAVE REVIEWED

12 Petitioner alleges that Respondent Polk County erred in
13 granting the contested conditional use permit to Respondent
14 Clarence Byrd. More specifically, petitioner asserts five
15 allegations of error as follows: (The fifth allegation of
16 error, asserting violations of Statewide Goal No. 2 was
17 withdrawn by petitioner with all parties agreeing.)

18 "The Board erred in that its finding that the
19 non-farm dwelling would be compatible with farm uses
20 described in ORS 215.243 and would not seriously
interfere with accepted farming practices on adjacent
lands are not supported by substantial evidence."

21 "The Board erred in that its finding that the
22 land on which the non-farm dwelling would be situated
is generally unsuitable for the production of farm
23 crops and livestock is not supported by substantial
evidence."

24 "The Board erred by improperly construing ORS
25 215.213(3)(a) in that it failed to consider whether
the construction of the non-farm dwelling would be
26 consistent with the intent and purposes set forth in
ORS 215.243."

1 "The Board erred by misconstruing the applicable
2 law in that its decision to grant the conditional use
3 was not consistent with the Polk County Comprehensive
4 Plan."

4 FACTS

5 Respondent Clarence Byrd made application to the Polk
6 County Planning Department on October 15, 1979, for a
7 conditional use permit to allow placement of a non-farm
8 dwelling on an 1.02 acre parcel of land held in his ownership.
9 The zoning on the subject land is agricultural forestry(AF) and
10 the parcel is composed of class II and III soils. The record
11 reveals that various types of agricultural activities have
12 taken place on the subject property in the past with specific
13 reference being made to the raising of cattle. On October 15,
14 1979, when the original application for the conditional use
15 permit was filed, Respondent Byrd owned and resided on a 4.6
16 acre parcel which was separated from the subject property by a
17 county road.

18 The Polk County Planning Commission denied Respondent's
19 application for a conditional use on November 2, 1979, based on
20 a finding that the conditional use would not be compatible with
21 the agricultural activity of the surrounding property. On
22 November 8, 1979, Respondent Byrd appealed the planning
23 commission's decision to Respondent Polk County. Subsequent to
24 the November 8th appeal Mr. Byrd, on December 7, 1979, sold the
25 4.6 acre parcel upon which he had been residing. On January 7,
26 1980, Respondent Polk County Board of Commissioners issued a

1 written opinion approving Mr. Byrd's application for
2 conditional use.

3 Throughout the proceeding, petitioner opposed the requested
4 conditional use on the grounds that the proposed dwelling would
5 interfere with the agricultural activity on her neighboring
6 cherry orchard. Petitioner's orchard is adjacent to and
7 directly east of the subject parcel and is zoned EFU.

8 Petitioner alleged throughout the proceeding that respondent's
9 proposed dwelling would be directly in line with the path used
10 by airplanes which apply spray to her orchard. The record
11 indicates that this aerial spraying takes place at least eight
12 times a year during which insecticides, chemicals, and
13 fertilizer are applied. Petitioner's concern centers on
14 restrictions to her orchard activity which could result if the
15 conditional use is permitted. More specifically the feared
16 restrictions take the form of legal action to stop the aerial
17 spraying and damage suits resulting from the drifting spray
18 falling on the proposed residence. In addition, complaints are
19 feared due to the noise created during the aerial spraying
20 activity.

21 DECISION

22 It is the decision of this Board that Respondent Polk
23 County's action in approving Respondent Byrd's conditional use
24 permit must be reversed.

25 Polk County Ordinance No. 78, Section 137.030 entitled
26 "Conditional Uses" states in pertinent part:

1 "If authorized under the procedures provided for
2 conditional uses in this Ordinance, the following uses
will be permitted in the AF Zone:

3 " . . .

4 (k) Non-farm dwelling in accordance with the
5 standards of ORS 215.213 (3) (a), (b), (c), and (d)."

6 ORS 215.213(3) (a), (b), (c), and (d) states:

7 "Single-family residential dwellings, not
8 provided in conjunction with farm use, may be
9 established, subject to approval of the governing body
or its designate in any area zoned for exclusive farm
use upon a finding that each such proposed dwelling:

10 "(a) Is compatible with farm uses described in
11 section (2) of ORS 215.203 and is consistent with the
intent and purposes set forth in ORS 215.243; and

12 "(b) Does not interfere seriously with accepted
13 farming practices, as defined in paragraph (c) of
14 subsection (2) of ORS 215.203, on adjacent lands
devoted to farm use; and

15 "(c) Does not materially alter the stability of
the overall land use pattern of the area; and

16 "(d) Is situated on generally unsuitable land
17 for the production of farm crops and livestock,
18 considering the terrain, adverse soil or land
conditions, drainage and flooding, vegetation,
location and size of the tract; and

19"

20 In its January 7, 1980 letter decision granting the
21 requested conditional use permit, respondent states in
22 pertinent part:

23 "Because your parcel is only slightly larger than
24 one acre and has existed for some time as a separate
25 parcel, we found that using it for a non-farm dwelling
26 would not materially alter the stability of the
overall land use pattern of the area. Likewise, the
small size of the parcel makes it generally unsuitable
for production of farm crops and livestock.

1 "We also found that a non-farm dwelling on the
2 parcel would be compatible with farm uses and would
3 not seriously interfere with accepted farming
4 practices on adjacent lands. We based these findings
5 on evidence presented at the hearing that the land to
6 the north, west and south is used for small woodlots
7 and residences; that there is an existing dwelling
8 closer to the orchard to the east of your property
9 which has not interfered with farm practices on the
10 orchard; that your house will be located a substantial
11 distance from the orchard in an area sheltered by
12 trees."

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Petitioner alleges Polk County's finding that the proposed conditional use would not seriously interfere with accepted farming practices on petitioner's cherry orchard is not supported by substantial evidence. A review of the record reveals conflicting evidence regarding the impact of the proposed use on petitioners' property. However, we cannot say, as a matter of law, the record is devoid of any evidence upon which a reasonable mind might arrive at the same conclusion reached by Polk County. As the Court of Appeals stated in Christian Retreat Center v. Comm. for Wash. Co., 28 Or App 673, 679, 560 P2d 1100 (1977):

"Where, as here, it is alleged that the findings of the lower tribunal are not supported by substantial evidence, the inquiry to be made by this court is the limited one of whether the record contains evidence which a reasonable mind might accept as adequate to support the findings challenged. Where the record includes conflicting believable evidence, that conflict is to be resolved not by this court but by the lower tribunal which may choose to weigh the evidence as it sees fit. Desler v. Lane County Commissioners, 27 Or App 709, 557 P2d 52 (1976); Braidwood v. City of Portland, 24 Or App 477, 546 P2d 777, Sup Ct review denied (1976); Auckland v. Bd. of Comm. Mult. Co., 21 Or App 596, 536 P2d 444, Sup Ct

1 review denied (1975); Dickinson v. Bd. of County
2 Comm., 21 Or App 98, 533 P2d 1395 (1975)."¹

3 The problem with Polk County's decision and reason for this
4 Board's reversal centers on application of ORS 215.213(3)(d).
5 The county's action is based almost entirely on the small size
6 of the parcel (1.02 acres).

7 In light of the holding in Meyer v. Lord, 37 Or App 59, 586
8 P2d 369 (1978) which places a presumption of agriculture land
9 on any property containing Class I-IV soils the burden is on
10 the applicant to overcome that presumption. When dealing with
11 the dictates of ORS 215.213(3)(d) the burden is on the
12 applicant (Byrd herein) to deal with each element of that
13 statute. Size is only one element of the test. The land must
14 be shown to be generally unsuitable for the production of farm
15 crops or livestock considering:

- 16 1. Terrain
- 17 2. Soil Conditions
- 18 3. Drainage
- 19 4. Flooding
- 20 5. Vegetation
- 21 6. Location
- 22 7. Size

23 As was held in Rutherford v. Armstrong, 31 Or App 1319,
24 1327, 572 P2d 1331 (1977) interpreting ORS 215.213(3)(d)

25 "The fact that the property cannot be farmed as
26 an economically self-sufficient farm unit is

1 irrelevant if it is otherwise suitable to produce farm
2 crops and livestock."

3 The Rutherford court also stated at 31 Or App 1324 in
4 review of the record in that case:

5 "There is no evidence in the record that the
6 subject five-acre parcel cannot be sold, leased or by
7 some other arrangement put to profitable agricultural
8 use."

9 Polk County's failure to require applicant to deal with
10 each element of ORS 215.213(3)(d) and to make findings thereon
11 was a mistake. In addition, the record reveals no attempt by
12 applicant to sell, lease or otherwise put the subject property
13 to profitable agricultural use. To the contrary, the record
14 reveals that a potential heir to the property will let the
15 petitioner have "first crack" at the property only after he
16 inherits it.

17 For the above stated reasons the action of Respondent Polk
18 County in approving Conditional Use No. 79-81 is reversed. In
19 light of this decision, it is unnecessary to deal with
20 petitioner's other assignments of error individually.

FOOTNOTE

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Our decision should not be to interpreted as an agreement with the county's limiting its decision to consideration of the 1.02 acre parcel rather than the 5.62 acres which were owned by Byrd at the time of the original conditional use permit application. That issue is not before this Board.