

LAND USE
BOARD OF APPEALS

JUN 13 11 55 AM '80

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

MICHAEL A. MCCRYSTAL and
FRIENDS OF POLK COUNTY,

Petitioners,

vs.

POLK COUNTY,

Respondent.

and

WILLIAM DE MARINI,

Respondent.

LUBA NO. 80-001

FINAL OPINION
AND ORDER

Appeal from Polk County.

Michael A. McCrystal, Dallas, argued the cause and filed a petition for review on his own behalf.

No Appearance for Respondent Polk County

William De Marini, Dallas argued the cause and filed a brief on his own behalf.

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

Reversed.

6/13/80

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).

1 parcel "to replace S.E. 78-56 if approved." Record 18.

2 Apparently, applicants were proceeding as though the original
3 grant of a two parcel partitioning had not been made.

4 The planning director denied special exception request
5 79-73, and his decision was reversed by the county
6 commissioners when appealed by the applicants. Record 8-14 and
7 1-2. Part of the Commissioner's letter of approval included
8 the statement that the Board's approval was "based" on the
9 earlier approval of Special Exception 78-56. Also mentioned in
10 the Board's letter was that when Special Exception 78-56 was
11 heard, "there was evidence that none of the land in the
12 immediate vicinity of the affected parcel was being farmed."
13 The Board concluded that division of the parcel would not be
14 incompatible with farm use nor interfere with farming
15 practices, and the Board additionally found that the parcel was
16 on poor agricultural land and was not generally suitable for
17 the production of crops or livestock.

18 During the course of the hearing on Special Exception
19 79-73, there was mention of the prior partitioning approval on
20 the same property, but the title or number of the previous
21 action was not mentioned. Record 6. Extensive mention of the
22 prior proceedings was included after the close of the time for
23 public testimony on Special Exception 79-73 and before the
24 making of the actual decision. Record 3-5. The staff report
25 dated 9/26/79 mentioned the prior special exception and
26 variance granted by the Commissioners on this property. The

1 Certificate of Mailing

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3
4 I hereby certify that I served the foregoing Final Opinion
5 and Order, for LUBA No. 80-001, on June 13, 1980, by mailing to
6 said parties or their attorney a true copy thereof contained in
7 a sealed envelope with postage prepaid addressed to said
8 parties or their attorney as follows:


9
10 Michael A. McCrystal
4820 Liberty Road
Dallas, OR 97338

Dennis McCaffrey
Legal Counsel
Polk County Courthouse
Dallas, OR 97338

11
12 Walter Scherf
Friends of Polk County
475 Liberty Road
13 Dallas, OR 97338

William De Marini
16a625 Gilliam Road
Dallas, OR 97338

14 DATED this this 13th day of June, 1980.

15
16 
17 Jeanne Hubbard
18 Secretary



STATE OF OREGON

INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION DATE: 5/21/80

FROM: LAND USE BOARD OF APPEALS

SUBJECT: MCCRYSTAL V. POLK COUNTY & DE MARINI
LUBA NO. 80-001

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

This case is about a "special exception" or partitioning approval of a 30-acre parcel of agricultural land into three lots of approximately 10 acres each. The first three assignments of error allege legal or procedural irregularities. Assignment of error no. 4 alleges a violation of statewide goals 3 and 4.

The partitioning occurred on agricultural land consisting of primarily class 3 and 4 soils. It is the Board's conclusion that the county's decision, made by a letter dated December 5, 1979, includes insufficient findings to show compliance with statewide goals 3 and 4. In our discussion assignment of error no. 4, we utilize some of our review under Petitioner's assignment of error no. 3. Assignment of error no. 3 is an allegation of procedural error based on a lack of findings. We believe it will be helpful for the commission to review the goal allegations under assignment of error no. 4 after noting our conclusions under assignment of error no. 3.

Additionally raised by petitioners was your enforcement order against Polk County made earlier this year. The Board has taken the position that that enforcement order is not important to this particular case as a violation of goals 3 and 4 is easily seen by independent means.

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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BEFORE THE LAND USE BOARD OF APPEALS
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MICHAEL A. MCCRYSTAL and)	
FRIENDS OF POLK COUNTY,)	
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Petitioners,)	LUBA NO. 80-001
)	
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)	OPINION AND ORDER
POLK COUNTY,)	
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Respondent.)	
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and)	
)	
WILLIAM DE MARINI,)	
)	
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No Appearance for Respondent Polk County

William De Marini, Dallas argued the cause and filed a brief on his own behalf.

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

Reversed. 5/21/80

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).

1 BAGG, Referee.

2 NATURE OF THE PROCEEDING

3 This case is about "a special exception" grant by Polk
4 County approving a partitioning of 30 acres of land into three
5 lots of approximately 10 acres each. The petitioners ask that
6 the approval be reversed on the ground that the parties were
7 denied due process because they were not given the opportunity
8 to confront evidence of a prior and similar land use action
9 affecting the same property; on the ground that Polk County
10 erred in relying on evidence of prior actions because those
11 actions were themselves invalid; on the ground that the
12 findings are incomplete and conclusory and not supported by
13 substantial evidence; and on the ground that the special
14 exception decision violates state land use goals 3 and 4.

15 PETITIONER'S STANDING

16 Petitioner Michael McCrystal is alleged to be the owner of
17 adjacent property and was entitled to and did receive written
18 notice of this land use action. He appeared in person and by
19 letter before the Polk County governing body. His standing has
20 not been challenged by respondents.

21 The petition alleges that Friends of Polk County derives
22 standing through Mr. McCrystal, who is a member of the Friends
23 of Polk County. However, the Notice of Intent to Appeal
24 includes a statement that Michael McCrystal is appearing before
25 the Board pro se, and that the Friends of Polk County are
26 appearing by and through Walter W. Scherf, the Vice-President

1 of Friends of Polk County. Mr. Scherf is not a member of the
2 Oregon State Bar.

3 At the hearing on the merits of this case held on May 7,
4 1980, Mr. Scherf volunteered that he could not appear for
5 Friends of Polk County as he was not an attorney. Nothing in
6 the file shows any attempt by Mr. Scherf or any other person to
7 include Mr. Scherf as a party in this proceeding.

8 Mr. De Marini has not challenged the standing of Friends of
9 Polk County. However, the admission by Mr. Scherf that he
10 could not appear on behalf of the Friends of Polk County leads
11 this Board to conclude that the Friends of Polk County are not
12 properly parties in this case as they did not appear through a
13 member of the Oregon State Bar in any of the documents filed.
14 A review proceeding before the Land Use Board of Appeals is a
15 "proceeding" under ORS 9.320, and an appearance by a
16 corporation or association may only be by an attorney, who is,
17 a member of the Oregon State Bar. See 35 Op Atty Gen 1088
18 (1972) and 36 Op Atty Gen 960, 989 (1974).¹

19 Friends of Polk County and Walter W. Scherf are, therefore,
20 not parties in this proceeding. Petitioner Michael A.
21 McCrystal, however, is a proper party with standing to bring
22 this appeal.

23 FACTS

24 In late 1978 or early 1979, William and Sam De Marini
25 applied for permission to partition a 30 acre parcel of land
26 consisting of class II and III soils into two residential lots

1 of 15 acres each. Record 10, 28-35. The Polk County
2 ordinances in effect at the time provided new lots could not be
3 created unless access was available to a public road, and no
4 more than four parcels could make use of a private easement,
5 should a public road not be available. A variance procedure
6 was available for this latter requirement, and the applicants
7 made application for such a variance. The variance request was
8 entitled "Variance 78-29," and the partitioning request was
9 entitled "Special Exception 78-56."

10 The planning director (an individual given the authority to
11 initially decide such matters) denied both the special
12 exception and the variance. Record 31-33. The applicants
13 appealed that decision to the Polk County Board of
14 Commissioners, and the Board reversed the planning director and
15 granted both the variance and the special exception. Record
16 20. The only "Findings and Conclusions" that appear to have
17 been adopted by the Board of Commissioners is the one statement
18 that "you will be responsible for upkeep of the road" in a
19 letter from Chairman of the Board of Commissioners Henry (Hank)
20 A. Dougherty to William and Sam De Marini. Record 20.

21 The special exception and the variance were not used by the
22 applicants. In September, 1979, the applicants applied again
23 to the county this time to partition the 30 acre parcel into
24 three lots of approximately 10 acres each. Record 18. It
25 should be noted that the application for special exception (no.
26 79-73) made reference to a proposed division of a 30 acre

1 parcel "to replace S.E. 78-56 if approved." Record 18.

2 Apparently, petitioners were proceeding as though the original
3 grant of a two parcel partitioning had not been made.

4 The planning director denied special exception request
5 79-73, and his decision was reversed by the county
6 commissioners when appealed by the applicants. Record 8-14 and
7 1-2. Part of the Commissioner's letter of approval included
8 the statement that the Board's approval was "based" on the
9 earlier approval of Special Exception 78-56. Also mentioned in
10 the Board's letter was that when Special Exception 78-56 was
11 heard, "there was evidence that none of the land in the
12 immediate vicinity of the affected parcel was being farmed."
13 The Board concluded that division of the parcel would not be
14 incompatible with farm use nor interfere with farming
15 practices, and the Board additionally found that the parcel was
16 on poor agricultural land and was not generally suitable for
17 the production of crops or livestock.

18 During the course of the hearing on Special Exception
19 79-73, there was mention of the prior partitioning approval on
20 the same property, but the title or number of the previous
21 action was not mentioned. Record 6. Extensive mention of the
22 prior proceedings was included after the close of the time for
23 public testimony on Special Exception 79-73 and before the
24 making of the actual decision. Record 3-5. The staff report
25 dated 9/26/79 mentioned the prior special exception and
26 variance granted by the Commissioners on this property. The

1 staff discussion was by way of a history of the property.
2 Record 8-14.

3 The property is zoned under section 137 of the county
4 zoning ordinance. That section constitutes the
5 "agricultural-forestry (AF) zone, which is a combination of
6 forestry and agriculture zone. The permitted uses within that
7 zone appear to be consistent with the permitted uses in
8 exclusive agricultural use zones under ORS 215.203 and ORS
9 215.213

10 ASSIGNMENT OF ERROR NO. 1

11 Assignment of error no. 1 alleges that Polk County erred in
12 its decision of Special Exception 79-73 in its reliance on
13 evidence of the two prior actions (Special Exception 78-56 and
14 Variance 78-29) without giving parties to the later proceeding
15 any prior notice or opportunity to confront that evidence.
16 Petitioners assert that though the fact of the prior actions
17 was known to them and was mentioned in the staff report, there
18 was no analysis by the staff on the part the prior actions were
19 to play in the decision that is the subject of this review
20 proceeding. Petitioners point out that there was no mention in
21 the November 7 hearing, the public hearing on the present
22 proposal, about relying on the prior actions. The chairman
23 "closed the public hearing" at the end of the November 7
24 meeting, and announced a meeting for November 21, 1980 at 10
25 a.m., to render a decision. Record 7.

26 At that November 21 meeting, the Board did, in fact, take

1 additional testimony from Mr. De Marini. There were a number
2 of questions put to Mr. De Marini and answered by him, and it
3 is the Board's view that such questioning by the Board of
4 Commissioners had the effect of reopening the public hearing
5 testimony. Part of that testimony included discussion of the
6 prior land use actions. Record 3-4.

7 There was no indication in the minutes and no fact brought
8 to our attention by the parties to suggest that petitioners
9 took advantage of the notice of the November 21 meeting and
10 appeared at that meeting, or, that if they did appear, they
11 took advantage of the question and answer session between the
12 applicant and the Commissioners to voice their own concerns.
13 The impression given was that the November 21 meeting would be
14 held for giving a decision, not taking testimony. The
15 Petitioners were under no obligation to protect their rights by
16 attending a meeting at which, supposedly, only the Board of
17 Commissioners would be active.

18 This Board believes the circumstances precluded the
19 Petitioners from having an opportunity to rebut the evidence
20 presented on November 21. The existence of the prior
21 proceeding was, in fact, part of the record and Petitioners
22 would have had the opportunity to rebut the prior proceedings
23 at the first public hearing, had they understood the prior
24 proceedings to be "evidence." But, the value of that evidence
25 to the proceeding before the county and the use of that
26 evidence was only brought to light in testimony by the

1 Applicant at the "closed" November 21 hearing. The county's
2 error, then, was in choosing to close the proceeding,
3 prematurely. To "close" a hearing commonly means to take no
4 further evidence. Notice that the hearing was to be reopened
5 was necessary to give the parties their "day in court" before
6 the county commission. Clearly, a remedy for this situation
7 would be for the county not to close the hearing. There is
8 always the possibility that further information is needed and
9 recognizing that possibility and keeping the hearing open would
10 insure due process for the parties and the ability to collect
11 needed information for the county commission. We believe the
12 Petitioners were denied a meaningful opportunity to "rebut" the
13 evidence given at the November 21 hearing. See Fasano vs.
14 Washington Co. Comm., 264 Or 574, 588, 507 P2d 23 (1973).The
15 First Assignment of Error is sustained.

16 ASSIGNMENT OF ERROR NO. 2

17 Assignment of error no. 2 alleges that Polk County erred in
18 relying on evidence of the prior actions, Special Exception
19 78-56 and Variance 78-29, because the prior actions were
20 themselves invalid.

21 We do not need to reach the matter of whether the old land
22 use actions are themselves valid or invalid because the grant
23 of the old two parcel partitioning and variance is not
24 relevant, it seems to us, to a request to divide the same
25 property into three parcels under Special Exception 79-73.
26 Indeed, the application for Special Exception 79-73 is premised

1 on a 30 acre parcel and not the two 15 acre parcels created by
2 Special Exception 78-56.

3 Since respondent's contested order is based on approval of
4 Special Exception 78-56 (Record 1), we sustain this assignment
5 of error because the respondent should not have relied on the
6 prior irrelevant actions to support its decision.

7 ASSIGNMENT OF ERROR NO. 3.

8 Assignment of error no. 3 alleges that the county erred in
9 its grant of Special Exception 79-73 because the findings are
10 vague, incomplete, conclusory and not supported by substantial
11 evidence. Petitioners are correct. As Special Exception 78-56
12 was relied upon by the county Commission in granting Special
13 Exception 79-73, and as Special Exception 78-56 includes no
14 findings, it provides no factual support for Special Exception
15 79-73.

16 In addition, according to Petitioners, the county's
17 findings show (1) failure to consider the statewide planning
18 goals; (2) failure to tie the decision to the county's own
19 zoning ordinance; (3) failure to clearly link the partitioning
20 of the subject property to other land uses in the vicinity; (4)
21 that the county made an illogical conclusion that the use of
22 the subject property would not be incompatible with farming
23 practices in the area; and (5) that the county's general
24 conclusion on the economic feasibility of farming the land is
25 not supported by any particular set of facts.

26 With respect to the petitioner's allegation that the county

1 failed to consider the statewide planning goals, we will
2 consider only goals 3 and 4. Violation of goals 3 and 4 is
3 specifically alleged in assignment of error no. 4, and those
4 are the only goals specifically mentioned by petitioners.
5 Inasmuch as the property in question is agricultural land
6 within the meaning of goal 3, the findings granting the
7 partition must address relevant factors in goal 3. Further,
8 there is evidence in the record that the property includes
9 growing timber and may be suitable for timber production. See
10 the Staff Analysis at pages 8-14 and 28-33. That evidence
11 means goal 4 must be addressed. We discuss goal 3 first.

12 The findings simply do not show that this partitioning (1)
13 will be compatible with the commercial agricultural enterprise
14 in the area or (2) comply with the conversion factors in ORS
15 215.213 for non-farm uses or (3) is supported by a valid
16 exception to goal 3. See Jurgenson v. Union County Court, 42
17 Or App 505, ___ P2d ___ (1979). Findings addressing one of
18 the three above noted criteria must be present when dividing
19 agricultural land, whatever the proposed use of that land may
20 be.

21 What the findings do address in conclusory form is the
22 quality of the agricultural land (it is found to be poor) and
23 the cost of converting the land for agricultural use (it is not
24 economically feasible). In terms of what findings must show
25 and even in terms of what the local zoning ordinance requires,
26 these findings are not sufficient.² The suitability for

1 production of farm, crops and livestock, according to section
2 137.140(b)(4) of the Polk County Zoning Ordinance, must be
3 based upon an evaluation of the "terrain, soil, drainage,
4 flooding, vegetation, location, area of the parcel, and area of
5 surrounding parcels." There is no discussion in the findings
6 of any such evaluation.³

7 With respect to goal 4, as mentioned above, there is
8 evidence in the record that the property has growing timber on
9 it and may be suitable for timber production. The applicant
10 said that his property could be used for timber production.
11 Record 25. There is enough evidence to conclude that this
12 property is comprised at least in part of "lands composed of
13 existing and potential forest land which are suitable for
14 commercial forest use." LCDC Goal 4. The presence of that
15 uncontroverted evidence places a duty on the applicant to
16 address Goal 4 and to show how his proposed partitioning will
17 be in compliance with Goal 4. That showing is not in the
18 record. In lieu of such a showing, the county must take an
19 exception to the Goal, and no exception is evident in the
20 record. Where, as apparently is the case here, the land
21 consists of a combination of agricultural and forest lands,
22 land use actions affecting the property should provide adequate
23 protection for both agricultural and forest uses. See 1000
24 Friends vs. Douglas County, LUBA No. 79-006 (1980) and 1000
25 Friends v. Marion County, LUBA No. 79-005 (1980). The findings
26 in record in this case do not show such protection has been

1 afforded in granting special exception 79-73.

2 In addition, the findings do not fulfill the demands of the
3 zoning ordinance. Section 137.140(b) of the Polk County Zoning
4 Ordinance, the section to which the Commissioners address
5 themselves in the findings, requires under subparagraph (1)
6 that the parcel to be created must be compatible with farm uses
7 described in ORS 215.203 and must be consistent with the
8 "intended purpose in ORS 215.243." The provisions of those two
9 statutes are substantial and require a rather careful analysis
10 of the land and its uses.

11 "(2)(a) As used in this section, 'farm use'
12 means the current employment of land for the primary
13 purpose of obtaining a profit in money by raising,
14 harvesting and selling crops or by the feeding,
15 breeding, management and sale of, or the produce of,
16 livestock, poultry, fur-bearing animals or honeybees
17 or for dairying and the sale of dairy products or any
18 other agricultural or horticultural use or animal
19 husbandry or any combination thereof. 'Farm use'
20 includes the preparation and storage of the products
21 raised on such land for man's use and animal use and
22 disposal by marketing or otherwise. It does not
23 include the use of land subject to the provisions of
24 ORS chapter 321, except land used exclusively for
25 growing cultured Christmas trees as defined in
26 subsection (3) of this section." ORS 215.203(2)(a)

ORS 215.245 provides as follows:

20 "The Legislative Assembly finds and declares
21 that:

22 "(1) Open land uses for agricultural use is an
23 efficient means of conserving natural resources that
24 constitute an important physical, social, aesthetic
25 and economic asset to all of the people of this state,
26 whether living in rural, urban or metropolitan areas
of the state.

"(2) The preservation of a maximum amount of the
limited supply of agricultural land is necessary to

1 the conservation of the state's economic resources and
2 the preservation of such land in large blocks is
3 necessary in maintaining the agricultural economy of
4 the state and for the assurance of adequate, healthful
5 and nutritious food for the people of this state and
6 nation.

7 "Expansion of urban development into rural areas
8 is a matter of public concern because of the necessary
9 increases in costs of community services, conflicts
10 between farm and urban activities and the loss of open
11 space and natural beauty around urban centers
12 occurring as the result of such expansion.

13 "Exclusive farm use zoning as provided by law,
14 substantially limits alternatives to the use of rural
15 land and, with the importance of rural lands to the
16 public, justifies incentives and privileges offered to
17 encourage owners of rural lands to hold such lands in
18 exclusive farm use zones." ORS 215.243

19 No analysis of the factors given in the quoted statute appears
20 in the findings.

21 In subparagraph (2) of Section 137.140(b) the ordinance
22 requires that parcels with nonfarm uses may not interfere with
23 accepted farming practices as described in ORS 215.203(2)(c).

24 "(c) As used in this subsection, 'accepted
25 farming practice' means a mode of operation that is
26 common to farms of a similar nature, necessary for the
27 operation of such farms to obtain a profit in money,
28 and customarily utilized in conjunction with farm
29 use." ORS 215.203(c)

30 Again, the provisions of that statute are not addressed in the
31 findings.

32 Regardless, then, of whether the property will be put to
33 farm or non-farm use, the findings in the letter granting
34 Special Exception 79-73 are inadequate.

35 Assignment of error no. 3 is sustained.

1 ASSIGNMENT OF ERROR NO. 4

2 Assignment of error no. 4 alleges that Polk County erred in
3 its approval of Special Exception 79-73 "Because its Decision
4 to Partition Agricultural Land for Residential Use Violates
5 State-Wide Planning Goals 3 and 4." The Board agrees with this
6 allegation with respect to Goals 3 and 4 for the reasons stated
7 in the discussion of assignment of error no. 3.

8 Petitioners have attempted to use an LCDC enforcement order
9 issued in January to show that Polk County's AF zone is not a
10 valid exclusive farm use zone or timber conservation zone as
11 required under Goals 3 and 4 respectively. Petitioners say
12 that it follows that the decision in this case does not comply
13 with Goals 3 and 4. Respondent replies that the enforcement
14 order was issued after special exceptions 79-73 was granted,
15 and that the enforcement order should not be used
16 retroactively.

17 Our review of this case was based upon not only compliance
18 with the AF zone, but also upon compliance with statewide land
19 use goals. From our discussion above, it has been shown that
20 the land use action appears not to have complied with either
21 the AF zone or statewide goals numbers 3 and 4, and it is
22 unnecessary for the Board to look past the applicability of the
23 LCDC enforcement order.

24 Assignment of error no. 4 is sustained.

25 The grant of special exceptions 79-73 is reversed.

1 FOOTNOTE

2 1

3 "It accordingly follows that it is unlawful for
4 any person who is not an active member of the Oregon
5 State Bar to represent another in proceedings before
6 the Public Employe Relations Board under ORS 240.560,
7 or in any contested case proceedings before an
8 administrative agency under ORS 183.310 to 183.500.
9 *** We affirm the previous opinion, [of the Attorney
10 General] and conclude that the Public Employe
11 Relations Board may not permit a union business agent,
12 who is not a member of the Oregon State Bar, to
13 represent an employe in a disciplinary matter before
14 the Board."

10 2

11 "What is needed for adequate judicial review is a
12 clear statement of what, specifically, the
13 decision-making body believes, after hearing and
14 considering all the evidence, to be the relevant and
15 important facts upon which its decision is based.
16 Conclusions are not sufficient." Sunnyside
17 Neighborhood v. Clackamas Co. Comm., 280 Or 3, 21,
18 569 P2d 1063 (1977).

15 "Findings are important only insofar as they
16 relate to the objectives and policies to which the
17 planning government is committed by its plan or by
18 state law, goals or guidelines. Consequently findings
19 must make clear what these objectives or policies are
20 as applied in the concrete situation. Thereafter,
21 findings must describe how or why the proposed action
22 will in fact serve these objectives or policies."
23 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or
24 3, 22, 569 P2d 1063 (1977).

21 3

22 Not only does the county's letter order of
23 December 5, lack the detailed findings and conclusions
24 which the county must make under section 137.140(b) of
25 its own ordinance, a search of the record in this case
26 reveals insufficient facts upon which the
27 commissioners might base the conclusions that they do
28 make in their letter.