BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

A. D. DORITY III,	)	
	)	
Petitioner,	)	
	)	LUBA No. 91-209
vs.	)	
	)	FINAL OPINION
CLACKAMAS COUNTY,	)	AND ORDER
	)	
Respondent.	)	

Appeal from Clackamas County.

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

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

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

AFFIRMED 06/24/92

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

Petitioner appeals a county hearings officer's decision denying his application for a dwelling not in conjunction with farm use in the General Agricultural District (GAD), an exclusive farm use zone.

FACTS

The subject property is an undeveloped 2.15 acre parcel on the south side of Butteville Road. Vegetation on the subject property consists of brush and several varieties of deciduous and evergreen trees. A stream flows south-to-north in a steeply sloping drainage divide across the eastern edge of the property. The subject property is comprised of U.S. Soil Conservation Service (SCS) Class II and III soils, except for the soils in the drainage divide, which are Class VII.

The subject property is surrounded by other GAD zoned property. Most parcels on the south side of Butteville Road in the vicinity of the subject property are in farm use. The property which abuts the subject property to the south and west is a 70 acre farm parcel. Approximately half of that parcel has been cleared of brush and trees for farm use, although the portions of that parcel abutting the subject property remain wooded. Record 65. The adjacent wooded portions of the 70 acre farm parcel consist of the same Class II and III soil types found on the subject

property. The subject property is approximately 150 feet south of the Willamette River.

FIRST AND SECOND ASSIGNMENTS OF ERROR

In these assignments of error, petitioner challenges the county's determination that the proposed nonfarm dwelling fails to comply with Clackamas County Zoning and Development Ordinance (ZDO) 402.05.A.4.[1] Petitioner contends both that the county applied ZDO 402.05.A.4 incorrectly and that the county's determination of noncompliance with ZDO 402.05.A.4 is not supported by substantial evidence in the record.

A. Application of ZDO 402.05.A.4

ZDO 402.05.A.4 requires a nonfarm dwelling in the GAD zone to 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[.]"[2]

Petitioner contends the county erred by basing its

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[1]In the third and fourth assignments of error, petitioner challenges the county's determinations of noncompliance with ZDO 405.02.A.1 and 5, respectively. However, petitioner's only basis for challenging the county's determinations of noncompliance with ZDO 402.05.A.1 and 5 is that the county erred in determining the subject property is generally suitable for agricultural use, under ZDO 402.05.A.4. Therefore, the third and fourth assignments of error present no issues in addition to those presented by the first and second assignments, and we do not discuss them further.

[2]ZDO 402.05.A.4 is worded identically to the "generally unsuitable" approval standard for nonfarm dwellings in exclusive farm use zones found in ORS 215.283(3)(d).

determination of noncompliance with ZDO 402.05.A.4 on a presumption that property with Class II and III soils must be suitable for agricultural use, regardless of other factors. Petitioner also argues that the county erred in not determining whether a reasonable and prudent farmer could put the subject property to profitable agricultural use, quoting the following language from a concurring opinion in 1000 Friends v. Benton County, 32 Or App 413, 432, 575 P2d 651 (1978):

> "The reference in ORS 215.203 [definition of "farm use"] to the profitability of agricultural land probably means that it is not mandatory that agricultural land within the meaning of [Statewide Planning] Goal 3 be zoned for [exclusive] farm use if a county determines that the land cannot presently or in the foreseeable future be farmed profitably by any reasonable and prudent farmer * * *."

We agree with petitioner that it would be improper for the county to consider only soil types in addressing ZDO 402.05.A.4. However, the county's determination of noncompliance with ZDO 402.05.A.4 is not based solely on the property's predominantly Class II and III soil classifications. The county's analysis also discusses terrain, existing vegetation, size and location of the subject property and the availability of irrigation and drainage. The county concludes:

> "In summary, the subject property contains several limiting characteristics for farm use. The small size of the property would render it generally unsuitable for the production of farm crops and

> livestock as a separate parcel. However, given the generally suitable soils on the property, with the possibility of acquiring irrigation water for the property in the future, and the availability of combining this property for farm operations with abutting properties to the south or to the west, the subject property is found to be generally suitable for the production of farm crops and livestock." Record 5.

We agree with the county that its decision properly reflects a consideration of all relevant factors listed in ZDO 402.05.A.4.

Petitioner is correct that the definition of "farm use" in ORS 215.203(2) refers to profitability. However, the general unsuitability standard of ZDO 402.05.A.4 and ORS 215.283(3)(d) does not use the term "farm use," but rather refers to land generally unsuitable for "the production of farm crops and livestock." In Rutherford v. Armstrong, 31 Or App 1319, 1325, 572 P2d 1331 (1977), rev den 281 Or 431 (1978), a case which also concerned the application of the statutory general unsuitability standard to approval of a nonfarm dwelling in an exclusive farm use zone, the Court of Appeals found that the omission of the phrase "farm use" from ORS 215.283(3)(d) was intended.[3]

[3]We note that 1000 Friends v. Benton County, the case cited by petitioner, concerned approval of a residential subdivision on land not zoned for exclusive farm use, prior to acknowledgment of that county's plan and land use regulations under ORS 197.251. The issue addressed in the quote from the concurring opinion cited by petitioner was whether Statewide Planning Goal 3 (Agricultural Lands) would require that the subject property be zoned for exclusive farm use, not the application of the general unsuitability standard to land which is already zoned for exclusive farm use.

Also, in Reed v. Lane County, 19 Or LUBA 276, 284 (1990), a case concerning approval of a nonfarm dwelling under a "general unsuitability" standard virtually identical to ZDO 402.05.A.4, we stated:

> "At best, whether a particular farmer can make a profit, at a particular period in time, on a particular piece of farm land, is indirect evidence of whether the land itself is suitable for the production of farm crops and livestock. The [local government decision maker] must determine whether the land itself is suitable for the production of farm crops and livestock, under the factors specified in [the generally unsuitable standard]. * * *" (Emphasis in original.)

Therefore, we conclude the county did not err by failing to find that a reasonable and prudent farmer can put the subject property to profitable agricultural use.

This subassignment of error is denied.

B. Evidentiary Support

To overturn the county's determination of noncompliance with ZDO 402.05.A.4 on evidentiary grounds, it is not sufficient for petitioner to show there is substantial evidence in the record to support his position. Rather, the evidence must be such that a reasonable trier of fact could only say petitioner's evidence should be believed. Adams v. Jackson County, 20 Or LUBA 398, 403 (1991); Morley v. Marion County, 16 Or LUBA 385, 193 (1988); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982). Petitioner must demonstrate that he sustained his burden to establish compliance with ZDO 402.05.A.4 as a matter of law.

Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d 1241 (1979); Adams v. Jackson County, supra; Van Mere v. City of Tualatin, 16 Or LUBA 671, 683 (1988). Where, as here, the relevant facts are not in dispute, the choice between different reasonable conclusions based on that undisputed evidence in the record belongs to the county. Stefan v. Yamhill County, 18 Or LUBA 820, 838 (1990).

We have reviewed the relevant evidence in the record cited by the parties. Record 22, 25-26, 28-34, 37, 45-49, 53-54, 65, 68-69, 81-88, 109. In addition to the statements in the "Facts" section of this opinion, supra, the evidence shows that the subject property and the adjacent wooded portions of the 70 acre farm parcel to the south and west have no history of farm use and no water rights for irrigation. Petitioner testified there is no possibility of obtaining new surface or ground water rights for irrigating these properties until the Water Resource Commission finishes the process of revising its Willamette River Basin Plan. Petitioner also testified it is uncertain whether such water rights will be available after the basin plan revision process is completed, or whether purchase of water from federal storage projects is feasible. However, SCS information on the Class II and III soil types found on the subject and neighboring property states only that "irrigation is needed for maximum production of most crops." (Emphasis added.) Record 68, 69. The record also includes

testimony from petitioner that it would be costly to clear the subject property and to install drainage tiles for the Class III soils.[4]

The county finds the existing vegetation on the subject property is a limiting characteristic, but points out that virtually all farm land in the Willamette Valley had to be cleared for farm use. The county also finds that surface or ground irrigation water may be available to the subject property after the Willamette Basin Plan is revised. The county concludes the small size of the subject property would make it generally unsuitable for agricultural production as a separate parcel. However, the county also concludes that given the suitable soil types on the subject property, and the possibility of using the subject property for agricultural operations in conjunction with the similar property to the south and west, the subject property is generally suitable for the production of farm crops and livestock. Based on the evidence in the record, we believe a reasonable person could conclude as the county does.

This subassignment of error is denied.

The first and second assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR

"Respondent's denial of petitioner's application

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[4]The SCS information on the Class III soil type indicates that wetness is a limiting factor, but can be reduced by tile drainage, where a suitable outlet is available. Record 68.

> for a nonfarm home is unconstitutional because it works a taking of petitioner's property in violation of Article I, Section 18 of the Oregon Constitution."

Petitioner contends the county's decision denies him any reasonable economic use of his property, in violation of Article I, section 18, of the Oregon Constitution. Petitioner argues the evidence in the record establishes that a reasonable and prudent farmer could not realize an economically viable use of the subject property for farm use. Petitioner also moves for an evidentiary hearing to establish that the subject parcel cannot be economically used for any other use allowed outright or conditionally in the GAD zone under ZDO 402.03 and 402.06. See Schoonover v. Klamath County, 105 Or App 611, 616, 806 P2d 156 (1991)(where owner remains able to use property for a number of uses allowed under applicable zoning, there is no "taking" under the Fifth Amendment to the U.S. Constitution).

We must first decide whether petitioner's state constitution "taking" claim is "ripe" for adjudication. In Dolan v. City of Tigard, 20 Or LUBA 411, 423 (1991), we stated:

> "The Oregon Supreme Court has * * * interpreted Article I, Section 18, of the Oregon Constitution to require property owners to use available administrative procedures for development of their property before pursuing a state taking claim, stating that 'if a means of relief from the alleged confiscatory restraint remains available, the property has not been taken.' Suess Builders

> v. City of Beaverton, 294 Or 254, 262, 656 P2d 306 (1982). Also in Suess Builders, the Court cited with approval discussion in Fifth Avenue Corp. [v. Washington County, 282 Or 591, 614-621, 581 P2d 50 (1978)] requiring property owners to seek quasi-judicial plan and zone map amendments before pursuing a claim that local regulations were unconstitutional as applied to their property. Finally, in Dunn v. City of Redmond, 86 Or App 267, 270, 739 P2d 55 (1987), the Court of Appeals rejected a property owner's taking claim where the property owner had failed to seek conditional use permits potentially available under local regulations." (Footnote omitted.)

We concluded in Dolan that available variances, as well quasi-judicial plan and zone map amendments and conditional use permits, must be sought before a state constitution taking claim is ripe for adjudication. Id.

Here, petitioner essentially seeks to demonstrate that there is no administrative relief available under the existing comprehensive plan designation and zoning district applied to the subject property, by establishing in an evidentiary hearing that all nonresidential uses allowed outright or conditionally under the GAD zone are not economically feasible on the subject property.[5] However, as noted in the above quote, the Oregon Supreme Court has determined that property owners are also required to seek quasi-judicial plan and zone map amendments, before pursuing a state constitution taking claim. Fifth Avenue Corp.,

[5]The parties agree that under the ZDO, there is no variance to the general unsuitability requirement of ZDO 402.05.A.4 available.

supra. Petitioner has not sought approval of a plan and zone map amendment which would allow residential development of the subject property and, therefore, petitioner's state constitution taking claim is not ripe for adjudication.[6]

The fifth assignment of error is denied.[7]

The county's decision is affirmed.

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[6]Of course, there is little doubt that such plan and zone map amendments would also require county adoption of an exception to Statewide Planning Goal 3, pursuant to ORS 197.732 and Goal 2, Part II. However, the exception process of ORS 197.732 and Goal 2, Part II is essentially a type of variance to the requirements of the Statewide Planning Goals. As such, approval of any necessary goal exceptions must be sought, in conjunction with a plan and zone map amendment, before petitioner's taking claim is ripe for adjudication. See Dolan, supra.

[7]Because petitioner's taking claim is not ripe for adjudication, the county's decision must be affirmed, regardless of whether petitioner is able to establish that all nonresidential uses of the subject property allowed under the GAD district are not economically viable. Thus, the facts petitioner seeks to establish through an evidentiary hearing would not warrant reversal or remand of the county's decision and, therefore, the motion for evidentiary hearing is denied. ORS 197.830(13)(b); OAR 661-10-045(1).