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

PAUL A. LE ROUX,)
)
Petitioner,)
)
vs.)
)
MALHEUR COUNTY,)
)
Respondent,)

LUBA No. 95-155

FINAL OPINION
AND ORDER

Appeal from Malheur County.

Paul A. Le Roux, Vale, filed the petition for review on his own behalf.

Stephanie J. Williams, County Counsel, Vale, filed the response brief.

GUSTAFSON, Referee; LIVINGSTON, Chief Referee; HANNA, Referee, participated in the decision.

REMANDED 12/29/95

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county court approval of a
4 conditional use permit for a non-resource dwelling in an EFU
5 zone.

6 **FACTS**

7 Owners of a 27.5 acre EFU zoned parcel applied for a
8 conditional use permit to legalize a second, non-resource
9 dwelling on their property. The dwelling in question is a
10 mobile home that was placed on the property in 1987 under a
11 permit for a farm labor house. The dwelling has not been
12 used as a farm labor house for at least the last two years.
13 It is now being used as a rental residence.

14 The application for a conditional use permit was
15 submitted after a complaint was filed for illegal use of the
16 property. The county planning commission denied the
17 conditional use application, finding it did not meet at
18 least one of four mandatory "specific" criteria under the
19 county's code. On appeal to the county court, the court
20 reversed the planning commission and approved the
21 application.

22 This appeal followed.

23 **ASSIGNMENT OF ERROR**

24 Petitioner makes one assignment of error: that the
25 county court misapplied the applicable law, and made
26 findings not supported by substantial evidence when it

1 approved the conditional use permit.

2 Petitioner contends first that the county court's
3 findings do not adequately address the four mandatory
4 "specific criteria" applicable to requests for non-resource
5 dwellings in the EFU zone. Those criteria, stated in
6 Malheur County Code 6-6-8-1(A), require that the use:

7 "1. Is compatible with farm uses and is
8 consistent with ORS 215.243; and

9 "2. Does not interfere seriously with accepted
10 farming practices on adjacent lands; and

11 "3. Does not materially alter the stability of
12 the overall land use pattern of the area; and

13 "4. Is situated on generally unsuitable land for
14 the production of farm crops or livestock
15 considering the terrain, adverse soil or land
16 conditions, drainage and flooding, location
17 and size of tract."

18 The county court's findings do not list these
19 applicable criteria, or relate the findings to these or any
20 other criteria. Rather, the county's findings to support
21 approval of the conditional use permit, state:

22 "1. The intended use would be compatible with
23 farm use and consistent with ORS 215.243,
24 Agriculture Land Use Policy. The rental
25 house does not represent an urban activity
26 within a farm zone. There would be no loss
27 of open space or natural beauty as the
28 residence has been in existence for several
29 years and would not negatively impact an
30 important physical, social, aesthetic or
31 economic asset to the people of the state.

32 "2. The portion of the subject parcel upon which
33 the nonfarm residence will be located is not
34 suitable for farm use as a residence is

1 currently located upon it. No productive
2 farm ground will be removed from farm use.

3 "3. The cost to the owner to remove the residence
4 far outweighs the benefit to the community
5 and would create an undue burden on the
6 owner. The effect would have a negative
7 impact on the community.

8 "4. As a condition of approval, the parcel will
9 be disqualified for valuation at tree cash
10 value for farm use under ORS 308.370."^[1]

11 Petitioner objects that the county's findings do not
12 establish compliance with each of the four cited approval
13 criteria. Petitioner's objection is well-taken.

14 The county's findings do not list, or in any way refer
15 to, the approval criteria. Without reference to the
16 approval criteria, we cannot perform our review function or
17 even determine which facts the county found satisfied which
18 approval criteria. Laine v. City of Rockaway Beach, 26 Or
19 LUBA 417 (1994); See DLCD v. Coos County, ___ Or LUBA ___
20 (LUBA No. 95-047, December 7, 1995). Moreover, none of the
21 county's findings is responsive to the approval criteria.²

22 To remedy the deficiencies in the county's findings, in
23 its brief the county recites and addresses the four specific

¹The county court also adopted seven findings of fact from the planning commission's denial of the application, but as with its own findings, the county does not relate any of these factual findings to compliance with any approval criteria.

²The county appears to rely most heavily on the existence of the residence in order to justify its continued presence. It is axiomatic that the presence of an illegally established dwelling cannot be used as its own justification.

1 approval criteria listed above. It also recites and
2 addresses additional "general" criteria, which apparently
3 the county also considers to be applicable.³ The county
4 contends we must overlook the deficiencies in the findings
5 when in its brief it provides both the list of the
6 applicable criteria, and its evaluation of how each of the
7 applicable approval criteria is satisfied.

8 The county's findings must be in the local decision,
9 not in the county's brief. See Eskandarian v. City of
10 Portland, 26 Or LUBA 98 (1993); Canby Quality of Life v.
11 City of Canby, ___ Or LUBA ___ (LUBA No. 95-059, October 31,
12 1995). Those findings must (1) identify the relevant
13 approval standards, (2) set out the facts relied upon, and
14 (3) explain how the facts lead to the conclusion that the
15 request satisfies the approval standards. Sunnyside
16 Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-21, 569
17 P2d 1073 (1977). See also Penland v. Josephine County, 29
18 Or LUBA 213 (1995); Reeves v. Yamhill County, 28 Or LUBA 123
19 (1994); Hart v. Jefferson County, 27 Or LUBA 612 (1994). In

³In its brief the county suggests petitioner has no objection to the county's findings as they relate to the "general" approval criteria, since petitioner did not assign error to compliance with any of those criteria. However, nowhere in the county's record is there any recitation of the applicable approval criteria. It appears that petitioner assigned error to the county's findings regarding compliance with the four specific criteria on the basis that the planning commission's findings indicated that those criteria were applicable. The planning commission did not list or address the general criteria. We will not assume petitioner has no objection to the county's "findings" regarding compliance with the general criteria, when the county has not yet addressed them.

1 addition, when, as here, a party raises issues regarding
2 compliance with any particular approval criteria, it is
3 incumbent upon the local government to address those issues.
4 Hillcrest Vineyard v. Bd. of Comm. Douglas Co., 45 Or App
5 283, 293, 608 P2d 201 (1980); Collier v. Marion County, 29
6 Or LUBA 462 (1995). Moreover, when the evidence is
7 conflicting, the local government may choose which evidence
8 to accept, but must state the facts it relies on and explain
9 why those facts lead to the conclusion that the applicable
10 standard is satisfied. Moore v. Clackamas County, 29 Or
11 LUBA 372 (1995); Reeves v. Yamhill County, 28 Or LUBA 123
12 (1994). The county has not made adequate findings in any of
13 these respects.

14 We do not address further petitioner's contention that
15 the findings are not based on substantial evidence. Since
16 the county's findings do not address the relevant approval
17 criteria, no purpose would be served to further evaluate
18 their evidentiary support.

19 Petitioner's assignment of error is sustained.

20 The county's decision is remanded.