BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JERRY LICHVAR,
Petitioner.

vs.

JACKSON COUNTY,
Respondent.

LUBA No. 2004-207

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Jerry Lichvar, Rogue River, filed the petition for review and argued on his own behalf.

No appearance by Jackson County.

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

AFFIRMED 03/16/2005

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer decision that denies his application for county approval of a non-farm dwelling in an exclusive farm use zone.[1]

INTRODUCTION

The statutes, LCDC administrative rules and county criteria that control approval of nonfarm dwellings impose criteria that are analytically complex and present potentially difficult problems of proof. The administrative rules that apply in this case are OAR 660-033-0130(4)(c) and 660-033-0130(4)(a). While a complete reading of those rules will demonstrate their complexity and the problems applicants and counties inevitably face in applying those rules, such a complete reading is not essential to understand this case. We set out the complete text of the rules in the margin below, but our summary of the key requirements of the rule in the next paragraph is sufficient to understand our disposition of this appeal.

For jurisdictions outside the Willamette Valley, the starting point in identifying the relevant nonfarm dwelling approval criteria is OAR 660-033-0130(4)(c).[2] Under that rule, an applicant

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[1] The county has not appeared to defend its decision.

[2] OAR 660-033-0130(4)(c) provides:

> "In counties located outside the Willamette Valley [approval of a nonfarm dwelling] require[s] findings 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;
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> "(B)(i) The dwelling is situated upon a lot or parcel, or a portion of a lot or parcel, that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel or portion of a lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land; and

must demonstrate that the dwelling: (1) "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;" (2) will be "situated upon a lot or parcel, or a portion of a lot or parcel, that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species;" and (3) "will not materially alter the stability of the overall land use pattern of the area." In this opinion we sometimes

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"(ii) A lot or parcel or portion of a lot or parcel is not 'generally unsuitable' simply because it is too small to be farmed profitably by itself. If a lot or parcel or portion of a lot or parcel can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch, then the lot or parcel or portion of the lot or parcel is not 'generally unsuitable'. A lot or parcel or portion of a lot or parcel is presumed to be suitable if, in Western Oregon it is composed predominantly of Class I-IV soils or, in Eastern Oregon, it is composed predominantly of Class I-VI soils. Just because a lot or parcel or portion of a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use; or

"(iii) If the parcel is under forest assessment, the dwelling shall be situated upon generally unsuitable land for the production of merchantable tree species recognized by the Forest Practices Rules, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the parcel. If a lot or parcel is under forest assessment, the area is not "generally unsuitable" simply because it is too small to be managed for forest production profitably by itself. If a lot or parcel under forest assessment can be sold, leased, rented or otherwise managed as a part of a forestry operation, it is not 'generally unsuitable'. If a lot or parcel is under forest assessment, it is presumed suitable if, in Western Oregon, it is composed predominantly of soils capable of producing 50 cubic feet of wood fiber per acre per year, or in Eastern Oregon it is composed predominantly of soils capable of producing 20 cubic feet of wood fiber per acre per year. If a lot or parcel is under forest assessment, to be found compatible and not seriously interfere with forest uses on surrounding land it must not force a significant change in forest practices or significantly increase the cost of those practices on the surrounding land;

"(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; and

"(D) The dwelling complies with such other conditions as the governing body or its designate considers necessary." (Emphasis added).

use the following short hand descriptions of these three standards: (1) the cost of farming or forest practices standard; (2) the generally unsuitable standard; and (3) the stability standard.

OAR 660-033-0130(4)(c)(C) incorporates the worst-case scenario methodology for applying the stability standard that is set out at OAR 660-033-0130(4)(a)(D).[3] The stability analysis required by OAR 660-033-0130(4)(a)(D) essentially requires that the applicant: (1) project the worst-case scenario for development of dwellings on similarly situated parcels; and (2) determine whether the stability of the area for continued agriculture will be upset if that worst-case

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[3] OAR 660-033-0130(4)(a)(D) sets out the following methodology for applying the stability standard:

> "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 pattern that could result from approval of the possible nonfarm dwellings under this subparagraph;
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> "(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."

scenario comes true. If the worst-case scenario would upset the stability of the area for continued agriculture, the application for a nonfarm dwelling must be denied.

As a practical matter, in most if not all cases, the stability standard cannot be applied until *after* the generally unsuitable standard is applied. This is because the applicant and county will need to know the salient characteristics of the subject property order to determine whether other similarly situated parcels include generally unsuitable land that could potentially provide a site for a nonfarm dwelling under OAR 660-033-0130(4), when applying the stability standard's worst-case scenario test. If so, the potential for siting a nonfarm dwelling on that similarly situated parcel must be included in the worst-case scenario. If not, then the worst-case scenario may proceed on an assumption that no nonfarm dwelling could be sited on that otherwise similarly situated parcel, because it lacks a site for the dwelling that is "generally unsuitable * * * for the production of farm crops and livestock or merchantable tree species."

FACTS

Petitioner's four-acre parcel is zoned for exclusive farm use (EFU). According to U.S. Natural Resource Conservation Service maps, the property consists of high quality Class II soils, if irrigated. The property has irrigation rights. In his application to the county, petitioner identified two potential sites for his proposed nonfarm dwelling—Area 1 and Area 2. Petitioner took the position before the county that Area 1 satisfies the generally unsuitable standard because it is an area where an old road, with associated cut and fill and compaction, has rendered the site generally unsuitable for the production of farm crops and livestock or merchantable tree species. Petitioner also took the position that Area 2 satisfies the generally unsuitable standard because more detailed study of the soils shows that Area 2 has steep slopes and poor quality Class VI soils.

The county's decision below was rendered initially by the planning department. The important aspects of the planning department's decision can be summarized as follows:

1. The planning department found the proposed nonfarm dwelling would comply with the cost of farming or forest practices standard. In reaching

that conclusion the planning department also found that Area 2 is too small for a house site.

2. The planning department appeared to accept petitioner's contention that Areas 1 and 2 are generally unsuitable for the production of farm crops and livestock or merchantable tree species. But the planning department goes on to conclude that if the existing roadway has rendered Area 1 generally unsuitable, then aerial photographs show other parcels with similar roads provide a sufficient number of potential additional nonfarm dwelling sites so that the stability standard is violated.

Petitioner appealed the planning department's decision to the hearings officer. The hearings officer, like the planning department, found that if required setbacks are applied to Area 2 it is too small to site a dwelling. The hearings officer also found that the proposal violates the stability standard. However, relying in large part on our decision in *Griffin v. Jackson County*, __ Or LUBA ___ (LUBA No. 2004-084, October 4, 2004), the hearings officer analyzed that question somewhat differently from the planning staff.[4]

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioner's first assignment of error is directed at the hearings officer's finding that Area 2 is too small to accommodate a dwelling.[5] Petitioner contends that while a building area that is only 85

[4] No question is presented in this appeal concerning whether the hearings officer correctly concluded that the existing driveway on the subject property has so damaged the soils that are crossed by that driveway that those soils now satisfy the generally unsuitable standard. We therefore do not consider that question. Also, because petitioner does not assign error to the hearings officer's assumption that because similar driveways might be constructed in the future on other vacant parcels in the study area, the hearings officer must conclude that there are building sites on all those parcels that satisfy the generally unsuitable standard. The hearings officer relied in large part on that assumption in concluding that the proposal violates the stability standard's worst-case scenario test.

Although we do not reach either of the above-noted questions, we believe the hearings officer's reliance on our decision in *Griffin* represents either a misreading or an unwarranted extension of that decision. The most important holding in *Griffin* is that the words "generally unsuitable for the production of farm crops and livestock or merchantable tree species" are not the same as the words "generally unsuitable for farm use." As we explained in *Griffin*, land that is "generally unsuitable for the production of farm crops and livestock or merchantable tree species" need not be considered suitable for those purposes simply because land under a farm building is deemed "current employment of land for farm use" under ORS 215.203(2)(b)(F). *Griffin*, slip op at 8.

[5] The hearings officer relied on the planning department's finding to this effect. The planning department, in addressing the cost of accepted farm or forest practices standard, concluded that after required setbacks are

feet long and 12 feet wide on one side and 25 feet wide on the other side may be constrained, Jackson County does not have any adopted minimum dwelling size standard and the county erred in concluding that Area 2 is too small to site a nonfarm dwelling. Petitioner appears to be correct that the county has no minimum size or dimensional requirement for nonfarm dwellings. In theory, if the nonfarm dwelling criteria that we have discussed above are satisfied, the county's finding that Area 2 is too small to accommodate a nonfarm dwelling would not provide a sufficient basis for denying petitioner's application. We turn to petitioner's other assignment of error.

In his second assignment of error, petitioner challenges the hearings officer's finding that his application violates the stability standard's worst-case scenario test. Petitioner contends that the hearings officer's reasoning in making that finding "was limited only to Area 1." Petition for Review 5. Petitioner contends that the county should have analyzed his application based on Areas 1 and 2 separately. We understand petitioner to argue that the county's decision should be remanded, and the county should be instructed, to apply the stability standard in a way that *only* asks if there are other parcels in the study area that include building sites that satisfy the generally unsuitable standard for precisely the same reason that Area 2 does, *i.e*. because they include Class VI soils and are steep.

There is nothing in OAR 660-033-0130(4)(a)(D) and OAR 660-033-0130(4)(c)(C) that supports petitioner's argument under the second assignment of error. *See* ns 2 and 3. Specifically, there is no support in the language of the rules for petitioner's position that the county should be instructed to apply the stability standard worst-case scenario test in a way that only considers whether there are Class VI soils with steep slopes on vacant parcels in the study area, which might provide additional sites for nonfarm dwellings.

The lengthy stability standard does not expressly mention the generally unsuitable standard at all. However, in applying the stability standard set out at OAR 660-033-0130(4)(c)(C) and

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imposed the remaining building envelope available to site a dwelling measures 85 feet long by 12 feet wide on one side and 25 feet wide on the other side.

OAR 660-033-130(4)(a)(D) the county must, among other things, consider the "cumulative impact of possible new nonfarm dwellings ** * on other lots or parcels in the area that are similarly situated. To determine whether new nonfarm dwellings could be approved under OAR 660-033-0130(4) on other similarly situated lots or parcels in the study area, the county will need to know whether they are similarly situated. An important similarity those other lots or parcels must have, for purposes of determining whether a nonfarm dwelling could be approved on those other lots or parcels under OAR 660-033-0130(4), is whether they include generally unsuitable land that would provide a possible building site.

As we have already explained, it was *petitioner* who took the position before the county that Area 1 and Area 2 constitute separate portions of the subject 4-acre parcel that meet the generally unsuitable standard—Area 1 because of compaction resulting from the existing roadway and Area 2 because of its Class VI soils and steep slopes. It is hard to see how petitioner can fault the county for accepting his arguments for concluding that Areas 1 and 2 satisfy the generally unsuitable standard. Having convinced the county to accept those arguments, petitioner cannot fault the county for proceeding to ask whether there may be other parcels that include potential development sites, based on *both* of petitioner's general unsuitability arguments, when the county applied the stability standard's worst case scenario test.[6] Petitioner identifies no reversible or remandable error in the hearings officer's stability standard findings.

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[6] As we have already noted, we seriously question any general proposition that a farm driveway renders the land that is crossed by that driveway generally unsuitable for the production of farm crops and livestock or merchantable tree species. As the hearings officer noted, such driveways are likely a common feature on most farms. An opposite general proposition that such roads can easily be removed seems at least as plausible. Nothing in this opinion should be understood to suggest that we believe the county would be obligated to reach the same conclusion in the future regarding driveways in applying the generally unsuitable and stability standards that the hearings officer reached in this case, or that we would necessarily agree with the hearings officer's conclusion if that issue were before us.

However, returning to this case, once petitioner demonstrated to the county's satisfaction that soil compaction in Area 1 had rendered that portion of the parcel generally unsuitable land for the production of farm crops and livestock or merchantable tree species, the county properly determined whether there were other "similarly situated" parcels in the study area.

Because petitioner's arguments under the second assignment of error provide no basis for reversal or remand of the hearings officer's decision, we deny the second assignment of error.

The county's decision is affirmed.