BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK R. SMITH, Petitioner - Cross-Respondent, vs. CLACKAMAS COUNTY, Respondent - Cross-Respondent, and JIM BISENIUS, Intervenor-Respondent - Intervenor-Cross-Petitioner.	LUBA No. 89-156 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Lawrence R. Derr, Portland, argued the cause and filed the briefs on behalf of petitioner - cross-respondent.

Michael E. Judd, Oregon City, argued the cause and filed the briefs on behalf of respondent - cross-respondent.

Stephen J. Williams, Salem, argued the cause and filed a brief on behalf of intervenor-respondent - intervenor-cross-petitioner.

HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED 05/15/90

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 decision denying his application (1) to divide a 54 acre parcel into a seven acre parcel and a 47 acre parcel, and (2) to place a nonfarm dwelling on the seven acre parcel.

FACTS

The existing 54 acre parcel at issue in this appeal is situated in the county's General Agriculture District (GAD), an exclusive farm use (EFU) zoning district. Petitioner lives and conducts a Christmas tree operation on the portion of the property proposed to be included in the 47 acre parcel.[1] There is no dispute that the existing 54 acre parcel, viewed as a whole, is suitable for farm use. However, it also is not disputed in this appeal that the proposed seven acre parcel, viewed by itself, is generally unsuitable for farm use for a variety of reasons.

In order to approve a nonfarm dwelling in the GAD district, the county must find the nonfarm dwelling:

> "Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract * * *." (Emphasis added.) Clackamas County Zoning and Development Ordinance (ZDO) 402.05.A.4.

[1]The proposed 47 acre parcel is separated from the proposed seven acre parcel by a county road.

The county applied ZDO 402.05.A.4 to the existing 54 acre parcel, concluded the 54 acre parcel was not generally unsuitable for production of farm crops, and on that basis denied the application.

PETITIONER'S ASSIGNMENT OF ERROR

> "The Respondent improperly construed the applicable law when it required all of the Petitioner's land, rather than all of the proposed non-farm parcel, be generally unsuitable for the production of farm crops or livestock."

Petitioner contends the county is required to apply ZDO 402.05.A.4 to the proposed seven acre parcel, rather than to the existing 54 acre parcel. The standard of ZDO 402.05.A.4 requiring that nonfarm dwellings be situated on "generally unsuitable land for the production of farm crops and livestock" is identical to the generally unsuitable standard contained in ORS 215.283(3)(d).[2] In order to approve a nonfarm dwelling, the county is required under ZDO 402.05.A.4 and ORS 215.283(3)(d) to find that the "tract" is generally unsuitable for farm purposes.

Because this appeal also concerns a proposed land division, ORS 215.263 is applicable. ORS 215.263 includes provisions governing divisions of land for farm use, ORS 215.263(2); for nonfarm uses other than dwellings, ORS 215.263(3); and for nonfarm dwellings, ORS 215.263(4). ORS

[2]A similar standard is provided at ORS 215.213(3)(b) for approval of nonfarm dwellings in counties electing to designate marginal agricultural lands. See ORS 197.247; 215.288.

215.263(4) provides:

> "The governing body of a county may approve a division of land in an exclusive farm use zone for a dwelling not provided in conjunction with farm use only if the dwelling has been approved under ORS 215.213(3) or 215.283(3), whichever is applicable."

ZDO 402.05.C similarly provides:

> "Approval of lot divisions * * * shall be subject to * * * approval of a nonfarm use under subsection 402.05A * * *."

A threshold question presented in this appeal is whether application of the generally unsuitable standard to petitioner's application for approval of a nonfarm dwelling should be approached differently simply because petitioner also requests approval to create a separate seven acre parcel for the nonfarm dwelling. We conclude that application of the generally unsuitable standard to determine whether the nonfarm dwelling may be approved must occur first. Only after the nonfarm dwelling is approved by the county may the county consider the applicant's request also to divide the seven acre parcel from the parent 54 acre parcel. This conclusion is supported by the language of ORS 215.263(4) and by ORS 215.243(2), one of the agricultural land use policies in ORS 215.243 to be furthered by EFU zoning.

ORS 215.263(4) provides that a land division to establish a separate parcel for a nonfarm dwelling may only be approved if the nonfarm dwelling "has been approved."

This language suggests a legislative intent that the decisions concerning nonfarm dwellings and land divisions for such dwellings be considered separately, with the decision to approve the nonfarm dwelling occurring first. Proceeding in this manner also assures that approvals of nonfarm dwellings that do not include dividing the parent parcel and approvals of nonfarm dwellings that do include division of the parent parcel are treated the same. To proceed otherwise could favor nonfarm dwelling requests that include a request to divide the parent parcel. Favoring the latter type of request would in turn conflict with the legislative purpose stated in ORS 215.243(2) to preserve "agricultural land * * * in large blocks," and the statutes suggest no intent to favor the latter type of application.

In addition, our conclusion that the application of the generally unsuitable standard in this case should be unaffected by petitioner's additional request for a land division is also supported by the Court of Appeals' decision in Cherry Lane, Inc. v. Board of County Comm., 84 Or App 196, 733 P2d 488 (1987). In that case, the circuit court had ordered the county to approve a subdivision of EFU zoned land, based on the county's failure to act on a request for subdivision approval within 120 days after the application was complete, as required by ORS 215.428(2). Citing the ORS 215.263(4) requirement that EFU land divisions for nonfarm dwelling may only be approved "if the dwelling has been

approved under ORS 215.213(3) or ORS 215.283(3)," the Court of Appeals reversed the circuit court. The Court of Appeals explained that until the applicant secured approval for the nonfarm dwellings, approval of the land division would violate the county's land use regulations, which incorporated the requirement of ORS 215.263(4) that the nonfarm dwellings be approved first. In a footnote, the court elaborated as follows:

> "An EFU zone is designed to preserve the limited amount of agricultural land to the maximum extent possible. It constitutes a substantial limitation on other uses of rural land. In order to achieve this purpose, the legislature has imposed substantial restrictions on the construction of non-farm dwellings in EFU zones. The clear intent is that non-farm dwellings be the exception and that approval for them be difficult to obtain. The requirement in ORS 215.263(4), that the county approve the dwelling before it may approve dividing the land on which the dwelling will stand, is designed to focus the county's attention on whether there is a need for the specific dwelling in question. The requirement thus allows the county to act without the pressure to approve the dwelling which the existence of a previously created parcel would produce. [The applicant's] proposal for a nine-parcel subdivision, made without any prior attempt to show that non-farm dwellings on any of the parcels would meet the appropriate criteria, is precisely what the legislature intended to forbid. Only after the county is convinced that a particular proposed non-farm dwelling would be proper may it approve a partition of EFU land to accommodate the dwelling. That conviction did not exist here." Id. at 199 n 3.

Having concluded that application of the generally unsuitable standard to petitioner's request for a nonfarm

dwelling is not to be influenced by petitioner's desire in this case also to partition the seven generally unsuitable acres from the parent parcel, we turn to the more difficult question -- whether the generally unsuitable standard requires that the entire parent parcel, or only the seven acres, be generally unsuitable for farm purposes.

In two cases this Board has determined whether, in approving a nonfarm dwelling on an existing parcel (where no land division was involved), it is the entire parent parcel or only the area where the nonfarm dwelling will be located that must be generally unsuitable for farm use. Endresen v. Marion County, 15 Or LUBA 60 (1986) (Endresen); Miller v. Linn County, 4 Or LUBA 350 (1982) (Miller).

Although our decision in Endresen did not involve a proposal to divide land,[3] the case is otherwise nearly identical factually to the present case. The 12 acre parcel at issue in Endresen included 10 acres of land that was suitable for farm use, and two acres that petitioner contended were generally unsuitable for farm use. The county applied a "generally unsuitable" standard identical to ZDO 402.05.A.4 to the 12 acre parcel and found the standard was not met. We agreed with petitioner that the county's requirement that the whole 12 acre parcel be

[3]The 12 acre parcel at issue in Endresen had been created several years earlier by foreclosure of a mortgage on 12 acres of a 23 acre parcel. However, that division was not at issue in the appeal.

generally unsuitable for farm purposes was erroneous.

> "We agree that the county must consider suitability of the whole parcel for farm use under this criterion. See Lemmon v. Clemens, 57 Or App 583, 646 P2d 633 (1982); Flury v. Land Use Board of Appeals, 50 Or App 263, 623 P2d 67 (1981); Meyer v. Lord, 37 Or App 59, 586 P2d 367 (1978), rev den (1979). This review is only a threshold inquiry, however. If it can be shown that a portion of the property is not suitable for farm use 'considering terrain, adverse soil or land conditions, drainage and flooding, [and] location and size of the parcel,' then the county may consider this criterion as satisfied even though the majority [emphasis in original] of [the] parcel is suitable for farm use. We note [the criterion] parallels ORS 215.283(3). We do not believe the legislature intended that nonfarm land in a large farm parcel could not be considered a potential site for a nonfarm dwelling simply because the greater part of the parcel is suitable for farm use, providing the criteria in ORS 215.283(a) through (c) are satisfied. * * *." (Except as noted, emphasis added.) Endresen, 15 Or LUBA at 63.

Our earlier decision in Miller concerned a conditional use permit authorizing a nonfarm dwelling on an existing approximately 20 acre parcel. In approving the conditional use permit the county applied an identical "generally unsuitable" standard to a small portion of the 20 acres that had previously been improved for residential development and concluded that smaller portion or "site," as opposed to the entire 20 acre "tract," was generally unsuitable for farm purposes. LUBA rejected the county's "site/tract" distinction as well as its application of the "generally unsuitable" standard to less than the entire existing

parcel.

> "It is undoubtedly true that on any tract of agricultural land there are specific sites which contain soil conditions, rock outcroppings or other impediments to agricultural use. To hold that once a property owner locates those sites, he or she will be allowed to place on them a nonfarm dwelling would do violence to the intent and purpose provisions of ORS 215.243. As the Court of Appeals stated in Still v. Board of County Comm'rs, 42 Or App 115, 120 (1979):
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> > "'It may be economically unfeasible to farm a piece of land in an exclusive farm use zone and residential use of it may not interfere with farming in the area, but residential use may nevertheless offend Oregon's land use policy as declared in ORS 215.243. It is therefore necessary in the application of ORS 215.213(3) to consider the policy ramifications of the proposed non-farm residential use.'" Miller, 4 Or LUBA at 354.

Our reference to the Court of Appeals' decision in Still makes it unclear whether our decision in Miller was based solely on the "generally unsuitable for farm purposes" criterion of ORS 215.283(3)(d) or also on the criterion of ORS 215.283(3)(a), which requires compatibility "with the intent and purposes set forth in ORS 215.243 * * *."[4] In either event, our decision in Miller clearly rejects the county's position in that case that, in applying ORS 215.283(3)(d), the county "need only look to the actual site

[4]As noted earlier in this opinion, ORS 215.243(2) expresses a legislative policy in favor of preserving agricultural land in large blocks.

upon which the residence will be located rather than the entire parcel of property of which the site is but a part." Id. at 354 n 2.

Our decision in Endresen did not discuss or cite our earlier decision in Miller. We see no way to reconcile or distinguish our decisions in Endresen and Miller, and we conclude they are inconsistent. In Hearne v. Baker County, 16 Or LUBA 193, 199 n 6 (1987), aff'd 89 Or App 282, rev den 305 Or 576 (1988) (Hearne), we noted the inconsistency between Endresen and Miller. However, we were not required to resolve the inconsistency in deciding that case, because we ultimately determined that the county found each of the three parcels resulting from division of the parent parcel were generally unsuitable for farming purposes.[5] Because our decision in Hearne concerned further division of a parent parcel that was itself generally unsuitable for farm use, it is of no assistance in determining the correct application of the generally unsuitable standard to a parent parcel that is generally suitable for farm purposes. Neither does the statutory language clearly identify what area of land the legislature had in mind when it required in

[5]A number of the county's findings quoted in our opinion are directed at the entire 20 acre parent parcel. In addition, we noted in our opinion that respondent argued "the county considered each of the proposed parcels, the tract as a whole and adjoining lands." Hearne, 16 Or LUBA at 198. Finally, in affirming our decision in Hearne, the Court of Appeals stated our decision was consistent with our earlier decision in Miller. Hearne v. Baker County, 89 Or App at 287.

ORS 215.283(3)(d) that the "tract" be generally unsuitable for farm purposes. In the circumstances presented in this case, the "tract" could refer to the parent parcel, as the county found, or it could refer to some smaller area to be occupied by the nonfarm dwelling, as petitioner argues.

Petitioner's understanding of the statutory term "tract" presents practical problems in identifying the "tract" in cases where no partition is proposed.[6] Presumably, in such cases "tract" would refer to some area around the proposed nonfarm dwelling which would be identified as part of the nonfarm dwelling approval process. This practical problem with petitioner's interpretation aside, and despite our contrary suggestion in Endresen, we seriously question whether the legislature intended the generally unsuitable standard to be applied in a manner that potentially would allow large parcels that are suitable for farm use, but happen to include smaller areas that may be generally unsuitable for farming purposes, to be developed with nonfarm dwellings. As we pointed out in Miller, such an interpretation is at odds with the legislative policy expressed in ORS 215.243(2) to preserve existing large

[6]Petitioner takes the position in his brief that "tract" refers to the proposed nonfarm parcel only where, as in this case, the request for a nonfarm dwelling also includes a request to create a new nonfarm parcel for that dwelling. However, we determined earlier in this opinion that application of the generally unsuitable standard to the proposed nonfarm dwelling should not be affected by the existence or lack of a contemporaneous request to partition the parent parcel.

parcels of agricultural land in large blocks.[7]

We also note that our interpretation of the proper application of the generally unsuitable standard does not mean generally unsuitable lands, which may be contained within larger parcels that are suitable for farm use when viewed as a whole, are therefore unusable for any purposes. Lands that are "generally unsuitable * * * for the production of farm crops or livestock" may nevertheless be usable for farming purposes related to such production such as farm related buildings. See ORS 215.203(b)(F). Furthermore, such lands potentially may be used for farm dwellings or the large number of nonfarm uses allowable in EFU zones.[8] See ORS 215.213(1) and (2); 215.283(1) and (2).

Petitioner's strongest argument in favor of his view of the proper application of the generally unsuitable standard is that the generally unsuitable standard is not the only

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[7]Of course the removal of "tracts" of generally unsuitable land from larger parcels containing other land that is generally suitable for farm use in theory would not reduce acreage in the larger parcel that is suitable for agricultural purposes. But see Hearne, 16 Or App at 199 (recognizing that a parcel generally unsuitable for farm use may include lands suitable for farm purposes and requiring that those lands be protected).

[8]We do not mean to imply that the statutes require that farm buildings or the nonfarm uses allowed under ORS 215.213(1) and (2) and 215.283(1) and (2) must be located on land generally unsuitable for the "production of farm crops and livestock." The statutes impose that stringent requirement only on nonfarm dwellings. However, the EFU statutes do recognize that EFU zoned lands likely will include property that may not be suitable for production of crops and livestock and allow in EFU zones uses which may be located on these less productive lands.

standard that nonfarm dwellings must satisfy. Therefore, petitioner argues, the more stringent interpretation and application of the generally unsuitable standard is unnecessary.[9] Petitioner correctly points out these other standards present significant limitations on nonfarm dwellings that might otherwise be allowable under petitioner's understanding of the generally unsuitable standard.

However, our view of the correct application of the generally unsuitable standard remains as explained above. Where language in the EFU statutes is not precise, and therefore susceptible of more than one interpretation, we adopt the interpretation favoring farm use and discouraging nonfarm use. See Cherry Lane, Inc. v. Board of County Comm., supra. The Court of Appeals has made it clear in analogous circumstances that land use regulations allowing

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[9]The other standards applicable to nonfarm dwellings under ORS 215.283(3) require that each dwelling:

> "(a) Is compatible with farm uses described in ORS 215.203(2) and is consistent with the intent and purposes set forth in ORS 215.243;
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> "(b) Does not interfere seriously with accepted farming practices, as defined in ORS 215.203(2)(c), on adjacent lands devoted to farm use;
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> "(c) Does not materially alter the stability of the overall land use pattern of the area;
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> "* * *
>
> "(e) Complies with such other conditions as the governing body or its designate considers necessary."

nonfarm uses in EFU zones "must be construed, to the extent possible, as being consistent with the overriding policy of preventing 'agricultural land from being diverted to non-agricultural use.'" McCaw Communications, Inc. v. Marion County, 96 Or App 552, 555, 773 P2d 779 (1989) (quoting from Hopper v. Clackamas County, 87 Or App 167, 172, 741 P2d 921 (1987), rev den 304 Or 680 (1988)).

It is not clear whether the term "tract" in ORS 215.283(3)(d) is intended to refer to the entire parent parcel or the area to be occupied by the nonfarm dwelling. The legislature provided no definition of the term. As we pointed out in our decision in Miller, dictionary definitions of the term "tract" suggest reference to the larger parent parcel rather than a smaller area around the proposed nonfarm dwelling. Miller, 4 Or LUBA at 354. Thus, although petitioner's view of the proper construction and application of the generally unsuitable standard may be reasonable and, in fact, apparently was embraced by this Board in Endresen, we reject that interpretation. We conclude the correct interpretation and application of the term was expressed in our decision in Miller. That interpretation is equally as reasonable and is more likely to result in protection of large parcels of land suitable for farm use.[10]

[10]Although not discussed by the parties, we note that OAR 660-05-040(2) states, in part, "when a nonfarm parcel is created, it should be of the

Petitioner's assignment of error is denied.

CROSS-PETITIONER'S ASSIGNMENT OF ERROR

> "The county erred in holding that the proposed partition would not materially alter the stability of the overall land use pattern of the area."

In his cross-petition for review, intervenor-cross-petitioner contends the county hearings officer erroneously found that the application in this matter satisfies ZDO 402.05.A.3, which requires that a nonfarm dwelling "not materially alter the stability of the overall land use pattern in the area."

Because we conclude that the county correctly denied the application based on failure to comply with the generally unsuitable standard of ZDO 402.05.A.5, and only a single basis for denial is required, the county's decision must be affirmed. Therefore, we do not consider the argument presented in the cross-petition for review.[11]

The county's decision is affirmed.

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minimum acreage needed to accommodate the nonfarm dwelling and be consistent with ORS 215.263(4)." The quoted rule language envisions that a new nonfarm parcel could be created to accommodate a nonfarm dwelling. However, the rule does not specify whether the parent parcel must be found generally unsuitable for farm use, as we determine in this decision is required. Therefore, we cannot tell whether LCDC's interpretation of the generally unsuitable standard is at odds with our decision in this case.

[11]ORS 197.835(9)(a) only requires the Board to address "all issues" when "reversing or remanding a land use decision * * *."