BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| MURPHY L. CLARK, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | |
| | ) | LUBA No. 90-004 |
| JACKSON COUNTY, | ) | |
| | ) | FINAL OPINION |
| Respondent, | ) | AND ORDER |
| | ) | |
| and | ) | |
| | ) | |
| DARRELL STANLEY and EUGENE STANLEY, | ) | |
| | ) | |
| Intervenors-Respondent. | ) | |

Appeal from Jackson County.

Murphy L. Clark, Eagle Point, filed the petition for review and argued on his own behalf.

Arminda J. Brown, Medford, filed a response brief and argued on behalf of respondent.

John R. Hassen, Medford, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Blackhurst, Hornecker, Hassen & Thorndike & Ervin B. Hogan.

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

REMANDED 05/25/90

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 seeks review of a county order granting approval of a conditional use permit for surface mining of shale deposits in an Exclusive Farm Use (EFU) zoning district.

MOTION TO INTERVENE

Darrell Stanley and Eugene Stanley move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenors-respondent (intervenors) propose to conduct a mining operation on 40 acres of EFU zoned land. The 40 acre area intervenors propose to mine has, in the past, been used for seasonal livestock grazing in conjunction with approximately 800 adjacent acres also owned by intervenors.[1]

Under the Jackson County Land Development Ordinance (LDO), approval of a mining operation in the EFU zone requires compliance with the standards set forth in LDO 218.060.[2] In Clark v. Jackson County, ___ Or LUBA ___ (LUBA

[1]Four hundred of intervenors' 800 acres are fenced. The 40 acres are included in the fenced 400 acres.

[2]One of those standards is LDO 218.060(1)(D), which provides as follows:

> "[The proposed use 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 tract, unless findings conclusively demonstrate that:

No. 88-114, March 31, 1989), this Board remanded an earlier decision by the county approving the requested conditional use permit. In remanding the county's earlier decision, we concluded the county's findings supporting that decision failed to demonstrate that the 40 acres proposed for mining were generally unsuitable for farm use, as required by LDO 218.060(1)(D).[3]

Following our remand, the board of commissioners (commissioners) convened a hearing on September 14, 1989 to further consider whether the general unsuitability standard of LDO 218.060(1)(D) is met by intervenors' application. At petitioner's request, the September 14, 1989 hearing was postponed to October 26, 1989. The commissioners accepted additional evidence concerning the suitability of the 40 acres for production of farm crops and livestock at an October 26, 1989 hearing. On December 15, 1989, the commissioners approved the challenged order granting the

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"i) The proposed use will result in a more efficient and effective use of the parcel in view of its value as a natural resource.

"ii) No feasible alternative sites in the area exist which shall have less impact on agricultural land."

[3]In view of our recent decision in Smith v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-156, May 15, 1990), construing language in ORS 215.283 that is nearly identical to that in LDO 218.060(1)(D), our direction that the county need only consider the suitability of the 40 acres may have been too narrow. However, our earlier decision was not appealed and, therefore, the issue on remand, as explained in our earlier decision, is whether the 40 acres proposed for mining are generally unsuitable for farm use.

requested conditional use permit.

FIRST ASSIGNMENT OF ERROR

> "Jackson County erred in granting the conditional use permit because the site is not included on an inventory in Jackson County's acknowledged comprehensive plan as required by ORS 215.298(2)."

ORS 215.298(2) provides:

> "A permit for mining of aggregate [on land zoned EFU] shall be issued only for a site included on an inventory in an acknowledged comprehensive plan."

Petitioner contends the county's decision must be remanded because the record includes no evidence that the site at issue in this appeal is included on an inventory in the county's comprehensive plan.

Respondent and intervenors-respondent (respondents) contend ORS 215.298 was adopted by the legislature in 1989 and did not become effective until October 3, 1989. The application at issue in this appeal was submitted in March, 1988. Following local proceedings leading to approval of the application, LUBA remanded that initial approval in March, 1989. Respondents contend the only reason ORS 215.298 is even arguably applicable is that the commissioners' hearing on remand was delayed past October 3, 1989, at petitioner's request. In these circumstances, respondents contend ORS 215.298(2) should not apply retroactively to the 1988 application. We agree with respondents.

We find no expression of legislative intent in ORS

215.298 that its requirements apply to applications submitted prior to, but still pending on, the date the statute became effective. Furthermore, ORS 215.428(3) provides that approval or denial of applications for permits subject to acknowledged comprehensive plans "shall be based upon the standards and criteria that were applicable at the time application was first submitted." See also ORS 215.110(6)(no retroactive zoning ordinances may be adopted). Assuming ORS 215.428(3) requires application of both county and statutory standards as they exist on the date an application is submitted, respondents are correct that ORS 215.298(2) does not apply to the permit decision at issue in this appeal. Kirpal Light Satsang v. Douglas County, ___ Or LUBA ___ (LUBA No. 88-082, January 22, 1990); Territorial Neighbors v. Lane County, 16 Or LUBA 641, 646 (1988). Even if ORS 215.428(3) does not preclude application of a statutory (as opposed to a county) standard adopted after a complete application is submitted, it nevertheless demonstrates the legislature's preference that an applicant be able to identify the criteria by which an application will be judged at the time the application is submitted. Therefore, absent some suggestion in the statutory language of ORS 215.298 or elsewhere that the legislature intended the statute to apply to applications submitted prior to the effective date of ORS 215.298, we do not believe the statute was intended to be applied to permit applications to mine

aggregate in EFU zones where those applications were pending on the date ORS 215.298 became effective.[4] See Joseph v. Lowery, 261 Or 545, 547, 495 P2d 273 (1972).

SECOND ASSIGNMENT OF ERROR

> "Jackson County erred in that its finding that the mining of aggregate resources on the land in question constitutes a more efficient and effective use of the site in view of its value as a natural resource, and that the use of the property as a quarry enables the remainder of the property to continue in farm use is not supported by substantial evidence."

The requirement of LDO 218.060(1)(D), see n 2, supra, that the proposed use be located on Land "generally unsuitable for the production of farm crops and livestock," does not apply where

> "findings conclusively demonstrate that:
>
> "i) The proposed use will result in a more efficient and effective use of the parcel in view of its value as a natural resource.
>
> "ii) No feasible alternative sites in the area exist which shall have less impact on agricultural land."

As we explain in more detail below under our discussion

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[4]In addition, as respondents correctly note, the subject property is included on the comprehensive plan aggregate resources inventory. Although the plan inventory is not included in the record submitted by the county in this matter, we may take official notice of the plan aggregate resources inventory and do so here. See Murray v. City of Beaverton, ___ Or LUBA ___ (LUBA No. 89-008, May 22, 1989), slip op 30 n 18; McCaw Communications, Inc. v. Marion County, ___ Or LUBA ___ (LUBA No. 88-068, December 12, 1988), slip op 4; Faye Wright Neighborhood Planning Council v. Salem, 6 Or LUBA 167, 170 (1982); Oregon Evidence Code Rule 202(7). Therefore, even if ORS 215.298 does apply, it is satisfied.

of the third assignment of error, the county's findings demonstrate that the value of the 40 acres for production of farm crops and livestock is severely limited by a number of natural constraints. In addition, as respondent correctly notes, the county's findings are adequate to demonstrate that the county has a need for aggregate and that the shale on the site is located close to the surface, making extraction less costly and less environmentally damaging than mining at locations where the resource is located under a deeper surface layer of soil. The findings also suggest that once the site is reclaimed, it will be better adapted for agricultural purposes.

Although the above described findings are, in our view, adequate to demonstrate compliance with LDO 218.060(1)(D)(i), all of the evidence cited by respondent supporting the findings concerning the nature of the aggregate resource on the site, the need for that aggregate resource, and the ability to reclaim the site for agricultural purposes is located in the record of the county decision appealed in LUBA No. 88-144. We agree with respondent that the record of that prior county proceeding could be included in the record of the county proceeding on remand following our decision in the prior appeal, because the same permit request is at issue. See Fisher v. City of Gresham, 10 Or LUBA 409 (1984). However, the record of the prior county proceeding was not included in the record filed

by the county in this appeal.[5] Although the county's findings and decision suggest the county may have intended to include the prior record in the record of its proceedings on remand, we do not believe we can assume that to be the case or overlook the county's failure to include the record of the prior county proceeding as part of the record filed in this appeal. There may be instances where a local government wishes to begin its proceedings anew on remand and does not wish the record of its prior proceedings to be part of the record of its proceedings on remand.

Because respondent cites no evidence in the record filed in this proceeding which supports the findings concerning the nature of the aggregate resource located on the 40 acre site and the ability to reclaim the site, we sustain petitioner's challenge that the findings demonstrating compliance with LDO 218.060(1)(D)(i) are not supported by substantial evidence.

Finally, even if the findings demonstrating compliance with LDO 218.060(1)(D)(i) were supported by substantial evidence in the record, petitioner contends the above-quoted language of LDO 218.060(1)(D) requires that in order to

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[5]Where the parties in an appeal of an initial local government decision and in a subsequent appeal of a local government decision after remand by this Board are identical, the Board has allowed the local government, in the appeal of the decision on remand, to simply designate the record of the original proceeding as part of the record in the subsequent appeal, rather than require it to submit a second copy of the record in the original proceeding. However, in this case the record of the original proceeding was not designated as part of the record filed in this appeal.

avoid the generally unsuitable requirement of that provision findings must conclusively demonstrate satisfaction of both LDO 218.060(1)(D)(i) and (ii). Petitioner argues satisfaction of either LDO 218.060(1)(D)(i) or (ii) is not sufficient. Petitioner contends that because the county only addressed paragraph (i) in its findings, the generally unsuitable standard of LDO 218.060(1)(D) remains applicable.

Although questions were raised during the local proceedings concerning the proper interpretation of LDO 218.060(1)(D), Supp. Record 22-23, the county never expressly adopted one interpretation or the other. However, the findings adopted by the county in support of its decision address only LDO 218.060(1)(D)(i) and neither mention nor demonstrate compliance with LDO 218.060(1)(D)(ii).

We conclude LDO 218.060(1)(D) requires findings showing compliance with both paragraphs (i) and (ii).[6] If the county intended that either paragraph (i) or (ii) provide a basis for avoiding the general unsuitability standard of LDO 218.060(1)(D), it would be a simple matter to insert the word "or" after paragraph (i). Absent such an indication,

[6]Respondents suggest that petitioner should not be allowed to raise this issue on appeal because the issue was not raised during the local proceedings. See ORS 197.763; 197.835(2)(limiting issues that may be raised before LUBA in appeals of local government quasi-judicial land use proceedings). However, even if ORS 197.763 and 197.835(2), which did not become effective until October 3, 1989, were applicable in this proceeding challenging county approval of a permit application submitted in March 1988, the interpretational issue was raised below. Supp. Record 22-23.

the more logical construction and, we conclude, the correct construction, is that both paragraphs must be satisfied.[7]

The county findings addressing paragraph (i) alone, even if adequate and supported by substantial evidence, would not provide a basis for avoiding the requirement of LDO 218.060(1)(D) that the use be located on land generally unsuitable for the production of farm crops and livestock. We turn to petitioner's third assignment of error, which challenges the county findings that the subject 40 acres are generally unsuitable for the production of farm crops or livestock.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

> "Jackson County erred in that its finding that the 40 acres in question [are] generally unsuitable for agricultural purposes is not supported by substantial evidence."

In our prior decision in this matter, we pointed out the standards of LDO 218.060(1), including the generally unsuitable standard of LDO 218.060(1)(D), are nearly identical to the standards required by statute to be applied

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[7]On December 18, 1988, nine months after the application at issue in this proceeding was submitted to the county, the county amended LDO 218.060(1)(D) to add the word "or" between paragraphs (i) and (ii), making each paragraph an alternative basis for avoiding the general unsuitability standard. Therefore, had a new application for the proposed use been submitted following our remand of the prior decision, county findings demonstrating compliance with LDO 218.060(1)(D)(i) alone would obviate the need to address the general unsuitability standard. See Sunburst Homeowners v. City of West Linn, ___ Or LUBA ___ (LUBA No. 89-130, January 26, 1990), aff'd ___ Or App ___ (slip op, May 2, 1990).

to nonfarm dwellings. ORS 215.213(3); 215.283(3). The standards of ORS 215.213(3) and 215.283(3) were adopted by the legislature to make it difficult to approve nonfarm dwellings on EFU zoned lands. See Cherry Lane Inc. v. Board of County Comm., 84 Or App 196, 199, 733 P2d 488 (1987); Hopper v. Clackamas County, 87 Or App 167, 172, 741 P2d 921 (1987), rev den 304 Or 680 (1988). ORS chapter 215 does not require that the standards of ORS 215.213(3) and 215.283(3) be applied to nonfarm uses other than nonfarm dwellings. By imposing the stringent nonfarm dwelling standards to all nonfarm uses allowed in the EFU zone, rather than to nonfarm dwellings only, the county regulates nonfarm uses in its EFU zone (other than nonfarm dwellings) more stringently than required by ORS chapter 215.

In our prior decision, we concluded the evidence and the county's findings did not show the 40 acres are generally unsuitable for grazing. We explained;

> "The forty acres [contain] significant rock outcroppings. It appears that more than 25% of the 40 acres is rocky outcrops based on a U.S. Soil Conservation Service letter which refers to a larger area. However, it is not clear from the record exactly what percentage of the 40 acres is rocky outcrops. The topography of the 40 acres is steep and there is no source of water for irrigation. Due to poor soils and lack of irrigation, the 40 acres [are] of limited value for grazing. However, the 40 acres apparently [have] been and can continue to be used as part of the larger farm unit for seasonal grazing of cattle for several months out of the year.
>
> "Even if we assume the 40 acres cannot be used

successfully as a self sufficient farm unit, that does not mean the 40 acres [are] generally unsuitable for grazing livestock, a farm use. Pilcher v. Marion County, 2 Or LUBA 309 (1981); Stringer v. Polk County, 1 Or LUBA 104, 108 (1980). The record clearly shows the 40 acres [have] been used for livestock grazing as part of the larger livestock operation conducted on the farm unit encompassing the 40 acre site. Although the record also shows the 40 acres, viewed in isolation, [have] constraints which limit [their] suitability for livestock grazing, the county's findings fall short of showing the 40 acres [are] generally unsuitable for grazing in view of [their] past use for such purposes. See Walter v. Linn County, 6 Or LUBA 135, 138 (1982).

"We stop short of determining that in view of the past use of the 40 acres for grazing purposes the county could not adopt findings that show the 40 acres [are] generally unsuitable for such purposes. * * * However, although we cannot say as a matter of law the past use of the property precludes a finding that the property is generally unsuitable for grazing, the evidence in the record of such use is a substantial obstacle in making such a findings." Clark v. Jackson County, supra, slip op at 15-16.

On remand the county adopted the following findings:

"The Board finds that the specific area proposed for quarrying is generally unsuitable for farm use. It is unsuitable for crops as it is on steep rocky terrain, without irrigation. While the information from the Soil Conservation Service indicates that rock outcrops comprise 25 percent of the McMullin-Rock outcrop complex mapping unit, the actual percentage on the 40 acre area is nearer 85 percent. It is unsuitable for grazing because of the thin layer of low quality Class VI soil, lack of irrigation, and extremely short period (two to three months) that any grazeable forage exists at the site. Forage plants include Foxtail, Squirrel Tail, Little Willow Herb, Cheatgrass, Medusahead, Cluster Tarweed and Vinegar Weed. All have very little forage value,

according to George Tiger of the Oregon State University Extension Service. Further, the area to be involved in the mining comprises less than 40 acres of a several thousand acre ranch.

"* * * The applicant testified, and the Board finds, that most of the forage becomes unpalatable by April 15, when the cattle are moved into the area, reducing to approximately one week the amount of time available for forage. Testimony of John A. Hoffbuhr, who is a longtime rancher and former member of the State Water Resources Board, indicated that the soils in the area of the proposed quarry could support only very sparse vegetation, causing the cattle to graze on the lower portions of the property where the topsoils are deeper. The Board accepts as fact Mr. Hoffbuhr's testimony that the 40 acre portion differs from the remainder of the property because there is substantially more rock exposed on the 40-acre tract, the slopes are steep, the soils is [sic] of very poor quality, and the soil's water holding capacity is minimal.

"* * * * *

"* * * The Board concludes that the quarry site is generally unsuitable for agricultural purposes because of the predominance of rock outcroppings, shallow soils, and unpalatable forage, severely reducing the potential for grazing. The Board recognizes that Section 218.060 requires a finding of general unsuitability rather than absolute unsuitability. While it can be argued that the site is suitable for grazing approximately one week of the year, this extremely short duration renders the site generally unsuitable.

"* * * * *." Record 2-3.

The testimony of Mr. Hoffbuhr relied upon by the county pointed out differences between the 40 acres and the balance of the 400 fenced acres that historically have been used for seasonal grazing. That testimony indicated that

approximately 85% of the 40 acres is either rocky outcrops or covered with limited soil supporting limited vegetation.[8] Record 55. Mr Hoffbuhr identified two types of grasses growing on the 40 acres that are harmful to cows and stated that the cows grazing on the 400 acres would graze on portions of the 400 acres other than the 40 acres.[9] Id. Mr. Hoffbuhr also stated that in his opinion the property was unsuitable for farm purposes and is not suitable for anything but aggregate resource removal. Record 56. Finally, seven different types of weedy plant growing on the 40 acres were provided to the Oregon State University Extension Agent and, as noted in the county's above-quoted findings, were determined to "have little forage value." Record 64.

The county's findings and the evidence in the record are sufficient to demonstrate that the 40 acres, viewed by themselves, are generally unsuitable for grazing purposes. However, forage, albeit of limited value and duration, does grow on the 40 acres. Notwithstanding Mr. Hoffbuhr's testimony, intervenor testified that cows grazing on the more productive land surrounding the 40 acres do go onto the

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[8]It is not possible to determine from the record how much of the 40 acres is rocky outcrops (presumably with no value for grazing) and how much is covered by thin soils supporting limited vegetation.

[9]However, there is testimony by one of the intervenors elsewhere in the record that the cows do go onto the 40 acres. Supp. Record 14. The intervenor suggested, however, that not much forage is available on the 40 acres. Id.

40 acres. While only poor forage is available on the 40 acres, and is only available for approximately a week out of the year, it has some forage value. If the 40 acres were not part of a much larger area used for seasonal grazing, we would sustain the county's finding that the 40 acres is generally unsuitable for production of farm crops or livestock. However, because it is (and historically has been) part of a 400 acre fenced seasonal grazing area and is of some value for grazing as part of that area, the 40 acres are not generally unsuitable for grazing purposes. Even lands with very limited value for agricultural use are not "generally unsuitable for the production of farm crops and livestock," within the meaning of ORS 215.213(3) and 215.283(3) and county regulations incorporating the language of those sections, where such lands are part of much larger agricultural operations which make it possible to make use of the limited resource value of the property. See Pilcher v. Marion County, 2 Or LUBA 309, 312-313 (1981); Stringer v. Polk County, 1 Or LUBA 104, 108 (1980).

The third assignment of error is sustained.

The county's decision is remanded.