

AUG 31 10 39 AM '82

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

J. MILO WALTER,

Petitioner,

v.

LINN COUNTY BOARD OF
COMMISSIONERS,

Respondent.

LUBA NO. 82-033

FINAL OPINION
AND ORDER

Appeal from Linn County.

Ben C. Fetherston, Jr., Portland, filed a petition for review on behalf of Petitioner. With him on the brief was John J. Haugh, P.C.

Respondent did not appear.

COX, Referee; REYNOLDS, Chief Referee; BAGG, Referee; participated in the decision.

Reversed.

8/31/82

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 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioner appeals Linn County Order No. 82-078 dated March
4 17, 1982 wherein the Linn County Board of Commissioners granted
5 conditional use permits and variances to F. G. Baker for a land
6 division in an exclusive farm use zone. The contested decision
7 also allows the location of non-farm dwellings on the land.

8 ALLEGATIONS OF ERROR

9 Petitioner asserts the following as assignments of error:

10 "A. The Linn County Board of Commissioners's
11 conclusion that the subject land is not suitable for
12 farm crops because of its size is not supported by its
13 findings of fact."

14 "B. The Linn County Board of Commissioner's Order
15 granting a conditional use permit and a variance
16 because of the subject land is not suitable for farm
17 crops because of its size is based on an erroneous
18 construction of the law."

16 FACTS

17 On March 17, 1982, the Linn County Board of Commissioners
18 approved a conditional use permit and variance for F. G. Baker
19 reversing the decision of the Linn County Planning Commission.
20 The conditional use permit allows the location of a non-resource
21 related residence on each of three tax lots. Those tax lots
22 are identified as 301, 302 and 303, which when combined with
23 tax lot 300, total the subject parcel which is 7.04 acres. The
24 parcel and surrounding land is located in an exclusive farm use
25 zone. More than 90 percent of the area of tax lots 300, 301,
26 302 and 303 is composed of Newberg fine sandy loam soils which

1 carry a Soil Conservation Service Class II designation.

2 The land is currently in agricultural use. The majority of
3 the land is planted in a field crop and there is one
4 residential dwelling (located on tax lot 300). To the
5 immediate west, and south of the subject property is land used
6 for an orchard and grazing. The land to the east of the
7 subject parcel is in field crops, orchard and pasture use. To
8 the north of the subject parcel, across the Santiam River,
9 farming is the primary land use.

10 DECISION

11 Taken as a whole, petitioner's allegations of error
12 indicate he believes ORS 215.213(3) controls the Linn County
13 decision and Linn County failed to properly apply that
14 statutory standard. We agree and reverse the Linn County
15 decision. ORS 215.213(3) states:

16 "Single family residential dwellings, not provided in
17 conjunction with farm use, may be established, subject
18 to approval of the governing body or its designate in
any area zoned for exclusive farm use upon a finding
that each such proposed dwelling:

19 "(a) Is compatible with farm uses described in ORS
20 215.203(2) and is consistent with the intent and
purposes set forth in ORS 215.243;

21 "(b) Does not interfere seriously with accepted
22 farming practice as defined in ORS 215.203(2)(c),
on adjacent lands devoted to farm use;

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

25 "(d) Is situated upon generally unsuitable land for
26 the production of farm crops and livestock,
considering the terrain, adverse soil or land

1 conditions, drainage and flooding, vegetation,
2 location and size of the tracts; and

3 "(e) Complies with such other conditions as the
4 governing body or its designate considers
5 necessary."

6 The county made 18 findings which it entitled "Basic
7 Facts." Included in those facts was the finding that "more
8 than 90 percent of the area including the four tax lots, is in
9 Newberg fine sandy loam soils which is a Class II soil for
10 agricultural use." In addition, the county found "the subject
11 tax lots are being managed as one farm unit which is now in a
12 field crop." The county also found that "surrounding zoning is
13 exclusive farm use except for a rural residential zone about
14 300 feet to the east of the subject tax lots." In describing
15 the surrounding area, the county found:

16 "an orchard and a field used for cattle and horse
17 grazing lie immediately west and south of the subject
18 parcels. The land to the east is in field crop,
19 orchard and pasture use. North of the subject tax
20 lots and across the Santiam River, farming is the
21 primary land use."

22 After going through its list of "Basic Facts," the county
23 made the following legal conclusions arguably relevant to the
24 issues before us:

25 "2. The subject tax lots include only 7.04 acres
26 which is not a large enough area to be defined as
27 a commercial agricultural unit.

28 "3. The subject 7.04 acre area is not suitable for
29 farm crops because of its size and it includes an
30 existing dwelling."

31 The fact the parcel contains a dwelling has no bearing on
32 the suitability of the parcel to grow crops. The conclusions

1 indicating the parcel is not suitable for farm crops because of
2 its size are not supported by any finding of fact. The only
3 "finding" even remotely addressing the conclusions that the
4 property is not suitable for farm crops because of its size
5 states:

6 "Testimony was submitted by the applicant as follows:

7 "* * *

8 "b. The total area including all the tax lots is not
9 big enough to farm economically but on an
10 individual basis (each parcel would be) very
11 productive to the owner."

12 The above quoted "finding" is not a finding at all but merely a
13 recitation of evidence. Norvell v. Portland Area LGBC, 43 Or
14 App 849, 852, 604 P2d 896 (1979).

15 In addition to relying on unsupported conclusions, the
16 county has misapplied ORS 215.213(3)(d). First, the county's
17 conclusions of law (2 and 3 supra) are inconsistent with its
18 finding that the land is presently being used as a farm unit
19 and is in crops. Second, contrary to the conclusion drawn by
20 Linn County, land is not to be deemed unsuitable for farm crops
21 solely because the parcel is too small. As this Board has held
22 in Stringer v. Polk County, 1 Or LUBA 104 (1980), citing
23 Rutherford v. Armstrong, 31 Or App 1319, 1327, 572 P2d 1331
24 (1977):

25 "The fact that the property can not be farmed as an
26 economically self-sufficient farm unit is irrelevant
if it is otherwise suitable to produce farm crops and
livestock."

The Rutherford court also stated at 31 Or App 1324, in review

1 of the record in that case, "there is no evidence in the record
2 that the subject five acre parcel can not be sold, leased or by
3 some other arrangement put to profitable agricultural use."
4 That same statement can be made regarding the record in this
5 case.

6 Based on the foregoing, we hold that the county's decision
7 shall be reversed for failure to properly apply 215.213(3)(d)
8 and because its conclusions of law are not supported by
9 sufficient findings of fact.

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