BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHARON S. FORSTER, Petitioner, vs. POLK COUNTY, Respondent.	LUBA No. 92-071 FINAL OPINION AND ORDER

Appeal from Polk County.

Richard C. Stein, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Ramsay, Stein & Feibleman.

Robert Oliver, Dallas, filed the response brief and argued on behalf of respondent.

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

REMANDED 06/29/92

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 order approving a farm dwelling on a 13 acre parcel in the Farm/Forest (F/F) zone, an exclusive farm use zone.[1]

FACTS

The subject parcel is undeveloped. It is comprised of 10 acres of U.S. Soil Conservation Service (SCS) Class II McAlpin silty clay loam soils and 3 acres of SCS Class II and III Bellpine silty clay loam soils. The majority of the parcel is within the 100-year floodplain of a creek adjoining the parcel's southeast border, and is designated by the county as a Special Flood Hazard Area.

This is the second time a decision of the board of county commissioners approving a farm dwelling on the subject property has been appealed to this Board.[2] In Forster v. Polk County, ___ Or LUBA ___ (LUBA No. 91-108, December 2, 1991) (Forster I), we remanded the county's decision because it failed to demonstrate compliance with the four criteria of Polk County Zoning Ordinance 138.040(B)

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[1]The F/F zone has been acknowledged by the Land Conservation and Development Commission as an exclusive farm use zone in compliance with Statewide Planning Goal 3 (Agricultural Lands). See DLCD v. Polk County, ___ Or LUBA ___ (LUBA No. 91-044, August 14, 1991), slip op 7-8.

[2]The local record submitted to the Board in Forster I is included in the local record of this appeal, and we cite it as Record I. The local record compiled after the county's first decision was remanded by Forster I is cited as Record II.

for approval of a dwelling "customarily provided in conjunction with farm use" on a F/F zoned parcel less than 40 acres in size.

On remand, the applicant submitted a revised farm management plan. Record II 47-55. The revised farm management plan indicates that in 1991, 1.25 acres of the property were planted in Grand fir seedlings and 2 acres of the property were planted in Noble fir seedlings. The revised farm management plan also indicates that the applicant intends to plant 2 additional acres in Noble firs, Grand firs and Scotch pines in 1992, and 1.5 additional acres in Noble firs in 1993. This would result in a total of 6.75 acres planted in Christmas trees.[3] The revised farm management plan also proposes, as did the original farm management plan, erecting a pole barn, fencing pasture and maintaining two brood cows.

After conducting a new evidentiary hearing on the applicant's proposal, the board of commissioners issued an order approving a farm dwelling on the subject property. The order includes the following condition of approval:

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[3]There is some uncertainty as to the exact acreage already planted, and the total acreage intended to be planted, in Christmas trees. The original farm management plan stated the applicant had planted 1 acre of Grand fir and 2 acres of Noble fir, and planned to plant another 4 acres in Grand and Noble firs in 1992, resulting in a total of 7 acres planted in Christmas trees. Record I 135-36. However, there are also statements in the record identifying the acreage of Grand fir already planted and total acreage already planted as 1.5 and 3.5 acres, respectively. Record I 54; Record II 39. There are also statements that the applicant intends to plant as many as 5 additional acres of Christmas trees. Record II 35, 43.

"A total of seven acres of Christmas trees must be planted within one year after this approval. At least 3-1/2 acres must be planted, demonstrating that the farm use is substantially in place, before issuance of any building permit." Record II 12.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

"Polk County's finding that PCZO 138.040(B)(1) is met is inadequate and not supported by substantial evidence in the record."

PCZO 138.040(B)(1) provides:

"The applicant must show in [the] farm [dwelling] application that the parcel is capable of producing a yield level as commensurate with the Standards listed in the 'Commercial Agricultural Justification.'"[4]

Under the CAJ standards, the annual productivity level required for F/F zoned parcels greater than 10 acres and less than 40 acres to qualify for a farm dwelling is $10,000 in gross farm sales. CAJ 16. The CAJ provides:

"* * * the County will use the following formula in determining if the necessary productivity level * * * could be attained on a given parcel:

"Average Yield/Acre X Average Commodity/Unit Price X Total Acres = Productivity Level" CAJ 18.

The county findings explain its calculation of the annual productivity level of the applicant's proposed farm

[4]The "Commercial Agricultural Justification" document (hereafter CAJ) was adopted as part of the Polk County Comprehensive Plan by Ordinance No. 87-26, dated December 23, 1987, of which we take official notice.

operation as follows:

> "The applicant has indicated she intends to plant a seven-acre mix of Grand fir, Noble fir and Scotch pine Christmas trees on the parcel, and to fence a pasture area for beef cattle.
>
> "* * * * *
>
> "* * * The Polk County agricultural commodity figures for the past three years (1989, 1990 and 1991) are used to find the average commodity price as well as the average yield per acre. These figures are based on Douglas fir Christmas trees, and show that the average yield per acre is 1,300 trees, while the average price per tree is $9.50. This is based on a seven-year rotation. Other information from OSU indicates that the price per tree for Noble fir was $18 in 1988 and $14 in 1989, indicating it has a higher productivity value even thought [sic] it has a longer rotation of eight to nine years. However, in order to err on the conservative side, the Board [of Commissioners] accepts the lower figures for Douglas fir in computing the potential productivity of the parcel.
>
> "Since the soils are well-suited for Christmas tree production * * * and the Extension Service indicates Noble and Grand firs and Scotch pine are among the recommended species, the Board finds that using the average yield of 1,300 trees per acre is justified. The productivity potential may be computed as follows:
>
> "$\frac{\text{1,300 trees/acre x seven acres x \$9.50/tree}}{\text{7-year rotation}} = \$12,350$
>
> "* * * * *
>
> "* * * If seven acres are devoted to Christmas tree production and one acre for the homesite and barn, five acres remain for pasture, more than enough for the two cattle [the applicant] proposes to raise. Fencing of this area will prevent any conflict with the Christmas tree operation. [The

applicant] proposes to change her original [farm management] plan from Herefords to Pinzgauers. The change is due to a higher value for the latter. The Extension Service has stated that the higher price is likely after one becomes established in the business and obtains better marketing connections. Using more conservative values for Herefords, however:

"* * * units/year x price/head = productivity potential

2 $800 = $1,600

"When the Christmas tree value is added to the livestock value, the total is $13,950. This is considerably more than the $10,000 necessary to qualify under PCZO 138.040(B)(1) and the [CAJ]." Record II 8-10.

Petitioner contends the county's determination that the subject parcel has an annual productivity potential greater than $10,000, as required by the CAJ, is inadequate. Petitioner specifically challenges the figures used by the county for the average yield/acre and rotation period of the Christmas tree portion of the proposed farm operation.

A. Average Yield/Acre

Petitioner argues the county's findings that the proposed operation will produce an average of 1,300 trees per acre are inadequate and not supported by substantial evidence because they fail to consider adverse site conditions and poor site maintenance and fail to take into account the applicant's proposed harvest of younger trees for use as "table toppers."

1. Site Conditions

Petitioner does not challenge the county's finding that

the soil types present on the subject parcel are stated to be generally "well suited to Christmas tree production" in the SCS Soil Survey for Polk County. Record II 8. Petitioner also does not challenge the finding that the average yield per acre for Douglas fir Christmas trees in Polk County is 1,300. Id. What petitioner does contend is that given the evidence in the record of flooding and poor drainage conditions on the subject parcel, there is not substantial evidence in the record to support the county's determination that the subject parcel will produce an average yield of 1,300 Christmas trees per acre of the species the applicant proposes to plant, particularly Noble fir.

We have reviewed the relevant evidence in the record cited by the parties. A Pacific Northwest Extension Service bulletin entitled "Developing High Quality True Fir Christmas Trees," states:

> "Noble * * * firs are very particular about their growing site. They prefer [sites where the] soil is rich in humus, moist and well drained. They do not tolerate heavy compacted clay soil, high water tables, heavy grass sod or frost pockets." Supp. Record I 160.

This bulletin also states that Grand fir will tolerate wetter soil conditions than either Douglas or Noble fir. Id. at 161. Another extension service bulletin, entitled "Growing Christmas Trees in the Pacific Northwest," states that "[w]est of the Cascades, Noble fir does well in only a

few places, usually at higher elevations." Supp. Record I 145. This bulletin also states that Scotch pine "is probably the only choice for wet areas." Supp. Record I 146. There is testimony in the record from petitioner and another neighboring property owner that significant portions of the subject parcel are wet and muddy for several months of the year.[5] Record I 78, 79; Record II 18. Petitioner also submitted photographs, taken in February 1992, showing water standing in areas of the subject property where Christmas tree seedlings are planted. Record II Exhibits I and II.

There is a letter in the record from a Christmas tree farmer, dated June 23, 1991, which states "high water table can be a problem if the area in question develops into a pond through the rainy season which to my understanding [it] does not." The letter also states the previously planted Christmas trees "seem to be doing fine." Record I 41. A letter from the county extension agent indicates he approves of the applicant's plan to plant additional Noble and Grand fir trees on the subject property and recommends planting them at 1,500 trees per acre, after a call to Christmas tree

[5]Petitioner also cites evidence in the record that most of the subject parcel is within the 100-year floodplain and is designated by the county as a Special Flood Hazard Area. Record I 40, 118. However, we agree with the county that there is no basis in the record for concluding that property has reduced suitability for growing Christmas trees solely because it is located within a 100-year floodplain. Record I 62-63.

growers in the area to confirm that number.[6] The agent also indicated those growers usually harvest more than 90% of the trees planted. Record II 39. Finally, the record shows county planning staff visited the subject property on December 24, 1991 and found the planted seedlings in good condition, with no evidence of severe water or drainage problems. Record II 35.

The county has also cited as evidence supporting its decision, with regard to this and other issues, statements made by members of the board of commissioners during its deliberations on this application. Record I 12-13. However, we do not believe comments by individual decision makers made during deliberation on an application can constitute evidence in support of, or in opposition to, a challenged decision.

In Angel v. City of Portland, ___ Or LUBA ___ (LUBA No. 91-192, February 14, 1992), slip op 14-15, aff'd 113 Or App 169 (1992), we stated:

> "Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); Van Gordon v. Oregon State Board of Dental Examiners, 63 Or App 561, 567, 666 P2d 276 (1983); Braidwood v. City of Portland, 24 Or App 477, 480,

[6]However, the record indicates the Christmas trees already planted on the subject property were planted at a density of 1,700 - 2,000 trees per acre, and that the applicant intends to plant additional trees at 1,700 trees per acre. Record I 54; Record II 34-35, 43.

> 546 P2d 777 (1976). Where we conclude a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, we defer to the local government's choice between conflicting evidence. Younger v. City of Portland, supra, 305 Or at 360; Wissusik v. Yamhill County, supra; Vestibular Disorder Consult. v. City of Portland, 19 Or LUBA 94, 103 (1990); Douglas v. Multnomah County, [18 Or LUBA 607, 617 (1990)]."

In addition, the choice between different reasonable conclusions based on the evidence in the record belongs to the local government. Stefan v. Yamhill County, 18 Or LUBA 820, 838 (1990).

Here, there is evidence that drainage conditions on some portions of the subject parcel may limit the growth of Noble fir, although there is no evidence of such limitation for the growth of Grand fir and Scotch pine, which the applicant also intends to plant. However, there is also testimony by county planning staff, a Christmas tree grower and the county extension agent that the subject parcel is suitable for the proposed use and that the trees the applicant has already planted, including Noble fir, appear to be in good condition. We find that a reasonable person could conclude, based on this evidence, that the subject property is capable of producing an average yield of 1,300 Christmas trees per acre when planted in Noble fir, Grand fir and Scotch pine.

This subassignment of error is denied.

2. Site Maintenance

Petitioner contends the evidence in the record establishes poor site maintenance techniques are used on the subject parcel. Petitioner argues that because there is evidence of poor site maintenance, the record lacks substantial evidence to support the county's determination that the subject parcel will produce an average yield of 1,300 Christmas trees per acre. Petitioner cites documentation concerning the importance of proper site maintenance for the growth of Christmas trees (Supp. Record I 146-47, 152, 162-64, 178-81), including testimony by a professional forester that even if Christmas trees are properly cared for, normally 15 to 20 percent will die or not meet buyers' grading standards. Record I 77. Petitioner argues she submitted evidence of weed and grass infestations among the Christmas trees already planted on the subject property. Record I 20, Exhibits; Record II 23.

The county cites the following portion of the February 11, 1992 staff report:

> "[S]taff revisited the site on 12-24-91, and found that the Christmas trees in the ground are being maintained. There were few weeds and grass, indicating that weed control is occurring. * * * [T]here is substantial evidence of site preparation and maintenance occurring." Record II 35.

There is no dispute that proper site maintenance techniques are required to attain the county's projected average yield of 1,300 Christmas trees per acre. However,

we agree with the county that a reasonable person could rely upon the staff report to conclude that proper site maintenance techniques are being used on the subject property. See Johnson v. Tillamook County, 16 Or LUBA 855, 869 n 12 (1988) (staff report can constitute substantial evidence in support of a local government decision).

This subassignment of error is denied.

3. Table Toppers

Petitioner points out the applicant submitted a letter to the county stating:

> "In about four years we are going to harvest a select amount of nobles from our front field to market as table toppers. This will allow for more spacing in this field." Record II 43-44.

Petitioner argues that table toppers sell for only $3 apiece. Petitioner contends the county should have taken into account the cutting and sale of such table toppers in its productivity calculation. According to petitioner, the county should have reduced the expected yield per acre of 1,300 Christmas trees (at a market value of $9.50), by the number of table toppers per acre harvested (at a market value of $3), resulting in a lower productivity potential for the subject parcel. Petitioner contends the evidence in the record does not support a conclusion that table toppers will only be cut as part of "thinning" the already planted Noble firs.

The county argues that the applicant did not propose to

derive the minimum gross farm sales required by PCZO 138.040(B)(1) from the sale of table toppers. According to the county, the applicant's proposed sale of thinnings as table toppers would only bring in additional income, which the county conservatively chose not to include in its productivity calculation.

The evidence in the record shows that the two acres already planted in Noble fir were planted at a density of 1,700 to 2,000 trees per acre. Record I 54; Record II 34-35. The record also shows the extension agent recommended that the density of trees be reduced to 1,500 trees per acre through thinning and transplanting. Record II 39. Further, the county planning director testified that the applicant indicated she would market such "thinnings" as table toppers, while leaving the remaining trees to grow for the full rotation. Record II 19. A reasonable person could conclude, based on the evidence in the record, that the applicant's plans to harvest a certain amount of Noble fir to market as table toppers, will not reduce the property's capability of producing 1,300 Christmas trees per acre.

This subassignment of error is denied.

B. Rotation Period

Petitioner contends the only evidence in the record concerning the rotation period of Noble fir Christmas trees is a letter from a professional forester stating the

rotation period is 9 to 10 years. Record I 77. Petitioner argues that if the county had used 9 or 10 years in its productivity potential calculation, rather than the 7 year figure appropriate for Douglas fir, the annual productivity figure would drop to $9,605 or $8,645, respectively.

In addition to the evidence cited by petitioner, the record contains an extension service bulletin stating the rotation period for Noble firs is 8 to 10 years and a staff report stating that information from OSU indicates the rotation period for Noble fir is 8 to 9 years. Supp. Record I 176; Record II 34. The challenged decision also includes an unchallenged finding that the market value of a Noble fir Christmas tree was $18 in 1988 and $14 in 1989, for an average market value of $16. Record II 34. It is undisputed that the property has been planted with two acres of Noble fir and that additional acreage will be planted in Noble fir in the future. If the county modified its productivity calculation to use an 8 to 10 year rotation period and $16 per tree market value for the acres of the subject property planted in Noble fir (rather than the 7 year rotation period and $9.50 per tree value for Douglas fir), the resulting annual productivity value would be higher, not lower. Therefore, if the county's failure to use the Noble fir rotation period for acreage planted in Noble fir is an error, it is a harmless one.

This assignment of error is denied.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

> "[The county] erred in construing the applicable law, e.g. the term 'farm use.'"
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> "[The county's] finding that PCZO 138.040(B)(2) is met is inadequate and not supported by substantial evidence."

PCZO 138.040(B)(2) provides:

> "The parcel is currently employed for farm use where the day-to-day activities are principally directed to the farm use of the land."

Under these assignments of error, petitioner contends (1) the applicant's proposed Christmas tree operation does not meet the statutory definition of "farm use," (2) an insufficient portion of the subject property is currently employed in the Christmas tree operation, and (3) the day-to-day activities on the subject property are not principally directed to farm use.

A. Definition of Farm Use

"Farm use" is defined in ORS 215.203(2) and (3).[7] Petitioner concedes the growing of Christmas trees can constitute farm use as defined in ORS 215.203(2) and (3), but only if such trees are grown on "land used exclusively" for that purpose. ORS 215.203(2)(a) and (3)(a). Petitioner argues this requirement is not satisfied here because only 3.25 acres, or 25 percent, of the subject property is

[7]The PCZO 110.223 and 110.167 definitions of "farm use" and "cultured Christmas trees," respectively, duplicate these statutory provisions.

currently planted in Christmas trees. Petitioner also argues that under ORS 215.203(2)(a) and (3)(d), the growing of Christmas trees can constitute a farm use only if there is evidence of the periodic maintenance practices listed in ORS 215.203(3)(d). Petitioner contends the record contains no such evidence.[8]

We have previously determined that the grown on "land used exclusively" requirement of ORS 215.203(2)(a) and (3)(a) and the "evidence of periodic maintenance practices" requirement of ORS 215.203(3)(d) are qualifications for particular tax treatment, and not standards applicable to the approval of dwellings "in conjunction with farm use" under ORS 215.213(2)(b)(A). Harwood v. Lane County, ___ Or LUBA ___ (LUBA No. 92-001, April 27, 1992), slip op 5-6. For the same reasons, we conclude these provisions of ORS 215.203(2)(a) and (3)(a) and (d) are not approval standards for dwellings "customarily provided in conjunction with farm use" under ORS 215.283(1)(f). Additionally, nothing in PCZO 138.040(B) itself imposes such requirements.

This subassignment of error is denied.

B. Current Employment

Petitioner contends the parcel is not "currently

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[8]Petitioner also argues that under ORS 215.203(2)(b)(D), land planted in Christmas trees cannot be considered to be in farm use unless the trees have been planted for at least three years. However, we agree with the county that ORS 215.203(2)(b)(D), by its own terms, applies only to "[l]and not in an exclusive farm use zone." As explained in n 1, supra, the F/F zone is an exclusive farm use zone.

employed" for farm use, as required by PCZO 138.040(B)(2), because only 3.25 acres have been planted in Christmas trees. Petitioner points out this acreage constitutes less than half the 7 acres the county's decision requires to be planted in Christmas trees, and only 25 percent of the subject parcel. Petitioner also points out the proposed cattle operation was not yet in existence on the subject property when the challenged decision was made.

PCZO 138.040(B) authorizes dwellings "customarily provided in conjunction with farm use" pursuant to ORS 215.283(1)(f). The wording of PCZO 138.040(B)(2) incorporates the requirements of OAR 660-05-030(4) for approval of such dwellings.[9] In Hayes v. Deschutes County, ___ Or LUBA ___ (LUBA No. 91-218, April 6, 1992), slip op 7-12, we determined that OAR 660-05-030(4) does not allow approval of a dwelling customarily provided in conjunction

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[9]OAR 660-05-030(4) provides in relevant part:

> "* * * ORS 215.283(1)(f) authorize[s] a farm dwelling in an EFU zone only where it is shown that the dwelling will be situated on a parcel currently employed for farm use as defined in ORS 215.203. Land is not in farm use unless the day-to-day activities on the subject land are principally directed to the farm use of the land. Where land would be principally used for residential purposes rather than farm use, a proposed dwelling would not be 'customarily provided in conjunction with farm use' * * *. At a minimum, farm dwellings cannot be authorized before establishment of farm uses on the land * * *."

We also note that OAR 660-05-030(4) is itself an approval standard directly applicable to a county decision to approve a dwelling customarily provided in conjunction with farm use in an exclusive farm use zone. See Newcomer v. Clackamas County, 94 Or App 33, 764 P2d 927 (1988).

with farm use where the particular farm use that the dwelling would customarily be provided in conjunction with does not yet exist on the subject property. However, we also noted:

> "In Miles v. Clackamas County, 18 Or LUBA 428, 439 (1989), we said it is consistent with OAR 660-05-030(4) for a county to approve a farm dwelling, in conjunction with approval of a specific farm management plan, even though the farm use proposed in the management plan does not yet exist on the subject property, 'so long as the county (1) determines the level of farm use proposed by the farm management plan satisfies OAR 660-05-030(4), and (2) ensures through conditions that the farm dwelling cannot actually be built until after the county determines that the farm management plan has been carried out.' * * *"

In this case, the county approved a farm dwelling in conjunction with the seven acre Christmas tree and two head of cattle farm operation proposed in the applicant's farm management plan. It is undisputed that at the time the county made its decision only part of the proposed farm operation existed on the subject property, namely the approximately 3.25 acres of Christmas trees which were planted in 1991.[10] Therefore, under Hayes v. Deschutes

[10]We note that substituting 3.25 acres for 7 acres in the county's productivity calculation produces an annual productivity potential of only $5,432. Further, even if the higher market value and longer rotation period for the two acres already planted in Noble fir are used in this calculation, the annual productivity potential would be at most $7,405. Therefore, it is clear that the 3.25 acres already planted in Christmas trees do not themselves satisfy the standard of PCZO 138.040(B)(1) for approval of a farm dwelling.

County, supra, and Miles v. Clackamas County, supra, the county can only approve a farm dwelling on the subject property if it (1) determines the Christmas tree and cattle operation proposed in the farm management plan satisfies PCZO 138.040(B)(2) (and OAR 660-05-030(4)), and (2) ensures through conditions that the farm dwelling cannot be built until after the county determines the farm management plan has been carried out.

We determine the county properly found the operation proposed by the applicant's farm management plan satisfies PCZO 138.040(B)(2). However, the county's decision does not ensure that the farm dwelling cannot be built until after the county determines the farm management plan has been carried out, but rather allows a building permit for the dwelling to be issued when as few as 3 1/2 acres of the subject parcel are planted in Christmas trees.[11] Record II 12. This exceeds the county's authority under PCZO 138.040(B)(2), OAR 660-05-030(4) and ORS 215.283(1)(f).

This subassignment of error is sustained.

C. Day-to-Day Activities

Petitioner contends the record does not contain substantial evidence that "the day-to-day activities are principally directed to the farm use of the land," as

[11]Also, we note the decision does not establish a process for ensuring the required county determination that the necessary farm operation exists on the subject parcel is made prior to the issuance of a building permit, and the parties cite no provisions in the PCZO establishing such a process.

required by PCZO 138.040(B)(2). Petitioner contends taking care of seven acres of Christmas trees and feeding two cows twice a day does not satisfy this standard. Petitioner points out the county extension agent testified that the applicant's proposed farm enterprises "are not labor intensive on an everyday basis." Record II 40. Petitioner further complains the record shows the applicant and her husband both have full time employment off the subject property. Record II 26, 54, 79.

We understand the county's decision to state that the planting of and periodic maintenance practices required by the proposed seven acres of Christmas trees, and the twice-daily attendance required by the proposed cattle operation demonstrate that the day-to-day activities on the subject parcel will be directed primarily to farm, rather than residential, use. Record II 10. We agree with the county that what PCZO 138.040(B)(2) requires is that the daily activities on the subject property be directed primarily towards farm use, rather than residential use, not that the daily activities of the residents of the land be directed primarily toward farm use.

The record shows that the proposed farm operation consists of a seven acre Christmas tree and five acre cattle operation on a 13 acre parcel. Record II 33, 35, 45. Where 12 out of 13 acres of the subject property would be actively involved in a farm operation, a reasonable person could

conclude that the day-to-day activities on the property will be directed primarily toward farm use.

This subassignment of error is denied.

The second and third assignments of error are sustained, in part.

FOURTH ASSIGNMENT OF ERROR

> "[The county's] finding is inadequate and not supported by substantial evidence that PCZO 138.040(B)(3) has been met."

Petitioner argues that because a farm meeting the requirements of PCZO 138.040(B)(1) and (2) has not yet been established on the subject property, the county cannot properly find compliance with PCZO 138.040(B)(3).

PCZO 138.040(B)(3) provides:

> "The dwelling is for the farm operator and there are no other dwellings located on the parcel."

In Forster I, supra, slip op at 9-10, we stated:

> "There is no dispute that the residents of the proposed dwelling will be the persons who carry out the proposed farm management plan. * * * However, PCZO 138.040(B)(3) requires that the proposed dwelling be for the operator of a farm which satisfies the requirements of PCZO 138.040(B)(1) and (2). We determine above that the county failed to demonstrate compliance with PCZO 138.040(B)(1) and (2). Therefore, the county's determination of compliance with PCZO 138.040(B)(3) is also inadequate."

We conclude above that the the county's determination of compliance with PCZO 138.040(B)(2) is improper because the farm operation proposed by the applicant's farm management plan does not yet exist on the property.

Accordingly, the county's determination of compliance with PCZO 138.040(B)(3) is deficient as well.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

> "[The county's] finding that the proposed site meets the requirements of PCZO 138.040(B)(4) is inadequate and is not supported by substantial evidence in the whole record."

PCZO 138.040(B)(4) provides in relevant part:

> "The proposed site can support a residential use considering * * * suitability for * * * utilities[.]"

The county adopted the following findings addressing the suitability of the subject property for residential use with regard to water supply:

> "* * * There is no community water system available to the parcel, so a well must be drilled. The applicant submitted well-log information for other properties in the area * * *. These show outputs of anywhere from six to 45 gallons per minute at depths varying from 90 to 250 feet. Copies of a flow test and information from the original well driller show that the well on the adjacent property has a flow of eight gallons per minute from a depth of 250 feet. * * * Actual drilling is not essential when other evidence indicates the likelihood [a well] would be sufficient when drilled. The submitted well log information indicates an abundance of water in the immediate area of the subject parcel. * * * [W]ater <u>probably</u> is available under the proposed site, and no evidence to the contrary has been adduced. In any event, no building permit can be issued until there is a producing well." (Emphasis added.) Record II 11.

The county also adopted the following condition of approval:

> "Prior to construction of the dwelling the applicant shall obtain all necessary permits from the County Public Works Director, Building Official and Environmental Health Officer. This includes, but is not limited to, proof of the availability of water." Record II 12.

Petitioner argues that determining water is "probably" available for residential use of the subject property, while requiring that a well be drilled prior to obtaining a building permit, does not satisfy PCZO 138.040(B)(4). According to petitioner, the county must find water is available when the county approves the subject farm dwelling. Petitioner also contends that while there is no evidence in the record to support the above quoted findings, there is contrary evidence. Petitioner points to testimony by herself and a another owner of neighboring property stating they have had water quantity and quality problems with their wells. Record I 78-79.

The county argues its findings are supported by a planning department staff report which states that well logs and flow tests submitted to the county planning department by the applicant show adequate water flow from wells on properties surrounding the subject property, at depths of 90 feet to 250 feet. Record II 37. The county also argues that this evidence of the abundance of water on neighboring parcels outweighed the testimony by petitioner and another property owner concerning problems with their water systems.

What PCZO 138.040(B)(4) requires is a determination

that the subject property is suitable for residential use, considering water supply. There is nothing in this provision specifically requiring that a well must actually be drilled on the subject property before the county can conclude it is suitable with regard to water supply. We agree with the county that a reasonable person could conclude, based on the staff report, that the subject property is suitable for residential use with regard to water supply.

The fifth assignment of error is denied.

The county's decision is remanded.