BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NANCY KNOCHE,
Petitioner,

vs.

CROOK COUNTY,
Respondent,

and

EUGENE GRAMZOW,
Intervenor-Respondent.

LUBA No. 2003-140

FINAL OPINION
AND ORDER

Appeal from Crook County.

Garry Abbott Parks, Tualatin, filed the petition for review and argued on behalf of petitioner.

Jeff M. Wilson, Prineville, filed a response brief and argued on behalf of respondent.

Ross Day, Tigard, filed a response brief on behalf of intervenor-respondent.

BRIGGS, Board Member; BASSHAM, Board Chair; participated in the decision. HOLSTUN, Board Member, did not participate in the decision.

AFFIRMED 12/19/2003

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a county decision approving (1) a partition of a 320-acre farm parcel into three parcels and (2) conditional use permits for two nonfarm dwellings on two of those parcels.

MOTION TO INTERVENE

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

FACTS

This is matter is before us for the second time. In *Hanna v. Crook County*, 44 Or LUBA 386 (2003), we described the relevant facts as follows:

> "The subject property is a 320.84-acre parcel zoned Exclusive Farm Use (EFU-3). The parcel has 65.3 acres of water rights. The irrigated portion of the property is used for growing hay, and the remainder for grazing [cattle.] All lands within one mile of the property are also zoned EFU-3, which has a 160-acre minimum parcel size. The majority of the surrounding parcels range in size from 80 to 1,500 acres. Thirteen parcels within one mile are sub-minimum in size, ranging from five to 60 acres. Of those thirteen parcels, nine are not under farm tax deferral, and five are developed with non-farm dwellings.
>
> "[Intervenor] filed an application with the county seeking to partition the subject parcel into three new parcels: a 299.34-acre farm parcel, and two nonfarm parcels measuring 10.5 and 11.00 acres in size. A nonfarm dwelling is proposed for each new nonfarm parcel. The proposed nonfarm parcels are on a portion of the parent parcel that has no water rights and that is composed entirely of Class VI soils. The proposed nonfarm parcels are adjacent to an irrigated hay field." 44 Or LUBA at 387-388.

The county court approved the partition and nonfarm dwelling applications. Petitioner and another party appealed the county court's decision to LUBA. We remanded the county's decision to properly apply (1) the "suitability standard" set out at ORS 215.263(5)(a) and (2) the "material alteration standard" set out in OAR 660-033-130(4)(a)(D)(i) in light of our decision in *Elliot v. Jackson County*, 43 Or LUBA 426 (2003).

On remand, the county court conducted additional evidentiary proceedings and again approved the applications. This appeal followed.

MOTION TO STRIKE

A. *Central Oregonian* newspaper article

Intervenor moves to strike references in the petition for review to excerpts from a newspaper article published in the *Central Oregonian* on July 18, 2003. That newspaper article is used to support petitioner's argument in the first assignment of error that the county judge was biased in favor of intervenor's application. Intervenor contends that petitioner may not use that newspaper article to allege bias before LUBA based on evidence that petitioner could, but did not, include in the record before the county court. Petitioner responds that her argument based on the newspaper article is appropriate, given that the county judge referred to the article in his disclosure of *ex parte* contacts.

We may consider arguments that refer to evidence not included in the record before the local decision maker if no party objects to the evidence relied on to support those arguments, or the party that wishes to rely on evidence not included in the record moves for the Board to consider that evidence pursuant to OAR 661-010-0045(1).[1] Intervenor's motion to strike is granted, as petitioner has not moved to take evidence not in the record pursuant to OAR 661-010-0045(1).

B. Table Estimating Full Buildout Within 2,000-Acre Study Area

Intervenor also moves to strike Appendix C to the petition for review, arguing Appendix C includes analysis and evidence that was not placed before the county court and may not now be used to support petitioner's argument in the third assignment of error that

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[1] OAR 661-010-0045(1) provides, in relevant part:

> "[LUBA] may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * *ex parte* contacts * * * or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision."

the county erred in concluding that two additional dwellings on nonfarm parcels would not alter the stability of the land use pattern within a 2,000-acre study area.

For the reason discussed in the third assignment of error, we agree with intervenor's argument. Accordingly, Appendix C is stricken.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county judge should not have participated in the county's decision on remand, because he was biased in favor of the applicant. According to petitioner, the county judge made comments during an interview with a local newspaper reporter that demonstrate that the county judge disagreed with LUBA's analysis in *Hanna* and believed that the county's land use laws should be applied to provide as many opportunities for applicants in general, and this applicant in particular, to develop land.

The county responds that petitioner had an opportunity to challenge the county judge's participation in the remand proceedings, but did not. The county argues that, as a result, petitioner may not challenge the county judge's participation in an appeal of the county's decision. Petitioner responds that it was not until the county judge participated in the decision to approve intervenor's application that petitioner's bias claim became "ripe for contest." Petitioner's Response to Motion to Strike 2.

To obtain reversal or remand on the grounds that a decision maker was biased, petitioner must demonstrate that the decision maker could not reach a decision on an application based on the law and evidence before that decision maker. *See Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 711 (2001) (evidence must clearly demonstrate that decision maker formed an opinion prior to receiving evidence during the course of the local proceedings); *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 146, *aff'd* 183 Or App 581, 54 P3d 636 (2002) (totality of circumstances, including participation by decision maker in petition supporting application, demonstrates prejudgment).

In this case, the county's remand hearing was held on June 26, 2003 and was continued to August 6, 2003. On August 6, 2003, at the commencement of the county's continued remand hearing, the county judge disclosed that (1) prior to the commencement of the remand proceedings, the county judge participated in an interview with a local newspaper reporter; (2) the article written as a result of that interview was not printed until July 18, 2003; (3) contrary to what was written in the article, he had commented only generally regarding legislation that he believed would allow for more development on marginal farm land, and did not comment on the merits of intervenor's application in particular; and (4) he had not made up his mind regarding intervenor's application. The county judge apologized for any "heartburn" the article may have caused, and allowed an opportunity for parties to challenge the disclosure and the participation of the members of the county court in the decision. Excerpt of Partial Transcript of August 6, 2003 County Court Hearing, Response Brief Appendix 2, 2-3.

Petitioner has not demonstrated that the county judge prejudged intervenor's application or was incapable of reviewing the application on the merits. *Halvorson Mason Corp.*, 38 Or LUBA at 711. While comments made by the county judge may indicate a predisposition to favorably consider nonfarm dwelling applications in certain circumstances, the county judge also declared that he was able to consider the application before him based on the evidence before him. Response Brief Appendix 2, 2-3. We believe the totality of the evidence cited to us demonstrates that contrary to petitioner's assertions, the county judge did not prejudge intervenor's application. Therefore, even if petitioner had challenged the county judge's participation during the county's proceedings, we agree with respondents that the county judge did not err by participating in the challenged decision. *See Friends of Jacksonville*, 42 Or LUBA at 143 (suggested predisposition in favor of applicant alone is not sufficient to disqualify decision maker).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ORS 215.263(5)(a) and (b) establish two similar, but distinct, methods to approve a partition to establish nonfarm dwellings in an EFU zone.[2] ORS 215.263(5)(a)(E) permits the

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[2] ORS 215.263(5)(a) provides in relevant part that, in eastern Oregon, the governing body of a county:

> "May approve a division of land in an exclusive farm use zone to create up to two new parcels smaller than the minimum size established under ORS 215.780, each to contain a dwelling not provided in conjunction with farm use if:
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> "* * * * *
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> "(E) The parcels for the nonfarm dwellings are generally unsuitable for the production of farm crops and livestock or merchantable tree species considering the terrain, adverse soil or land conditions, drainage or flooding, vegetation, location and size of the tract. 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."

ORS 215.263(5)(b) provides in relevant part that, in eastern Oregon, the governing body of a county:

> "May approve a division of land in an exclusive farm use zone to divide a lot or parcel into two parcels, each to contain one dwelling not provided in conjunction with farm use if:
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> "* * * * *
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> "(D) The parcels for the nonfarm dwellings are:
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> "* * * * *
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> "(ii) Either composed of at least 90 percent Class VII and VIII soils, *or composed of at least 90 percent Class VI through VIII soils and are not capable of producing adequate herbaceous forage for grazing livestock.* The Land Conservation and Development Commission, in cooperation with the State Department of Agriculture and other interested persons, may establish by rule objective criteria for identifying units of land that are not capable of producing adequate herbaceous forage for grazing livestock. In developing the criteria, the commission shall use the latest information from the United States Natural Resources Conservation Service and consider costs required to utilize grazing lands that differ in acreage and productivity level;
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> "* * * * *
>
> "(F) The parcels for the nonfarm dwellings are generally unsuitable for the production of farm crops and livestock or merchantable tree species considering the terrain, adverse soil or land conditions, drainage or flooding, vegetation, location and size of the tract. 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." (Empasis added.)

creation of a nonfarm parcel if the proposed parcel is "generally unsuitable" for agricultural use. ORS 215.263(5)(b) allows a nonfarm dwelling to be sited on a newly formed nonfarm parcel provided the parcel is "generally unsuitable" for the production of farm crops and livestock *and* does not contain adequate herbaceous forage. ORS 215.263(5)(b)(D) and (F). During the county's initial proceedings in the appeal, the county court relied exclusively on its finding that the proposed nonfarm parcels do not provide adequate herbaceous forage for cattle to conclude that those proposed parcels are generally unsuitable for the production of farm crops and livestock.[3]

After considering the relationship between the herbaceous forage standard set out in ORS 215.263(5)(b)(D) and the "generally unsuitable" standard set out in ORS 215.263(5)(a)(E) and (b)(F), we concluded that findings that there is inadequate herbaceous forage does not necessarily result in a determination that property is generally unsuitable for agricultural use under the suitability considerations set forth in ORS 215.263(5)(a)(E) or (b)(F), stating:

> "The relationship between the 'generally unsuitable' test at ORS 215.263(5)(b)(F) and the soil and forage capacity standard at ORS 215.263(5)(b)(D)(ii) is not entirely clear to us. However, the fact that the legislature chose to require compliance with both standards indicates that compliance with one standard does not necessarily establish compliance with the other. As the statute is written, it is at least theoretically possible that a particular property may be incapable of producing adequate 'herbaceous forage,' and yet be generally suitable for production of livestock, or capable of producing adequate 'herbaceous forage,' and yet be generally unsuitable for production of livestock." 44 Or LUBA at 396.

Our remand directed the county to consider other evidence regarding the suitability of the proposed nonfarm parcels for agricultural use against the six factors set out in ORS 215.263(5)(a)(E). On remand, the county adopted findings concluding that the proposed

[3] As we explained in *Hanna*, the herbaceous forage test at ORS 215.263(5)(b)(D) is not directly applicable to the application at issue here. In the decision at issue in *Hanna*, the county court used the herbaceous forage test at ORS 215.263(5)(b)(D) to conclude that the proposed parcels satisfy the "generally unsuitable" standard.

parcels are unsuitable for crop production and grazing, because the two parcels (1) are physically separated from the grazing land located on the remainder of the subject property; (2) include poor soils, uneven terrain, and inadequate forage; (2) are of inadequate size to be farmed independently; and (4) cannot be used in conjunction with adjacent farm operations.[4] Petitioner challenges each of these conclusions.

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[4] The county court adopted evidence and findings provided by intervenor to support its decision that ORS 215.263(5)(a)(E) is satisified. Record 11. In addition, the county court found:

> "* * * Considering each of the criteria required by ORS 215.263(5)[(a)(E)], including terrain, adverse soil or land conditions, drainage or flooding, vegetation, location and size of tract, it is apparent that the land in question may not be operated independently as a farm or ranch operation. The official maps published by the soil conservation service dated February 1966 identify the area of the two proposed non-farm parcels as Class VII Soils. This classification is significant because lands classified as I through VI are presumed to be agricultural lands while lands [classified] as VII and VIII do not carry that same presumption.
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> "Specifically, the Court makes the following findings as to each of the six factors:
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> "1) Terrain – The terrain of the proposed new non-farm parcel is lava plain and is generally unsuitable for farming.
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> "2) Adverse Soil or Land Conditions – The new subject parcels are comprised almost entirely of Class VII Soils. This finding is made notwithstanding the conflict between the Draft Soils Map (identifying the property as Class VI) and the Official Published Soils Report (identifying the property as Class VII). The Official Soils Report published by NRCS ([U.S. Natural] Resources Conservation Service) identifies the proposed new parcels as predominately Class VII soils. The Draft soils map relied upon by appellants has not yet been published.
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> "3) Drainage or Flood Conditions – The proposed new parcels are located in Flood Zone X, outside of the 500-year Flood Zone.
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> "4) Vegetation – The herbaceous Forage Report identifies the parcels as unsuitable for the production for forage due to 'soils and terrain,' concluding that the proposed new parcels will only support grazing for one cow for a total of 19 days [a year.] LUBA held * * * that use of the Herbaceous Forage test was sufficient to satisfy the question of land capacity for the production of vegetation.
>
> "5) Location – The location is consistent with development in the area away from properties currently put to farm use.
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> "6) Size – The proposed non-farm parcels (21 acres) are consistent with the size and type of parcels within the study area. The Court notes that in *Hearne v. Baker County*, 89 Or App 282 (1988), The Court of Appeals * * * rejected any argument that a parcel cannot be 'generally unsuitable' for farm use unless a majority of the parcel is unsuitable.

A. Terrain

Petitioner argues that the conclusion that the two proposed nonfarm parcels are comprised of "lava plain" is not supported by substantial evidence. Even if the proposed nonfarm parcels are predominately composed of lava plain, petitioner argues that the finding is inadequate to explain why such terrain cannot be used for grazing.

Respondent responds that there is testimony from intervenor that only 24 percent of the proposed nonfarm parcels include perennial grass species and the remainder consists of "bare ground, rock, litter, cheat grass and desert moss. The terrain of the proposed [nonfarm] parcels is Lava plain." Record 54. According to respondent, the county could rely on that evidence and other evidence that large rocks on the proposed parcels make them difficult to use for farming operations to conclude that the terrain is generally unsuitable for crop production and grazing. We agree with respondent.

B. Adverse Soil Conditions

Petitioner argues that the county erroneously relied on evidence that the proposed nonfarm parcels are predominately comprised of Class VII soils. According to petitioner, there is considerable evidence in the record, including the county staff report, and statements from the intervenor and his representatives, that the proposed nonfarm parcels are comprised of predominately Class VI soils. Petitioner argues that the map provided by intervenor does not comprise substantial evidence a reasonable decision maker would rely on because it is

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> "* * * In addition to the six factors of the unsuitability test discussed above, the Court finds that the proposed new parcels cannot reasonably be put to farm use in conjunction with other land. While the proposed non-farm parcels may be useable as dry ground for part of a cattle operation, the Court finds that the remaining parcel includes 240 acres of existing dry land. The Court finds that there is an absolute limit at which additional dry ground becomes superfluous, and the prior conclusion of this Court that 240 acres is sufficient was correct. Furthermore, [intervenor's] representative (Vikki Breese) and former Farm Bureau President (Doug Breese) each testified that the location of the proposed non-farm parcels is separated from the remaining dry land, making it impracticable to utilize it as part of a farming operation." Record 11-12.

> "not labeled [or] authenticated. * * * [T]he map in the record is illegible. The source, author, [and] date of the document is nowhere provided. Also, the location of the subject parcels is not marked on this map. That is not surprising, however, because even a cursory scale comparison of this map in relation to the other maps provided by the county * * * shows that the subject parcels are not on the map * * *." Petition for Review 19 (emphasis omitted).

The county responds that there is evidence, in the form of testimony from the planning director and intervenor's representative that the maps that were used by the NRCS to identify the soils classification on the property during the county's initial proceedings were based on unpublished data, and that published data indicates that at least some of the property is comprised of Class VII soils. Record 49 and 284. The county argues that that evidence is evidence the county court could rely on to conclude that, in general, the soil is not conducive to cultivation or for grazing.

Even if petitioner is correct that the county's finding regarding soil classification is not supported by substantial evidence, we fail to see that that error is itself a basis for reversal or remand. It is undisputed that a majority of the soils on the property are Class VI soils at best, and that those soils are not conducive to crop production. *See Hanna*, 44 Or LUBA at 392, n 5. Therefore, the question is whether the soils on the property are suitable for grazing. Other findings adopted by the county show that the soils do not have the capability to provide adequate forage for cattle. Those findings, in addition to the findings and evidence regarding the soils classification of the property, are adequate to show that insofar as soil condition affects the suitability of the property for cattle grazing, the property is generally unsuitable for cattle forage. *See* n 4.

C. Drainage or Flood Conditions

Petitioner argues that there is no evidence in the record that the land is extremely dry because of good drainage and, as a result, the county's findings are not supported by substantial evidence.

In addition to the findings set out at n 4, the county adopted findings that state, in relevant part:

> "The proposed new parcels are well drained and do not present any immediate flood conditions as the proposed new parcels receive only approximately 8 to 12 inches of precipitation per year. * * *
>
> "The drainage conditions on the property make the land extremely dry and devoid of vegetation, making it much more difficult to use the subject property for any farm uses. * * *" Record 56.

There is evidence in the record that supports the county's findings that the lack of surface water on the proposed nonfarm parcels, in addition to the lack of water rights for irrigation, limit agricultural use of that area. There is also evidence in the record that vegetation is sparse. The findings are adequate to explain why the county believes that the drainage conditions on the subject property make it generally unsuitable for grazing and those findings are supported by substantial evidence.

D. Vegetation

The county relied on a forage report provided by intervenor to show that the subject property does not include adequate vegetation to provide forage for cattle. Petitioner disputes both the county's finding and the evidence, arguing that there is no evidence that the county considered the forage capability for animals other than cattle, such as ostriches, emus, alpacas, llamas, bison, sheep or goats. In addition, petitioner argues that the forage report ignores evidence that the property does have the capability to be improved to increase forage and that the current conditions are a result of poor management.

Based on the forage report, the county found that the limited availability of water, poor soils and rocky terrain provided little opportunity for adequate forage on the proposed nonfarm parcels. In addition, the county found that the types of vegetation that exist on the property limit its suitability for grazing. While the forage report assumes that the livestock subsisting on the available forage would be cattle, petitioner cites to no evidence that the forage requirements of other species are different than that of cattle. We do not agree with

petitioner that the county is obliged to consider the suitability of the proposed nonfarm parcels for other animal species in the absence of evidence that the forage requirements differ from cattle and the property is capable of supporting them.

E. Size and Location

The county found that the two nonfarm parcels are too small and have too limited forage to allow them to be farmed independently. The county also found that the proposed nonfarm parcels are located on a portion of the parent parcel that is separated from the remainder of the dry grazing land by irrigated hay field, and have been fenced off from the remainder of the property. The findings note that none of the parcels located in the vicinity of the proposed nonfarm parcels are currently in agricultural use and that there is an abundance of dry grazing land in the area. Finally, the findings cite to testimony from the lessee of the subject property, where the lessee stated that the proposed nonfarm parcels are not being used as part of the property's grazing operation. Therefore, the county concluded that both the size and location of the parcels make them unsuitable for farm use, and unlikely to be used in conjunction with other ranching activities in the area.

Petitioner challenges these findings, arguing that the findings the county adopted that specifically pertain to size and location are not relevant to the criteria and are not supported by substantial evidence. Specifically, petitioner argues that there is no evidence in the record that the proposed parcels are, as the county concluded, "consistent" with other parcel sizes in the area. Petitioner points out that, within a 2,000-acre radius, there are only four other parcels that are of a similar size. Petitioner also argues that with respect to location, the subject property, including the proposed nonfarm parcels, is currently leased to a neighboring rancher. Petitioner argues that there is nothing that would prevent the proposed nonfarm parcels from being included in that larger ranching operation, as they have been in the past.

We agree with respondents that there is evidence in the record to support the county's findings that the proposed nonfarm parcels are located away from the remainder of the

grazing operation on the ranch, and that because there is little agricultural activity occurring in the area, the proposed nonfarm parcels cannot reasonably be put to agricultural use in conjunction with other land.

In conclusion, we agree with respondents that, overall, the findings demonstrate that the proposed nonfarm parcels are generally unsuitable for grazing, the only feasible farm use of the property, and those findings are supported by substantial evidence. The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In the county's initial proceedings, the county court concluded that the proposed partition and nonfarm dwellings would not materially alter the land use stability in the area because two additional nonfarm parcels and dwellings would not affect the present land use pattern, although they may contribute to a cumulative change in that pattern.

We concluded that the county's findings were inadequate to establish that approval of the two nonfarm parcels and dwellings on those parcels would not alter the stability of the land use pattern of the area when considering the full build out potential of the study area. 44 Or LUBA at 398-399; *see also Elliot*, 43 Or LUBA at 440-441 (describing what is required to satisfy stability standard set out at OAR 660-033-0130(4)).

Petitioner argues that on remand the county again failed to properly consider the ultimate buildout of the study area. Petitioner concedes that there is evidence in the record that shows that between 13 and 21 dwellings could be approved within a 2000-acre radius of the subject property and the county relied on that evidence to conclude that if up to 21 nonfarm dwellings are built, those additional dwellings would not alter the stability of the land use pattern of the study area. However, petitioner argues that the county is obliged to undertake its own analysis of potential buildout. Petitioner contends that had the county done so, it would have concluded that up to 61 dwellings could be approved, a number that would significantly alter the stability of the land use pattern in the area. Petitioner attaches a table to

the petition for review at Appendix C that lists the properties within the study area and estimates the number of potential dwellings on those parcels to be 61.

Respondents argue that during the local proceedings, petitioner's own estimate of potential buildout was not substantially greater than intervenor's. According to respondents, petitioner estimated 21 dwellings could be established in the study area and intervenor's attorney estimated 19 dwellings could be established. Respondents argue that the county court could, and did, rely on that testimony to conclude that the land use pattern would not be altered.[5] Respondents contend that petitioner may not now introduce different evidence that shows substantially more dwellings could be established.

Petitioner responds that the table does not contain new evidence. Rather, petitioner argues, the table is based on evidence in the record and applies legal standards to establish the number of dwellings that could be approved based on that evidence.

We disagree with petitioner that we may consider the table attached to the petition for review at Appendix C for purposes of resolving petitioner's evidentiary challenge to the county's findings under the stability standard. That table is not in the record, and reflects a theory of calculating potential new nonfarm dwellings that was not presented below. Petitioner does not dispute that the evidence that is in the record, including petitioner's own

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[5] The county's findings with respect to the stability standard state:

> "* * * Regarding the land use pattern, [intervenor] and [petitioner] have correctly identified a study area of 2,000 acres. [Intervenor and petitioner] are in virtual agreement regarding the buildout. Applicant testified that 13 non-farm dwellings could be approved within the study area pursuant to ORS 215.263(5) * * * plus an additional 5 lot of record dwellings for a total of 18 non-farm dwellings. Appellant testified that the impact analysis indicates a total potential buildout of 21 non-farm dwellings. While an impact of 18 to 21 non-farm dwellings could potentially impact intensive farming units, the pattern related to the non-farm parcels within the study area is way from rather than towards intensively farmed irrigated land. [Petitioner's] assertion that existing development has had any chilling effect on agricultural utilization [in] the study area is unsubstantiated by any evidence in the record. On the other hand, [intervenor] presents testimony from farmers and ranchers that the proposed development will not inhibit existing farming operations. Cumulative impact resulting from full buildout will likely appear on the margins of the study area and will not occur in proximity to existing agricultural operations." Record 13.

estimate of 21 dwellings, supports the county's dwelling count and ultimate conclusion that the stability standard is met.

The third assignment of error is denied.

The county's decision is affirmed.