BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. CROOK COUNTY, Respondent, and MIKE UMBARGER, Intervenor-Respondent.	)	LUBA No. 96-230 FINAL OPINION AND ORDER

Appeal from Crook County.

Celeste J. Doyle, Salem, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent Crook County.

William C. Cox, Portland, filed a response brief and argued on behalf of intervenor-respondent.

GUSTAFSON, Board Chair; HANNA, Board Member.

REMANDED 03/26/98

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals (1) the county's approval of the division of a 40-acre parcel into three parcels; and (2) conditional use permits for a nonfarm dwelling on each of the resulting parcels.

MOTION TO INTERVENE

Mike Umbarger (intervenor), the applicant below, moves to intervene in this proceeding on the side of respondent. There is no objection to the motion, and it is allowed.

MOTION TO STRIKE

Petitioner moves to strike an appendix to intervenor's brief that contains what purports to be U.S. Natural Resources Conservation Service (NRCS) soil classification and capability tables for pertinent soils on the subject property. The soil tables are not in the record. Notwithstanding, intervenor argues that the tables are produced by the U.S. Department of Agriculture, and thus are "official acts" or other official documents that are judicially cognizable law under Oregon Evidence Code 202.[1]

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[1]OEC 202 defines "Law judicially noticed" in relevant part as:

"* * * * *

"(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory or other jurisdiction of the United States.

"* * * * *

OEC 202(2) permits adjudicative bodies to take official notice of "public and private official acts" of government bodies, including federal executive departments. Under OEC 202(4), adjudicative bodies may take official notice of federal regulations and "similar legislative enactments." However, intervenor does not establish that the soil classification tables are either "official acts" or a federal regulation or enactment and thus are judicially cognizable law for purposes of OEC 202. Rather, the tables appear to be statements of fact. While those facts may potentially be subject to official notice under OEC 201(b), our limited scope of review does not allow us to recognize facts outside the record pursuant to OEC 201. Blatt v. City of Portland, 21 Or LUBA 337, 342, aff'd 109 Or App 259 (1991); Home Builders Assoc. v. City of Wilsonville, 29 Or LUBA 604, 606 (1995).

Petitioner's motion to strike is granted.

FACTS

The subject property is a 40-acre parcel located in the county's exclusive farm use (EFU) zone. Intervenor applied for approval to divide the parcel into one 20-acre parcel and two 10-acre parcels, and for a conditional use permit for a nonfarm dwelling on each parcel.

"(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any state, territory or possession of the United States."

The property is not irrigated, and has no water rights. Within one mile of the subject property are approximately 39 parcels of sizes ranging from five acres to 831 acres, all zoned EFU. Intervenor owns a 160-acre parcel adjacent to the subject property, and runs a dry pasture cattle operation in conjunction with other lands. A 67-acre nonirrigated parcel on farm deferral abuts the subject parcel to the north, with a 170-acre irrigated mint operation to the north of that. Within a mile of the subject property is another irrigated mint field, and two other cattle operations, including an 831-acre tract used both as a Goal 5 aggregate site and for grazing. The remainder of the parcels within one mile are nonirrigated parcels or tracts with sizes ranging from five to 120 acres, none of which possess a farm tax deferral. Eight nonfarm dwellings exist within a mile of the subject property, and the county recently approved three additional nonfarm dwellings in the area.

The planning commission denied intervenor's application on the basis that the proposed nonfarm dwellings would have a significant cumulative negative impact on the land use pattern and agricultural operations in the area, because they would contribute to the transition of the area from agricultural to low-density residential use. Intervenor appealed that decision to the county court. The county court heard intervenor's appeal on the record compiled by the planning commission, and reversed the planning commission's decision,

approving the land division and conditional use permits.

This appeal followed.

ASSIGNMENT OF ERROR

Petitioner argues that the challenged decision misconstrues applicable law, and makes findings not supported by substantial evidence, in finding that the proposed nonfarm dwellings and parcels comply with Crook County Zoning Ordinance (CCZO) 3.030(8)(C) and (D).[2]

CCZO 3.030(8)(C) (the stability standard) and 3.030(8)(D) (the suitability standard) are local implementations of statutory provisions for nonfarm dwellings at ORS 215.284(3)(b) and (d).[3] ORS 215.284(3) is further

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[2]CCZO 3.030(8) provides:

> "The County may approve a non-farm residential dwelling upon a finding that the proposed dwelling:
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> "* * * * *
>
> "C. Does not materially alter the stability of the overall land use pattern of the area;
>
> "D. Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil and land condition, drainage and flooding, vegetation, location and size of the tract[.]"
>
> "* * * * *"

[3]ORS 215.284(3) provides:

> "In counties [in eastern Oregon], a single-family residential dwelling not provided in conjunction with farm use may be established, subject to approval of the governing body or its designate, in any area zoned for exclusive farm use upon a finding that:
>
> "* * * * *
>
> "(b) The dwelling is situated upon a lot or parcel or portion of a lot or parcel that is generally unsuitable land for

implemented by rules adopted by the Land Conservation and Development Commission (LCDC) at OAR 660-33-130(4).

As a preliminary matter petitioner asserts, and we agree, that because the local provisions parallel and implement the statutory standards, the county's discretion to interpret its local criteria is constrained, and the county's application of 3.030(8)(C) and (D) must be consistent with the statutory provisions that CCZO 3.030(8)(C) and (D) implement.[4] Leathers v. Marion County, 144 Or App 123, 130, 925 P2d 148 (1996); Kenagy v. Benton County, 115 Or App 131, 134-36, 838 P2d 1076 (1992).

A. Stability Standard

Petitioner challenges the county court's determination that the proposed land division and nonfarm dwellings will not "materially alter the stability of the existing land use pattern." ORS 215.284(3)(d).

> 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;
>
> "* * * * *
>
> "(d) The dwelling will not materially alter the stability of the overall land use pattern of the area[.]"

[4]Given the primacy of the pertinent statutes and administrative rules in this context, we will refer to those statutes and rules as the source of applicable requirements and not provide parallel cites to corresponding local provisions. Wilbur Residents v. Douglas County, 151 Or App 523, 525 n1, ___ P2d ___ (1997).

In Sweeten v. Clackamas County, 17 Or LUBA 1234 (1989), we described the three-step inquiry necessary to determine whether a nonfarm dwelling will materially alter the stability of the overall land use pattern in the area:

> "First, the county must select an area for consideration. The area selected must be reasonably definite including adjacent land zoned for exclusive farm use. Second, the county must examine the types of uses existing in the selected area. In the county's determination of the uses occurring in the selected area, it may examine lot or parcel sizes. However, area lot or parcel sizes are not dispositive of, or even particularly relevant to, the nature of the uses occurring on such lots or parcels. It is conceivable that an entire area may be wholly devoted to farm uses notwithstanding that area parcel sizes are relatively small. Third, the county must determine that the proposed nonfarm dwelling will not materially alter the stability of the existing uses in the selected area." Id. at 1246.

We have further elaborated that what is required under the Sweeten standard is "a clear picture of the existing land use pattern [and] the stability of that existing land use pattern * * *." DLCD v. Crook County, 26 Or LUBA 478, 491 (1994). In addition, OAR 660-33-130(4)(c)(C) requires that:

> "in determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated. If the application involves the creation of a new parcel for the nonfarm dwelling, a county shall consider whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area;" (Emphasis added).

OAR 660-33-130(4)(c)(C) is derived from a similar standard we articulated in Blosser v. Yamhill County, 18 Or LUBA 253, 263 (1989). In Blosser, we held that where there

are other similarly situated properties in the area on which nonfarm dwelling applications might be encouraged, or there is a history of progressive partitioning and development of nonfarm residences, the county must consider the "cumulative impact" or "precedential effect" of approving an additional nonfarm dwelling, when that issue is raised. Id.

The challenged decision addresses the issues of cumulative impact and precedential effect as follows:

> "[The county court] feels that each land use hearing is judged upon the facts and merits of each application and differs with the [planning commission] * * * that a precedent would be created by this approval. No approval for a specific parcel of land with its own particular facts and situation can create a legal precedence.
>
> "* * * * *
>
> "The [county court] firmly believes as stated earlier in this Decision that each application must be judged upon its own merit. The history of land use actions does not suggest people apply because of a previous decision." Record 12, 16.

The decision then makes the following findings under the stability standard:

> "FINDINGS: * * * The area identified by [intervenor] is generally a one mile radius from the subject. There are 40 parcels described within the area ranging in size from 5 acres up to 831 acres. All parcels except for the two closest mint fields are nonirrigated, primarily nonfenced lands that are not on farm deferral. There are existing nonfarm residences with three additional nonfarm dwellings approved by the Planning Commission. Those three recent approved dwellings all abut existing farm practices, had no opposition testimony, and were approved by the [Planning] Commission with a finding the application does not materially alter the stability of the land use pattern in the area. As indicated in the report, there are 17 non-farm parcels, some with residences on 5-20 acre parcels

> in the immediate general area with farm parcel sizes of generally 160 acres up to 800+ acres. * * * [T]o the south just beyond one mile is Powell Butte View Estates Subdivision with parcel sizes ranging from 2 [acres] up that number 90-100 lots with Red Cloud Ranch just over a mile to the northeast of the subject with about 89 5-acre parcels." Record 14-15.

The decision then concludes that

> "[w]ithin the study area the predominate use, both vacant and improved, is non-irrigated rural sized lands of varying sizes. Allowing for the division of additional parcels will not impact or materially alter the existing land use pattern in the area. The [county court] concludes that a 10 or 20 acre parcel does not impact a 5 acre parcel, a 20 acre parcel or a dry 40 acre parcel. The [county court] does not consider this level of development as constituting a high density rural development such as that exhibited in the platted subdivisions to the south and to the northeast east. The [county court] feels the "threshold" level of impact is not met by a minimum of a 10 acre parcel within this area. The cumulative impact must also be considered in light of impact to the detriment of agriculture in the land use pattern area. * * * Three, five, or even 10 additional houses served by two paved county roads cannot be considered to have a material detrimental impact." Record 15.

1. The Study Area

Petitioner challenges first the county court's definition of the study area and the consideration of the two rural subdivisions south and northeast of the subject property. In defining an area to study, the county must explain what justifies the scope and contours of the study area. See Bruck v. Clackamas County, 15 Or LUBA 540, 543 (1987). The county court's explanation consists of the following:

> "[T]he area is served by two paved County roads, Bussett Road from the west and Reif Road from the north. Both roads dead end into the study area.

> Shumway Road is considered the western boundary line with the Powell Butte geologic feature to the east while to the south just beyond one mile is Powell Butte View Estates Subdivision * * *.
>
> "* * * The [county court] feels that roughly a one mile radius as described by the [intervenor's] report and map should be adopted and considered the land use pattern study area. It makes geographic and traffic pattern sense. The entire Powell Butte area is too diverse, too separated, and too large to consider as a whole. * * *" Record 17.

We agree with petitioner that bare references to "geographic and traffic pattern[s]" are insufficient to explain the scope and contours of the study area. The decision does not explain why Shumway Road to the west and Powell Butte to east are appropriate boundaries, nor why the "traffic pattern" justifies the limited area the decision examines.

Petitioner also argues that the decision improperly includes the two rural subdivisions within the study area. Shaad v. Clackamas County, 15 Or LUBA 70, 77-78 (1986)(study area should consider only the land development pattern on agricultural land). Intervenors responds that the county properly examines the subdivisions only as a basis for forming the study area boundaries. We see no error in using the rural subdivisions to define the boundaries of the study area.

We conclude for the foregoing reasons that the county's delineation of the study area is inadequate.

2. Description of the Land Use Pattern

Petitioner argues next that the decision fails to adequately describe the overall land use pattern. An adequate

description draws a "clear picture" of both the existing land use pattern in the area and the stability of that pattern. DLCD v. Crook County, 26 Or LUBA 478, 491 (1994).

We agree with petitioner that the decision fails to describe land uses on any but a handful of the 39 parcels in the study area. Instead, the decision appears to presume from the lack of farm tax deferrals on many of these parcels that no farm uses exist on them. Characterizing the bulk of the study area solely on the basis of non-specific information such as farm tax deferrals is insufficient to draw the requisite clear picture of the existing land use pattern. See Ray v. Douglas County, ___ Or LUBA ___ (LUBA No. 95-237, February 6, 1997) slip op 8 (general findings about zoning and details about some of the properties in the area do not provide a "clear picture" of existing land use patterns).

On remand, the county must describe the land uses on the parcels in the study area, analyze the stability and relative significance of those uses, and provide a sufficient characterization of the land use pattern, in order to meaningfully evaluate whether the proposed nonfarm dwellings will materially alter that pattern. DLCD v. Crook County, 26 Or LUBA at 492.

3. Materially Alter Stability of the Pattern

Petitioner also challenges the county court's analysis of why the proposed nonfarm dwellings will not materially alter the overall land use pattern.

Petitioner argues that the county court errs in adopting a retrospective analysis that examines only whether a "threshold" of transition between resource and residential uses has yet been reached, contrary to the more comprehensive prospective analysis required by OAR 660-33-130(4)(c)(C), Blosser and similar decisions. We generally agree. Throughout the challenged decision, the county court repeatedly rejects arguments that project what would or could happen if the proposal were approved.[5]

For purposes of the stability standard, the county must determine not only what the land use pattern is, but also whether the proposed use or land division will encourage similar uses or divisions on similarly situated parcels in the area. OAR 660-33-130(4)(c)(C). Doing so necessarily requires the county to identify the development trends in the area and what role the current application plays in those trends. See Ray, slip op 10-11.

In our view, the basic purpose of evaluating the land use pattern and the development trends in the area is to determine how stable the current land use pattern is and hence what steps are necessary to protect that stability. It is the stability of the EFU land use pattern that the standard protects from material alteration, not some indeterminate

[5]For example, the decision dismisses opposition arguments regarding impacts on farm uses because they present "what could happen, and not what has happened." Record 14.

"threshold" or balance between resource and nonresource uses. The county court's approach relaxes the stability standard to protect an area of EFU lands only from ultimate transformation to rural residential development.[6] OAR 660-33-130(4)(c)(C) and our decisions require the county to determine that the proposed nonfarm dwellings and any chain of conversions that the dwellings will encourage on similarly situated properties susceptible to development shall not materially alter the stability of the current land use pattern.

The present record reveals both a history of similar nonfarm dwelling approvals and the existence of a large number of similarly situated properties apparently indistinguishable from the subject property. The record shows that eight nonfarm dwellings currently exist in the area, that the county recently approved three additional nonfarm dwellings in the area, that intervenor has received approval to establish nonfarm dwellings on other, newly created nonfarm parcels, and that other similar applications are pending before the county. Record 14, 138-9, 157, 173. The decision itself uses the recent approvals as establishing a precedent for the current application, reasoning in effect that if the recent approvals did not alter the stability of the land use pattern, neither will the current application. Record 14. This reasoning

[6]For example, the decision apparently considers the stability standard to be satisfied as long as the chain of conversion has not yet resulted in the "high density rural development such as exhibited in the platted subdivisions to the south and northeast east." Record 15.

succinctly demonstrates the "precedential effect" of development approvals in encouraging comparable development on similar lands. Blosser, 18 Or LUBA at 253. The prior approvals clearly encourage and act as a de facto precedent for the current application.

Equally important, the decision fails to analyze whether the proposed nonfarm dwellings will encourage or continue a chain of conversions on the numerous similarly situated parcels in the study area. It appears from the record that of 40 parcels in the study area, some 24 or 25 are nonirrigated parcels similar to the subject property. The subject property is adjacent to what appear to be several identical nonirrigated 40 acre parcels. One basis for approval intervenor argues in his application is that his development will allow owners of neighboring parcels to partition and develop their parcels more easily. Record 139. The decision does not identify any features distinguishing the subject property from nearby properties on which similar nonfarm uses might be encouraged, or explain why approval of intervenor's dwellings will not encourage owners of these properties to seek similar nonfarm dwellings. See Thomas v. Wasco County, 30 Or LUBA 302, 309-10 (1996). On the contrary, it appears intervenor's intent is to facilitate additional nonfarm dwellings in the area.

For these reasons, we conclude that the decision must be remanded for correct application of the stability standard.

The first subassignment of error is sustained.

B. The Suitability Standard

Petitioner challenges the county court's determination under CCZO 3.030(8)(D) that the proposed nonfarm dwellings are situated on land "generally unsuitable" for the production of farm crops and livestock, considering, among other things, the "location and size of the tract." "Tract" is defined in this context as "one or more contiguous parcels under the same ownership." ORS 215.020(2); OAR 660-33-020(10).

OAR 660-33-130(4)(c)(B) and ORS 215.284(3)(b) elaborate on the meaning of the suitability standard:

> "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."

OAR 660-33-130(4)(c)(B) further states that:

> "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.'"

The county court's findings and conclusions on compliance with CCZO 3.030(8)(D) state:

> "FINDINGS: The proposed partitioning is on a 40 acre non-farm parcel that the county had determined to be non-productive. The soils are shallow and from testimony cannot be plowed because of the presence of surface rocks. The soils are Ayres stony sandy Class VI. There is no irrigation water to the property and the property has not been actively farmed in the past because of these limitations. Testimony from neighboring farmers also indicate the land is not generally suitable for agricultural purposes. * * *

> "CONCLUSION: Due to the terrain, the shallow soils, short growing season, and particularly lack of irrigation water, the [county court] agrees with the conclusion of the Planning Commission Decision that the land is not viable for agriculture and cannot be reasonably used in conjunction with existing operations as testimony from nearby farmers indicate the land was worthless for farming; if not, it would already be utilized." Record 16-17 (emphasis added).

Petitioner challenges these findings and conclusions on two grounds. First, petitioner notes that intervenor owns an adjacent 160-acre parcel, and argues that the decision fails to consider whether the subject parcel is suitable for farm use as part of intervenor's tract. Second, petitioner argues that the decision fails to consider whether the subject parcel can reasonably be put to use in conjunction with other land not owned by intervenor.

We agree with petitioner that the county must consider whether the subject parcel or portion thereof can reasonably be put to farm use in conjunction with adjacent or nearby lands, including land under the same ownership. In this context, the county must consider not only the property's suitability for producing crops but also its suitability for producing livestock, that is, grazing, both alone and in conjunction with adjoining and nearby properties. Avgeris v. Jackson County, 23 Or LUBA 124 (1992); Alexanderson v. Clackamas County, 26 Or LUBA 209, 212 (1993), aff'd 126 Or App 549 (1994).

The county reasons in the challenged decision that the land is not "agriculturally viable" based on the lack of

irrigation and hence the parcel's inability to grow crops, and concludes that the parcel cannot be used in conjunction with irrigated parcels in the area for that reason. The decision does not consider whether the subject parcel can be used alone or in conjunction with other lands to graze cattle. The record shows that cattle graze on other nonirrigated lands in the area, including lands owned or leased by intervenor, and nothing directed to our attention in the record indicates that the soils or other conditions on the subject parcel are different from nearby parcels used to graze cattle or that the subject parcel cannot be used in conjunction with these or other lands to graze cattle.[7]

In sum, we conclude that the county misconstrued the applicable law, and its finding that the subject parcel is not "generally unsuitable" for farm use, specifically grazing, is not supported by substantial evidence.

The second subassignment of error is sustained.

C. Soil Classifications

Petitioner challenges the decision's finding that "the soils [on the property] are Ayres stony sandy Class IV," as

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[7]Intervenor cites elsewhere to a statement in the record that it takes between 145 and 233 acres to support one cow for one year on BLM allotments in the Powell Butte area. However, that statement does not clearly support a finding that the subject parcel cannot be used in conjunction with other grazing land. ORS 197.835(11)(b). Intervenor does not argue that the BLM allotments are within the study area, or how grazing conditions on the allotments compare with the subject parcel or parcels in the study area. Even if the conditions are the same, the record demonstrates that grazing occurs on nonirrigated parcels in the study area. Intervenor has not established that the subject parcel cannot be used in conjunction with other grazing land within the study area.

inaccurate and lacking substantial evidence in the record.

The staff report states that the soil on the parcel is composed of

> "* * * 4 acres of Deschutes sandy loam, [NRCS] Class II; 16 acres of Ayres stony sandy loam, Class VI; 5 acres of Ayres stony sandy loam, Class IV; and 15 acres of Ayres sandy loam, Class IV, according to the [NRCS]." Record 125.

Thus, the record demonstrates that the subject parcel is predominantly composed of Class IV or better soils. We agree with petitioner that the record does not support the county's finding that soils on the subject parcel are composed of Class VI soils.[8] The county's findings on the capability of soils on the subject property are not supported by substantial evidence in the record.

The second subassignment of error is sustained.

The assignment of error is sustained.

The county's decision is remanded.

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[8]Petitioner notes further that the entire parcel is composed of soils in capability classes II through VI, and is "agricultural land" by definition. OAR 660-33-020(1)(a)(A). Thus, the subject property is "presumed to be suitable" for farm use because it is "composed predominantly of Class I - VI soils." OAR 660-33-130(4)(c)(B).