

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

JUN 16 4 10 PM '86

OF THE STATE OF OREGON

3 ROY HEARNE,)
4)
4 Petitioner,) LUBA No. 86-010
5)
5 vs.) FINAL OPINION
6) AND ORDER
6 BAKER COUNTY,)
7)
7 Respondent.)

8 Appeal from Baker County.

9 Roy Hearne, Elaine Hearne, and Freda Martin, Halfway, filed
10 petitions for review on their own behalf.

11 Donald B. Dunn, Jr., Halfway, filed a response brief and
12 argued on his own behalf as applicant.

13 No appearance by Baker County.

14 DUBAY, Referee; KRESSEL, Chief Referee; BAGG, Referee;
15 participated in the decision.

16 REMANDED 06/16/86

17 You are entitled to judicial review of this Order.
18 Judicial review is governed by the provisions of ORS 197.850.
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1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 This appeal challenges the county's approval of a division
4 of a 20 acre tract in an Exclusive Farm Use zone. The division
5 will create one 10-acre parcel and two 5-acre parcels.
6 Conditional use permits for two non-farm dwellings were also
7 approved. All approvals are appealed.

8 FACTS

9 The applicant's property is predominantly Class IV
10 soils.¹ The property is located in a rural portion of the
11 county known as "Boulder Flat." Grazing is the most common
12 agricultural activity for land in the immediate area. Twelve
13 acres of the property have irrigation water rights, but steep
14 slopes prevent irrigation on all of the property. The 10-acre
15 parcel includes an existing dwelling.

16 The proposal is before us for the second time. The
17 county's first approval decision was remanded in Smith v. Baker
18 County, ___ Or LUBA ___ (1985) (LUBA No. 85-039, dated
19 December 2, 1985). After the remand, the county held further
20 hearings and again approved the application. This appeal
21 followed.

22 FIRST ASSIGNMENT OF ERROR

23 Petitioners allege the decision violates applicable
24 criteria in ORS 215.283 and the county ordinance for approval
25 of non-farm dwellings.

26 ORS 215.263(4) allows

1 "(a) division in an exclusive farm use zone for a
2 dwelling not provided in conjunction with farm use
3 only if the dwelling has been approved under ORS
 215.213(3) or 215.283(3), whichever is
 applicable."²

4 To establish a dwelling on lands zoned for exclusive farm use,
5 ORS 215.283(3) requires findings that each dwelling:

6 "(a) Is compatible farm use described in ORS
7 215.203(2) and is consistent with the intent and
 purposes set forth in ORS 215.243;

8 "(b) Does not interfere seriously with accepted
9 farming practices, as defined in ORS
 215.203(2)(c), on adjacent lands devoted to farm
 use;

10 "(c) Does not materially alter the stability of the
11 overall land use pattern of the area;

12 "(d) Is situated upon generally unsuitable land for
13 the production of farm crops and livestock,
14 consider the terrain, adverse soil or land
 conditions, drainage and flooding, vegetation,
 location and size of the tract; and

15 "(e) Complies with such other conditions as the
16 governing body or its designate consider
 necessary."³

17 Petitioners allege the findings are inadequate to show the
18 property is generally unsuitable for the production of farm
19 crops and livestock.

20 The county found:

21 "These dwellings would be located upon generally
22 unsuitable land for the production of farm crops and
23 livestock because of the very porous rocky soil,
24 uneven terrain, degree of separation of two small
25 fields from creeks, ditches and vegetation, limited
26 availability of irrigation water, and the small size
 of the parcel, made even smaller by the amount of land
 taken by brush, boulders, cobbles, trees, creek
 channels, ditches and hummocks which are aren't
 feasible to level. The photographs are impressive
 evidence of the unsuitable nature of all but

1 approximately 7 acres of the applicant's land."
Record, Item 9 at p. 9.

2 The findings supporting this conclusion may be summarized
3 as follows:

- 4 1. The amount of rock on the property impairs use
5 for farm purposes. The rock inhibits water
6 retention, prevents land levelling, and increases
the cost of fencing.
- 7 2. Without levelling, only 50 percent of the
property can be flood irrigated.
- 8 3. Only 7 acres of the tract, which is divided
9 between two locations, is grazing land.
- 10 4. The applicant has received low levels of income
11 for rental of pastures, and has had high
land-management expenses.
- 12 5. No neighbors want to buy the property.

13 We agree with petitioners that the county's findings are
14 inadequate to justify partition of the 20-acre parcel. The
15 findings are defective in two respects.

16 The findings do not identify the portion of the property
17 considered unsuitable for the production of farm crops or
18 livestock and therefore inappropriate for nonfarm dwellings.
19 The county did not find that only a portion of the tract is
20 unsuitable for farm production by, for example, identifying an
21 isolated area with poorer soils than the remainder of the 20
22 acres. Instead, the county made a generalized finding that the
23 20 acres are unsuitable for the production of farm crops and
24 livestock.

25 The 20 acres at issue is zoned for exclusive farm use, is
26 predominately Class IV soils, has been used, at least in part,

1 for agricultural use, and has been specially assessed for farm
2 use. The findings also state seven acres of the property are
3 grazing land, and the applicant has rented part of the property
4 for pasture. These findings show that part of the 20 acres is
5 suitable for the production of farm crops and livestock.

6 The agricultural land use policy in ORS 215.243(2) states
7 the necessity of preserving the maximum amount of agricultural
8 land in large blocks.⁴ Given this statewide policy, we do
9 not construe ORS 215.263(4) and 215.213(3) or 215.283(3) to
10 authorize the creation of parcels for non-farm dwellings that
11 also do not preserve the maximum amount of the land that is
12 suitable for production of farm crops and livestock.

13 To meet the requirements in either ORS 215.213(3) or ORS
14 215.283(3), the county must find the parcel for a non-farm
15 dwelling is generally unsuitable for the production of farm
16 crops and livestock and that land suitable for production of
17 farm crops and livestock is preserved. The findings do not
18 meet this requirement.

19 Petitioner's first assignment of error is sustained.

20 SECOND ASSIGNMENT OF ERROR

21 Petitioners attack numerous findings on the grounds they
22 are not supported by substantial evidence in the record and a
23 variety of other grounds. However, we will only review two
24 specific challenges. The remaining challenges either assert
25 petitioners' evidence should have been accepted by the county
26 commissioners, request a different interpretation of evidence,

1 or attack findings that are not essential to the decision. The
2 Board is bound by any finding of fact for which there is
3 substantial evidence in the whole record, ORS 197.830(11), and
4 we will not reweigh conflicting credible evidence. Christian
5 Retreat Center v. Comm. for Wash Co., 280 Or App 673, 560 P2d
6 1100 (1976). Therefore, except for the challenges discussed
7 below, petitioners' assignments of error are denied.

8 Petitioners challenge Finding 27. It states:

9 "That the uses in the area are non-farm uses and
10 described as grazing a few head of cattle, horses and
11 sheep but then only in the late Spring until the first
12 of July when irrigation water is gone or until
13 mid-September for dry land."

14 We agree with petitioners' claim that this finding is
15 contradictory. It describes summertime grazing as non-farm
16 uses in the area. The finding is inadequate to show land uses
17 in the area are limited to non-farm uses.

18 Petitioners also challenge the county's finding that
19 grazing on the 20 acres is limited to one month per year.
20 Petitioners point to the testimony of Edmond Davis, who
21 appeared on behalf of the applicant. Mr. Davis testified the
22 applicant had leased pasture for use by sheep that graze two
23 and one half to three months. Respondent does not refer to any
24 part of the record where evidence supporting the finding may be
25 found. When a finding is challenged for lack of supporting
26 evidence, respondents have an obligation to show where in the
record the supporting evidence may be found. City of Salem v.
Families for Responsible Govt., 64 Or App 238, 249, 668 P2d 395

1 (1983); rev'd on other grounds, 248 Or 574, 694 P2d 965
2 (1985). Because respondent has not, the challenge to the
3 finding for lack of supporting evidence will be sustained.

4 The assignment of error is sustained regarding the findings
5 discussed above. The assignment of error is denied in
6 connection with the petitioners' remaining challenges to the
7 findings.

8 THIRD ASSIGNMENT OF ERROR

9 Petitioners allege the county exceeded its jurisdiction.
10 However, petitioners do not amplify this bare charge with any
11 argument or analysis. We will not guess as to petitioners'
12 theory or argument. Deschutes Development v. Deschutes County,
13 5 Or LUBA 218 (1982). This assignment of error is denied.

14 Remanded.

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FOOTNOTES

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4 After Petitioner Hearne objected to the record, the county
5 amended the record by submitting a soils report for Map Unit
6 103A, describing the soils as Langrell very cobbly loam, Class
7 IVs. Respondent asserts the report for Unit 103A includes the
8 property in question and that he submitted the report at the
9 county hearings. Petitioner Hearne contends the property is in
10 Map Unit 100A which is predominantly Class III soils. We reject
11 petitioner's request to accept a report for Map Unit 100A as part
12 of the record. Petitioner submitted no map showing the location
13 of the soil map in units and makes no claim that the report for
14 Unit 103A was not the report relied upon by the county in the
15 decision process.

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17 ORS 215.213(3) allows non-farm dwellings on parcels with
18 soils predominantly in capability Classes IV through VII if
19 specified findings are made. Although ORS 215.288(1) allows
20 counties to apply ORS 215.213(3) to land zoned for exclusive farm
21 use where comprehensive plans do not provide for marginal lands
22 under ORS 197.247, the county did not apply ORS 215.213(3) to the
23 Dunn application. We note, however, that the criterion in ORS
24 215.283(3)(d) challenged in the first assignment of error is
25 almost identical to the criterion in ORS 215.213(3)(b).

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The county zoning ordinance has similar criteria:

- 18 "1. The dwelling or activities associated with
19 the dwelling will not force a significant
20 change in or significantly increase the cost
21 of accepted farming practices on nearby
22 lands devoted to farm use;
- 23 "2. The dwelling does not materially alter the
24 stability of the overall land use pattern of
25 the area;
- 26 "3. The dwelling is situated on generally
unsuitable land for the production of farm
crops and livestock considering the terrain,
adverse soil or land conditions, drainage
and flooding, vegetation and location and
size of the tract;

1 "4. The dwelling is situated upon land which can
2 be approved for sub-surface sewage disposal
3 or an approved alternative sewage disposal
4 system;

5 "5. The land shall be disqualified from farm
6 deferral [ORS 215.236]

7 "6. The use removes minimal land from production
8 with a minimum of 2 acres for residential
9 use; and

10 "7. The use complies with such other conditions
11 as the Planning Commission considers
12 necessary." Section 301(C) Baker County
13 Zoning Ordinance.

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ORS 215.243(2) states:

15 "(2) The preservation of maximum amount of the limited
16 supply of agricultural land is necessary to the
17 conservation of the state's economic resources
18 and the preservation of such land in large blocks
19 is necessary in maintaining the agricultural
20 economy of the state and for the assurance of
21 adequate, healthful and nutritious food for the
22 people of this state and union."
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