BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TIBOR STEFANSKY, Petitioner, vs. GRANT COUNTY, OREGON, a municipal corporation; and MARK and SANDRA MURRAY. Respondents.	LUBA No. 84-039 FINAL OPINION AND ORDER

Appeal from Grant County.

Steven H. Corey, Pendleton, filed the Petition for Review and argued the cause on behalf of petitioner. With him on the brief were Corey, Byler, Rew, Lorenzen & Hojem.

BAGG, Chief Referee; DUBAY, Referee; KRESSEL, Referee; participated in the decision.

REMANDED 09/07/84

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioner appeals issuance of a conditional use permit allowing Respondents Mark and Sandra Murray to construct a non-farm single family residence on rural land in Grant County. Petitioner asks LUBA to reverse the decision.[1]

FACTS

Respondents Murray purchased 11 acres of a 160 acre farm in 1981. In 1982, they obtained a water permit to irrigate 10 acres, and in April, 1983, they acquired an additional 6.3 acres of the same original 160 acre parcel. Also in April of 1983, Respondents Murray deeded a part of the land to Mr. Murray alone and a part to their son, with husband and wife retaining a third small parcel.

In July, 1983, Mr. Murray obtained a "zoning clearance" from the Grant County Planning Department to construct a dwelling on the property.[2] Petitioner herein contested the clearance and asked for a hearing. The application was eventually withdrawn. A new application was submitted in September, 1983, seeking a conditional use permit. The Grant County Planning Commission heard the matter and granted the conditional use permit in November, 1983. That decision was appealed to the Grant County Court which issued a final decision approving the request on April 18, 1984. This appeal followed.

ASSIGNMENT OF ERROR No. 1

"Respondent Grant County failed to make each of the required findings under ORS 215.283(3)."

ORS 215.283(3) provides:

"[S]ingle-family residential dwellings, not provided in conjunction with farm use, may be established, subject 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:

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

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

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

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

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

Petitioner first claims the county court failed to make findings required under ORS 215.283(3)(a). This criterion requires a showing of compatibility with farm uses. In this case, the county court relied on the conclusion of its planning commission that the site is poorly suited for agricultural use and on the companion conclusion that there is no evidence

establishing past conflicts between residential uses and agricultural uses in the area. These findings do not fully respond to the criterion. In order to show that the use is compatible, the county must describe the farm uses in the area and explain why the proposed use will be compatible with these existing agricultural uses. If it is believed the proposed use will not negatively impact surrounding agricultural uses, findings of fact supporting that conclusion must be adopted.

Petitioner next claims the county court did not make adequate findings of noninterference with "accepted farming practices" as required by ORS 215.283(3)(b). We agree. The county has neither described specific farming practices on the agricultural lands in the area nor explained how the proposed use will interact with them. The county's general finding that the existing five non-farm residences in the area have not interferred with farm uses may be relevant to whether the challenged use satisfies the criterion, but it is not sufficient. Such a statement is not equivalent to an affirmative finding that this non-farm use will not interfere with the specific farm use nearby. The burden is on the applicant to show the use will not interfere with accepting farming practices, not on the petitioner to show there will be interference. See Jorgenson v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979).

Petitioner also argues the county failed to make adequate findings showing the proposed non-farm dwelling will not

materially alter the overall land use pattern of the area, as required under ORS 215.213(3)(c). Petitioner characterizes the one county finding that bears on this issue as a mere conclusion. The county found the use "is not detrimental to the site nor the surrounding agricultural operations." Record T-931.

The findings made by the county court and those made by the planning commission and incorporated in the county court's order do not address whether the proposed home is detrimental to the site or surrounding agricultural operations. With the exception of the conclusion by the county court mentioned supra, the findings simply state that there are agricultural units in the area, that there are residences in the area, and there is no evidence establishing any past conflicts with farm uses in the area. There is no discussion of the "overall land use pattern" in this particular area of Grant County or whether this proposed conditional use will alter the stability of the overall land use pattern.

The last complaint in the first assignment of error is that the county failed to make an adequate finding that the land proposed for the conditional use was "generally unsuitable" for production of farm crops and livestock as required by ORS 215.283(3)(d).

The county found that there was a grazing season on the property. See Record T-940. The county found the dwelling would be situated on land unsuitable for agricultural use

because of "terrain, adverse soil or land conditions, vegetation, seasonal use limitations, use capability ratings, irrigation/cultivation limitations, locations and size of tract." Record T-945. There are more specific findings about the kinds of soils on the property and about the suitability for particular kinds of agricultural use. See Record T-940. For example, the county found

> "Specific use potential ratings include the following:
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> > "a) Grain seed crops-very poor; b) Grasses and lagumes-very poor; c) Wild herbaceous plants-fair; d) Shrubs-poor; e) Range land wildlife-poor; f) Grazing season-March 15 to July 1; and g) Is not considered arable."

This finding does not support a conclusion the property is not generally suited for agricultural use. In fact, the finding includes a statement the property is usable for grazing. While the property may be of poor quality for some kinds of agricultural activities, its suitability for one agricultural use, grazing, prevents the county from making the affirmative determination required by the statute. See Rutherford v. Armstrong, 31 Or App 1319, 527 P2d 1331 (1977) and Pilcher v. Marion County, 2 Or LUBA 309 (1981).

The first assignment of error is sustained.

ASSIGNMENT OF ERROR NO. 2

> "Respondent Grant County's findings under ORS 215.283(3) are not supported by substantial evidence in the record."

We hesitate to review the county's findings against the

record as requested. In Assignment of Error No. 1, we held the county's findings failed to meet the requirements of ORS 215.283(3)(a-d). Whether or not the findings the county made are supported by substantial evidence is not particularly important when the findings do not adequately address applicable criteria. It is only when a finding properly addresses the criterion that an inquiry into whether or not the finding is supported by substantial evidence is profitable.[3]

ASSIGNMENT OF ERROR NO. 3

> "Respondent Grant County erred in recognizing the creation of an illegal parcel, and in allowing the conditional use application to be processed when it was founded upon an illegal partitioning of land."

In this assignment of error, the petitioner alleges the manner in which the property was purchased and divided amounts to a major partition, not a minor partition as claimed by the county. The divisions which have occurred constitute illegal partitions because, according to petitioner, no roadway abuts the property and the necessary approval for a major partition was not obtained. See ORS 92.010(2); 92.014. If the property in question is not a legally constituted lot, no conditional use permit can be granted, according to petitioner.

Ordinarily, we would not consider it appropriate, in reviewing approval of a conditional use permit, to take up claims concerning prior actions relating to the property. Generally, our review function is limited to consideration of the approval criteria applied by the decisionmaker to the

permit under appeal. Our jurisdiction does not encompass all questions which might be relevant to the use of the property. See ORS 197.825; ORS 197.835(1) through (8).[4] However, in this case it appears the county considered petitioner's claim that issuance of the permit was barred by the fact the subject property had been illegally created. In rejecting the claim, the county discussed the partition(s) and made findings concerning them in its order. Accordingly, we believe the claim is subject to our review.[5] See Forman v. Clatsop County, 63 Or App 617, 665 P2d 365 (1983).

The county's findings about the partition(s) are confusing because they appear to say that the county views no major partition occurred when the first 11.1 acre lot was created in 1981, but then the county acknowledged transfers between family members which took place in 1983. The county apparently regards these transfers as outside of its review on the grounds that the divisions occurred for "estate planning purposes." However, divisions for estate planning purposes are not accepted from the definition of "partition" contained in ORS 92.010(8). Further complicating the matter is the county's finding that "as of December 8, 1981," the county had no ordinance controlling minor partitions. Record T-936. The record reveals the matter of compliance with the partitioning requirements to have been a major concern at the county court hearing, and the findings seem to acknowledge that the legality of the lot divisions is a relevant issue, but the findings fail

to answer adequately whether the divisions comply with applicable county requirements or not.

Because this case has to be remanded for adequate findings addressing ORS 215.283(3), we believe it appropriate to remand this issue for a discussion of the legality of the partitions and whether the partitions have any effect on this conditional use application. See footnote 4, supra.

ASSIGNMENT OF ERROR NO. 4

> "Respondent Grant County found, contrary to substantial evidence, that the 1982 Murray water right application did not show an intent to use the land for agricultural purposes."

In this assignment of error, petitioner advises that Respondents Murray filed an application for a water permit. The application shows an intent to farm the property, according to petitioner. As we understand the argument, an intent to farm the property proves that the land is suitable for agricultural use.

We fail to understand how seeking and obtaining a water right for irrigation purposes, and, indeed, farming the land can warrant reversal or remand. While this evidence may be relevant to whether the land is suited for the production of farm products, it is not of itself a circumstance requiring us to reverse or remand the decision.

This matter is remanded to Grant County for further proceedings. Specifically, the county needs to address whether the legality of the partitions is an issue in the grant of a

conditional use permit and, if so, whether the partitions met county and state requirements. Also, the county must address whether the proposal meets the criteria for creation of non-farm uses in ORS 215.283. In particular, the county must consider the agricultural activities in the area and whether the proposed use will interfere with these agricultural uses. See our discussion of Assignment of Error No. 1, supra.[6]

FOOTNOTES

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A brief was filed by Grant County. The brief arrived too late for our consideration. We note, however, that our opinion rests on the quality of the findings and does not require legal analysis depending on the arguments of the parties.

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We understand this term to mean certification that the proposal does not require further county review and is permitted under the zoning ordinance.

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The record contains considerable testimony on both sides of the question of whether this use would affect the overall land use pattern of the area and whether the property is located on land generally unsuitable for agricultural use.

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See also Ludwick v. Yamhill County, 294 Or 778, 663 P2d 398 (1983). We believe the Ludwick decision is relevant because the county in that case included in its ordinance a requirement that conditional use permits only be issued for "existing legal lots of record." The Supreme Court held the county was therefore obliged to inquire into the legal status of the land to be benefited by the permit. We do not know whether the Grant County Ordinance contains a similar provision.

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The county findings recite the following:

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"On April 6, 1983, the subject 18 + acres of contiguous Murray ownership were segregated into three ownerships vested in the names of Mark Muray, Sandra Murray, and Mark and Sandra Murray; such was attested to by the applicants as being done for estate planning purposes; relative thereto, applicable state land use regulations set forth by Section 9, Chapter 88-4, OR Law 1981 as amended by Section 14, Senate Bill 237, OR Law 1903 provide that...."

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"(2) (a)....only one lot of record exists when:

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"(A) A lot or parcel that is within the definition of a 'lot of record' is contiguous to one or more lots or parcels tht are within the definition of a 'lot of record'; and

"(B) Greater than possessory interests are held in those contiguous lots, parcels or lots and parcels by the same person, spouses or a single partnership or business entity, separately or in tenancy in common...." Record T-939.

* * *

"(2) At the time the original 11.10 acre parcel was created on 8 December 1981 there was no violation of State regulations governing major partitions and the Conty did not have any applicable partitioning regulations, nor was such mandated by applicable State Statute. Further, the additional lands added to the original parcel did not constitute a violation of any applicable State or County partitioning regulations. Finally, there was no evidence establishing an intent to circumvent any applicable State or County land division regulations." Record T-943-944. See also the finding at T-936.

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[6] The Grant County Comprehensive Plan has not been acknowledged by LCDC. Presumably, Statewide Land Use Planning Goal 3 and perhaps Goal 4 are applicable and should be addressed on remand.