BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRITZ VON LUBKEN, JOANN VON LUBKEN, VON LUBKEN ORCHARD, INC., and HOOD RIVER VALLEY RESIDENTS COMMITTEE, INC., Petitioners, vs. HOOD RIVER COUNTY, Respondent, and HANEL LUMBER COMPANY, INC., Intervenor-Respondent.	LUBA No. 94-132 FINAL OPINION AND ORDER

Appeal from Hood River County.

Max M. Miller, Jr., Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Tonkon, Torp, Galen, Marmaduke & Booth.

Teunis Wyers, County Counsel, and B. Gil Sharp, Hood River, filed a response brief. With them on the brief was Jaques, Sharp & Sherrerd. Tuenis Wyers argued on behalf of respondent and B. Gil Sharp argued on behalf of intervenor-respondent.

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

REMANDED 12/06/94

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a conditional use permit for a golf course.

MOTION TO INTERVENE

Hanel Lumber Company, the applicant below, moves to intervene in this appeal on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The decision challenged in this appeal is the fourth county decision granting conditional use approval for the disputed golf course. The county's first decision was remanded by LUBA. Von Lubken v. Hood River County, 18 Or LUBA 18 (1989) (Von Lubken I). The county's second decision was affirmed by LUBA, but LUBA's decision was reversed by the Court of Appeals. Von Lubken v. Hood River County, 19 Or LUBA 404, rev'd 104 Or App 683 (1990), adhered to 106 Or App 226 (1991) (Von Lubken II). The county's third decision was also affirmed by LUBA, but was reversed and remanded by the Court of Appeals. Von Lubken v. Hood River County, 24 Or LUBA 271 (1992), rev'd 118 Or App 246 (1993) (Von Lubken III).

The golf course at issue in this appeal occupies approximately 170 acres, of which approximately 113 acres are zoned Exclusive Farm Use (EFU). Construction of the golf course was commenced while petitioners' appeal of the

county's first decision granting conditional use approval of the disputed golf course was pending.[1] The golf course has been operating since 1990.

FIRST ASSIGNMENT OF ERROR

Under ORS 215.213(2) and 215.283(2), certain nonfarm uses, including golf courses, may be allowed in EFU zones. However, under ORS 215.296(1), the county must find such nonfarm uses will not:

> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

Petitioners Von Lubken own and operate an orchard comprised of a number of different tracts which together total approximately 50 acres. Some of the tracts making up those 50 acres adjoin the disputed golf course on one or more sides. Petitioners Von Lubken contend the golf course has forced changes in their accepted farm practices and significantly increased the costs of those practices in the past, and will continue to do so in the future. Petitioners contend the county incorrectly applied ORS 215.296(1) in approving the challenged conditional use permit and made findings that are not supported by substantial evidence.

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[1]Petitioners' request for a stay of the county's first decision was denied by LUBA. Von Lubken v. Hood River County, 17 Or LUBA 1150 (1989).

A. Improper Construction of ORS 215.296(1)

1. Legal Effect of Continued Accepted Farm Practices

Some of the findings adopted by the county in support of its decision are as follows:

> "During the time the golf course has been open [V]on Lubken Orchards, Inc., was observed to conduct all normal and accepted farming practices on its orchard properties at the times those activities would normally be conducted with one exception. No aerial spray applications were observed on the 5 and 10 acre orchard blocks. It was unclear whether these blocks historically received aerial applications on an annual basis. In all testimony submitted by the opponents not one accepted farm practice that was not or could not be conducted during this period has been identified." Record I 37.[2]

Petitioners contend the above findings construe ORS 215.296(1) as being met simply because accepted farm practices have been carried out on petitioners' property since the golf course began operation.[3]

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[2]The record in this matter is composed of six separate volumes. When citing to the record we use Roman numerals to distinguish between the six volumes.

[3]Petitioners' argument is as follows:

> "The County determined in [the findings quoted in the text] that because the Von Lubkens have been observed conducting accepted farm practices except for aerial spraying, forced changes in those practices have not been significant. * * * The County misinterpreted the statute in determining that because accepted farm practices continue to be conducted, the level of forced changes in practices and costs is insignificant." Petition for Review 9-10.

We do not see an erroneous construction of ORS 215.296(1) in the above quoted findings. The findings are findings of fact, and the allegedly erroneous construction of ORS 215.296(1) is not present in those findings. The findings simply say that with the exception of aerial spraying, all of the accepted farming practices petitioners used to carry out on the subject property have continued to be carried out after the golf course was constructed.

This subassignment of error is denied.

2. Spray Drift and Aerial Spraying as Accepted Farm Practices

Petitioners next contend the findings supporting the challenged decision imply "that spray drift is not an accepted farm practice and that aerial spraying is not a necessary farm practice." Petition for Review 10. Petitioners cite several pages of findings, but do not specifically identify the findings they contend make this improper implication.

We accept for purposes of this subassignment of error that an erroneous implication could provide a basis for reversal or remand. However, again, we do not see the legal error petitioners contend is present in the findings. The findings do not conclude that spray drift and aerial spraying are not accepted farm practices. The findings do explain that it is possible to spray with little off-site drift if label restrictions concerning spraying when certain drift conditions exist are followed. The findings explain

that pesticide labels and federal regulations make it illegal to spray some pesticides when drift conditions exist and that it is not an accepted farm practice to apply pesticides in violation of such requirements. The findings also state that when off-site spray drift is anticipated, it is an accepted farm practice to call neighboring property owners to advise them of the spraying activity.

The county's findings do suggest that application of chemicals without regard to weather conditions or the expected degree of drift onto adjacent properties is not an accepted farm practice. The county also found that aerial spraying is declining in the Hood River Valley and that many successful orchardists no longer apply chemicals by air at all. However, the county did not find that aerial application of chemicals on orchards is not an accepted farming practice. Neither did it find that unavoidable spray drift is not an accepted farm practice.

This subassignment of error is denied.

3. Increased Cost of Aerial Spraying

Petitioners appear to contend the county improperly interpreted and applied ORS 215.296(1) by refusing to consider the increased costs that will be incurred to aerially spray the Von Lubken orchard because at least two tracts adjoin the golf course on several sides.

The county did not ignore petitioners' contention that costs of aerial spraying are substantially increased by the

golf course. The county adopted findings rejecting petitioners' contention. Record I 42. Petitioners identify no misconstruction of ORS 215.296(1). We consider petitioners' challenge to the adequacy of the evidence to support the county's findings below.

This subassignment of error is denied.

4. Cumulative Impacts and Costs, Generally

In remanding LUBA's decision in Von Lubken III, the Court of Appeals determined that LUBA erred by considering the six identified impacts of the golf course on petitioners' farming operation in isolation.[4] The court explained "ORS 215.296(1) should be construed to require their cumulative effects to be considered." Von Lubken III, supra, 118 Or App at 251.

Petitioners contend the requirement that cumulative effects be considered is determinative because LUBA decided in Von Lubken III that the question of whether the "golf course significantly affects petitioners' ability to aerially spray their orchard is an exceedingly close one." Von Lubken III, supra, 24 Or LUBA at 280-81. According to petitioners, had cumulative effects been properly considered by LUBA in Von Lubken III, such consideration would have made the case no longer an "exceedingly close one," and LUBA

[4]The six impacts addressed by LUBA in Von Lubken III were trespass, dust, and impacts on petitioners' aerial spraying, ground spraying, air flow, and liability.

would have concluded the golf course forces a significant change in accepted farm practices. Petitioners contend the same situation exists now, and that the county erred by failing to so find.

Petitioners apparently take the view that any identified changes in accepted farm practices are "additive" in the sense that if changes in or increased cost of two or more accepted farming practice are almost significant, when viewed separately, then adding them together necessarily results in a conclusion that the standard stated in ORS 215.296(1) is violated.

In the above quoted statement from our decision in Von Lubken III we addressed impacts on aerial spraying only. As we have already explained, the error identified by the Court of Appeals was the failure of the county and LUBA to consider cumulative impacts on accepted farm practices as a whole. We reject petitioners' apparent contention that where impacts on an individual accepted farm practice are such that they almost force a significant change in that practice, then any impacts on other accepted farm practices must necessarily lead to a conclusion that there is a cumulative significant change in accepted farm practices. Such may be the case, but it is not necessarily so.

Summarizing, we do not understand the Court of Appeals' directive to preclude the county from considering each of the six types of impacts identified by petitioners

individually, and finding that no single type of impact, viewed alone, is significant. The Court of Appeals simply said the county may not end the analysis there. The totality of accepted farm practices and the totality of the changes to and cost increases in those accepted farm practices associated with the golf course must also be considered.

In the challenged decision, the county adopts findings addressing individual impacts and also adopts findings addressing "Cumulative Impacts." Record 47-48. With one exception, petitioners do not challenge the adequacy of these findings. Petitioners do contend the county failed to address cumulative impacts in the sense the county refused to consider increased costs of accepted farm practices incurred as a result of dust generated during construction of the golf course. We consider that argument below.

This subassignment of error is denied.

5. Cumulative Impacts and Costs of Dust

Petitioners contend the county failed to consider costs in the amount of approximately $20,000 which they allege were incurred due to the dust created for a two and one-half month period during construction of the golf course. Petitioners contend these are cumulative costs that the Court of Appeals' decision in Von Lubken III requires that the county consider.

The county's findings appear to take the position that since the golf course is now constructed, any increased costs that might be attributable to dust generated during the construction phase are not authorized by the challenged decision and need not be considered.

In our prior opinion, we agreed with respondents' argument that because the golf course is now constructed, "the challenged decision will [not] result in the creation of dust in the future." Von Lubken III, supra, 24 Or LUBA at 283. Therefore, petitioners' cumulative costs argument under this subassignment of error effectively challenges LUBA's conclusion in Von Lubken III that changes in accepted farming practices and increased costs in those practices that may have been incurred prior to approval of the disputed conditional use permit need not be considered by the county in granting the conditional use permit.

The Court of Appeals' decision in Von Lubken III does not make it clear that the rejection of costs incurred prior to permit approval aspect of LUBA's decision in Von Lubken III was affected by the court's remand. However, neither does it make clear that this aspect of LUBA's decision was not affected. The court's remand required LUBA to consider "cumulative effects" and "to reconsider the compatibility of the proposed use with ORS 215.296(1)." Von Lubken III, supra, 118 Or App at 246. We conclude the Court of Appeals determined LUBA was incorrect in concluding in Von Lubken

III that changes in or increases in costs of accepted farm practices attributable to dust generated during the construction phase need not be considered in addressing ORS 215.296(1), simply because those impacts and costs occurred prior to approval of the disputed decision.

The golf course challenged in this appeal was constructed while the decisions approving that golf course were on appeal. The county may not allow the applicant to construct the golf course, prior to receipt of a decision approving such construction that is sustained on appeal, and thereafter rely on the fact that construction has already occurred to avoid showing that the impacts on accepted farm practices and the costs thereof during construction of the golf course are not significant.

The county also adopted findings suggesting that any increased costs to petitioners' orchard operation associated with dust created during construction of the golf course need not be considered because creation of dust is itself an accepted farm practice. However, respondents do not argue in their brief that these findings provide an independent basis allowing the county not to consider the dust-related costs petitioners allege they have incurred. Therefore, we express no view concerning the adequacy of these findings to satisfy ORS 215.296(1).

This subassignment of error is sustained.

B. Lack of Substantial Evidence

In Von Lubken III, supra, 24 Or LUBA at 278, we concluded the evidence in the record was such that a reasonable decision maker could answer the question of whether the proposed golf course complied with ORS 215.296(1) either way. Petitioners contend the record in this appeal is such that it is no longer reasonable for the county to conclude that the challenged golf course complies with ORS 215.296(1). First, the record includes evidence of actual impacts since the golf course reopened on January 25, 1992.[5] Second, petitioners submitted evidence that the increased cost of their farm practices attributable to the golf course is approximately $100,000. Petitioners contend this increased cost is substantial and the county's findings dismissing their evidence as "unreliable" are not supported by substantial evidence.

1. Golf Balls

Petitioners contend the record demonstrates the trees planted in the buffer area and the fencing installed to reduce the number of golf balls leaving the golf course and entering petitioners' property do not do so. According to petitioners, the golf balls landing in the orchard damage

[5]Petitioners contend this evidence shows the conditions of approval imposed on the golf course have not been effective in keeping golf balls out of the orchard or preventing chemical spray from potentially drifting onto golfers.

fruit, represent a threat to employees and must be picked up to safely operate mowing machinery.

The county rejected petitioners' evidence concerning the actual number of golf balls leaving the golf course and landing in the orchard as partially fabricated. The county found that far fewer golf balls actually enter petitioners' property than the number claimed by petitioners.[6] Moreover, respondent cites evidence in the record that it is not necessary to pick up golf balls to operate mowing equipment such as that used by petitioners.

The county also found no orchard employee has been hit by a golf ball during the four years the golf course has operated, and petitioners do not challenge that finding. The county found the trees will perform their function of buffering the orchards from errant golf balls more effectively as they mature and that the fencing reduces the number of golf balls leaving the golf course. We conclude these findings are supported by substantial evidence, as is the county's ultimate finding that the number of golf balls falling into petitioners' orchard has not caused significant changes in any accepted farm practices or significantly increased the costs of those practices.

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[6]The county discounted petitioners' allegations concerning the number of golf balls leaving the golf course and landing in petitioners' orchard because one of the petitioners was video taped picking up golf balls on the golf course property.

This subassignment of error is denied.[7]

2. Ground Spraying

The county's findings explain that, as conditioned, the golf course neither significantly affects nor significantly increases the costs of ground spraying in petitioners' orchards. In Von Lubken III, we concluded similar findings were supported by substantial evidence in the record. Petitioners cite evidence submitted below in support of their contention that the condition requiring golf course closures during spraying operations is not always effective. Respondents cite testimony that the closures have worked well and that petitioners' ground spraying activities are not interrupted by the presence of the golf course. At worst, the evidence is conflicting, and the county could reasonably find as it did.

This subassignment of error is denied.

3. Air Flow

In our decision in Von Lubken III, we concluded the county's findings that the fencing, screen and trees required to buffer the golf course from petitioners' orchard will not significantly affect air flow. Petitioners submitted additional testimony addressing concerns about the

[7]We approach the issues identified by petitioners one-by-one, because that is how the parties approach the issues. As noted above, we are mindful of the Court of Appeals' admonition to the county and LUBA that "cumulative" impacts must be considered under ORS 215.296(1).

possibility of reduced airflow which the county rejected as speculative.

We conclude the county's findings concerning air flow are supported by substantial evidence in the record.

This subassignment of error is denied.

4. Dust

We have already sustained petitioners' challenge that the county should have considered costs they allege were incurred as a result of dust generated during golf course construction. Petitioners do not develop an evidentiary challenge to the county's findings concerning dust, and we do not consider the dust issue further.

This subassignment of error is denied.

5. Aerial Spraying

The local aerial sprayer who sprayed petitioners' property in the past testified he no longer will do so. The aerial sprayer cited liability concerns attributable to drifting aerial spray. According to the local aerial sprayer, those concerns are not adequately addressed by the condition requiring closure of the golf course while aerial spraying is occurring.

In response to evidence submitted by the applicant that aerial spraying of orchards adjoining golf courses occurs elsewhere, the local aerial sprayer pointed out there is a difference between orchard tracts that are surrounded by a golf course and orchards that are bordered by a golf course

on only one side. Where an orchard tract is bordered by a golf course on only one side, it is possible to approach the tract over the golf course when the wind is blowing from the golf course onto the orchard tract and thereby avoid spray drift onto the golf course.[8] When an orchard tract is surrounded by a golf course, it is not possible to do so.[9]

In our decision in Von Lubken III, we explained that the issue of the significance of changes in aerial spraying required by the presence of the golf course presented an exceedingly close question. In finding that the local sprayer's concerns did not demonstrate that the golf course forced a significant change in aerial spraying or the cost of aerial spraying, we noted that a second sprayer located in The Dalles testified that he would be willing to spray petitioners' orchard tracts. However, we noted that while petitioners alleged that sprayer would charge more than the local sprayer, they did not identify how much more. Von Lubken III, supra, 24 Or LUBA at 280 n 9.

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[8]Respondents point out there are pictures in the record showing that petitioners' local aerial sprayer in fact approaches target orchards over golf courses that are not closed. However, this evidence is not necessarily inconsistent with the local sprayer's testimony. As noted in the text, he testified that approaching orchards over golf courses when the wind is blowing away from the golf course avoids spray drift onto the golf course.

[9]The parties dispute whether any of petitioners' orchard tracts are actually surrounded by the golf course on all four sides. The important point appears to be that a sufficient portion of the perimeter of at least some of petitioners' orchard tracts is contiguous with the golf course such that there is no time when winds would not be blowing from the orchard onto some portion of the golf course.

The record establishes that the local sprayer used by petitioners in the past will no longer aerially spray petitioners' orchard.[10] This was not critical in Von Lubken III, because the second aerial sprayer located in The Dalles testified he would be willing to spray petitioners' orchard. Neither was the additional cost of aerial spraying critical, because petitioners did not contend the cost would be significantly more. In this appeal they do.

Based on evidence submitted by the applicant, petitioners point out it is uncontested that the aerial sprayer from The Dalles will charge approximately $2,000 more per year than the local sprayer charged to spray their orchards. Petitioners contend, correctly, that the county dismissed the significance of this cost increase without explaining why it does not represent a significant increase in the cost of accepted farm practices.

As the record stands, the aerial sprayer in The Dalles is the only option available to petitioners for aerial spraying of their orchard tracts. There is no dispute that aerial spraying is an accepted farm practice. The county must adopt findings addressing this increased cost in accepted farm practices and explain why the increase is not

[10]The county's findings suggest the presence of the golf course is not the real reason the aerial sprayer no longer will do so. However, that suggestion is not supported by substantial evidence in the record. Although there is evidence in the record showing the aerial sprayer sprays orchards adjoining golf courses, we are cited no evidence establishing the aerial sprayer sprays orchards surrounded by golf courses.

significant. The county must explain why the $2,000 increase in cost for aerial spraying, considered alone and considered cumulatively with any other increases in the costs of accepted farm practices properly attributable to the golf course, does not constitute a significant increase in the cost of petitioners' accepted farm practices.

This subassignment of error is sustained.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioners argue the golf course is incompatible with the orchard it surrounds and the orchard is not properly separated from the golf course. Petitioners contend compatibility and separation are required by Hood River Comprehensive Plan, Goal 3 - Agricultural Lands.[11]

We addressed such arguments in Von Lubken I and rejected them. Von Lubken I, supra, 18 Or LUBA at 36. In Von Lubken III, we rejected petitioners' arguments that the county improperly failed to consider evidence concerning actual operation of the golf course in considering whether the golf course is compatible with petitioners' orchards. Von Lubken III, supra, 24 Or LUBA at 284. Petitioners do not offer any substantial reason why we should reach a different conclusion based on the record in this appeal.

The second assignment of error is denied.

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[11]Petitioners do not identify the specific policies under plan Goal 3 they believe impose these compatibility and separation requirements.

The county's decision is remanded.