BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLIAM MOORE and MARILYN MOORE, Petitioners, vs. COOS COUNTY, Respondent, and FRANK BLACK and RAMONA BLACK, Intervenors-Respondent.	LUBA No. 95-149 FINAL OPINION AND ORDER

Appeal from Coos County.

William Moore and Marilyn Moore, Bandon, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent.

Jerry O. Lesan, Coos Bay, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Lesan & Finneran.

HANNA, Referee; LIVINGSTON, Chief Referee, participated in the decision.

REMANDED 07/03/96

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a nonfarm dwelling in an exclusive farm use (EFU) zone.

MOTION TO INTERVENE

Frank and Ramona Black (intervenors), the applicants below, move to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 0.99 acre parcel, zoned EFU. It is composed of approximately 30 percent class III soils and 70 percent class VI soils, as determined by the Natural Resources Conservation Service.[1] It is surrounded by two parcels zoned EFU, one of which is 22.24 acres and the other 40 acres. Zoning in the area is generally for farm and forest uses. Customary farm uses in the area are livestock pasturage and cranberry production. Farming activities are conducted on parcels in the immediate vicinity.

The subject property is served by two outbuildings and on-site improvements for water, sewage disposal, electricity and telephone service. The property was occupied by a

[1]The generally accepted soil rating system for agricultural soils is the Agricultural Capability Classification System administered by the United States Department of Agriculture Natural Resources Conservation Service, formerly known as the Agriculture Soil Classification Service (SCS).

mobile home until 1988. There are indications that a motor home or travel trailer occupied the property much of the time until 1992.

Intervenors' application for a conditional use permit for a nonfarm dwelling was denied by the county planning department. On appeal, the board of commissioners (board) approved the application. Petitioners appealed that decision to LUBA. In Moore v.Coos County, ___ Or LUBA ___ (LUBA No. 94-220, January 27, 1995) (Moore I), we granted the county's request for a voluntary remand. On remand the board made the challenged decision, which approves establishment of a nonfarm dwelling on two separate and alternative bases: (1) under the nonfarm dwelling criteria set forth in ORS 215.284(2) and OAR 660-33-130(4)(c); and (2) under Coos County Zoning and Land Development Ordinance (ZLDO) 3.4.300, which allows the resumption of an interrupted or abandoned nonconforming use.

FIRST ASSIGNMENT OF ERROR

The county identified ORS 215.284(2) and OAR 660-33-130(4)(c) as the criteria for a nonfarm dwelling. Petitioners challenge the decision under ORS 215.284(2)(b). That criterion states:

> "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. 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[.]" (Emphasis added.)

Petitioners challenge the county's conclusion that the proposed dwelling will be situated on land that is generally unsuitable for the production of farm crops or livestock. Petitioners review and comment on the evidence submitted pertaining to farm use. They contend that the evidence demonstrates that the property has been used for farm purposes in the past and could be put to such use in the future.[2] Although the primary limiting factor is the small size of the parcel, petitioners reason it could be put to use in conjunction with adjacent parcels or it could be used otherwise for farm purposes.

A. Burden to Demonstrate Unsuitability

The burden to demonstrate that the parcel is generally unsuitable for agricultural production of farm crops and livestock is on the applicant. Nelson v. Benton County, 23 Or LUBA 392, 395-397 aff'd 115 Or App 453 (1992). The question to be answered is whether the subject land, rather than a particular farmer, can produce crops or livestock. See Reed v. Lane County, 19 Or LUBA 276, 284 (1990).

[2]In 1992, petitioners offered to purchase the subject property. Record 131 and 138.

B. Unsuitability Test

Of the potential components of the unsuitability test, two are crucial in considering the challenged decision: the size of the subject parcel and the terms used to describe agricultural uses. OAR 660-33-130(4)(c)(B) codifies the historical standard used to implement ORS 215.283(3)(c).[3] Case law that addresses the former standard continues to be relevant. See DLCD v. Crook County, 26 Or LUBA 478, 482 n3 (1994).

1. Parcel Size

Analysis of whether the parcel can be sold, leased or otherwise put to profitable agricultural use is required,

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[3]OAR 660-33-130(4) provides:

> "Requires approval of the governing body or its designate in any farmland area zoned for exclusive farm use:
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> "* * * * *
>
> "(c) In counties located outside the Willamette Valley require[s] findings that:
>
> "* * * * *
>
> "(B) 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 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. * * * 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 can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch, it is not 'generally unsuitable.' * * *"

unless the county first finds that a parcel is generally unsuitable for farm use, regardless of size. Size alone is not determinative of whether a parcel is suitable for the production of farm crops and livestock. OAR 660-33-130(4)(c)(B). See also Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331 (1977); Stefan v. Yamhill County, 18 Or LUBA 827 (1990); Nelson, supra, 23 Or LUBA at 397. In Nelson LUBA affirmed the county's decision denying a request for approval of a nonfarm dwelling. We held that size is not a determinative factor if the parcel may be used for the production of farm crops and livestock in conjunction with other parcels in the area.

2. Agricultural Use Terms

"Evidence that the subject parcel is suitable for grazing of livestock is evidence of suitability for the production of farm products." Alexanderson v. Clackamas County, 26 Or LUBA 209, 212 (1993). "Production of farm crops and livestock" is not defined by statute, rule or land use case law. "However, when we interpret a statute, we usually give words of common usage their plain, natural and ordinary meaning." Hogan v. Gridelli, 129 Or App 539, 879 P2d 896 (1994).

Where a parcel has historically been used in conjunction with other parcels for livestock grazing or the production of hay, a county must consider the parcel's suitability for grazing in conjunction with adjoining and

nearby properties in determining whether the parcel satisfies the "generally unsuitable" standard. Avgeris v. Jackson County, 23 Or LUBA 124 (1992); Adams v. Jackson County, 20 Or LUBA 398 (1991).

As explained in Stefan, the Court of Appeals in Rutherford found the distinction between the "farm use" test under ORS 215.203(2)(a) and the "production of farm crops and livestock" test to be the absence of the requirement, in the case of the "production of farm crops and livestock" test, that the use be profitable. The court found "farm use," with its profitability component, to be the narrower standard, and "production of farm crops and livestock," the broader standard.

These cases are illustrative of the general application of OAR 660-33-130(4)(c)(B), and guide our review of the challenged decision.

C. County Application of Unsuitability Test

The challenged decision states:

> "The Board concludes that the test for determining general unsuitability is unsuitability for the production of farm crops and livestock and not the general unsuitability for 'farm uses' under ORS 215.203. Therefore, the general unsuitability for [sic] the parcel for use as part of a pasture rental and horse boarding business is not the relevant test because the Board finds that this activity is not the 'production of livestock.'" Record 27.

Over one-half of the 36-page decision is devoted to findings and conclusions qualifying the parcel for a nonfarm

dwelling. The decision discusses soil characteristics, water availability and potential uses, which it finds generally to be limited to cranberry production. The decision sets forth descriptions of the qualifications of at least five area farmers and their opinions, in which they describe the subject property's lack of value for any farm use. Integral to their descriptions is the distinction the county makes between property suitable for "farm use" and property suitable for the "production of farm crops and livestock." The challenged decision states:

> "The Board concludes that the test for determining general unsuitability is unsuitability for the production of farm crops and livestock and not the general unsuitability for 'farm uses' under ORS 215.203." Record 27.

The challenged decision devotes comparatively little discussion to the potential use of the property for pasture in conjunction with other farming operations. However, the board concludes:

> "In considering whether the parcel could be suitable for the raising of farm crops or livestock if it could be sold, leased, rented or otherwise managed as part of a commercial farm or ranch, the Board concludes that:
>
> "(1) Leasing, selling it, renting it or otherwise managing it as part of the adjacent recreational riding, boarding and pasturing of horses is not the proper inquiry because that activity is not a commercial farm or ranch which this Board concludes must be one producing farm crops or livestock.
>
> "(2) Due to the previously identified soil limitations, unavailability of irrigation

> water, the small size of the parcel and the costs associated with conversion to cranberry production, the Board concludes that the property cannot be sold, leased, rented or otherwise managed as part of a commercial farm or ranch. This conclusion also relies in part on the fact that [farmer witnesses] have opined that it would not be feasible to be leased, rented or otherwise managed as part of a commercial farm or ranch. [A farmer witness] who operates the cranberry bogs closest to the subject property on Tax Lot 1200 to the west has indicated that he would not be interested in leasing, renting or otherwise managing the parcel for raising crops or livestock." Record 31.

With respect to the first factor, the county erred when it concluded that consideration of the potential use of the subject property for grazing horses in conjunction with the adjacent equine operation is not required because that operation does not produce farm crops or livestock. An operation that requires land for grazing horses employs that land "for the production of * * * livestock" as that phrase is used in ORS 215.284(2)(b). Because petitioners raised below their willingness to use the property for grazing horses in conjunction with their equine operation, and because such activities are an aspect of the production of livestock, the county must evaluate the possible use of the subject property for grazing horses applying the general unsuitability test. The challenged decision is not supported by findings that demonstrate that the requirements of ORS 215.284(2) and OAR 660-33-130(4)(c) have been met.

Because the county's findings are inadequate, no

purpose would be served by addressing petitioner's evidentiary challenge. DLCD v. Columbia County, 16 Or LUBA 467, 471 (1988); DLCD v. Columbia County, 15 Or LUBA 302, 305 (1987); McNulty v. City of Lake Oswego, 14 Or LUBA 366, 373 (1986).

The first assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the county's decision to approve a nonfarm dwelling on the basis of substantial commitment to a nonfarm use is not supported by substantial evidence in the record. Petitioners' argument consists largely of citations to points in the record in which the viability of the on-site services, including the well and septic system, is questioned.

The county responds that petitioners misconstrue the basis for the county's decision when they contend the county approval was based on a substantial commitment to a nonfarm use. The county argues that the evidence pointed to by petitioners relates to ZLDO 3.4.300, which allows a replacement dwelling.[4]

To the extent we understand petitioners' argument, it does not establish any legal basis for remand or reversal.

The fourth assignment of error is denied.

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[4]Approval for a replacement dwelling is discussed in the second, third, fifth and sixth assignments of error.

SECOND, THIRD, FIFTH AND SIXTH ASSIGNMENTS OF ERROR

These assignments of error address the application of ZLDO 3.4.300, which allows a replacement dwelling. Petitioners argue that the challenged decision, adopted under ZLDO 3.4.300, violates Goal 3 and state law, and grants overly broad authority to the county. Additionally, petitioners contend that the challenged decision is not based on substantial evidence in the record.

ZLDO 3.4.300 provides:

> "Abandonment. Any lawfully created use not otherwise permitted in a zoning district may not be resumed after a period exceeding 2 years of interruption or abandonment unless:
>
> "(a) the resumed use conforms with the requirements of the applicable zone at the time of the proposed resumption; or
>
> "(b) the Hearings Body finds the subject property or building is substantially committed to a use not more intensive than the last use of record and the proposed use is compatible or can be made compatible with the surrounding uses. * * *"

ORS 215.130 provides, in relevant part:

> "* * * * *
>
> "(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. * * *
>
> "* * * * *
>
> "(7) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of

zoning ordinances or regulations applicable at the time of the proposed resumption.

"* * * * *"

The challenged decision interprets the ordinance as follows:

"The applicable provisions of [ZLDO 3.4.300] provide that the board must find:

"(1) That a lawfully created use has been either abandoned or interrupted for a period exceeding two years;

"(2) that the subject property is substantially committed to a use not more intensive than the last use of record;

"(3) that the proposed use to be resumed is compatible or can be made compatible with surrounding uses." Record 21.

The challenged decision continues:

"Applied to the application the applicant will have to:

"(1) prove what the use was that became non-conforming at the time the present zoning was adopted;

"(2) must seek to resume that use;

"(3) prove that the subject property is substantially committed to a use not more intensive than that last non-conforming use." Record 22.

The county made 10 separate findings in its conclusion pertaining to the resumption of the use. Several of these findings explain that if the applicants had been aware earlier of the possibility of obtaining approval for a replacement dwelling they would have done so, and if they

had obtained approval earlier, there would not have been such a large interval of time since the last residential use.[5] The findings conclude:

> "* * * while the passage of time is clearly relevant, the more important consideration is whether the property remained committed in a physical sense as well as whether there is evidence of the owner's intent to commit the property to the use sought to be resumed * * *" Record 38.

The county contends that ORS 215.130(7) does not require a specific length of time before a use is considered abandoned. While that contention may be true, the county's argument misses the point. The challenged decision demonstrates that the residential use was interrupted or abandoned under ORS 215.130(7) when it set forth the facts to resume residential use.

As applied to the challenged decision, the scope of ZLDO 3.4.300 is broader than is allowed under ORS 215.130. See City of Corvallis v. Benton County, 16 Or LUBA 488 (1988). ZLDO 3.4.300 goes beyond an interpretation of interruption or abandonment.[6] By its terms, ZLDO 3.4.300 allows a use that has been interrupted or abandoned to be resumed. Resumption of a nonconforming use is prohibited as

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[5]The challenged decision also sets forth the board of commissioners' confusion about the date of the last legal residential use. Record 35.

[6]We do not consider whether ZLDO 3.4.300 violates ORS 215.130(7) because the validity of the rule is not the subject of this appeal. City of Corvallis v. Benton County, 16 Or LUBA at 492-93.

a matter of law. ORS 215.130(7).

The second, third, fifth and sixth assignments of error are sustained.

SEVENTH ASSIGNMENT OF ERROR

In Moore I, we granted a motion to remand a challenged decision over petitioners' objection. Petitioners now contend that the county did not address all issues on remand, and erred in not doing so.

In the Moore I petition for review, petitioners described evidence of perceived bias by the county against petitioners and in favor of intervenors. Additionally, they set forth a segment of the minutes of the original proceeding in which they alleged commissioners' comments demonstrated personal bias including irregularities which occurred in voting. Petitioners have pointed to remarks and conduct by the county that include waiver of fees, sympathy for the plight of the applicant and a mid-vote postponement resulting in continuance of a hearing. In their brief, petitioners describe these irregularities as the issues the county should have, but did not, address on remand.

On remand the county conducted a de novo proceeding and adopted the challenged decision that does not, in fact, address petitioners assignment of error in Moore I. Accordingly, we review the record from both proceedings to determine if the county's conduct evidenced bias or impropriety in contravention of a legal standard.

> To establish actual bias or prejudgment on the part of a local decision maker, petitioners have the burden of showing the decision maker was biased or prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented. Tylka v. Clackamas County, 28 Or LUBA 417, 425 (1994).

Waiver of fees, expressions of sympathy for the plight of the applicant and the postponement of a vote resulting in continuance of a hearing do not establish that the county commission did not reach its decision by applying relevant standards based on the evidence and argument presented.

The seventh assignment of error is denied.

The county's decision is remanded.