BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRENDA EPP,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

CHARLES SHIRTCLIFF,
Intervenor-Respondent.

LUBA No. 2003-179

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Brenda Epp, Roseburg, filed the petition for review and argued on her own behalf.

No appearance by Douglas County.

Stephen Mountainspring, Roseburg, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich & Aitken, PC.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 02/24/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a land division and non-farm dwelling.

MOTION TO INTERVENE

Charles Shirtcliff (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 108-acre parcel that was split off from a 213-acre ranch in 1997 and is zoned exclusive farm use – grazing. The challenged decision approves a division of the 108-acre parcel into a 107-acre parcel and a one-acre parcel. The nonfarm dwelling is to be located on the one-acre parcel.

The property is located on a ridge between Lookingglass Valley and Happy Valley approximately 20 miles southwest of the City of Roseburg. A rock ridge running east to west divides the property. The slopes to the south of the ridge include generally poor soils. The slopes to the north of the ridge include significant Class IV soils, and are appropriate for agricultural and forest production. The property has been logged twice in the past 100 years.

Currently, the property is undeveloped and is crossed by logging roads and skid trails. Access to the property is via an easement across petitioner's property, the remaining portion of the original 213-acre ranch. The proposed nonfarm dwelling is to be established on the proposed one-acre parcel that will be located on the northern portion of the property. The county planning commission approved the application, and petitioner appealed that approval to the board of county commissioners. The board of county commissioners affirmed the planning commission's decision. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner contends that the county failed to demonstrate that the property is "generally 3 unsuitable for the production of farm crops and livestock or merchantable tree species" as required 4 by the Douglas County Land Use and Development Ordinance (LUDO) and state statute.[1]

5 **A. Location of Parcel**

6 Petitioner argues that the county could not establish that the one-acre parcel is unsuitable for 7 resource use because the location of that one-acre parcel is not properly identified. According to 8 petitioner, because the county relied on various maps to locate the proposed nonresource parcel, 9 the precise location of the parcel cannot be determined, and until the precise location of the parcel is 10 determined no decision regarding suitability of that parcel for resource use is possible.[2]

11 The approximate location of the proposed nonresource parcel is shown on the preliminary 12 partition plan. Under the LUDO, a preliminary partition plan need not include a legal description of 13 the exact location of parcel lines; it is only required to include general information showing parcel 14 dimensions and areas. LUDO 4.250(1)(b)(3). The precise description of parcel lines for the 15 nonresource parcel will occur when the final partition plat is prepared by a professional land 16 surveyor and approved by the county. LUDO 4.250(3)(b). The final partition plat is required to 17 substantially conform to the preliminary partition plan. LUDO 4.250(2)(b)(1).

18 The county's decision makes clear that the intent of the preliminary partition plan was to

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[1] LUDO requirements for division of a nonresource parcel from a resource parcel and for approval of a nonfarm dwelling mirror the statutory requirements for such actions found in ORS 215.263(4)(a)(E) and 215.284(3)(b). LUDO 3.43.100(1)(b) and 3.44.100(1). Those requirements include, among other things, that the dwelling be situated upon a parcel that is:

> "* * * generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel or portion of a lot or parcel may not be considered unsuitable based solely on size or location if the parcel can reasonably be put to farm or forest use in conjunction with other land[.]" LUDO 3.44.100(1).

[2] Intervenor argues that petitioner waived this issue by not raising it below. ORS 197.763(1). Petitioner, however, specifically raised this issue below. Record 84.

1 locate the nonresource parcel in a clearing that is shown in aerial photographs and that is the subject
2 of the soil survey. Record 10. The location of the nonresource parcel is clearly described by the
3 soil scientist's report. Record 363-64. The site includes a circular road system with logging
4 landings and an adjacent boulder field. As a review body, we are authorized to reverse or remand
5 the challenged decision if it is "not supported by substantial evidence in the whole record."
6 ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in
7 reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d
8 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey*
9 *v. Deschutes County*, 21 Or LUBA 118, 123, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In
10 reviewing the evidence, however, we may not substitute our judgment for that of the local decision
11 maker. Rather, we must consider and weigh all the evidence in the record to which we are
12 directed, and determine whether, based on that evidence, the local decision maker's conclusion is
13 supported by substantial evidence. The LUDO does not require a precise legal description of the
14 nonresource parcel. The location of the nonresource parcel is sufficiently described to allow the
15 county to evaluate its suitability for production of farm crops, livestock, and merchantable tree
16 species.

17 This subassignment of error is denied.

18 **B. Forest Capability**

19 Petitioner argues that the county erred by concluding "the production of merchantable tree
20 species [on the nonresource parcel] is irrelevant." Petition for Review 6-7. In actuality, the county
21 determined that "the proposed one acre nonresource parcel is not under forest assessment * * *
22 [and] therefore the suitability of the land for production of merchantable tree species is not relevant
23 to the siting of a dwelling on the proposed parcel." Record 17. The basis for this conclusion is
24 LUDO 3.43.100(1)(b)(5), which requires that a nonresource dwelling must be sited on a portion of
25 the property that is generally unsuitable for the production of merchantable tree species when the
26 property is in forest assessment. Because the county found the proposed nonresource parcel is not

in forest assessment, suitability for the production of merchantable tree species is irrelevant under that section. Furthermore, the challenged finding was an alternative finding. Petitioner does not challenge the county's earlier finding that the nonfarm dwelling "will not be located on a portion of the property that is suitable for growing merchantable tree species. Record 17.

This subassignment of error is denied.

C. General Unsuitability of the Parcel for Resource Uses

Petitioner argues that there is not substantial evidence in the record that the proposed nonresource parcel is generally unsuitable for the production of merchantable tree species. Petitioner relies primarily upon a timber cruise prepared for a possible purchase of the property by petitioner that valued the timber on the entire 108-acre property. According to petitioner, the timber cruise shows the proposed nonresource parcel to be timbered. As intervenor points out, however, the objective of the timber cruise was to determine the total timber and land value of the property as a whole. Record 262. The cruise did not determine if there were smaller areas within the 108 acres that are generally unsuitable for forestry uses. Thus, the timber cruise does not establish that the proposed nonresource parcel is suitable for the production of merchantable tree species. Furthermore, the county also relied upon aerial photographs and the soil report in reaching its conclusion that the nonresource parcel is generally unsuitable for the production of merchantable tree species. The county's decision is supported by substantial evidence.

This subassignment of error is denied.

D. Use in Conjunction With Other Lands

Petitioner argues that even if the proposed nonresource parcel consists of soils that are not suitable for timber production, the nonresource parcel has been put to forest use in conjunction with other adjacent land as described in LUDO 3.44.100(2)(f) and ORS 215.263(4)(E).[3] As intervenor

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[3] LUDO 3.44.100(2)(f) and ORS 215.263(4)(E) provide in pertinent part:

> "A parcel may not be considered unsuitable based solely on size or location if the parcel can reasonably be put to farm or forest use in conjunction with other land."

1 points out, those provisions refer to parcels that are found to be unsuitable "based solely on size or
2 location." In the present appeal, the parcel was found to be unsuitable due to the terrain, adverse
3 soils and land conditions and not due to size or location. Therefore, whether the parcel could be
4 used in conjunction with other land for resource purposes does not, in and of itself, provide a basis
5 for reversal or remand. Furthermore, the reason that petitioner cites for the proposition that the
6 parcel could be used in conjunction with other lands is based on the definition of "forestland"
7 provided by ORS 321.705(3).[4] That definition requires that openings such as the area of the
8 proposed nonresource parcel be "necessary to hold the surrounding forestland in forest use." As
9 intervenor points out, although the parcel will be located on the access road to the remainder of the
10 108-acre parcel there is other land to locate an alternative road if necessary and use of the access
11 road for forest management purposes occurs less than once a year. Thus, the opening is not
12 "necessary" for resource use of the remaining timber parcel.

13 This subassignment of error is denied.

14 **E. County's Response to Specific Evidence**

15 In this subassignment of error, petitioner argues that the county did not respond to ten
16 specific evidentiary matters she raised regarding whether the proposed nonfarm parcel is unsuitable
17 for resource use. A local government is not required to respond specifically to every item of
18 evidence introduced during the course of public proceedings. What is required is that a local
19 government respond to challenges raised to specific approval criteria and explain why those criteria
20 are or are not satisfied. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). All ten of

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[4] ORS 321.705(3) provides:

> "'Forestland' means land which, in the judgment of the State Forester, is suitable for the production of timber and is being utilized primarily for that purpose. Forestland often contains isolated openings, which because of rock outcrops, river wash, swamps, chemical conditions of the soil, brush and other like conditions prevent adequate stocking of such openings for the production of trees of a marketable species. *If such openings in their natural state are necessary to hold the surrounding forestland in forest use through sound management practices, they are deemed fores land.* * * *" (Emphasis added.)

the evidentiary matters raised in this subassignment of error pertain to LUDO 3.43.100(1)(b) regarding the general unsuitability of the land for resource use. The county findings reciting the evidence it relied upon adequately explain why it believes the land is unsuitable for resource use. Those findings are supported by substantial evidence. Petitioner's subassignment of error does not provide a basis for reversal or remand.

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

LUDO 3.43.100(1)(a) and ORS 215.284(3)(a) require the county to determine whether the nonfarm dwelling and land division will force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use. Petitioner argues that the county erred in determining that such changes and costs would not occur.

A. Nearby Farm and Forest Uses

Petitioner argues that the county failed to identify farm and forest uses on nearby lands, thereby fatally undermining the analysis. First, petitioner asserts the county did not consider rotational grazing practices on her property. The county, however, did address farming practices occurring on her property, and petitioner does not challenge that finding. Record 16. Petitioner also claims the county did not identify and consider a 568-acre ranch located to the south. The county, however, did identify that ranch and concluded it would not be adversely affected by the proposed land division and nonfarm dwelling. Record 11. Finally, petitioner claims the county failed to address the impact on three nonfarm parcels along the eastern boundary of the property and a parcel to the west. Intervenor responds that those issues were not raised below. Petitioner has not identified where such issues were raised below, and we will not search the record on petitioner's behalf. Therefore, those issues are waived. ORS 197.763(1); ORS 197.835(3).

This subassignment of error is denied.

1 **B. Relevancy of Findings**

2 Petitioner, in a one-paragraph subassignment of error, asserts that the county improperly
3 relied upon a dozen residentially zoned parcels adjacent to the northwest portion of the study area
4 and the location of the nearest urban growth boundary in making its decision. Again, intervenor
5 responds that these issues were not raised below. Petitioner has not identified where these issues
6 were raised below, nor has petitioner responded to intervenor's challenge. Therefore, these issues
7 are waived.

8 This subassignment of error is denied.

9 **C. Impact on Remainder Parcel**

10 Petitioner claims that the county failed to consider how the creation of a one-acre parcel
11 within a larger timber parcel would affect the farm and forest related activity on the larger remainder
12 parcel. Intervenor responds that this issue was not raised with sufficient specificity to allow the
13 county to respond. The only citation to the record that petitioner provides refers to a letter from
14 another opponent that consists of the following sentence, "[i]t is going to create management
15 problems for the owner of the larger parcel." Record 285. This was only raised in the context of
16 further division of the property, and not in regard to forest management practices. The county
17 responded to this concern by finding that it was unlikely that the property would be further divided.
18 Record 11, 21. Additionally, no further division of the remaining larger parcel is allowed. Record
19 11. Therefore, the county did consider this impact and addressed it.

20 This subassignment of error is denied.

21 The second assignment of error is denied.

22 **THIRD ASSIGNMENT OF ERROR**

23 LUDO 3.43.100(1)(c) and ORS 215.284(3)(d) require that the "dwelling * * * not
24 materially alter the stability of the overall land use pattern of the area." Although petitioner's
25 assignment of error nominally challenges the county's findings addressing this requirement,
26 petitioner's entire argument is that the impact area is not adequately described because the decision

fails to state "why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard." OAR 660-033-0130(4)(a)(D)(i) and (4)(c). While the administrative rule does require this, the LUDO is slightly different. LUDO 3.43.100(1)(c)(1) only requires such an explanation if the study area is less than 2,000 acres. If the study acre is at least 2,000 acres then no such explanation is required.[5] In the present appeal, the study area is over 2,000 acres. Record 14. Therefore, under the LUDO, the county was not required to provide the findings petitioner argues it was required to make. The LUDO is acknowledged to comply with OAR Chapter 660, division 33. Therefore, compliance with the LUDO is sufficient. *DLCD v. Douglas County*, 28 Or LUBA 242, 254 (1994). Petitioner's argument does not provide a basis for reversal or remand. Furthermore, the county adopted extensive findings explaining why it believes the proposed development will not materially alter the stability of the overall land use pattern of the area. Record 14-16. Petitioner does not challenge these findings.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the parcel will be inadequate to meet various siting approval requirements. LUDO 3.44.100(3) provides:

> "The proposed new parcel(s) has appropriate physical characteristics such as adequate drainage, proper sanitation and water facilities to accommodate a residence."

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[5] LUDO 3.43.100(1)(c)(1) provides:

> "Study Area: The applicant shall identify a study area which must include at least 2,000 acres, or a smaller area of not less than 1,000 acres if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other adjacent agricultural areas.
>
> "(a) If a 1,000 acre study area is selected, then findings shall describe the study area and explain why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the required analysis."

1 **A. Stable Slopes**

2 Petitioner devotes considerable time and space to an argument that the proposed nonfarm
3 dwelling parcel is located on unstable slopes. The county considered petitioner's arguments and
4 was not persuaded. Record 18. Those findings are supported by substantial evidence.

5 This subassignment of error is denied.

6 **B. Proper Sanitation and Adequate Water Supply**

7 Petitioner challenges the county's finding that it is feasible to provide water and sanitation to
8 the proposed dwelling. The findings state that approved facilities can be provided. Record 52.
9 Petitioner asserts that this is not supported by substantial evidence in the record.

10 The findings state that a preliminary evaluation of the site by the consulting soil scientist
11 suggests that Department of Environmental Quality (DEQ) approved sanitation facilities can be
12 accommodated for the proposed dwelling. Record 52. As petitioner points out, however, there is
13 apparently no mention of this information in any of the letters from the soil scientist in the record.
14 Intervenor does not dispute this, but instead directs us to the application documents where it is
15 asserted that "[p]reliminary evaluation of the site suggests that DEQ-approved sanitation facilities
16 can be accommodated for the proposed dwelling." Record 335. Thus, although there is no written
17 evidence from the soil scientist regarding the feasibility of providing sanitation facilities, the county
18 apparently relied upon this assertion and the condition approval imposed in the final decision to
19 ensure this approval criterion is satisfied.[6] In the face of a specific challenge to the feasibility of

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[6] Condition of Approval 8 provides:

> "The applicant shall provide written documentation that adequate sanitation is available to each parcel. Prior to final approval, the applicant shall provide:
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> "a. Written verification from [DEQ] that Parcel 1 has an approved site for an on-site septic disposal system; or written documentation from a professional qualified under ORS 700 (i.e., a licensed sanitarian) certifying the soils of Parcel 1 are suitable for septic system installation, and that at least one suitable site for septic installation exists with the boundaries of Parcel 1.

1 providing such sanitation facilities the meager evidence and the condition of approval might not be
2 sufficient to withstand review. Neither petitioner, nor other opponents, raised a specific challenge to
3 the feasibility of obtaining DEQ approval. The only references cited to us by petitioner do not raise
4 such a challenge. The mere mention of the necessity of sanitation facilities does not suffice to require
5 an in-depth feasibility analysis by the county.[7] In the absence of challenge below to the feasibility of
6 obtaining DEQ approval of sanitation facilities, the county properly found that the approval criterion
7 was satisfied through means of the condition of approval.

8 As to other needed facilities, there is a 35-foot wide access and utility easement from the
9 nonresource parcel to the water line of the Umpqua Basin Water Association. Record 153. A
10 booster pump makes it feasible to bring water to the site. Record 274. Springs also exist on the
11 property and could utilized. Record 190. Finally, a well is also a possibility. *Id.* Intervenor has
12 directed us to sufficient evidence in the record demonstrating that it is feasible to provide water to
13 the proposed dwelling.

14 This subassignment of error is denied.

"b. Written documentation from [DEQ] that Parcel 2 has approved means of sanitation. A copy of the approved site evaluation from DEQ will suffice to fulfill this condition." Record 20.

[7] Petitioner stated:

> "I would like to see the preliminary evaluation of the site for the view lot sanitation facilities by the DEQ. We have a developed stock spring and two stock ponds located down hill from the proposed lot. I would need the information to determine how it will impact our farming operation." Record 202.

Another opponent stated:

> "I am also very concerned about the size of the proposed home site. A one-acre parcel seems to be too small for the area. I was under the impression that a five-acre parcel was required to satisfy DEQ for septic disposal reasons. Parcels of under 5-acres are out of character with the rural values of the area. Allowing a smaller parcel will set the stage for further small lots in the area." Record 285.

1 **C. Fire Protection and Prevention**

2 Petitioner combines a number of fire safety arguments based on different approval criteria
3 under this subassignment of error. First, petitioner claims the proposed dwelling cannot
4 accommodate the 100-foot secondary fuel break requirements of LUDO 3.5.170(3)(b) because
5 the proposed parcel is only 225 feet wide. The condition of approval for the 100-foot secondary
6 fuel break, however, does not require that it be located entirely on the subject parcel. Record 21.
7 It only requires that an agreement be recorded in the deed records to provide the fuel break.
8 Petitioner does not argue that obtaining an easement or other agreement to maintain the fuel break is
9 infeasible. Considering the owner of the nonresource and resource parcels is currently the same,
10 there should not be a problem in obtaining an easement from the larger parcel.

11 Next, petitioner argues that a dwelling will increase fire danger and will not improve road
12 access. We are not sure what approval criterion petitioner is referring to. It appears she may be
13 referring to LUDO 3.44.100(3) regarding appropriate physical characteristics. LUDO
14 3.44.100(3), however, makes no mention of fire safety or prevention as an "appropriate physical
15 characteristic" and we do not see that it is. Finally, petitioner cites no other approval criteria
16 regarding fire safety or prevention that are allegedly violated. Petitioner merely challenges the
17 county's findings that there would be a reduced potential for fire hazard. Petitioner does not explain
18 nor do we see what that issue has to do with the applicable approval criteria.

19 The fourth assignment of error is denied.

20 **FIFTH ASSIGNMENT OF ERROR**

21 Petitioner challenges the county's findings that the proposed parcel has adequate access for
22 roads and utilities.

23 **A. Findings**

24 Petitioner argues that the findings regarding road and utility access are inadequate because
25 "they do not address the requirements in Chapter 4 of the LUDO." Petition for Review 21. LUDO
26 Chapter 4 is quite extensive and contains many approval criteria and standards. Petitioner's

subassignment of error does not identify what part of LUDO Chapter 4 she considers the findings to address inadequately. This subassignment of error is not sufficiently developed for our review. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

This subassignment of error is denied.

B. Road Design

Petitioner makes numerous arguments based on the alleged inadequacies of the proposed access road and design. Petitioner's arguments, however, are all based upon provisions of LUDO 4.100(5)(b)(4). This ordinance provision applies to developments serving three to ten parcels.[8] The proposed development and roads to that development will only serve two parcels: the one-acre nonfarm dwelling parcel and the remaining 107-acre resource parcel. The access road does not serve petitioner's property. Therefore, the approval criteria cited by petitioner do not apply to the proposed development and do not provide a basis for reversal or remand.

This subassignment of error is denied.

C. Utility Easement

Finally, petitioner argues that there is only a five-foot utility easement, and because LUDO 4.100(10) requires a six-foot easement the county erred in approving the application. The proposed parcel, however, has a combined 35-foot easement for access and utilities. Petitioner does not explain why the easement is insufficient.

This subassignment of error is denied.

The fifth subassignment of error is denied.

The county's decision is affirmed.

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[8] LUDO 4.100(5)(b)(4) provides:

> "In evaluating proposals to serve from three to ten parcels in resource areas, the Approving Authority shall consider the following items: * * *"