

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

| | | |
|------------------------------|---|-----------------|
| JOEL ROWAN, HANK SCHMID, BOB |) | |
| WAGGENER, STAN PROSSER, and |) | |
| BILL ROBINSON, |) | |
| |) | |
| Petitioners, |) | LUBA No. 89-154 |
| |) | |
| vs. |) | FINAL OPINION |
| |) | AND ORDER |
| CLACKAMAS COUNTY, |) | |
| |) | |
| Respondent. |) | |

Appeal from Clackamas County.

David B. Smith, Tigard, filed the petition for review and argued on behalf of petitioners.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED

05/09/90

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a decision of the Clackamas County Hearings Officer denying their application to establish a private park as a conditional use in the Exclusive Farm Use, 20 Acre District (EFU-20).

FACTS

Petitioners propose to establish a private park, including a fish and wildlife preserve, recreational lake, primitive campground and playground facilities, for the use of the public and the handicapped. The park would be established on a vacant 75.10 acre parcel which is generally level, with an upward slope at the west and east borders. Much of the property is covered with brush and scattered trees, with wooded Garret Creek flowing through the easternmost portion. Ground water and water from Garret Creek would be used to maintain the level of the proposed man-made lake.

The subject property is composed predominantly of U.S. Soil Conservation Service Class I-IV soils. The property has recently been used as pasture for cattle during the summer months. The property is located within an area of large parcels in commercial farm use.

ASSIGNMENT OF ERROR

"The respondent's conclusion that petitioners' application for development of a conditional use in an Exclusive Farm Use zone should be denied,

because the development did not satisfy the goals and purposes of the county's comprehensive plan that apply to petitioners' proposed use, misconstrues the applicable law."

Clackamas County Zoning and Development Ordinance (ZDO)

401.06.A ("Conditional Uses") provides in relevant part:

"The following uses may be established [in the EFU-20 district], subject to approval by the Hearings Officer * * *. Approval shall not be granted unless the proposed use * * * conforms with the criteria listed in Section 1203, and does not conflict with the purposes under subsection 401.01.

"* * * * *

"6. Private parks, playground, hunting and fishing preserves and campgrounds and parks, playgrounds or community centers owned and operated by a governmental agency or a nonprofit community organization;

"* * * * *." (Emphasis added.)

ZDO 1203 ("Conditional Use") establishes the following general criteria for approval of conditional uses:

- "A. The use is listed as a conditional use in the underlying district.
- "B. The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, existence of improvements and natural features.
- "C. The site and proposed development is timely, considering the adequacy of transportation systems, public facilities and services existing or planned for the area affected by the use.
- "D. The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs, or precludes

the use of surrounding properties for the primary uses listed in the underlying district.

"E. The proposal satisfies the goals and policies of the Comprehensive Plan which apply to the proposed use." (Emphasis added.)

ZDO 401.01 ("Purpose") provides as follows:

"[Section 401 (EFU-20 District)] is adopted pursuant to ORS 215.203, 215.213, 214.215 [sic 215.215], 215.243 and 215.263 and pursuant to the goals of the Comprehensive Plan for agricultural lands which are:

"A. To preserve agricultural lands.

"B. To protect agricultural lands from conflicting uses, high taxation and the cost of public facilities unnecessary for agriculture.

"C. To maintain the economic base of Clackamas County and increase its share of the market.

"D. To increase agricultural income and employment by creating conditions which further the growth and expansion of agriculture and which attract agriculturally related industries.

"E. To maintain and improve the quality of air, water and land resources.

"F. To conserve scenic and open space.

"G. To protect wildlife habitats."

The Land Use chapter of the Clackamas County Comprehensive Plan (plan), at p. 82, sets out seven Agriculture Goals,

which are identical to those in ZDO 401.01 quoted above.¹

The county hearings officer found that petitioners' proposal (1) conflicts with plan Agriculture Goals A-E; (2) is consistent with plan Agriculture Goals F and G, Agriculture Policies 11.0, 12.0 and 13.0, and Noise and Air Quality goals; and (3) furthers plan Parks and Recreation goals. The hearings officer concluded petitioners' application does not comply with ZDO 1203.E, for the following reasons:

"An analysis of [compliance with ZDO 1203.E] requires a balancing of competing policies. It is not sufficient as the applicant maintains to determine that the proposal is permitted as a nonfarm use by ORS 215.213 and ORS 215.283 and Policy 13.0. The ORS provisions which authorize Clackamas County to allow a private park on land zoned for exclusive farm use, establish only a minimum standard. Clackamas County has chosen to permit those allowable nonfarm uses only where they meet several separate criteria, including one which requires that the application be consistent with applicable Goals and Policies of the Plan. As discussed above, this application furthers some Plan provisions, is consistent with others, and is in conflict with others. In this situation, the Hearings Officer gives great weight to the Goals to preserve agricultural land and to prevent uses which conflict with farm uses in exclusive farm use areas. It is significant that this proposal would be the only identified nonfarm use in this larger area. It is also significant that the proposal would alter the land in such a manner as to preclude future agricultural use of a portion of the property. On balance, the proposal is

¹In this opinion we shall refer to these plan agriculture goals by the A through G designations used in ZDO 401.01.

found to conflict with applicable Goals and Policies of the Plan." Record 7-8.

The hearings officer also concluded petitioners' proposal conflicts with the purposes listed under ZDO 401.01, based on his findings with regard to conformance with the plan Agriculture Goals, and the following reasoning:

"The applicant must establish that the proposal does not conflict with the purposes of subsection 401.01 of the ZDO. The purposes of subsection 401.01 are a restatement of the Goals of the Agriculture Element of the Plan. For the reasons discussed above [see previous quote], the application conflicts, on balance, with the purposes of subsection 401.01.

"* * * * *" Record 8.

The parties agree that the sole issue presented in this appeal is whether petitioners' proposed conditional use may be denied solely on the basis that it does not comply with the comprehensive plan Agriculture Goals. Petitioners argue that since the ZDO itself contains detailed standards governing petitioners' conditional use application (ZDO 1203.A-D), the county misconstrued the applicable law in determining that the plan Agriculture Goals are separate, additional conditional use approval standards.² Jarvis v. Wallowa County, 15 Or LUBA 390, 396 (1987).

²Petitioners recognize, however, that plan goals and policies may be approval standards for plan amendments. Hummel v. City of Brookings, 16 Or LUBA 1 (1987).

Petitioners also argue that comprehensive plan goals or policies cannot be applied as approval standards for conditional uses in the EFU-20 district where to do so would frustrate the legislative purpose underlying ORS ch 215 and ZDO 401. Petitioners specifically argue that it is improper to apply Agriculture Goal A ("preserve agricultural lands") as an approval standard for conditional uses listed in ORS 215.283(2) and ZDO 401.06.A in the EFU-20 zone, because such uses always remove agricultural land from potential farm use and, therefore, will always be denied. Petitioners contend that in J.R. Golf Services v. Linn County, 62 Or App 360, 364, 661 P2d 91 (1983), the Court of Appeals held that a county ordinance provision requiring that nonfarm conditional uses in an exclusive farm use zone "not remove land suitable for agricultural * * * production" could not be interpreted and applied to effectively prohibit golf courses in that zone since the zone specifically listed golf courses as a conditional use. See also Dougherty v. Tillamook County, 12 Or LUBA 20, 32 (1984).

Petitioners also argue that where a use is specifically listed as a permissible conditional use in a zone, it must be presumed that the use is consistent with the purposes of that zoning district, and the zoning district's purpose section, therefore, cannot be applied as a separate approval criterion. Jarvis v. Wallowa County, supra; Dougherty v. Tillamook County, 12 Or LUBA at 32-33.

The county argues that whether comprehensive plan goals and policies or ordinance purpose sections are approval standards for a conditional use in a particular instance depends upon an examination of the relevant language in the applicable plan or ordinance. The county contends that the LUBA decisions which petitioners claim establish that plan goals and policies and ordinance purpose sections cannot be approval standards for conditional uses, or at least not where the ordinance itself sets out detailed conditional use approval standards, e.g. Jarvis v. Wallowa County and Dougherty v. Tillamook County, in fact hold only that the plan goals and policies and ordinance purpose sections at issue in those cases were not intended to be approval standards. According to the county, LUBA has in several instances found that plan policies are approval standards applicable to individual land use decisions. Storey v. City of Stayton, 15 Or LUBA 165 (1986) (annexation and PUD approval); McCoy v. Tillamook County, 14 Or LUBA 108 (1985) (subdivision approval).

The county further argues that in this case there can be no doubt as to the intent of its code. ZDO 1203.E, which applies to all conditional uses, requires that a proposed conditional use "satisfies the goals and policies of the Comprehensive Plan which apply to the proposed use." According to the county, there can be no doubt that the plan Agriculture Goals apply to a conditional use in the EFU-20

zone, especially because ZDO 401.06.A requires that a conditional use in the EFU-20 zone "not conflict with the purposes under subsection 401.01," and those purposes are the plan Agriculture Goals themselves. The county further notes that if the plan agricultural goals and policies were not applicable to nonfarm conditional uses in EFU zones, there would be no way for the decision maker to consider the value of the subject property for agricultural use, as the other approval criteria, ZDO 1203.A-D, are general criteria applicable to conditional uses in all zones.

The county finally argues that, unlike the situation in J.R. Golf Services v. Linn County and Dougherty v. Tillamook County, application of its plan agriculture goals to approval of nonfarm conditional uses does not automatically result in a total prohibition against such uses in the EFU-20 zone. According to the county, the hearings officer properly interpreted ZDO 1203.E and the requirement of ZDO 401.06.A that the use "not conflict with" the purposes listed in ZDO 401.01 to require a balancing of the degree to which the proposed use furthered or conflicted with competing plan goals and policies.

We agree with the county that determining whether comprehensive plan goals and policies, or ordinance purpose sections, are approval standards for conditional use approval in a particular instance depends upon an examination of the particular relevant plan and code

provisions. In this case, ZDO 401.06.A explicitly requires that conditional uses in the EFU-20 zone comply with the criteria of ZDO 1203, and ZDO 1203.E explicitly requires that the conditional use "satisfy" applicable plan goals and policies. We find no reason to doubt that the agriculture goals and policies applied by the county to its appealed decision are plan provisions applicable to approval of a nonfarm conditional use in an EFU-20 zone. The plan states, at p. 3, that "goals and policies in this plan direct future decisions on land use actions * * *." (Emphasis in original.) Furthermore, ZDO 401.06.A also explicitly provides that a conditional use in the EFU-20 zone must not conflict with the purposes under ZDO 401.01. These listed purposes are the Agriculture Goals found at p. 82 of the plan, and applied by the county to its decision.

Additionally, we disagree with petitioners' contention that application of the plan Agriculture Goals (especially Goal A) to proposed nonfarm conditional uses in the EFU-20 zone, as required by ZDO 401.06.A, would effectively prohibit such uses, a prohibition inconsistent with the decision to identify those uses as conditional uses in that district. Under the county's interpretation of its code, which we find to be reasonable and correct, the requirements to satisfy, and not conflict with, the purposes of the plan Agriculture Goals are applied by balancing the degree to which the proposed use furthers or conflicts with various

plan goals and policies. See Douglas v. Multnomah County, ____ Or LUBA ____ (LUBA No. 89-086, January 12, 1990), slip op 21-22.

In this case, the hearings officer gave greater weight to the plan goals to preserve agricultural land and prevent conflict with farm uses in exclusive farm areas than, e.g., to the plan Parks and Recreation Goal, because the proposed use would be the only nonfarm use in an area of large parcels in commercial farm use. Record 7-8. Furthermore, the hearings officer did not find a conflict with Agriculture Goal A ("preserve agricultural lands") simply because some agricultural land would be temporarily occupied by the proposed nonfarm use, but rather because a "substantial amount of land," 25-30 acres, would be permanently removed from agricultural use by the proposed lake. Record 6, 8. Based on the appealed decision, we see no reason to conclude that the county's application of its plan goals and policies to proposed nonfarm conditional uses in the EFU-20 zone will result in a prohibition of all such uses.

The assignment of error is denied.

The county's decision is affirmed.