

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

JUN 14 3 59 PM '84

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EDWIN GREENWOOD, JOAN)
GREENWOOD, and WILLIAM R.)
WAIDNER,)
Petitioners,)
vs.)
POLK COUNTY, KATHLEEN WARDELL,)
RON BECK, CLAYTON ROGERS,)
DORIS ROGERS, DEBBIE INSOGNA,)
Respondents.)

LUBA No. 84-009
FINAL OPINION
AND ORDER

Appeal from Polk County.

Kent Hickam, Albany, filed the Petition for Review and argued the cause on behalf of Petitioners.

John L. Hemann, Salem, filed a response brief and argued the cause on behalf of Respondents Beck, Rogers, Insogna and Wardell. With him on the brief were Garrett, Seideman, Hemann, Robertson & DeMuniz.

No appearance by Polk County.

DUBAY, Referee; BAGG, Chief Referee; KRESSEL, Referee; participated in the decision.

REMANDED 06/14/84

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

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 The county approved placing a mobile home as a farm
4 dwelling on a five acre tract zoned for Exclusive Farm Use
5 (EFU). Three neighbors bring this appeal.

6 FACTS

7 The county's comprehensive plan and zoning ordinance has
8 been acknowledged, and they provide no minimum lot size for
9 land zoned EFU. The subject property is one of three, five
10 acre lots created by a partition in 1976. Since partitioning,
11 the property has been used for pasture and raising oats and
12 hay. It is subject to farm tax deferral under ORS 308.370 et
13 seq. The applicants propose to change the type of farming by
14 raising hay, beef calves and planting a small fruit orchard.

15 The application for the farm dwelling permit was denied by
16 the planning department, appealed to the county commissioners,
17 and approved by them. There was an appeal to LUBA which was
18 remanded by stipulation of the parties on November 29, 1983.
19 The county commissioners held another hearing and made a new
20 order approving the application. This appeal followed.

21 FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

22 These assignments of error state the order is in violation
23 of the county's comprehensive plan and zoning ordinance. The
24 challenges are based on the premise the county did not make
25 findings supported by substantial evidence of a farm use
26 adequate to warrant placing a farm dwelling on the property.

1 Petitioners' challenges are aimed at two issues: (1) Do the
2 findings and evidence show a bona fide, money-making farm
3 enterprise, either existing or proposed, and (2) is the
4 proposed mobile home necessary to conduct the farm use?

5 We discuss these issues in turn.

6 A. The "Profit in Money" Farm Purpose

7 Dwellings in conjunction with farm use are permitted
8 outright by the zoning ordinance. The definition of farm use
9 in the county ordinance includes the requirement that the land
10 must be currently employed for the purpose of obtaining a
11 profit in money from farming activities. Section 110.223, Polk
12 County Zoning Ordinance. Petitioners' first line of attack is
13 directed at the adequacy of the findings addressing this
14 "purpose of obtaining a profit in money" standard.

15 The county's findings regarding past and current farm use
16 are minimal. They merely recite the parcel "has been actively
17 used as a farm" since 1976. Record 63e. There were no
18 findings showing how the parcel was farmed, what was produced
19 or what income resulted. Another finding states the
20 "day-to-day activities on the property are principally and
21 patently directed to achieving a profit in money through the
22 farm use of this land...." Since there are no findings
23 stating what the past and current farm practices and day-to-day
24 activities are or were, petitioners correctly characterize this
25 finding as an impermissible conclusion.

26 Although the findings about past and current use of the

1 property may be inadequate to describe farm activities
2 conducted for the purpose of making a profit in money, the
3 county's decision does not stand on past and current use. The
4 findings emphasize future farm use as the basis for the
5 decision:

6 "(3) The Applicants are able to establish a commercial
7 scale, intensive farm use of this parcel, with
8 accepted farming practices, to wit:

8 "a. The subject parcel can be farmed profitably
9 as an intensive commercial farm for the
10 raising of hay, fruit orchards, and the
11 raising of feeder steers. The parcel is
12 made up of the Woodburn Soil Series, which
13 will produce crops or livestock very typical
14 for this area. On a per acre basis, this
15 parcel will produce similar amounts as will
16 surrounding parcels. This parcel should
17 produce at or above yield for this area.
18 The potential exists to increase
19 productivity above average yields due to
20 vegetables (sic) gardens, home orchards and
21 more intensive livestock operations.

22 "b. The intended use for this parcel, raising
23 calves, hay and orchards, is appropriate for
24 the soil and terrain. The gross income
25 generated should be \$110.00 per acre for
26 hay, and \$600.00 per acre for calves.

27 "c. On a per acre basis, this parcel has the
28 potential to make a profit which will vary
29 from year to year, depending on prices,
30 weather and management.

31 "(4) The surrounding area is made up predominantly of
32 part-time farmers on smaller parcels, very few
33 whose sole purpose is for making a profit from
34 agriculture. According to the 1978 U.S. Census
35 of Agriculture for Polk County, 55% of the farms
36 listed give their principal source of income as
37 coming from off the farm. Applicants' testimony
38 shows that the intended farm use is similar to a
39 national average of small farm uses.

40 * * *

1 "(9) The applicants, Mr. and Mrs. Beck, possess the
2 skill and ability to raise livestock, to
3 cultivate an orchard, and to more intensively
4 farm this parcel and generate a profit." Record
5 at 5-6.

6 Petitioners characterize these findings as "recitations of
7 evidence." They say these findings merely repeat information
8 in a letter in the record from an agricultural extension
9 agent. We do not agree the findings are impermissible
10 recitations of evidence. The findings are not like those
11 considered by the Court of Appeals in Norvell v. Portland Area
12 LGBC, 43 Or App 849, 604 Pd 896 (1979). There, the finding
13 declared "...the applicant has submitted evidence which
14 indicate the property is not viable as forest land." The Court
15 characterized this type of finding as a summary or recitation
16 of the evidence which is unsatisfactory as a finding of fact by
17 the agency. "What must be employed, however, is a declarative
18 sentence stating a fact qua fact." Norvell, Id at 853.

19 The findings meet this standard. The commissioners set
20 forth the facts they chose to believe and on which they based
21 their decision. The findings affirmatively state this parcel
22 has the capacity to be used to obtain a profit in money for the
23 raising of hay, feeder steers and fruit crops.

24 Petitioners next challenge the findings of potential profit
25 on the ground they are not supported by substantial evidence in
26 the record. Petitioners first point to a statement of one of
27 the applicants as evidence of unprofitability. The applicant
28 stated a person cannot "make a living off of five acres of

1 ground." Record 12. They also assert there was more credible
2 evidence of profitability than applicants' testimony of \$1745
3 profits from a sharecropping arrangement in 1980. Petitioners
4 say the better evidence was in the testimony of the person who
5 farmed the land. He said there has been no income or
6 observable attempts at income for four years. Last,
7 petitioners criticize the findings, which are based on the
8 projected gross income per acre, on grounds expenses are not
9 taken into consideration. Petitioners state the proposal does
10 not project net profit and therefore does not meet the
11 ordinance standard.

12 We do not accept these objections. The ordinance does not
13 equate "farm use" with production of sufficient income to
14 support one man or his family. See Ordinance, §110.223, infra
15 at page 10. Instead, the ordinance states the land must be
16 employed for the purpose of making a profit of money."
17 (emphasis added). This phraseology does not specify any
18 particular amount of money, nor does it imply the amount must
19 sustain a self-sufficient farm unit.¹

20 Since the ordinance is copied from ORS 215.203 as it read
21 prior to 1979, court decisions interpreting that statute give
22 some guidance to its meaning. In Rutherford v. Armstrong, 31
23 Or App 1319, 572 P2d 1331 (1977) the Court of Appeals noted the
24 definition of "farm use" in ORS 215.203(2)(a) was related to
25 the property tax deferral of farm lands under the taxing
26 statutes. The tax statutes did not make deferral contingent

1 upon a self-sufficient farm unit. Therefore, the Court held
2 that even though a five acre parcel could not support an
3 economically profitable farm unit, it nevertheless could be
4 sufficiently profitable to meet the definition of "farm use"
5 under ORS 215.203.

6 In 1000 Friends v. Benton County, 32 Or App 413, 575 P2d
7 651 (1978), the Court of Appeals again reviewed the
8 relationship of ORS 215.203 to the tax deferral statutes and
9 held "[t]he legislative history of ORS 215.203 indicates the
10 use of the term 'profit' in that statute does not mean gross
11 profit in the ordinary sense, but rather refers to gross
12 income...." (emphasis supplied). Id at 429. Petitioners have
13 cited no authority contrary to these decisions, nor have
14 petitioners convinced us these views of the pre 1979 statute
15 are not of assistance in interpretation of the county ordinance.

16 We also reject petitioners' challenge to the evidence based
17 on a claim of greater credibility of the witness who once
18 farmed the property. In addition to the applicants' statement
19 about earnings from the property in 1980, an agricultural
20 agent's report stated the parcel should produce yields similar
21 to crop and livestock operations in the area and has the
22 potential to increase productivity and to make a profit.
23 Record 69. We find this evidence believable. It is up to the
24 commissioners, not us, to choose which evidence they believe
25 when confronted with conflicting believable evidence.

26 Homebuilders v. Metro Service Dist., 54 Or App 60, 633 P2d 1320

1 (1981).

2 In short, we do not agree with petitioners' challenges to
3 the adequacy of the findings and the evidence supporting them
4 on the issue of whether this parcel is capable of being put to
5 profitable farm uses.

6 B. Relationship of Dwelling to the Farm

7 In their second attack, petitioners challenge the findings
8 regarding the necessity of the residence as part of a farm
9 use. The county's findings in relation to this issue, include
10 the following:

11 "...a residence is necessary to continue operation of
12 current farm use of the property, and in order to
13 comply with the Farm Use and Accepted Farming
14 Practices as defined in Polk County Zoning Ordinance
15 Section 110.223." Record 64b.

16 "...the state law ORS 215.213 and the Polk County
17 Ordinance 136.020 allow a single family residence or a
18 mobile home in conjunction with a farm use. The
19 statute does not require that the residence be
20 necessary to farm their property, but we have
21 considered the opponents' objection that a residence is
22 not necessary to farm this parcel, and we find that
23 under the circumstances of this case, a residence for
24 Mr. and Mrs. Beck is necessary to enable them to more
25 intensively farm this land." Record 64e.

26 "...a residence is necessary to continue operation of
current farm use of the property, and in order to
comply with the Farm Use and Accepted Farming
Practices as defined in Polk County Zoning Ordinance
Section 110.223." Record 64f.

27 Petitioners argue these statements are insufficient on
28 three bases. First, they are conclusions without any findings
29 of fact or explanation to support them. Second, the assertion
30 a finding of necessity isn't required is contrary to a prior

1 LUBA decision. Last, the findings a house is necessary to
2 enable the applicants to do more intensive farming does not
3 meet the definitions of necessity formulated by statute, and
4 decisions of LCDC and LUBA.

5 The necessity requirement was articulated in Billington v.
6 Polk County, ___ Or LUBA ___ 1983 (LUBA No. 83-027, dated
7 June 29, 1983). There, as here, the county approved placing a
8 mobile home on land zoned EFU. The decision was remanded by
9 LUBA because there were no findings the house was necessary
10 either to continue the current farm use of the property or to
11 engage in a new but unproven farm venture, a "Holstein
12 Replacement" operation. The Board based the requirement on the
13 provisions of ORS 215.203(2), noting the term "current
14 employment" of land includes a reference to "accepted farming
15 practices" which, in turn, is defined to mean operations common
16 to farms of a similar nature and necessary for their operation.

17 Respondents argue the holding in Billington was effectively
18 overruled by the Supreme Court in Byrd v. Stringer, 295 Or 311,
19 666 P2d 1332 (1983). The Court in Byrd held that after a
20 comprehensive plan and implementing ordinance have been
21 acknowledged by LCDC, land use decisions must be measured not
22 against the goals but against the acknowledged plan and
23 ordinances. We do not read Byrd to exclude consideration of
24 statutory standards, as distinguished from statewide goal
25 standards, once acknowledgement has been achieved. However,
26 our treatment of this issue is not based upon statutory terms

1 or definitions but upon the provisions of the Polk County
2 Zoning Ordinance. The ordinance defines "farm use" as follows:

3 "'Farm use' means the current employment of land
4 including that portion of such lands under buildings
5 supporting accepted farming practices for the purpose
6 of obtaining a profit in money by raising, harvesting
7 and selling crops or by feeding, breeding, management
8 and sale of, or the product of, livestock, poultry,
9 fur-bearing animals or honeybees or for dairying and
10 the sale of dairy products or any other agricultural
11 or horticultural use or animal husbandry or any
12 combination thereof. 'Farm use' includes the
13 preparation and storage of the products raised on such
14 land for man's use and animal use and disposal by
15 marketing or otherwise. It does not include the use
16 of land subject to the provisions of ORS Chapter 321,
17 or to the construction and use of dwellings
18 customarily provided in conjunction with the farm use.

19 "'Current employment' of land for farm use includes
20 (i) land subject to the soil bank provisions of the
21 Federal Agricultural Act of 1956, as amended (P. L.
22 84-540, 70 Sta. 188); (ii) land lying fallow for one
23 year as a normal and regular requirement of good
24 agricultural husbandry; (iii) land planted in orchards
25 or other perennials prior to maturity for bearing
26 crops.

1 "'Accepted farming practice' means a mode of operation
2 that is common to farms of a similar nature, necessary
3 for the operation of such farms to obtain a profit in
4 money, and customarily utilized in conjunction with
5 farm use.'" (emphasis supplied). Section 110.223,
6 Polk County Zoning Ordinance.²

7 We take note at this time of the disparity between the
8 current definition of farm use in ORS 205.203(2)(a) and the
9 above definition of farm use in the county ordinance. The
10 ordinance definition does not reflect changes made in the
11 statute in the 1979 legislature and thereafter.³ For
12 example, the ordinance excludes dwellings customarily provided
13 in conjunction with farm use from the definition of farm use.

1 The former wording of the statute was consistent with the tax
2 deferral laws prior to 1979 by which tax deferral for farm use
3 was not given to farm dwellings or the land on which they were
4 located. Prior to 1979, dwellings customarily provided in
5 conjunction with farm use were considered non-farm uses in EFU
6 zones. See Chapin v. Dep't of Revenue, 290 Or 931, 627 P2d 480
7 (1981).

8 In light of the county ordinance provisions, we agree with
9 petitioners the county was required to find farm dwellings and
10 the land on which they are located must support accepted
11 farming practices, and therefore must be necessary for farm
12 operations.⁴ Because the ordinance specifically excludes the
13 construction and use of dwellings as a farm use, a dwelling may
14 be considered in conjunction with farm use only if it is a
15 building "supporting accepted farming practices." This in turn
16 requires a finding the dwelling is "common to farms of a
17 similar nature, necessary for the operation of such farms to
18 obtain a profit in money, and customarily utilized in
19 conjunction with farm use." Section 110.223, Polk County
20 Zoning Ordinance. (emphasis supplied).

21 Petitioners' challenges to the findings purporting to show
22 the dwelling is necessary for both past and future farm use are
23 well taken. The order contains no statement of reasons why a
24 dwelling is necessary, only a conclusion that it is. Similarly,
25 the findings conclude mobile homes "are common to farms of a
26 similar nature and customarily utilized in conjunction with

1 farm use," but there are no findings of fact to support this
2 conclusion. Land use decisions must be based on more than such
3 conclusions. Moore v. Clackamas County, 7 Or LUBA 106, 110
4 (1982).

5 Because the findings do not include findings of fact,
6 supported by substantial evidence, showing how the proposed
7 mobile home will support accepted farming practices, as the
8 term is defined in the ordinance, we sustain the first, second
9 and third assignments of error.

10 FOURTH ASSIGNMENT OF ERROR

11 At the conclusion of the second hearing before the county
12 commissioners, petitioners requested the record remain open for
13 15 days to allow petitioners to rebut evidence presented by the
14 applicant at the hearing. The commissioners refused, and
15 petitioners now assign the refusal as error. The refusal to
16 give petitioners a chance to present evidence at a later time
17 is said to be a denial of a right to a fair hearing to the
18 prejudice of a substantial right. We do not understand
19 petitioners to allege they were prevented from speaking or
20 presenting rebuttal evidence at the public hearing on January
21 4, 1984. It was at that hearing the applicant introduced the
22 letter from the extension agent, and it was that letter
23 petitioner wanted to review and rebut with evidence at a later
24 time.

25 In Lower Lake Subcommittee v. Klamath Cty, 3 Or LUBA 55
26 (1981), we held there was a denial of the right to present

1 rebuttal evidence where a hearings officer held a record open
2 for 15 days to allow additional written testimony without
3 giving the other side the opportunity to rebut any new
4 evidence. Those circumstances are distinguishable from the
5 present case. In Lower Lake Subcommittee there was no
6 opportunity to rebut. Here, there was an opportunity (at the
7 hearing), but petitioners wanted additional opportunity to
8 submit rebuttal evidence.

9 In these circumstances, we do not consider further
10 opportunity to review the evidence and submit further evidence
11 to be a constitutionally protected right. The commissioners
12 were within their discretion to disallow the request for
13 additional time to take a second bite of the apple. This
14 assignment is denied.

15 FIFTH ASSIGNMENT OF ERROR

16 Petitioners note that although LCDC has acknowledged the
17 county's plan, the order of acknowledgement has been appealed
18 to the Court of Appeals. Should the appeal be successful,
19 petitioner asserts statewide goals will be applicable to this
20 decision, and there is no evidence to show compliance with
21 goals.

22 We deny this assignment of error. We cannot assume that
23 LCDC's acknowledgement order is invalid. Statewide goals do
24 not control land use decisions subsequent to acknowledgement.
25 Byrd v. Stringer, supra.

26 The decision is remanded for further proceedings. At a

1 minimum the county must make findings setting forth the facts
2 and explanation how and why the proposed dwelling is common to
3 farms of a similar nature, necessary for operation of the farm
4 to obtain a profit in money and customarily utilized in
5 conjunction with farm use.

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FOOTNOTES

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4 The finding showing per acre gross income of \$110 for hay
5 and \$600 for calves appears to meet the gross income test for
6 farm use tax deferral for unzoned farm land as set forth in ORS
7 308.372. The record does not indicate whether the county
8 adopted that statutory standard as the appropriate measure of
9 profitability for land zoned EFU as it did in Niemi v. Clatsop
10 County, ___ Or LUBA ___ (LUBA No. 83-052, dated October 17,
11 1983). However, the parties in this appeal have not raised the
12 issue whether the statutory standard is applicable here.

9 2
10 Section 110.223 of the county ordinance is substantially
11 the same as ORS 215.203(2) (a) as it existed prior to the 1979
12 amendments. See 1979 Or Laws, ch 480, §1.

12 3
13 ORS 215.203(2) now provides:

14 "(a) As used in this section, 'farm use' means the
15 current employment of land for the primary
16 purpose of obtaining a profit in money by
17 raising, harvesting and selling crops or by the
18 feeding, breeding, management and sale of, or the
19 produce of, livestock, poultry, fur-bearing
20 animals or honeybees or for diaring and the sale
21 of dairy products or any other agricultural or
22 horticultural use or animal husbandry or any
23 combination thereof. 'Farm use' includes the
24 preparation and storage of the products raised on
25 such land for human use and animal use and
26 disposal by marketing or otherwise. It does not
include the use of land subject to the provisions
of ORS chapter 321, except land used exclusively
for growing cultured Christmas trees as defined
in subsection (3) of this section.

22 "(b) 'Current employment' of land for farm use
23 includes: (A) land subject to the soil-bank
24 provisions of the Federal Agricultural Act of
25 1956, as amended (P.L. 84-540, 70 Stat. 188);
26 (B) land lying fallow for one year as a normal
and regular requirement of good agricultural
husbandry; (C) land planted in orchards or other
perennials prior to maturity; (D) any land

1 constituting a woodlot of less than 20 acres
2 contiguous to and owned by the owner of land
3 specially valued at true cash value for farm use
4 even if the land constituting the woodlot is not
5 utilized in conjunction with farm use; (E)
6 wasteland, in an exclusive farm use zone, dry or
7 covered with water, lying in or adjacent to and
8 in common ownership with a farm use land and
9 which is not currently being used for any
10 economic farm use; (F) land under dwellings
11 customarily provided in conjunction with the farm
12 use in an exclusive farm use zone; and (G) land
13 under buildings supporting accepted farm
14 practices.

15 "(c) As used in this subsection, 'accepted farming
16 practice' means a mode of operation that is
17 common to farms of a similar nature, necessary
18 for the operation of such farms to obtain a
19 profit in money, and customarily utilized in
20 conjunction with farm use."

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We are uncertain whether the reasoning of Billington is a correct interpretation of ORS 215.203(2) after the 1979 changes. We acknowledge Billington was decided in reference to the amended statute. However, we recognize there may be a different result if consideration is given to the portions of ORS 215.203(2)(b) not considered in Billington. That is, the reference to accepted farming practices may not apply to farm dwellings but only to other buildings supporting accepted farming practices. We do not take up this issue at this time as the decision before us was based upon the ordinance provisions, not on the statute. The parties here have not raised the issue.