BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

02/16/18 AM 8:07 LUBA

CROOK COUNTY,
Respondent,

and

LEE GARCIA and JOYCE GARCIA,
Intervenors-Respondents.

LUBA No. 2017-108

FINAL OPINION
AND ORDER

Appeal from Crook County.

Carol Macbeth, Bend, filed the petition for review and argued on behalf of petitioner.

Jeffrey M. Wilson, County Counsel, Prineville, filed a response brief and argued on behalf of respondent.

Shannon McCabe, Bend, filed a response brief on behalf of intervenors-respondents. With her on the brief was Lynch Conger McLane, LLP. Lori Murphy, Bend, argued on behalf of intervenors-respondent.

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

REMANDED 02/16/2018

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision that grants conditional use approval for a nonfarm dwelling in an exclusive farm use (EFU) zone.

MOTION TO INTERVENE

Lee Garcia and Joyce Garcia, the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

FACTS

The subject property is located in Powell Butte, between the cities of Redmond and Prineville. Powell Butte is one of the more productive agricultural areas in Crook County.[1] The subject property is 9.32 acres in size

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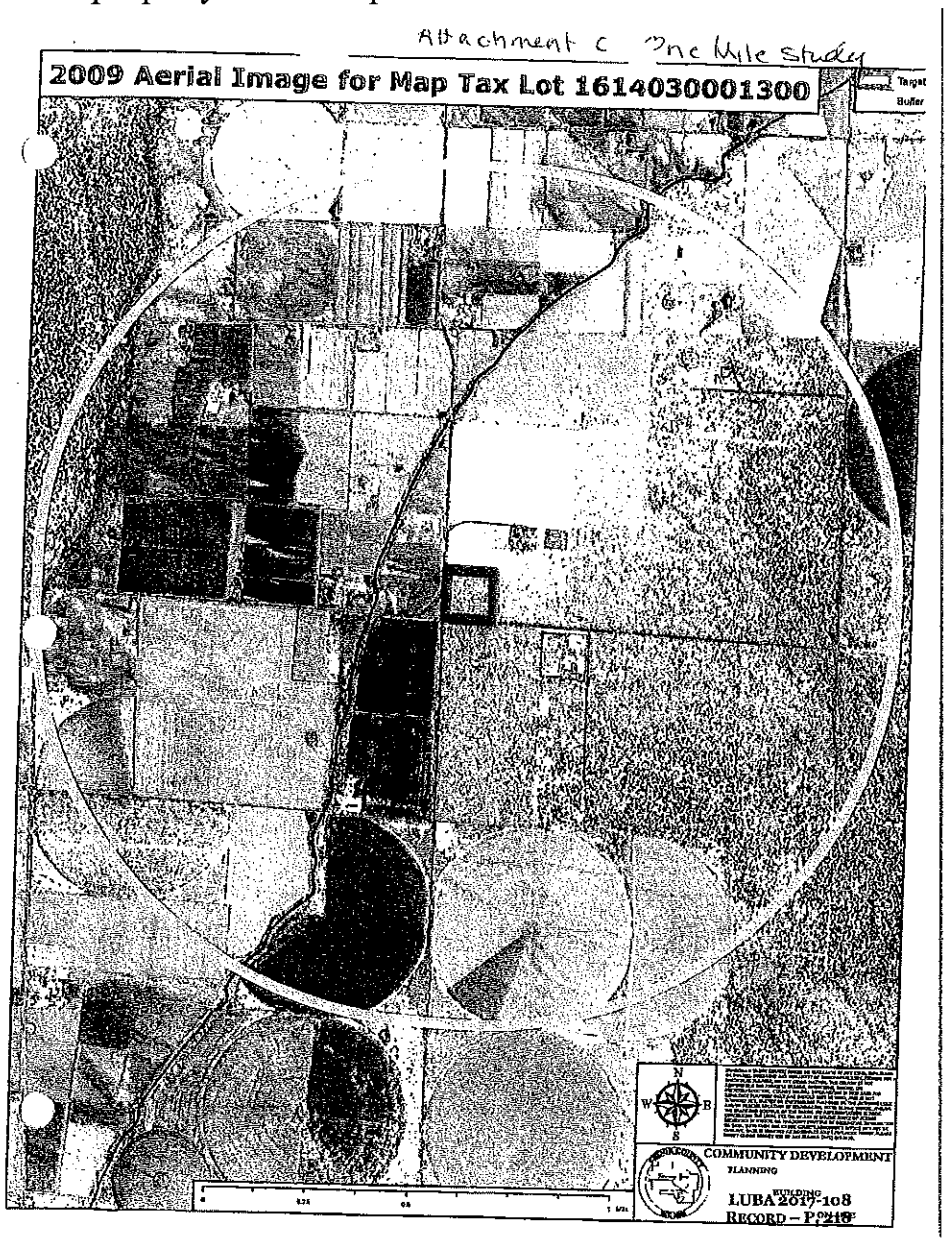
[1] The Agriculture Chapter of the Crook County Comprehensive Plan (CCCP) includes the following finding:

> "The most productive croplands within the county are concentrated in the valley area surrounding the City of Prineville, in the lowlands along the Crooked River and its major tributaries, and in the *Powell Butte* and Lone Pine areas. These areas have been under a transition of being consumed by the introduction of part-time farming and rural non-farm residences on small parcels. Rural subdivisions and partitionings with lots ranging from two (2) to ten (10) acres have encompassed in excess of 1,200 acres of class I through IV lands during the period of 1971 to 1975 in the Prineville valley area, 500 acres in the Powell Butte area, and 40 acres in the Lone Pine area. This trend poses serious problems and conflicts to the continuation of commercial farming operations in the area as more and more lands are broken up into smaller non-farm parcels. * * *" CCCP 40 (2003) (emphasis added).

and is zoned for exclusive farm use "EFU-3 (Powell Butte Area)." The subject property has not historically been used for crops or grazing. Record 79.

The record includes a map showing a one-mile radius study area centered on the property. That map is set out below:



The subject property is shown with a dark, square outline, at the northeastern corner of the roadways that cross in the middle of the circle. Making a turn at

this intersection, Powell Butte Road extends north and west from the center of the circle. The road that travels south from the center of the circle is Shumway Road. The road that travels east from the center of the circle is SW Bussett Road. A Central Oregon Irrigation District canal, visible as a wandering dark line, approximately bisects the study area from the southwest to the northeast, passing approximately one-quarter mile west of the subject property.

The subject property, and most of the properties in the study area east of the irrigation canal and east of Powell Butte Road and Shumway Road, are not irrigated, except for some circle pivot irrigated properties visible on the map in the southern part of the study area, east of Shumway Road. There is a very small irrigated parcel to the north of the subject property, that like the subject property is located east of the irrigation canal. The subject property is covered by juniper and native shrubs.

The properties west of the irrigation canal and west of Powell Butte Road and Shumway Road in the study area are almost all used for irrigated agriculture. The adjoining irrigated properties immediately west and southwest of the subject property, located east of the irrigation canal, are separated from the subject property by Powell Butte Road and Shumway Road. For the subject property to be irrigated, irrigation rights would need to be obtained and delivery of that water would require crossing Powell Butte Road. The parties dispute the likelihood of obtaining irrigation rights for the subject property, and the practicality of transmitting irrigation water across Powell Butte Road.

The subject parcel currently has no dwelling; however, a nonfarm dwelling was approved on the property in 1979 for a previous owner by the county planning commission as a conditional use. A manufactured home was placed on the property but was later removed in 1981 for failure to meet the conditions of approval. A septic system was installed on the property in 1979. The intervenors-respondents (intervenors), the applicants below, have owned the property since 1995.

Intervenors requested approval from Crook County to site a nonfarm dwelling on the property in May 2017. County planning staff issued a decision approving the nonfarm dwelling application on June 22, 2017. That decision was appealed to the Crook County Planning Commission by petitioner on July 5, 2017. The planning commission considered the appeal at their August 9, 2017 public hearing and voted unanimously to approve the intervenors' request. Petitioner appealed this decision to the Crook County Court (county court) on September 5, 2017, where the matter was scheduled for public hearing on October 4, 2017. The county court issued its decision on October 18, 2017, and affirmed the county's approval of the intervenors' request. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Nonfarm dwellings are authorized on EFU-zoned lands, if applicable approval standards are satisfied. ORS 215.284; OAR 660-033-0130(4); Crook County Code 18.24.080. The statute, rule and code all set out the relevant

approval standards in similar language. The central issue in this appeal is whether the county court's finding that the subject property is "generally unsuitable land for the production of farm crops and livestock" correctly interprets and applies the applicable law and is supported by substantial evidence. The county court's interpretation of state law is entitled to no deference. *Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076, *rev den* 315 Or 271 (1992).

In this opinion we will generally refer to the "generally unsuitable land for the production of farm crops and livestock" standard as the generally unsuitable for farm use standard. OAR 660-033-0130(4)(c)(B) sets out the administrative rule's version of the generally unsuitable for farm use standard that applies to counties located outside the Willamette Valley and the relevant text is set out blow:

> "(i) The dwelling, including essential or accessory improvements or structures, is situated upon a lot or parcel, or, in the case of an existing lot or parcel, upon a portion of a lot or 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 shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land; and
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> "(ii) A lot or parcel or portion of a lot or parcel is not 'generally unsuitable' simply because it is too small to be farmed profitably by itself. If a lot or parcel or portion of a lot or parcel can be sold, leased, rented or otherwise managed as a

> part of a commercial farm or ranch, then the lot or parcel or portion of the lot or parcel is not 'generally unsuitable[.]' A lot or parcel or portion of a lot or parcel is presumed to be suitable if, in Western Oregon it is composed predominantly of Class I-IV soils or, in Eastern Oregon, it is composed predominantly of Class I-VI soils. Just because a lot or parcel or portion of a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use[.]"

Crook County is located in Eastern Oregon, and according to the decision the subject property is made up of soils that are Class IV if irrigated and Class VI if not irrigated. Record 80. The subject property is therefore presumptively suitable for production of farm crops or livestock. Petitioner emphasizes this fact, the possibility that the subject property could be irrigated in the future, and the fact that the soils on the subject property are the same as surrounding properties, some of which are in irrigated agriculture and, petitioner alleges, some of which are in non-irrigated agriculture.

The county, in finding the subject property satisfies the generally unsuitable for farm use standard, emphasized: (1) the property's lack of any historical agricultural use, (2) lack of irrigation rights and infrastructure needed to irrigate, (3) and the absence of non-irrigated agriculture on adjoining properties ("the parcel is considered * * * not necessary for the future continuation of any existing farm operation * * * [and is] surrounded on 3 sides by non-agricultural uses"). Record 83-84.

For purposes of this appeal, we believe it is appropriate to assign some weight to the possibility that irrigation rights for the subject property could be

obtained in the future and that it is possible irrigation water could be delivered to the property. That apparent possibility, if realized, would drastically improve the suitability of the subject property for production of farm crops or livestock; nevertheless, the significance assigned to the possibility that the property could be irrigated in the future must take into account that it is not currently irrigated and may never be irrigated.

The county disregarded the adjoining properties to the south, east and north as "nonfarm parcels," apparently because a small area of the parcels to the north and south are developed with nonfarm uses. The parcel to the south, across SW Bussett Road, is developed with the "Shilo Ranch Cowboy Church," which apparently does not currently raise farm crops or livestock on the property but does operate an onsite cattle feeding and holding facility, utilizing feed grown off-site. It is certainly accurate to say that that property is not currently used for raising farm crops or livestock. But that does not necessarily mean the Shilo Ranch Cowboy Church property is generally unsuitable for raising farm crops or livestock and it does not mean the subject property with similar soils is generally unsuitable for production of farm crops or livestock. *King v. Washington County*, 42 Or LUBA 400, 408 (2002); *Moore v. Coos County*, 31 Or LUBA 347, 350, *rev'd and rem'd on other grounds*, 144 Or App 195, 925 P2d 927 (1996); *Reed v. Lane County*, 19 Or LUBA 276, 284 (1990).

The answer to whether the the subject property is generally unsuitable for farm use begins with the OAR 660-033-0130(4)(c)(B)(ii) presumption that

it is suitable for farm use in its currently non-irrigated state, because its soils are predominantly Class VI. The county attempts to dismiss the significance of the predominant soil class because only 50 to 60 percent of the soils are Class VI soils. However, because the county found Class VI soils predominate, under OAR 660-033-0130(4)(c)(B)(ii) the presumption of suitability for farm use applies.

More importantly, it is simply not appropriate to disregard the adjoining properties to the north and east as "nonfarm parcels," simply because there is a nonfarm dwelling on the property to the north. Petitioner argued below that the properties to the north and east either are or have been planted in winter wheat without irrigation. Record 32. That argument was supported by photographs that appear to show the northern and eastern properties after a crop of some sort was harvested on those properties. Record 28-31. As previously noted, petitioner argued, and respondents do not dispute, that the soils on those adjoining properties to the north and east are the same as the soils on the subject property. Without some response to this argument and evidence, we conclude the county's finding that the subject property is generally unsuitable for farm use is not supported by substantial evidence.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

OAR 660-033-0130(4)(c)(B)(i) was quoted in full earlier. Under OAR 660-033-0130(4)(c)(B)(i), "[a] lot or parcel or portion of a lot or parcel shall

not be considered unsuitable solely because of size or location if it can reasonably be put to farm * * * use in conjunction with other land[.]"[2]

In its second assignment of error, petitioner contends "[t]he county misconstrued and misapplied the applicable law in finding the subject property cannot be used [for farm use] in conjunction with other land * * *." Petition for Review 20.

Intervenors respond:

> "Although 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,' * * * '*if size or location is not the sole basis for a finding of suitability, then whether or not the parcel can be used in conjunction with other lands is irrelevant.*' *Epp v. Douglas County*, 45 Or LUBA 480, 485. In this case, there are a variety of factors that make the property generally unsuitable for crops or livestock * * *." Intervenor-Respondents' Brief 6-7 (italics added).

The italicized language quoted above from intervenor's response brief ("if size or location is not the sole basis for a finding of suitability, then whether or not the parcel can be used in conjunction with other lands is irrelevant") does not appear in *Epp*. The relevant holding in Epp is that the statutory and rule obligation to consider whether property can reasonably be put to farm use in conjunction with other land is not implicated where a county finds the property is generally unsuitable for farm use *for reasons that do not*

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[2] Identical language appears in ORS 215.284(2)(b).

include size or location.[3] Even if we assume that size and location were not among the county court's considerations in finding the subject property is generally unsuitable for farm use—something that is not clear, because we sustain petitioner's first assignment of error we have concluded the county has not established that the subject property is generally unsuitable for farm use based on factors other than size and location.

On remand, if this matter is to be pursued further, intervenors and the county will have another opportunity to demonstrate that the subject property is generally unsuitable for farm use, based on factors other than size and location.[4] If so, under *Epp*, the county need not consider size or location and need not consider whether the subject property can be used for farm use in conjunction with other lands. But if size and location must be considered, and

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[3] In *Epp* we explained the requirement that land "may not be considered unsuitable based solely on size or location if the parcel can reasonably be put to farm * * * use in conjunction with other land" did not apply there because the county had not relied on size or location:

> "In the present appeal, the parcel was found to be unsuitable due to the terrain, adverse soils and land conditions and not due to size or location. Therefore, whether the parcel could be used in conjunction with other land for resource purposes does not, in and of itself, provide a basis for reversal or remand." 46 Or LUBA at 485.

[4] In determining whether a tract is generally unsuitable for farm use, both ORS 215.284(2)(b) and OAR 660-033-0130(4)(c)(B)(i) require the county to consider "terrain, adverse soils or land conditions, drainage and flooding, vegetation, location and size of the tract."

therefore are to be the determining factors in establishing that the subject property is generally unsuitable for farm use, then the county must consider whether the subject property "can reasonably be put to farm * * * use in conjunction with other land[,]" as required by ORS 215.284(2)(b) and OAR 660-033-0130(4)(c)(B)(i). *Ploeg v. Tillamook County*, 50 Or LUBA 608, 632 (2000).[5]

With that understanding of how the county should proceed on remand under ORS 215.284(2)(b) and OAR 660-033-0130(4)(c)(B)(i), we return to petitioner's assignment of error. Again, petitioner's second assignment of error is that "[t]he county misconstrued and misapplied the applicable law in finding the subject property cannot be used [for farm use] in conjunction with other land * * *." Petition for Review 20. It is not clear to us that the county adopted the finding that petitioner challenges in its second assignment of error. The county found the subject property "is not necessary for the future continuation of any existing farm operation," and that "[t]here is no evidence that the subject property can be put to farm use in conjunction with other land." Record 83-84.

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[5] In *Ploeg* LUBA concluded the county had not established that the property was generally unsuitable for farm use based on "terrain, adverse soil or land conditions, drainage and flooding, and vegetation." 50 Or LUBA at 632. We then concluded:

> "It follows that, if the subject property is generally unsuitable, it can only be so due to its size or location. Under that circumstance, there is no question that OAR 660-033-0130(4)(c)(B) requires the county to consider conjoined use." *Id.*

To the extent those findings were intended to be a finding that the subject property cannot "reasonably be put to farm * * * use in conjunction with other land," as required by ORS 215.284(2)(b) and OAR 660-033-0130(4)(c)(B)(i), they are inadequate. It is entirely possible that the subject property could "reasonably be put to farm * * * use in conjunction with other land" even though nearby farms do not depend on such conjoined use to continue to operate. And a lack of evidence that the subject property can be put to use in conjunction with other lands, is not evidence that the subject cannot "reasonably be put to farm * * * use in conjunction with other land[.]" Intervenor as the applicant has the evidentiary burden to establish the subject property cannot "reasonably be put to farm * * * use in conjunction with other land[.]"

To the extent the county intended to find that the subject property cannot "reasonably be put to farm * * * use in conjunction with other land," as required by ORS 215.284(2)(b) and OAR 660-033-0130(4)(c)(B)(i), its finding is inadequate and is not supported by substantial evidence.

The second assignment of error is sustained.

CONCLUSION

Petitioner argues the county's decision that the subject property is generally unsuitable for production of farm crops or livestock is erroneous as a matter of law. We do not agree. The evidence that shows the adjoining properties to the north and east are being used or have been used to raise non-

irrigated winter wheat in the past is strong evidence that the subject property with the same soils is also suitable for raising non-irrigated winter wheat. The evidence also shows that at least one small, similarly situated property has managed to obtain irrigation water from the irrigation canal to the west, which is some evidence that it might be possible to do so for the subject property in the future and, if so, significantly increase the suitability of the subject property for producing farm crops and livestock. However, that evidence falls considerably short of establishing that the subject property is suitable for the production of farm crops or livestock as a matter of law.

The county's decision is remanded.