

LAND USE
BOARD OF APPEALS

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

SEP 11 1 00 PM '89

3	David R. Williams,)	
)	
4	Petitioner,)	LUBA No. 89-057
)	
5	vs.)	FINAL OPINION
)	AND ORDER
6	Wasco County,)	
)	
7	Respondent.)	

8
9 Mark J. Greenfield, Portland, filed the petition for review
and argued on behalf of petitioner. With him on the brief was
10 Mitchell, Lang, & Smith.

11 Jeffrey K. Kolbe, The Dalles, filed the response brief and
argued on behalf of respondent. With him on the brief was
12 Bernard Smith, Wasco County Counsel.

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

14 REMANDED 09/11/89

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

1 Opinion by Kellington.

2 NATURE OF THE DECISION

3 Petitioner appeals an order of the Wasco County Court
4 approving a conditional use permit for a children's summer camp
5 (camp) in an exclusive farm use zone.

6 FACTS

7 This is the second time county approval of a conditional
8 use permit for a camp on the subject property has been before
9 us. The relevant facts in this case are accurately set out in
10 Williams v. Wasco County, ___ Or LUBA ___ (LUBA No. 88-036,
11 September 16, 1988) (Williams I) as follows:

12 "The proposed campground would be located on a 29.1
13 acre parcel in an active farming area. The county's
14 decision limits the campground operation to four weeks
15 per year during the period of July 1 through August
16 31. Camp attendance would be limited to a maximum of
17 twelve campers, ages eight to fourteen. Each session
18 is approximately one week long. There will be no
19 additional buildings constructed on the property as a
20 result of this permit. There is an existing residence
21 with accessory buildings on the property." Slip op 2.

22 In Williams I, we remanded the county's approval of the
23 camp on the basis of inadequate findings as follows:

24 " * * * In these circumstances, we conclude allowing
25 the proposed campground may materially alter the
26 stability of the overall land use pattern in the area.
On remand, the county must explain how the land use
pattern of the area is maintained by allowing the
proposed recreational use in its exclusive farm use
zone rather than requiring the use to locate on nearby
land already planned and zoned and partially developed
for such use." Slip op 3-4.

" * * * * * "

" * * * The county order does not explain how adjacent
field burning activity is compatible with the proposed
recreational use. The county's order simply concludes

1 that the likelihood of conflicts with farming
2 practices is 'not sufficiently great to warrant denial
3 of the permit.' This statement is not sufficient to
4 explain why the farming operations are compatible with
5 the campground or that the campground will not
6 seriously interfere with petitioner's farming
7 operation. We believe such an explanation is required
8 in order to sustain the permit under the county land
9 use and development ordinance.

6 "Finally, the county concludes that there is no
7 evidence that the proposal would interfere with
8 farming practices on adjacent land while at the same
9 time noting that there are 'potential
10 incompatibilities' with this use. We disagree that
11 there is no evidence that the proposal will interfere
12 with farming practices on adjacent lands. Petitioner
13 presented testimony about his farm operation and how
14 chemicals, dust and smoke from this operation would
15 not be consistent with a camp use. This evidence is
16 sufficient to raise the question and the county was
17 obliged to respond to it." (Footnote and citations
18 omitted.) Slip op 7-8.

12 On remand, the county held another evidentiary hearing,
13 after which the county again approved a conditional use permit
14 for the proposed camp, subject to conditions. This appeal
15 followed.

16 FIRST ASSIGNMENT OF ERROR

17 "The County Court erroneously determined that the
18 proposed use would be compatible with farm uses on
19 Petitioner's property and would not seriously
20 interfere with accepted farming practices employed by
21 Petitioner. The County Court improperly construed the
22 requirements of Sections 3.210(D)(1) and (2) of its
23 Land Use and Development Ordinance, adopted findings
24 inadequate to demonstrate compliance with these
25 criteria, and rendered a decision not supported by
26 substantial evidence in the whole record."

23 The Wasco County Land Use and Development Ordinance (LUDO)
24 3.210(D)(1) and (2) provide the following approval standards for
25 conditional uses in the Exclusive Farm Use (A-1) zone:

26 "(1) Is compatible with farm use described in

subsection (2) ORS 215.203 * * *.

"(2) Does not interfere seriously with accepted farming practices as defined in paragraph (c) of subsection (2) of ORS 215.203, on adjacent lands devoted to farm uses * * *."

We based our remand in Williams I, in part, on evidence presented by petitioner, to which the county did not respond, that petitioner sprays chemicals and engages in field burning as a part of his farming operation, occasionally producing smoke and spray drift. Petitioner's evidence was that this smoke and spray drift generated by the farm use of his property could drift onto the applicant's property and cause harm to the campers.

The county's response on remand was twofold. First, the county determined that spray and smoke drift are not accepted farming practices and, therefore, a determination whether the proposed camp would seriously interfere with such practices is unnecessary. Second, the county determined that spray and smoke drift are not "farm use," because such drift is or may be a tort and, therefore, an analysis of whether the proposed camp is compatible with these practices is unnecessary.¹ In its brief,

¹Specifically, the county found:

"* * * The petitioner's primary concern seems to be that if his agricultural operation affects a camper, he will be a target of litigation. There has been no allegation that the summer camp will directly interfere with farming, i.e. the use will not impede the farmers ability to cultivate, harvest, burn, spray or transport the harvest.

"Upon hearing all testimony and reviewing the record of proceedings, the County Court finds:

1 the county contends that these conclusions are justified under
2 our decision in Taber v. Multanomah County, 11 Or LUBA 127
3 (1984).

4 Petitioner argues that the county incorrectly applied the
5 law on remand. Petitioner claims that the county erred by
6 refusing to consider the compatibility of the camp with
7 petitioner's farm use, which petitioner claims necessarily
8

9 "1. The proposed camp will operate four weeks per year during
10 the months of July or August or both.

11 "2. Agricultural spraying and burning occur during July and
12 August.

13 "3. Not all the activities of the proposed camp will take
14 place in the sensitive area near the applicant's house.

15 "4. Spraying farm chemicals in a manner such that they drift
16 to or fall upon adjacent properties in [sic] not an
17 accepted farming practice.

18 "5. Agricultural burning on the petitioner's property is
19 accomplished within a time span of one or two days each
20 year.

21 "6. The Oregon Dept. of Forestry evaluates weather conditions
22 to determine whether they are suitable for safe burning
23 prior to issuance of the burning permit.

24 "The County Court concludes that spray drift is not a
25 significant factor to be considered in the decision because it
26 is not a practice that is or should be protected.
Additionally, a fire that escapes a controlled burn is also not
an accepted farm practice, and the farmer will be liable
regardless of whether the non-farm use is established."

"Therefore, the only potential source of incompatibility to be
considered is field burning, and the only potential
interference is complaints or actions in response to the
burning. Field burning is not a common practice in the
vicinity of the proposed camp. The Court concludes that the
threat of smoke creating adverse health effects on campers is
nullified by the combination of the facts that burning occurs
only one or two days per year, it is then closely monitored
before and during the event, and campers will be present only a
portion of those one or two days." Record 16-17.

1 includes drift from the use of sprays and from field burning.
2 Petitioner urges that the county also erred by determining that
3 spray and smoke drift are not part of the "accepted farming
4 practices" occurring on petitioner's land, against which the
5 impact of the proposed camp should be measured. Petitioner
6 argues that spraying and burning are accepted farming practices,
7 and that spray and smoke drift are incidental consequences of
8 farm use because the causative acts are accepted farming
9 practices.

10 Petitioner maintains that the proposed camp must be found
11 to be compatible and not to seriously interfere with, the
12 totality of his farming practices. Petitioner contends that our
13 decision in Taber v. Multnomah County, 11 Or LUBA 129 (1984),
14 is inapplicable here. Petitioner contends that our decision in
15 Taber concerned only the improper application of chemical sprays
16 used in farming. Petitioner argues that the unrebutted evidence
17 in this record is that even the proper application of chemicals
18 and field burning, with professional consultation and advice,
19 does not prevent the occasional drifting of chemicals and smoke.

20 We consider whether spray and smoke drift are included in
21 the definitions of "farm use" and "accepted farming practices"
22 contained in ORS 215.203 and incorporated by reference into
23 LUDO 3.210(D)(1) and (2).²

24
25 ²We note that LUDO 1.090 defines farm use substantially the same as ORS
26 215.203(2). The LUDO 1.090 definition of "accepted farming practices" is
also substantially identical to the statutory definition in ORS

1 ORS 215.203(2)(a) defines farm use as follows:

2 "* * * the current employment of land for the primary
3 purpose of obtaining a profit in money by raising,
4 harvesting and selling crops or the feeding, breeding,
5 management and sale of, or the produce of, livestock,
6 poultry, fur-bearing animals or honeybees or for
7 dairying and the sale of dairy products or any other
8 agricultural or horticultural use or animal husbandry
9 or any combination thereof. 'Farm use' includes the
10 preparation and storage of the products raised on such
11 land for human use and animal use and disposal by
12 marketing or otherwise. * * *"

13 ORS 215.203(2)(c) defines accepted farming practices as
14 follows:

15 "* * * a mode of operation that is common to farms of
16 a similar nature, necessary for the operation of such
17 farms to obtain a profit in money, and customarily
18 provided in conjunction with farm use."³

19 No deference is owed to a local government's interpretation
20 of state law. Hammack & Associates, Inc. v. Washington County,
21 89 Or App 40, 45, 747 P2d 373 (1987). We find that the county's
22 interpretation of these statutory definitions, viz, that
23 consequential spray and smoke drift from farming practices is
24 not a legitimate consideration in determining compatibility with
25 "farm use" and in determining serious interference with
26 "accepted farming practices," is neither reasonable nor
27 correct.

28 Petitioner raises mint and blue grass seed. There is no
29 dispute that raising these crops constitutes "the current

30 215.203(2)(c).

31 ³The relevant portions of these statutory definitions have not changed
32 since June 1985, when the LUDO was adopted. See Mental Health Division v.
33 Lake County, ___ OR LUBA ___ (LUBA No. 88-004, July 16, 1989).

1 employment of land for the primary purpose of obtaining a profit
2 in money * * *." ORS 215.203(2)(a). It is also undisputed that
3 as a part of this farm use, petitioner employs spraying and
4 burning. The unrebutted evidence in the record is that the
5 spraying and field burning utilized by petitioner is "a mode of
6 operation common to farms of a similar nature, necessary for
7 the operation of such farms to obtain a profit in money, and
8 customarily used in conjunction with farm use," consistent with
9 ORS 215.203(2)(c). Furthermore, it is undisputed that the farm
10 use of petitioner's land, which includes these practices,
11 produces drift which, even with proper techniques and under the
12 best of conditions, may travel onto or above adjacent land. The
13 central issue in this assignment is whether the drift which
14 incidentally results from petitioner's farm use is properly
15 considered as part of that farm use and whether it is properly
16 considered as an "accepted farming practice" as defined in
17 ORS 215.203.

18 We disagree with the county that for purposes of applying
19 approval criteria for nonfarm uses it may ignore the
20 consequences of farm use and accepted farming practices. We
21 decided in Resseger v. Clackamas County, 7 Or LUBA 152, 157
22 (1983), that satisfaction of a criterion substantially similar
23 to the LUDO provisions at issue required the county to " * * *
24 find that there will not be serious interference with accepted
25 * * * farm[ing] practices including the use of chemical sprays
26 or burning on adjacent lands devoted to farm * * * use." We

1 conclude that the drift of chemical sprays and smoke
2 occasionally produced on petitioner's farm results from, and is
3 an incidental part of, accepted farming practices utilized on
4 petitioner's farm in connection with the farm use.⁴
5 Accordingly, the county's approval standard that the camp not
6 seriously interfere with accepted farming practices requires the
7 county to consider whether the proposed camp will seriously
8 interfere with petitioner's accepted farming practices,
9 including the incidental consequences thereof. Furthermore, the
10 county's approval standard that the proposed camp must be
11 compatible with farm use requires the county to evaluate whether
12 the camp is compatible with identified aspects of petitioner's
13 farm use, including its incidental consequences.⁵

14 The county failed to adopt findings regarding the
15 compatibility of the proposed camp with the totality of
16 petitioner's farm use (including the incidental consequences of
17 petitioners farm activity). The county also failed to adopt
18

19
20 ⁴We do not agree that Taber v. Multnomah County, supra, requires a
21 different result. Taber involved concerns over the improper application of
22 farm sprays. There was no assertion in Taber that accepted farming
23 practices would unavoidably result in drifting sprays or other events which
might cause annoyance or damage to the users of neighboring land or the
land itself. See Taber v. Multnomah County, 11 Or LUBA at 132. In this
case, however, the unrebutted evidence is that even with the proper
application of chemical sprays and proper field burning techniques, drift
can and does occur.

24 ⁵The county may be correct that petitioner's farm use results on
25 occasion in tortious activity. However, that this may be so illustrates
26 the existence of a conflict between the farm use and the proposed nonfarm
use, rather than justifies that the conflict can be ignored by the county
in its consideration of the proposed nonfarm use.

1 findings regarding interference by the proposed camp with the
2 totality of the accepted farming practices occurring on
3 petitioners farm (including the incidental consequences of
4 petitioner's accepted farming practices). Thus, the county
5 incorrectly applied its approval standards and adopted findings
6 inadequate to address a correct interpretation of its approval
7 standards regarding compatibility and interference.⁶

8 Petitioner also contends that the county's decision is not
9 supported by substantial evidence in the whole record. Because
10 we have concluded that the county erroneously construed
11 applicable criteria and that the county's findings are
12 inadequate, little purpose would be served in examining the
13 adequacy of the evidence. Sweeten v. Clackamas County, ___ Or
14 LUBA ___ (LUBA No. 89-024, July 27, 1989, slip op 6).

15 The first assignment of error is sustained.

16 SECOND ASSIGNMENT OF ERROR

17 "The County Court erroneously determined that the
18 proposed use would not materially alter the stability
19 of the area's overall land use pattern, in violation
20 of LUDO Section 3.210(D)(3). The County Court's
21 findings are inadequate to demonstrate compliance with
22 this criterion and its determination of no material
23 alteration is not supported by substantial evidence in
24 the whole record."

25 ⁶Respondent suggests that the incidence of drift is exaggerated by
26 petitioner and that when caution is used the incidence of drift is rare.
We do not suggest that respondent must deny the proposal on the basis of
hazards which may never occur. The county must evaluate the evidence in
the record and determine and explain in its findings whether the proposed
camp is compatible with petitioner's farm use in the record and whether the
camp will seriously interfere with the accepted farming practices occurring
on petitioner's farm.

1 LUDO 3.210(E) (3) provides that a conditional use in the A-1
2 zone must not:⁷

3 "* * * materially alter the stability of the land use
4 pattern of the area * * *"

5 The county's determination that this standard is supported
6 by the following findings:

7 "1. The request does not include any new permanent
8 structures.

9 "2. The intent of the applicant is to provide an
10 agrarian atmosphere for the campers, which is
11 not possible at the Pine Hollow recreation area.

12 "3. The applicant has in the past invited children
13 to her property to stay on a non-commercial
14 basis. Their numbers and activities were
15 substantially the same as those proposed for the
16 conditional use camp, and their visits were
17 during the same time of year.

18 "4. Each application for a conditional use permit is
19 reviewed on its own merits, and one approval
20 does not establish a precedent that in any way
21 affects subsequent requests.

22 "The County Court concludes that the proposed summer
23 camp will not be a substantial change in the on-site
24 land use merely because the applicant wishes to make
25 the visits to her farm more formal by calling it a
26 'camp' and possibly charging a fee. There will be no
new structures and the number of potential campers is
no greater than the site would experience during a
typical family gathering. Therefore, the land use
pattern of the area will not be materially altered by
the camp." Record 15.

27 Petitioner attacks these findings on the basis that they do
28 not address:

29 " * * * how this pattern is maintained by allowing the
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⁷Petitioner mistakenly cites LUDO 3.210(D) (3) in this assignment of error. Petitioner intended to cite LUDO 3.210(E) (3).

1 proposed use at the proposed location rather than
2 requiring it to locate on nearby recreationally
3 planned and zoned land, which is part of the 'overall
4 land use pattern' of the area. The findings do not
5 adequately address impacts within the exclusive farm
6 use zone or impacts on the recreationally zoned area.
7 Because the order fails to address this matter,
8 contrary to this Board's instructions, the order again
9 must be remanded to the county." (Emphasis in
10 original.) Petition for Review 30.

11 The county argues that the purpose of the proposed camp is
12 to provide a farm experience for the campers and that the nearby
13 land zoned for recreational use cannot accommodate this purpose.
14 The county contends that the applicant's ranch has the resources
15 to provide a "living farm" experience, a characteristic not
16 shared by the Pine Hollow recreation area.
17 Respondent's Brief 8.

18 The county points to its findings stating (1) the camp will
19 not disrupt the land use pattern of the area zoned for exclusive
20 farm use because the proposed activity is substantially the same
21 as the lawful activities that have been taking place on the
22 applicant's ranch in the past, during the same time of year; (2)
23 the numbers of people proposed are no more than the number
24 typically experienced during a "family gathering;" and (3) no
25 new structures will be added and the physical appearance of the
26 area will not be changed. The county points to particular
findings which appear to support its determination of compliance
with LUDO 3.210(E)(3). Petitioner must identify why the
findings cited by the county are inadequate. League of Women
Voters v. Metro Service District, ___ Or LUBA ___ (LUBA No.
88-109, July 11, 1989). Petitioner has not done so.

1 Accordingly, we do not remand on the county's decision on this
2 basis.

3 Petitioner also challenges, generally, the substantiality
4 of the evidence to support the county's decision. The county
5 cites evidence in the record which it contends supports the
6 findings it made. The county's evidence indicates (1) the
7 activities proposed for the camp are "substantially the same as
8 Mrs. McAllister's social activities in the past;" (2) the
9 proposed camp activities will emphasize "farm activities such as
10 gathering eggs, milking cows, and playing with baby animals; and
11 (3) the proposed camp will not add any permanent structures,
12 but rather only two tents will be set up for a period of four
13 weeks.

14 Petitioner does not point out any conflicting evidence
15 which undermines the evidence cited by the county, and does not
16 explain why the evidence relied upon by the county is not
17 reliable. We conclude that the evidence relied upon by the
18 county is evidence a reasonable person would rely upon to reach
19 a conclusion. See Younger v. City of Portland, 305 Or 346, 348,
20 752 P2d 262 (1988).

21 The second assignment of error is denied.

22 The county's decision is remanded.
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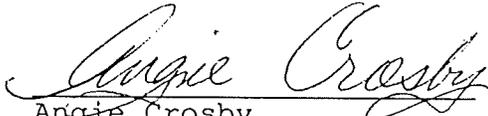
CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 89-057, on September 11, 1989, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Mitchell, Lang & Smith
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2000 One Main Place Bldg.
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Bernard L. Smith
Wasco County D.A.
Wasco County Courthouse
5th and Washington
The Dalles, OR 97058

Dated this 11th day of September, 1989.


Angie Crosby
Administrative Assistant