

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

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J. KENNETH & PAULINE SMITH, )  
EUNICE BARGER, MR. & MRS. )  
RAYMOND MILLER, FRED A MARTIN, )  
ROY & ELAINE HEARNE, )

Petitioners, )

vs. )

BAKER COUNTY, )  
DONALD B. DUNN, JR. )

Respondents. )

LUBA No. 85-039

FINAL OPINION  
AND ORDER

Appeal from Baker County.

Kenneth A. Bardizian, Baker, filed the Petition for Review on behalf of Petitioners.

Kenneth C. Hadley, Baker, filed the response brief and argued the cause on behalf of Respondent County.

Donald B. Dunn, Jr., Halfway, filed the response brief and argued the cause on his own behalf.

BAGG, Referee; KRESSEL, Chief Referee; DuBAY, Referee; participated in this decision.

REMANDED

11/27/85

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal a Baker County Court decision approving  
4 the partitioning of a 20 acre tract into one 10 acre parcel and  
5 two 5 acre parcels.

6 STANDING

7 Respondent, Donald B. Dunn, Jr., argues petitioners lack  
8 standing to bring this appeal. Mr. Dunn says petitioners'  
9 reasons for opposing the partitioning are "without proof."<sup>1</sup>

10 Petitioners allege (and respondent does not deny) that each  
11 of them appeared before the county and voiced opposition to the  
12 partitioning. The county decision was against petitioners'  
13 expressed position. This circumstance constitutes  
14 "aggrievement" to petitioners. Appearance before the county  
15 and aggrievement as a result of the decision meets the  
16 statutory criteria for standing in ORS 197.830(3).<sup>2</sup>

17 Jefferson Landfill Committee v. Marion County, 297 Or 280, 686  
18 P2d 310 (1984); Warren v. Lane County, 297 Or 290, 686 P2d 316  
19 (1984).

20 FACTS

21 The Baker County Planning Commission approved the partition  
22 after a hearing on March 28, 1985. Petitioners appealed the  
23 approval to the Baker County Court. The county court adopted  
24 the planning commission's findings and affirmed the planning  
25 commission's decision.

26 The property is in an Exclusive Farm Use (EFU) Zone.

1 FIRST ASSIGNMENT OF ERROR

2 "The Baker County Court's approval of Respondent  
3 Dunn's application violates ORS 215.283(3) and Baker  
County Ordinance § 301(B)(14)(A) and (C)."

4 ORS 215.283(3) provides that single family residential  
5 non-farm dwellings may be provided in EFU zones if the  
6 governing body finds the proposed dwelling:

7 "(a) Is compatible with farm use described in ORS  
8 215.203(2) and consistent with the intent and  
purposes set forth in ORS 215.243;

9 "(b) Does not interfere seriously with accepted  
10 farming practices, as defined in ORS  
215.203(2)(c), on adjacent lands devoted to farm  
11 use;

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

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

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

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19 Similarly, Baker County Ordinance §301(c) provides:

20 "(1) The dwelling or activities associated with the  
21 dwelling will not force a significant change in  
or significantly increase the cost of accepted  
22 farming practices on nearby lands devoted to farm  
use:"

23 "(3) The dwelling is situated on generally unsuitable  
24 land for the production of farm crops and  
livestock considering the terrain, adverse soil  
25 or land conditions, drainage and flooding,  
vegetation and location and size of the tract."<sup>3</sup>

1           Petitioners argue the findings do not satisfy these  
2 standards.  Particularly, petitioners say the county failed to  
3 establish whether adjacent lands are currently employed in farm  
4 use, how large adjacent holdings are and whether the proposed  
5 dwellings are compatible with any farm uses on adjacent lands.  
6 Also, petitioners argue the findings do not show the parcel is  
7 unsuitable for the production of livestock as required by ORS  
8 215.283(3)(d).

9           The county's findings are as follows:

- 10           "1.  The parcel is too small, too rocky and has too  
11           little productive ground to be suitable for  
12           commercial agriculture;
- 13           "2.  The pattern of development in the general  
14           vicinity is small tract, non-commercial farms to  
15           the degree that the area could have qualified for  
16           residential zoning had the area not opposed that  
17           zoning two years ago;
- 18           "3.  The existing state laws relative to septic tanks,  
19           drain fields and domestic wells are designed to  
20           protect public health from contamination;
- 21           "4.  The adjacent farming practices are grazing and  
22           some hay and forest production.  There is no  
23           evidence that two more non-farm residences in the  
24           area will interfere with those farming or timber  
25           operations;
- 26           "5.  The permit will be conditioned upon the applicant  
              disqualifying the land from special farm  
              assessment and obtaining all necessary state  
              permits (DEQ, DOC, and Watermaster)."

          The county's findings do not adequately address the  
criteria in ORS 215.283(3) or county ordinance §301(D).  
Finding 1, which seems to address ORS 215.283(3)(d), is  
deficient in several respects.  First, it fails to set forth

1 the facts underlying the very general statements that the  
2 parcel is "too small, too rocky and has too little productive  
3 ground" to meet the unsuitability test. Second, the finding  
4 measures the land's capabilities against a standard  
5 (suitability for commercial agriculture) not expressed in the  
6 governing statute. As petitioners point out, the statute  
7 authorizes non-farm dwellings only on land generally unsuitable  
8 for "the production of farm crops and livestock..." ORS  
9 215.283(3)(d), (emphasis added). The county's terminology may  
10 be intended as shorthand for the statutory standard, but it is  
11 doubtful to us that the phrases can be equated. The  
12 relationship between the two is not explained in the final  
13 order or the briefs. See Rutherford v. Armstrong, 31 Or App  
14 1319, 572 P2d 1331 (1977); Miller v. Linn County, 4 Or LUBA 350  
15 (1982); Billington v. Polk County, 4 Or LUBA 263 (1981).  
16 Accordingly, we cannot uphold the finding. Also, the phrase  
17 "too little productive ground," does not state facts showing  
18 the property is unsuited for agricultural use.

19 The statement that the property might have qualified for  
20 different zoning, see Finding 2, does not address the issue of  
21 whether the parcel is now suitable for farm use. The finding  
22 may be construed as a reference to the "stability of the  
23 overall land use pattern in the area" (ORS 215.283(3)(c)), but  
24 there is too little information about the area to demonstrate  
25 compliance with the criterion. Finding 3 also does not address  
26 the criteria in ORS 215.283(3)(d). Finding 4 incorrectly

1 shifts the burden of proof to the petitioners. It is the  
2 county's responsibility to state affirmatively that the  
3 proposed uses will not interfere with accepted farming  
4 practices.

5 In summary, petitioners' complaints about the findings are  
6 well taken, and the decision must be remanded. On remand, the  
7 county should inventory farming activities in the area,  
8 consider the suitability of this parcel for farm use and from  
9 this basic information, address the criteria in ORS 215.283 and  
10 the county's own comprehensive plan and land use ordinances.  
11 In that regard, the county's attention is directed to Kenagy v.  
12 Benton County, 6 Or LUBA 93 (1982); Lamb v. Lane County, 6 Or  
13 LUBA 195 (1982); Lamb v. Lane County, 7 Or LUBA 137 (1983).

14 SECOND ASSIGNMENT OF ERROR

15 "The findings of fact by the Baker County Planning  
16 Commission, as adopted by the Baker County Court, are  
inadequate in that they lack sufficient foundation."

17 This assignment of error complains that the county's  
18 findings are not supported by substantial evidence in the  
19 record. See ORS 197.835(8)(a)(C). Petitioners argue that the  
20 county's findings are based solely on a staff report and the  
21 testimony of the applicant.

22 Petitioners do not allege that any particular finding is  
23 not supported by substantial evidence. The staff report lists  
24 numerous facts about whether the property should be  
25 partitioned. The information provided by the applicant is also  
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1 evidentiary support for the decision. Substantial evidence is  
2 evidence "a reasonable mind might accept as adequate to support  
3 the findings...." Christian Retreat Center v. Board of  
4 Commissioners of Washington County, 28 Or App 673, 675, 560 P2d  
5 1100 (1977). The applicant's testimony qualifies under this  
6 test. Without a more particular charge that findings critical  
7 to the decision are not supported by substantial evidence, we  
8 are not able to review petitioners' second assignment of  
9 error.<sup>4</sup> Wyatt v. Cannon Beach, 10 Or LUBA 217 (1984). It is  
10 therefore denied.

11 This matter is remanded to the Baker County Court for  
12 further proceedings not inconsistent with this opinion.

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FOOTNOTES

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In addition, Mr. Dunn believes an attorney representing petitioners has a "conflict of interest" in his representation. Our jurisdiction does not extend to conflict of interest complaints.

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7 ORS 215.283(3) provides:

8 "Subject to ORS 215.288, single-family residential  
9 dwellings, not provided in conjunction with farm use,  
10 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:

11 "(a) Is compatible with farm uses described in ORS  
12 215.203(2) and is consistent with the intent and  
purposes set forth in ORS 215.243;

13 "(b) Does not interfere seriously with accepted  
14 farming practices, as defined in ORS  
215.203(2)(c), on adjacent lands devoted to farm  
15 use;

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

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

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

22 3

23 Section 301(B)(14) incorporates ORS 215.283(3) as a  
24 standard for conditional use approvals. Petitioners'  
25 reference to §301(A) is unclear. Section 301(A) lists  
permitted uses in the EFU Zone.

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Part of petitioners' argument is that though the staff report was read at the county court hearing, "there is no indication of the contents of the Staff Report." Petition for Review at 9. The staff report is part of the record in this proceeding and there is no charge that the report, prepared for the planning commission, was not before the county commissioners when they reviewed the partitioning request. The report provides evidentiary support for the county's decision.