BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES ELLIOTT,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

JACKSON COUNTY CITIZENS LEAGUE,
Intervenor-Respondent.

LUBA No. 2002-085

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Stephen Mountainspring, Roseburg, filed the petition for review and argued on behalf of petitioner. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich and Aitken, PC.

No appearance by Jackson County.

Roger A. Alfred, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Perkins Coie LLP.

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

REMANDED 01/06/2003

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 the county's denial of a nonfarm dwelling on land zoned exclusive farm use (EFU).

MOTION TO FILE REPLY BRIEF

Petitioner moves for permission to file an eight-page reply brief, to address three alleged "new matters" raised in the response brief. The motion is accompanied by the proposed reply brief, and explains that the number and complexity of the three new matters warrants a reply brief that exceeds the five-page limit set forth in OAR 661-010-0039. Intervenor-respondent (intervenor) does not object to either the reply brief or its length. We agree with petitioner that a reply brief is warranted and allow the eight-page brief.

FACTS

The subject property is a 30-acre parcel zoned EFU, located approximately two miles north of the City of Ashland. The parcel was created in 1974. It has irrigation rights for 17.5 acres, and approximately 10 acres are currently used to grow hay. The surrounding area generally consists of EFU-zoned tracts used for grazing and growing hay.

On November 1, 2001, petitioner applied to the county for approval of a nonfarm dwelling, pursuant to ORS 215.284, its implementing rule at OAR 660-033-0130(4), and local land use regulations.[1] As discussed below, the statute, its implementing rule, and local ordinances permit a nonfarm dwelling only upon a finding that the proposed dwelling "will not materially alter the stability of the overall land use pattern of the area." To address this standard (the stability standard), petitioner submitted a study of 3,200 acres of land surrounding the subject property. The study analyzed the number of existing dwellings in

[1] At the time of the challenged decision, Jackson County had not yet implemented the administrative rule provisions at issue in this appeal. However, pursuant to ORS 197.646(3), the county applied certain provisions of OAR 660-033-0130(4).

the study area, and the number of new nonfarm dwellings that could be approved in the area, and determined that only five new nonfarm dwellings, including the proposed dwelling, could be approved. The study concluded that, assuming these five potential nonfarm dwellings were approved, opportunities to continue existing farm operations in the area would not be diminished. Therefore, petitioner's study concluded, approving the proposed dwelling would not materially alter the stability of the overall land use pattern in the area.

County staff issued a staff report that reached a contrary conclusion. The staff report reduced the size of the study area by excluding several parcels, totaling approximately 770 acres, that were included in petitioner's study. The staff report identified 35 parcels within the reduced study area, with 26 of those parcels, totaling approximately 2,196 acres, currently under farm tax deferral and in farm use. According to the staff report, there is the potential for 18 new nonfarm and lot of record dwellings in the area, including the proposed dwelling, in addition to existing farm and nonfarm dwellings. The staff report assumed that, if all 18 nonfarm and lot of record dwellings were approved, the parcels containing those dwellings would be disqualified from farm tax deferral and removed from farm use. Based on that assumption, staff found that if all 18 potential nonfarm and lot of record dwellings were approved, the number of parcels involved in farm use would be reduced from 26 to 12, and the acreage involved in farm use would be reduced from 2,196 to 708 acres. Staff concluded that the cumulative effect of existing and potential nonfarm dwellings would destabilize the overall land use pattern in the area, by greatly decreasing the number of lots and acreage in farm use. Accordingly, staff denied petitioner's application for failure to satisfy the stability standard.

Petitioner appealed the staff decision to the county hearings officer. The hearings officer conducted a hearing on April 1, 2002, accepted additional evidence, and closed the record. On June 17, 2002, the hearings officer issued a decision denying petitioner's appeal,

on the grounds that the proposed nonfarm dwelling would materially alter the stability of the overall land use pattern in the area. This appeal followed.

INTRODUCTION

ORS 215.284(1) through (7) allow nonfarm dwellings under a variety of circumstances. ORS 215.284(2) allows a nonfarm dwelling on EFU-zoned parcels created before January 1, 1993, in counties outside the Willamette Valley.[2] The subject application is presumably authorized by ORS 215.284(2), because it involves an EFU-zoned parcel created prior to January 1, 1993, in a county outside the Willamette Valley.[3]

To place that statute and its related rules in context, it is useful to briefly review the other nonfarm dwelling statutes. ORS 215.284(1) allows a nonfarm dwelling on EFU-zoned parcels within the Willamette Valley, if, among other things, the subject parcel has poor agricultural soils and was created prior to January 1, 1993. ORS 215.284(3) allows nonfarm dwellings on new parcels created pursuant to ORS 215.263(4) in western Oregon, but

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[2] ORS 215.284(2) provides, in relevant part:

> "In counties not [in the Willamette Valley], a single-family residential dwelling not provided in conjunction with farm use may be established, subject to approval of the governing body or its designee, in any area zoned for exclusive farm use upon a finding that:
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> "(a) The dwelling or activities associated with the dwelling will not 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;
>
> "(b) The dwelling is situated upon a lot or parcel or 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. * * *;
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> "(c) The dwelling will be sited on a lot or parcel created before January 1, 1993; [and]
>
> "(d) *The dwelling will not materially alter the stability of the overall land use pattern of the area*[.]" (Emphasis added.)

[3] The term "Willamette Valley" is defined at ORS 215.010(5) to mean Clackamas, Linn, Marion, Multnomah, Polk, Washington and Yamhill Counties, and certain portions of Benton and Lane Counties.

expressly excludes the Willamette Valley.[4] ORS 215.284(4) allows a nonfarm dwelling in the Willamette Valley on a newly created parcel of at least 20 acres, if, among other things, the parent parcel has extremely poor soils. Finally, ORS 215.284(7) allows nonfarm dwellings on new parcels created pursuant to ORS 215.263(5) in eastern Oregon. One element common to all nonfarm dwellings permitted under ORS 215.284 is the requirement that the proposed dwelling "not materially alter the stability of the overall land use pattern of the area." ORS 215.284(1)(d), (2)(d), 3(d), 4(d) and 7(c).[5]

In 1998, and subsequently, the Land Conservation and Development Commission (LCDC) significantly amended the rules at OAR 660-033-0130(4) that implement ORS 215.284(1) through (7) or their statutory predecessors. The pre-1998 rules included three separate provisions imposing the stability standard. OAR 660-033-0130(4)(a) (1997) implemented ORS 215.284(1) and set forth the standards for approving a nonfarm dwelling on existing parcels in the Willamette Valley that were created before 1993.[6] OAR 660-033-0130(4)(b) (1997) implemented ORS 215.284(4) and set forth the standards for approving a nonfarm dwelling on a newly created parcel in the Willamette Valley.[7] All statutory

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[4] The term "western Oregon" is defined at ORS 321.257. The corresponding definition of "eastern Oregon" is at ORS 321.405.

[5] Certain other dwellings in farm or forest zones also share the requirement that the dwelling not materially alter the stability of the overall land use pattern. *See, e.g.*, ORS 215.705(2)(a)(C)(iii); 215.705(5)(b) (lot of record dwellings). Lot of record dwellings are subject to approval under the standards of OAR 660-033-0130(3). At least one subsection of OAR 660-033-0130(3) references and requires compliance with the stability standard at OAR 660-033-0130(4)(a)(D). OAR 660-033-0130(3)(c)(C)(iii).

[6] OAR 660-033-0130(4)(a) (1997) provided, in relevant part:

> "In the Willamette Valley, the [nonfarm dwelling] may be approved if:
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> "* * * * *
>
> "(D) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated[.]"

[7] OAR 660-033-0130(4)(b) (1997) provided, in relevant part:

provisions for nonfarm dwellings outside the Willamette Valley were addressed collectively at OAR 660-033-0130(4)(c).[8] The pre-1998 rule versions of the stability standard did not cross-reference each other. Notably, OAR 660-33-0130(4)(b)(B) and (c)(C) (1997) contained additional language requiring the county to consider whether the new parcel the dwelling would occupy would "lead to the creation of other nonfarm parcels, to the detriment of agriculture in the area." OAR 660-033-0130(4)(a)(D) (1997) did not require that consideration, presumably because that rule provision, and the statute it implements, allows nonfarm dwellings only on existing parcels that were created prior to January 1, 1993.

The 1998 amendments significantly altered this scheme. OAR 660-033-0130(4)(b)(B) and (c)(C) were amended to cross-reference OAR 660-033-0130(4)(a)(D), and to require compliance with the standards in that paragraph.[9] OAR 660-033-0130(4)(a)(D)

> "In the Willamette Valley, on a lot or parcel allowed under [rules implementing ORS 215.284(4)], the [dwelling] may be approved if:
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> "* * * * *
>
> "(B) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated and whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area[.]"

[8] OAR 660-033-0130(4)(c) (1997) provided, in relevant part:

> "In counties located outside the Willamette Valley [approval of a nonfarm dwelling requires] findings that:
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> "* * * * *
>
> "(C) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated and whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area[.]"

[9] OAR 660-033-0130(4)(c)(C) (1998) provided, in relevant part:

was expanded to impose an elaborate multi-part analysis that requires, among other things, consideration of new parcels created for nonfarm dwellings under ORS 215.263(4).[10]

> "In counties located outside the Willamette Valley [approval of a nonfarm dwelling application] require[s] findings that:
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> "* * * * *
>
> "(C) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated. If the application involves the creation of a new parcel for the nonfarm dwelling, a county shall consider whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area *by applying the standards set forth in paragraph (4)(a)(D) of this rule*[.]" (1998 amendments emphasized.)

[10] OAR 661-033-0130(4)(a)(D) now provides:

> "In the Willamette Valley, [a nonfarm dwelling] may be approved if:
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> "* * * * *
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> "(D) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of possible new nonfarm dwellings and parcels on other lots or parcels in the area similarly situated. To address this standard, the county shall:
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> "(i) Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 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. Findings shall describe the study area, its boundaries, the location of the subject parcel within this area, 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. Lands zoned for rural residential or other urban or nonresource uses shall not be included in the study area;
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> "(ii) Identify within the study area the broad types of farm uses (irrigated or nonirrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, nonfarm, hardship, etc.), and the dwelling development trends since 1993. Determine the potential number of nonfarm/lot-of-record dwellings that could be approved under subsections (3)(a), (3)(d) and section (4) of this rule, including identification of predominant soil classifications, the parcels created prior to January 1, 1993 and the parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings under ORS 215.263(4). The findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use

One other rule amendment deserves mention. The 1998 amendment to OAR 660-033-0130(4)(c)(C) added a cross-reference to OAR 660-033-0130(4)(a)(D) only in the third sentence of OAR 660-0330130(4)(c)(C), which is directed at circumstances when a new nonfarm parcel is proposed. *See* n 9. In 2000, LCDC amended OAR 660-033-0130(4)(c)(C) to add an identical cross-reference to OAR 660-033-0130(4)(a)(D) in the *second* sentence of OAR 660-033-0130(4)(c)(C), which appears to be directed at circumstances when a nonfarm dwelling is proposed on an *existing* parcel.[11] Thus, the current version of OAR 660-033-0130(4)(c)(C) refers to and requires compliance with the standards of OAR 660-033-0130(4)(a)(D), whether a nonfarm dwelling is proposed on an existing parcel or a newly created parcel.

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pattern that could result from approval of the possible nonfarm dwellings under this subparagraph;

"(iii) Determine whether approval of the proposed nonfarm/lot-of-record dwellings together with existing nonfarm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area[.]"

[11] OAR 660-033-0130(4)(c)(C) currently provides:

"In counties located outside the Willamette Valley [a nonfarm dwelling] require[s] findings that:

"* * * * *

"(C) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated *by applying the standards set forth in paragraph (4)(a)(D) of this rule*. If the application involves the creation of a new parcel for the nonfarm dwelling, a county shall consider whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area by applying the standards set forth in paragraph (4)(a)(D) of this rule[.]" (2000 amendments emphasized.)

OAR 660-033-0130(4)(a)(D) itself is not artfully written. However, it is reasonably clear, and the parties do not contend otherwise, that analysis under OAR 660-033-0130(4)(a)(D) must consider the cumulative impact of (1) existing nonfarm dwellings, (2) the proposed nonfarm dwelling, (3) potential new nonfarm dwellings that could be approved on existing lots in the study area, and (4) potential new nonfarm dwellings that could be approved on new nonfarm parcels in the study area.[12] In effect, the OAR 660-033-0130(4)(a)(D) analysis requires the county to identify the total potential build-out of nonfarm dwellings in the study area, the full development scenario, to determine whether the full development pattern of land use would violate the ultimate stability standard in any of the ways described in OAR 660-033-0130(4)(a)(D)(iii). However, as discussed below, the parties disagree on how the OAR 660-033-0130(4)(a)(D) analysis is conducted, if that analysis is invoked by OAR 660-033-0130(4)(c)(C). With that background, we turn to petitioner's assignments of error.

FIRST ASSIGNMENT OF ERROR

SECOND ASSIGNMENT OF ERROR, THIRD SUBASSIGNMENT

Petitioner argues that the county erred in applying certain provisions of OAR 660-033-0130(4)(a)(D) (henceforth, (4)(a)(D)) in determining whether the proposed dwelling will materially alter the stability of the overall land use pattern, for purposes of OAR 660-033-0130(4)(c)(C) (henceforth (4)(c)(C)). According to petitioner, the county's error was also procedural error that prejudiced petitioner's substantial rights, because petitioner relied to his detriment upon the county's notice that wrongly set forth the requirements of (4)(a)(D) as applicable approval criteria.

[12] OAR 660-033-0130(4)(a)(D) also requires consideration of potential lot of record dwellings that could be approved under OAR 660-033-0130(3)(a) and (d). For convenience, our reference to "nonfarm dwellings" includes both dwellings allowed under OAR 660-033-0130(4) and lot of record dwellings allowed under OAR 660-033-0130(3)(a) and (d), unless more specific reference is required.

As noted, petitioner's application involves a nonfarm dwelling on an existing parcel created before January 1, 1993, and does not involve creation of a new parcel on which to site the proposed nonfarm dwelling. Petitioner argues that the standards at (4)(a)(D) are applied differently, or rather that the analysis under that subsection is conducted differently, when subsection (4)(a)(D) is invoked pursuant to subsection (4)(c)(C) and the proposal does not include creation of a new parcel.

According to petitioner, textual differences between subsections (4)(a)(D) and (4)(c)(C) demonstrate LCDC's intent that nonfarm dwelling applications under (4)(c)(C) need apply only that portion of (4)(a)(D) that requires analysis of the cumulative impact of (1) *existing* nonfarm dwellings in the study area and (2) the *proposed* nonfarm dwelling, to determine whether the proposed dwelling will materially alter the stability of the land use pattern in the area. Petitioner argues that, if the (4)(a)(D) analysis is invoked by (4)(c)(C), the analysis need not consider (1) the impact of potential new nonfarm dwellings that could be approved on existing parcels, or (2) the impact of potential new nonfarm parcels that could be created in the study area, and the nonfarm dwellings that could be approved on such new parcels.

In support of that view of the rule, petitioner cites to the lack of parallelism between certain terms in (4)(a)(D) and (4)(c)(C). Petitioner points out that (4)(a)(D) requires the county to "consider the cumulative impact of *possible new* nonfarm dwellings *and parcels* on other lots or parcels in the area similarly situated." (Emphasis added.) The corresponding second sentence of (4)(c)(C) requires the county to "consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated by applying the standards set forth in paragraph (4)(a)(D) of this rule." Petitioner argues that the omission of the terms "possible new" nonfarm dwellings in the second sentence of (4)(c)(C) is deliberate, and demonstrates that, for counties outside the Willamette Valley, the county need not

include in its analysis under (4)(a)(D) potential new nonfarm dwellings that might be approved on existing parcels.

Similarly, petitioner argues that the omission of the term "and parcels" from the second sentence of (4)(c)(C) is significant, as is the fact that proposals involving the creation of possible new parcels are separately addressed by the third sentence of (4)(c)(C). That third sentence states that "[i]f the application involves the creation of a new parcel for the nonfarm dwelling," the county must "consider whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area by applying the standards set forth" in (4)(a)(D). According to petitioner, the necessary negative implication of the third sentence of (4)(c)(C) is that if the application does *not* involve creation of a new parcel for the nonfarm dwelling, then the county need *not* include in its analysis under (4)(a)(D) any potential new nonfarm dwellings on potential new nonfarm parcels, notwithstanding (4)(a)(D) requirements to the contrary. If the third sentence does *not* carry that implication, petitioner argues, then the (4)(c)(C) stability standard analysis is the same whether or not the application proposes creation of a new nonfarm parcel. If that is the case, petitioner argues, the third sentence is simply surplusage.

Therefore, petitioner concludes, the county erred in the present case in considering either (1) potential new nonfarm dwellings on existing parcels or (2) potential new nonfarm dwellings on new parcels, in conducting its analysis under (4)(a)(D).

Intervenor responds that the county correctly considered potential new nonfarm dwellings on existing parcels, as required by (4)(a)(D). Notwithstanding the lack of parallelism between certain phrases in (4)(a)(D) and (4)(c)(C), intervenor argues, (4)(c)(C) unreservedly requires application of the standards of (4)(a)(D), which plainly requires consideration of potential new nonfarm dwellings on existing parcels. Further, intervenor notes that (4)(c)(C) itself requires consideration of the *cumulative* impact of nonfarm dwellings (plural) on other lots or parcels *similarly situated*. Intervenor argues that whatever

the phrase "similarly situated" means, it includes lots or parcels that, like the subject property, are vacant and are not already developed with a nonfarm dwelling. In other words, intervenor argues, (4)(c)(C) itself requires, and has always required, consideration of the cumulative impact of the proposed nonfarm dwelling and potential new nonfarm dwellings on other existing lots or parcels on which such dwellings might be placed. According to intervenor, there is no textual support in either rule subsection for application of a truncated or different version of the (4)(a)(D) analysis when that analysis is invoked pursuant to (4)(c)(C). Intervenor also argues that the county correctly considered potential new nonfarm parcels and nonfarm dwellings that could be approved on new nonfarm parcels, as (4)(a)(D) requires. Intervenor disagrees with petitioner's negative implication reading of the third sentence of (4)(c)(C).

We agree with intervenor's view of the second sentence of (4)(c)(C), that (4)(c)(C) requires the county to include in its stability analysis potential nonfarm dwellings on existing lots or parcels. That requirement is implicit in the directive that the county consider the cumulative impact of the proposed nonfarm dwelling on lots or parcels "similarly situated." That implicit directive is strengthened by the explicit requirement that the county determine the cumulative impact on lots or parcels similarly situated "by applying the standards set forth" in (4)(a)(D). There is no dispute that the standards of (4)(a)(D) require consideration of potential new nonfarm dwellings on existing parcels. To the extent doubt remains, it is worth noting that the 1998 through 2000 versions of (4)(c)(C) did not contain the explicit reference to (4)(a)(D) now found in the second sentence of (4)(c)(C). *Compare* ns 9 and 11. Apparently that was an oversight, because in 2000 LCDC added the reference to (4)(a)(D) now found in the second sentence of (4)(c)(C). The legislative history available to us suggests that the purpose of the 2000 amendment was to "clarif[y] that the rule provisions on the 'materially altered' standard in [(4)(a)(D)] appl[y] to *both* the review of nonfarm

dwellings on existing parcels and when reviewed in conjunction with the creation of a new parcel." February 15, 2000 DLCD staff report to LCDC (emphasis in original).

While we are not at liberty "to insert what has been omitted," neither should we read into (4)(a)(D) and (4)(c)(C) implications that are contrary to their text, context and legislative history. ORS 174.010. Petitioner's argument to the contrary is an implication drawn from the lack of complete parallelism between similar phrases in (4)(a)(D) and (4)(c)(C). There is no suggestion in the legislative history of that amendment, or elsewhere that we can find, that LCDC intended the (4)(a)(D) standards to apply only in a limited fashion when those standards are invoked by the second sentence of (4)(c)(C), as petitioner argues.

Whether the county must consider potential new nonfarm parcels, or potential new nonfarm dwellings on such parcels, when the proposed nonfarm dwelling does not itself involve a new parcel, is a more difficult question. Nothing in the text of (4)(a)(D) supports petitioner's view of that rule, that the analysis under (4)(a)(D) is conducted differently, under different considerations, when that analysis is invoked under (4)(c)(C). The terms of (4)(a)(D) seem to contemplate that the same analysis be conducted in all cases, whether the proposed dwelling is a lot of record dwelling (which by definition does not involve a new parcel), a nonfarm dwelling under OAR 660-033-0130(4)(a), or nonfarm dwellings under OAR 660-033-0130(4)(b)(B) or (4)(c)(C). However, if that is the case, it is difficult to understand why LCDC would choose to separately address nonfarm dwellings on existing parcels and those involving new parcels in the second and third sentences of (4)(c)(C), respectively. As petitioner points out, the third sentence of (4)(c)(C) has very little if any independent function, if it simply invokes the identical analysis that is required under the second sentence. The apparent superfluity of the third sentence is avoided under petitioner's view of (4)(c)(C).

Nonetheless, petitioner's view of (4)(c)(C) is based primarily on an inference drawn from the fact that LCDC chose to state in two sentences what it might have stated in one.

The inference that petitioner draws is contrary to the plain text of (4)(c)(C), the second and third sentences of which require, in identical language, that compliance with the stability standard be determined "by applying the standards set forth in paragraph (4)(a)(D) of this rule." As noted, (4)(a)(D) prescribes the same analysis whether the proposed dwelling is a lot of record dwelling, a nonfarm dwelling on an existing parcel, or a nonfarm dwelling on a new parcel. Further, (4)(a)(D) plainly requires in all cases that the analysis include consideration of the potential for creation of new nonfarm parcels. Petitioner's view of the rule, although it has the virtue of giving independent meaning to the third sentence of (4)(c)(C), suffers the vice of reading (4)(a)(D) contrary to its text. We decline to read an implication into (4)(c)(C) and (4)(a)(D) that is contrary to their text and context.[13]

Consequently, we disagree with petitioner that the hearings officer misconstrued the rule, or that the county committed procedural error in notifying petitioner that his application would be subject to the standards of (4)(a)(D).

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[13] The evolution of (4)(a)(D) and (4)(c)(C) described in the introductory section, above, provides a probable explanation for the sentence structure of (4)(c)(C) that does not rely on the inference petitioner posits. Prior to 1998, it was reasonably clear that (4)(a)(D), (4)(b)(B) and (4)(c)(C) were independent standards, with no express references to or interactions with each other. OAR 660-033-0130(4)(b)(B) and (4)(c)(C) (1997) contained provisions regarding new parcels because nonfarm dwellings on new parcels were allowed under those subsections. OAR 660-033-0130(4)(a)(D) (1997) did not, because no new parcels could be created under that subsection. Notably, OAR 660-033-0130(4)(b)(B) (1997) stated in one sentence what OAR 660-033-0130(4)(c)(C) (1997) stated in two, because under the former a nonfarm dwelling may *only* be allowed on a new nonfarm parcel. Under OAR 660-033-0130(4)(c)(C) (1997) a nonfarm dwelling may or may not involve a new nonfarm parcel. Thus, petitioner's inference might well be correct with respect to the pre-1998 version of the rules: the sentence structure of OAR 660-033-0130(4)(c)(C) (1997) may well have reflected LCDC's intent that the stability analysis differ depending on whether one is proposing a new nonfarm dwelling or not.

However, the 1998 and 2000 amendments reflect a different intent. The function and apparent intent of the 1998 amendments was to transform the (4)(a)(D) stability standard from one with limited geographic and substantive scope to a comprehensive standard that applied, by cross-reference, to all nonfarm dwelling applications anywhere in the state. Why LCDC chose to place that single comprehensive standard in (4)(a)(D) rather than in a separate section or subsection is something of a mystery, given that (4)(a)(D) is part of a rule subsection that applies only in the Willamette Valley and only to proposals that do not include creation of a new parcel. That problem aside, the 2000 amendments to (4)(c)(C) make it reasonably clear that LCDC wanted to subject all applications under (4)(c)(C) to the comprehensive standard of (4)(a)(D), whether the application involved a new parcel or not. Rather than rewrite (4)(c)(C) to restate in one sentence what it now says in two, the 2000 amendments simply added language to the second sentence to make it parallel to the third, in referencing (4)(a)(D). In other words, the sentence structure of (4)(c)(C) is probably more accurately viewed as a relic of an earlier regulatory scheme, rather than a deliberate policy choice, as petitioner argues.

The first assignment of error and the second assignment of error, third subassignment, are denied.

SECOND ASSIGNMENT OF ERROR

The challenged decision denies the application based on failure to comply with the stability standard at Jackson County Land Development Ordinance (LDO) 218.00(7)(B).[14]

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[14] The hearings officer's decision states, in relevant part:

> "The Hearings Officer has examined the respective analyses of the study area required under LDO 218.090(7) offered by both staff and the applicant, and has concluded that approval of the instant application would 'materially alter the stability of the land use pattern in this area,' within the meaning of LDO 218.090(7)(B)(3).
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> "Both state and local provisions authorizing non farm uses on agricultural lands 'must be construed to the extent possible as being consistent with the overriding policy of preventing 'agricultural land from being directed to non agricultural use.'" (*See* ORS 215.243(2) and also ORS 215.243(1), (3) and (4).
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> "The County's Agricultural Policy in its Comprehensive Plan states:
>
> > "'The County recognizes that the priority use of farm land shall be for farm uses. At all times in which non-agricultural uses or divisions are proposed on farm land, the applicant shall be required to provide substantial and compelling findings which document that the nonfarm proposal will result in a more efficient and effective use of land in view of its value as a natural resource and no feasible alternative site in the area exists which has less impact on agricultural land.'
>
> "The Hearings Officer perceives no such 'substantial and compelling findings' in the record. If anything, the converse is true as staff noted in its report:
>
> > "'While approval of one nonfarm dwelling on the subject parcel will not materially alter the stability of the land use pattern in the area since it would be located near a cluster of other dwellings that are not in conjunction with farm use, the cumulative effect of all of the existing and potential nonfarm dwellings would destabilize the overall character of the study area by greatly decreasing both the number of lots and the acreage that is currently in farm use. Instead of 26 lots and 2196 acres being under special assessment as farm land, if all of the potential divisions and dwellings not in conjunction with farm use were approved, only 12 lots and 708 acres would still be considered farm parcels.' Ex. 17, p. 21 [Record 160].
>
> "De-stabilization would not exist in theory only as ORS 308A.259 requires the loss of farm assessment with the establishment of a non-farm dwelling and minimum zoning requirements on EFU land would prevent partitioning of the subject parcels. LDO 218.070. The clear result would be an escalation of land prices beyond any relation to its value as farmland, making its continued use as farmland highly speculative.
>
> "The application does not satisfy the requirements of LDO 218.090(7)." Record 3-4 (capitalization and section heading omitted).

Petitioner argues that the hearings officer erred in applying or misapplying three additional standards.[15]

A. First Subassignment: ORS 215.243

Petitioner argues that the challenged decision cites to and appears to quote ORS 215.243, and seems to view that statute either as an approval criterion or as somehow relevant to application of the stability standard. *See* n 14. According to petitioner, no state or local provision purports to incorporate ORS 215.243 as an approval criterion applicable to a nonfarm dwelling. In addition, petitioner points out, the quoted discussion of an "overriding policy" of preventing agricultural lands from being directed to non-agricultural uses is not found at ORS 215.243. Petitioner argues that the hearings officer erred to the extent he relied on ORS 215.243 as a basis to deny the application.

Intervenor points out that the language quoted by the hearings officer stems from a Court of Appeals case, *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 555, 773 P2d 779 (1989). Intervenor argues that, notwithstanding failure to properly attribute the quoted language, it is clear that the hearings officer did not apply either the quoted language or ORS 215.243 as an approval criterion or as a basis to deny the application. We agree.

The first subassignment of error is denied.

B. Second Subassignment: Substantial and Compelling Findings

Petitioner argues that the hearings officer quoted from a nonexistent comprehensive plan provision, which purportedly requires "substantial and compelling findings" to justify the proposed nonfarm dwelling, and then denied the application for failure to provide such findings. *See* n 14.

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[15] Petitioner also argues under the second assignment of error that the hearings officer erred in applying certain provisions of OAR 660-033-0130(4)(a)(D), for the same reasons discussed in the first assignment of error. We addressed those arguments under the first assignment of error.

Intervenor concedes that the quoted comprehensive plan provision is not in the current comprehensive plan, and speculates that the hearings officer is quoting an outdated plan policy.[16] Intervenor also concedes that there is no statutory, plan or code requirement for "substantial and compelling findings," in order to approve a nonfarm dwelling. However, intervenor argues, the hearings officer's citation to a nonexistent or superseded comprehensive plan policy is at most harmless error, because the sole basis for denial was the applicant's failure to satisfy the stability standard, not the purported comprehensive plan provision.

As far as we can tell, noncompliance with the stability standard was the sole basis for denial. However, even if the hearings officer did not rely on the purported comprehensive plan policy as an independent basis for denial, he seems to regard the purported requirement for "substantial and compelling findings" as stating the requisite showing under the stability standard. We cannot tell from the decision whether or not the hearings officer applied a nonexistent "substantial and compelling findings" requirement in analyzing whether petitioner satisfied the stability standard. Accordingly, we cannot agree with intervenor that the hearings officer's reliance on the purported comprehensive plan provision is merely harmless error.

The second subassignment of error is sustained.

C. Fourth Subassignment: LDO 218.090(7)

Petitioner contends that the hearings officer ostensibly denied the application based on failure to satisfy the stability standard at LDO 218.090(7)(B). *See* n 14. However, petitioner argues, it is clear from the hearings officer's analysis that the actual basis for denial was failure to comply with the more specific standards in OAR 660-033-

[16] It is worth noting that the original version of Statewide Planning Goal 2 (Land Use Planning) required that an exception to the goals be supported by "compelling reasons and facts," which LUBA found to impose a rigorous findings and evidentiary burden. *1000 Friends of Oregon v. Clackamas Cty.*, 3 Or LUBA 281, 297 (1981). It is possible that the county's comprehensive plan once contained similar language.

0130(4)(a)(D), which the county has not yet implemented. Petitioner contends that the hearings officer erred in presuming that LDO 218.090(7)(B) contains the same requirements as OAR 660-033-0130(4)(a)(D).

We do not understand the argument. Petitioner does not dispute that OAR 660-033-0130(4)(c)(C) and (4)(a)(D) are applicable approval criteria, as is LDO 218.090(7)(B). The ultimate standard under both rule provisions and the code is the same: whether the proposed dwelling will materially alter the stability of the overall land use pattern, considering the cumulative impact of nonfarm dwellings similarly situated. OAR 660-033-0130(4)(c)(C) and (4)(a)(D) elaborate on that standard, and prescribe how that determination is made. It would seem that failure to satisfy the ultimate standard stated at OAR 660-033-0130(4)(c)(C) and (4)(a)(D) would also constitute failure to satisfy LDO 218.090(7)(B). Absent some explanation from petitioner, we fail to see why reference to LDO 218.090(7)(B) rather than to the rule provisions is reversible error, if it is error at all.

The fourth subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer's findings of noncompliance with the stability standard, quoted at n 14, are inadequate. In particular, petitioner contends that the hearings officer's decision fails to make the detailed findings required by OAR 660-033-0130(4)(a)(D)(i) and (ii). Petitioner argues that the challenged decision does not identify or describe a study area, the area's boundaries, or the location of the subject property within the study area, does not state why the study area is representative of the land use pattern surrounding the subject property, and does not explain why the study area is adequate to conduct the stability analysis, as (4)(a)(D)(i) requires. *See* n 10. Further, petitioner contends that the hearings officer's decision fails to identify the broad types of farm uses in the study area, the number, location, and type of existing dwellings, the dwelling development trends

since 1993, the existing land use pattern in the area, or the land use pattern that could result from approval of possible new nonfarm dwellings, as required by (4)(a)(D)(ii). *Id.*

Intervenor responds, first, by noting that findings of noncompliance with applicable criteria need not be as exhaustive or detailed as findings necessary to show compliance with such criteria. *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266, 270 (2000); *Eddings v. Columbia County*, 36 Or LUBA 159, 162 (1999). Findings of noncompliance are adequate if they suffice to explain the local government's conclusion that applicable criteria are not met, and if they suffice to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Eddings*, 36 Or LUBA at 162. According to intervenor, the hearings officer's findings, while cursory, are supported by the staff report findings at Record 156-60, a portion of which the hearings officer quotes. Intervenor concedes that the hearings officer did not expressly adopt the staff report as findings. However, intervenor argues that LUBA may nonetheless consider the staff report as findings in support of the hearings decision pursuant to ORS 197.835(11)(b).[17]

The staff report at Record 156-60 appears to contain the information and descriptions required by OAR 660-033-0130(4)(a)(D)(i) and (ii), as does an analysis submitted by petitioner at Record 192-98. The hearings officer's decision states he examined both analyses, quotes an excerpt from the staff report, and appears to agree with the staff report conclusion that the stability standard is not met. However, the challenged decision does not adopt the staff report as findings. We have held that:

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[17] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

> "[I]f a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated." *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992) (footnote omitted).

The decision does not clearly indicate an intent to incorporate the staff report as findings, and therefore we agree with petitioner that the staff report analysis is not part of the decision's findings.

Whether the findings in the hearings officer's decision itself are inadequate, and whether any such inadequacy may be overlooked under ORS 197.835(11)(b), are more difficult questions. However, we need not resolve those questions. As explained in other portions of this opinion, the decision must be remanded for additional findings under the second, fourth and sixth assignments of error. For the reasons discussed under the sixth assignment of error, it is likely that the findings challenged under this assignment of error are materially defective in at least *some* particulars, and such deficiency cannot be overlooked pursuant to ORS 197.835(11)(b). Under these circumstances, we see no point in attempting to resolve which of the findings challenged under this assignment of error are inadequate and warrant remand. Because remand is required in any case, the better course is to sustain this assignment of error and allow the hearings officer an opportunity on remand to adopt more adequate findings.[18]

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[18] In sustaining the third assignment of error, we do not wish to convey agreement with petitioner that *all* of the alleged inadequacies in the decision's findings necessarily warrant remand. For example, as far as we can tell, the parties do not dispute the following information found in both the staff study and petitioner's own study: the location of the subject property within the study area, why the area is representative, why it is adequate to conduct the analysis, what are the broad types of farms uses in the area, the number of existing dwellings, and the development trends within the study area since 1993, as required by (4)(a)(D)(i) and (ii). If the decision's findings are inadequate solely for failure to set out undisputed information contained in the record, it is difficult to see why remand is warranted to remedy such findings. ORS 197.835(11)(b). Nonetheless, there is no point in resolving these matters here when the decision must be remanded in any case,

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer's stability analysis is based on several erroneous or unsupported assumptions.

As noted above, the crux of the hearings officer's finding of noncompliance is a comparison of the number of parcels and amount of acreage currently devoted to farm use, with the number of parcels and amount of acreage that would be devoted to farm use, assuming that all potential nonfarm dwellings were approved in the study area. *See* n 14. The hearings officer found, based upon a quoted portion of the staff report, that the study area currently includes 26 parcels and 2,196 acres under farm tax deferral, but would have only 12 parcels and 708 acres under farm tax deferral, assuming all potential nonfarm dwellings and parcels were approved. The decision appears to treat farm tax deferral status as a reliable indicator of whether property is or will be in farm use.

The hearings officer's finding of noncompliance with the stability standard presumes that placement of a nonfarm dwelling on an EFU-zoned parcel means that the parcel will lose its farm tax deferral, pursuant to ORS 215.236 and 308A.113.[19] Petitioner does not question

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and we do not do so. The hearings officer will have an opportunity on remand to adopt more adequate findings.

[19] ORS 215.236 provides, in relevant part:

> "(3) The governing body or its designee may grant tentative approval of an application made under ORS 215.213 (3) or 215.284 (1), (2), (3), (4) or (7) for the establishment of a dwelling on a lot or parcel in an exclusive farm use zone that is specially assessed at value for farm use under ORS 308A.050 to 308A.128 upon making the findings required by ORS 215.213 (3) or 215.284 (1), (2), (3), (4) or (7). An application for the establishment of a dwelling that has been tentatively approved shall be given final approval by the governing body or its designee upon receipt of evidence that the lot or parcel upon which establishment of the dwelling is proposed has been disqualified for special assessment at value for farm use under ORS 308A.050 to 308A.128 and any additional tax imposed as the result of disqualification has been paid.
>
> "(4) The owner of a lot or parcel upon which the establishment of a dwelling has been tentatively approved as provided by subsection (3) of this section shall, before final approval, simultaneously:

that premise. However, petitioner questions the hearings officer's further assumption that disqualification for farm tax deferral means that no farm use will occur on the parcel, for purposes of determining whether proposed and potential nonfarm dwellings will materially alter the stability of the land use pattern in the area. Petitioner argues that it is unreasonable to assume that placing a nonfarm dwelling on a large parcel will necessarily terminate all farm use of that parcel. The parcel is still zoned EFU, and is still subject to the restrictions of the EFU zone, which limit uses to farm uses and those nonfarm uses allowed under the EFU statutes. Therefore, we understand petitioner to argue, the county should have assumed at least for the larger parcels in the study area that at least some farm use would continue on some portion of those parcels, and applied *that* assumption in its stability analysis.

Similarly, petitioner questions the hearings officer's assumption that farm tax deferral status is an appropriate or sufficient means of determining whether the cumulative impact of nonfarm dwellings would materially alter the stability of the land use pattern in the area. According to petitioner, the focus of the stability analysis is on the stability of the land *use* pattern, not tax status. We understand petitioner to argue that farm tax deferral status is at best an indirect method of determining whether property is or will be in farm *use*. In the same vein, petitioner also questions the assumption that if a large parcel in the subject area could be partitioned to allow a nonfarm dwelling, it would be.

> "(a) Notify the county assessor that the lot or parcel is no longer being used as farmland;
>
> "(b) Request that the county assessor disqualify the lot or parcel for special assessment under ORS 308A.050 to 308A.128, 308A.315, 321.257 to 321.390, 321.730 or 321.815; and
>
> "(c) Pay any additional tax imposed upon disqualification from special assessment.
>
> "(5) A lot or parcel that has been disqualified pursuant to subsection (4) of this section may not requalify for special assessment unless, when combined with another contiguous lot or parcel, it constitutes a qualifying parcel."

In order to obtain final approval of a nonfarm dwelling, the applicant must notify the assessor that the parcel is no longer being used as farmland. ORS 215.236(4)(a). The statutory presumption appears to be that a parcel containing a nonfarm dwelling is no longer being used as farmland.[20] Given that presumption, we disagree with petitioner that the county erred in assuming that a parcel disqualified for farm tax deferral is no longer in farm use, for purposes of the stability analysis. The stability analysis at OAR 660-033-0130(4)(a)(D) requires both retrospective and prospective analyses of land use patterns, and the latter necessarily requires that the county project future land use patterns, based on reasonable assumptions. While farm tax status may not be conclusive evidence of *current* farm use, we fail to see why farm tax status may not be a reasonably reliable and sufficient indicator of *future* farm use, for purposes of the stability analysis. Requiring the county to assume that in the future there will be some level of farm use on some portions of some larger parcels that are entirely assessed for nonfarm use is unreasonable and unworkable.

With respect to the assumption that a parcel will be partitioned to allow nonfarm dwellings if it can be, that appears to be precisely what OAR 660-033-0130(4)(a)(D) requires. OAR 660-033-0130(4)(a)(D)(ii) requires identification of any "parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings under ORS 215.263(4)."[21] OAR 660-033-0130(4)(a)(D)(iii) requires the county to determine whether the "cumulative effect of existing and potential nonfarm dwellings" will alter the stability of the land use pattern in the area, in any of the described ways, including

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[20] There may be other statutory or local provisions that allow the county to apply or reapply farm tax deferral to only the farm portion of a parcel containing both a nonfarm use and a farm use, but no one has cited us to such a provision. ORS 215.236(5) seems to suggest that requalification for farm tax deferral is possible only if the parcel is combined with a qualifying contiguous parcel. *See* n 19.

[21] Prior to 2001, ORS 215.263(4) governed creation of nonfarm parcels throughout the state. In 2001, ORS 215.263(4) was amended to allow new nonfarm parcels in western Oregon that are below the minimum parcel size, while a new statutory section, ORS 215.263(5), was added to allow similar parcels in eastern Oregon. OAR 660-033-0130(4)(a)(D) was not amended after the 2001 legislative session.

"diminish[ing] the number of tracts or acreage in farm use[.]" It is difficult to imagine why (4)(a)(D)(ii) would require identification of parcels that may be divided to create new nonfarm parcels, if that information is not factored into the (4)(a)(D)(iii) determination. As described earlier, (4)(a)(D) essentially requires that a full development projection be used in the cumulative impacts analysis. The hearings officer's assumption that all new nonfarm parcels that can be created will be created is consistent with, if not mandated by, that approach.

Finally, petitioner contends that there is no evidence to support the hearings officer's finding that nonfarm dwelling approvals will result in an escalation of land prices, making "continued use as farmland highly speculative." Record 4, quoted at n 14. Petitioner argues that it is counterintuitive to presume that paying higher taxes leads to higher land prices. Intervenor does not cite to any evidence supporting the challenged finding. Instead, intervenor argues that, rather than being counterintuitive, it is a proposition beyond doubt that nonfarm parcels are more expensive than farm parcels of the same acreage, and that the potential for nonfarm residential development in an EFU-zoned area increases the price of farmland.

The hearings officer's finding is presumably directed at that part of (4)(a)(D)(iii) that requires an evaluation of whether the cumulative impact of nonfarm dwellings "will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland[.]" We do not agree with intervenor that the impact of proposed and potential nonfarm dwellings on land prices, for purposes of applying that standard, is something we or the hearings officer may simply assume to be true. Because no party identifies any evidence in the record supporting that material finding, we conclude that it is not supported by substantial evidence.

Alternatively, intervenor argues, and we agree, that the stability standard at (4)(a)(D)(iii) is framed in the disjunctive, and that the standard is not met if the cumulative

impact of nonfarm dwellings will *either* (1) make it more difficult for farm use to continue due to diminished opportunities to expand, purchase or lease farmland, *or* (2) diminish the number of tracts or acreage in farm use in a manner that destabilizes the character of the study area. *See* n 10. The hearings officer appears to have found that the stability standard is violated under both elements. That being the case, as intervenor points out, the county may rely upon either element, and the lack of substantial evidence supporting one element is only harmless error, if no error is attributed to the other element.

In this opinion we sustain portions of the second, third and sixth assignments of error, and require remand for the hearings officer to adopt more adequate findings regarding the stability analysis. The remanded aspects of the challenged decision have at least some bearing on the hearings officer's conclusion that the cumulative impact of existing, proposed and potential nonfarm dwellings in the area will diminish the number of tracts or acreage in farm use in a manner that destabilizes the character of the study area. In other words, we have already found reversible error in the second element of the hearings officer's ultimate conclusion under (4)(a)(D)(iii). Accordingly, we cannot say that the apparent lack of evidence supporting the first element, diminished opportunity to expand, purchase or lease farmland, is merely harmless error. The proper course then is to sustain this assignment of error, in part. On remand, if the hearings officer continues to believe that the stability standard is not met based in part on the impact of nonfarm dwellings on land prices or any diminished opportunity to purchase farmland, the hearings officer should identify evidence in the record supporting that finding.

The fourth assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the focus of the stability standard is the cumulative impact of nonfarm dwellings on *other* lots or parcels in the area, not on the subject parcel that is under consideration. According to petitioner, the hearings officer's finding of noncompliance with

the stability standard seems to refer to the impact on the subject property, not the other similarly situated lots or parcels in the area.

Specifically, petitioner cites to the emphasized portions of the following conclusion:

> "De-stabilization would not exist in theory only as ORS 308A.259 requires the loss of farm assessment with the establishment of a non-farm dwelling and minimum zoning requirements on EFU land would prevent partitioning of the *subject parcels*. LDO 218.070. The clear result would be an escalation of land prices beyond any relation to *its* value as farmland, making *its* continued use as farmland highly speculative." Record 4 (emphasis added).

Intervenor responds that, notwithstanding use of the singular possessive pronoun, the hearings officer's reference to "subject parcels" is to the other lots or parcels similarly situated in the study area, and the focus of the stability analysis is on those lots or parcels, not the subject parcel. We agree. Read in context, it is clear that the hearings officer did not apply the stability analysis to the subject property.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner contends that the city failed to address six issues raised below regarding how the county conducted the stability analysis. Some of these issues were raised under other assignments of error, and resolved there. We now address the remainder.

A. City-Owned Tract

Petitioner first argues that the county erred in omitting from its study area a 760-acre tract adjacent to the subject property that is owned by the City of Ashland, and currently used for grazing. As the staff report explains, staff eliminated the city-owned tract from the study area, because they believed the property is being used for disposal of treated waste water from the city's sewage treatment plant. Record 159. Based on that belief, staff concluded that it is unlikely that the city property would ever be developed with nonfarm dwellings, *i.e.*, that property was not "similarly situated" as the subject parcel. *Id.* Petitioner argued to the county that the City of Ashland is not using and does not plan to use the 760-acre tract for

wastewater disposal, that in fact the city has instead opted to upgrade its existing treatment plant. Record 70.

The hearings officer did not resolve that evidentiary dispute, or the related issue of whether the 760-acre tract adjacent to the subject property should be included in the study area. Where specific issues are raised concerning compliance with an approval criterion, the findings supporting the decision must respond to those issues. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979); *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Although intervenor argues that the staff report addressed this evidentiary dispute, we have already held that the staff report was not adopted as part of the decision's findings. Accordingly, we agree with petitioner that the decision must be remanded to address this issue.

This subassignment of error is sustained.

B. The Paden Tract

Petitioner argued to the hearings officer that the staff study erred in assuming that the 656-acre Paden tract within the study area could be divided so as to qualify three additional nonfarm dwellings. Petitioner disagreed with that assumption, arguing in a document entitled "Supplemental Findings of Fact" that a 1991 decision approving a farm dwelling on the Paden tract was expressly conditioned on the requirement that the two lots within the Paden tract be retained under single ownership and considered as one parcel for development purposes. Record 72. The 1991 decision is attached to petitioner's proposed findings, at Record 82. Petitioner argues to us that the hearings officer erred in failing to address this issue, which pertains to the question of how many potential nonfarm dwellings may be built in the study area, and the number of potential nonfarm parcels and loss of farm acreage under the stability standard.

Intervenor responds that the hearings officer was entitled to ignore any issue raised in petitioner's "Supplemental Findings of Fact," because the hearings officer obviously

disagreed with petitioner's proposed ultimate conclusion in those findings, that the proposed nonfarm dwelling satisfied the stability standard. We disagree. However labeled, the document entitled "Supplemental Findings of Fact" is in fact an advocacy memorandum, submitted at the evidentiary hearing before the hearings officer. We see no basis to ignore a relevant issue regarding an approval criterion that was raised with sufficient specificity, simply because it is embodied in a document proposing findings of fact and the hearings officer ultimately disagreed with the proponent that the application should or should not be approved. Consequently, we agree with petitioner that the hearings officer erred in failing to address the issues petitioner raised regarding the Paden tract.[22]

This subassignment of error is sustained.

C. Similarly Situated

Petitioner argues that the county erred in failing to address an issue raised below regarding the meaning of the term "similarly situated" in (4)(c)(C), citing to Record 13. Record 13 is part of petitioner's final rebuttal, in which petitioner objects that the staff report considered all vacant lands zoned EFU within the study area to be "similarly situated," without regard to the size of such lands. Petitioner argued to the hearings officer that to be "similarly situated" other vacant lands within the study area must be similar in size to the subject property, and urged the hearings officer to adopt an interpretation of OAR 660-033-0130(4)(c)(C) that limited the size of "similarly situated" parcels. At the very least, petitioner argued, "similarly situated" parcels should be limited to substandard parcels. Lands that exceed the minimum parcel size, we understand petitioner to argue, should not be included in the cumulative impacts analysis.

[22] Petitioner also argues that the hearings officer failed to address certain issues raised regarding other farm tracts in the study area, the White, Young, James and Smith tracts. However, petitioner does not identify what issues were raised regarding these tracts. The cited record references do not raise any issue that we can identify regarding these tracts. Accordingly, we agree with intervenor that any issues regarding how the county analyzes these tracts have been waived. ORS 197.763(1).

Again this issue goes to the question of whether the cumulative effect of proposed and potential nonfarm dwellings will diminish the number of tracts or acreage in farm use in a manner that destabilizes the character of the study area. The hearings officer did not provide the requested interpretation, although he appears to concur with the staff's approach, which did not consider size in determining which parcels in the study area were "similarly situated" with the subject parcel, and thus were considered impacted under the analysis. However, the issue is a matter of interpreting the administrative rule. We owe no deference to the hearings officer's views on the meaning of the rule, and therefore see no point in remanding for the hearings office to address that issue.

Although the meaning of "similarly situated" is not entirely clear to us, we disagree with petitioner's position that it necessarily limits consideration of parcels based on size. Nothing in the text of the rule drawn to our attention suggests that whether other parcels in the study area are "similarly situated" with the subject property depends on the size of the respective parcels. Given that (4)(a)(D)(ii) expressly requires consideration of whether parcels larger than the minimum parcel size may be divided to allow nonfarm dwellings, it would appear that the scope of "similarly situated" parcels is not limited to substandard parcels, as petitioner suggests.

This subassignment of error is denied.

D. Consistency

Finally, petitioner argues that "[t]he county's tentative denial of the subject application was inconsistent with other recent decisions by the county that approved similar applications in the same area. R[ecord] 12" Petition for Review 20. The cited record page contains a paragraph that refers to application 2001-17-NF, and characterizes the county's decision in that case as finding that "potential dwellings were unlikely to be developed and would not materially alter the existing land use pattern." Record 12.

Intervenor responds that petitioner has failed to explain why the challenged decision is inconsistent with 2001-17-NF. Intervenor notes that portions of the staff report for 2001-17-NF are in the record at Record 79-81, but argues that those portions do not contain sufficient information to substantiate petitioner's assertion that the two decisions are in fact inconsistent. We agree. Among other things, we note that the two decisions appear to involve dwellings in different areas.[23] In any case, even if the two decisions involve the same area and are otherwise comparable, petitioner has made no effort to explain why he believes the two decisions are inconsistent or, even assuming they are, why that provides a basis for reversal or remand.

This subassignment of error is denied.

The sixth assignment of error is sustained, in part.

CONCLUSION

We have sustained the third assignment of error, and portions of the second, fourth and sixth assignments of error, requiring remand for more adequate findings. Specifically, on remand the hearings officer should adopt findings that more adequately address the considerations required under (4)(a)(D). In doing so, the hearings officer should address the issues petitioner raised regarding the treatment of the city-owned tracts and the Paden tract in the stability analysis. Further, the hearings officer should determine whether petitioner has demonstrated that the proposed nonfarm dwelling satisfies the stability standard at (4)(a)(D)(iii), without imposing a "substantial and compelling findings" burden on petitioner. Finally, if the hearings officer continues to believe that the application should be denied due to impacts on land prices, the hearings officer should identify evidence in the record that supports that conclusion.

The county's decision is remanded.

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[23] The stability analysis in 2001-17-NF involved a 3,860-acre study area east of the City of Ashland. Record 79. The present case involves an area north of the city.