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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

WASHINGTON COUNTY FARM BUREAU,)
)
Petitioner,)
)
vs.)
)
WASHINGTON COUNTY,)
)
Respondent,)
)
and)
)
RON MACK, FOREST E. BUMP, ROSEMARY)
BUMP, KENNETH A. BUMP and ELLEN P.)
BUMP, dba WILKESBORO JOINT)
VENTURE,)
)
Intervenors-Respondent.)

LUBA No. 91-171
FINAL OPINION
AND ORDER

Appeal from Washington County.

Scott O. Pratt, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

Lawrence R. Derr, Portland, filed the response brief and argued on behalf of intervenors-respondent.

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

AFFIRMED 01/14/92

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the county commissioners
4 approving an application for a special use approval for a
5 golf course on land zoned Exclusive Farm Use (EFU).

6 **MOTION TO INTERVENE**

7 Ron Mack, Forrest E. Bump, Rosemary Bump, Kenneth A.
8 Bump, and Ellen P. Bump filed a motion to intervene on the
9 side of respondent. There is no objection to the motion,
10 and it is allowed.

11 **FACTS**

12 This is the second time a decision approving the
13 subject golf course has been appealed to this Board. In
14 Washington Co. Farm Bureau v. Washington County, ___ Or
15 LUBA ____ (LUBA No. 90-154, March 23, 1991) (Washington Co.
16 Farm Bureau), we stated the following relevant facts:

17 "Intervenors-respondent (intervenors) applied for
18 permission to construct an 18 hole golf course on
19 158 acres of EFU zoned land. In addition to the
20 golf course, the proposal includes a club house,
21 pro shop, driving range and lakes.

22 "The subject land is currently in farm use. It is
23 adjacent to the city limits of the City of Banks,
24 and lies 25 miles west of the City of Portland.
25 Farming activity is conducted on land located to
26 the northwest, north and east of the subject
27 property. There is residential development to the
28 south of the property." Washington Co. Farm
29 Bureau, supra, slip op at 2.

30 In Washington Co. Farm Bureau, we remanded the county's

1 decision on the basis that two conditions¹ essential to the
2 decision did not satisfy a Washington County Community
3 Development Code (CDC) 340-4.2(D) requirement that such
4 conditions of approval be "clear and objective."

5 On remand, the county commissioners conducted a public
6 hearing. This hearing was held on the record made during
7 the previous local proceedings concerning the proposed golf
8 course. The county commissioners did not allow new evidence
9 to be submitted at the public hearing. After the hearing,
10 the county commissioners adopted the challenged decision
11 approving the golf course. This appeal followed.

12 **THIRD ASSIGNMENT OF ERROR**

13 "The county's statement that the proposed golf
14 course will not seriously interfere with accepted
15 farm practices (CDC 340-4.2B) or force a
16 significant change in accepted farm practices or
17 significantly increase the cost of accepted farm
18 practices (CDC 340-4.2D) is not supported by
19 substantial evidence in the whole record."

20 Petitioner argues the findings of compliance with
21 CDC 340-4.2(B) and (D) are not supported by substantial

¹Those two conditions concerned the coordination of spraying and field burning activities by the golf course operator and affected area farmers (coordination condition) and required the course operator to provide certain waivers of liability (waiver condition). While worded somewhat differently, these two conditions are also present in the challenged decision. However, the parties dispute whether they are conditions of approval necessary to establish compliance with relevant standards in the challenged decision, or are unnecessary to establish such compliance. We address this issue, infra.

1 evidence in the whole record.² CDC 340-4.2(B) and (D)
2 provide the following:

3 "Required Findings:

4 "* * * * *

5 "(B) The proposed use does not interfere seriously
6 with 'accepted farming practices' as defined
7 in ORS 215.203(2)(c) on adjacent lands
8 devoted to farm use.

9 "* * * * *

10 "(D) The proposed use will not:

11 "(1) Force a significant change in accepted
12 farm or forest practices on surrounding
13 lands devoted to farm or forest use; or

14 "(2) Significantly increase the cost of
15 accepted farm or forest practices on
16 surrounding lands devoted to farm or
17 forest use.

18 "An applicant may demonstrate that these
19 standards for approval will be satisfied
20 through the imposition of conditions. Any
21 conditions imposed shall be clear and
22 objective."

23 The challenged order contains a number of findings
24 concerning compliance with these standards. These findings
25 are followed by several conclusions, including the
26 following:

²Petitioner also argues that some of the findings in the challenged decision are mere conclusions. However, respondent cites a number of findings, spanning six pages of the record, which explain the basis of the findings petitioner contends are conclusory, as well as the basis for other findings. Petitioner does not argue these explanatory findings are inadequate, and we do not see that they are.

1 "The [board of commissioners] concludes that the
2 potential conflicts that have been identified will
3 not cause the proposal to interfere seriously with
4 accepted farming practices nor will the proposed
5 use force a significant change in the accepted
6 farming practices on surrounding lands or
7 significantly increase the cost of those
8 practices. This conclusion relies in part on the
9 conditions imposed in this Order other than the
10 conditions relating to waivers and coordination.
11 At some time a golfer may experience contact with
12 smoke, dust or spray. However, the possibility is
13 sufficiently remote under the proposed use and the
14 evidence of lack of adverse effects on farming
15 from such a possibility is strong enough that the
16 negative effects of the proposed use, if any, will
17 not be 'serious' or 'significant' as provided by
18 applicable standards." Record 24.

19 Petitioner contends the record does not contain
20 substantial evidence to support the county's determinations
21 that the proposal will not (1) significantly interfere with
22 accepted farming practices in the area, (2) significantly
23 increase the cost of accepted farming practices in the area,
24 or (3) force a significant change in accepted farming
25 practices in the area.

26 The parties do not disagree that the evidence discussed
27 in the findings does exist. Rather, they disagree about
28 whether that evidence is adequate to support the county's
29 determination of compliance with CDC 340-4.2(B) and (D).

30 We believe the evidence in the record is sufficient to
31 support a determination that the proposal will not
32 significantly interfere with, increase the costs of, or
33 change the accepted farming practices in the area.
34 Petitioner does not argue it is probable that the proposal

1 will cause significant direct impacts on area farmers.
2 Rather, it argues the proposal has the potential, which it
3 concedes is remote, for causing economic liability for area
4 farmers from possible claims brought by golfers against
5 farmers who utilize aerial spraying or field burning in
6 farming operations.³ Petitioner also argues the
7 justification the county adopted to enable area farmers to
8 avoid such liability, i.e. that they can easily change
9 aerial spray patterns and coordinate with the course
10 operator during times such practices are utilized, is a
11 significant change in the way such farmers go about their
12 business. Consequently, petitioner argues, the proposal
13 violates CDC 340-4.2(B) and (D).

14 Without more, we do not believe that simply because a
15 reasonable farmer would change the aerial spray pattern
16 utilized on a particular farm due to adjacent development
17 that this constitutes either a significant interference with
18 or a significant change to accepted farming practices in a
19 farming area. Specifically, there is nothing in the record

³For example, petitioner argues:

"* * * although the possibility of a golfer making a claim against a farmer is remote, if such a claim is made it will result in significantly increased costs for the farmer as a result of engaging in accepted farm practices. Therefore, though the possibility of significantly increased costs may be remote, this is not allowed by CDC 340-4.2D." Petition for Review 16.

1 to suggest that using alternative aerial spray patterns will
2 make it more difficult or impossible to continue to use
3 aerial spraying as a farm practice. Further, there is
4 nothing in the record to suggest that new aerial spray
5 patterns will be significantly more costly to area farmers.

6 The record establishes that two other rural golf
7 courses near similar types of farming operations have never
8 experienced any liability or claims of liability resulting
9 from a golfer's exposure to farming practices. The record
10 also contains evidence from an agricultural spraying
11 business which has sprayed various farms, including farms
12 near golf courses, in the Willamette Valley for 40 years. A
13 representative of that spraying business stated that it has
14 never had any "legal problems or insurance claims from golf
15 courses or from individuals playing golf on the courses."
16 Record 19. This evidence is relevant to establish the
17 proposed golf course will not result in any significant
18 interference with, or change in, accepted farming practices
19 in the area. We further agree with the county that it is
20 neither a significant change in, or a significant
21 interference with accepted farming practices for a farmer to
22 notify a golf course operator of impending field burning or
23 spraying activity.

24 We conclude the evidence in the record supports the
25 county's determination that the proposal satisfies
26 CDC 340-4.2(B) and (D).

1 The third assignment of error is denied.

2 **FIRST ASSIGNMENT OF ERROR**

3 "The Board's refusal to accept new evidence at its
4 July 23, 1991, hearing was a procedural error in
5 violation of the county's ordinances regarding the
6 conduct of public hearings (CDC 205) to the
7 prejudice of substantial rights of petitioner."

8 Petitioner argues it was entitled to present evidence
9 at the remand public hearing, citing CDC 205 governing the
10 conduct of public hearings generally.

11 Respondents point out that CDC 205-5.1 contains the
12 following limitation before setting forth the procedures for
13 the conduct of public hearings:

14 "Subject to the specific standards and limitations
15 set forth in this Code, the following procedural
16 entitlements shall be provided at the public
17 hearing." (Emphasis supplied.)

18 Respondents also point out that CDC 209-5.3 provides that
19 subject to CDC provisions not applicable here:

20 "** * * appeal to the Board [of Commissioners] of
21 all final decisions of the Hearings Officer or
22 Planning Commission shall be confined to the
23 record."

24 The challenged decision is the final county action on an
25 appeal of the hearings officer's decision to the county
26 commissioners. We do not believe that simply because our
27 remand in Washington Co. Farm Bureau, supra, triggered the
28 final action of the county commissioners on that hearings
29 officer appeal alters the fact that the county commissioners
30 did consider an appeal of the hearings officer's decision in

1 making the challenged decision. Accordingly, we agree with
2 respondents that CDC 209-5.3 applies, and the county
3 commissioners did not err in refusing to accept new evidence
4 at the remand hearing.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 "The county's statement that the two conditions
8 regarding waiver and coordination are not
9 necessary to find that the application meets the
10 standards of CDC 340-4.2(B) and 340-4.2(D) is not
11 supported by substantial evidence in the whole
12 record.

13 "The waiver condition imposed by the county is not
14 sufficient to comply with the standards contained
15 in CDC 340-4.2(B) and 340-4.2(D), requiring that
16 the golf course not seriously interfere with,
17 significantly increase the cost of or force a
18 significant change in accepted farm practices.

19 "The condition requiring coordination between the
20 golf course operator and surrounding farmers is
21 not clear and objective as required by CDC 340-
22 4.2."

23 In this assignment of error, petitioner argues that
24 certain of the conditions of the challenged decision
25 relating to the proposal's compliance with CDC 340-4.2(B)
26 and (D) are not "clear and objective," as required by CDC
27 340-4.2.

28 CDC 340-4.2(D) requires that conditions of approval be
29 "clear and objective" only if such conditions are necessary

1 to satisfy the standards imposed by CDC 340-4.2(D).⁴ Here,
2 the challenged decision makes it clear that the disputed
3 conditions concerning waiver and coordination are not
4 required for the purpose of satisfying CDC 340-4.2(D).⁵
5 Rather, these conditions are simply supplemental protections
6 the county is affording area farmers through its decision.
7 The challenged decision does not rely on these conditions to
8 satisfy CDC 340-4.2(D). Consequently, whether those
9 conditions are clear and objective provides no basis for
10 reversal or remand.

11 The second assignment of error is denied.

12 The county's decision is affirmed.

⁴The requirement that conditions adopted to satisfy standards be "clear and objective" does not apply to CDC 340-4.2(B). See Washington Co. Farm Bureau, supra, slip op at 9-11.

⁵The challenged decision states the following regarding the intended role of the conditions concerning waiver and coordination:

"The coordinating obligation accepted by the applicant, if utilized by the farmers, can eliminate interference with spray operations and reduce the possible contact between golfers and blowing smoke. The waiver program imposed by the Applicant on golfers which involves multiple notices, proof of acceptance by the golfer and education as to the significance of the waiver, is likely to prevent claims when and if contacts occur and is calculated to assure the effectiveness of the waiver if a claim is nevertheless made. The majority of the farmers surrounding the site have responded positively to these measures. None have concluded that they will be forced to significantly change or increase the cost of their practices. The coordination and waiver conditions, although not necessary to establish that the proposed use will satisfy the standards of B. and D. of CDC 340-4.2, will provide additional assurance that the proposed use will not conflict with surrounding farm uses.
* * *" Record 24

1