BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KENT GAMBEE and ALPINE MANAGEMENT, LLC,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent,

and

FRIENDS OF YAMHILL COUNTY,
Intervenor-Respondent.

LUBA No. 99-058

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Christian E. Hearn, Ashland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Davis, Gilstrap, Hearn, Saladoff & Smith, P.C.

Fredric Sanai, Assistant County Counsel, McMinnville, filed a response brief and argued on behalf of respondent.

Charles Swindells, Portland, filed a response brief and argued on behalf of intervenor-respondent.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED 07/21/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a decision by the board of county commissioners denying their application for a forest template dwelling.

MOTION TO INTERVENE

Friends of Yamhill County moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

Petitioners applied for a forest template dwelling on a 20-acre parcel located within the county's Agricultural/Forestry Large Holding (AF-80) zone. The AF-80 zone permits uses allowed under both Statewide Land Use Goals 3 (Agricultural Lands) and 4 (Forest Lands). The soils on the property are classified as high-value farm land. The soils are also productive for forest uses. A majority of the soils on the property are capable of producing 155 cubic feet per acre per year of wood fiber. The remaining soils are capable of producing 145 cubic feet per acre per year of wood fiber. The property is undeveloped and is currently receiving both farm and forest tax deferral.

Yamhill County Zoning Ordinance (YCZO) 403.03(P) permits a dwelling to be placed on a lot or parcel located within the AF-80 zone if that lot or parcel was predominantly devoted to forest use on January 1, 1993 and certain other criteria are met. According to evidence presented by the applicant and a 1992 aerial photograph, county staff determined that on January 1, 1993, 16 acres of the parcel were covered with brush and invasive blackberry vines. Of the remaining acreage, approximately three acres were forested and one acre was a pasture. The staff concluded that between farm and forest use, forest use was predominant on January 1, 1993. Based on that conclusion, staff approved the application for a forest template dwelling.

The staff decision was appealed to the board of commissioners (commissioners).

During the appeal hearing, opponents of the application testified that the property had been the site of a walnut orchard that had been damaged by frost in the 1950s. According to opponents, the only forest activity that had occurred on the property was the result of inadvertent seeding and was not the result of any concentrated forest practices on the property. Opponents contended that the historical evidence tended to show that farm uses were predominant on the property, not forest uses. In response, petitioners argued that (1) the statutory definition of "farm use" in ORS 215.203(2) required the "current employment" of the property for farm purposes on January 1, 1993, in order for the county to determine that farm uses predominated on the property on that date; (2) no farm uses were occurring on the property on January 1, 1993; and (3) the definition of "forest use" does not require any particular activities on the part of the owner or operator to demonstrate that forest uses exist on a parcel zoned for forest use. Therefore, petitioners argued, by default the predominant use of the property on January 1, 1993, was "forest use."

The commissioners rejected petitioners' contention that an absence of "current" agricultural activity on the property in 1993 created a presumption that the property was in "forest use" and thus eligible for a forest template dwelling. The commissioners interpreted "predominant use" to mean something more than the predominant acreage devoted to a particular use. The commissioners considered other factors, such as soil classification, historic uses and percentages of income derived from particular activities, to be relevant considerations. Although the commissioners found that all applicable criteria for a forest template dwelling were met, the commissioners concluded that petitioners failed to demonstrate, as a threshold matter, that forest uses predominated on the property on January 1, 1993. Accordingly, the commissioners denied petitioners' application.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

YCZO 403.03(P) implements ORS 215.705(4) and OAR 660-006-0050(2).[1] OAR 660-006-0050(2) provides that, in mixed agricultural/forest zones, if a tract of land was predominantly in forest use on January 1, 1993, then the county shall apply the siting standards for dwellings in forest zones.[2]

Petitioners argue that the evidence in the record demonstrates that the property was not in farm use on January 1, 1993. ORS 215.203(2)(a) defines "farm use" in relevant part as:

> "[T]he current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. * * *"

ORS 215.203(2)(b) defines "'current employment' of land for farm use" to include, in relevant part:

> "(B) Land lying fallow for one year as a normal and regular requirement of good agricultural husbandry;
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> "* * * * *

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[1]ORS 215.705(4) provides:

> "If land is in a zone that allows both farm and forest uses [and] is acknowledged to be in compliance with goals relating to both agriculture and forestry * * *, the county may apply the standards for siting a dwelling under either [ORS 215.705(1)(d)] or ORS 215.720, 215.740 and 215.750 as appropriate for the predominant use of the tract on January 1, 1993."

Forest template dwellings are authorized by ORS 215.750.

[2]OAR 660-006-0050(2) provides:

> "Uses authorized in Exclusive Farm Use Zones in ORS Chapter 215, and in OAR 660-006-0025 and 660-006-0027, subject to the requirements of the applicable section, may be allowed in any agricultural/forest zone. The county shall apply either OAR Chapter 660, Division 6 or 33 standards for siting a dwelling in an agriculture/forest zone based on the predominant use of the tract on January 1, 1993."

> "(E) Wasteland, in an exclusive farm use zone, dry or covered with water, neither economically tillable nor grazeable, lying in or adjacent to and in common ownership with a farm use land and which is not currently being used for any economic farm use[.]"

According to petitioners, the record shows that the farm activities on the property ended as early as the mid-1950s, when the orchard was abandoned, and definitely by 1986, when intermittent grazing of the parcel ceased. Therefore, according to petitioners, even with the expanded definition of "current employment" of land for farm use to include "land lying fallow for one year" and "wasteland," the property was not in farm use on January 1, 1993.

Goal 4 defines "forest land" as "lands which are suitable for commercial forest uses * * * and other forested lands that maintain soil, air, water, and fish and wildlife resources." Petitioners argue that unlike the definition of "farm use," the definition of "forest land" does not require any action on the part of the property owner to demonstrate that a parcel is in forest use. Petitioners contend, "[r]ather, it is a forest use to let the land lay unused, to be reclaimed by the natural elements, in order that soil, air, water, and fish and wildlife resources may be maintained." Petition for Review 20-21. Since the property is overrun with blackberries, brush and Scotch Broom, but does contain a small stand of Douglas Fir, petitioners contend that the nonuse of the property for any farm purposes inevitably leads to the conclusion that the property is in forest use.[3]

In the alternative, petitioners argue that the county has the obligation to determine which of two uses, farm or forest, predominated on the property on January 1, 1993. The parties agree that the county's decision treats ORS 215.705(4) as requiring a threshold determination. *See* n 1. That is, the county is obligated to determine whether a property was predominantly in forest or farm use on January 1, 1993, before deciding which particular standards for siting a dwelling apply. Petitioners argue that the county's decision sidesteps

[3]Himalayan Blackberry and Scotch Broom are non-native invasive plant species. The county has listed Scotch Broom as a noxious weed. Record 50, 60.

this threshold determination, by simply concluding that petitioners failed to establish that forest uses predominated on the property.

We disagree with petitioners that a determination that a property is not employed for farm use necessarily means that the property is predominantly in forest use. There must be some evidence in the record of the use of the property for the county to make its required determination. However, in this case, we agree with petitioners that the county's decision failed to apply the correct standards in reaching its conclusion that petitioners' application did not demonstrate that the subject parcel was predominantly in forest use on January 1, 1993.

ORS 215.705(4) requires that the county determine the predominant use on the "tract" as of January 1, 1993. A "tract" is defined as "one or more contiguous lots or parcels [of land] under the same ownership." ORS 215.010(2). YCZO 403.03(P) refers to a forest template dwelling on "a *lot or parcel* predominantly devoted to forest use on January 1, 1993." (Emphasis added.) The county interpreted YCZO 403.03(P) to be no more and no less restrictive than the statute. The county then interpreted ORS 215.705(4) to require consideration of the tract as it existed in 1993. Therefore, the county concluded, both the statute and its code required consideration of the "tract" as it existed on January 1, 1993. In 1993, the subject property was part of a 95.88-acre tract.

The county's decision interprets provisions of state law and, therefore, no deference is afforded its interpretation. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392, 403 (1999) (ORS 197.829 does not require that LUBA defer to county interpretations of state statutes). We disagree with the county that the provisions of ORS 215.705(4) require consideration of a tract as it was configured in 1993. We believe that the statute requires consideration of the "tract" as it exists as of the time of the application for a forest template dwelling. Once that "tract" is identified, the inquiry turns to determining whether farm or forest uses predominated on that tract on January 1, 1993. *See Parsons v. Clackamas County*,

32 Or LUBA 147, 152 (1996) (unlike the "lot of record" statutes, ORS 215.750 specifies no date by which parcels qualifying for template dwellings must have been created). Petitioners submitted their application for a forest template dwelling on June 4, 1998. At that time, the "tract" as defined in ORS 215.010(2) consisted solely of the 20-acre subject parcel. In this case, the application of YCZO 403.03(P) results in the same study area—the parcel is the tract. Thus, uses occurring in 1993 on land other than the subject parcel in this case are irrelevant for purposes of ORS 215.705(4).

We now turn to the county's interpretation of the predominant use of the subject property on January 1, 1993. The commissioners' findings state:

> "* * * The Board [of commissioners] finds that the county * * * must characterize A/F[-80] land either as predominantly farm use or predominantly forest use, and that there is no option of choosing neither, provided that there is substantial evidence to support either characterization. * * * The Board [of commissioners] must base its choice of farm rules or forest rules under ORS 215.705(4) upon substantial evidence in the record, and the burden is upon the applicant to prove that the property is predominantly in farm use or predominantly in forest use." Record 7.

The commissioners then interpreted the "predominant use" standard to require consideration of

> "the long term use of the property; agricultural soil classes showing suitability for agricultural use and forest site classifications showing suitability for forestry; income from agricultural activities and from forest operations; and activities which come within the broad definition of forest land and farm use." Record 8-9.

Petitioners argue that "this ambiguous, expansive, and subjective interpretation of ORS 215.705(4) is inappropriate, arbitrary and capricious." Petition for Review 24. We disagree, at least in part. If a property included both farm and forest uses on January 1, 1993, we believe that the predominance standard allows a local government to consider more than the number of acres devoted to farm and forest use in determining the predominant use. *See Shirley v. Washington County*, 20 Or LUBA 127 (1990) (a county may consider more than mere acreage to determine whether farm or forest uses predominate on a particular property).

However, the standard is limited to farm and forest uses *that existed on January 1, 1993*. That is, income from the farm and forest uses that existed on the property on January 1, 1993, and the activity that was directed at producing income from farm and forest uses may be considered by the county in determining which use predominated on that date. However, historic uses and the capability of the tract to be put to farm or forest use are not relevant considerations in determining whether farm or forest use was predominant on January 1, 1993.

The county's assessment of the evidence regarding the predominant use of the property is permeated by the two interpretational errors discussed above. The county's findings include the following:

> "The parcel is approximately 20 acres in size. The staff report indicated that air photos taken [in September 1992] show that approximately 16 acres of the parcel [are] covered in brush and that no agricultural use is apparent. Earlier air photos show that this area used to be an orchard, and the parcel has been receiving a farm tax deferral. Of the remainder of the parcel, approximately 3 acres [are] forested, with one acre or less adjacent to Dupee Valley Road being in pasture. [T]he Planning Department found that the parcel was predominantly in forest use based on the [September 1992] aerial photo which showed the property was not in agricultural use. [Staff] stated that on a site visit the field was mostly covered with blackberries, with some fir trees visible which [staff] estimated to be between 10 and 15 years old. * * *" Record 9.

> "In addition, applicant submitted: (1) a Reforestation Survey dated 4 February 1999 for the 20 acres, which states that 'from the evidence present, it appears that this * * * parcel has been in forest use since 1979 and possibly as early as 1929.'; and (2) a letter from applicant stating that 'this property was replanted the first planting season following timber harvest. In addition, we replanted this property a second time in January, 1999.'

> "* * * The staff issued a supplemental staff report dated February 3, 1999 in which it stated that: (1) on January 1, 1993, [the subject parcel was] part of a 95.88 acre tract and that 99% of the soils on the tract are high value farmland and 95% of the parcel had high forest production capability; (2) On January 1, 1993, 34% of the tract was mostly cleared, 46% was mostly forested, and 20% was covered in brush; (3) 18 acres of the tract [are] receiving forest deferral; 76 [acres are] in farm deferral, and of that, 30 acres [are] classified as non-tillable and may be suitable for raising livestock; (4) Prior to December 29, 1993, the tract was split zoned, EF-40 (30%) and AF-20 (70%)." Record 10.

> "[T]he applicant's evidence failed to show that the parcel was used in conjunction with the larger tract which was predominantly in forest use on January 1, 1993. As explained above, such an analysis of the parcel and the tract is necessary in order to harmonize the ordinance with the statute. The applicant's analysis was inadequate in several respects. The applicant's evidence of growing timber and stocking on this parcel was ambiguous and not supported by substantial evidence in the record. The Reforestation Survey stated 'from the evidence present' 11 acres had been in forest use without describing the nature of that evidence. The letter dated February 4, 1999 from applicant contends that there was replanting but other than a 1999 replanting, does not provide the dates, locations, or other details of any earlier replantings of the parcel or of the tract so as to enable the Board [of commissioners] to evaluate the evidence. Therefore, the Board [of commissioners] finds that applicant failed to carry its burden to show, by substantial evidence, that the parcel, when used in conjunction with the tract, was predominantly in forest use on January 1, 1993." Record 11.

The county's decision concludes that the above-referenced evidence is insufficient to demonstrate what use predominated on the subject parcel on January 1, 1993. We understand the county's conclusion to rest on one of two bases. The first of those bases is that there is insufficient evidence to support a finding of predominant use of the 95.88-acre tract of which the subject parcel was a part on January 1, 1993. The second is that there is insufficient evidence in the record to support a finding that a majority of the acreage contained within either the 95.88-acre tract or the 20-acre parcel was devoted to either farm or forest use.

We have already determined that the relevant date for determining the composition of the tract for the purposes of ORS 215.705(4) is the date of application, not January 1, 1993. With regard to the second basis for denial, we reject the county's implicit premise that the majority of the acreage of the property must consist of either farm or forest uses for one of the two to predominate. The inquiry under ORS 215.705(4) is whether farm or forest use predominates on the property on January 1, 1993. Portions of the property that are unused or used for nonfarm or nonforest uses have no relevance to that inquiry. If only a small portion of the property can reasonably be considered to be in farm or forest use, the county need only consider that portion in its determination of predominant use. The remainder of the property is not part of the analysis.

The county's findings indicate that on January 1, 1993, the property contained approximately three acres of forested area and one acre "in pasture." Record 9. In light of the county's analytical error in evaluating the evidence regarding the predominant use of the parcel on January 1, 1993, a remand is appropriate to allow the county to consider the evidence based on the proper analysis of the statutory standards.[4]

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county's decision, which interpreted YCZO 403.03(P) to include consideration of resource uses on the entire 95.88-acre tract as of January 1, 1993, is either an improper amendment of the county ordinance in the guise of an interpretation, or is inconsistent with the express language of the regulation. Petitioners contend that this interpretation was first established in the commissioners' final decision. According to petitioners, the county's denial may be interpreted to require that an applicant for a forest template dwelling demonstrate that a majority of the entire tract was in forest use as of January 1, 1993. Petitioner argues that the county's decision cannot adopt a new interpretation that has the effect of establishing new approval criteria, without allowing the applicant an opportunity to present evidence demonstrating that the new approval criteria are satisfied.

Intervenor argues that the issue of whether the county should consider the predominant use of the property based on the 20-acre parcel or the tract of which it was a part was raised during the proceedings before the board of commissioners and petitioners presented evidence to show that forest uses were predominant on both the parcel and the tract

[4]While we agree with the county that the lack of farm activities occurring on the property on January 1, 1993, does not mean that the property is automatically in forest use, we reject intervenor's argument that active forest management is necessary to demonstrate "forest use." For example, stands of old growth forest that have never been "managed" for timber production are, nevertheless, indisputably in "forest use."

on January 1, 1993. Intervenor argues that petitioners should not be allowed a second opportunity to present evidence.

We agree with intervenor that the question of whether the county should consider uses on the 20-acre parcel alone or in conjunction with the tract of which it is a part was considered during the proceedings before the board of county commissioners and that petitioners presented evidence to demonstrate that both the parcel and the tract were predominantly in forest use on January 1, 1993. Petitioners' assignment of error provides no basis for reversal or remand. *See Gutoski v. Lane County*, 155 Or App 369, 373-74, 963 P2d 145 (1998) (parties to a local land use proceeding should anticipate and present arguments to address a variety of potentially applicable interpretations that could be adopted by a local government).

The second assignment of error is denied.

CONCLUSION

OAR 661-010-0071(2) provides, in relevant part

"The Board shall remand a land use decision for further proceedings when:

"* * * * *

"(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law."

The county's decision is based on an erroneous interpretation and application of ORS 215.705(4), but we cannot say that the decision is prohibited as a matter of law. As we stated in our discussion under the first assignment of error, remand is appropriate to allow the county to consider the evidence in light of the proper application of the relevant standards.

The county's decision is remanded.