

LAND USE
BOARD OF APPEALS

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

Nov 8 8 01 AM '88

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MIRIAM D. AUW,)	
)	
Petitioner,)	LUBA No. 88-055
)	
vs.)	FINAL OPINION
)	AND ORDER
MALHEUR COUNTY,)	
)	
Respondent.)	

Appeal from Malheur County.

Miriam D. Auw, Ontario, filed the petition for review and argued on her own behalf.

Patricia Sullivan, Vale, filed the response brief. The county did not participate in oral argument.

AFFIRMED 11/08/88

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

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals a Malheur County Court (county court)
4 order denying her application for a conditional use permit for
5 a non-farm dwelling in the Exclusive Farm Use (EFU) zone.

6 FACTS

7 The parcel on which petitioner wishes to place a non-farm
8 dwelling is 1.86 acres in size and was formerly used as a
9 county gravel pit. The parcel is surrounded by EFU-zoned
10 property which is being used for crops or pasture and is at a
11 lower elevation than the irrigated field to the south and
12 east. The parcel is bordered by a small drainageway to the
13 west and a paved county road to the north.

14 The county planning commission denied the conditional use
15 permit application on May 26, 1988. Petitioner appealed this
16 denial to the county court, which affirmed the planning
17 commission's decision on June 28, 1988. This appeal followed.

18 FIRST ASSIGNMENT OF ERROR

19 "The Planning Staff erred [sic] in stating the
20 granting of this non-farm dwelling would set a
precedent."

21 Petitioner argues the county erred in finding that approval
22 of her conditional use permit application would set a
23 precedent. Petitioner claims her property is unique in the
24 area.

25 The county's findings include the following statements:

26 //

1 "A precedent exists within [sic] any decision
2 rendered. The site is an old County gravel pit sold
3 in 1985 for consideration of \$511. The site is a
4 grandfathered gravel pit only. The deed has the
5 appropriate disclaimer saying no particular use is
6 guaranteed and that it should be checked out at the
7 appropriate Planning Department. Land use law does
8 not intend the final disposition of a gravel pit in
9 EFU zones to one or more home sites.

10 " * * * * *

11 "Because of the factors listed above, staff believes
12 it unwise to allow any use but gravel extraction from
13 the subject site * * * ." Record 28.

14 The above-quoted statements are found in the May 26, 1988
15 planning department staff report. The county argues that "this
16 assignment of error is without merit, as the [statements] by
17 staff were not the basis of the findings of fact by the
18 Planning Commission, which were in turn adopted by the County
19 Court." Respondent's Brief 3. In other words, the county
20 argues that the challenged finding was not part of the county's
21 decision.

22 We disagree. The staff report was adopted by the planning
23 commission as part of its findings of fact. The planning
24 commission's decision states:

25 "The following Findings of Fact were brought out:

26 "- The staff report is to be included.

27 " * * * * * " Record 25.

28 Furthermore, the county court adopted the findings and
29 conclusions of the planning commission, thereby incorporating
30 the staff report into its findings as well. Record 2.

31 Fairly read, petitioner's assignment challenges the
32 evidentiary support for the county's finding that approval of

1 the conditional use permit would set a precedent.¹ When a
2 substantial evidence challenge is made, respondent must direct
3 our attention to evidence in the record that is sufficient to
4 support the challenged finding. McCoy v. Linn County, ___ Or
5 LUBA ___ (LUBA No. 87-046, December 15, 1987), slip op 32;
6 Bowman Park v. City of Albany, 11 Or LUBA 197, 214 (1984); City
7 of Salem v. Families for Responsible Govt, 64 Or App 238, 249,
8 668 P2d 395 (1983). Respondent has not done so.

9 We, therefore, sustain the first assignment of error.²

10 SECOND ASSIGNMENT OF ERROR

11 "The Planning Commission erored [sic] in denying my
12 request 'because of the law.'"

13 The planning commission decision concludes "[t]he
14 application was denied because of the law." Record 25.
15 Petitioner argues as follows:

16 "There was no specific law stated during the meeting
17 that I would be breaking by placing a single-family
18 dwelling on my land. Oregon Statute 215.203 states
19 'Exclusively for farm use except as otherwise provided
in ORS 215.213 or 215.283.' This exception is the
basis for my request." Petition for Review 3.

20 Fairly read, petitioner argues that the county's findings are
21 inadequate because they do not explain the basis for the
22 county's decision and, specifically, do not identify the
23 approval standard(s) with which petitioner's conditional use
24 permit application does not comply.

25 The findings of the staff report, incorporated into the
26 county court's decision are found under the following heading:

1 "Nonfarm Dwelling/Divisions
2 "(ORS 215.283(3))/(215.263(4))"

3 In relevant part, the findings state:

4 "The subject site is nestled roughly 15 feet below and
5 immediately adjacent to a leveled and apparently
6 productive field to the east and south. It is
7 bordered by Holly Road on the north and a drainage
8 swale to the west.

9 "Agricultural practices on the fields above,
10 particularly herbicide and insecticide spraying will
11 adversely impact the quality of the home, perhaps
12 seriously. Errant irrigation water from the field
13 above could do serious property damage to this site.

14 "Because of the factors listed above, staff believes
15 it unwise to allow any use but gravel extraction from
16 the subject site, or it should remain wasteland
17 because of near certain future conflicts between
18 owners of it and adjacent agricultural land."
19 (emphasis added) Record 28.

20 The above-quoted findings identify ORS 215.283(3) as the
21 applicable approval standard and explain that the application
22 was denied because of lack of compatibility between use of the
23 parcel as a homesite and farm use of the adjacent lands.³
24 Thus, we conclude that the county adequately explained that the
25 basis for its denial of the conditional use permit application
26 was failure to comply with ORS 215.283(3)(a).⁴

27 The second assignment of error is denied.

28 The county's decision is affirmed.

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FOOTNOTES

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This finding that petitioner's proposed conditional use would set a precedent was one of the "factors" cited by the county as a basis for its denial of petitioner's application. Petitioner has not challenged this basis for denial on the ground that it does not address an applicable approval criterion of state statute or county ordinance. We, therefore, consider only petitioner's charge that the finding is not supported by substantial evidence.

2
However, we note that in reviewing a local government denial of a requested approval or permit, we examine the decision to determine whether there are findings supporting a conclusion that any one of the approval criteria is not met. McCoy v. Marion County, ___ Or LUBA ___ (LUBA No. 87-063, December 15, 1987), slip op 3; Portland City Temple v. Clackamas County, 11 Or LUBA 70, 78 (1984); Marracci v. City of Scappoose, 26 Or App 131, 135, 552 P2d 552 (1976). In McCoy v. Marion County, supra, we stated:

" * * * If there are adequate findings regarding noncompliance with a required approval criterion and those findings are supported by substantial evidence in the record, the denial will be affirmed. In such cases affirmance is required even if the local government's findings on other applicable criteria are erroneous or unsupported by substantial evidence in the record. This is an extremely heavy burden for petitioners to overcome."

Thus, even though we uphold the first assignment of error, the county's decision must be affirmed if there are other bases for denial relied on in its decision and petitioner fails to challenge these other bases or challenges them unsuccessfully.

3
We note that Malheur County Zoning Ordinance Section 20.5, "Non-Farm Dwellings in an EFU Zone," also establishes as a conditional use permit approval standard that "the use is compatible with farm uses * * * ." MCZO 20.5.A.

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ORS 215.283(3)(a) provides:

"(3) * * * [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) * * * "

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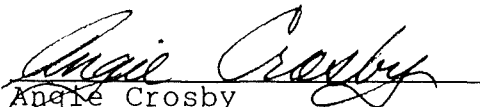
CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 88-055, on November 8, 1988, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Miriam D. Auw
5562 Hwy. Spur 95
Ontario, OR 97914

Pat Sullivan
Legal Counsel
Box 12
Vale, OR 97918

Dated this 8th day of November, 1988.


Angie Crosby
Administrative Assistant