BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. CURRY COUNTY, Respondent, and RIVER'S END RANCH, Intervenor-Respondent.	LUBA No. 94-075 FINAL OPINION AND ORDER

Appeal from Curry County.

Jane Ard, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Theodore R. Kulongoski, Attorney General; Thomas A. Balmer, Assistant Attorney General; and Virginia L. Linder, Solicitor General.

No appearance by respondent.

G. Frank Hammond and Jeff H. Bachrach, Portland, filed the response brief. With them on the brief was O'Donnell, Ramis, Crew, Corrigan & Bachrach. G. Frank Hammond argued on behalf of intervenor-respondent.

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

REMANDED 10/26/94

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals an order of the Curry County Board of Commissioners approving a comprehensive plan and zone change for a 233 acre portion of an approximately 272 acre parcel.

MOTION TO INTERVENE

River's End Ranch, the applicant below, moves to intervene on the side of respondent in this appeal proceeding. There is no opposition to the motion, and it is allowed.

FACTS

The decision amends the existing comprehensive plan designation for the subject 233 acres from Forest Grazing to Rural Residential and changes the existing zoning from Forestry-Grazing (FG) to Rural Residential Ten (RR-10). The petition for review states the following additional facts:

> "The subject property is * * * located 0.5 miles east of the junction of North Bank Rogue River Road and US Highway 101 at Wedderburn. The property contains a mixture of soil types, including soils in capability classes II, III VI, and VIII. The vegetation on the subject property is unimproved grass and natural vegetation. Forty percent of the property is forested with a mixed stand of conifer, deciduous trees and underbrush. The forested acres have a forest site index of III and IV, which can yield 85 to 120 cubic feet of merchantable timber per acre per year.
>
> "The subject property is adjacent to the City of Gold Beach Urban Growth Boundary (UGB) at its southwestern corner. All other boundaries of the

subject property are adjacent to forest or grazing resource land.

"The subject property was created as a separate parcel in May 1992. At the time of the partition, the applicant submitted a resource management plan for the subject property. Prior to the partition, the property was part of a 1075-acre tract and ranch [being] used for cattle grazing. The property has been and continues to be used for seasonal livestock grazing." (Citations to record omitted.) Petition for Review 2-3.

After a public hearing, the board of commissioners approved the proposed plan and zone change, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

"The county misconstrued the applicable law, failed to make adequate findings, and made a decision not supported by substantial evidence in the whole record in concluding that the subject property was not agricultural land as defined in Goal 3 and OAR Chapter 660, Division 33."

To remove the current plan designation as agricultural land under Goal 3 from the subject 233 acres, the challenged decision must establish the subject property is not "agricultural land," as that term is defined by OAR 660-33-020(1).[1] See Kaye v. Marion County, 23 Or LUBA 452 (1992). OAR 660-33-020(1) provides:

"(a) 'Agricultural land' as defined in Goal 3 includes:

"(A) Lands classified by the U.S. Soil Conservation Service (SCS) as predominantly Class I - IV soils in

[1]Alternatively, the county may adopt an exception to Goal 3. See third assignment of error, infra.

Western Oregon[;]

"(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climactic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and

"(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.

"(b) Land in capability classes other than I-IV * * * that is adjacent to or intermingled with lands in capability classes I-IV * * * within a farm unit, shall be inventoried as agricultural lands even though this land may not be cropped or grazed.

"* * * * *"

There is substantial evidence in the record to support the county's finding under OAR 660-33-020(1)(a)(A) that the 233 acres is not composed predominantly of Class I - IV soils. Under OAR 660-33-020(1)(a)(A), it is permissible for a county to examine only the 233 acres under consideration to determine its predominant soil classification. However, with regard to OAR 660-33-020(1)(a)(B)-(C) and (b), where adjacent property is in the same ownership as the subject property, the analysis of whether the subject property is properly considered "agricultural land" is not limited to the 233 acres. See Still v. Board of County Comm'rs, 42 Or

App 115, 120 (1979); Smith v. Clackamas County, 19 Or LUBA 171, aff'd 103 Or App 370 (1990), aff'd 313 Or 519 (1992); McNulty v. Marion County, 19 Or LUBA 367 (1990); Miller v. Linn County, 4 Or LUBA 350, 354 (1982). This is particularly important where, as here, the subject 233 acres are part of a 272 acre parcel, which itself was part of an adjacent, larger, working farm until 1992. At that time, the applicant divided the subject parcel from the parent parcel on the basis that both would be managed as farm units.[2] Thus, the determination of whether the subject property is agricultural land depends upon an analysis of an applicant's entire ownership, here consisting of the subject 272 acre parcel and the adjacent parent parcel.

We agree with petitioner that the findings of compliance with OAR 660-33-020(1)(a)(B), that the subject property is not suitable for farm use, are erroneous. The challenged decision examines the suitability of only the subject 272 acre parcel. The decision fails to explain why the 272 acre parcel is not suitable for farm use in conjunction with the parent parcel in the same ownership (a working commercial farm). Further, the findings are

[2]In 1992, the county approved a farm management plan for the subject 272 acre parcel which indicates that 188 acres of the subject parcel will be used for livestock grazing. Record 251-52. The division of existing farm parcels into two or more smaller farm parcels is only appropriate where the resulting parcels are appropriate for the continuation of the existing commercial agricultural enterprise in the area. ORS 215.263(2)(a); Still v. Marion County, 22 Or LUBA 331, 334-35 (1991).

inadequate because they fail to explain how the subject parcel is now unsuitable for farm use, whereas a division of the 272 acre parcel from the parent parcel was justified two years ago on the basis that the parcel was suitable for farm use and a farm management plan was adopted for the parcel.

In addition, the county's findings of compliance with OAR 660-33-020(1)(a)(C) are erroneous. The findings determine:

> "The subject property is not 'necessary' to permit farm practices to be undertaken on adjacent or nearby agricultural lands. The county approved the creation of the subject parcel of land by finding that site specific physical differences in land use capabilities separates this property from adjacent agricultural lands. The county found that the creation of the parcel would not significantly impact existing uses and capabilities of adjacent or nearby lands. Adjacent and nearby ownerships have not historically required the use of the subject property in order to conduct their farm practices. Therefore, [the board of commissioners] finds no reason to expect this situation to change." Record 21.

The challenged decision fails to identify the farm uses on adjacent lands. Further, the findings fail to explain why the subject 272 acre parcel is unnecessary to the farm uses ultimately identified as occurring on such adjacent lands.

Finally, the county's findings of compliance with OAR 660-33-020(1)(b) are also erroneous. The subject 233 acres are intermingled with land in capability classes I-IV, even if only the entire subject 272 acre parcel is considered in the analysis. Specifically, while the record

is somewhat conflicting on the point, there is no dispute that the 272 acre parcel is composed of either 14% (Record 250) or 22.6% (Record 113) class I - IV soils. Similarly, the subject property is adjacent to the applicant's working farm, which is composed of predominantly class I-IV soils. Further, in 1992 the subject 272 acre parcel was divided from the applicant's adjacent working farm on the basis that the 272 acre parcel is a discrete farm unit. Accordingly, the findings that the subject parcel is not "adjacent to or intermingled with lands in capability classes I-IV * * * within a farm unit" under OAR 660-33-020(1)(b) are erroneous.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "The county misconstrued the applicable law and failed to make adequate findings supported by substantial evidence in the record when it concluded that the subject property was not forest land as defined in Goal 4."

Intervenor concedes the challenged decision should be remanded for the adoption of findings regarding Goal 4 (Forest Lands). We do not consider this assignment further.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

> "The county misconstrued the applicable law and failed to make adequate findings supported by substantial evidence that the subject parcel is irrevocably committed to uses not allowed by Goals 3 and 4."

The parties agree that this assignment requires remand.

Specifically, the parties agree on two things. First, that an exception to Goals 3 and 4 based on irrevocable commitment pursuant to OAR 660-04-028 need be adopted only if the county determines the subject property is land subject to Goals 3 and 4. Second, the parties agree, and we believe the proposition to be correct, that in adopting an exception to Goals 3 and 4, the county may consider the characteristics of the subject property as one of the "other relevant factors" to be addressed in the analysis required by OAR 660-04-028(1).

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

> "The county misconstrued the applicable law and failed to make adequate findings supported by substantial evidence that the proposed plan amendment complies with the Goal 5 and the county's acknowledged comprehensive plan requirements for mineral and aggregate resources."

The challenged decision determines compliance with Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) with reference only to a nearby aggregate operation. Petitioner argues the county failed to complete the analysis required by Goal 5, including an analysis of resources other than the nearby aggregate operation. However, intervenor points out that during the proceedings below, petitioner advised the county that the scope of the required Goal 5 inquiry was limited to the nearby aggregate operation. Intervenor characterizes petitioner's position

during the proceedings below as an affirmative waiver of Goal 5 issues that are unrelated to the nearby aggregate operation. We agree with intervenor. See Newcomer v. Clackamas County, 16 Or LUBA 564, 567, rev'd on other grounds 92 Or App 174, modified 94 Or App 33 (1988).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "The county failed to make adequate findings supported by substantial evidence in the record that the proposed plan and zone change comply with Goals 11 and 14."

Petitioner concedes it failed to raise the issues presented in this assignment of error during the proceedings below and withdraws the fifth assignment of error. Therefore, we do not consider the merits of this assignment.

The county's decision is remanded.