

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

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ROY HEARNE,)
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 Petitioner,)
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 vs.)
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 BAKER COUNTY,)
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 Respondent,)
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 and)
)
 DONALD B. DUNN, JR.,)
)
 Participant-Respondent.)

LUBA No. 87-030
FINAL OPINION
AND ORDER

Appeal from Baker County.

Sam H. Ledridge, La Grande, filed a petition for review and argued on behalf of petitioner.

Donald B. Dunn filed a response brief and argued on his own behalf.

No appearance by Baker County.

HOLSTUN, Referee; DuBAY, Chief Referee, BAGG, Referee, participated in the decision.

AFFIRMED 10/21/87

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 This appeal challenges Baker County's approval of the
4 partition of a 20 acre tract zoned EFU. The major partition
5 created one 10 acre parcel and two five acre parcels. The
6 county also approved conditional use permits for a nonfarm
7 dwelling on each of the five acre parcels. Petitioner appeals
8 each of the county's approvals.

9 FACTS

10 The property is located in a rural area of Baker County
11 known as Boulder Flats. The participant-respondent's
12 (hereafter respondent) mobile home is located on the 10 acre
13 parcel (parcel A). The adjoining five acre parcels (parcels B
14 and C) as well as parcel A are predominately agricultural
15 soils.¹

16 Approximately 12 acres of the 20 acres have irrigation
17 water rights. Grazing is the most common agricultural activity
18 in the area.

19 This proposal is before us for the third time. Prior
20 decisions were remanded in Smith v. Baker County, 14 Or LUBA
21 167 (1985) and Hearne v. Baker County, 14 Or LUBA 743 (1986).
22 After the second remand, the county conducted further hearings
23 and approved the application for a third time. This appeal
24 followed.²

25 FIRST ASSIGNMENT OF ERROR

26 "The partition order under review (No. 87-1) violates

1 Baker County Comprehensive Plan Section III.C.12."

2 Baker County Comprehensive Plan Section III.C establishes
3 agricultural lands policies. Section III.C.12 states

4 "There shall be no subdivision of irrigated farm land
5 in the EFU zone of Baker County."

6 The same requirement is included in the Baker County Zoning
7 and Subdivision Ordinance:

8 "Uses Not Permitted: In the EFU zone the following
9 uses are not permitted:

10 1. Subdivisions of irrigated farm land.

11 * * *" Section 301.G.1.

12 However, the following subsection in the county's zoning
13 and subdivision ordinance expressly provides for "partition" of
14 irrigated farm lands.³ The partition challenged in this
15 appeal, according to the county, was approved pursuant to
16 Section 301.H.2.f which permits partition of EFU land for
17 conditional uses on the "minimum amount of land necessary for
18 the proposed use." Record 9.

19 The proscription in the comprehensive plan against
20 subdivision may not apply to partitions.⁴ However, the
21 county's findings do not clearly state this interpretation.
22 Therefore, we would normally remand to the county for a more
23 complete explanation of its application of the plan and
24 ordinance. We could then review that explanation to assure it
25 is consistent with the plan and zoning and subdivision
26 ordinance. See, 1000 Friends v. LCDC and Lane County, 85 Or
App 619, 622, ___ P2d ___, rev allowed 304 Or 185 (1987); 1000

1 Friends v. LCDC (Curry County), 301 Or 477, 521, 724 P2d 268
2 (1986).

3 However, as we previously noted, this case is before us for
4 the third time. Based on our review of the record, petitioner
5 could have raised this issue before but did not.⁵ We
6 previously decided the "law of the case" doctrine applies to
7 proceedings before this Board. Portland Audubon Society v.
8 Clackamas County, 14 Or LUBA 433 (1986); Mill Creek Glen
9 Protection Associaton v. Umatilla County, ___ Or LUBA ___ (LUBA
10 No. 87-003, August 14, 1987). Under that doctrine, a party may
11 not raise legal issues decided in earlier appeals or which
12 could have been raised but were not. See Baker v. Lane County,
13 37 Or App 87, 586 P2d 114 (1978). As we explained in Portland
14 Audubon, supra at 436-438:

15 "The legislature * * * intended land use decisions be
16 made promptly. ORS 197.805. In addition to the
17 general policy of timeliness in ORS 197.805, the
18 legislature set strict time limits for review of
19 decisions by LUBA and the Appellate Court.
20 ORS 197.830(12), 197.855. Another indication of the
21 legislature's intent to streamline the appeals process
is found in ORS 197.835(10), requiring LUBA to address
'all issues presented' when a decision is reversed or
remanded. These provisions all indicate a legislative
intent to expedite reviews of land use decisions at
the state level and to minimize the number of appeals
of the same case."

22 * * * * *

23 "Legal questions that could have been determined in
24 [prior appeals] should not be subject [to] challenge
for the first time in [subsequent appeals]."

25 Following our last remand in Hearne v. Baker County, supra,
26 the county conducted additional proceedings to accept evidence

1 and adopt supplemental findings. Our review of the record
2 discloses no reason why petitioner could not have raised the
3 issue of compliance with Baker County Comprehensive Plan
4 Section III.C.12 during one of the two prior appeals. We,
5 therefore, apply the law of the case doctrine and deny this
6 assignment of error.

7 SECOND ASSIGNMENT OF ERROR

8 "The partition order (No. 87-1) fails to follow
9 procedures for the approval of major partitions
10 required by Sections 301.H and 1001-1008 of the county
11 zoning ordinance."

12 Petitioner argues as follows:

13 "* * * [T]he Tentative Plan called for by Sections
14 1001-1002 has not been reviewed, approved or made
15 available as those ordinances require. The approval
16 standards of Sections 1004-1005 are similarly
17 unmentioned in the findings and orders under review.
18 The contents required of the Tentative Plans for major
19 partitions by Section 1007 are also lacking. No bond
20 has been filed by the applicant as required by Section
21 1006. Finally the area approved for partition is
22 acknowledged to be at least partially in a flood zone
23 area." Petitioner's Brief 6.

24 As with the first assignment of error, petitioner asserts
25 errors in the county's decision for the first time in this
26 appeal. Each of the errors could have been raised in prior
27 appeals. For the reasons explained in our discussion under the
28 first assignment of error, we decline to address assignments of
29 error in this appeal that could have been raised in the prior
30 appeals.

31 The second assignment of error is denied.

32 THIRD ASSIGNMENT OF ERROR

1 "The county's findings that the parcels are generally
2 unsuitable land for continued production of farm crops
3 and livestock are erroneous, unsupported by
substantial evidence in the record, and contrary to
established law both state and local."

4 In the third and fourth assignments of error, petitioner
5 alleges the county's decision violates applicable criteria in
6 ORS 215.283 and the county ordinance for approval of non-farm
7 dwellings. ORS 215.263(4) allows land divisions in EFU zones
8 for dwellings not provided in conjunction with farm use if the
9 standards in ORS 215.283(3) are satisfied. ORS 215.283(3)
10 requires findings that each dwelling:

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

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

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

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

20 "(e) Complies with such other conditions as the
21 governing body or its designate consider
necessary."

22 In the third assignment of error petitioner challenges the
23 county's findings of compliance with ORS 215.283(3)(d)
24 regarding general unsuitability for farm use. Citing
25 Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331 (1977),
26 petitioner alleges respondent cannot claim his property is

1 generally unsuitable merely by showing it is not economically
2 self-sufficient. Petitioner also says he would buy the
3 property which has been leased for grazing in the past.
4 Petitioner alleges that since it is not disputed that 88% of
5 the soils are classed I-VI a finding that the soils are
6 "marginal" or unsuitable is precluded. Finally, petitioner
7 claims the county tries to bootstrap its findings on
8 unsuitability by referring to non-farm uses in the area.

9 Respondent disputes each of petitioner's contentions.
10 Respondent contends that, unlike the property at issue in
11 Rutherford v. Armstrong, supra, the county's decision did not
12 rest solely on the small uneconomic size of the parcels.
13 Respondent argues the county considered each of the proposed
14 parcels, the tract as a whole and adjoining lands. Respondent
15 cites 1000 Friends of Oregon v. LCDC (Umatilla Co.), 85 Or App
16 88, ___ P2d ___ (1987), where the Court of Appeals affirmed
17 LCDC's acknowledgement of exceptions for parcels that were in
18 actual farm use. In doing so, the Court of Appeals said:

19 "Although those parcels are now or have recently been
20 used for agricultural purposes, the record indicates
21 that their productivity has been marginal. Two of the
22 parcels are portions of larger parcels, each of which
23 is in a common ownership with the challenged parcel;
24 the remaining portions of those larger parcels are
25 planned for exclusive farm use. The county's
26 justification for dividing these parcels is that a
bluff running through them creates a natural
difference in the use of the different portions, with
the portions at higher level more appropriately
designated for residential uses similar to that of
other parcels at the same elevation. The county also
emphasizes serious conflicts between agricultural and
residential uses for all the questioned parcels.

1 "1000 Friends points out, in response to the county's
2 arguments, that the parcels are now in agricultural
3 use. How it asks, can agricultural use be
4 impracticable? Conflicts with the surrounding
5 residences do not by themselves prove commitment, but
6 they are relevant. Here the level of conflict, the
7 extent of the residential development and the lack of
8 profitable agricultural use of the parcels in recent
9 years supports the county's decision as to all the
10 parcels." 1000 Friends of Oregon v. LCDC (Umatilla
11 Co.), supra at 96.

12 In a Laudahl v. Polk County, 3 Or LUBA 101 (1981) we held
13 where it was undisputed "* * * that the property is suitable
14 for farm use and will be used by [adjoining property owners]
15 for such purpose if allowed to purchase the property at a
16 reasonable price * * *" the property was not shown to be
17 unsuitable for agricultural use. Id. at 108. Respondent says
18 that unlike Laudahl, there is no evidence here that petitioner
19 has offered a reasonable price or is seriously interested in
20 leasing or purchasing his property.

21 A finding that a parcel cannot be used for commercial
22 farming or livestock purposes is not sufficient to show
23 compliance with ORS 215.283(3)(d). Rutherford v. Armstrong, 31
24 Or App 1319, 527 P2d 1331 (1977); Stringer v. Polk County, 1 Or
25 LUBA 104 (1980). In Miller v. Linn County, 4 Or LUBA 350
26 (1982) we concluded it was improper to look solely at the site
proposed for a nonfarm dwelling in determining whether the
dwelling will be situated upon land generally unsuitable for
production of farm crops and livestock. We said

"It is undoubtedly true that on any tract of
agricultural land there are specific sites which

1 contain soil conditions, rock outcroppings or other
2 impediments to agricultural use. To hold that once a
3 property owner locates those sites he or she will be
4 allowed to place on them a nonfarm dwelling would do
5 violence to the intent and purpose provisions of
6 ORS 215.243. As the Court of Appeals stated in Still
7 v. Board of County Commissioners, 42 Or App 115, 120
8 (1979):

9 'It may be economically unfeasible to farm a
10 piece of land in an exclusive farm use zone and
11 residential use of it may not interfere with
12 farming in the area, but residential uses may
13 nevertheless offend Oregon's land use policy as
14 declared in ORS 215.243. It is therefore
15 necessary in the application of ORS 215.213(3) to
16 consider the policy ramifications of the proposed
17 nonfarm residential use.'" Id. at 354.

18 As we explained in our last remand in this case the county
19 must find "the parcel for a nonfarm dwelling is generally
20 unsuitable for the production of farm crops and livestock and
21 that land suitable for production of farm crops and livestock
22 is preserved."⁶ Hearne, supra at 746. In other words, the
23 county is not required to show the entirety of parcels A, B and
24 C are unsuitable for farm use. Our remand required the county
25 to find that each parcel is generally unsuitable for the
26 production of farm crops and livestock; and, to the extent the
parcels do include land suitable for such purposes, find that
land will be preserved. On remand the county adopted amended
and supplemental findings. Record 6-29. Relevant findings are
summarized below:

27 AMENDED AND SUPPLEMENTAL FINDINGS

- 28 13. Approximately eight acres have limited flood
29 irrigation water rights - - two acres on parcel
30 B, two acres on parcel C and the remainder on
31 parcel A. The owner has 20 shares of Clear Creek

1 which is usable only in the last three to four
2 weeks of the growing season. Because of low
3 priority, access to the water is uncertain. Last
4 summer the owner was cut off on July 15 which is
5 fairly typical. New houses will not be built on
6 land subject to irrigation rights.

- 7
- 8 14. The parcels are described in detail by the Soil
9 Conservation Service as being very cobbly and
10 very stony. Forty-eight percent of the 20 acre
11 parcel is Class VI or Class VII. Considered
12 individually or as a whole, the parcels contain
13 marginal soils.
- 14 16. An equipment operator testified he was prevented
15 from leveling the property because of the size
16 and inordinate number of rocks on and below the
17 surface of the property. His equipment was
18 damaged during attempts to level the property.
- 19 17. Without leveling, which is prohibitively
20 expensive, it is impossible to flood irrigate
21 about 75% of the 20 acres.
- 22 20. Two small areas are relatively level and
23 irrigable. They are separated from each other by
24 water courses, boulders and brush rendering them
25 unsuitable for economic farm management
26 practices. The two small areas consist of sparse
native grasses and have been used for limited
grazing. The rockiness of the soil makes it
impossible to cultivate, plant or harvest any
kind of row crops, even on the two relatively
level areas.
28. On the 20 acre parcel, grazing use is limited to
one month per year. The land is free of frost
and able to grow some grass for only 110-130 days
per year, on average. There is enough grass for
grazing only after 30 days of the growing season
has passed, and the animals quickly graze the
grass off. After the second cycle water rights
have normally been exhausted. There is not
enough natural rainfall to generate grass for a
third cycle. Almost all grazing occurs on the
larger parcel. The current cost of leasing
private land for grazing in Baker County is \$9.00
per animal unit month (AUM), which is the amount
of forage needed to feed a cow and her calf for
one month. Parcel A is rated at 15.25 AUMs with
a lease value of \$137.25 per year. Parcel B is

1 physical screening from the surrounding parcels
2 without taking agricultural land out of
3 production.

4 We believe the county's findings are adequate to respond to
5 the issues we raised in our last remand, regarding
6 ORS 215.283(3)(d). Specifically, the county identified the
7 areas that are unsuitable for grazing and areas that are
8 marginally suitable. Record 22, 56-60. The areas that are
9 marginally suitable will be preserved since the proposed
10 dwellings will not be allowed to locate on the irrigated
11 portions of the parcels. We believe the county has illustrated
12 that the portions of these three parcels that are not
13 irrigated, in view of the small size of the combined parcel,
14 very rocky soils and short growing season, are generally
15 unsuitable for grazing, the only practical farm use. See
16 Spooner v. Marion County, 2 Or LUBA 1 (1980), where the Board
17 deferred to the county where there was conflicting believable
18 evidence that the property was of limited use for trees or
19 pasture because of its stony condition. Further we believe the
20 county adequately explained that physical features separating
21 these parcels from adjoining properties inhibit pasture use in
22 conjunction with other grazing operations in the area.

23 The Court of Appeals decision in 1000 Friends v. LCDC
24 (Umatilla Co.), supra, while addressed to the criteria for
25 exceptions in ORS 197.732 and therefore not determinative on
26 the issue raised in this assignment of error, does lend some
support to the county. The record shows this parcel is of

1 extremely limited value for grazing purposes. Record 103-105.
2 See also, 1000 Friends v. Wasco Co. Court, 80 Or App 525, 531,
3 723 P2d 1039 (1986).

4 Finally, we also conclude petitioner's claim that he is
5 willing to lease the property is too speculative to negate the
6 county's finding that this property is generally unsuitable for
7 farm use. Even if petitioner is interested in leasing or
8 purchasing the property, we have no indication he is willing to
9 pay a reasonable price or even what a reasonable price would
10 be. See, 1000 Friends v. LCDC (Umatilla Co.), supra at 95.
11 Compare Laudahl v. Polk County, supra at 96.

12 The third assignment of error is denied.

13 FOURTH ASSIGNMENT OF ERROR

14 "The findings required by ORS 215.283(3)(a)-(c) are
15 lacking and unsupported by substantial evidence in the
record."

16 In Hearne v. Baker County, supra, petitioner challenged the
17 adequacy of the county's findings of compliance with
18 ORS 215.283(3)(a)-(c) and the evidence supporting those
19 findings. This Board rejected petitioner's challenge to the
20 county's findings regarding ORS 215.283(3)(a)-(c) but remanded
21 for additional findings regarding compliance with
22 ORS 215.283(3)(d). 14 Or LUBA at 746. Petitioner appealed the
23 Board's decision and that decision was affirmed by the Court of
24 Appeals. Hearne v. Baker County, 81 Or App 105, 724 P2d 351
25 (1986). The issues raised by petitioner in this assignment of
26 error, therefore, were resolved against petitioner, and will

1 not be reconsidered in this appeal. See our discussion under
2 the first assignment of error.

3 Petitioner's fourth assignment of error is denied.

4 FIFTH ASSIGNMENT OF ERROR

5 "Petitioner should be awarded reasonable attorney's
6 fees and expenses incurred herein pursuant to
ORS 197.830(13)(b)."

7 Pursuant to ORS 197.830(13)(b) we are empowered to award
8 reasonable attorney's fees and expenses to prevailing parties
9 in certain circumstances. Because the county's decision is
10 affirmed, the county, rather than petitioner, is the prevailing
11 party. Petitioner is not entitled to attorney's fees under the
12 circumstances.

13 This assignment of error is denied.⁷

14 The county's decision is affirmed.

FOOTNOTES

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Goal 3 defines agricultural lands as follows:

"AGRICULTURAL LAND -- in Western Oregon is land of predominantly Class I, II, III and IV soils and in Eastern Oregon is land of predominantly Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event."

The predominant soil classifications for parcels A, B and C are as follows:

Parcel A: 20% Class III, 40% Class IV, 25% Class VI, 5% Class VII and 10% Classes III-VII.

Parcel B: 40% Class IV, 40% Class VI, 15% Class III-VII, 5% Class VII.

Parcel C: 25% Class IV, 40% Class VI, 20% Class III-VII, and 15% Class VII. Record 20-21.

Each of the parcels are predominantly Class I-VI soils. Each of the parcels is, therefore, "per se", 'agricultural land,' whether or not it can be used for agricultural use. 1000 Friends v. LCDC (Linn Co.), 85 Or App 18, ___ P2d ___ (1987).

2

Respondent filed a motion to dismiss alleging petitioner failed to file a timely petition for review. On July 9, 1987, we issued an order denying that motion to dismiss. While respondent reasserted his motion to dismiss in his brief and at oral argument, he provided no new argument in support of that motion. We adhere to our earlier order denying the motion to dismiss for reasons stated in that order. Hearne v. Baker County, ___ Or LUBA ___ (LUBA No. 87-030, Order denying Motion to Dismiss, July 9, 1987).

Section 301.H of the Baker County Zoning and Subdivision Ordinance No. 83-3 states:

"H. Minimum Lot Sizes: In the EFU zone, partitions may be allowed after findings have been reached that each of the parcels resulting from the proposed partition:

1. Generally:

- a. Is appropriate for the continuation of the existing commercial agricultural enterprises in the area.
- b. Complies with the purpose and intent of the Oregon Agricultural Land Use Policy (ORS 215.243).
- c. Is not detrimental to the parent farm or ranch.

2. Specifically:

- a. Partitions lands fully covered by adjudicated water rights into no less than 40 acres or a sixteenth of a Section, whichever is smaller. See also Section 502 of this Ordinance for roads and survey adjustments.
- b. Partitions dry land into parcels no less than 160 acres.
- c. Partitions dry lands containing less than 40 acres of adjudicated irrigation rights by requiring four acres for each dry acre less than 40; for example: 30 acres of irrigated land would require a minimum parcel size of 70 acres.
- d. Partitions land with non-adjudicated water resources into parcels of no less than 40 acres when said water resources are judged to be sufficient to meet the commercial farm test on a case-by-case basis. The criteria are as follows. The applicant can demonstrate to the satisfaction of the Planning Commission:
 - 1) That sufficient water is available during a typical year from any one or a combination of the following sources: Moisture in the form of rainfall and/or snowpack; existing wells and ponds on which no filing has been

1 made (giving consideration to the depth of
2 the well and to the lift on pumps for both
wells and ponds); lands that subirrigate;

3 2) That the soil, growing season, and energy
4 are adequate and available for the planned
farm use;

5 3) That markets for the farm products are
6 available; and

7 4) That the proposal is found to be commercial.

8 e. Partitions land for outright uses permitted
9 under Subsection A.3 and 5 of Section 301 with
10 no minimum parcel size required.

11 f. For all Conditional Uses: Partitions lots not
12 specifically established elsewhere by the
13 Ordinance into:

14 1) The minimum amount of land determined by
15 the governing body or its designate to be
16 necessary for the proposed use; and

17 2) Parcels large enough to comply with state
18 and local standards and the criteria set
19 forth in this Ordinance."

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The county defines subdivide and partition as follows:

"Subdivide land: To divide an area or tract of land into
four or more lots within a calendar year in such area or
tract of land as listed as a unit or contiguous units of
land under single ownership of such year." Baker County
Zoning and Subdivision Ordinance at 17.

"Partition land: To divide an area or tract of land into
two or three parcels within a calendar year when such area
or tract of land exists as a unit or contiguous units of
land under a single ownership at the beginning of such
year. * * *" Id. at 13.

5

The copies of the Baker County Comprehensive Plan and
Zoning and Subdivision Ordinance provided the Board during this
appeal incorporate but do not identify the date amendments are
adopted. We therefore take official notice of the Baker County

1 Comprehensive Plan and Zoning and Subdivision Ordinance in
2 effect when the county rendered the decision reviewed in Hearne
3 v. Baker County, supra. Our review of those documents, on file
4 at the Department of Land Conservation and Development, shows
5 the plan and code provision raised in this assignment of error
6 and the second assignment of error were in effect at the time
7 the county rendered the decision we reviewed in Hearne v. Baker
8 County, supra.

6
7 But see, Endresen v. Marion County, ___ Or LUBA ___ (LUBA
8 No. 86-031, September 14, 1986) where we concluded that a
9 nonfarm dwelling might be approved on a portion of the property
10 not suitable for farm use even though the majority of the
11 parcel was suitable for farm use. We note, however, even
12 though a parcel generally suitable for farm use may include
13 small areas of generally unsuitable land, the criteria in ORS
14 215.283(3)(a)-(c) also must be met before a nonfarm dwelling
15 can be approved.

7
8 Respondent also asserts petitioner's request for attorney's
9 fees is premature and is not properly presented as an
10 assignment of error. We agree. A prevailing party may file a
11 petition for attorney's fees within 15 days after a final order
12 is entered by the Board. Objections may be filed within 10
13 days after the petition is filed. See, OAR 661-10-075(2)(b).