BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DUANE BOYER, HOWARD PAYTON, STAN KITZMANN, BRENT KERNS, MARK R. WARD, KEN BENSON, TOMMY L. DUNCAN, OWEN WENDT and ERIC ROMTVEDT,	)	LUBA No. 98-026
Petitioners,	)	FINAL OPINION AND ORDER
vs.	)	
BAKER COUNTY,	)	
Respondent.	)	

Appeal from Baker County.

Susan Isabel Boyd, Union, filed the petition for review and argued on behalf of petitioners.

Brad Anderson, County Counsel, Baker City, filed the response brief and argued on behalf of respondent.

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

REMANDED 10/13/98

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

Petitioners appeal the county's adoption of legislative amendments to its comprehensive plan and zoning ordinance to provide for siting destination resorts.

FACTS

ORS 197.435 to 197.467 provide the statutory framework for siting destination resorts.[1] ORS 197.445 provides that "[a] destination resort is a self-contained development that provides for visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities." ORS 197.455(1) provides that "[a] destination resort shall be sited on lands mapped as eligible for destination resort siting by the affected county." It then lists several types of areas where a "destination resort shall not be sited." Among those areas are:

> "(A) On a site with 50 or more contiguous acres of unique or prime farmland identified and mapped by the United States Natural Resources Conservation Service, or its successor agency.
>
> "(B) On a site within three miles of a high value crop area * * *." ORS 197.455(1)(b).

As defined in ORS 197.435(2):

> "'High value crop area' means an area in which there is a concentration of commercial farms capable of producing crops or products with a minimum gross value of $1,000 per acre per year. These crops and products include field crops, small fruits, berries, tree fruits, nuts or vegetables, dairying, livestock feedlots or Christmas trees as these terms are used in the 1983 County and State Agricultural Estimates prepared by the Oregon State University Extension Service. The 'high value crop area' designation is used for the purpose of minimizing conflicting uses in resort siting and does not revise the requirements of an agricultural land goal or administrative rules interpreting the goal."

[1]Statewide Planning Goal 8 (Goal 8) implements ORS 197.435 to 197.467. Much of Goal 8 replicates the statutory language of ORS 197.435 to 197.467.

On January 7, 1998, the county adopted the challenged decision, which amends the comprehensive plan and zoning ordinance to allow for the siting of destination resorts.[2] In developing the amendments over a ten month period, the county relied on the Department of Land Conservation and Development's (DLCD) "Destination Resort Handbook: A Guide to Statewide Planning Goal 8's Procedures and Requirements for Siting Destination Resorts" (handbook). The challenged decision describes the steps the county followed based on the handbook:

> "The first step is to map areas of the county where state law and local concerns do not allow destination resorts. The remaining areas not specifically required to be excluded, indicate where destination resorts may be considered for siting.
>
> "The second step is to adopt comprehensive plan and ordinance requirements to regulate resort development on eligible lands. The county establishes minimum requirements for resort development based on statutory requirements, and local concerns. This step determines how destination resorts may be developed.
>
> "The third step is to review specific development proposals. After counties adopt plan and ordinance provisions that comply with Goal 8, the county's plan governs resort development." Record 18-19 (emphasis in original).

The focus of petitioners' appeal concerns step one of the county's process, the identification of high value crop areas. Specifically, petitioners allege that the county's identification of high value crop areas is inconsistent with that portion of the statutory definition of high value crop areas that provides that a high value crop area includes "an area in which there is a concentration of commercial farms capable of producing crops or products with a minimum gross value of $1,000 per acre per year."

The challenged decision states that:

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[2]The comprehensive plan amendment provides a historical review of the evolution of these amendments. During the 1980s and early 1990s, several reports prepared on behalf of the county evaluated the feasibility of siting destination resorts in the county under the ORS 197.732 exception process. The county then applied for and received two state agency grants to fund establishment of a process for siting destination resorts under Goal 8.

> "In DLCD's analysis and response to Jefferson County['s periodic review task], DLCD stated that '[a] "concentration" means there are several farms producing high value crops near each other.' Based on DLCD's analysis, Baker County considered 'several' and 'concentration' to mean three or more commercial farms near each other that are capable of producing $1,000 per acre per year. Baker County took the approach that it was necessary to determine whether farm land was capable of producing $1,000 per acre per year before an attempt could be made to identify whether there were any concentrations of such farms. Second, 'capable of producing' was considered to mean that a farm has actually demonstrated the ability to grow a crop identified as a high-value crop. Third, in order to distinguish between farms that are capable of grossing $1,000 per acre only on an occasional basis, as opposed to farms that typically gross $1,000 per acre, Baker County interpreted the 'per acre per year' standard to mean that farm land must be capable of grossing $1,000 per acre for more years than the land does not gross $1,000 per acre during a normal [crop] rotation cycle."[3] Record 20 (emphasis added, emphasis in original deleted).

This interpretation led the county to consider crop rotation practices:

> "Accepted farming practices were considered in determining whether Baker County has any farms capable of meeting the $1,000 per acre per year standard. In Baker County, farm land is rotated in and out of production, or lesser value crops may be grown on a rotation basis with high-value crops as part of normal accepted farming practices." Record 20.

The challenged decision distinguishes high-value farmland from high value crop areas:

> "In contrast to 'high-value crop areas,' high-value farmland is found within Baker County. * * * High-value farmland in the county is designated as either Class II or Prime soils. No Class I or Unique soils have been identified in Baker County * * *." Record 23 (emphasis in original).

Using the described interpretations, assumptions and procedures, the county concluded that "there are no high-value crop areas, as defined by ORS 197.435(2), existing within Baker County." Record 22. Consequently, the challenged decision amends the

[3]Petitioners do not assign error to the county's interpretation that to be "capable of grossing $1,000 per acre per year," a farm must gross $1,000 per acre per year for more years than it does not in order to meet the production standard. Thus, we do not decide and express no opinion regarding whether this interpretation is consistent with the statutory requirement.

comprehensive plan and adopts a Destination Resort Overlay Zone that does not exclude from destination resort siting any land as a high value crop area.

Petitioners appeal the county's decision.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county improperly construed the definition of high value crop area. As stated above, a high value crop area is defined as "an area in which there is a concentration of commercial farms capable of producing crops or products with a minimum gross value of $1,000 per acre per year." ORS 197.435(2). Petitioners contend that the county's interpretation of ORS 197.435(2) is inconsistent with the plain meaning of that statute. PGE v. Bureau of Labor and Industries, 317 Or 606, 611, 859 P2d 1143 (1993) (in interpreting statutory text, words of common usage typically should be given their plain, natural, and ordinary meaning.) Petitioners argue:

> "The plain and usual meaning of the word 'capable' is 'able; having fitness or ability.' One could restate the phrase 'capable of producing' as 'able to produce' or 'having fitness or ability to produce.' Baker County redefined the phrase 'capable of producing' by adding the requirements that land 'has actually demonstrated the ability to grow.'" Petition for Review 6 (footnote omitted).

Petitioners then reason that the context of the last sentence of the high value crop area definition, in which minimization of conflicts is the stated purpose, is inconsistent with the county's interpretation of "capable of" and that the county's interpretation tends to nullify that purpose and increase conflicts. Petitioners urge that the county's interpretation reads 'capable of' out of the definition.

In addition, petitioners argue that the county misconstrued ORS 197.435(2) in identifying "concentrations of commercial farms" only when proximate farms produced the same type of high value crop (e.g. mint), and thus the county failed to identify as "concentrations of commercial farms" groups of proximate farms that produced different types of crops. Petitioners contend that ORS 197.435(2) requires a specific order of

operations. First, the county must identify concentrations of commercial farms regardless of type of production, before evaluating the capability of those farms. Second, the county must determine from that base which farms actually produce or have the potential to produce $1,000 per acre per year of high value crops.

The county responds, first, that the phrase "capable of" as used in ORS 197.435(2) should be construed to limit the required consideration to land that is capable of a specified level of production. The county explains:

> "Webster's Dictionary defines 'capable of' as 'having the ability or capacity for.' Baker County's definition is consistent with the text of the provision because Baker County's definition does not necessarily exclude land. The definition only limits the land to land that has 'demonstrated the ability to grow a high value crop,' but even that land did not meet the entire definition of high value crop area in Baker County. That is, the land that was most able to meet the high value crop area definition failed to meet the standard. If the land most capable of producing at the level required does not meet the standard, then a more broad definition of 'capable of producing' is unnecessary." Respondent's Brief 6 (footnote omitted).

Alternatively, the county responds that even if its interpretation is incorrect, that interpretation is not essential to the challenged decision because the findings demonstrate that the county applied the provisions of ORS 197.435(2) correctly. The county explains that, taken as a whole,

> "the findings are not entirely based on the 'capable of producing' definition. The findings regarding 'capable of producing' were intertwined with the findings regarding 'concentration of commercial farms' and 'per acre per year.' Respondent's Brief 9 (citations omitted).

We agree with petitioners that the county's interpretation of the definition of "high value crop area" is inconsistent with the text of ORS 197.435(2). By its plain meaning, the phrase "capable of producing" is not limited to past performance; it includes a projection of future potential. PGE, 317 Or at 611. Just because land has not been farmed, or has not been farmed to capacity, does not mean it is not capable of greater performance. The county's limited interpretation is insufficient to capture the scope of the term.

We also agree with petitioners that the statutory order of operations requires that the county first identify concentrations of commercial farms, regardless of type of production, before it determines which farms actually produce or have the potential to produce $1,000 per acre per year. The county's reverse approach is inconsistent with ORS 197.435(2) in narrowing the required evaluation to farms producing similar types of high value crops.

Finally, we disagree with the county's alternative argument that its misinterpretation of the phrase "capable of producing" is harmless error. The county's interpretation of the phrase "capable of producing" is integral to the scope and substance of its analysis. The county's other findings under ORS 197.435(2) cannot cure that fundamental error.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county impermissibly failed to exclude sites "with 50 or more contiguous acres of unique or prime farmland identified and mapped by the United States Natural Resource Conservation Service" as required by ORS 197.455(1)(b)(A).

The county responds that land required to be identified and excluded from eligibility under ORS 197.455(1)(b)(A) falls within the parameters of high-value farmland.[4] The county argues that it met the requirement of ORS 197.455(1)(b)(A) because it mapped and excluded from eligibility all high-value farmland.

The record reflects that the county mapped high-value farmland. Record 23. The

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[4]For purposes of siting lot-of-record dwellings, ORS 215.710(1) defines high-value farmland as:

> "land in a tract composed predominantly of soils that, at the time the siting of a dwelling is approved for the tract, are:
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> "(a) Irrigated and classified prime, unique, Class I or Class II; or
>
> "(b) Not irrigated and classified prime, unique, Class I or Class II."

The high-value farmland definition is relevant to destination resort siting only because the county had already identified the high-value farmland in the county, and it could make use of that exercise for purposes of excluding that land from destination resort siting.

definition of high-value farmland encompasses all land described in ORS 197.455(1)(b)(A). By mapping and excluding from eligibility all high-value farmland, the challenged decision meets the requirements of ORS 197.455(1)(b)(A).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that the challenged decision reflects an incorrect assumption that ORS 197.435 to 197.467 require the county to identify land eligible for a destination resort. We do not see that the county made such an assumption, and petitioners do not point to any such specific language in the decision. However, if the county did make such an assumption in the decision, that assumption would be not more than harmless error. [5]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the county's finding that a destination resort "would increase the tax base," is erroneous and not supported by substantial evidence in the whole record. Petition for Review 12.

It is petitioners' responsibility to identify the statute, plan, or code standard allegedly violated by the challenged decision. Petitioners have failed to do so here. If indeed the finding is not supported by substantial evidence in the whole record, absent a standard that requires such a finding, it is harmless error. Marcott Holdings, Inc. v. City of Tigard, 30 Or LUBA 101 (1995).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the challenged comprehensive plan amendments conflict with

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[5]Petitioners also argue in this assignment of error that the demand for irrigation water exceeds the county-wide supply, and that, therefore, the carrying capacity of this resource is insufficient to accommodate destination resort siting. However, petitioners do not develop a legal argument concerning this assertion, and we do not address it further.

the challenged zoning ordinance because the comprehensive plan does not allow for residential uses in destination resorts while the implementing ordinance does. Comprehensive Plan Recreation Policy IV B.6, adopted as part of the challenged decision,

does not specifically provide for residential uses:

> "Uses in destination resorts will be limited to visitor-oriented accommodations, overnight lodgings, developed recreational facilities, commercial uses limited to types and levels necessary to meet the needs of visitors to the resort, and uses consistent with resource preservation and open space."

Petitioners contrast this plan provision with the newly adopted zoning overlay provision of ZSO 319.03A.4.b, which states:

> "Accommodations available for residential use shall not exceed two such units for each unit of overnight lodging."

Petitioners argue that because Recreation Policy IV B.6 does not list residential uses as allowed uses in conjunction with destination resorts, the zoning provision violates the plan.

The county responds by pointing to the second step in its process for siting destination resorts where residential development is considered and where the plan specifically provides for residential uses:

> "Residential development is allowed on a 2:1 housing ratio for two reasons. First, few owners use existing resort homes as primary residences. Most are vacation homes and are rented out. Second, the sale of individual lots is often necessary to finance resort development. However, it is not the intent of Goal 8 to encourage destination resorts for residential development." Record 25.

Because the plan contemplates residential development, the zoning ordinance does not conflict with it.[6]

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[6]Additionally, ORS 197.445 specifically allows residential uses in destination resorts:

> "A destination resort is a self-contained development that provides for visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities. To qualify as a destination resort under ORS 30.947, 197.435 to 197.467, 215.213, 215.283 and 215.284, a proposed development shall meet the following standards:
>
> "* * * * *
>
> "(4) Visitor-oriented accommodations including meeting rooms, restaurants with seating for 100 persons and 150 separate rentable units for overnight lodging shall be provided. However, the rentable units may be phased in as follows:
>
> "(a) A total of 150 units of overnight lodging shall be provided as follows:

The fifth assignment of error is denied.

The county's decision is remanded.

"(A) At least 75 units of overnight lodging, not including any individually owned homes, lots or units, shall be constructed or guaranteed through surety bonding or equivalent financial assurance prior to the closure of sale of individual lots or units.

"(B) The remainder shall be provided as individually owned lots or units subject to deed restrictions that limit their use to use as overnight lodging units. The deed restrictions may be rescinded when the resort has constructed 150 units of permanent overnight lodging as required by this subsection.

"(b) The number of units approved for residential sale shall not be more than two units for each unit of permanent overnight lodging provided under paragraph (a)(A) of this subsection.

"* * * * *" (Emphasis added).