LAND USE
BOARD OF APPEALS
SEP 11 1 00 PM '89

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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

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

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

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

REMANDED 09/11/89

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

Opinion by Kellington.

NATURE OF THE DECISION

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

FACTS

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

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

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

> " * * * In these circumstances, we conclude allowing the proposed campground may materially alter the 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.
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> " * * * * * "
>
> " * * * The county order does not explain how adjacent field burning activity is compatible with the proposed recreational use. The county's order simply concludes

> that the likelihood of conflicts with farming practices is 'not sufficiently great to warrant denial of the permit.' This statement is not sufficient to explain why the farming operations are compatible with the campground or that the campground will not seriously interfere with petitioner's farming operation. We believe such an explanation is required in order to sustain the permit under the county land use and development ordinance.
>
> "Finally, the county concludes that there is no evidence that the proposal would interfere with farming practices on adjacent land while at the same time noting that there are 'potential incompatibilities' with this use. We disagree that there is no evidence that the proposal will interfere with farming practices on adjacent lands. Petitioner presented testimony about his farm operation and how chemicals, dust and smoke from this operation would not be consistent with a camp use. This evidence is sufficient to raise the question and the county was obliged to respond to it." (Footnote and citations omitted.) Slip op 7-8.

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

FIRST ASSIGNMENT OF ERROR

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

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

> "(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,

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[1]Specifically, 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.
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> "Upon hearing all testimony and reviewing the record of proceedings, the County Court finds:

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

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

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> "1. The proposed camp will operate four weeks per year during the months of July or August or both.
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> "2. Agricultural spraying and burning occur during July and August.
>
> "3. Not all the activities of the proposed camp will take place in the sensitive area near the applicant's house.
>
> "4. Spraying farm chemicals in a manner such that they drift to or fall upon adjacent properties in [sic] not an accepted farming practice.
>
> "5. Agricultural burning on the petitioner's property is accomplished within a time span of one or two days each year.
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> "6. The Oregon Dept. of Forestry evaluates weather conditions to determine whether they are suitable for safe burning prior to issuance of the burning permit.
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> "The County Court concludes that spray drift is not a significant factor to be considered in the decision because it 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.

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

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

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

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

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

> "* * * the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce 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 human use and animal use and disposal by marketing or otherwise. * * *"

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

> " * * * 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 provided in conjunction with farm use."[3]

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

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

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215.203(2)(c).

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

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

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

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

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

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[4]We do not agree that Taber v. Multnomah County, supra, requires a different result. Taber involved concerns over the improper application of farm sprays. There was no assertion in Taber that accepted farming 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.

[5]The county may be correct that petitioner's farm use results on occasion in tortious activity. However, that this may be so illustrates 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.

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

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

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

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

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[6]Respondent suggests that the incidence of drift is exaggerated by 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 occuring on petitioner's farm.

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

> "* * * materially alter the stability of the land use pattern of the area * * *"

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

> "1. The request does not include any new permanent structures.
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> "2. The intent of the applicant is to provide an agrarian atmosphere for the campers, which is not possible at the Pine Hollow recreation area.
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> "3. The applicant has in the past invited children to her property to stay on a non-commercial basis. Their numbers and activities were substantially the same as those proposed for the conditional use camp, and their visits were during the same time of year.
>
> "4. Each application for a conditional use permit is reviewed on its own merits, and one approval does not establish a precedent that in any way affects subsequent requests.
>
> "The County Court concludes that the proposed summer camp will not be a substantial change in the on-site land use merely because the applicant wishes to make the visits to her farm more formal by calling it a '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.

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

> " * * * how this pattern is maintained by allowing the

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[7]Petitioner mistakenly cites LUDO 3.210(D)(3) in this assignment of error. Petitioner intended to cite LUDO 3.210(E)(3).

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

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

The county points to its findings stating (1) the camp will not disrupt the land use pattern of the area zoned for exclusive farm use because the proposed activity is substantially the same as the lawful activities that have been taking place on the applicant's ranch in the past, during the same time of year; (2) the numbers of people proposed are no more than the number typically experienced during a "family gathering;" and (3) no new structures will be added and the physical appearance of the 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.

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

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

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

The second assignment of error is denied.

The county's decision is remanded.

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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Dated this 11th day of September, 1989.

Angie Crosby
Administrative Assistant