BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CLIFFORD FALLS AND JERRI FALLS,
Petitioners,
vs.

MARION COUNTY,
Respondent,

and

MARJORIE BRAZIL-WHTE AND
MARIANNE GRIFFITH
Intervenors-Respondents.

MAR23'10 AM11:20 LUBA

LUBA No. 2009-129

FINAL OPINION
AND ORDER

Appeal from Marion County.

Christopher J. Pallanch, Portland, and David J. Peterson, Portland, filed the petition for review. David J. Peterson argued on behalf of petitioners. With them on the brief was Tonkon Torp LLP.

Jane Ellen Stonecipher, Marion County Legal Counsel, Salem, filed the joint response brief and argued on behalf of respondent. With her on the brief were Brownstein, Rask, Sweeney, Kerr, Grim, DeSylvia & Hay, LLP and David J. Sweeney.

David J. Sweeney, Portland, filed a joint response brief and argued on behalf of interveners-respondents. With him on the brief were Brownstein, Rask, Sweeney, Kerr, Grim, DeSylvia & Hay, LLP and Jane Ellen Stonecipher.

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

AFFIRMED 03/23/2010

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 that denies their application for conditional use approval for a wind turbine facility.

MOTION TO INTERVENE

Marjorie Brazil-White and Marianne Griffith (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

FACTS

The subject 10.25-acre parcel is located northeast of Sublimity, Oregon. The property lies south of the intersection of Silver Creek Falls Highway (State Highway 214) and Victor Point Road SE. The subject property is designated Primary Agriculture in the county's comprehensive plan and is zoned for exclusive farm use (EFU). The property is surrounded by other EFU-zoned properties that are currently in farm use. Petitioners' proposed wind turbine facility would include three 100-kilowatt wind turbines that are 155 feet tall.

Intervenors are members of the Tate family that operates a grass seed farm on adjoining parcels to the west (40 acres), east (157 acres) and south (300 acres) of the subject property. The Tate family also owns a 100-acre forest operation farther to the south. An existing Christmas tree farm that is operated by a different family (the Hunt family) is located southwest of the subject property.

One of the criteria that must be satisfied to approve the proposed wind turbine facility is Marion County Rural Zoning Ordinance (MCRZO) 136.060(a)(1), which requires that the county find that the proposed wind turbines would "not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands

1 devoted to farm or forest use."[1] The county planning director found that petitioners failed to
2 carry their burden concerning MCRZO 136.060(a)(1). Petitioners appealed the planning
3 director's decision to the county hearings officer. The hearings officer also found petitioners
4 failed to carry their burden concerning MCRZO 136.060(a)(1), citing potential conflicts
5 between the wind turbines and nearby customary farm practices.

6 MCRZO 136.060(f)(1) requires that the proposed turbines be located on Class III or
7 lower quality soils.[2] While the property contains Class III soils, the hearings officer found
8 that the evidentiary record was not sufficient to demonstrate that petitioners could both
9 comply with the MCRZO 136.060(f)(1) Class III soils requirement and setbacks that would
10 be required to meet noise limits imposed by MCRZO 136.060(a)(4) and the Marion County
11 Noise Ordinance. The planning director found that MCRZO 136.060(a)(4) and the Marion
12 County Noise Ordinance together require that the proposed turbines be no closer than 40
13 meters from the subject property's property lines.[3] On appeal, the board of county
14 commissioners affirmed the hearings officer's decision. Record 7. This appeal followed.

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[1] MCRZO 136.060(a)(1) replicates the standard set out at ORS 215.296(1) which applies to uses allowed in EFU zones under ORS 215.213(2) and 215.283(2). The complete text of MCRZO 136.060(a)(1) is set out below:

> "The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. Land devoted to farm or forest use does not include farm or forest use on lots or parcels upon which a non-farm or non-forest dwelling has been approved and established, in exception areas approved under ORS 197.732, or in an acknowledged urban growth boundary."

[2] The text of MCRZO 136.060(f)(1) is set out below:

> "The facility will not be located on a portion of the subject property that is comprised of soils that are irrigated and classified prime, unique, Class I or Class II, or not irrigated and classified prime, unique Class I or Class II."

[3] MCRZO 136.060(a)(4) requires that "[a]ny noise associated with the use will not have a significant adverse impact on nearby land uses." The Marion County Noise Ordinance imposes a 55dBA limit measured at the property line, which the planning director found would require that the turbines be located no closer than 40 meters from the property line. Record 20.

1 **FIRST ASSIGNMENT OF ERROR**

2 In a portion of the hearings officer's decision set out below, the hearings officer found
3 that the neighboring Tate family grass seed farm could be converted to a Christmas tree farm,
4 and under MCRZO 136.060(a)(1) petitioners must establish that the wind turbines would not
5 conflict with helicopter spray and harvest operations on any resulting Christmas tree farm
6 operations on the Tate family farm. Petitioners' first assignment of error challenges that
7 finding:

8 "The Possible Future Use Of The Tate Grass Seed Farm For Christmas Tree
9 Farming Is Irrelevant To The Analysis Required By MCRZO 136.060(a)(1)."
10 Petition for Review 4.

11 Petitioners contend the purely speculative possibility that the Tate family might make a
12 decision in the future to convert its grass seed farm that nearly surrounds the subject property
13 to a Christmas tree farm is irrelevant under LUBA's decision in *Dierking v. Clackamas*
14 *County*, 38 Or LUBA 106 (2000). Petitioners contend that until such a conversion is
15 underway and concrete steps have been taken to implement such a conversion, MCRZO
16 136.060(a)(1) does not require that they consider the impacts the proposed turbines might
17 have on helicopter operations in conjunction with a possible Christmas tree farm on the Tate
18 family property.

19 In *Dierking* a former rabbit and chicken farm had ceased operation and the property
20 owner was in the process of establishing an organic herb farm. In applying ORS 215.296(1),
21 the statutory equivalent of MCRZO 136.060(a)(1), *see* n 1, LUBA held that an applicant for a
22 wireless communication tower on EFU-zoned land must demonstrate that the tower would
23 not force a significant change in accepted farm practices on or significantly increase the cost
24 of accepted farm practices of the proposed herb farm and botanical garden. In reaching that
25 conclusion we explained that ORS 215.296(1) does not require that the applicant consider
26 every conceivable farm practice that might be employed on nearby property in the future, but
27 where such a conversion was already underway such farm practices must be considered:

1 "We agree with the county that it is not required under ORS 215.296(1) to
2 anticipate and consider the accepted farming practices that might be associated
3 with every possible farm use to which surrounding lands may be put in the
4 future. However, we see no reason why petitioner's property is not properly
5 viewed as devoted to use as an herb farm and botanical garden by virtue of the
6 expenditures that petitioner has already made and the plans that he is
7 developing. Petitioner's planned use is much more than a hypothetical or
8 possible use of the property. Petitioner's plans have developed to the point
9 where petitioner is able to describe the planned herb farm and botanical
10 garden in some detail. Perhaps more importantly, petitioner is able to identify
11 the farming practices that will be employed on the property. Therefore, the
12 county faces no practical difficulties in determining which of those farm
13 practices qualify as 'accepted farm practices' that must be considered under
14 ORS 215.296(1). Where a party in the local proceedings advises the county
15 that an existing or prior farm use on surrounding lands is in the process of
16 being abandoned, and plans for the new farm use are sufficiently developed to
17 allow the new farm use to be described in sufficient detail to allow the farm
18 practices that will be associated with the new farm use to be identified, an
19 applicant for a nonfarm use that is subject to ORS 215.296(1) must address
20 the accepted farming practices that will be associated with that new farm use."
21 38 Or LUBA at 121-22.

22 **A. Petitioners' Assignment of Error**

23 Petitioners' first assignment of error assumes that the hearings officer's finding
24 concerning the possible future conversion of the Tate family grass seed farm to use as a
25 Christmas tree farm either is the entire basis for her conclusion that petitioners' proposal does
26 not comply with the MCRZO 136.060(a)(1) significant change/cost criterion or at least is
27 critical to her decision regarding the MCRZO 136.060(a)(1). If the hearings officer relied on
28 another reason for concluding that petitioners have not demonstrated the proposal complies
29 with the MCRZO 136.060(a)(1) significant change/cost criterion, and that other reason is not
30 challenged by petitioners, the hearings officer's decision must be affirmed. *Delta Property*
31 *Company v. Lane County*, 58 Or LUBA 409, 416 (2009); *Franzke v. City of Tigard*, 52 Or
32 LUBA 761, 765 (2006); *Garre v. Clackamas County*, 18 Or LUBA 877, 881, *aff'd* 102 Or
33 App 123, 792 P2d 117 (1990). We therefore set out the relevant text of the hearings officer's
34 analysis concerning MCRZO 136.060(a)(1) below, in order to determine if petitioners'
35 assumption is correct.

1 "Generally, Christmas tree and grass seed farming are the types of agricultural
2 operations in the area surrounding the subject property. Several people noted
3 that Christmas tree farming operations often use helicopters to spray
4 herbicides and fertilizers and to harvest trees. Letters from tree farmers and
5 commercial pilots assert that the proposed towers will interfere with
6 agricultural operations in the area by restricting aerial spraying and harvesting
7 practices. The height of the towers, their proximity to farm fields and
8 turbulence are seen as interfering with the ability to safely pilot aircrafts and to
9 control overspray. Aerial application is also a common practice on grass seed
10 farms (see exhibit 2) and the concerns about grass seed farming practices are
11 similar—Pilots refusing to operate in proximity to the turbines out of safely
12 and liability concerns and overspray into neighboring properties because of
13 wind turbulence, as well as seed drop (seeds being blown to the ground
14 instead of [the] receptacle) during harvest, and affect on field burning after
15 harvest. Field burning is a common and highly controlled grass seed farming
16 practice. Impacts on timber operations are also a concern because of helicopter
17 use in that operation as well.

18 "Applicants assert that concerns over interference with farm and forest
19 practices are unfounded. Applicants note that the nearest timber operation is
20 one-half mile away, and that only one adjacent property is in Christmas trees
21 at this time. According to applicants, future conversion to Christmas trees on
22 other properties cannot be considered. The hearings officer agrees that non-
23 proximate and speculative uses should not be considered. The timber
24 operation that is a half-mile away is not on 'surrounding land' as used here
25 and there is no evidence suggesting any interference that would require it to
26 reasonably be considered. *However, conversion of neighboring properties to*
27 *Christmas tree use can be considered because Christmas tree operations are*
28 *common on surrounding lands. Crop rotation is a farm practice and*
29 *conversion to Christmas trees from grass seed or to grass seed from*
30 *Christmas trees is reasonably considered a farm practice.*

31 "Applicants note that, based on a wind study conducted for the project, the
32 currently existing Christmas tree operation on the Hunt property is not
33 downwind of the turbines for most of the year. Also, according to applicants,
34 in a 15-mile per hour wind, turbulence effects diminish to insignificance at
35 about 200' and will not reach the Hunt farm. Applicants also note that aerial
36 spraying is not typically conducted when wind speeds are more than ten miles
37 per hour, so turbulence behind the towers would have even less reach under
38 spraying conditions. And, according to applicants the turbines will not 'cut in'
39 until wind speed reaches eight miles per hour, narrowing the window of
40 opportunity for conflicts with spraying even further. Applicants note that
41 many of the articles submitted concerning interference with agricultural
42 operations are based on giant wind towers on large wind farms, and applicants
43 proposed only three small wind turbines. Applicants also offered a condition

1 requiring the wind turbines to be turned off during aerial agricultural
2 operations.

3 "While some interference with farm practices may be speculative, such as seed
4 drop, others are more concrete. One aerial agricultural business operator
5 states unequivocally that he will not provide services within 1,000' of wind
6 towers. The height of the towers is a piloting concern as is turbulence during
7 spraying and harvesting operations. According to applicants, turbulence is not
8 a problem beyond 200' at a wind speed of 15 miles per hour. This might
9 preclude turbulence from interfering with the more distant, generally upwind
10 Hunt property, but the Tate properties are not 200' away from the subject
11 property and are not generally upwind of the turbines. A 200' setback might
12 mitigate some turbulence problems, but such a setback is not feasible."
13 Record 17-18 (underlining and italics added).

14 Petitioners' first assignment of error is directed at the italicized findings above,
15 which, petitioners argue, are inconsistent with the analysis required under *Dierking*.
16 However, petitioner does not assign error to the findings that are underlined in the first
17 paragraph quoted above. Those findings admittedly could be clearer. However, fairly read,
18 in the underlined findings the hearings officer found that just as the proposed turbines may
19 conflict with helicopter application of herbicides and fertilizers and helicopter harvest on
20 Christmas tree farms, because aerial application is a common practice on grass seed farms,
21 the proposed turbines present similar concerns for aerial applications on grass seed farms,
22 *e.g.*, safety, liability, overspray and seed drop. The underlined findings also identify potential
23 for impacts on field burning. Although the hearings officer later dismisses seed drop
24 concerns and potential impacts on distant forest operations as speculative, the other concerns
25 regarding potential interference with aerial applications on grass seed farms (safety, liability
26 and overspray) are not dismissed. Because petitioners do not assign error to the hearings
27 officers' findings concerning conflicts the turbines may cause with aerial applications on
28 adjacent grass seed farms, their first assignment of error provides no basis for reversing or
29 remanding the hearings officer's decision regarding MCRZO 136.060(a)(1).

1 **B. Substantial Evidence**

2 Although in their first assignment of error petitioners do not assign error to the
3 underlined findings in the first paragraph quoted above, petitioners do include the following
4 footnote on page 7 of the petition for review.

> 5 "To the extent the [board of county commissioners'] decision is based on the
> 6 Hearings Officer's erroneous finding [concerning evidence in the record about
> 7 use of helicopters in conjunction with grass seed farming], it should be
> 8 reversed for lack of substantial evidence to support the decision. * * *"
> 9 Petition for Review 7 n 4.

10 Earlier in a footnote in their discussion of the facts, petitioners also questioned the
11 evidentiary support for the hearings officer's finding that aerial application of herbicide and
12 fertilizer is customary in grass seed farming.[4] The only place that petitioners' substantial
13 evidence challenge is advanced is in these footnotes.

14 OAR 661-010-0030(3)(d) requires that a petition for review include assignments of
15 error that are set forth under separate headings.[5] The Court of Appeals does not consider
16 assignments of error that are presented only in footnotes. *Miles v. City of Florence*, 190 Or
17 App 500, 505 n 2, 79 P3d 382 (2003); *Confederated Tribes (Siletz) v. Employment Dept.*, 165
18 Or App. 65, 81 n 8, 995 P2d 580 (2000); *Noren v. Board of Chiropractic Examiners*, 117 Or
19 App 337, 341 n 3, 843 P2d 1021 (1992). Oregon Rule of Appellate Procedure (ORAP) 5.45,

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[4] Footnote 3 on page three of the petition for review is set out below:

> "The Hearings Officer additionally concluded that 'aerial application is also a common practice on grass seed farms' (R. at 17), but her only evidence for this conclusion (Exhibit 2, *see* R. at 211) makes no mention whatsoever of aerial spraying or the use of helicopters in conjunction with grass seed farming. There is no other evidence in the record that helicopters are used in conjunction with grass seed farming, and notably, the most recent correspondence on the issue from Intervenor-Respondents' counsel * * * (R. at 105-110) does not dispute Petitioners' contention that helicopters are not used for grass seed farming."

[5] OAR 661-010-0030(3)(d) requires that a petition for review:

> "Set forth each assignment of error under a separate heading. Where several assignments of error present essentially the same legal questions, the argument in support of those assignments of error shall be combined[.]"

1 which the Court of Appeals relies on in refusing to consider assignments of error that are
2 presented only in footnotes, is more detailed than OAR 661-010-0030(3)(d). However,
3 ORAP 5.45(2) is quite similar to OAR 661-010-0030(3)(d) and requires that "[e]ach
4 assignment of error shall be separately stated under a numbered heading." *See* n 5. LUBA
5 also has refused to consider arguments in footnotes that set out a different legal theory than
6 presented in the assignment of error. *Frewing v. City of Tigard*, 59 Or LUBA 23, 45 (2009);
7 *David v. City of Hillsboro*, 57 Or LUBA 112, 142 n 19 (2008). We refuse to do so here.

8 Although we decline to consider petitioners' substantial evidence challenge, even if
9 we were to consider that challenge, the record includes evidence a reasonable person could
10 accept to conclude that the surrounding grass seed farm may include at least some aerial
11 spraying. The document cited by the hearings officer is a letter from a nearby property owner
12 that states, in part:

13 "**Safety**. Helicopters are commonly used year round in this area for
14 agricultural spraying, Christmas tree harvesting, and other uses necessary for
15 healthy crops. I believe the height of these wind turbines would definitely
16 pose a hazard to the pilots when performing their spraying and other required
17 tasks." Record 211.

18 The helicopter safety concerns expressed in the letter do not appear to be limited to Christmas
19 tree farming. The record also includes a letter from the owner of an aviation service who
20 opposed the application. That letter states that the company uses aircraft and helicopters in
21 "applying agricultural chemicals and fertilizers onto farm crops, [C]hristmas trees and
22 timberland * * *." Record 231. Finally, one of the intervenors submitted a letter that
23 includes the following:

24 "* * * Because we did not receive notice of the proposed conditional use
25 application, the Findings do not recognize that the proposed wind turbines
26 also pose a direct threat to the safety of the helicopter operations in our
27 adjacent family timber farm (commercial timber, not Christmas trees) and
28 grass seed fields, and will jeopardize future agricultural uses of our land.
29 * * *" Record 217.

It is fair to say that the above testimony and other evidence in the record clearly supports a conclusion that use of helicopters to apply chemicals and harvest trees is an accepted farm practice on Christmas tree farms. But it is also fair to say that the above evidence at least suggests that use of helicopters is not entirely limited to Christmas tree farms and suggests that use of helicopters may be an accepted farm practice for other agricultural operations, including grass seed farms. Petitioners cite no direct evidence that use of helicopters to apply herbicides and fertilizer is not an accepted farm practice on grass seed farms.

For the reasons explained above, petitioners' first assignment of error provides no basis to upset the hearings officer finding that petitioners failed to carry their burden regarding MCRZO 136.060(a)(1). Accordingly, the first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As we noted earlier in this opinion, MCRZO 136.060(f)(1) requires that the proposed turbines be located on Class III or lower quality soils and MCRZO 136.060(a)(4) and the Marion County Noise Ordinance together require that the proposed turbines be no closer than 40 meters from the subject property's property lines.[6] The planning director found that the noise criteria could be satisfied by imposing a condition that the wind turbines be sited no closer than 40 meters from the property line. However, the hearings officer also found that the evidentiary record is not sufficient to demonstrate that it is feasible to both (1) comply with the 40 meter setback and (2) site the wind turbines on Class III or lower quality soils.

> "The Planning Director's findings and condition are facially reasonable in dealing with noise concerns. Applicants explained that the wind turbines proposed here are smaller and the generators are not gear driven, eliminating much of the noise and problems (wind turbine syndrome, etc.) associated with larger, gear driven turbines.. The problem with imposing the setback condition to meet this criterion is a practical one.

[6] *See* ns 2 and 3 and related text.

> "The towers must be sited on the class III soil portion of the subject property. Applicants provided no evidence on the dimensions of the class III soil area. The hearings officer roughly scaled the soils map in the file based on the measurements depicted on the site plan, and found that the class III soil band varied in width from approximately 75' to 190'. According to the applicants, the turbines must have a certain amount of separation to prevent the turbulence of one tower from interfering with another tower. Applicants have not proven that it is feasible to place the proposed towers on the class III soils and still meet the noise mitigating setback condition. MCRZO 136.060(a)(4) is not met for the power generating facility and height increase." Record 20-21.

Petitioners first argue the hearings officer should have followed the planning director's lead and simply imposed two conditions of approval—one requiring the 40 meter setback to address noise concerns and one requiring that the three turbines be sited on Class III or lower soils. There are two problems with that argument. First, as the hearings officer found, the evidentiary record is not sufficient to establish that it is feasible to meet both of those conditions. Second, the county is not under any general obligation to impose conditions of approval to modify the proposal so that the permit application can be approved. *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266, 271 (2000); *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229, 241-42, *aff'd* 129 Or App 433, 879 P2d 1313 (1994); *Simonson v. Marion County*, 21 Or LUBA 313, 325 (1991).

Petitioners also argue the hearings officer's findings quoted above are unfair to petitioners because "they did not know that the Planning Director would recommend a 40-meter setback to address noise issues, so they had no reason to demonstrate in their application that the turbines could be sited on Class III or lower soils more than 40 meters from the property boundaries." Petition for Review 8.

It may be that it is unreasonable to require petitioners to anticipate, at the time they submit their application, that the county would require a 40-meter setback to address noise regulations. However, petitioners knew that the planning director determined that a 40-meter setback would be necessary on June 5, 2009, when the planning director issued his decision.

Record 259-60 (finding 10). Petitioners also knew on June 5, 2009 that the planning director took the position that the county must rely on the National Resource Conservation Service soils maps rather than the more detailed soils maps that petitioners prepared. Record 258. While it admittedly is not easy to anticipate all the evidentiary questions the hearings officer might have on a complicated land use proposal like this one, we do not agree that petitioners could not reasonably have foreseen that the hearings officer might have questions about whether the subject property's Class III soils are located so that it is feasible to comply with the Class III siting requirements *and* the 40 meter setback. Petitioners had an opportunity at the July 8, 2009 hearing before the hearings officer and during the three weeks the record remained open to provide additional evidence that the turbines can be sited on Class III soils and also can be sited more than 40 meters from the subject property's property line.

The second assignment of error is denied.

The county's decision is affirmed.