BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RALPH YOUNGER, Petitioner, vs. JACKSON COUNTY, Respondent.	LUBA No. 96-031
	FINAL OPINION AND ORDER

Appeal from Jackson County.

Ralph Younger, Portland, filed the petition for review and argued on his own behalf.

Arminda J. Brown, County Counsel, Medford, filed the response brief and argued on behalf of respondent.

LIVINGSTON, Referee; GUSTAFSON, Referee, participated in the decision.

REVERSED 11/12/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a decision of the county hearings officer denying an application for a lot-of-record dwelling in the county's Exclusive Farm Use (EFU) zone.

MOTION TO STRIKE

The county moves to strike Appendix 4 to petitioner's brief. Appendix 4 is an unrelated decision of the county hearings officer that is not part of the record in this case.

Except as provided in ORS 197.835(2)(b), our review is confined to the record. ORS 197.835(2)(a). Since Appendix 4 is not part of the record and is not a document of which we may take official notice, see Friends of Eugene v. City of Eugene, ___ Or LUBA ___ (LUBA No. 95-234, October 31, 1996), slip op 4 n4, we allow the county's motion to strike Appendix 4 and do not consider the discussion in petitioner's brief related to it.

FACTS

The subject property, which was created as a separate parcel on November 1, 1978, includes 9.32 acres. There is presently no dwelling. A portion of the property is located within the boundaries of the Medford Irrigation District (MID).

The property contains three Natural Resource Conservation Service (NRCS) soil types, in the following

percentages: (1) Coleman loam (60 percent); (2) Gregory silty clay loam (30 percent); and (3) Medford silty clay loam (10 percent). Coleman loam and Gregory silty clay loam are Class II soils if irrigated and Class IV soils if not irrigated. Medford silty clay loam is prime soil whether irrigated or not. It is a Class I soil if irrigated and a Class IV soil if not irrigated.

Prior to January 9, 1996, 5.5 acres of the property were entitled to irrigation waters from MID. On January 9, 1996, the staff issued a report on petitioner's application, which noted:

> "[S]oils information indicates that with irrigation, the parcel consists of 90 percent Class II soils and 10 percent Class I soils. The Class I soil, which is Medford silty clay loam, is also considered to be prime, regardless of its irrigation status. The parcel is located within Medford Irrigation District, and the district has submitted information stating that the parcel receives irrigation over approximately 5.5 acres, or 59 percent of the property. Unless it can be determined that the combination of the prime Medford silty clay loam soils and the irrigated Class II soils comprise less than 50 percent of the property, it can be found that the property consists predominantly of prime, Class I and II soils." Record 26.

Petitioner then requested that MID exclude one acre of the property from MID irrigation, which left 4.5 acres of soil on the property irrigated.

Under Jackson County Land Development Ordinance (LDO) 218.090(6)(D), a lot-of-record dwelling is not permitted on land characterized by predominantly irrigated prime, unique

or Class I or II soils or nonirrigated prime, unique or Class I or II soils.[1] The hearings officer concluded petitioner's voluntary relinquishment of irrigation water, which reduced the percentage of prime or Class I or II soils to 48.5 percent, could not operate to make the subject property eligible for a lot-of-record dwelling and denied petitioner's application. This appeal followed.

ASSIGNMENT OF ERROR

The challenged decision articulates the issue raised in petitioner's assignment of error:

"The issue in this case is whether property ceases

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[1]LDO chapter 218 contains regulations for the EFU district. LDO 218.090(6) implements lot-of-record standards found in ORS 215.705 and 215.710, which were adopted by Oregon Laws 1993, chapter 792 (HB 3661). LDO 218.090(6) provides, in relevant part:

> "A dwelling on a lot or parcel that the current owner acquired before January 1, 1985, or acquired by devise or intestate succession from an owner who acquired the property before January 1, 1985 may be allowed subject to the following:
>
> "* * * * *
>
> "D) Is not on land that is either:
>
> "i) Characterized by predominantly irrigated prime, unique or Class I or II soils or nonirrigated prime, unique or Class I or II soils, as designated in the Soil Conservation Service (SCS) [now NRCS] data in effect on November 4, 1993 (The soil class, soil rating, or soil designation of a specific lot or parcel may be changed if the property owner submits a statement of agreement from the SCS that the soil data should be adjusted based on new information); or
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> "* * * * *"

> to be 'high-value farmland'[2] when irrigation rights are voluntarily relinquished by a property owner, thereby diminishing the percentage of soils on the property which are prime or Class I or II to a level below 50%. The Hearings Officer concludes that the answer is no." Record 10-11.

The hearings officer explained his conclusion:

> "But for applicant's voluntary relinquishment of irrigation rights for 1 acre of the tract, not only would the tract be irrigated, more than 50% of the soils on the property would be either prime or Class II by virtue of irrigation. The Hearings Officer holds that the ordinance and administrative rules do not contemplate land being declassified from high-value farmland as a result of the voluntary petition of a landowner to exclude a portion of a tract from an irrigation when, without such a petition, the property would properly be classed as high-value farmland." Record 11-12.

Finally, the hearings officer quoted ORS 215.700, which states "* * * it is necessary to * * * provide certain owners of less productive land an opportunity to build a dwelling on their land * * *," and concludes that petitioner's deliberately shunning irrigation on a portion of his land cannot render the land "less productive."[3]

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[2]ORS 215.710(1) defines "high-value farmland," for purposes of ORS 215.705, as "land in a tract composed predominantly of soils that, at the time the siting of a dwelling is approved for the tract, are:

> "(A) Irrigated and classified prime, unique, Class I or II; or
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> "(B) Not irrigated and classified prime, unique, Class I or II."

[3]ORS 215.700 provides:

Record 12.

Because the challenged decision was made by the county's hearings officer, rather than its governing body, and because it interprets state law as paraphrased in a local ordinance, we owe the county's interpretation no deference. We must decide whether it is reasonable and correct. McCoy v. Linn County, 90 Or App 271, 752 P2d 323 (1988).

Petitioner makes three, closely related subassignments of error. All of them are based on the same contention, which is, essentially, that the hearings officer erred in considering petitioner's motives in removing one acre of the subject property from irrigation between the issuance of the staff report and the date of the hearing.

We agree with petitioner that ORS 215.705 and 215.710, which are incorporated in LDO 218.090(6), do not allow a decision maker to evaluate a permit application for the applicant's soundness of motive. Since there is no dispute

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> "The Legislative Assembly declares that land use regulations limit residential development on some less productive resource land acquired before the owners could reasonably be expected to know of the regulations. In order to assist these owners while protecting the state's more productive resource land from the detrimental effects of uses not related to agriculture and forestry, it is necessary to:
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> "(1) Provide certain owners of less productive land an opportunity to build a dwelling on their land; and
>
> "(2) Limit the future division of and the siting of dwellings upon the state's more productive resource land."

that the subject property was not composed predominantly of high-value farmland at the time of decision, a lot-of-record dwelling is not precluded by ORS 215.705(1)(d) or LDO 218.090(6)(d)(i).

We agree with the county that permitting the conscious manipulation of the proportion of high-value farmland on a particular property in order to qualify for a lot-of-record dwelling under ORS 215.705 and 215.710 partially frustrates the purpose, stated in ORS 215.700, of "protecting the state's more productive resource land." However, we see nothing in ORS 215.705 and 215.710 to prohibit such manipulation.

Moreover, the county acknowledged at oral argument that if petitioner had removed one acre from irrigation prior to applying for a lot-of-record dwelling, the record would not have reflected that the subject property ever had contained predominantly high-value farmland, and a dwelling permit would have been granted as a matter of course. It is neither reasonable nor correct to interpret ORS 215.705 and 215.710 in such a way that an applicant who acts to qualify for a dwelling after applying for a permit is treated differently from another applicant who acts to qualify for a dwelling before applying.[4] As the Court of Appeals stated

[4]If the county's motive analysis were carried to its logical conclusion, petitioner himself could never qualify for a lot-of-record dwelling on the subject property, since his motive in removing the one acre from irrigation

in Craven v. Jackson County, 135 Or 250, 255, 898 P2d 809, rev den 321 Or 512 (1995), another lot-of-record case: "[i]n one way or another, the statutes make possible the achievement of the objective that [one party] seeks and [the other party] disfavors. * * * Any unintended gap in the statute is for the legislature to fill."

Under OAR 661-10-071(1)(c) we must reverse when the challenged decision violates a provision of applicable law and is prohibited as a matter of law. Since the only basis for the county's decision to deny petitioner's application for a lot-of-record dwelling is its faulty application of ORS 215.705 and 215.710 as they are implemented through LDO 218.090(6), the county's decision must be reversed. The county must approve petitioner's application.

The assignment of error is sustained.

The county's decision is reversed.

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would always be a reason to deny his application. However, a future owner of the property, as "owner" is defined in ORS 215.705(6), would qualify.