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

3 ROBERT L. HARRELL, EDNA E.)
4 HARRELL, LAWRENCE M. SCHMIT,)
5 EILENE SCHMIT, JAMES R. EVANS,)
6 RUTH M. EVANS, ALVIN LITTLE,)
7 FERN POPE, CHARLES POPE,)
8 LORI UPTON, KEN UPTON,)
9 O'NEIL SULLIVANT, GIDGET)
10 SULLIVANT, JANET HENTZ,)
11 RICHARD HENTZE,)

12 Petitioners,)

LUBA NO. 81-109

13 v.)

FINAL OPINION
AND ORDER

14 BAKER COUNTY COURT and)
15 CITY OF BAKER,)

16 Respondents.)

17 Appeal from Baker County.

18 Robert L. Liberty, Portland, filed a petition for review
19 and argued the cause for petitioners.

20 Kenneth C. Hadley, Baker, attorney for Baker County, and
21 Timothy M. Collins, Baker, attorney for the City of Baker filed
22 a joint brief for Respondents, and Timothy M. Collins argued
23 the cause for Respondents.

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

26 Remanded.

3/18/82

27 You are entitled to judicial review of this Order.
28 Judicial review is governed by the provisions of Oregon Laws
29 1979, ch 772, sec 6(a).

1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioners seek reversal of Respondent Baker County's
4 grant of a conditional use permit to the City of Baker. The
5 August 28, 1981, conditional use permit in effect allows the
6 placing of eight or nine dwellings not in conjunction with farm
7 use on land designated for Exclusive Farm Use.

8 ALLEGATIONS OF ERROR

9 Petitioners' numerous assignments of error fit within the
10 following categories:

11 (1) Respondent failed to to make findings required by ORS
12 215.213.

13 (2) The findings respondent made under the provisions of
14 ORS 215.213(3) are not supported by substantial evidence in the
15 record.

16 (3) Respondent failed to take a Statewide Goal 2 exception
17 to Statewide Goals 3 and 4.

18 (4) Respondent's action violated Statewide Goal 5.

19 FACTS

20 The City of Baker requested a conditional use permit from
21 Baker County to divide into eight or nine lots for dwellings
22 not in conjunction with farm use 53.3 acres of EFU zoned
23 property. The property is located some eight miles from the
24 Baker city limits. The SCS class of soil on the property is
25 unclear. However, it appears that a portion of the land is
26 covered by placer tailings which had resulted from an old

1 placer mine in the vicinity. The record indicates that at
2 least a portion of the property has been inventoried as
3 containing SCS Class II-IV soil. There is conflicting evidence
4 in the record about the agricultural nature of the property.
5 Adjoining property owners testified that the subject property
6 is untillable and that its quality as range land is minimal.
7 Other evidence indicates that the property has been used for
8 grazing over the past 47 years and is similar to neighboring
9 property successfully reclaimed for grazing purposes. The
10 record includes some evidence that the land is critical elk and
11 deer habitat and that some timber exists on the property.

12 DECISION

13 This is a findings case. All the allegations of error
14 either directly or indirectly attack the county's findings. We
15 agree with petitioners that the county has failed to make the
16 findings necessary to support and explain its decision.
17 Therefore, we remand the decision.

18 The county's entire findings regarding the substantive
19 standards to be applied to the subdivision request are as
20 follows:

21 "(6) Pertaining to Goal #3; (a) very marginal
22 agriculture lands with no adjudicated water rights;
23 (b) limited grazing with no estimate of potential
24 AUM's; (c) presently and for a number of years,
25 grazing rights have been leased for \$1.00 yearly and
26 fence repairs as needed; (d) generally non-tillable
because of placer tailings with exception of three
small parcels; (e) small size timber insufficient to
qualify as a crop per annual growth standards as
commercial timber land; (f) that surrounding lands are
small tracts ranging from 1 acre to 13 acres in size

1 except for Mr. Harrell's property which does not
border this property.

2 "(7) Pertaining to Goal #5; (a) Property is
3 completely surrounded by private property; (b) that
4 deer and elk feeding on private lands creates problems
5 and such wildlife does not have rights to private
6 lands but are allowed range at discretion of private
7 land owner; (c) although appellants stated this
8 property was critical deer and elk winter range, the
Oregon Fish and Wildlife Department (notified by
appellants) did not appear before the Court either by
letter or by personal testimony, therefore Court can
only assume it is not to be very critical; (d) this
property does not interfere with open space;

9 "(8) That this land is unsuitable for general
farming.

10 "(9) That the land in the area is already
11 committed to small acreages and no adverse effect on
surrounding lands will arise from proposed use.

12 "(10) That Goals #3 and #5 are not violated by
13 the proposed use to the extent approved by the
Department of Environmental Quality."

14
15 Petitioners' first assignment of error is that

16 "Respondent Baker County Court failed to make each of the
17 required findings under ORS 215.213(3)."¹ A discussion
18 of petitioners' first assertion is intertwined with the
19 county's determination of whether Statewide Goal No. 3
20 "Agriculture Lands" applies to this property. A review of
21 the county's findings indicate it may believe Goal 3 doesn't
22 apply to the property. It took no Statewide Goal 2
23 exception and did not address ORS 215.213(3). It did reach a

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1 conclusion, entitled "finding" number 8 "that this land is
2 unsuitable for general farming."

3 Although the court in Jurgenson v. Union County Court, 42
4 Or App 505 (1979) was dealing with a requested partitioning
5 what it stated regarding the relationship between Statewide
6 Goal 3 and ORS 215.213 is nevertheless applicable to the
7 subdivision proposed by the City of Baker.

8 "In order to satisfy Goal 3, an owner seeking to
9 partition land has the burden of proving: (1) the
10 predominant soil classes on the property are other
11 than agricultural land within the Goal 3 definition,
12 see Meyer v. Lord, 37 Or App 59, 586 P2d 367 (1978),
13 rev den 286 Or 303 (1979); or (2) the lot sizes
14 created by the partition will be sufficient for the
15 continuation of the existing agricultural enterprise
16 in the area; or (3) the factors set out in ORS
17 215.213, and incorporated by reference into Goal 3,
18 relevant to permitting non-farm uses--usually meaning
19 residential use--on agricultural land are met, see
20 Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331
21 (1977), rev den 281 Or 431 (1978)."

22 The county's findings neither indicate what it believes the
23 predominant soil classes on the property to be nor do they set
24 forth whether the lots created are large enough to continue the
25 existing commercial agriculture enterprise in the area. Given
26 the lack of findings on the first two factors of the Jurgenson
test supra, the only way the county could then approve the
requested subdivision would be to adopt findings supporting the
conclusion that the standards set forth in ORS 215.213(3) have
been met. The findings do not support such a conclusion.

The courts in this state, as well as this Board, have
repeatedly held that before a single-family residential

1 dwelling not provided in conjunction with farm use may be
2 established, each criterion set forth in ORS 215.213(3) must be
3 met. See Miles v. Bd. of Comm'rs of Clackamas County, 48 Or
4 App 951, 618 P2d 986 (1980); Still v. Bd. of Commr's of Marion
5 County, 42 Or App 115, 600 P2d 433 (1979), rev den 288 Or 493
6 (1980); Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331
7 (1977); Stringer v. Polk County, 1 Or LUBA 104 (1980).

8 This Board is aware of the holding of Sunnyside
9 Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569 P2d 1063
10 (1977), wherein the Court held that there was no specific form
11 required for findings in a land use decision. However, a
12 review of the county's findings in this case reveals it has not
13 properly addressed the standards found in ORS 215.213(3). For
14 the most part, the quoted "findings" are not findings within
15 the definition of that term traditionally used by the courts in
16 the State of Oregon. This Board has held in numerous cases,
17 consistent with holdings of the Oregon Supreme Court and Court
18 of Appeals, that before an adequate review of a land use action
19 can be made on appeal, sufficient findings of fact must exist.
20 As the Court of Appeals held in Hill v. Union County, 42 Or App
21 883, 886, 601 P2d 905 (1979), when it refused to review for
22 substantial evidence the county court's denial of a subdivision
23 approval:

24 "None of the eight 'findings of fact' relied upon by
25 the defendants are actually findings of fact. They
26 include recitations of evidence like those which we
held in Graham v. Oregon Liquor Control Commission, 20
Or App 97, 530 P2d 858 (1975), to be inadequate as

1 findings of fact; conclusions as to the law and as to
2 ultimate facts for which the underlying facts are
3 neither given nor apparent from the record; and a
reference to the 'principles set forth' in a decision
of this court, clearly not a finding of fact. [sic]"

4 See generally B & L Holdings v. Corvallis, 1 Or LUBA 115 (1980).

5 The "findings" of Baker County in the case before us are
6 much like those described by the Court in Hill, supra. They
7 are conclusions as to the law and as to ultimate facts. The
8 underlying factual basis for the conclusions are not set out.
9 The few "facts" identified are not tied into the ultimate
10 conclusion required by the standard to be applied. Findings
11 are important only insofar as they relate to the objectives and
12 policies to which the deciding jurisdiction is committed by
13 state law, statewide goals or its comprehensive plan.
14 Consequently, findings should not only identify those
15 objectives or policies but also describe how and why the
16 proposed action will, in fact, serve those objectives or
17 policies. Sunnyside Neighborhood v. Clackamas County, 280 Or
18 at 22. The county does not explain how the few "facts" it did
19 "find" serve the applicable objectives. This is not only true
20 of its application of ORS 215.213 but, as discussed below, the
21 statewide goals.

22 Goals

23 Although the county does put headings in its findings, i.e.
24 "Pertaining to Goal #3"² and "Pertaining to Goal #5,"³ it
25 does nothing to address the standards contained within those
26 goals. The county, of course, knows that prior to

1 acknowledgment of its comprehensive plan, it must apply all
2 relevant statewide goals to any of its land use decisions.

3 As we mentioned above when discussing the Jurgenson test,
4 the county did not determine the SCS soil class on the
5 property. The county further failed to address the "other
6 lands" and "necessary adjacent lands" portions of the Goal 3
7 definition of agriculture lands. Without first properly
8 identifying whether the subject property is "Agricultural
9 Land," the county can not make an informed decision on the
10 city's subdivision request. The city may have been required to
11 seek a Goal 2 exception to Goal 3 to allow it to use the
12 property as requested. Without first addressing Goal 3
13 properly, however, the county can not determine whether a Goal
14 2 exception is mandated.

15 "Finding" number 9 which states:

16 "That the land in the area is already committed to
17 small acreages and no adverse effect on surrounding
lands will arise from proposed use,"

18 is not a finding but a conclusion. Such a conclusion can only
19 be reached after applying the "committed lands" test set forth
20 in 1000 Friends v. Clackamas County, 3 Or LUBA 281 (1981) and
21 Coleman v. Lane County, ____ Or LUBA ____ (LUBA NO. 81-005,
22 1981). The County did not apply the test.

23 With regard to Statewide Goal 4, the county's only
24 "finding" addressing the timber resource value of the subject
25 property is 6(e), supra. Finding 6(e) is a conclusion and not
26 a finding. The county did not address the dictates of Goal

1 4.⁴ No determination was made whether the property was by
2 definition "forest land" and if it was, no Goal 2 exception was
3 taken thereto.

4 The county did realize Goal 5 (Open Spaces, Scenic and
5 Historic Areas, and Natural Resources) was applicable to the
6 property but it improperly addressed the goal. For instance,
7 in finding 7(c) it determined that the land was a wildlife
8 habitat, i.e. deer and elk range. It also indicated that the
9 deer and elk conflict with the private use of the property. It
10 made no findings, however, addressing the "economic, social,
11 environmental and energy" consequences of forcing the deer and
12 elk to seek other range. There is no reference to the
13 inventory required by Goal 5 and without such an inventory the
14 consequences of turning this wildlife range into a housing
15 development can not be determined.

16 For the above stated reasons, this Board finds it
17 unnecessary to specifically address each of petitioners'
18 allegations of error. The county has failed to make adequate
19 findings of fact and, therefore, this Board need go no further
20 in its discussion.

21 Remanded.

FOOTNOTES

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4 ORS 215.213(3) provides:

5 "(3) Single-family residential dwellings, not
6 provided in conjunction with farm use, may be
7 established, subject to approval of the governing body
8 or its designate in any area zoned for exclusive farm
9 use upon a finding that each such proposed dwelling:

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

13 "(b) Does not interfere seriously with accepted
14 farming practices, as defined in paragraph (c) of
15 subsection (2) of ORS 215.203, on adjacent lands
16 devoted to farm use; and

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

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

24 "(e) Complies with such other conditions as the
25 governing body or its designate considers necessary."
26

27 2
28 Goal 3 Agricultural Lands states:

29 "GOAL: To preserve and maintain agricultural lands.

30 "Agriculture lands shall be preserved and
31 maintained for farm use, consistent with existing and
32 future needs for agricultural products, forest and
33 open space. These lands shall be inventoried and
34 preserved by adopting exclusive farm use zones
35 pursuant to ORS Chapter 215. Such minimum lot sizes
36 as are utilized for any farm use zones shall be
37 appropriate for the continuation of the existing
38 commercial agricultural enterprise with the area.
39 Conversion of rural agricultural land to urbanizable
40 land shall be based upon consideration of the
41 following factors: (1) environmental, energy, social

1 and economic consequences; (2) demonstrated need
2 consistent with LCDC goals; (3) unavailability of an
3 alternative suitable location for the requested use;
4 (4) compatibility of the proposed use with related
5 agricultural land; and (5) the retention of Class I,
6 II, III and IV soils in farm use. A governing body
7 proposing to convert rural agricultural land to
8 urbanizable land shall follow the procedures and
9 requirements set forth in the Land Use Planning goal
10 (Goal 2) for goal exceptions.

11 "AGRICULTURAL LAND - In western Oregon is land of
12 predominantly Class I, II, III and IV soils and in
13 eastern Oregon is land of predominantly Class I, II,
14 III, IV, V and VI soils as identified in the Soil
15 Capability Classification System of the United States
16 Soil Conservation Service, and other lands which are
17 suitable for farm use taking into consideration soil
18 fertility, suitability for grazing, climatic
19 conditions, existing and future availability of water
20 for farm irrigation purposes, existing land use
21 patterns, technological and energy inputs required, or
22 accepted farming practices. Lands in other classes
23 which are necessary to permit farm practices to be
24 undertaken on adjacent or nearby lands, shall be
25 included as agricultural land in any event.

26 "Farm Use - is as set forth in ORS 215.203 and
includes the non-farm uses authorized by ORS 215.213."

3

17 Goal 5, Open Spaces, Scenic and Historic Areas, and
18 Natural Resources, states:

19 "GOAL: To conserve open space and protect natural and
20 scenic resources.

21 "Programs shall be provided that will: (1)
22 insure open space, (2) protect scenic and historic
23 areas and natural resources for future generations,
24 and (3) promote healthy and visually attractive
25 environments in harmony with the natural landscape
26 character. The location, quality and quantity of the
following resources shall be inventoried:

- 27 "a. Land needed or desirable for open space;
- 28 "b. Mineral and aggregate resources;
- 29 "c. Energy sources;
- 30 "d. Fish and wildlife areas and habitats;

- 1 "e. Ecologically and scientifically significant
2 natural areas, including desert areas;
3 "f. Outstanding scenic views and sites;
4 "g. Water areas, wetland, watersheds and
5 groundwater resources;
6 "h. Wilderness areas;
7 "i. Historic areas, sites, structures and
8 objects;
9 "j. Cultural areas;
10 "k. Potential and approved Oregon recreation
11 trails;
12 "l. Potential and approved federal wild and
13 scenic waterways and state scenic waterways.

14 "Where no conflicting uses for such resources
15 have been identified, such resources shall be managed
16 so as to preserve their original character. Where
17 conflicting uses have been identified the economic,
18 social, environmental and energy consequences of the
19 conflicting uses shall be determined and programs
20 developed to achieve the goal.

21 "Cultural Areas - refers to an area characterized by
22 evidence of an ethnic, religious or social group with
23 distinctive traits, belief and social forms.

24 "Historia Areas - are lands with sites, structures and
25 objects that have local, regional, statewide or
26 national historical significance.

"Natural Areas - includes land and water that has
substantially retained its natural character and land
and water that, although altered in character, is
important as habitats for plant, animal or marine
life, for the study of its natural historical,
scientific or paleontological features, or for the
apreciation of its natural features.

Open Space - consists of lands used for agricultural
or forest uses, and any land area that would, if
preserved and continued in its present use:

- 22 "(a) Conserve and enhance natural or scenic resources;
23 "(b) Protect air or streams or water supply;
24 "(c) Promote conservation of soils, wetlands, beaches
25 or tidal marshes;
26 "(d) Conserve landscaped areas, such as public or
private golf courses, that reduce air pollution
and enhance the value of abutting or neighboring
property;

1 "(e) Enhance the value to the public of abutting or
2 neighboring parks, forests, wildlife preserves,
3 nature reservations or sanctuaries or other open
4 space;

5 "(f) Promote orderly urban development.

6 Scenic Areas - are lands that are valued for their
7 aesthetic appearance.

8 Wilderness Areas - are areas where the earth and its
9 community of life are untrammelled by man, where man
10 himself is a visitor who does not remain. It is an
11 area of undeveloped land retaining its primeval
12 character and influence, without permanent improvement
13 or human habitation, which is protected and managed so
14 as to preserve its natural conditions and which (1)
15 generally appears to have been affected primarily by
16 the forces of nature, with the imprint of man's work
17 substantially unnoticeable; (2) has outstanding
18 opportunities for solitude or a primitive and
19 unconfined type of recreation; [sic] (3) may also
20 contain ecological, geological, or other features of
21 scientific, educational, scenic or historic value."

22 4

23 Goal 4, Forest Lands, states:

24 GOAL: To conserve forest lands for forest uses.

25 "Forest land shall be retained for the production
26 of wood fibre and other forest uses. Lands suitable
27 for forest uses shall be inventoried and designated as
28 forest lands. Existing forest uses shall be protected
29 unless proposed changes are in conformance with the
30 comprehensive plan.

31 "In the process of designating forest lands,
32 comprehensive plans shall include the determination
33 and mapping of forest site classes according to the
34 United States Forest Service manual 'Field
35 Instructions for Integrated Forest Survey and Timber
36 Management Inventories - Oregon, Washington and
37 California, 1974.'

38 "Forest Lands - are (1) lands composed of existing and
39 potential forest lands which are suitable for
40 commercial forest uses; (2) other forested lands
41 needed for watershed protection, wildlife and
42 fisheries habitat and recreation; (3) lands where

1 extreme conditions of climate, soil and topography
2 require the maintenance of vegetative cover
3 irrespective of use; (4) other forested lands in urban
4 and agricultural areas which provide urban buffers,
5 wind breaks, wildlife, and fisheries habitat livestock
6 habitat, scenic corridors and recreational use;

7 "Forest Uses - are (1) the production of trees and the
8 processing of forest products; (2) open space, buffers
9 from noise, and visual separation of conflicting uses;
10 (3) watershed protection and wildlife and fisheries
11 habitat; (4) soil protection from wind and water; (5)
12 maintenance of clean air and water; (6) outdoor
13 recreational activities and related support services
14 and wilderness values compatible with these uses; and
15 (7) grazing land for livestock."
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BEFORE THE LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

ROBERT L. HARRELL, EDNA E.)
HARRELL, LAWRENCE M. SCHMIT,)
EILENE SCHMIT, JAMES R. EVANS,)
RUTH M. EVANS, ALVIN LITTLE,)
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JANET HENTZ, RICHARD HENTZ,)

Petitioners,)

v.)

BAKER COUNTY COURT and)
CITY OF BAKER,)

Respondents.)

LUBA No. 81-109

LCDC DETERMINATION

The Land Conservation and Development Commission hereby approves the recommendation of the Land Use Board of Appeals in LUBA case No. 81-109.

Dated this 17th day of March, 1982.

For the Commission:



James F. Ross, Director
Department of Land Conservation
and Development



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 2/23/82

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: HARRELL V. BAKER COUNTY
LUBA NO. 81-109

Enclosed for your review is the Board's proposed opinion and final order in the above captioned appeal.

Petitioners seek review of Baker County's granting of a conditional use permit to the City of Baker. The permit allows the subdivision of 53.3 acres of land designated for Exclusive Farm Use into 8 or 9 lots. The lots will be used for residences not in conjunction with farm use. Petitioners allege that the county failed to properly apply Goals 2, 3, 4 and 5 and ORS 215.213(3). We agree and remand. This is a findings case and Baker County's findings are inadequate.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



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