BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

EARL BRUCK, Petitioner,	)	LUBA No. 87-027
vs.	)	FINAL OPINION AND ORDER
CLACKAMAS COUNTY, Respondent.	)	

Appeal from Clackamas County.

John E. Frohnmayer, Portland, filed the petition for review and argued on behalf of petitioner.

Michael E. Judd, Oregon City, filed a response brief and argued on behalf of Respondent County.

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

REMANDED 07/16/87

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

Opinion by DuBay.

NATURE OF DECISION

This is an appeal from the county's order approving a non-farm dwelling on property zoned for exclusive farm use.

FACTS

The approximately two-acre tract is zoned EFU-20, Exclusive Farm Use, 20-acre minimum lot size. It is located in an area with several lots below the minimum lot size, on some of which are residences. The tract was used for production of grain and hay and as pasture until 1984.

The county planning department first approved the application. That decision was appealed to the county commission which also approved the permit. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner alleges the county's findings concerning suitability of the tract for farm use are inadequate and not supported by substantial evidence in the record. The challenged findings are as follows:

> The proposed use is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil and land conditions, drainage and flooding, vegetation, location and size of the tract. The parcel is a separate legal lot of record. The site contains predominantly Class VI agricultural soils (Xerochrepts and Haploxeralls)." Record at 3.

Petitioner first says the finding that the site contains Class VI agricultural soils is incorrect and that the only

evidence in the record is that the soils are predominantly Class II. The county concedes that the findings are incorrect. We need not discuss the matter further.

Petitioner also alleges the findings state conclusions only and are not supported by any evidence that the property is unsuitable for farm use.

We agree the findings state conclusions only. The first sentence of the challenged finding affirmatively states the tract is unsuitable for the production of farm crops and livestock considering the factors enumerated in the ordinance. No facts are stated in support of this conclusion. Findings of this type do not explain why the criteria are satisfied. McNulty v. City of Lake Oswego, ___ Or LUBA ___ (LUBA No. 86-050, October 2, 1986). The added statement that the parcel is a separate lot of record also provides no information about the suitability of the property for farm use.

Respondent relies on statements by individual commission members and other evidence in the record to show that the conclusion about suitability for farm use was based on factors other than soil type. Comments of the commissioners made during the hearing on the matter do not serve as findings of the commission. Jackson-Josephine Forest Farm Assn. v. Josephine County, 12 Or LUBA 47, 50 (1984). We may only review the findings the deciding body did make.[1] Without adequate findings setting forth the facts relied upon and an explanation why those facts support a conclusion that applicable criteria

are met, the decision must be remanded for adoption of the necessary findings. Hoffman v. Dupont, 49 Or App 699, 621 P2d 63 (1980).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner challenges the findings addressing the ordinance requirement that the proposed non-farm dwelling

> "does not materially alter the stability of the overall land use pattern of the area." Clackamas Development Code (CDC) Section 401.05A.3

Petitioner alleges the county did not identify what area was evaluated to arrive at the conclusion the proposed use would satisfy this criterion.

The county found:

> "This area is not a prime agricultural area. There are numerous dwellings on small parcels to the north, northeast, and east. The parcel is a legal lot of record. No division is proposed. Based on these facts, staff concludes the proposal is consistent with the land use pattern in the area." Record at 3.

Respondent argues that the order shows the pattern of land use in the immediate vicinity was considered, and that the county was entitled to restrict its evaluation to this limited area.

We do not read the findings as limiting the area considered to the immediate vicinity as respondent contends. The reference to "small parcels to the north, northeast, and east" is silent about their distance from the subject parcel. Assuming, however, that the commission did limit its

consideration to the immediate vicinity, neither the findings nor respondent's arguments in this appeal set forth a basis for placing this limitation on the area evaluated.

In Resseger v. Clackamas County, 7 Or LUBA 154 (1983) the Board rejected a similar contention. There, the county found there were predominantly five acre parcels on one side of a road and lots ranging in size from five to nine acres immediately adjacent to the road on the other side. The Board held that limiting consideration to the immediate vicinity of a parcel does not provide analysis of the overall land use pattern of the area as the criterion requires. Resseger, supra at 158. Nothing presented here convinces us to depart from that view.

Respondent contends the county is entitled to interpret its ordinances to permit consideration of a limited area. Respondent's argument must be rejected in this case for two reasons. First, as noted above, the findings are ambiguous about the location of the area the county did consider. Second, the findings state no facts justifying a limited view of the "overall land use pattern." As was stated in Resseger, supra:

> "The county needs to explain its area of study or explain how it arrives at an interpretation of the ordinance that would permit so limited a view of 'area.'" (Emphasis added.) Resseger, supra, at 158.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner alleges no substantial evidence supports the findings that the proposed non-farm dwelling will not seriously interfere with accepted farming practices on adjacent lands devoted to farm use. Petitioner also alleges the findings inadequately address issues raised by petitioner at the hearing. Petitioner testified at the hearing that he ground-sprays his adjacent farm about 6-8 times a year, that the sprays are hazardous, that only one residence adjoins his property, and that he is concerned that additional residences could interfere with his spraying. Petitioner contends the county was required to address the effect of an additional residence next to his farm on his spraying program. Petitioner cites Schaad v. Clackamas County, ___ Or LUBA ___, (LUBA No. 86-042, October 11, 1986).

In Schaad we held the county's order should have addressed testimony that some farmers in the area stopped spraying after receiving complaints and that disputes over spraying had increased. Having received evidence of complaints about spraying and some alteration of farmer's practices, the county was obligated to discuss in the final order the impact on spraying practices of complaints by neighbors. Schaad, supra, at 9. The critical issue identified in Schaad was whether a new non-farm residence would seriously interfere with farm practices on adjacent lands devoted to farm use.

The order here reviewed addressed the spraying issue as

follows:

> "The appellant's discussion of possible problems from spray on neighboring properties is balanced by the applicant's statements that there were no known occasions of problems with spraying; the addition of a single new residence to an area that is already substantially developed with single family residences does not appear to constitute serious interference with such practices over what might already be existing." Record at 2.

Petitioner argues these findings miss the mark because the effect of a non-farm dwelling on adjacent lands devoted to farm use is not addressed.

Unlike the county's decision in Schaad, supra, the above finding does address the impacts on farming practices resulting from the addition of a new residence. The finding is supported by petitioner's testimony that his spraying practices have not occasioned any complaints. Petitioner testified that one residence now adjoins his property and that no complaints were ever received about spraying. Record at 11. The county's finding that an additional residence would not increase the impacts on petitioner's spraying operations was reasonable given the testimony.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner's last challenge attacks the finding that the proposed non-farm dwelling is compatible with farm use, a necessary prerequisite to the approval. CDC Section 401.05A.1. The county found:

"The proposed use is compatible with farm uses

> described in subsection 401.03 of this Ordinance and is consistent with the intent and purpose set forth in Oregon Revised Statutes 215.243. Limited farm uses can occur on the property. No land division will occur, and no land suitable for commercial farm use will be lost to residential development." Record at 3.

We agree with petitioner that these findings fail to set forth facts supporting a conclusion the proposed dwelling will be compatible with farm uses. The unexplained reference to "limited farm uses" occuring on the property is inconsistent with other findings related to the suitability of the property for farm use discussed under the first assignment of error. Indeed, that reference, combined with the statement that no commercial farm use will be lost to residential development, ignores the compatibility issue.

We also note that ORS 215.243 articulates a state policy to preserve the maximum amount of agricultural land to conserve the state's economic resources. We have already sustained petitioner's challenge to the county's conclusion that the property is situated on land generally unsuitable for the production of farm crops or livestock. The findings state no facts, therefore, to support the conclusion that the use of the property for non-farm purposes is consistent with ORS 215.243.

The fourth assignment of error is sustained.

The decision is remanded.

FOOTNOTES

[1] The 1987 legislature passed HB 2950 which would allow review of evidence in the record in certain circumstances. See Section 2, HB 2950, amending ORS 197.835(10). The legislation has not been signed by the governor and is not effective at this time.