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

On remand from the Court of Appeals.

Sharon S. Forster, Dallas, represented herself.

Liz Fancher, County Counsel, Dallas, represented respondent.

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

REMANDED 02/08/93

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.

FACTS

The challenged decision is the second decision by the board of county commissioners approving a farm dwelling on the subject property that has been appealed to this Board.[1] In Forster v. Polk County, 22 Or LUBA 380 (1991) (Forster I), we remanded the county's decision because it failed to demonstrate compliance with the four criteria of Polk County Zoning Ordinance (PCZO) 138.040(B). Those criteria govern approval of a dwelling "customarily provided in conjunction with farm use" on a F/F zoned parcel less than 40 acres in size.

In Forster v. Polk County, ___ Or LUBA ___ (LUBA No. 92-071, June 29, 1992) (Forster II), slip op 3-4, we described the local proceedings after our decision in Forster I as follows:

> "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

[1]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.

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. 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:

> "'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." (Footnote omitted.)

The county's second decision was appealed to this Board. In Forster II, we upheld the county's determination that the subject property is capable of producing $10,000 in annual gross farm sales, as required by PCZO 138.040(B)(1).[2]

---

[2]PCZO 138.040(B)(1) requires that a parcel be capable of producing a yield level "commensurate with the standards listed in the 'Commercial Agricultural Justification' [CAJ]." Under the CAJ, which is part of the county comprehensive plan, 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. The CAJ provides:

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

We also upheld the county's determination that the level of farm use proposed in the applicant's farm management plan (seven acres of Christmas trees and two head of cattle on five acres of pasture) satisfies the requirement of PCZO 138.040(B)(2) and OAR 660-05-030(4) that the parcel be "currently employed for farm use [and] the day-to-day activities are principally directed to the farm use of the land." However, we concluded the challenged decision exceeds the county's authority under PCZO 138.040(B)(2), OAR 660-05-030(4) and ORS 215.283(1)(f), because it "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."[3] Forster II, supra, slip op at 18.

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

Using the above formula, the county determined that if seven acres of the subject property were planted in Christmas trees, as proposed by the applicant's farm management plan, the productivity level of the Christmas tree operation would be $12,350. The county also determined that if five of the remaining acres of the subject parcel were used to pasture two head of Pinzgauer cattle, also as proposed in the farm management plan, the productivity level of the livestock operation would be $1,600. Record II 8-10.

[3]We also noted the county's decision did not establish a process for ensuring the required determination that the necessary farm operation exists on the subject parcel is made prior to the issuance of a building permit, and that there appear to be no provisions in the PCZO establishing such a process. Id., slip op at 18 n 11.

The county appealed our decision in Forster II to the Court of Appeals. The Court of Appeals reversed and remanded the decision to us to reconsider the interpretation of OAR 660-05-030(4) and its application to the facts of this case.[4] Forster v. Polk County, 115 Or App 475, ___ P2d ___ (1992) (Forster III). The Court of Appeals agreed with this Board that ORS 215.283(1)(f) and OAR 660-05-030(4) are directly applicable to the challenged decision.[5] Forster III, 115 Or App at 478. The Court further explained

---

[4]The Court also noted that the second basis for remanding the challenged decision we relied on in Forster II is dependent on our determination of noncompliance with OAR 660-05-030(4). The court refers to our determination in Forster II that the challenged decision does not comply with PCZO 138.040(B)(3). Because our determination of noncompliance with PCZO 138.040(B)(3) was based entirely on our determination of noncompliance with PCZO 138.040(B)(2) and, therefore, OAR 660-05-030(4) (see n 5), we need not address this issue separately.

[5]ORS 215.283(1)(f) provides that "dwellings * * * customarily provided in conjunction with farm use" may be established in an exclusive farm use zone. 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 * * *."

In addition, PCZO 138.040(B)(2) requires that "[t]he parcel is currently employed for farm use where the day-to-day activities are principally directed to the farm use of the land." As the Court of Appeals pointed out in Forster III, supra, both this Board and the parties are in agreement that PCZO 138.040(B)(2) embodies and duplicates the requirements of OAR 660-05-030(4) and, therefore, is not more restrictive toward the proposed farm dwelling than either the state statute or the administrative rule.

that our interpretation of these state statute and rule provisions is not subject to the limitations that Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), places on our review of local enactments. Id.; see Kenagy v. Benton County, 115 Or App 131, ___ P2d ___ (1992); Ramsey v. City of Portland, 115 Or App 20, ___ P2d ___ (1992).

However, the Court disagreed with our interpretation of OAR 660-05-030(4). The Court found although OAR 660-05-030(4) makes "some actual current farm use of property a prerequisite to permitting a farm dwelling on it under ORS 215.283(1)(f)," the rule "does not particularize or provide any set formula for determining the amount of actual farm use that must precede the approval or construction of a dwelling * * *." Id. at 479-80. The Court believed our decision in Forster II interpreted the rule to require that all contemplated farm use must be commenced before a farm dwelling can be allowed.[6] The Court stated that "however much actual farm use" the rule requires, it "does not require the full establishment of all planned farm uses in all cases as a condition precedent to the building of a primary farm dwelling on any EFU parcel." Id., at 481. The Court remanded the decision to this Board "to reconsider the issue in the first instance." Id.

[6]The Court felt that this "all contemplated" farm use standard comes too close to the "wholly devoted" to farm use test established in Matteo v. Polk County, 14 Or LUBA 67 (1985) (Matteo II), which OAR 660-05-030(4) was adopted in part to negate.

DECISION

The county argues that requiring an applicant to establish more than half of the level of farm use necessary to justify a farm dwelling before the dwelling is approved, or a building permit issued, should satisfy OAR 660-05-030(4). The county points out that under its formula for determining productivity level, the 3.25 acres of Christmas trees currently planted on the subject property represent a productivity level of $5,734, over half of the productivity required by the CAJ for approval of a farm dwelling. The county also points out that its decision requires half of the total Christmas tree acreage proposed in the applicant's farm management plan (3.5 out of 7 acres) to be planted before a building permit for the farm dwelling is issued.

In the alternative, the county suggests OAR 660-05-030(4) should be interpreted to require the amount of farm use established by the CAJ as justifying approval of a farm dwelling (i.e. $10,000 annual productivity level) to be established prior to issuance of a building permit for such dwelling. The county points out that in this case, using the county's formula for determining productivity level, a building permit could be issued after the applicants have either (1) planted 5.67 acres of Christmas trees at a density of at least 1300 trees per acre; or (2) planted 4.76 acres of Christmas trees at

such density and established the proposed two head of cattle livestock operation.

In addition, the county indicates it understands that under McKay Creek Valley Assoc. v. Washington County, ___ Or LUBA ___ (LUBA No. 92-115, October 26, 1992), if the required level of farm use does not currently exist on the subject property, and discretion is involved in determining compliance with conditions requiring that additional farm use be established prior to issuance of a building permit, it must provide notice to all parties and an opportunity for a hearing with regard to compliance with such conditions. The county indicates it is not opposed to including such a requirement in its decision as a condition precedent to issuance of a building permit for the proposed farm dwelling.

Petitioner argues that the amount of farm used proposed by the applicant's farm management plan is the minimum necessary to establish that the proposed dwelling is "customarily provided in conjunction with farm use," as required by ORS 215.183(1)(f). Therefore, according to petitioner, under ORS 215.183(1)(f) and OAR 660-05-030(4), the entire farm management plan must be implemented prior to approval of a farm dwelling. Petitioner also argues that such full implementation is necessary because the PCZO does not provide any process for ensuring that the remainder of the proposed farm use is actually carried out.

In Hayes v. Deschutes County, ___ Or LUBA ___ (LUBA No. 91-218, April 6, 1992), slip op 11-12, we interpreted OAR 660-05-030(4) as follows:

> "* * * OAR 660-05-030(4) must be construed in its entirety. The second and third sentences of this section of the rule provide guidance on how to determine whether a proposed dwelling is 'customarily provided in conjunction with farm use,' as required by ORS 215.213(1)(g) or 215.283(1)(f). Newcomer [v. Clackamas County, 94 Or App 33, 38-39, 764 P2d 927 (1988) (Newcomer II)]. They refer to the 'day-to-day activities on the subject land' and to 'whether land would be principally used for residential purposes rather than for farm use.' (Emphasis added.) We believe these sentences require consideration of the farm use which the proposed dwelling is contended to be customarily provided in conjunction with.
>
> "In addition, the fourth sentence states 'farm dwellings cannot be authorized before establishment of farm uses on the land,' citing Matteo [v. Polk County, 11 Or LUBA 259 (1984) (Matteo I)[7]]. We believe the fourth sentence does not simply restate the requirement established by the first sentence. Although it certainly could be clearer, because the fourth sentence refers to establishment of 'farm uses,' rather than 'farm use as defined in ORS 215.203,' and cites Matteo I, the 'farm uses' referred to, like those referred to in the second and third sentences, are the farm uses which the proposed dwelling would be customarily provided in conjunction with. Thus, OAR 660-05-030(4) does not allow approval of a dwelling customarily provided in conjunction with farm use where the farm use that the dwelling

[7]We also emphasized in Hayes v. Deschutes County that Matteo I requires that "the farm use to which the [proposed farm] dwelling relates must be existing," and that neither Newcomer II, nor the administrative history of OAR 660-05-030(4) cited therein, indicates any intent to overrule Matteo I.

> would be customarily provided in conjunction with does not yet exist on the subject property. * * *". (Footnote omitted; final emphasis added.)

We see nothing in the Court of Appeals' decision in Forster III that is inconsistent with the above expressed interpretation of OAR 660-05-030(4), including the final emphasized conclusion. Therefore, we adhere to our prior conclusion that under OAR 660-05-030(4), a dwelling customarily provided in conjunction with farm use may not be approved until the farm use which justifies such a dwelling exists on the subject property. Our error in Forster II was in assuming that the entire farm use proposed in the applicant's farm management plan was necessarily the amount of farm use required to justify approval of the farm dwelling.

ORS 215.283(1)(f) and OAR 660-05-030(4) require that local governments determine the amount of farm use with which a dwelling is customarily provided. In this case, PCZO 138.040(B) and the CAJ, read together, determine that a dwelling is customarily provided in conjunction with an F/F zoned parcel of more than 10 but less than 40 acres, only if that parcel has an annual agricultural productivity level of at least $10,000. Therefore, the county may not approve a farm dwelling on such a parcel until that level of farm use has been established.

The challenged decision approves a farm dwelling when 3.25 acres of Christmas trees have been planted on the

subject property. Using the county's agricultural productivity formula, as applied in the challenged decision, an agricultural productivity level of $5,734 has been established on the subject parcel.[8] This is not sufficient to satisfy ORS 215.283(1)(f) and OAR 660-05-030(4).

The county's decision is remanded.[9]

---

[8]The challenged decision also requires that 3.5 acres of Christmas trees be planted prior to issuance of a building permit for the farm dwelling. However, under the county's formula, 3.5 acres of Christmas trees would equal a productivity level of $6,175, also less than the required $10,000. In addition, as previously noted, the challenged decision establishes no process for ensuring this condition is satisfied prior to issuance of a building permit, and there do not appear to be such provisions in the PCZO.

[9]We note that our interpretation of OAR 660-05-030(4) is consistent with the county's suggestion that it amend its decision to condition issuance of a building permit on the applicant either (1) planting 5.67 acres of Christmas trees at a density of at least 1300 trees per acre, or (2) planting 4.76 acres of Christmas trees at such density and establishing the proposed two head of cattle livestock operation, and to require that notice and an opportunity for a hearing be provided to all parties with regard to determining compliance with such a condition.