BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARY LOU MATTEO, JOSEPH MATTEO, ARLENE SMITH and MELVIN SMITH, Petitioners, vs. POLK COUNTY, Respondent.	LUBA No. 85-037 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 Ronald and Carol Hulett, Respondents.

No appearance by Polk County.

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

DUBAY, Referee; Dissenting.

REVERSED 09/03/85

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a permit allowing a farm dwelling on an 8.97 acre parcel zoned for Exclusive Farm Use (EFU).

FACTS

In January, 1984, Ronald and Carol Hulett requested approval of a permit for a dwelling in conjunction with farm use. In their application, they contended part of their parcel would be used for an orchard of dwarf Asian pear trees, a new crop for the area. The remainder of the tract would be used as a woodlot/homesite and garden.

The county approved the application, and the approval was appealed to this Board. We remanded the county's decision, Matteo v. Polk County, 11 Or LUBA 259 (1984) (herein Matteo I), because the findings did not show the property was currently in "farm use" as defined in ORS 215.203(2)(a). Without such findings, we held the permit for a dwelling "customarily provided in conjunction with farm use" (ORS 215.283(1)(f)), could not be granted. After the remand, further hearings were held and the county again approved the application.

The county's order describes the farm uses, lot sizes and other uses surrounding the property. It then discusses the applicants' intent to

> "enhance the present commercial aspect of the property by better maintenance and harvesting of the commercial firewood woodlot, and by phasing in a 5.5 to 7 acre

orchard of Asian pears." Record 7.

The order includes information about the Asian pear crop and concludes with an estimate of the profit obtainable from this crop. The order says "intensive planting technique" will be used to produce the planned crop.

We understand the county's order to conclude that although the orchard is still largely in the planning stage, the farm dwelling will give the operators the ability to prevent early crop damage caused by animals and vandalism. The dwelling is seen as a means of increasing efficiency of the operation. See Record, pp. 8-10.

PRELIMINARY ISSUES

Respondents Ronald and Carol Hulett urge the Board to dismiss this appeal on two jurisdictional grounds. First, they say petitioners failed to exhaust a local remedy available by right, as required by ORS 197.825(2)(a).[1] The alleged remedy consisted of an opportunity to comment on a draft of the final order prior to its submission to the governing body for approval. The alleged failure of petitioners to respond to the request for comments is said to deprive this Board of jurisdiction over the appeal. See Lyke v. Lane County, 11 Or LUBA 117 (1984).

We do not consider the statutory exhaustion requirement to include the sort of ad hoc procedural opportunity at issue here. Respondents cite no county ordinance or regulation

creating the "remedy" they say petitioners should have pursued. We reject the suggestion that a request for comments on a proposed order is a remedy available by right within the meaning of ORS 197.825(2)(a). Compare Portland Audubon Society v. Clackamas County, 12 Or LUBA 269 (1984) holding ORS 197.825(2)(a) applies where local ordinance gives petitioner a right to request reconsideration and a right to a response from the governing body.

Respondent's second jurisdictional challenge is based on ORS 197.835(7)(a). The statute states, in relevant part:

> "...(LUBA) shall not review a...building permit issued under the state building code...for compliance with the goals if the permit is issued:
>
> "(a) For land subject to an acknowledged comprehensive plan and land use regulation...."

As we discuss below, petitioners' first and second assignments of error do not allege violation of statewide goals. Instead they allege the county's decision violates statutory and ordinance provisions and is not supported by substantial evidence in the record. The quoted statute limiting our review is therefore not applicable to the first two assignments of error.

Petitioners' third assignment of error does allege a violation of Goal 3 and the Land Conservation and Development Commission's rule regarding dwellings on pre-existing lots, OAR 660-05-025. As discussed later, we have no power to review petitoners' claim.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The record shows that subsequent to the decision in Matteo I, the applicants submitted an updated farm management plan, planted 1 acre with Asian pear trees, and obtained a determination by the county assessor that 6 1/2 acres of the property qualifies for valuation at true cash value for farm use. The applicants also cut and sold firewood, thinned the stand and sprayed herbicides on a portion of the property. Petitioners say these activities do not satisfy statutory and ordinance requirements that the property must be currently employed in farm use in order for the county to approve a farm dwelling.

Petitioners argue that the definition of farm use in ORS 215.203(2)(a) requires a showing that agricultural activities are currently the principal or primary uses of the property, rather than the planned uses of the property, and that the county did not construe its ordinances and the statute in this way. Petitioners say the evidence shows that agricultural use is not the primary use of the property and that unless and until the proposed crop is established, agricultural use will be secondary or incidental to the proposed residence.

Not all of the 9 acre tract is in "farm use" as that term is defined in the statute. ORS 215.203(2)(a) provides in part:

> "...'Farm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops...."

In addition, ORS 215.203(2)(b) states:

"'Current employment' of land for farm use includes:

* * *

"(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;"

The order reveals that 1 acre is planted in Asian pear trees. Arguably, this acre is in "farm use" as defined by the statute. ORS 215.203(2)(b)(c). However, the county's order discusses the profitability of this crop in terms of what a mature Asian pear orchard should yield. Record, p. 8. The order talks about "gross profit" when all the orchards are in full production. Id. Therefore, while the 1 acre is currently employed in the raising of crops, it is not clear to us that the one acre is currently employed "for the primary purpose of obtaining a profit in money." ORS 215.203(2)(a). It is only when this 1 acre is combined with other parts of the tract, now planned for Asian pear production, that the tract at issue will be employed for "farm use" as defined in ORS 215.203(2)(a).

With regard to the portion of the tract asserted to be in farm use as a woodlot, the county found:

"A portion of the property which is a mixture of oak and fir is currently being managed and cut for resale as firewood. Over the past season, the applicants, state that over 50 cords of firewood have been sold, and the property is continuing to be cleared and the

firewood lot managed for a maximum yield of existing timber."

As we pointed out in Matteo I, a woodlot may be a farm use in either of two ways. First, a woodlot as defined in ORS 215.203(2)(b)(D) is presumptively in farm use. Alternatively, land is in farm use if it is currently employed for the primary purpose of obtaining a profit in money by raising, harvesting and selling firewood as a crop. ORS 215.203(2)(a).

Here, the county made no finding that any portion of the property meets the definition of a woodlot in ORS 215.203(2)(b)(D). The county's order seems to say the woodlot is a farm use as defined in ORS 215.203(2)(a), but petitioners allege there is no substantial evidence that trees are being raised as a farm crop. In fact, according to petitioners, the testimony of the applicants is that the firewood only comes from trees that are cut to clear land for orchard purposes.

The record supports petitioners' claim that trees were cleared from a portion of the property for orchard planting and the wood sold as firewood. Although the permit applicants testified that cutting and selling these trees for firewood is raising, harvesting and selling a farm crop, we adhere to our view, expressed in Matteo I, that cutting existing vegetation in these circumstances is not "farm use" as defined in the statute. There must be proof of efforts to cultivate tree growth and to provide protection from fire, insects and disease. We therefore sustain petitioners' claim that the

previously wooded portion of the property which has been cleared is not in farm use under ORS 215.203(2)(a).

The permit applicants contend, however, that there is a 3 acre woodlot on the property apart from the area being cleared for orchard planting. They point to evidence in the record showing efforts to promote tree growth by spraying herbicides and thinning the treestand, and that these activities demonstrate firewood is being cultivated as a crop. However, the county's only finding on the matter, previously quoted above, does not describe a specific woodlot, but instead vaguely refers to "a portion of the property...." Further, the finding implies that firewood is sold only as land is being cleared, despite the conclusory reference to management for maximum yield. The record is likewise unclear regarding the size and location of the woodlot.[2] Even if it were our function, which it is not, to make a finding of fact about the size of the woodlot, we could not do so from the record. Without factually supported findings by the county regarding the size and location of the woodlot and the extent to which it is being managed for production of firewood as a crop, we cannot uphold the claim that the land is in farm use as a woodlot.

In summary, 1 acre is planted with young fruit trees. That acre is the only portion of the 9 acre tract which is arguably in farm use. The next and more difficult question is whether a farm dwelling may be allowed under these circumstances.[3] We

answer this question in the negative, for the reasons set forth below.

Neither the definition of farm use in ORS 215.203(2)(a), nor the listing of uses permitted on land zoned for exclusive farm use advise how much of a lot must be devoted to farm use before a dwelling in conjunction with farm use may be permitted. What is clear from a reading of ORS 215.203 to 215.337, however, is that it is the policy of this state to assure that farm land is used for farm purposes. ORS 215.243 declares that agricultural land is to be preserved, and that the supply of agricultural land is limited. ORS 215.243(1) and (2). This policy is reflected in the careful and limited enumeration of farm and non-farm uses permitted, under certain conditions, within exclusive farm use zones. See, for example, ORS 215.213 and ORS 215.236 and 215.283.[4] In considering whether or not the respondents in this case have established that they are presently entitled to construct a "dwelling customarily provided in conjunction with farm use," we believe a restrictive approach should be taken. The statute should be read to permit farm dwellings only where it is clear that the state's policy of agricultural lands preservation will be promoted.

It is, therefore, our view that to be entitled to a "dwelling customarily provided in conjunction with farm use," the applicant must show and the county must find that the dwelling will be sited on a parcel wholly devoted to farm use.

To hold otherwise would be to open the door to allowance of dwellings which serve other than farm uses.[5] These "non-farm" dwellings are restricted by statute and are recognized other than "dwellings customarily provided in conjunction with farm use." ORS 215.213(3). Non-farm dwellings are restricted because they do not preserve "the limited supply of agricultural land...." ORS 215.243(2).

We recognize the good faith intentions of the permit applicants in this case to develop the new crop on the 9 acre parcel. However, we do not believe the statute in question allows construction of farm dwellings before establishment of farm uses on the land. The cart should not be placed before the horse, in our view, lest the underlying policy of farmland preservation be threatened.

We therefore agree with petitioners that ORS 215.283(1)(f) authorizes a dwelling in an EFU zone only where it may be shown that the dwelling is part of a parcel devoted to farm use. The dwelling is then truly "in conjunction with farm use."

The county order and the record show that not all (or even a substantial part) of this property is currently in farm use. Even if we assume the 1 acre planted in Asian pear root stock is in farm use, it is unclear as to how much of the property is in agricultural use because of woodlot activities. If the county reconsiders this application, it must consider how much land is in woodlot use.

Because the county has not shown that the property is currently devoted to farm use, the permit could not be issued. ORS 215.283(1)(f). A dwelling in conjunction with an acreage homesite is not a dwelling "customarily provided in conjunction with farm use." ORS 215.283(1)(f). See, 1000 Friends of Oregon v. Marion County, 1 LCDC 57, 68 (1977); see also, Sane and Orderly Development v. Douglas County, 2 Or LUBA 196, 200-203 (1981).

The county's decision must therefore be reversed. OAR 661-10-070(1)(b)(A)(3). If this application is to be approved, the applicant must show (and the county must find) that the the parcel is currently in farm use as defined in ORS 215.203. The county must then answer whether or not a proposed dwelling is "customarily" provided in conjunction with farm use.

THIRD ASSIGNMENT OF ERROR

As they did in Matteo I, petitioners claim the decision violates Goal 3 and LCDC administrative rule interpreting the goal, OAR 660-05-025. We denied a similar challenge in Matteo I on the ground that Polk County's plan has been acknowledged by LCDC to be in compliance with statewide land use goals, and the goals are not applicable to the decision. Byrd v. Stringer, 295 Or 311, 666 P2d 532 (1983). Although LCDC's acknowledgement order has been challenged in the circuit court, and the matter is now before the Court of Appeals, the land use decision must be measured against the acknowledged plan, not the goals, until the acknowledgement order is invalidated by

appropriate proceedings. We therefore find we have no jurisdiction to consider petitioners' last assignment of error.

The decision of Polk County is reversed.

DuBay, Dissenting.

I disagree with the majority's view that a dwelling customarily provided in conjunction with farm use on land zoned EFU may be sited only on a tract which is wholly devoted to farm use. This standard is not based on any statutory criterion, but is invoked as a policy statement derived from ORS 215.243(1) and (2). The general statewide policy stated in ORS 215.243 is that the maximum amount of agricultural land should be preserved, and that it should be preserved in large blocks to maintain the agricultural economy of the state. The statutory policy does not address how much farming must take place on individual tracts of agricultural land. It certainly does not purport to impinge on the allowance or location of farm dwellings or any of the other uses specifically allowed by ORS 215.213(1) and 215.283(1) on land zoned for exclusive farm use.

By taking this step, the majority have added a new criterion to the relevant statutes regarding the allowance of farm dwellings. The legislature has seen fit to permit "[t]he dwellings and other buildings customarily provided in conjunction with farm use" on EFU land. ORS 215.283(1)(f). This provision is effectively altered by the majority to read: the dwellings and other buildings customarily provided in conjunction with a tract of land wholly in farm use. There is no warrant for this addition to the statutory criteria, and this Board has no authority to add to the statute. See Speck

Restaurant, Inc. v. Oregon Liquor Control Commission, 24 Or App 337, 545 P2d 601, appeal dismissed, 97 S Ct. 35, 429 US 803, 50 Law Ed 2nd 64 (1976).

Where non-farm dwellings are at issue, the general policy in ORS 215.243 regarding preservation of agricultural lands is a necessary consideration. This is because the legislature provided in ORS 215.283(3)(a) that nonfarm dwellings may be approved if "consistent with the intent and purposes set forth in ORS 215.243." Although the same consistency requirement could have been mandated by the legislature in the case of farm dwellings, it did not do so. It is reasonable to assume the omission was not unintentional.

While I disagree with the addition of a new criterion restricting the allowance of farm dwellings, I do not believe the criteria in ORS Chapter 215 permit placing a dwelling on land merely because some part of the land is in farm use, no matter how little that use may be. The provisions of ORS 215.283(1)(f) are clear that only those dwellings and other buildings customarily provided in conjunction with farm use may be allowed. This limitation, i.e., whether dwellings and other buildings are customarily provided, must be taken into account by the granting authority. The appropriateness of the dwelling with the farm use in each instance is addressed and measured by this standard.

As I read the findings, the county found the dwelling to be in conjunction with the planned Asian pear orchard rather than

in conjunction with the 1 acre actually in farm use. While dwellings may be or may not be customarily provided in conjunction with a 4-5 acre fruit orchard described in the management plan, there are no findings that dwellings are customarily provided in conjunction with newly planted 1 acre orchards.[6] Without that determination by the local jurisdiction, it is not possible to review for compliance with applicable criteria. I would remand for findings on this issue.

FOOTNOTES

[1] ORS 197.825(2)(a) states:

"(2) The jurisdiction of the board:

"(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review."

[2] The record includes references to a woodlot of various sizes. For example, the 5 acre management plan submitted with the original application includes a drawing showing a woodlot and homesite location of about 2-3 acres, while the narrative part of the plan claims 4 acres are utilized as a woodlot. Record 143, 144, LUBA No. 84-012. The updated farm management plan dated March, 1985, does not describe the size or location of the woodlot. Although respondents argue a 3 acre woodlot is included in the 6.5 acres determined by the tax assessor to be subject evaluation for farm use or on the county property tax records, the tax assessor's letter of determination does not mention a woodlot. Record 109.

[3] We assume the county would authorize the dwelling even without the existence of the woodlot referred to in the final order. We therefore proceed to the question of whether a dwelling in conjunction with farm use may be allowed where only 1 acre of a 9 acre parcel is in farm use.

[4] The Legislature recognized that limitations on non-farm uses had to be imposed. The law provides that exclusive farm use zoning "substantially limits alternatives to the use of rural land...." 215.243(4).

[5] To read the statute to allow farm dwellings where only a portion of the property is devoted to farm use is to ignore the policy statement in ORS 215.243. Policy statements, while perhaps not dictating specific actions, are an aid to interpreting statutes. 1A Sands, Sutherland Statutory Construction, Sec. 20.12 (4th Ed, 1985).

[6] The county did find a dwelling is needed to facilitate protection of the young orchard from animal damage. However, need for a dwelling is not the appropriate criterion.