BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GILBERT SCHAAD and ANNA WAGNER, Petitioners, vs. CLACKAMAS COUNTY and CLIFFORD V. AARON, Respondents.	LUBA No. 86-042 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Richard P. Benner, Portland, filed the petition for review and argued on behalf of Petitioners.

John T. Gibbon, Wilsonville, filed a response brief and argued on behalf of Respondent Aaron.

Michael E. Judd, Oregon City, filed a response brief and argued on behalf of Respondent Clackamas County.

KRESSEL, Referee; Bagg, Referee; DuBay, Chief Referee; participated in this decision.

REMANDED 10/17/86

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

Opinion by Kressel.

NATURE OF THE DECISION

Respondent approved the division of a 42-acre tract zoned for farm use. The approval divides the tract into three parcels and allows construction of nonfarm dwellings on two of them.

FACTS

The tract is in the county's General Agricultural District (GAD), an acknowledged exclusive farm use zone. Respondent Aaron raises horses on the tract. The land to the north, west, and east is in farm use and is also in this district. However, the land to the south is zoned for rural residential use (RRFF-5). This area, known as Becke's Addition, is developed with single family dwellings on small lots (between 1 and 5 acres).

Respondent Aaron proposes to divide the tract into three parts. His land division application states:

> "I wish to separate two tracts in the southeast corner of TL 304. The area is brush and trees. As it cannot be used in conjunction with the existing horse ranch operation, I wish to raise capital for that operation by selling these tracts." Record at 35.

The two three-acre lots described in the application are to be sold as sites for nonfarm residences. Respondent Aaron's horse raising operation would continue on the remaining 36 acres.

The county planning director denied the application. Respondent Aaron appealed the decision to the Board of County Commmissioners. After a hearing, the commission overturned the

director's decision and approved the application.

FIRST ASSIGNMENT OF ERROR

Like the statute on which it is based, Respondent's zoning ordinance authorizes approval of nonfarm dwellings in the general agricultural district. See Section 402.05, Clackamas County Zoning Ordinance. See also, ORS 215.283(3). The ordinance lists six prerequisites for approval of a nonfarm dwelling. The first is that the proposal

> "[I]s compatible with farm uses described in Subsection 402.03 of this Ordinance and is consistent with the intent and purpose set forth in ORS 215.243." Section 402.05(1), Clackamas County Zoning Ordinance.

The county's finding concerning this standard reads:

> "The written testimony in the record, the oral testimony presented at the hearing and the viewing of the site by the commissioners provides substantial evidence to conclude that the proposal is compatible with Farm Uses in the ordinance (sic). Commercial farming activities are carried out on large acreages in the area, both by other property owners and the applicant. These activities primarily include filbert orchards and animal husbandry. The proposed non-farm uses will occur on land physically separated by a roadway from commercial farming activities of adjoining land owners and physically separated by topography from the remainder of the applicant's parcel. The proposed lots abut existing parcels of sizes less than the G.A.D. minimum, these lots are utilized for homesites, however, some uses compatible with the agricultural uses in the area occur on them.
>
> "The proposal is consistent with the intent and purpose of ORS 215.243 because the testimony presented and the Commissioners' viewing of the property establishes that land to be included in the non-farm use lots consists of land which rationally cannot be converted to use as crop land, because of its topography and soil conditions and because of its size and location, which also make it unsuited for timber production." Record at 2-3.

Petitioner claims the finding does not demonstrate compatibility between the proposed nonfarm dwellings and nearby farms. The point is well taken. Reduced to essentials, the finding is that the proposed lots are separated from other farming operations by a road and separated from the remainder of the applicant's tract by "topography." The order does not explain why the intervening road warrants the conclusion that two nonfarm dwellings will be compatible with neighboring farm uses. The proposition that farm and nonfarm uses are compatible because they are separated by a road is not one that we find self-evident.

Nor does the county's order describe the topographical differences between the proposed homesites and the remainder of the applicant's ranch or explain why those differences make the homesites compatible with the ranch and other farm uses nearby. The county's brief maintains that "...due to physical separation the proposed dwellings will have no impact on neighboring farm uses...," County's brief at 3, but the "no impact" finding is not in the final order. We may agree that a use that has no impact on neighboring uses is compatible with them, but we cannot conclude from the order at issue here that the nonfarm dwellings approved by the county will have no impact on the neighboring farm uses.[1]

Based on the foregoing, the first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

The county zoning ordinance requires a finding that the proposed nonfarm dwelling:

> "Does not interfere seriously with accepted farming practices, as defined in subsection 402.03 of this Ordinance, on adjacent lands devoted to farm use." Section 402.05(2), Clackamas County Zoning Ordinance.

The county concluded that the non-interference criterion was satisfied for the following reasons:

> "Although there is conflicting testimony regarding whether or not the proposed use will interfere with accepted farming practices in the area, the more persuasive testimony on this issue was presented (1) by the applicant's representative, to the effect that filbert management techniques now utilize sprays which were not intrusive or highly toxic, and that the applicant would be willing to burden the property with covenants which would prevent future owners from challenging farming practices, and (2) by an adjoining landowner who testified that sprays utilized for filbert management are not toxic enough to constitute a basis for an adjoining owner to complaint (sic) about their use. These specific comments outweighed the staff's generalized concern regarding the potential for conflict and the testimony of the homeowner on the abutting property to effect (sic) an incident involving spraying had occurred somewhere in the area." Record at 4.

Petitioners allege that the county "misapplied Section 402.05(A)(2) by approving the partition in the face of evidence of complaints and harm from chemical spraying." Petition at 7. They direct our attention to the following evidence in the record: (1) chemicals were being applied to filberts on an adjacent tract when a planner visited the area in question, (2) testimony by petitioner Wagoner that a farmer in the area told her of complaints he had received about spraying from a

non-farmer who lives in the area (the farmer told Wagoner that he had to stop spraying as a result) and (3) a letter in opposition to the proposal stating that:

> "In the area, disputes between farmer and residential owner concerning spraying and fertilizing of crops have risen in direct proportion to the number of new residences built. Two more homes owned by people who want to "move to the country" but not live near fields that are crop-dusted have the potential for even more disputes." Record at 26.

Petitioners' main argument, as we understand it, is that the county could not conclude that the non-interference standard was satisfied once the foregoing evidence was introduced into the record. A secondary argument seems to be that, at a minimum, the county was obligated to address the evidence of interference in the final order. We construe both arguments to be that the county "improperly construed the applicable law" by concluding that Section 402.05(A)(2) was satisfied. ORS 197.835(8)(a)(D). For the reasons stated below, we reject petitioners' first argument but accept the second.

Under the ordinance, a nonfarm dwelling may be approved if it "does not interfere seriously with accepted farming practices..." Section 402.05(A)(2), Clackamas County Zoning Ordinance (emphasis added). We stress the phrase "interfere seriously" because the ordinance does not flatly prohibit approval of a nonfarm dwelling that interferes in some way with farming practices on nearby land. If a flat prohibition were contained in the ordinance, petitioners' challenge would have

considerably more force than it does.

The evidence relied on by petitioners is that (1) some farmers in the area use chemical sprays, (2) one farmer stopped the practice after receiving complaints from a neighbor and (3) disputes over spraying have increased. The evidence could support a decision to deny the application under Section 402.05(A)(2). See Braidwood v. City of Portland, 24 Or App 477, 546 P2d 777 (1976). However, we cannot say, as petitioners ask us to, that the evidence compelled such a decision as a matter of law.

Standing alone, the fact that farmers use chemical sprays in the area does not establish that allowance of non farm dwellings would violate Section 402.05(A)(2). The additional fact that a farmer halted the practice after complaints were received shows some interference, but we cannot say as a matter of law that the incident referred to in the testimony proves that existing dwellings "interfere seriously with accepted farming practices" nearby or that the proposed dwellings will do so. Petitioner Wagoner testified:

> "I would also like to make a point on this spraying that we do have one farmer who I have personally talked to who has had difficulty with an indiviudal who had moved into the area on a one acre lot and that he has had to quit spraying because of the danger he caused his family and also he said it discolored his house so he had to paint his house." Record at 18.

We cannot tell from this testimony whether the farmer halted spraying for an hour, a day or an indefinite period after receiving the neighbor's complaints. That information would be

significant in determining whether the incident amounted to "serious interference" with farming (as petitioners suggest) or a relatively insignificant incident (as the county's findings suggest). The further statement in a letter from two opponents of the proposal that complaints about spraying have increased in the area is also too general to conclusively establish the claim that petitioners make, i.e., that "Respondent misapplied Section 402.05(A)(2) by approving the partition in the face of evidence of complaints and harm from chemcical spraying."[2] Petition at 7.

Stated in other terms, we hold that the evidence petitioners rely on does not legally prohibit the county from finding that the non-interference standard is satisfied. We must add, however, that the county is obligated to address the issues raised by opponents of the proposal that are relevant under Section 402.05(A)(2) and the findings adopted by the county must be supported by substantial evidence in the record. We turn next to whether the findings before us in this appeal are adequate.

Petitioners' argument that the county misapplied Section 402.05(A)(2) by failing to address the evidence of interference with spraying stands on better footing than their first argument. The issue was clearly raised by opponents of the proposal. The county's finding makes passing reference to this issue, but it does not directly discuss whether there has been serious interference with spraying (presumably an accepted

practice in the area) as a result of complaints by neighboring nonfarmers. Rather, the county's finding stresses the point that the chemicals used by farmers are not intrusive or toxic enough to justify complaints.[3] We do not equate these points with the finding necessary under Section 402.05(A)(2). For example, neighbors may complain about spray odors or perceived medical harms (justified or not) and these complaints may cause farmers to alter their practices--to the detriment of the farming operations. Given the specific evidence of interference along the lines just suggested, the county was required to discuss in the final order the impact on spraying practices of complaints raised by area residents. Norvell v. Portland Area LGBC, 43 Or App 849, 852-3, 604 P2d 898 (1979)[4].

The county misconstrued the applicable law by failing to address the evidence of interference with accepted farming practices. Based on the foregoing, the second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Under the zoning ordinance, the county was required to find that the proposal

> "Does not materially alter the stability of the overall land use pattern of the area." Section 402.05(A)(3), Clackamas County Zoning Ordinance.

The county found as follows:

> "The staff report and exhibits, the applicant's testimony and exhibits, and the Commissioners' viewing of the property established that the propsal would not

materially alter the stability of the area. This is because the proposed parcels abutt (sic) an area, Beck's Addition which is zoned RRFF-5 and which has been divided into lots of a size comparable to those proposed by applicant. Moreover, the proposed lots are physically separated from adjoining land owners (sic) G.A.D. zoned land by a roadway and distinct from the remainder of the applicant's G.A.D. zoned property by reason of a substantial topographic variation. The remainder of the applicant's property is developed as a horse raising operation, with complete facilities already existing and no need for expansion onto the subject property. It cannot therefore be concluded that this approval will set a precedent for other property in the area, as this parcel is essentially an isolated leftover tract more logically related to the abutting RRFF-5 property than the adjacent G.A.D. lands." Record at 4-5

Petitioners contend the county's finding either fails to define the area being considered in connection with Section 402.05(A)(3) or defines the area too narrowly. In essence, they claim the approval standard demands consideration of the land use pattern of the agricultural area (land zoned GAD) in the vicinity of the 42 acres, whereas the county's finding looks only at the pattern in the rural residential settlement (Becke's Addition) to the immediate south of the 42 acres.

Respondents answer that petitioners misread Section 402.05(A)(3). In their view, the standard demands consideration of the area surrounding the 42 acres, regardless of whether that area is zoned for agricultural or some other use.

Petitioners' argument is the more persuasive one. The county ordinance is indisputably modeled on state law pertaining to exclusive farm use zoning. See 215.283(3)(c). The underlying policy in the statutes is the preservation of rural

farmland. See ORS 215.243(2). The policy would not be advanced if nonfarm residences could be sited on farmland based on land development patterns established on nearby nonagricultural land. Rather, we believe the appropriate consideration under provisions such as Section 402.05(A)(3) is the land development pattern on agricultural land in the area.

Petitioners overstate their case somewhat when they accuse the county of considering only the development pattern on the rural residential land south of the 42 acres in question. The finding does address adjoining land in the GAD zone. However, we must agree that the finding does not take into account the overall pattern in this agricultural area. Yet that overall pattern, presumably made up of parcels in various sizes and uses, and the effect on it of approving nonfarm dwellings on two three acre lots must be the critical focus under Section 402.05(A)(3).

Based on the foregoing, the third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

The final assignment of error directs attention to Section 402.05(A)(4) of the county zoning ordinance. The section requires a finding that a nonfarm dwelling:

> "Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract."

With respect to this provision, the county found as follows:

"The testimony and exhibits presented by the applicant and those members of the public supporting the application and the commissioners viewing of the property were sufficient to establish that the property proposed for the non-farm use is unsuitable for the production of crops and livestock, for the following reasons:

"(1) Terrain - the proposed parcels are separated from the applicant's farming operation by reasons of a gully and contain a slope on which the operation of farm equipment appears to be impractical.

"(2) The soils of the subject site are not, according to the Soil Conservation Service's Soil Survey of Clackamas County, suitable for commercial forest production. Any alteration of the use to the production of crops or forage would, because the soil's permeability characteristics, require erosion control activity impractical because of the site's slope as well as the installation of irrigation facilities impractical because of its location and size.

"(3) Utilization of the parcel for crops or forage would require removal of existing vegetation consisting of fir, cedar, oak, Oregon grape and forbs and grass which is of value in protecting air, soil and water quality. Such an action considering costs related to agricultrual use of the tract and its size and location in relation to the existing farms and home sites in the area is not feasible." Record at 5-6.

Petitioners contend the findings are conclusory and therefore fail to demonstrate satisfaction of Section 402.05(A)(4). Petitioners add that the findings are not supported by substantial evidence. Underlying their contentions is the argument that the land in question is class III soil and is therefore presumptively capable of agricultural use, including a use not adequately considered by the county, i.e., grazing.

The county's finding under Section 402.05(A)(4) rests on

three points. Petitioners attack each of them. We consider their claims in turn.

The first point is that a gully separates the proposed residential lots from the remainder of the ranch and that the land slopes to such a degree as to appear to make operation of farm equipment impractical. Petitioners correctly observe that the finding is overly general. It does not explain why the gully or the slope make the land unsuitable for farm uses. See Resseger v. Clackamas County, 7 Or LUBA 152, 159 (1983). Even if conclusional findings of this sort could withstand scrutiny on the ground they are supported by more detailed or explanatory evidence in the record, the Respondents fail to cite such evidence.[5]

There is an additional flaw in the county's discussion of the terrain issue under Section 402.05(A)(4). The finding seems to assume that the critical issue is whether operation of farm equipment on the parcel is practical. However, this gives too much importance to the use of farm machinery and too little importance to the soil classification of the property. The finding seems to disregard, for example, the possibility of using the class III soil for grazing--an agricultural use which presumably does not depend on the site's accessibility to farm equipment. See Pilcher v. Marion County, 2 Or LUBA 309, 313 (1981).

The county's second point under Section 402.05(A)(4) is that alteration of the land (we assume this means clearing and

leveling) for crops or forage would require erosion control and irrigation measures that are impractical. The finding shares the defect of the one concerning terrain. It is conclusional. It does not describe the soil's "permeability characteristics" or the slope of the land. Nor does it describe what irrigation facilities would be necessary in order to put the land to agricultural use. See Resseger v. Clackamas County, supra. Even if the conclusional nature of the finding is overlooked, Respondents do not direct our attention to evidence in the record backing up or explaining the statement that difficult erosion control measures and prohibitively expensive irrigation facilities would be required. Petitioners' challenge to this finding, as a basis for the county's decision under Section 402.05(A)(4) must therefore be sustained.

The final point made in the county's unsuitability finding is that preparation of the land for agricultural use would necessitate land clearance measures that are environmentally undesirable. The finding adds that such action would be infeasible "...considering costs related to agricultural use of the tract and its size and location in relation to the existing farms and home sites in the area..." Record at 6. The first point (environmental drawbacks) is only tangentially related to the unsuitability standard in the county ordinance. The second point (feasibility) is too vague to justify the unsuitability conclusion. The county avers that putting the land to agricultural use is infeasible due to cost, size of the tract

and its location near rural residential development, but these very general statements are not explained. Standing alone or in combination with the previously discussed findings, they do not demonstrate that the proposed nonfarm dwellings would be "situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract." Section 402.05(A)(4), Clackamas County Zoning Ordinance. Resseger v. Clackamas County, supra.

Based on the foregoing, the fourth assignment of error is sustained.

The county's decision is remanded.

FOOTNOTES

1 Petitioner requests we strike portions of Respondent Aaron's brief. Petitioner objects to Exhibit B, a letter from a surveyor dated Septemer 10, 1986 and references to the letter in the brief.

The objection is well taken. The letter and facts drawn from it and discussed in the brief were not before the county board when it made its decision on August 6, 1986. See ORS 197.830(11); Lamb v. Lane County, 14 Or Luba 506 (1985).

2 We will not speculate on what level of evidence would be required to conclusively establish interference with accepted farming practices.

3 The order also says that the landowner is willing to burden the land with covenants that "would...prevent future owners from challenging farm practices." Record at 4. However, the final order does not require such covenants. Even if covenants were required, however, we do not believe they would justify the conclusion that Section 402.05(A)(2) is satisfied.

4 The pertinent questions on remand are (1) the nature and extent of spraying in the area, (2) the impact on spraying of complaints raised by neighbors and (3) the probable impact on the practice of adding two nonfarm residences at the site in question.

5 Respondent Aaron's brief offers information about the slope of the property, but that information is not in the record. It therefore cannot be considered in this appeal. ORS 197.830(11).

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 86-042, on October 17, 1986, 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:

Richard P. Benner
300 Willamette Building
534 Third Avenue
Portland, OR 97204

Michael E. Judd
Assistant County Counsel
906 Main Street
Oregon City, OR 97045

John T. Gibbon
Office of District Attorney
PO Box 100
Albany, OR 97321

Dated this 17th day of October, 1986.

Elizabeth E. Sheridan
Management Assistant