BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner,	)	LUBA No. 98-034
vs.	)	FINAL OPINION AND ORDER
UMATILLA COUNTY, Respondent,	)	

Appeal from Umatilla County.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review. With her on the brief was Hardy Myers, Attorney General, David Schuman, Deputy Attorney General and Michael Reynolds, Solicitor General.

No appearance by county.

HANNA, Board Member, GUSTAFSON, Board Chair, participated in the decision.

REMANDED 07/30/98

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

Opinion by Hanna.

NATURE OF THE DECISION

The challenged decision grants conditional use approval for a "lot-of-record" dwelling on land zoned for exclusive farm use.

FACTS

The subject eight-acre parcel is zoned for exclusive farm use (EFU-10). An apple orchard was planted and a shop building was constructed on the subject parcel approximately 18 years ago. A domestic well was drilled on the subject parcel in 1988. Because the subject parcel (1) is composed primarily of soils that are rated as "unique" and (2) includes an apple orchard, the parcel is considered "high value farmland." ORS 215.710(1)-(2).[1] "The surrounding area is a mixture of small to medium sized pastures, orchards and alfalfa fields, most with associated dwellings, and several rural residential dwellings on smaller lots." Petition for Review 2.

ASSIGNMENT OF ERROR

Petitioner argues the challenged decision misapplies the statutory criteria governing approval of "lot-of-record"

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[1]ORS 215.710(1)-(4) sets out a detailed definition of "high value farm land." As relevant, ORS 215.710(1) provides that "a tract composed predominantly of soils that are * * * [n]ot irrigated and classified * * * unique" are considered to be "high value farmland." In addition, ORS 215.710(2) defines "high value farmland" as including tracts outside the Willamette Valley "growing specified perennials." "Specified perennials" is defined as including "perennials grown for market or research purposes including, but not limited to, * * * fruits * * *." ORS 215.710(2). The legislative definition of "high value farmland" is repeated at OAR 660-33-020(8)(a)-(d).

dwellings in exclusive farm use zones.[2] Because the subject parcel is "high value farmland," the county must find that the criteria at ORS 215.705(2) or the criteria at ORS 215.705(3) are satisfied. ORS 215.705(1)(d).[3] For purposes of this appeal, the relevant statutory criteria appear at ORS 215.705(2)(a)(C),[4] which requires that the county make the following findings:

> "(i) The lot or parcel cannot practically be managed for farm use, by itself or in conjunction with other land, due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity.
>
> "(ii) The dwelling will comply with the provisions of ORS 215.296(1).[5]

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[2] In 1993 the legislature adopted special Exclusive Farm Use zone provisions allowing single family dwellings on certain parcels lawfully created before 1985. ORS 215.700 et seq. Such dwellings are commonly referred to as "lot-of-record" dwellings.

[3] The statutory criteria for approval of "lot-of-record" dwellings are set out at ORS 215.705(1). ORS 215.705(1)(d) requires that where such dwellings are to be sited on farmland, the land must not be "high value farmland," unless the exceptions to this prohibition that are provided by ORS 215.705(2) or (3) are met.

[4] The statutory criteria are repeated in the relevant Land Conservation and Development Commission administrative rule at OAR 660-33-130(c)(C). The county has also adopted the statutory criteria at Umatilla County Land Development Code (UCLDC) 152.059(3). In this opinion we refer to the statutory criteria rather than the administrative rule or the UCLDC. Kneagy v. Benton County, 112 Or App 17, 20 n2, 826 P2d 1047 (1992).

[5] ORS 215.296(1) requires findings that a proposed use 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."

> "(iii) The dwelling will not materially alter the stability of the overall land use pattern in the area."

Petitioner contends the county's findings are inadequate to demonstrate compliance with the ORS 215.705(2)(a)(C) criteria and that the county's findings are not supported by substantial evidence.

A. The Parcel Cannot Practically be Managed for Farm Use Due to Extraordinary Circumstances (ORS 215.705(a)(C)(i)).

The board of commissioners' decision incorporates the minutes of prior meetings of the planning commission and board of commissioners as findings. Those minutes do not state a consistent position concerning ORS 215.705(a)(C)(i).[6] The minutes of the board of commissioners' December 22, 1997 meeting include the following:

> "Commissioner Muller noted this entire area consists of several unique small acreages in primarily orchard land. So the subject property is being used and managed for agricultural purposes even though the land is not considered high-value by this commission due to the frost threat. He concurred with Reeder that the rocky soil type of the property and general area limits agricultural use to orcharding." Record 31.

The above-quoted discussion can be read to say the subject parcel does not qualify as "high value farmland" due to frost threat. However, we agree with petitioner that such a finding is both legally inadequate and not supported by record. The

[6]As we have noted in the past, the practice of adopting findings that incorporate other documents as findings increases the risk of adopting inconsistent findings. Wilson Park Neigh. Assoc. v. City of Portland, 24 Or LUBA 98, 106 (1992); Seger v. City of Portland, 22 Or LUBA 162, 164 n 5 (1991).

subject parcel is "high value farmland" as the statutes define that term, even if the property is subject to a frost threat. In addition, the above-quoted discussion is inconsistent with other portions of the challenged decision which specifically recognize that the subject property is "high value farmland" as that term is defined in ORS 215.710. Record 7, 9.

The board of commissioners also adopted findings that can be read to conclude that while the subject parcel may be "high value farmland," the frost threat means the property "cannot practicably be managed for farm use, by itself or in conjunction with other lands, due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity." Record 12. Petitioner argues the record does not include substantial evidence to support such a finding.

The challenged decision expressly recognizes that the standard imposed by ORS 215.705(a)(C)(i) is an exceedingly difficult standard to meet.[7] Record 24, 31. The subject property has in fact been used for an orchard for the past 18 years. For the years 1989 and 1990, the subject property yielded a gross profit of $86,227 and $53,466 respectively. The most that can be said for the challenged findings is that they suggest that the proposed dwelling would facilitate on-site management of the existing orchard and thereby make it

[7]The challenged decision characterizes the standard as "unmanageable" and as being effectively impossible to meet. Record 24.

more profitable. Record 80-82. The challenged decision does not establish that the subject parcel "cannot practicably be managed for farm use." We agree with petitioner that the county's findings do not demonstrate compliance with ORS 215.705(a)(C)(i).

This subassignment of error is sustained.

B. The Dwelling will not Cause a Significant Change in or Increase in Cost of Accepted Farm Practices (ORS 215.705(a)(C)(ii); 215.296(1)).

Petitioner argues the county failed to adopt findings addressing this criterion and that there is not substantial evidence in the record to support a finding that the dwelling approved by this decision will not result in a significant change in accepted farm or forest practices or significantly increase the cost of accepted farm or forest practices.

The challenged decision does not include findings which specifically address this criterion. The decision simply adopts the same findings that the county adopted to attempt to show the property cannot practicably be managed for farm purposes. Those findings are not adequate to demonstrate compliance with ORS 215.296(1).

This subassignment of error is sustained.

C. The Dwelling will not Materially Alter the Stability of the Overall Land Use Pattern of the Area (ORS 215.705(a)(C)(iii))

Finally, petitioner contends the county's findings are not adequate to demonstrate the dwelling approved by the challenged decision "will not materially alter the overall

land use pattern in the area." The three-step analysis that is required to address this criterion is set out in Sweeten v. Clackamas County, 17 Or LUBA 1234, 1245 (1989):

> "First, the county must select an area for consideration. The area selected must be reasonably definite including adjacent land zoned for exclusive farm use. Second, the county must examine the types of uses existing in the selected area. In the county's determination of the uses occurring in the selected area, it may examine lot or parcel sizes. However, area lot or parcel sizes are not dispositive of, or even particularly relevant to, the nature of the uses occurring on such lots or parcels. It is conceivable that an entire area may be wholly devoted to farm uses notwithstanding that area parcel sizes are relatively small. Third, the county must determine that the proposed nonfarm dwelling will not materially alter the stability of the existing uses in the selected area.

While petitioner faults the county for only considering immediately adjacent properties, the findings do appear to consider some properties beyond the immediately adjacent parcels.[8] However, petitioner also argues the challenged decision inappropriately considers lands "zoned and developed for rural residential uses" in performing the analysis required under this criterion.

In adopting findings describing the overall land use pattern of the area under ORS 215.705(a)(C)(iii) and local code criteria implementing that statute, only agricultural lands zoned for exclusive farm use are to be considered. See

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[8]Petitioner also complains that the decision "relies on speculation rather than evidence regarding the nature of the land use pattern in the area." That part of petitioner's argument is not sufficiently developed for review. Deschutes Development v. Deschutes Cty., 5 Or LUBA 218, 220 (1982).

Sweeten, 17 Or LUBA at 1244; Shaad v. Clackamas County, 15 Or LUBA 70, 77-78 (1986).[9] We cannot tell from the county's findings whether its analysis was appropriately limited to EFU zoned lands.

This subassignment of error is sustained.

We reject petitioner's invitation to reverse the challenged decision rather than remand it. We agree with petitioner that it is extremely unlikely that the county could adopt adequate and supportable findings to establish that the subject property "cannot practicably be managed for farm use," when the property apparently has been put to farm use for the past 18 years. However, we are not prepared to say it is impossible that there is additional evidence that could be presented on remand that would allow the county to adopt such findings.

The county's decision is remanded.

[9] Our decisions in Sweeten and Schaad were based on statutory language in prior versions of ORS 215.283(3)(c) which, as material, is identical to ORS 215.705(a)(C)(iii).