BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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.

Opinion by DuBay.

NATURE OF THE DECISION

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

FACTS

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

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

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

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

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

We discuss these issues in turn.

A. The "Profit in Money" Farm Purpose

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

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

Although the findings about past and current use of the

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

> "(3) The Applicants are able to establish a commercial scale, intensive farm use of this parcel, with accepted farming practices, to wit:
>
> > "a. The subject parcel can be farmed profitably as an intensive commercial farm for the raising of hay, fruit orchards, and the raising of feeder steers. The parcel is made up of the Woodburn Soil Series, which will produce crops or livestock very typical for this area. On a per acre basis, this parcel will produce similar amounts as will surrounding parcels. This parcel should produce at or above yield for this area. The potential exists to increase productivity above average yields due to vegetables (sic) gardens, home orchards and more intensive livestock operations.
> >
> > "b. The intended use for this parcel, raising calves, hay and orchards, is appropriate for the soil and terrain. The gross income generated should be $110.00 per acre for hay, and $600.00 per acre for calves.
> >
> > "c. On a per acre basis, this parcel has the potential to make a profit which will vary from year to year, depending on prices, weather and management.
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> "(4) The surrounding area is made up predominantly of part-time farmers on smaller parcels, very few whose sole purpose is for making a profit from agriculture. According to the 1978 U.S. Census of Agriculture for Polk County, 55% of the farms listed give their principal source of income as coming from off the farm. Applicants' testimony shows that the intended farm use is similar to a national average of small farm uses.

* * *

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

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

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

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

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

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

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

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

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

We also reject petitioners' challenge to the evidence based on a claim of greater credibility of the witness who once farmed the property. In addition to the applicants' statement about earnings from the property in 1980, an agricultural agent's report stated the parcel should produce yields similar to crop and livestock operations in the area and has the potential to increase productivity and to make a profit. Record 69. We find this evidence believable. It is up to the commissioners, not us, to choose which evidence they believe when confronted with conflicting believable evidence. Homebuilders v. Metro Service Dist., 54 Or App 60, 633 P2d 1320

(1981).

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

B. Relationship of Dwelling to the Farm

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

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

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

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

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

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

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

> "'Farm use' means the current employment of land including that portion of such lands under buildings supporting accepted farming practices for the purpose of obtaining a profit in money by raising, harvesting and selling crops or by feeding, breeding, management and sale of, or the product of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. 'Farm use' includes the preparation and storage of the products raised on such land for man's use and animal use and disposal by marketing or otherwise. It does not include the use of land subject to the provisions of ORS Chapter 321, or to the construction and use of dwellings customarily provided in conjunction with the farm use.
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> "'Current employment' of land for farm use includes (i) land subject to the soil bank provisions of the Federal Agricultural Act of 1956, as amended (P. L. 84-540, 70 Sta. 188); (ii) land lying fallow for one year as a normal and regular requirement of good agricultural husbandry; (iii) land planted in orchards or other perennials prior to maturity for bearing crops.
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> "'Accepted farming practice' means a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use.'" (emphasis supplied). Section 110.223, Polk County Zoning Ordinance.[2]

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

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

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

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

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

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

FOURTH ASSIGNMENT OF ERROR

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

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

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

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

FIFTH ASSIGNMENT OF ERROR

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

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

The decision is remanded for further proceedings. At a

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

FOOTNOTES

1

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

2

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

3

ORS 215.203(2) now provides:

"(a) As used in this section, 'farm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for diarying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. 'Farm use' includes the preparation and storage of the products raised on such land for human use and animal use and 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.

"(b) 'Current employment' of land for farm use includes: (A) land subject to the soil-bank provisions of the Federal Agricultural Act of 1956, as amended (P.L. 84-540, 70 Stat. 188); (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

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

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

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[4] 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.