BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MISSION BOTTOM ASSOCIATION, INC., RON SACCHI, TAMRA SACCHI, SPRING LAKE FARMS, MARIE ZIELINSKI, ADELE EGAN, EGAN GARDENS, LOIS EGAN, ELLEN EGAN, MISSION CHERRY FARM, PAUL WITTEMAN, FRANCES WITTEMAN, CHAPIN FARMS, JACK CHAPIN, MARY CHAPIN, RON M. CHAPIN, BRUCE R. CHAPIN, VELAN E. CHAPIN, and MARION COUNTY FARM BUREAU,	)	
Petitioners,	)	LUBA No. 96-057
vs.	)	FINAL OPINION AND ORDER
MARION COUNTY,	)	
Respondent,	)	
and	)	
MORSE BROS., INC.,	)	
Intervenor-Respondent.	)	

Appeal from Marion County.

Edward J. Sullivan and Daniel Kearns, Portland, filed the petition for review on behalf of petitioners. With them on the brief was Preston Gates & Ellis. Edward J. Sullivan argued on behalf of petitioners.

Jane Ellen Stonecipher, Assistant County Counsel, Salem, and Paul R. Hribernick and Ronald T. Adams, Portland, filed the response brief on behalf of respondent and intervenor-respondent. With them on the brief was Black Helterline. Jane Ellen Stonecipher argued on behalf of respondent. Paul R. Hribernick argued on behalf of intervenor-respondent.

GUSTAFSON, Referee; HANNA, Chief Referee, participated in the decision.

AFFIRMED 09/26/96

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a comprehensive plan amendment, which adds a 490-acre site to the county's Significant Mineral and Aggregate Sites Inventory, applies a mineral and aggregate overlay zone to the site, and allows mineral and aggregate extraction on a 186-acre portion of the site.

MOTION TO INTERVENE

Morse Bros, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

The Oregon Farm Bureau (OFB) moves to intervene on the side of petitioner. The county and intervenor (respondents) challenge OFB's standing to intervene, since it did not participate below. OFB participated as an amicus during our first review of the county's approval in this matter. However, it has not established that it appeared during the local proceedings, or that it has any right to intervene in this matter. OFB's motion to intervene is denied.

FACTS

This is the second time petitioners have appealed the county's approval of intervenor's request. The facts of this case are described in Mission Bottom v. Marion County, 29 Or LUBA 281, (1995), aff'd 136 Or App 275 (1995) (Mission Bottom I). Briefly, and as relevant here, the county

approved a permit for mineral and aggregate extraction on a 186-acre portion of intervenor's 490-acre site. The site also includes a 115-acre batch plant operation that was approved through a 1979 conditional use permit. The challenged approval does not affect the ongoing operations under that conditional use permit in any way. The approval does not allow any extraction on the remainder of intervenor's 490 acres.

In Mission Bottom I, we remanded the county's decision because the findings did not independently establish compliance with ORS 215.296 and because the county had not provided petitioners adequate notice of a requested floodplain permit.

On remand, the county adopted findings of compliance with ORS 215.296. The county also revoked the floodplain permit, and required that intervenor apply for a floodplain permit through a separate proceeding.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

In Mission Bottom I, the county purported to establish compliance with ORS 215.296 through establishing compliance with former Marion County Zoning Ordinance (MCZO) Chapter 180, which was intended to implement that statute.[1] While the findings regarding compliance with MCZO Chapter 180 were

[1]MCZO Chapter 180 has been repealed.

not challenged, petitioners complained that the county erred in failing to independently establish compliance with ORS 215.296. We agreed that ORS 215.296 is independently applicable, and found:

> It appears that MCZO Chapter 180 is intended to implement ORS 215.296 and, to some extent, the county's findings do address the substance of the ORS 215.296 requirements. However, the requirements of MCZO Chapter 180 do not mirror the statutory requirements of ORS 215.296 and the findings do not specifically address the statute. Without any reference to ORS 215.296 in the findings, we cannot determine whether each of the requirements of that statute is addressed. Mission Bottom I, 29 Or LUBA at 295.

Consequently, we remanded the decision for the county to make those findings.

Petitioners now challenge the county's findings of compliance with ORS 215.296, which requires:

> "(1) A use allowed under ORS 215.213(2) or 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:
>
> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
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> "(2) An applicant for a use allowed under ORS 215.213(2) or 215.283(2) may demonstrate that the standards for approval set forth in subsection (1) of this section will be satisfied through imposition of conditions. Any conditions so imposed shall be clear and

objective."[2]

A. ORS 215.296(1)

Petitioners contend the county's findings of compliance with ORS 215.296(1) (1) improperly identify the area subject to evaluation; (2) improperly allocate the evidentiary burden; (3) are inadequate under ORS 215.416(9); and (4) are not supported by substantial evidence in the record.

1. Area Subject to Evaluation

Petitioners assert that in evaluating compliance with ORS 215.296, the county erred by evaluating only that area approved for mineral and aggregate extraction, rather than the entire 490-acre site. The county's findings explain the area for which this land use approval applies as follows:

> "The site is approximately 1.5 miles north of the Salem/Keizer Urban Growth Boundary and approximately 9 miles north of Salem city center. This described area contains approximately 490 acres, including the Morse Bros. existing 115-acre conditional use site where extraction and processing are presently occurring. Of the approximately 375 new acres described above, we are protecting and approving 186 acres for mineral and aggregate extraction outside Morse Bros.' existing conditional use operation. The remainder of the site is not approved for mining and shall remain for farm use or wildlife habitat. * * * Our approval allows no more than 186 acres to be disturbed for surface mining." Record 17.

ORS 215.283(2) defines the area subject to review under ORS 215.296 in terms of the uses allowed in the area. As

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[2]The proposed mineral and aggregate extraction is a use allowed under ORS 215.283(2)(a)(B).

pertinent here, that statute specifies:

> "The following nonfarm uses may be established, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use subject to ORS 215.296:
>
> (a) Operations conducted for:
>
> (B) Mining, crushing or stockpiling of aggregate and other mineral and other subsurface resources subject to ORS 215.298[.]"

The essential purpose of the review required under ORS 215.296 is to ensure that uses otherwise allowable under ORS 215.283(2) will not force a significant change in accepted farming or forest practices or significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use. The only use approved by the challenged decision was the mineral and aggregate extraction on a 186-acre site. The batch plant operation approved under the 1979 conditional use permit is not subject to review in this case, and therefore that operation is not subject to review under ORS 215.296. Nor are uses on the remainder of intervenor's 490-acre parcel subject to review under ORS 215.296, since the challenged decision approves no use allowed under ORS 215.283(2) on that portion of the parcel.

The county's findings correctly limit the evaluation of compliance with ORS 215.296 to the area of mineral and aggregate extraction use approved through the challenged decision.

2. Burden of Proof

Petitioners argue that the county misconstrued the evidentiary burden under ORS 215.296(1). Petitioners contend: "ORS 215.296(1) requires proof of a negative, i.e., that something will not happen to accepted farming practices if a land use permit were granted." Petition for Review 8. Petitioners contend Berg v. Linn County, 22 Or LUBA 507 (1992) compels their reading of the statute's evidentiary requirement.

As counsel for the county explained at oral argument, "As anyone who has taken Philosophy 101 knows, you can't prove a negative." Essentially, for this Board to find that ORS 215.296(1) requires just that would be to find that it is impossible to satisfy this statutory standard. We do not accept that the intent of ORS 215.296 is that it be impossible to satisfy. We also do not accept that Berg supports such an interpretation.

In Berg, we discussed the evidentiary burden under ORS 215.296(1) as follows:

> "[T]he burden is on the applicant * * * to show the proposed golf center will force no significant change in accepted farming practices or their cost, and on the county to so find. Schellenberg v. Polk County, 21 Or LUBA 425, 545 (1991); Platt v. Washington County, 16 Or LUBA at 154. Thus, the * * * portion of the county findings stating that '[t]here has been no information submitted that indicates the proposed development will result in any change in the accepted farming practices' * * * does nothing to establish compliance of the proposed use with ORS

215.296(1)." Id. at 510-11.

As respondents in this case correctly explain,

> "Berg states that a local government may not assume that there are no adverse farm impacts from an absence of information in the record. Berg states that the local government has the burden to identify and explain why it believes there are no significant adverse impacts." Respondents' Brief at 6 (Emphasis in original).

This analysis is consistent with our discussion of the evidentiary burden under ORS 215.296(1) in Schellenberg v. Polk County. In that case, the petitioners complained that the county erroneously relied on findings that there was "no evidence" that the proposed use would force significant change in accepted farm practices; and that "there is no reason to conclude" that the use would increase the cost of farm practices. LUBA agreed with the petitioners that under ORS 215.296(1), "the burden is on the applicant to show the proposed use will force no significant change in accepted farming practices or their cost, and on the county to so find." Id., 21 Or LUBA at 434-35. However, LUBA also concluded that the phrases the petitioners excerpted to support their argument that the county had improperly shifted the burden of proof had been taken out of the context in which they were written. As LUBA recognized,

> "[B]oth portions of the findings quoted by petitioners follow other statements in the findings that there is credible evidence in the record that the proposed use will not force changes in farming practices in the area or increase their cost. When viewed in context, the

> findings essentially state (1) there is credible evidence in the record that the proposed use will not force changes in farming practices or increase their cost, (2) there is conflicting evidence in the record that the proposed use will have such effects, and therefore (3) the county concludes the standards of * * * ORS 215.296(1) are satisfied. The findings do not indicate the county misconstrued the burden of proof to demonstrate compliance with * * * ORS 215.296(1). See Washington Co. Farm Bureau v. Washington Co., 21 Or LUBA 51, 64 (1991)." Id. at 434-35.[3]

ORS 215.296(1) does not require of the local government the impossible task of proving a negative, and our caselaw does not support such an interpretation. The local government must affirmatively consider the impacts of a proposed use on farm or forest practices, and in consideration of those impacts, consider whether the use will force a significant change or significantly increase the cost of those practices. The county in this case properly construed the evidentiary burden.

3. Adequacy of Findings under ORS 215.416

Petitioners argue the findings do not satisfy ORS 215.416, which requires:

> "Approval or denial of a permit, expedited land division or limited land use decision shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the

[3]We note that the quoted excerpt from Schellenberg does not fully recite the statutory standard of ORS 215.296(1), which requires the local government to consider whether the use will force significant changes or significantly increase the cost of accepted farming practices.

> facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

The Supreme Court first articulated the now well-established standard for evaluating the adequacy of local findings in Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 21 (1977):

> "No particular form is required, and no magic words need be employed. What is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient."

Petitioners argue that the county's findings (1) do not adequately describe the surrounding farm uses, (2) do not explain why the proposed use will not force a significant change in those practices, and (3) do not explain why the proposed use will not significantly increase the cost of those practices. Petitioners rely on our explanation of the requirements of ORS 215.416 in LeRoux v. Malheur County, 30 Or LUBA 268 (1996) to argue that the findings in this case are inadequate. In that case, we explained the requirement for adequate findings as follows:

> "The county's * * * findings must (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion that the request satisfies the approval standards. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-21, 569-P2d 1073 (1977). See also Penland v. Josephine County, 29 Or LUBA 213 (1995); Reeves v. Yamhill County, 28 Or LUBA 1234 (1994); Hart v. Jefferson County, 27

> Or LUBA 612 (1994). In addition, when a party raises issues regarding compliance with any particular approval criteria, it is incumbent upon the local government to address those issues. Hillcrest Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 283, 293, 608 P2d 201 (1980); Collier v. Marion County, 29 Or LUBA 462 (1995). When the evidence is conflicting, the local government may choose which evidence to accept, but must state the facts it relies on and explain why those facts lead to the conclusion that the applicable standard is satisfied. Moore v. Clackamas County, 29 Or LUBA 372 (1995)." LeRoux, 30 Or LUBA at 271.

In LeRoux, petitioner challenged the county's approval of a conditional use permit for a non-resource dwelling in an EFU zone. The county's code required evaluation of four specific criteria, including one which required that the use be "consistent with ORS 215.243". The county's findings did not mention the applicable criteria or relate the findings to the criteria in any respect. Rather, the county's findings consisted of four brief conclusory statements that included no analysis of the facts as they related to the criteria.

In contrast to the findings in LeRoux, the challenged findings are exhaustive. They specifically address each of the requirements of ORS 215.296: they describe the surrounding area and address the farm uses in the surrounding area; they explain why the county concludes that the proposed use will not force a significant change in accepted farm practices; and they explain why the county concludes that the proposed use will not significantly

increase the cost of accepted farm practices. The findings also address each of the specific issues petitioners raised regarding the nine factors petitioners consider necessary for evaluating compliance of the use with ORS 215.296.

Petitioners argue that the findings are nonetheless inadequate in several respects. Petitioners complain that the findings fail to address petitioners' analysis and arguments related to each of the many issues petitioners raised. They also argue the findings are inadequate because the analysis of the facts as it appears in the findings is not itself in the record. Finally, petitioners fault the county for the form and organization of its findings, and the language the county uses in its evaluation.

Regarding their first complaint, that the findings do not address petitioners' analysis and arguments, petitioners are correct that the findings do not discuss each of the facts petitioners would chose the decision to rely on or respond to each opponent's testimony. Nor do they accept petitioners' analysis of the facts, or explain in detail why they reject petitioners' analysis. However, neither ORS 215.416 nor any other authority to which we have been cited requires the county to respond to each argument or to petitioners' analysis of each issue.

Petitioners are also correct that the findings, rather than the record, include the county's analysis of the facts as they relate to the criteria. Each of the facts upon

which the county's analysis relies, however, is in the record. The findings include the commissioners' analyses and not the factual analysis of one or more witness. Again, neither ORS 215.416 nor any other authority to which we have been cited contemplates that the county's analysis of the facts in the record must itself be in the record.

Finally, as the Supreme Court stated in Sunnyside, the adequacy of local findings does not depend on any "particular form" or "magic words". That petitioners disagree with the form and organization of the findings, or fault the county for the words it employs in its analysis, does not make the findings inadequate.

Petitioners' essential disagreement with the county's analysis and its conclusions does not make the findings inadequate under ORS 215.416. McGowan v. City of Eugene, 24 Or LUBA 540, 546 (1993) (disagreement with the local government's ultimate conclusion in its findings provides no basis for reversal or remand of the challenged decision.) Petitioners have misconstrued the county's obligation under ORS 215.416. What petitioners urge to be the standard for adequate findings is far beyond that which we or the courts have ever interpreted ORS 215.416 to require.

The county's findings satisfy ORS 215.416(9) by "explain[ing] the criteria and standards considered relevant, stat[ing] the facts relied upon in rendering the decision and explain[ing] the justification for the decision

based on the criteria, standards and facts set forth."

4. Substantial Evidence

The bulk of petitioners' written challenge to the findings questions the evidentiary support for the county's findings of compliance with ORS 215.296(1). At oral argument, however, petitioner's attorney argued this is not a substantial evidence case. He added, "This is not a case about which evidence to choose. It is certainly about whether a reasonable person could have found the way the county did on the relevant evidence and explanation of that evidence." As we understand their position, petitioners contend that the evidence submitted in this case compels a conclusion that the proposed aggregate extraction site will force a significant change in accepted farm practices or significantly increase the cost of accepted farm practices on surrounding lands devoted to farm use. We treat this as a substantial evidence challenge.

As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(7)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991). In reviewing the evidence, we may not substitute our judgment for that of the

local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988); 1000 Friends of Oregon v. Marion County, 116 Or App 584, 588, 842 P2d 441 (1992). If there is substantial evidence in the whole record to support the county's decision, LUBA will affirm it, notwithstanding that reasonable people could draw different conclusions from the evidence. Adler v. City of Portland, 25 Or LUBA 546, 554 (1993). Where the evidence is conflicting, if a reasonable person could reach the decision the county made, in view of all the evidence in the record, LUBA will defer to the county's choice between conflicting evidence. Mazeski v. Wasco County, 28 Or LUBA 178, 184 (1994), aff'd 133 Or App 258, 890 P2d 455 (1995); Bottum v. Union County, 26 Or LUBA 407, 412 (1994); McInnis v. City of Portland, 25 Or LUBA 376, 385 (1993).

Petitioners dissect the voluminous findings, and question the evidentiary support for the county's description of the surrounding lands and its analysis of whether there will be a significant change or increased costs in accepted farm practices on that surrounding land. Petitioners specifically challenge the evidentiary support regarding impacts on accepted farm practices, including

truck transportation, farm sharing, rentals custom work, equipment rentals and ownership; land swaps; increased land costs; farm crop damage; noise and water impacts; vibration; farm security; critical mass of farm land; and interference with a nearby vineyard.[4]

With regard to each of the alleged impacts, petitioners cite evidence to support their conclusion that the proposed use will force a significant change in or significantly increase the cost of accepted farming practices in the surrounding area. They also discount the evidence relied upon by the county to support its conclusions that the use will not have such a significant impact. In most instances, petitioners allege that the evidence relied upon by the county in reality does not support the county's position, or that the only credible evidence submitted supports petitioner's position.

The findings specifically acknowledge the substantial amount of conflict in the evidence regarding the impacts of the proposed use. Petitioners vehemently argue the proposed aggregate extraction will have devastating impacts to the surrounding farm land. Intervenors argue with equal vehemence that to the extent there will be any impacts, they

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[4]With regard to the nearby vineyard, the only issue relevant here is whether the proposed use would force a significant change or increase in accepted farm practices on that vineyard under ORS 215.296. Compliance with ORS 215.301 was resolved in Mission Bottom I, and cannot be bootstrapped as an issue here.

will not be significant. Based on the evidence in the record, the county was forced to determine whether the proposed use would force a significant change or significantly increase the cost of accepted farming practices in the surrounding area. The function of this reviewing body is not to second guess the county, or to revisit and evaluate all the evidence the county had before it. It is, rather, to determine whether there is substantial evidence in the whole record to support the county's conclusion.

Despite their detailed recitation of the evidence that petitioners argue supports their conclusion, and their rejection of both the contrary evidence and the conclusions the county drew from all of the evidence, petitioners have not established that the county's findings lack evidentiary support. With regard to each of the issues petitioners raise, there is substantial evidence in the record, upon which the county relied, to reach its conclusion that individually and cumulatively, the proposed use will not force a significant change or significantly increase the cost of accepted farm practices.

This subassignment of error is denied.

2. ORS 215.296(2)

As an alternative to establishing outright compliance with the requirements of ORS 215.296(1), ORS 215.296(2) allows an applicant to demonstrate that a use allowed under

215.283(1) will satisfy the requirements of ORS 215.296(1) "through the imposition of conditions. Any conditions so imposed shall be clear and objective." ORS 215.296(2). Petitioners allege that the county has failed to satisfy the requirements of ORS 215.296(2) because its conditions are not sufficiently clear and objective.

The county's findings specifically establish compliance with each of the standards of ORS 215.296(1). The county did not rely on ORS 215.296(2) to establish compliance with ORS 215.296(1). Petitioners have not established that the county was required to apply ORS 215.296(2) when it has established compliance with ORS 215.296(1).

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners object to the county's revocation of a floodplain permit, which it approved as part of its decision challenged in Mission Bottom I. Petitioners appealed the floodplain permit approval in Mission Bottom I because they had not received notice that the county was considering a floodplain permit request as part of that proceeding. While we recognized that floodplain issues had been exhaustively examined in conjunction with the county's Goal 5 analysis, we remanded the floodplain permit approval because the county had not provided adequate notice of its pendency.

On remand, the county revoked the floodplain permit, requiring instead that it consider the floodplain permit request through a separate proceeding. The county's findings state:

> "In response to the Second Assignment of Error raised by the opponents [in Mission Bottom I], LUBA ruled that * * * the County did not adequately provide petitioner with notice that the County was considering a floodplain permit application. LUBA also ruled that Chapter 180 of the County's Zoning Ordinance does not clearly contemplate the applicability of floodplain permit requirements when a mineral and aggregate overlay zone is applied. * * * We have reviewed this issue and believe that the appropriate response is for the County to sever the floodplain development permit (which was granted as part of Order & Ordinance 985) and have the floodplain permit considered separately. Following LUBA's instructions, we will require a submission of a floodplain permit application and process that application in compliance with §178 of the County Zoning Ordinance.
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> "We do not believe it is necessary to hold up the remaining portions of our approval of the proposed gravel use pending completion of the floodplain permit review. Resolution of the matter in this way will allow closure on the issue of whether or not there will be an expansion of the gravel pit, but we leave open the issue of compliance with the County's floodplain requirements under Section 178 in the Marion County Zoning Ordinance. Accordingly, we amend our prior Order & Ordinance to delete the granting of a floodplain development permit." Record 98.

Petitioners now appear to complain that the county cannot revoke the floodplain permit. Petitioners are apparently concerned that either the floodplain permit requirements will not be satisfied, or that the floodplain

permit is somehow necessary to establish compliance with other mandatory approval criteria.[5]

We find no authority to preclude the county from revoking the floodplain permit, and considering it in a separate proceeding.

The second assignment of error is denied.

The county's decision is affirmed.

[5]During Mission Bottom I, there was no allegation made that the floodplain issues relevant to compliance with Goal 5 had not been adequately addressed, or that the county was required to satisfy the floodplain permit requirements in order to satisfy Goal 5. To the extent petitioners may be attempting to introduce such an argument now, it is too late.