

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 KEVIN J. McNAMARA, RON LAY, ALOHA)
5 LAY, ALLISON VALERIO, and MAURIZIO)
6 VALERIO,)

7)
8 Petitioners,)
9)

10 vs.)

11)
12 UNION COUNTY,)
13)

14 Respondent,)
15)

16 and)
17)

18 ROBERT BENNETT and JEAN BENNETT,)
19)

20 Intervenors-Respondent.)

LUBA No. 94-134

FINAL OPINION
AND ORDER

21
22
23 Appeal from Union County.

24
25 Timothy J. Sercombe, Portland, filed the petition for
26 review. With him on the brief was Preston Gates & Ellis.
27 John Nelson argued on behalf of petitioners.

28
29 No appearance by respondent.

30
31 Robert L. Bennett, Baker City, filed the response brief
32 and argued on his own behalf.

33
34 SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,
35 Referee, participated in the decision.

36
37 REMANDED 12/09/94

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a board of county commissioners'
4 decision approving a minor partition.

5 **MOTION TO INTERVENE**

6 Robert Bennett and Jean Bennett, the applicants below,
7 move to intervene in this proceeding on the side of
8 respondent. There is no opposition to the motion, and it is
9 allowed.

10 **FACTS**

11 The subject parcel is approximately 143 acres in size.
12 State Highway 203 adjoins the subject property to the north
13 and west. Approximately 103 acres of the subject parcel are
14 within a "built and committed" Statewide Planning Goal 3
15 (Agricultural Land) exception area and are zoned Rural
16 Center (R-2). The remaining 40 acres are located in the
17 southeastern corner of the parcel. These 40 acres are
18 designated for farm use in the county comprehensive plan and
19 zoned Agricultural Grazing (A-2).

20 Intervenors propose to divide the subject parcel into
21 three parcels. Two new, undeveloped R-2 zoned parcels, 1.42
22 and 2.38 acres in size, would be created from the
23 northeastern corner of the parent parcel, between Highway
24 203 and an irrigation ditch that traverses the parent
25 parcel. The remaining parcel would be approximately 139
26 acres in size and include the A-2 zoned part of the property

1 and the former Pondosa Mill and townsite. Existing uses on
2 this parcel "include the Pondosa Store in the old hotel and
3 several accessory structures." Record 5.

4 After a public hearing, the county planning commission
5 approved intervenors' application. Petitioners appealed the
6 planning commission decision to the board of commissioners.
7 On June 1, 1994, the board of commissioners held a public
8 hearing on the application and left the record open until
9 June 10, 1993 for receipt of written testimony. On June 3,
10 1994, the members of the board of commissioners and the
11 county planning director conducted a site view of the
12 subject property. Record 9. On June 15, 1994, the board of
13 commissioners deliberated on this matter and adopted a
14 tentative oral decision to deny petitioners' appeal and
15 approve the proposed partition. On July 6, 1994, the board
16 of commissioners adopted its final written decision
17 approving the partition.

18 **THIRD ASSIGNMENT OF ERROR**

19 Petitioners contend the county commissioners failed to
20 disclose the content of the observations made during their
21 site visit. Petitioners argue such observations constitute
22 evidence that must be placed on the record. Petitioners
23 further argue that remand is required because they were not
24 given an opportunity to rebut any information obtained by

1 the decision makers during the site view.¹

2 In Angel v. City of Portland, 21 Or LUBA 1, 8-9 (1991),
3 we explained:

4 "Petitioner has a right to rebut evidence placed
5 before the local decision maker in a
6 quasi-judicial land use proceeding. Fasano v.
7 Washington Co. Comm., [264 Or 574, 507 P2d 23
8 (1973)]; Lower Lake Subcommittee v. Klamath
9 County, 3 Or LUBA 55, 59 (1981). This right
10 extends to requiring disclosure of and opportunity
11 to rebut the substance of * * * personal site
12 observations by the local decision maker. * * *
13 Jessel v. Lincoln County, 14 Or LUBA 376, 381
14 (1986); Friends of Benton Cty v. Benton Cty, 3
15 Or LUBA 165, 173 (1981).

16 "[A]n uncontroverted allegation that a party was
17 provided no opportunity to rebut [evidence placed
18 before the decision maker through site
19 observations] is sufficient to demonstrate
20 prejudice to that party's substantial rights.
21 * * * (Emphasis in original; footnote omitted.)

22 The county commissioners conducted a site view without
23 notification to the parties. The fact the site view
24 occurred was disclosed after the evidentiary record in this
25 matter was closed, during the board of commissioners'
26 June 15, 1994 deliberations. The county commissioners
27 failed to place on the record the substance of their site
28 observations and failed to provide petitioners and other

¹Petitioners also imply that the county commissioners' site view constitutes an ex parte contact subject to the disclosure and rebuttal requirements of ORS 215.422(3). However, petitioners do not contend the commissioners' site view involved communication with anyone other than a county staff member, so we do not see that the site visit constituted an ex parte contact.

1 parties any opportunity to rebut this evidence.
2 Accordingly, the county committed procedural errors that
3 prejudiced petitioners' substantial rights.
4 ORS 197.835(7)(a)(B).

5 The third assignment of error is sustained.²

6 **FIRST ASSIGNMENT OF ERROR**

7 Union County Zoning, Partition and Subdivision
8 Ordinance (ZPSO) 26.03 ("Decision of Partition Approval")
9 provides that a tentative partition plan "shall be approved
10 if it satisfies the [provisions of ZPSO] Articles 25.00 and
11 26.00 * * *." ZPSO 25.03.2 ("Initiation of Partition or
12 Subdivision Procedures") provides, in relevant part:

13 "Partitioning or subdivision procedures may be
14 initiated if the developer determines [sic] that
15 his proposal can satisfy the following:

16 "A. It is in accord with the area Land Use Plan
17 and Zoning requirements.

18 "B. It is suitable for partitioning, and does not
19 materially alter the stability of the overall
20 land use pattern of the area, nor initiate or
21 encourage a pattern of development
22 incompatible with existing area uses. In
23 determining suitability the following
24 policies shall be recognized:

25 "(1) That access and provisions for water

²Sustaining this assignment of error requires us to remand the county's decision. OAR 661-10-071(2)(c). On remand, the board of commissioners will have to reopen the evidentiary record for receipt of at least the substance of the commissioners' site observations and rebuttal evidence from the parties. Consequently, we address the remainder of petitioners' assignments of error only to the extent they raise non-evidentiary legal issues, the resolution of which could be helpful to the parties on remand.

1 supply, sewage disposal, school
2 capacity, fire protection, surveying,
3 and possibly other requirements must be
4 satisfied.

5 "(2) That the development does not seriously
6 interfere with accepted farming, timber
7 production, and rangeland practices in
8 areas affected by the proposal; and that
9 it is important to protect both the
10 economic and social integrity of
11 farmland, timberland and rangeland in
12 order to maintain or improve the
13 economic base and the quality of living
14 important to residents of Union County.

15 "(3) That the proposal is consistent with the
16 need to minimize flood damage."

17 In addition, ZPSO 25.03.1B provides that ten listed
18 "factors" "will be considered to determine suitability of
19 the proposal."³

³The factors listed in ZPSO 25.03.1B are:

- "(1) Land Use Plan and Zoning provisions.
- "(2) Initial and potential future development of the area.
- "(3) Initial and potential future area street design and related requirements.
- "(4) Sewage disposal and water supply provisions.
- "(5) Phone and electrical service availability.
- "(6) Fire protection requirements.
- "(7) School district service capability.
- "(8) Protection of agriculture, timber production, and rangeland areas.
- "(9) Development limitations, e.g., flooding, landslides, seasonal access, etc.

1 Petitioners contend the county findings addressing
2 ZPSO 25.03.1B and .2B fail to provide necessary
3 interpretations of these approval criteria and are
4 impermissibly conclusory. Petitioners also contend the
5 county failed to adopt any findings on certain critical
6 issues, such as:

7 "* * * the adequacy of the water supply in the
8 area, the needed level of fire protection, the
9 capacity of the local schools, the accepted farm
10 and forest practices in the areas affected by the
11 proposal, and the effect of the proposed and
12 potential development on these practices and the
13 economic and social integrity of the farmland,
14 timberland and rangeland in the area." Petition
15 for Review 12.

16 Petitioners further argue the county failed to determine the
17 "overall land use pattern of the area" or what constitutes a
18 material alteration of that pattern.

19 The challenged decision lists ZPSO 25.03.1 and .2 in
20 its "Criteria" section. Record 3-4. The decision includes
21 findings concerning each of the 10 "factors" listed in
22 ZPSO 25.03.1B. Record 6-7. However, some of these findings
23 are not responsive to the ZPSO factors. For instance, the
24 finding for ZPSO 25.03.1B(7) (school district service
25 capability) simply states "[t]he property is in Baker County
26 School District No. 5J." Record 6. It says nothing about
27 the capability of the school district to serve the proposed
28 development. Perhaps more importantly, nothing in the

"(10) Other information as may be pertinent."

1 findings explains how the facts found concerning the 10
2 factors relate to determining the "suitability of the
3 proposal" for partitioning, which is also required by
4 ZPSO 25.03.2B.

5 In addition, the findings addressing ZPSO 25.03.2B
6 concern only that section's requirement that the proposed
7 partition "not materially alter the stability of the land
8 use pattern of the area." Record 7. They do not address
9 the requirements of ZPSO 25.03.2B that the parcel be
10 "suitable for partitioning," or that the proposed partition
11 not "initiate or encourage a pattern of development
12 incompatible with existing area uses." Also, the findings
13 do not address the three "policies" which ZPSO 25.03.2B
14 states "shall be recognized" "in determining suitability,"
15 or interpret ZPSO 25.03.2B with regard to what role these
16 policies serve in making the suitability determination
17 required by that section.

18 Finally, we agree with petitioners that the findings
19 addressing the "stability" provision of ZPSO 25.03.2B are
20 inadequate because they fail to identify the "overall land
21 use pattern in the area." Rather, the findings simply state
22 there are "other small parcels in the area." Record 7.
23 Identifying the area to be considered and the overall land
24 use pattern of that area are prerequisites to determining
25 whether the proposed partition will materially alter the
26 stability of that pattern. See DLCD v. Curry County, 24

1 Or LUBA 200, 203 (1992); Sweeten v. Clackamas County, 17
2 Or LUBA 1234, 1245-46 (1989).

3 The second assignment of error is sustained.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioners challenge the evidentiary support for the
6 county's decision. Because our resolution of the third
7 assignment of error requires that the evidentiary record of
8 the county proceeding be reopened on remand, we do not
9 address this assignment.

10 The county's decision is remanded.