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

KENNETH MILLER,

Petitioner,

vs.

LINN COUNTY,

Respondent.

LUBA NO. 81-097

FINAL OPINION  
AND ORDER

Appeal from Linn County.

Roger H. Reid and Paul H. Kuebrich, Albany, filed a petition for review and Roger H. Reid argued the cause for petitioner.

Karen Christianson and James Delapoer, Albany, filed a brief and argued the cause for Respondent.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

Reversed.

01/06/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

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1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioner appeals Linn County Board of Commissioners  
4 granting of a conditional use permit authorizing the placement  
5 of a nonresource related dwelling (mobile home) on a 19.87 acre  
6 parcel in an EFU zone.

7 ALLEGATIONS OF ERROR

8 In sum, petitioner's allegations of error are

9 (1) Respondent did not make findings required by ORS  
10 215.213(3)(A) and (D).

11 (2) Respondent erred in determining that since the  
12 contested mobile home was already on the property, ORS  
13 215.213(3)(D) was irrelevant and 215.213(3)(B) and (C) had been  
14 satisfied.

15 FACTS

16 In 1972 Mr. and Mrs. Charles Alich purchased a rectangular  
17 parcel of property from Mr. Kennel. The Alichs believed the  
18 parcel to contain approximately 17.2 acres because of  
19 information shown on their tax statements. At the same time,  
20 the Alichs negotiated with Mr. Kennel for the purchase of an  
21 adjoining parcel which was described as containing three acres  
22 more or less.

23 Thereafter, on September 25, 1972, the Alichs applied for a  
24 building permit to locate a mobile home on the property. The  
25 permit was granted on October 9, 1972. The permit indicated  
26 that the subject parcel contained 20 acres as that is what the

1 Alich thought their combined acreage totalled. On October 10,  
2 1972, the Alichs requested approval of an access easement which  
3 was granted on October 11, 1972, along with a permit for the  
4 location and installation of a septic tank on the site.

5 On December 6, 1973, the Linn County Planning staff  
6 informed Mr. Alich that County records did not indicate the  
7 Alichs had yet acquired title to the additional three acre  
8 parcel necessary to make the subject parcel meet the then  
9 required 20 acre minimum lot size. Since the Alichs at that  
10 time had not finalized the purchase of the "three" acre parcel  
11 from Kennel because of ill health of the seller, nothing was  
12 done about the planning director's letter until 1974 when the  
13 Alichs acquired title to the additional parcel. In 1978, the  
14 mobile home which had initially been located on the subject  
15 property in 1972 was replaced with a new one with county  
16 approval.

17 In 1980, Petitioners complained to the Linn County Planning  
18 Department that the mobile home was not resource related and  
19 was in violation of the Linn County zoning laws which had been  
20 revised in 1973 to require a minimum EFU zone lot size of 40  
21 acres. The Linn County Planning Staff reviewed the matter and  
22 determined that the residence was resource related but noted  
23 that the actual parcel size, contrary to initial beliefs, was  
24 only 19.87 acres.

25 The determination of resource related activity was appealed  
26 by the Millers to the Linn County Planning Commission. The

1 Alichs maintained the mobile home is owned by persons who, as a  
2 condition of being able to rent the land upon which the mobile  
3 home is located, work at the farm in a caretaker capacity. The  
4 "renters" were alleged to have assumed primary duty of  
5 livestock care when the Alichs were not available. In  
6 addition, the "renters" testified they worked regularly on the  
7 "farm."

8 The planning commission considered the evidence but  
9 determined that the property owners had failed to establish the  
10 absolute need to have someone on the premises and consequently  
11 the request for a resource related conditional use permit was  
12 denied. The owners appealed that decision to the Linn County  
13 Board of Commissioners but the Board split 1 to 1 with the  
14 third commissioner abstaining due to ex parte contacts. In  
15 light of the foregoing vote, the planning commission decision  
16 was deemed affirmed.

17 In 1981 the property owners applied to the Linn County  
18 Planning Commission for a conditional use permit for a  
19 nonresource related dwelling. This application was approved by  
20 the planning commission and subsequently affirmed by the Board  
21 of Commissioners upon the findings set forth in the order. It  
22 is that decision which is now before this Board on appeal.

23 Adjacent to the subject property parcel sizes of 60 acres  
24 or more exist. The adjacent farm land is in grass seed and  
25 wheat production.

26 The land in question is a uniformly level parcel. A

1 portion of the property is used for livestock raising, but the  
2 majority of the property is in field crops. Soils on the  
3 property range from class II to class IV. The parcel contains,  
4 in addition to the mobile home and related pad, a pump house,  
5 power pole, septic tank and a barn.

6 DECISION

7 The entire thrust of petitioner's allegations of error are  
8 centered around OPS 215.213(3). Petitioner alleges in all  
9 assignments of error that the county failed to make findings  
10 sufficient to indicate that it has complied with the dictates  
11 of OPS 215.213(3). Given the county's decision and the posture  
12 in which this case has been brought to this Board, we have  
13 little choice but to agree with the petitioner.<sup>1</sup>

14 ORS 215.213(3) states in its entirety

15 "Single-family residential dwellings, not  
16 provided in conjunction with farm use, may be  
17 established, subject to approval of the governing body  
18 or its designate in any area zoned for exclusive farm  
19 use upon a finding that each such proposed dwelling:

20 "(a) Is compatible with farm uses described in  
21 subsection (2) of ORS 215.203 and is consistent with  
22 the intent and purposes set forth in ORS 215.243; and

23 "(b) Does not interfere seriously with accepted  
24 farming practices, as defined in paragraph (c) of this  
25 subsection (2) of ORS 215.203, on adjacent lands  
26 devoted to farm use; and

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

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

1           "(e) Complies with such other conditions as the  
2 governing body or its designate considers necessary."

3           A review of the findings indicates the county based its  
4 decision to allow the non-resource related residence in the  
5 exclusive farm use zone by focusing solely on that portion of  
6 the 19.87 acre parcel upon which the mobile home pad, pump  
7 house, power pole, septic tank and barn are located. As the  
8 county held in "conclusion" no. 4 of Order No. 81-297:

9           "The area used for the past seven years as a homesite  
10 contains a pump house, power pole and septic tank in  
11 addition to the mobile home. The existing structures  
and improvements make this area unsuitable for  
agricultural use."

12 In addition, in "conclusion" no. 7 the county states:

13           "The building site for the proposed non-resource  
14 related residence has been developed since 1972 with a  
15 mobile home pad in gravel, a well, a septic system, a  
16 gravel access road with parking area and a barn. The  
17 result of this development has been to remove this  
18 area from agricultural use due to the location of the  
above cited structures. The board therefore concludes  
that the existing structures have permanently removed  
any potential agricultural land [sic], thus location  
of the residence will not remove land capable of  
agricultural crop, forest crops or livestock [sic]."

19 The county's "conclusion" no. 8, in part, states:

20           "the Alich application will result in no loss of  
21 resource land as the application would apply to an  
existing developed site." (Emphasis added)

22           Once again the standard which must be applied by the county  
23 under 215.213(d) requires a consideration of whether the  
24 proposed residential dwelling:

25           "Is situated upon generally unsuitable land for the  
26 production of farm crops and livestock, considering  
the terrain, adverse soil or land conditions, drainage

1 and flooding, vegetation, location and size of the  
2 tract;" (Emphasis added)

3 The county seems to have made its decision based on an  
4 assumption that the terms "site" and "tract" are  
5 equivalent.<sup>2</sup> A review of dictionary definitions of site and  
6 tract does not support such an assumption or equation. In  
7 Websters New Collegiate Dictionary site is defined as

8 "1 a: the spatial location of an actual or planned  
9 structure or set of structures (as a building, town,  
10 or monuments) b: a space of ground occupied or to be  
occupied by a building 2: the place, scene, or point  
of something."

11 In the same dictionary tract is defined as:

12 "2: an area either large or small: as a: an  
13 indefinite stretch of land b: a defined area of land"

14 In The American Heritage, New College Edition, Dictionary site  
15 is defined as

16 "1. The place or plot of land where something was,  
17 is, or is to be located."

18 In the same dictionary, tract is defined as:

19 "1. An expanse of land; a region."

20 Furthermore, when applying ORS 215.213, the definition that  
21 is given to terms appearing therein must be in context and  
22 consistent with the intent and purposes set forth in ORS  
23 215.243 and the farm uses described in ORS 215.203 (see  
24 215.213(3)(a) supra). The county's use of "site" as equivalent  
25 to "tract" is in conflict with the dictates of both ORS 215.243  
26 and ORS 215.203.

1           ORS 215.243

2           It is undoubtedly true that on any tract of agricultural  
3 land there are specific sites which contain soil conditions,  
4 rock outcroppings or other impediments to agricultural use. To  
5 hold that once a property owner locates those sites he or she  
6 will be allowed to place on them a non-farm dwelling would do  
7 violence to the intent and purpose provisions of OPS 215.243.  
8 As the Court of Appeals stated in Still v. Board of County  
9 Comm'rs, 42 Or App 115, 120 (1979):

10                   "It may be economically unfeasible to farm a  
11 piece of land in an exclusive farm use zone and  
12 residential use of it may not interfere with farming  
13 in the area, but residential use may nevertheless  
14 offend Oregon's land use policy as declared in ORS  
215.243. It is therefore necessary in the application  
of ORS 215.213(3) to consider the policy ramifications  
of the proposed non-farm residential use."

15 Linn County's findings do not reveal consideration of the  
16 policy ramifications its focus on "site" rather than "tract"  
17 will have on other agricultural property over the use of which  
18 the county must provide stewardship.

19           ORS 215.203

20           ORS 215.213(3)(a) allows a single family residential  
21 dwelling in an EFU zone upon a finding that the dwelling is  
22 "compatible with farm uses described in subsection (2) of ORS  
23 215.203." ORS 215.203(2)(a) defines farm use to mean the  
24 "current employment of land" for the primary purpose of  
25 obtaining a profit in money, etc. ORS 215.203(2)(b) defines  
26 "current employment of land for farm use" to include:

1 "(E) wasteland, in an exclusive farm use zone, dry or  
2 covered with water, lying in or adjacent to and in  
3 common ownership with a farm use land and which is not  
4 currently being used for any economic farm use; (F)  
5 land under dwellings customarily provided in  
6 conjunction with the farm use in an exclusive farm use  
7 zone; and (G) land under buildings supporting accepted  
8 farm practices."

9  
10 Read in conjunction with ORS 215.213(3)(d), the inclusion  
11 of wasteland and land under dwellings and farm buildings within  
12 the term "farm use" under ORS 215.203(2)(b) would appear to be  
13 inconsistent with singling out the subject site for  
14 consideration as "unsuitable for the production of farm crops"  
15 (ORS 215.213(3)(d)). As 215.203(2)(b)(E) indicates, the  
16 legislature recognized that there would be wasteland not  
17 currently being used for economic farm use. In addition, it  
18 recognized that although not currently used to actually raise  
19 feed for farm animals or produce crops for human consumption,  
20 the land under buildings nevertheless was not intended to be  
21 singled out for residential, non-farm use dwelling purposes.

22 In county conclusion no. 7 the county points to the fact  
23 that

24 "The building site for the proposed non-resource  
25 related residence has been developed since 1972 with a  
26 mobile home pad in gravel, a well, a septic system, a  
27 gravel access road with parking area and a barn. The  
28 result of this development has been to remove this  
29 area from agricultural use due to the location of the  
30 above cited structures." (Emphasis added).

31 Included in the county's findings is a reference to an  
32 existing barn and a conclusion arising in part therefrom that  
33 because the barn is on this property, the ground underneath the

1 barn has been removed from agricultural use. Such a conclusion  
2 is unwarranted first because the barn is in fact an  
3 agricultural use which is allowed on the land. Second, using  
4 the county's emphasis on site it would theoretically be  
5 possible to convert the barn into a single-family residence  
6 because the "site" is not producing agricultural crops. Such a  
7 conversion would be inconsistent with ORS 215.243.

8 Respondent argues that petitioner is barred from raising  
9 the applicability of ORS 215.213(3) on appeal because he failed  
10 to raise it as an issue before the Linn County Board of  
11 Commissioners. Respondent argues this Board has held in  
12 previous cases that when petitioners fail to raise a procedural  
13 error which could have been corrected had it been raised before  
14 the governing body, they are barred from raising it on appeal,  
15 citing Dobaj v. City of Beaverton, 1 Or LUBA 237 (1980) and  
16 Metro Service District v. Bd. of Co. Comm. of Washington  
17 County, 1 Or LUBA 282 (1980). We do not agree with  
18 respondent's characterization of a failure to comply with ORS  
19 215.213(3) as merely a procedural error. Local governments are  
20 under an affirmative obligation to comply with the statutes  
21 whether or not those statutes are raised as an issue before  
22 them during a quasi-judicial hearing.

23 For the foregoing reasons, the decision of Linn County  
24 Board of Commissioners is reversed.

FOOTNOTES

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1 Our agreement with petitioner and consequently our reversal of the county's decision must be read with an understanding of what this Board is not ruling upon: we are not ruling upon whether Linn County could have concluded that the 19.87 acre parcel, given the history of this property, is of sufficient size to be considered a nonconforming use which was legally created prior to changing from 20 to 40 acres, the minimum EFU zone lot size.

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2 The respondent cites no authority to support its position that in establishing a single-family residential dwelling, not provided in conjunction with farm use, it need only look to the actual site upon which the residence will be located rather than the entire parcel of property of which the site is but a part.