

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

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MARY LOU MATTEO, JOSEPH)
MATTEO, ARLENE SMITH and)
MELVIN SMITH,)
Petitioners,)
vs.)
POLK COUNTY,)
Respondent.)

LUBA No. 84-012
FINAL OPINION
AND ORDER

Appeal from Polk County.

Mark J. Greenfield, Portland, filed the Petition for Review and argued the cause on behalf of Petitioners.

Wallace W. Lien, Salem, filed a response brief and argued the cause on behalf of Respondent-Participants. With him on the brief were Rhoten, Brand & Lien.

No appearance by Polk County.

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

REMANDED 06/25/84

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 This is an appeal from the county's approval of a permit
4 for a dwelling in conjunction with farm use on an 8.97 acre
5 parcel in an Exclusive Farm Use (EFU) Zone.

6 FACTS

7 The tract was not used for farming before it was acquired
8 approximately 2 years ago by the applicants-participants
9 herein. Oak and fir trees grow on most of the property. As
10 part of the application for a farm dwelling, the participants
11 submitted a development and farm management plan. The plan
12 shows, in addition to the homesite, a half acre pasture and
13 garden space, one acre reserved for accessory buildings and 5.5
14 acres of oriental pear orchard to be developed in four phases.
15 The proposal includes copies of descriptive materials regarding
16 oriental pears, a new crop for the area. The proposal also
17 includes letters from an extension agent stating this crop can
18 be grown on this parcel and there "is a good potential for the
19 type of crop they are thinking about." Record 152.

20 FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

21 These assignments of error challenge the order as in
22 violation of ORS 215.203, 215.213, and 215.243, as well as the
23 county zoning ordinance. In addition petitioners claim the
24 decision is not supported by adequate findings or substantial
25 evidence in the record. The challenges are all based on the
26 contention the parcel is not in farm use because it is not

1 currently employed for farming activities. According to
2 petitioners' argument there can be no dwelling in conjunction
3 with farm use until there is an existing farm.

4 The county ordinance allows dwellings "in conjunction with
5 farm use" in EFU Zones. Polk County Zoning Ordinance,
6 §136.020(b). ORS 215.283(1)(f) allows dwellings "customarily
7 provided in conjunction with farm use" on EFU lands. "Farm
8 use" is defined in both statute (ORS 215.203(2)(a))¹ and
9 county ordinance (§110.223).² There are differences in the
10 definitions since the ordinance appears to copy the provisions
11 of ORS 215.203(2)(a) as it read prior to the amendments made in
12 1979 and thereafter. Nevertheless, both statute and ordinance
13 definitions state farm use "means the current employment of
14 land for the (primary) purpose of obtaining a profit in money"
15 from farming activities. The word "primary" appears in the
16 statute but not in the ordinance definition.

17 Petitioners contend the proposal to plant a pear orchard
18 shows no more than an intention to put the land to farm use,
19 but it does not show the current use of the land for farming.
20 Petitioners argue the term "current employment" in the
21 statutory and ordinance definition of "farm use" precludes
22 approval of a dwelling on EFU land proposed for farm use.

23 The meaning of "current employment" in the definition of
24 farm use when a dwelling is sought for a proposed farm is a
25 matter before us for the first time.³ Consideration of the
26 question is complicated by the various applications of the

1 statutory definition of "farm use." Analysis by the courts has
2 resulted in different interpretations of the definition,
3 depending on the context in which the definition is used.
4 There are three different situations requiring use of the
5 definition.

6 As outlined in Rutherford v. Armstrong, 31 Or App 1319, 572
7 P2d 1331 (1977), the first enactment of farm use zoning in the
8 state occurred in 1961. The statute provided that when land
9 was zoned exclusively for farm use by a county, the property
10 was to be taxed "at its true cash value for farm use and not at
11 true cash value...." Or Laws 1961, ch 695. The definition was
12 initially used for purposes of identifying land eligible for
13 special tax treatment. The second situation arose when later
14 legislation put the definition to work in the land use
15 regulation scheme by allowing the use of dwellings and other
16 buildings in EFU Zones if "in conjunction with farm use." Or
17 Laws 1969, ch 258, §1. Then, in 1974, statewide planning goals
18 were adopted. Goal 3 requires agricultural lands to be
19 preserved and maintained for "farm use," and the definition of
20 farm use in ORS 215.203 is specifically incorporated in the
21 goal.⁴

22 This last use of the definition, i.e., to identify what
23 lands are "farm use" lands and therefore subject to goal
24 requirements, has received some consideration by the courts.
25 See e.g., Hillcrest Vineyards v. Board of Comm. Douglas Co., 45
26 Or App 285, 608 P2d 201 (1980); Meyer v. Lord, 37 Or App 59,

1 586 P2d 367 (1978); Meeker v. Board of Commissioners, 36 Or App
2 699, 585 P2d 1138 (1979); 1000 Friends v. Benton County, 32 Or
3 App 413, 575 P2d 651, rev den 284 Or 541 (1978); Rutherford v.
4 Armstrong, supra.

5 The distinction between use of the term "current
6 employment" for tax purposes and use of the term for other land
7 use regulation purposes was particularly noted in 1000 Friends
8 v. Benton Co., supra at 425. Judge Schwab said:

9 "The reference in ORS 215.203(2)(a) to the 'current
10 employment' of land is irrelevant in applying Goal 3
11 because it is a tax rule, not a land use rule." 1000
12 Friends v. Benton Co., 32 Or App 413, 432 (1978).

13 The probable basis for the statement was stated in the
14 majority opinion:

15 "Because they are taxation statutes the primary
16 emphasis is on the 'current employment of the land' so
17 that status may be determined for taxation purposes.
18 In contrast most zoning laws, and Goal 3, are
19 primarily concerned with both existing and future land
20 uses." Id at 425.

21 We do not consider the statement in 1000 Friends v. Benton
22 Co., supra, about the irrelevancy of the "current employment"
23 terminology to be applicable when considering the approval of
24 farm dwellings on EFU lands. The court made the observations
25 while analyzing the relationship between the statutory
26 definition of farm use and Goal 3. The two were said to be
inconsistent if zoning for exclusive farm use could be
compelled only for lands currently employed in farm
production. The court found the Goal 3 requirement that
agricultural lands be inventoried and placed in exclusive farm

1 use zones could not be implemented if such zoning could be
2 mandated only for lands currently employed in farm production.
3 The inconsistency was resolved by ignoring the term "current
4 employment" when used for Goal 3 purposes of identifying and
5 preserving agricultural land. The inconsistency with Goal 3 is
6 not present in questions of what dwellings may be placed on
7 land zoned EFU under the provisions of ORS 215.213 and 215.283.

8 We believe a further distinction in the use of the
9 definition of farm use is in order. When land is to be
10 identified and categorized as land with special attributes to
11 be regulated for the purpose of protecting those attributes,
12 then the current use of the land is not critical. That is,
13 agricultural land is not limited to lands in actual farm use.
14 On the other hand, when a status or activity on the land must
15 be established before another event may occur - as a condition
16 precedent to the other event - then the current use of the land
17 or activity on the land becomes relevant. For example, before
18 land may be determined to be eligible for tax deferral it must
19 qualify by being in farm use. Proposed or intended use as a
20 farm is not sufficient to obtain tax deferral.

21 The provisions of ORS 215.213 and ORS 215.283 allowing some
22 kinds of dwellings on EFU lands "in conjunction with farm use,"
23 and other kinds of dwellings when placed on land "used for farm
24 use" are in this latter category. The statute does not speak
25 in terms of proposed or future farm use, only farm use in the
26 present tense. In this context, the use of the term "current

1 employment" is relevant because farm use must exist as a
2 condition precedent to the establishment of dwellings in
3 conjunction with farm use or on land used for farm use.
4 Intended farm use on EFU lands is not sufficient to satisfy the
5 condition.

6 In summary, agricultural land need not be in "farm use" in
7 order to be within the protection of Goal 3. However, before a
8 farm dwelling may be established on agricultural land, the farm
9 use to which the dwelling relates must be existing.

10 In this case the findings refer to two activities on the
11 property illustrating current farm use: orchard preparation
12 and commercial woodlot management. The findings regarding
13 orchard development are conflicting. In one instance the
14 county found clearing had occurred in preparation for planting,
15 yet another finding stated two varieties of pears were
16 currently being planted. We note ORS 215.203(2)(b)(C)
17 specifically provides land is currently employed for farm use
18 if planted to orchards, even prior to maturity or actual
19 production of fruit. However, because the findings are
20 conflicting we are unable to determine whether or not any
21 specific part of the property has been planted.⁵

22 The findings about the woodlot consist of the following:

23 "The parcel is currently employed in agricultural
24 production in that it has a commercial firewood
25 woodlot, and clearing (in preparation for planting of
26 Asian pear root stock) has taken place on the
property." Record 36-37.

"They have begun management of the woodlot, and

1 started site preparation for orchard plantings."
Record 40.

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3 These findings are challenged by the petitioners on two
4 grounds. First petitioners allege the county failed to find
5 the property includes a woodlot as described in ORS
6 215.203(2)(b). That statute gives several examples of the term
7 "current employment of land for farm use" including:

8 "Any land constituting a woodlot of less than 20 acres
9 contiguous to and owned by the owner of land
10 specifically valued at true cash value for farm use
11 even if the land constituting the woodlot is not
12 utilized in conjunction with farm use." ORS
13 215.203(2)(b)(D).

14 Petitioners are correct in pointing out the findings in
15 this case do not show a woodlot meeting this description.
16 However, the statute is not definitive by its terms, and the
17 lists of examples of current employment for farm use does not
18 purport to be an exhaustive list. Even if a woodlot does not
19 meet the test of ORS 215.203(2)(b)(D), it can be considered a
20 farm use if its operation meets the definition of "raising,
21 harvesting and selling crops." However, in this case, the
22 findings only state the conclusion that the woodlot is a
23 commercial woodlot. A conclusion such as this, by itself, does
24 not serve to show how the woodlot is used to raise, harvest or
25 sell a crop or otherwise meet the definition of current farm
26 use.

As their second base of challenge petitioners say that
there is no substantial evidence of a commercial woodlot

1 meeting the statutory definition of "farm use." Respondents
2 answer this charge by reference to a letter to the county
3 commissioners. The letter states in part:

4 "I am aware of...(applicants') basic plan to utilize
5 the wood resources to finance a portion of the
6 clearing costs. I have assisted in clearing a portion
7 of the property on a barter exchange agreement."
8 Record 82.

9 This testimony does not show either management or use of
10 the land to raise, harvest and sell a wood crop. At most, the
11 evidence shows firewood taken from the land as incidental to
12 the land clearing process. Particularly when there is no
13 history of farm use, and current farm use is a necessary
14 precondition for placing a farm dwelling on EFU land, the
15 evidence should disclose activities unequivocally dedicated to
16 farm use. The evidence here does not. Clearing off the
17 natural vegetation does not by itself indicate the kind of
18 activity described in ORS 215.203(2)(a) as farm use.

19 Because the findings of current employment of the land for
20 farming activities is conflicting, and because the evidence
21 supporting the findings of an existing commercial woodlot do
22 not show activity unequivocally devoted to the raising,
23 harvesting and selling farm crops as defined in ORS
24 215.203(2)(a), the finding of a current employment of the land
25 for farm use is not sustainable. We therefore sustain these
26 assignments of error.

27 FOURTH ASSIGNMENT OF ERROR

28 Petitioners allege a violation of Goal 3 and the LCDC rule

1 implementing the goal. Although Polk County's Comprehensive
2 Plan has been acknowledged by LCDC, the order of
3 acknowledgement has been challenged in the circuit court.
4 Petitioners say statewide planning goals and OAR 660-05-025
5 will apply to this decision in the event the challenge is
6 successful.

7 We will not assume the order of acknowledgement is invalid
8 for purposes of our review. Until the acknowledgement order is
9 invalidated by appropriate proceedings, land use decisions must
10 be measured against the acknowledged plan, not the goals. Byrd
11 v. Stringer, 295 Or 311, 666 P2d 1332 (1983). We therefore
12 deny this assignment of error.

13 The decision is remanded for further proceedings not
14 inconsistent with this opinion. Before approving the permit
15 for a farm dwelling, the county must make findings clearly
16 stating the land has been planted to orchards or otherwise is
17 supporting activities illustrating current employment for farm
18 use as defined in ORS 215.203(2)(a).

19 REMANDED.

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FOOTNOTES

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4 ORS 215.203(2) (a) states:

5 "(2) (a) As used in this section, 'farm use' means the
6 current employment of land for the primary purpose
7 of obtaining a profit in money by raising,
8 harvesting and selling crops or by the feeding,
9 breeding, management and sale of, or the produce
10 of, livestock, poultry, fur-bearing animals or
11 honeybees or for dairying and the sale of dairy
12 products or any other agricultural or combination
13 thereof. 'Farm use' includes the preparation and
14 storage of the products raised on such land for
15 human use and animal use and disposal by marketing
16 or otherwise. It does not include the use of land
17 subject to the provisions of ORS chapter 321,
18 except land used exclusively for growing cultured
19 Christmas trees as defined in subsection (3) of
20 this section."
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24 Section 110.223 of the Polk County Zoning Ordinance states:

25 "Farm Use. 'Farm Use' means the current employment of land
26 including that portion of such lands under buildings
27 supporting accepted farming practices for the purpose of
28 obtaining a profit in money by raising, harvesting and
29 selling crops or by the feeding, breeding, management and
30 sale of, or the product of, livestock, poultry, furbearing
31 animals or honeybees or for dairying and the sale of dairy
32 products or ay other agricultural or horticultural use or
33 animal husbandry or any combination thereof. 'Farm Use'
34 includes the preparation and storage of the products raised
35 on such land for man's use and animal use and disposal by
36 marketing or otherwise. It does not include the use of
37 land subject to the provisions of ORS Chapter 321, or to
38 the construction and use of dwellings customarily provided
39 in conjunction with the farm use."
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42 The question of appropriate placement of a farm dwelling on
43 EFU land was before this Board in Stringer v. Polk County, 4 Or
44 LUBA 99 (1981). The decision was reversed by the Court of
45 Appeals in Byrd v. Stringer, 60 Or App 1, 652 P2d 1276 (1982)
46 and affirmed by the Supreme Court in Byrd v. Stringer, 295 Or

1 311, 666 P2d 1332 (1983). Neither this Board nor the Courts
2 discussed the meaning of the term "current employment" of land
3 for farm use in that case.

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4 Goal 3 states in part:

5 "Farm Use - is as set forth in ORS 215.203 and includes the
6 non-farm uses authorized by ORS 215.213.

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8 Attached to respondent's brief is an affidavit of the
9 applicant purporting to state activities on the land pending
10 the proceedings and since the hearing date. The affidavit is
11 not part of the record of matters before the commissioners at
12 the time they made their decision. Documents not part of the
13 record will not be considered by us on review.

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