BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL A. LE ROUX, Petitioner, vs. MALHEUR COUNTY, Respondent, and DUANE De LONG and GERTRUDE DeLONG, Intervenors-Respondent.	LUBA No. 96-088 FINAL OPINION AND ORDER

Appeal from Malheur County.

Paul A. Le Roux, Vale, filed the petition for review and argued on his own behalf.

No appearance by respondent.

Carol DeHaven Skerjanec, Vale, filed the response brief and argued on behalf of intervenors-respondent.

GUSTAFSON, Referee; LIVINGSTON, Referee, participated in the decision.

REMANDED 10/21/96

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

Petitioner appeals the county's approval of a conditional use permit to allow a non-resource dwelling in an exclusive farm use (EFU) zone.

MOTION TO INTERVENE

Duane and Gertrude DeLong (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenors own an approximately 27-acre parcel zoned EFU, on which there are two existing residential dwellings. The primary dwelling is intervenors' residence. The findings do not indicate when that dwelling was established, or whether its use is resource-related. The second residence was established in 1987 as a farm labor dwelling. Petitioner and intervenor disagree whether the farm labor dwelling was legally established in 1987. However, there is no dispute that the dwelling is no longer being used for that purpose. Rather, for at least the last two years intervenors have rented it as a non-resource residence.

In response to petitioner's zoning violation complaint to the county, intervenors applied to the county for conditional use approval to permit the second residence as a non-resource dwelling. The county planning commission denied the application, finding that a rental residence was

not a permitted conditional use in the EFU zone. On appeal, the county court overturned the planning commission's decision and approved the application. Petitioner appealed that decision, which we remanded because the county's summary findings did not identify the approval criteria, explain the facts upon which the county relied, or apply the facts to the applicable criteria. LeRoux v. Malheur County, 30 Or LUBA 268 (1996) (LeRoux I).

On remand, the county amended and supplemented its findings. Petitioner appealed again. The county stipulated to another remand, after which it adopted "Third Amended Findings of Fact, Conclusions of Law and Order." Petitioner appeals that decision.

FIRST ASSIGNMENT OF ERROR

Petitioner contends the county misconstrued the requirements of the Malheur County Code (MCC) in three respects.

A. MCC Conditional Use Purpose

Petitioner contends the challenged decision violates the purpose of the conditional use review because the proposed dwelling is not a use expressly authorized as a conditional use in the EFU zone.

MCC 6-6-1, states, as the purpose of the conditional use review:

> "PURPOSE: Conditional use is a use of land expressly authorized if the general and specific criteria are met. The applicant for the

> conditional use must show that the use will not cause problems that call for denial or special conditions. The use should be in character with existing development in the zone and approval may be conditioned with requirements which are intended to make the use and facilities it requires an asset to the area."

MCC 6-3A-3(P) lists as conditional uses in the EFU zone, "Single-family residential dwellings not provided in conjunction with the respective resource use * * *." The county's findings conclude, without elaboration, that the proposed dwelling is permitted as a conditional use, stating:

> "The proposed conditional use is an allowed use in an exclusive farm use zone pursuant to state statute, the Malheur County Code, Section 6-3A-3(P) and the Comprehensive Plan." Remand Record 1.[1]

Petitioner argues primarily that since intervenors intend to use the proposed single-family dwelling as a rental residence, it does not fall within the uses "expressly authorized." According to petitioner, a "rental" is not a single-family dwelling under the code.

Intervenors respond, and we agree, that the code does not distinguish between single-family dwellings that are

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[1]The record in this case consists of the original record from LeRoux I and two amendments. The first amendment consists of the findings and conclusions the county adopted following the LeRoux I remand. Those findings were superseded by the "Third Amended Findings of Fact and Conclusions of Law and Order," which followed the voluntary remand, and constitute the second amendment to the record. It is this latest amendment to which we refer as the "Remand Record."

owner-occupied, and single-family dwellings that are rented. The fact that a dwelling may be renter-occupied rather than owner-occupied establishes no violation of the purpose of the county's conditional use process.

However, petitioner also challenges generally the county's presumption that second dwellings are authorized as conditional uses in the EFU zone. The county's findings do not explain its conclusion that the proposed dwelling is authorized, either under its code or under any statutory authority, and we cannot determine from the record that a second dwelling is authorized in this case. For example, the county does not explain when the primary dwelling was established or whether its use is resource-related. However, depending on the legal nature of the primary residence on the parcel, the county may be statutorily precluded from siting a second dwelling on this parcel. Until the county addresses the legal nature of the primary residence, the county cannot establish that the second dwelling is authorized as a conditional use.[2]

The first subassignment of error is sustained.

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[2]Petitioner does not challenge the adequacy of the findings, and therefore we do not remand on that basis. However, in construing the relevant approval standards, and establishing substantive compliance with those standards, it is critical that the findings clearly establish how the county construed the standard, and how it factually established compliance. We set forth the requirements for adequate findings in LeRoux I, and do not repeat them here.

B. MCC Application Procedure

MCC 6-6-5 describes the application requirements for a conditional use application for a single-family dwelling in the EFU zone, in part, as follows:

> "The application form shall contain instructions which are substantially the same as the following:
>
> "* * * * *
>
> "D. A plot map of the parcel, with accurate dimensions, indicating the following information, shall be included in the application:
>
> "* * * * *
>
> "4. The location of all road R.O.W. and access easements on or adjacent to the parcel.
>
> "5. Accurate dimensions of the property lines."

Petitioner contends the plot map submitted by intervenors is "grossly inaccurate and misleading." Petition for Review 7. Petitioner argues the county misconstrued its application requirements by accepting the inaccurate plot map as part of the application. Petitioner further argues that because of the mis-information, the county was mislead to believe that petitioner's objections involved a property line dispute. Petitioner does not explain how the alleged errors in the plot map violate any mandatory approval criterion for the challenged conditional use approval.

The application requirements are not approval criteria.

The fact that application requirements may not have been satisfied provides no basis for remand absent a showing that the failure to satisfy the requirements resulted in non-compliance with at least one mandatory approval criterion. Champion v. City of Portland, 28 Or LUBA 618 (1995); Wissusik v. Yamhill County, 27 Or LUBA 94 (1994). Petitioner has not established any such non-compliance.

This subassignment of error is denied.

C. Comprehensive Plan Housing Goal 10

The county's comprehensive plan Housing Goal 10 states:

> "Housing will be encouraged on land with the least agricultural productivity, in locations that compliment existing development, makes the most efficient use of required facilities, and presents the least conflict with agriculture in the area."

The county identified this comprehensive plan goal as an approval criterion for the requested conditional use. The county's findings of compliance state:

> "The requested conditional use is for a non-resource dwelling in an Exclusive Farm Use Zone. The non-resource dwelling will provide additional housing in rural Malheur County. The necessity of providing adequate housing is not limited to urban Malheur County, but extends to rural Malheur County. The location of the requested conditional use, as it effects [sic] existing development and whether it presents the least conflict with agriculture in the area, will satisfy Malheur County Comprehensive Plan Goal 10 when the below general and specific criteria for suitability are met." Remand Record 3.

Petitioner contends the county has not established compliance with the county's housing goal because the

proposed dwelling house is not on the least agriculturally productive location on the property. According to petitioner, land on another portion of the site is much less agriculturally productive than the site of the proposed dwelling.

Housing Goal 10 speaks generally in terms of "encouraging" location of development. It does not require evaluation of the specific location of dwellings on a particular site. As the finding states, the merits of particular development are evaluated through the general and specific development criteria. Petitioner has not established that the county misconstrued its plan by failing to accept petitioners' analysis of the location of the least productive soil on the subject parcel.

This subassignment of error is denied.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the county's findings regarding three MCC criteria lack substantial evidence in the record.

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); Bay v. State Board of Education,

233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991). In reviewing the evidence, however, 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 decisionmaker'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). When 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). However, in order for this Board to determine whether a reasonable person could reach the decision the county made, the local government 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); Reeves v. Yamhill County, 28 Or LUBA 123 (1994).

We review each of petitioner's substantial evidence challenges based on this standard.

A. General Criterion G3

General criterion G3 requires the county to evaluate:

> "Location and size of driveway access points and right-of-way widening and improvement and future traffic circulation and safety."

Petitioner argues that the county's findings that the requested conditional use satisfies this criterion are not supported by substantial evidence, because the county relied on a plot map that petitioner contends is incorrect, and because the facts in the record do not substantiate the conclusion the county reached. Petitioner attaches to his petition for review both the plot map intervenors apparently submitted to the county, as well as a plot map petitioner prepared with what he considers the correct dimensions superimposed on it. However, neither the plot map or petitioner's version of it are part of the record.

In reviewing whether the county's findings are supported by substantial evidence, we consider only evidence in the record which the county had before it in reaching its conclusion. Because neither the plot map nor petitioner's version of it are part of the record before us, in reviewing the county's findings for substantial evidence, we consider neither.[3]

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[3]It may be that the plot map submitted by intervenor should have been made part of the record before us. However, it is not in the record, and neither petitioner nor intervenor objected to the record submitted by the county for failure to include that map. Record objections must be made in accordance with OAR 661-10-026. A party may not supplement the record, or

The county's findings of compliance with this criterion state:

> "The access road from the John Day Highway to the conditional use is North Road I. North Road I is essentially a dead end street. The road ends at Mr. LeRoux's home. Only four property owners use the road on a regular basis to access their property. * * * The conditional use will increase traffic by one family.
>
> "The subject property is serviced by the Value Rural Fire Department and the location and size of N. Road I can accommodate this service.
>
> "The Malheur County road department maintains North Road I.
>
> "From these facts, it is concluded that access and road improvements (dimension of road and road surface material) to the proposed conditional use is satisfactory." Remand Record 6.

The county's findings rely on evidence in the record that support its conclusion that the location and size of driveway access points and right-of-way widening, and improvement and future traffic circulation and safety are adequate to satisfy this criterion. Petitioner does not cite to evidence in the record that so undermines the evidence upon which the county relies that a reasonable person could not reach the county's conclusion.

This subassignment of error is denied.

B. Specific Criterion A1.

The MCC "specific criteria" evaluate the suitability of

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submit documents that should have been, but were not included in the local government's record, by attaching them as exhibits to a brief.

the proposed use. MCC A1 requires a demonstration that the proposed use

> "[is] compatible with farm use and is consistent with ORS 215.243."

The county's findings of compliance with this criterion state:

> "This criterion indicates that the conditional use is to be 'compatible with farm uses', not that it be a farm use. The joining in the application of seventeen (17) landowners in close proximity to the subject dwelling is compelling and signifies that the dwelling will exist harmoniously with surrounding farm uses. The proposed dwelling was lawfully placed upon the land in 1987. The dwelling is compatible with agricultural uses now as indicated by 17 surrounding landowners. This compatibility will not change because of this application. No separate parcel is created for the conditional use, the conditional use will be under one landowner and the conditional use will house only a single family. This occupancy is similar to the farm labor house occupancy. From these facts, it is concluded that the conditional use will be compatible with farm use even as a non-farm dwelling.
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> "[Intervenor] stated that prior to 1987 (before being the site of the dwelling), the land underneath and surrounding the proposed dwelling had been utilized for marginal pasture land because of [its] poor soil condition.
>
> "The total subject parcel is 27.5 acres including land currently used for the home of [intervenors] and for outbuildings. From this fact, it is concluded that the subject parcel is not a large, single, unobstructed block of farm land.
>
> "From these facts, it is concluded that the amount of open land used for agricultural use will not change. The granting of this application will not result in loss of natural resources. The proposed

use, is therefore, compatible with farm uses." Remand Record 7-8.

Petitioner makes several arguments to support his contention that there is insubstantial evidence in the record to support the county's conclusion that the proposed dwelling will be compatible with farm use and consistent with ORS 215.243. First, petitioner argues that "the establishment of rental dwellings does not fall within the intent of the framers of the code or within the integument of ORS 215.243 Agricultural Land Use Policy." Petition for Review 12. Second, petitioner disputes the county's finding that the dwelling was legally established in 1987. Petitioner argues that because the dwelling was illegally established, the fact that it may be compatible now is irrelevant. Finally, petitioner argues that the county's findings include insufficient evidence upon which to conclude that the proposed residence is compatible with surrounding farm uses.

We reject petitioner's first argument. The fact that the proposed dwelling may be renter-occupied rather than owner-occupied has no bearing on whether the proposed single family dwelling is compatible with surrounding farm use. Regarding the second argument, whether the dwelling was legally established as a farm labor dwelling is irrelevant to the county's inquiry of whether the proposed use is

compatible with farm use.[4] Regardless of the legality of its establishment for another use, the question here is whether the proposed conditional use satisfies the compatibility requirement. Factual evidence that the use of the residence has been "compatible" with surrounding farm use is relevant to that inquiry. See Von Lubken v. Hood River County, 28 Or LUBA 362, 366 (1994). However, a conclusory statement that the residence has been compatible with farm use, without a description of surrounding farm use or any further explanation, is insufficient to establish compliance with this standard.

The problem with the county's findings is that there is insufficient evidence in the county's findings upon which the county could reach its ultimate conclusion of compatibility. In order to demonstrate that a non-farm dwelling will be compatible with farm use and ORS 215.243, the county must first identify the farm uses in the area, and explain how the proposed nonfarm dwelling will be compatible with the identified farm uses. Sweeten v.

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[4]Petitioner contends that in LeRoux I we determined that the dwelling was illegally established in 1987. We made no such determination in that case. The statement upon which petitioner relies is in a footnote, where we stated: "The county appears to rely most heavily on the existence of the residence in order to justify its continued presence. It is axiomatic that the presence of an illegally established dwelling cannot be used as its own justification." 30 Or LUBA at 270, n 2. The "illegality" to which we referred resulted from the fact that the dwelling had not yet been legally approved as a conditional use. The statement did not relate to whether the dwelling was legally established as a farm dwelling in 1987. That issue was not then, and is not now, relevant to our review of the challenged decision.

Clackamas County, 17 Or LUBA 1234, 1241 (1989). See also Kaye/DLCD v. Marion County, 28 Or LUBA 452, 471 (1992).

The county's findings are not relevant to and do not address the requirements of this criterion. The fact that the proposed use will not remove farm land from production is not relevant to whether the proposed nonfarm dwelling will be compatible with farm use. Nor does the fact that 17 area landowners join in the application establish compatibility with farm use, particularly where there is no evidence as to the location of the parcels owned by those 17 landowners or to what extent they may be engaged in farm use.

The findings regarding compatibility do not include evidence regarding the surrounding farm uses in the area. The county has neither identified the farm uses in the area nor explained how the proposed nonfarm dwelling will be compatible with area farm uses, as required by the standard explained in Sweeten. Thus, there is insufficient evidence in the county's findings upon which the county could reach a factually based conclusion regarding compatibility.

This subassignment of error is sustained.

B. Specific Criterion A3

Specific criterion A3 requires a finding that the proposed conditional use

> "does not materially alter the stability of the overall land use pattern of the area."

This criterion implements OAR 660-33-130(4)(c)(C), which

states the stability standard as follows:

> "The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed non-farm dwelling will alter the stability of the land use pattern in the area a county shall consider the cumulative impact of non-farm dwellings on other lots or parcels in the area similarly situated. * * *"

Petitioner argues the record lacks substantial evidence upon which the county could base its conclusion that the proposed non-farm dwelling will not materially alter the stability of the surrounding land use pattern. In particular, petitioner notes the number of small acreage parcels in the area, and the potential for numerous non-resource conditional use dwellings to be added on the subject as well as surrounding properties, which would undermine the purpose of the EFU zone.

In Sweeten, we described the analysis for determining whether a nonfarm dwelling will materially alter the stability of the overall land use pattern in the area of a particular property:

> "First, the county must select an area for consideration. The area selected must be reasonably definite including adjacent land zoned for exclusive farm use. Second, the county must examine the types of uses existing in the selected area. In the county's determination of the uses occurring in the selected area, it may examine lot or parcel sizes. However, area lot or parcel sizes are not dispositive of, or even particularly relevant to, the nature of the uses occurring on such lots or parcels. It is conceivable that an entire area may be wholly devoted to farm uses

> notwithstanding that area parcel sizes are relatively small. Third, the county must determine that the proposed nonfarm dwelling will not materially alter the stability of the existing uses in the selected area. Id., 17 Or LUBA at 1246. See also McNamara v. Union County, 28 Or LUBA 396 (1994); DLCD v. Crook County, 26 Or LUBA 478 (1994).

The county's findings lack evidentiary support for its conclusion that the proposed dwelling will not materially alter the stability of the surrounding area. The evidence regarding the surrounding area does not adequately describe the area, the findings include inadequate evidence regarding the uses existing in the area, and the county's findings lack evidence regarding how the proposed dwelling will not alter the stability of those uses in the selected area.

This subassignment of error is sustained.

C. Specific Criterion A4.

Specific criterion A4 requires a finding that the proposed use

> "is situated on generally unsuitable land for the production of farm crops or livestock considering the terrain, adverse soil or land conditions, drainage and flooding, location and size of tract."

This criterion implements OAR 660-33-130(4)(c)(B), which requires that:

> "The dwelling is situated upon a lot or parcel, or a portion of a lot or parcel, that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation,

location and size of the tract. A lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land. * * * A lot or parcel is not 'generally unsuitable' simply because it is too small to be farmed profitably by itself. If a lot or parcel can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch, it is not 'generally unsuitable.' A lot or parcel is presumed to be suitable if, * * * in Eastern Oregon, it is composed predominantly of Class I-Vi [sic] soils. Just because a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use. * * *"

The county's findings of compliance state:

"The soil for the entire parcel is Frohman Silt Loam, a zero to two (2%) percent slope and has a capability class IV. Site specific testimony from Mr. DeLong establishes that the conditional use dwelling will be situated on <u>part</u> of the subject parcel which is unsuitable land for production. Mr. DeLong testified that the ground immediately surrounding the home is pasture and will not produce anything else but pasture. The DeLongs placed the home on its particular site because the site is of high terrain and the soil is alkali. When the DeLongs dug test holes for the septic tank, they hit hardpan at about a foot deep indicating that the ground is real shallow.

"* * * From the testimony of Mr. Delong that the ground is shallow, it is concluded that the runoff on the subject parcel is slow. Mr. Delong also testified that the proposed dwelling was placed on its particular site because the site was of high terrain.

"* * * Due to the adverse conditions of the soil, the portion of the subject parcel for the conditional use cannot reasonably be put to farm use in conjunction with other land. The conditional use sits in the southeast corner of the subject parcel and is bordered by a drain ditch to the south, a hay stack to the east

> (located on LeRoux property) and pasture to the north and west (Delong parcel).
>
> "From these facts, it is concluded that the proposed dwelling is situated on generally unsuitable land for the production of farm crops or livestock." Remand Record 10.

Petitioner submitted conflicting testimony that the portion of the parcel upon which the dwelling is located is not the least productive of intervenor's parcel.[5] He also introduced evidence to specifically controvert intervenor's testimony that the portion of the parcel where the dwelling is located is unproductive because of the terrain, the alkaline level, and the runoff. Petitioner also noted the county's own findings that the soils on the subject parcel has only a zero to 2% slope with a capability class IV. The county rejected petitioner's testimony in favor of intervenors', finding:

> "Although Mr. LeRoux's testimony relative to the soil quality was conflicting, Mr. DeLong's testimony is given more weight. Mr. LeRoux has no direct personal knowledge of the adverse soil conditions on the subject parcel. The information from a soils biologist which Mr. LeRoux relied on for his testimony was not substantiated. The credentials of the soils biologist are unknown and it is uncertain whether the biologist actually inspected the site." Remand Record 2.

The choice between conflicting testimony belongs to the

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[5]Neither party before the county established any factual description of the "portion" of the parcel which they evaluate. Before any defensible determination can be made that a "portion" of the subject property is generally unsuitable land for agricultural production, that "portion" must be clearly identified.

county, so long as it is reasonable. However, the county has not explained why intervenors' evidence is more persuasive than petitioners, and based on the facts presented here, we cannot determine that a reasonable person could reach the conclusion the county did. The county must at least explain a reasonable basis for its choice between the conflicting evidence, particularly given that the evidence urged by petitioner reveals factual inconsistencies in intervenors' own evidence.

Moreover, in this case, the county's conclusion is not substantiated by its factual findings. The county's findings specifically determine that the parcel contains Class IV Frohman silt loam soil, with a zero to 2% slope. Such soils are presumptively suitable for farm use. The substantial evidence upon which the county relies is in direct conflict with its conclusion. The county also determined that the parcel could be used for pasture, and that in fact a portion of the parcel immediately adjacent to the subject portion is used for pasture. The county's findings do not indicate that continued pasturing on the subject portion of the parcel is not a feasible agricultural activity on the site, or that the subject portion of the site cannot be combined with the remainder of the site for continued use as a pasture. In fact, the evidence upon which the county relies compels an opposite conclusion.

The county's own findings conflict with its conclusion

that the dwelling is situated upon a lot or parcel, or a portion of a lot or parcel, that is generally unsuitable for agricultural production. The county's findings are not supported by substantial evidence.

This subassignment of error is sustained.

This assignment of error is sustained, in part.

The county's decision is remanded.