BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARJORIE TABER, JEROME DE GRAAFF, Petitioners, vs. MULTNOMAH COUNTY, Respondent.	LUBA No. 83-109 FINAL OPINION AND ORDER

Appeal from Multnomah County.

Jan D. Sokol, Portland, filed the petition for review and argued the cause on behalf of Petitioners. With him on the brief were Kobin & Meyer.

Peter Kasting, Portland, filed the response brief and argued the cause on behalf of Respondent Multnomah County.

Frank Josselson, Portland, filed the response brief and argued the cause on behalf of Respondent-Participant George Douglas. With him on the brief were Josselson & Potter.

BAGG, Chief Referee; DuBAY, Referee; participated in this decision.

AFFIRMED 05/04/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

Opinion by Bagg.

NATURE OF THE DECISION

Petitioners seek review of a community service designation and a conditional use permit for certain property on Sauvie Island in Multnomah County, Oregon. The purpose of the designation and permit is to allow an 18 hole golf course and accessory uses.

STANDING

Petitioner Marjorie L. Taber alleges she is a farmer and life long resident of Sauvie Island and is "an adjacent property owner." She states her property is within sight and sound of the proposed project. Petitioner Jerome DeGraaff alleges he passes the proposed project site daily on his way to and from work.

Both petitioners allege their property will be adversely affected by increased traffic congestion and resultant increases in noise, air pollution and pressures for additional commercial development. They allege these pressures will adversely affect their "property values" and hamper the future sale or lease of properties on Sauvie Island for farm use. According to petitioners, the proposed use is inconsistent with the character and nature of Sauvie Island, and the use will "adversely affect the general character of the area which is currently used for commercial agriculture." Petition for Review at 2. Petitioners claim the use will conflict with farm uses because farming practices including application of

herbicides and pesticides are not compatible with a golf course.

Respondent George Douglas attacks standing of both petitioners.[1] The challenge is based in the greater part on a claim that petitioners' allegations of injury are not sufficient as a matter of law to confer standing.

We conclude petitioners have standing to bring this appeal. Petitioners have alleged there will be increased traffic congestion and this increase will cause noise and air pollution.[2] Petitioners conclude they will suffer a loss of "property values." We view a claim for diminution of property values to be a claim of adverse effect. The assertion that there will be increased traffic and noise and air pollution is an assertion of fact. Together, we believe they constitute a sufficient claim of standing.[3] Ruef v. Stayton, 7 Or LUBA 219 (1983).

We are aware of respondents' assertion the county has found that traffic generated by the golf course would not create safety or congestion problems. We are also aware of respondents' view that the record demonstrates traffic related air pollution will be "insignificant" and that there is no evidence in the record that additional noise will be generated by the golf course. However, we do not believe respondents' opinion of the severity of injury to petitioners to deprive petitioners of standing. The issue is whether an injury is likely to occur, not whether the respondents find it insignificant. Warren v. Lane County, 6 Or LUBA 47; 62 Or App

682, 662 P2d 755, 66 Or App 7, ___ P2d ___ (1983).[4]

FACTS

In March of 1983, Respondent George E. Douglas applied for a conditional use permit and a community service designation to develop a golf course and accessory uses on 125 acres of land on Sauvie Island. The application included not only a golf course but a club house, pro shop, driving range, storage and maintenance buildings, a parking lot, a jogging trail, tennis courts and a restaurant. In August of 1983, the Multnomah County Planning Commission approved the application but denied permission for construction of a restaurant. Petitioner DeGraaff filed a notice of review of the planning commission's decision, as did Respondent Douglas. The Multnomah County Board of Commissioners heard these appeals on September 27, 1983 in a de novo proceeding. The board of commissioners met again on October 11, 1983, and adopted findings and conclusions in support of the decision to approve the project. However, the commission declined to allow the proposed full service restaurant. The county board approved instead a limited service restaurant. On November 9, 1983, petitioners filed the notice of intent to appeal the decision to this Board.

FIRST ASSIGNMENT OF ERROR

"The Board of County Commissioners erred in approving the proposed golf course because the applicant failed to establish that:

"(a) The proposed project would not conflict with farm uses in the area by interfering with and inhibiting the use by farmers of chemicals,

herbicides and pesticides on their farmland; and

"(b) the proposed project would not conflict with farm uses as a result of increased traffic congestion and compound the already critical conflict between agricultural equipment and recreational activities on the Island."

Petitioners correctly state that in order to obtain a community service designation for the golf course, the board of county commissioners is required to find the project

"(A) Is consistent with the character of the area;

"(B) Will not adversely affect natural resources;

"(C) Will not conflict with farm or forest uses in the area;

"(D) Will not require public services other than those existing or programmed for the area;

"(E) Will be located outside a big game winter habitat area as defined by the Oregon Department of Fish and Wildlife or that agency has certified that the impacts will be acceptable;

"(F) Will not create hazardous conditions;

"(G) Will satisfy the applicable policies of the Comprehensive Plan." Multnomah County Code (M.C.C.) §11.15.7015.

Petitioners challenge the county board's finding that there is "no evidence of any agricultural practices in the area which would conflict with the use of the site for a golf course." Record, p. 40. Petitioners argue this finding not only is not supported by evidence in the record, but what evidence exists shows the golf course will conflict with farm uses. See Record, pp. 240, 272-73, 625-6. The evidence to which petitioners refer includes statements by Mr. Mike Getz, a

farmer, as follows:

> "My name is Mike Getz, I live out on Sauvie Island, I farm out there and as a farmer one of our main concerns is getting rid of weeds and and [sic] grasses is our crops and as a golf course, one of their main concerns is growing grasses although not for crops it's for recreation and that is a little bit of a [sic] inconsistency, but what brought this to my attention was I was reading the Oregonian awhile back and there was an article in the Oregonian about problems with golf courses may be caused by farmers and this was in the August 30th issue, 1983, sport section, titled "Forest Hills greens looks like rough, it's written by Terry Haggers of the Oregonian staff and the quote was 'there are many ways that contamination could have occured, [sic] certainly one guess is that something sprayed on the neighboring land got into the pond water. Owner Sprios is making no accusatons, [sic] but has retained a Portland lawyer, John Holmes says, I think it fair to say there's a possibility of a law suit [sic]' and that's unquote. Now if I'm out farming and I spray a field and it gets in the water and leaches down and days for irrigation, that's going to put a real burden on us if we have to fight lawsuits to keep this golf course going all the time. Thank you." Record, pp. 240-241.

Petitioners buttress their argument that farming practices in the area will be adversely affected by arguing there is no legal protection from lawsuits in cases where chemicals may "trespass" onto adjacent non-farm properties. See Record, pp. 240-241.

The county's findings characterized Mr. Getz as being worried about his own grass and weed problems. The county then found Mr. Getz failed to give reasons showing how the presence of a golf course would aggravate his current problems with grass and weeds and so dismissed his concerns. However, findings by the Multnomah County Planning Commission (which were adopted by the county commissioners) state that there

would be no conflict between agricultural and golf course uses. The findings point out similarities in the kinds of cultivation practices that would occur on both the golf course and farm land. See Record, pp. 596. Support for these findings may be found in the Multnomah County staff report submitted to the planning commission and adopted by both the planning commission and the county board of commissioners. See Record, pp. 610-623.

Mr. Getz's testimony expresses only a fear of litigation based on a hypothetical set of facts. There is no indication of the likelihood of these facts coming into existence. Indeed, there is no assertion that any farming activities in the area are likely to make use of chemicals which could conflict with the golf course use and thereby occasion lawsuits or other vexatious behavior. We are aware of no presumption that legitimate farm use means chemicals will be used, whether harmful to neighboring non-farm uses or not. We find Mr. Getz's testimony recites a fear and does not force the conclusion that the county lacked substantial evidence to support the conclusion that no forseeable conflicts with farm use existed. See Homebuilders v. Metro Service District, 54 Or App 60, 633 P2d 1320 (1981); Cook v. Employment Division, 47 Or App 437, 614 P2d 1193 (1981).

We also believe it important to note that Mr. Getz appears to be speaking of potential lawsuits from the improper use of farm chemicals. That is, there is no assertion that legitimate

farming practices result in drifting sprays or other events which might cause annoyance or damage to the farmers' neighbors. We do not believe that Oregon's land use laws furnish a shield against suits or legal action for wrongful or tortious farming practices. Oregon has a "right to farm" law which provides a shield to protect farmers from suits based on a nuisance theory. ORS 30.930. However, the law does not protect the farmer from claims based on other theories of wrongful conduct such as negligence or trespass. ORS 30.935(3)(a). We decline to adopt a view holding that a "conflict" within the meaning of MCC §11.15.7015(C) exists between a golf course and wrongful operation of a farm. Of course, we do not wish to minimize petitioners' concerns about legal harassment resulting from recreational users' displeasure over legitimate farming practices. We only say that in this case, it does not appear that the petitioners' fears of potential harassment require us to conclude there is insufficient evidence in the record to support the county's conclusion there will be no conflict between the golf course and farm uses.[5]

Petitioners' next concern is about traffic. Petitioners attack the county's finding that there is no evidence that traffic would interfere with agricultural operations. See Record, p. 40. Petitioners claim the record contains unrebutted evidence of conflict with farm uses. The evidence cited consists of claims of existing conflicts between

agricultural traffic and other traffic, including joggers.

The record includes a traffic analysis appearing at pages 670-672, see also the testimony given to the county board at 224-225.[6] The analysis notes that the capacity of the bridge and road are some 5,000 vehicles per day which is estimated to be twice the total volume of traffic from all sources after opening of the golf course. In other words, the traffic analysis and other testimony shows that the expected traffic volume falls well short of the maximum county standard and that there is and will be no congestion. We believe this evidence constitutes substantial evidence that traffic to and from the golf course will not create a safety or congestion problem.[7]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The Board of County Commissioners erred in approving the proposed golf course because the applicable criteria for review contained in M.C.C. § 11.15.7015 and Multnomah County "Agricultural Land Area Policy", Policy No. 9, are impermissibly vague and they failed to advise both the applicant and the opponent of the criteria upon which an application will be judged."

The Agricultural Land Area Policy in the Multnomah County plan provides it is county policy to designate and maintain areas as agricultural land which are:

> "A. Predominately agricultural soil capability I, II, III and IV as defined by the U.S. Soil Conservation Service;
>
> "B. Or parcel sizes suitable for commercial agriculture;
>
> "C. In predominately commercial agricultural use;

"D. Not impacted by urban service."

We understand the petitioners to argue that while the county has discretion to apply the policy or not, there needs to be a basis for the decision to apply or not apply this policy. Petitioners urge the policy calls upon the county to maintain this area as agricultural land, not as a golf course.

We do not believe the policy applies in the manner argued by petitioners. Petitioners are correct that it is county policy to designate and maintain agricultural areas which happen to fit the four criteria listed above. However, the county has already applied this policy and designated this area as agricultural land. Further, Policy 9 contains implementation strategies which recognize non-farm uses and which call for provisions for non-farm uses within the community development ordinance (the zoning ordinance).

> "A. The following strategies should be addressed as part of the Community Development Ordinance:
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> "1. The Zoning Article: Shall include:
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> "a. An exclusive farm use zone consistent with the provisions of ORS 215.213.
>
> "b. Provisions for non-farm uses as conditional uses prescribed by ORS 215.213...." Multnomah County Comprehensive Framework Plan, p. 204.

The county has followed this policy by enacting a zoning ordinance which allows for non-farm uses under particular criteria.

We find, therefore, provision for a non-farm use, such as a

golf course is consistent with Policy 9. To the extent that petitioners may be asking the Board to review the county comprehensive plan and Policy 9, we decline to do so. The time to challenge the comprehensive plan has long past.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The Board of County Commissioners erred in approving the proposed restaurant because neither ORS 215.213 nor M.C.C. § 11.15.7005 et seq. authorized eating facilities, whether or not accessory. Even if ORS 214.213 or M.C.C. § 11.15.7015 authorized accessory eating facilities, the Board erred in approving a non-accessory restaurant."

For the purposes of this argument, petitioners acknowledge that ORS 215.213(2)(e) permits the establishment of a golf course as a non-farm use in an exclusive farm use zone. However, petitioners argue that an accessory structure, in this case a restaurant, is not authorized under the statute. Petitioners say accessory uses are not permitted unless specifically provided for. As evidence of this construction, petitioners point to legislative history of ORS 215.213(1)(a) permitting private or public schools "including all buildings essential to the operation of a school" as evidence of a general legislative policy to permit accessory uses only when specifically provided for in the governing statute. Petitioners say the Multnomah County Code fails to provide for accessory uses in community service designation areas. Therefore, the accessory restaurant is not permitted, according to petitioners. In support of this conclusion, petitioners

point to other sections in the Multnomah County Code which specifically mention not only primary but also accessory uses. See Petition for Review at 23.

Petitioners then offer the alternative argument that even if ORS 215.213 and the Multnomah County Code (MCC §11.15.7015) authorize accessory eating facilities, the county erred in approving this restaurant. According to this argument, the county's error was in its failure to recognize that the restaurant is not an accessory because it is not a subordinate building truly incidental to the main use. Petitioners say that an accessory use is one "normally expected" to be associated with the allowed use, and this condition does not exist here. See Card v. Flegel, 26 Or App 783, 787, 554 P2d 596 (1976); Yunker v. Means, 271 Or 57, 59, 530 P2d 846 (1975).

We agree with Respondent Douglas and Respondent Multnomah County that ORS 215.213 and the Multnomah County Code at MCC §11.15.2014, 11.15.7020(A)(10) and (23) provide for accessory uses. These provisions allow county authorization of accessory uses in various zones and designations, including EFU zones. The Multnomah County Code defines accessory uses as "structures or uses customary incidental to any use permitted or approved" within a zoning district.

We believe the city was correct in concluding that a restaurant is an accessory use to a golf course. The restaurant approved here has gone through several changes from a full service and rather expansive facility to the one finally

approved by the county. It was reduced from some 3,000 square feet to 1,500 square feet, and seating was reduced by one-half. The menu was also altered pursuant to a condition attached by the county. The county went to some length to ensure that this eating facility was truly an accessory incidental to the primary use and not an impermissible non-farm attraction not incidental to the golf course. We find the county's interpretation of its ordinance allowing for such a use to be in keeping with the language of the ordinance and reasonable. We have no basis for overturning this interpretation and we decline to do so in this case. Alluis v. Marion County, 7 Or LUBA 98 (1983). See also 2 R Anderson, The American Law of Zoning, Sec. 9.28 (2d ed, 1976); 2 Rathkopt, The Law of Zoning and Planning, 23-1 (4th Ed, 1983).

The third assignment of error is denied.

The decision of Multnomah County is affirmed.

FOOTNOTES

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1 Respondent Multnomah County joins in Douglas's arguments on standing.

Petitioners Marjorie Taber and Jerome DeGraaff ask for an evidentiary hearing "to prove an interest sufficient to support standing" or, in the alternative, permission to file a memorandum on the question of standing. The request was occasioned by Respondent George Douglas' challenge to standing of petitioners.

Because of our holding in this case in which we find that Petitioners Taber and DeGraaff have alleged sufficient facts to show standing to bring the appeal, we do not believe it necessary to hold an evidentiary hearing. We understand respondents' challenge to petitioners' standing to be based upon the sufficiency of the allegations, at least with respect to the matter of petitioners' claim of injury through increased traffic, noise and air pollution as a result of the allowance of a golf course. Because respondents do not assert there will be no increased traffic, noise and pollution, we will accept these allegations as true.

The motion for evidentiary hearing or leave to file additional memorandum on standing is denied.

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2 Petitioners have also alleged there will be pressures for further development hampering the future sale or lease of properties on Sauvie Island for farm use. Neither of petitioners asserts any interest in purchase or sale of farm property on Sauvie Island. Therefore, whether or not there will be increased pressure for further commercial development does not provide a basis for standing for these petitioners. See Kenagy v. Benton County, 6 Or LUBA 83 (1982).

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3 We understand petitioners' reference to "property values" to be a reference to both monetary and livability matters. Petitioners' statement of standing includes a claim that the "general character of the area" will be adversely affected by the proposed use. This claim, along with that of noise and air pollution and pressures for development, leads us to conclude that when petitioners speak of their property values, they are

speaking not only of issues of money, but also issues of livability.

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[4] Respondent, while denying that Petitioner Taber is an adjacent property owner, does not advise us as to the "true facts," or, where indeed Ms. Taber's property is located. See OAR 661-10-035(3)(6). Therefore, we will accept petitioner's claim of adjacent property ownership to be true. We believe a claim of adjacent property ownership is sufficient to confer standing on petitioner. As with an allegation of proximity within sight and sound of a proposed land use activity or site, we believe that a neighbor, sharing a lot line (as we understand "adjacent" to mean), may be presumed to suffer adverse affect or aggrievement as a result of land use activities on the land of his neighbor. Therefore, even if we are mistaken as to petitioner's claim about adverse affects from traffic, noise and pollution, we find Petitioner Taber has established an independent and sufficient basis for standing to bring this appeal. See also Gruber v. Lincoln County, 2 OR LUBA 180 (1981).

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[5] We do not hold the applicant or a governing body is relieved of the burden to show an absence of conflicts when that is the criterion. However, fear of legal harassment alone does not require a finding of conflicting use when there is other evidence that no conflicts exist.

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[6] This testimony includes the following:

> "On November 1, 1982, traffic count was taken on the North ramp of Sauvie Island Bridge. The total 20-4 hour traffic at that time was 20-300 Sixty-3 vehicles. The highest 1-hour count was the peak hour in the afternoon, 4-5 p.m. totalled 237 vehicles. The operation of the golf course and restaurant will add 56 hours to that peak hour load to make an expected total volume at peak hour of 290-3 vehicles. If all of these cars were in one lane, rather than both lanes, and none in the opposite lane, a vehicle would pass the counting station once every 12 seconds or five vehicles each minute. That is not congestion. And that is the worse scenario that can be constructed." Record, p. 225.

[7] We have noted before that a decisionmaker is entitled to rely on the evidence and expertise of its staff. Meyer v. City of Portland, 7 Or LUBA 184 (1983). Here, the county chose the evidence and conclusions made by staff, and we believe the county was entitled to do so.