

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS | 4 44 PM '87
OF THE STATE OF OREGON

4 KEN HERSHBERGER, ROBERT)
5 SINCLAIR and A. R. SPRINGER,)
6 Petitioners,)
7 vs.)
8 CLACKAMAS COUNTY,)
9 Respondent.)

LUBA No. 87-008

FINAL OPINION
and ORDER

10 Appeal from Clackamas County.

11 Paul D. Schultz, Oregon City, filed a petition for review
12 and argued on behalf of petitioners. With him on the brief
13 were Hibbard, Caldwell, Bowerman, Schultz & Hergert.

14 Michael E. Judd, Oregon City, filed a response brief and
15 argued on behalf of respondent.

16 DuBAY, Chief Referee; Bagg, Referee; participated in the
17 decision.

18 REMANDED 05/01/87

19 You are entitled to judicial review of this Order.
20 Judicial review is governed by the provisions of ORS 197.850.
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1 NATURE OF THE DECISION

2 Petitioners appeal an order approving a permit for a farm
3 labor camp to house 175 laborers on land zoned EFU-20.

4 FACTS

5 The 20 acre tract has been used as a farm labor camp since
6 1972. The camp now houses 61 workers. The applicant also
7 farms 200 acres on five widely separated parcels, the largest
8 of which is 123 acres and the smallest 20 acres. The
9 application is to permit expansion of the facilities to house
10 workers on applicant's farm operations.

11 ASSIGNMENTS OF ERROR

12 Petitioners' assignments of error will be reviewed in three
13 categories. We first consider the challenges addressing the
14 necessity to construct a labor camp for 175 workers. Next we
15 take up the claims that the use is unsuitable on the proposed
16 site. Last we consider petitioners' alleged violation of
17 proper procedure.

18 NECESSITY

19 Petitioners' Fourth and Fifth Assignments of Error attack
20 the county's findings addressing the following criterion:

21 "The assistance of the occupant(s) of the accessory
22 dwelling is, or will be, required by the farm operator
23 in the management of the farm use. If the occupant(s)
24 of the accessory dwelling are not related to the farm
25 operator, the need for assistance shall be based
26 solely on the size, type and intensity of the farm
use, and not on the personal conditions of the farm
operator." Section 401.04(B)(1), Clackamas County
Development and Zoning Ordinance.

1 Petitioners allege the county made no finding that 175
2 workers are needed by the applicant on his farm operations.
3 Petitioners also say no evidence in the record supports the
4 county's conclusion that this criterion is satisfied.

5 The county found:

6 "The farm operator owns and leases over 250 acres of
7 land within the Sandy and Gresham area. This land is
8 in intensive farm use with the raising and harvesting
9 of strawberries, raspberries, cabbage, cauliflower,
10 broccoli, brussels sprouts, pumpkins and corn. . . .
11 A large number of farm laborers are needed to raise
12 and harvest these crops during May through October.
13 The farm operator has stated it is hard to get and
14 keep farm laborers when they are bussed in on a daily
15 basis. He has further stated the competition for farm
16 laborers is keen, and it is important to have this
17 number of laborers to adequately manage his intensive
18 farm use. The . . . criteria is met." Record at 5.

19 We first note that the statements by the farm operator are
20 not statements of what the county believes to be the relevant
21 facts. They are statements of evidence. Norvell v. Portland
22 Area LGBC, 43 Or App 849, 604 P2d 896 (1976). The substance of
23 the quoted findings that are not statements of evidence is that
24 a large number of laborers are needed to raise and harvest
25 several different crops intensively grown on 250 acres. For
26 the reasons stated below, these findings fail to set forth
sufficient facts to show satisfaction of Section 401.04(B)(2).

 As we read the criterion, the county must determine the
extent that farm help is required in order to establish the
need for dwellings. The county found "a large number of farm
laborers are needed." This finding does not indentify the
extent, i.e. the specific number, of laborers needed, nor does

1 it provide any linkage between the number of dwellings required
2 and the number of farm workers employed between May and
3 October. The generally-worded finding does not state facts
4 warranting a conclusion that assistance of 175 or any other
5 number of workers need to be housed on the property.

6 Because the findings are inadequate, we will not review the
7 evidence supporting them. McNulty v. City of Lake Oswego, 14
8 Or LUBA 366 (1986)

9 SUITABILITY

10 Petitioners allege the findings fail to show compliance
11 with the criterion that accessory farm dwellings must be
12 located on the same lot or parcel as the principal dwelling of
13 the farm operator. Section 401.04(B)(1), Clackamas County
14 Development and Zoning code. The county found:

15 "The principal dwelling of the farm operator
16 (applicant) is on a 31.50 acre ownership directly
17 across Trubel Road from the subject property. This
18 combined 51 acre ownership is contiguous but for
19 Trubel Road. The first criterion is met." Record at
20 4.

21 Petitioners' point is that the additional farm dwellings cannot
22 be on the same lot or parcel as the dwelling of the principal
23 farm operator because a road separates the two tracts.

24 Respondent argues that only one lot exists because the
25 ordinance defines a lot as "Any lot, parcel, tract, or
26 combination thereof...." Therefore, according to petitioner's
argument, the two tracts in one ownership, separated by a road,
comprise a combination of tracts meeting the definition.

1 We agree with respondent. In another context, the Court of
2 Appeals observed that a parcel of land does not lose its
3 unitary character simply by the happenstance of an intersecting
4 boundary line, street or dedicated road. State v. Emmich, 34
5 Or App 945, 949, 580 P2d 570 (1978). We, therefore, deny the
6 Third Assignment of Error.

7 Petitioners' Sixth Assignment of Error alleges the findings
8 do not show compliance with Code Section 401.04(B)(3). This
9 section provides:

10 "The accessory dwelling shall be sited in a manner
11 which minimizes negative impacts on farm uses, and
12 also minimizes impacts on sensitive wildlife areas
13 identified on Table III-1 and Map III-3 of the
Comprehensive Plan using siting techniques a-c under
subsection 401.11B1."

14 The findings note the applicant proposes to remodel two
15 existing buildings for bunkhouse accommodations. The county
16 also found the applicant plans to add an unspecified number of
17 mobile homes on the portion of the property now used to house
18 workers in a house and mobile home. Record at 4. The county
19 concluded:

20 "This proposal would appear to have little or no
21 impact on the portion of the farm operator's property
which is presently cultivated." Record at 5.

22 Petitioners say these findings are defective because 1)
23 they set forth no underlying facts to support the conclusion,
24 and 2) the finding addresses only the farm use on the
25 applicant's property.

26 We find no error. Section 401.01(B)(3), we note, is a

1 standard for siting accessory dwellings in order to minimize
2 their impacts on farm uses. The ordinance does not require
3 there be no adverse impacts. cf. DEQ v. City of Portland, 14
4 Or LUBA 700, 705 (1986).

5 Petitioners point to testimony by neighbors expressing
6 concern with respect to rats, open garbage pits, inadequate
7 sanitation facilities, traffic congestion and crime in the
8 neighborhood. These concerns of the neighbors, however, relate
9 to the suitability of a labor camp in the neighborhood and not
10 to the question of where the housing facilities should be
11 located on the property to minimize adverse impacts on farm
12 use.¹

13 The findings that proposed housing will be located in
14 existing buildings and on the part of the property now used to
15 house workers show that the facilities will be sited on land
16 not used for growing crops. These findings support the
17 county's conclusion that the siting of the proposed housing
18 facilities satisfies the criterion in Section 401.01(B)(3).
19 Accordingly, the Sixth Assignment of Error is denied.

20 Petitioner's Seventh Assignment of Error challenges the
21 county's finding that alternative housing is not available.
22 Code Section 401.14(B)(5) states:

23 "There are no other suitable housing alternatives on
24 the property or in the vicinity available to the farm
help."

25 The findings addressing this criterion state:

26 "The farm operator has stated that there is a shortage

1 of housing for farm laborers in the area and that the
2 only other source of laborers requires daily busing
3 [sic]. The information in the file indicates the farm
4 operator needs this number of farm laborers to
5 adequately manage his farm use, and busing [sic] in
6 laborers from outside the area is an inadequate
7 solution. This criteria(sic) is met." Record at 5

8 Petitioners say no substantial evidence supports this
9 finding.

10 The finding, like the findings considered in the Fourth and
11 Fifth Assignments of Error, does not state facts. It only
12 recites evidence. In Norvell v. Portland Area LGBC, 43 Or App
13 849, 604 P2d 896 (1976), the land use decision included the
14 following finding:

15 ". . . the applicant has submitted evidence which
16 indicates the property is not viable as forest land.
17 Thus, annexation does not violate Goal #4."

18 The court held that the finding is unsatisfactory as a finding
19 of fact and added:

20 "Certain of respondents argue that the finding should
21 be held satisfactory inasmuch as the record shows the
22 relevant matters were considered and 'no magic words
23 need be employed.' Sunnyside Neighborhood v.
24 Clackamas County Comm., 280 Or 321, 569 P2d 1063
25 (1977). What must be employed, however, is a
26 declarative sentence stating a fact qua fact. This
was not done." Norvell v. Portland Area LGBC, supra,
at 852.

27 The findings addressing the alternative housing standard in
28 Section 401.04(B)(5) suffer this same defect. See also Hill v.
29 Union County Court, 42 Or App 883, 601 P2d 905 (1979). In
30 addition, the findings state conclusions without stating the
31 supporting facts. It would serve no point to consider
32 petitioners' claim that the findings are not supported by

1 substantial evidence in these circumstances. Therefore, we
2 sustain the Seventh Assignment of Error.

3 Petitioners' Eighth Assignment of Error challenges the
4 county's finding of compliance with Section 401.04(B)(6). The
5 permit criterion in this code section is:

6 "A temporary permit for farm help will not satisfy the
7 needs of the farm operator based on the long-term
8 management requirements of the farm use on the
9 property."

10 The county found:

11 "This proposal involves a substantial remodeling of
12 existing buildings and location of several mobile
13 homes on the property on a more permanent basis than
14 would be favorably considered under a temporary
15 permit." Record at 5.

16 Temporary permits are allowed in the county for up to one
17 year for uses not otherwise allowed in the zoning district.
18 Section 1204.01, Zoning and Development Ordinance. Temporary
19 permits may be issued when the following criteria are met:

20 "A. There is no reasonable alternative to the
21 temporary use;

22 "B. The permit will be necessary for a limited time
23 or will allow an occasional use, such as seasonal
24 farm labor;

25 "C. The temporary use does not involve the erection
26 of a substantial structure or require any other
permanent commitment of the land;

"D. The temporary use will not be detrimental to the
area or to adjacent properties; and

"E. The temporary use will comply with the
Comprehensive Plan."

The county's conclusion that the proposal satisfies the
criterion in Section 401.04(B)(6) is based on the rationale

1 that one of the temporary permit criteria (subparagraph C,
2 above) cannot be satisfied. The correct inquiry, however, is
3 stated in Section 401.04(B)(6), i.e. whether the long term
4 management needs of the farm operator requires more than a
5 temporary permit for no more than one year. This inquiry
6 focuses on the needs of the farm operator for farm help rather
7 than the proposed type of construction as considered by the
8 county. Because the county made no findings that a temporary
9 permit will not satisfy the applicant's long term requirements
10 for farm help, the findings are inadequate.² We sustain the
11 Eighth Assignment of Error.

12 PROCEDURE

13 Petitioners' first challenge is that the permit application
14 did not include a farm management plan meeting the requirements
15 in Section 401.10. This ordinance calls for the following
16 information in a farm management plan:

- 17 "1. A written description of a five-year plan
18 describing the proposed cropping or livestock
19 pattern by type, location, and area size.
20 "2 Soils tests or SCS OR01 field data sheets, or
21 similar information demonstrating the suitability
22 of the land for the proposed crop or pasture uses.
23 "3 A written description of the commercial farm uses
24 in the area, including acreage size and type of
25 crop or livestock raised."

26 Petitioners charge that the farm management plan submitted
by the applicant includes none of the required information. As
a result, petitioners say the county did not have a basis to
determine the need for housing 175 farm workers.

1 The applicant submitted a farm management plan on a form
2 provided by the county. Record 77-78. Respondent does not
3 dispute petitioners' allegation that the submitted plan does
4 not include the information required by ordinance. However,
5 respondent characterizes the deficiencies as a technical
6 failure that does not warrant reversal or remand. Citing
7 decisions of this Board that deficiencies in the application do
8 not amount to reversible error, respondent argues that without
9 a showing of prejudice, any deficiencies in the farm management
10 plan as submitted are harmless error. See, Dougherty v.
11 Tillamook County, 12 Or LUBA 20, (1984); Grover's Beaver
12 Electric Plumbing v. Klamath Falls, 12 Or LUBA 61 (1984);
13 Families for Responsible Government v. Marion County, 6 Or LUBA
14 254 (1982), rev on other grounds, 65 Or App 8, 670 P2d 615
15 (1983).

16 We disagree. In both Dougherty v. Tillamook County,
17 supra, and Families for Responsible Government v. Marion
18 County, supra, the Board found that information omitted from
19 the application was available elsewhere in the record and that
20 petitioners had not shown themselves to be prejudiced by the
21 deficiencies in the application. Indeed, in Grover's Beaver
22 Electric Plumbing v. Klamath Falls, supra, the Board emphasized
23 in a footnote that information in a site plan required as part
24 of an application could be crucial to a complete analysis of
25 whether the requirements in the city code can be met.
26 Similarly, the information in the farm management plan required

1 by Section 401.10 appears to be crucial to a determination of
2 the need for housing in the scale here considered.

3 The information required by the ordinance is not in the
4 record. A space is provided on the county's form for farm
5 management plans to indicate and substantiate a need for more
6 than one farm residence. The space was left blank in the farm
7 management plan submitted by the applicant. In these
8 circumstances, the requirement for a farm management plan is
9 not an empty formality.

10 The First Assignment of Error is sustained.

11 Petitioners also attack the decision on the ground the
12 record does not disclose that certain required notices were
13 given to interested parties before the hearing by the county
14 commission.³ Petitioners do not complain that they did not
15 receive notice of the hearing nor that the failure to give
16 notice to other parties prejudiced petitioners' procedural
17 rights. However, we may only reverse or remand a decision for
18 procedural error when petitioners show prejudice to their
19 procedural rights. ORS 197.835(8)(a)(B); Apalategui v.
20 Washington County, 14 Or LUBA 261, 267 (1986).

21 The Second Assignment of Error is denied.

22 The decision of Clackamas County is remanded.

1 FOOTNOTES

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4 There is no allegations the site of the proposed buildings
is in an identified wildlife area.

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6 We also reject respondent's argument that Section
7 401.14(B)(6) is satisfied because temporary permits are allowed
8 only for uses not otherwise allowed in the zone. Respondent
9 argues that accessory farm dwellings are allowed in the EFU
district. In addition to the reason for rejecting this
argument as set forth in the text, we note that temporary
permits to house farm help are contemplated by the provisions
of Section 401.04(B)(6) and by Section 1204.01(B).

10 ³
11 Section 1302.01(C)(2) of the Development and Zoning
12 Ordinance requires notice of public hearings to all owners of
13 record of adjacent property at least 20 days prior to the
hearing.

14 Section 1302.01(A) requires that a copy of the application
15 be sent to a recognized community planning organization at
least 35 days before the hearing.

16 Section 401.04(B)(6) requires that notice of applications
17 for accessory farm dwellings must be given to the Oregon State
University Extension Service with a request for comments.

18 Petitioners assert that the record fails to show any of
these notices were given.