BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROY HEARNE and ELAINE HEARNE, Petitioners, vs. BAKER COUNTY, Respondent, and PATTI COFFEE and LAURI BRYAN, Intervenors-Respondent.	LUBA No. 97-146 FINAL OPINION AND ORDER

Appeal from Baker County.

Susan Isabel Boyd, Alameda, California, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent.

Patti Coffee, Halfway, filed the response brief and argued on her own behalf.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

REMANDED 03/18/98

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a conditional use application for a nonfarm dwelling on land zoned exclusive farm use (EFU).

MOTION TO INTERVENE

Lauri Bryan, the applicant below (intervenor), and Patti Coffee (lead-intervenor), move jointly to intervene on the side of the respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 18.4-acre parcel zoned EFU, located four miles north of the city of Halfway. Soils on the property are 30 percent Langrell gravelly loam, Class III, and 70 percent Langrell very cobbly loam, Class IV. Past agricultural use on the property includes seasonal livestock grazing, and production of alfalfa and grain on a portion of the property entitled to irrigation water rights. The property does not receive special farm use assessment.

The area within one mile of the property contains 85 tax lots, all zoned either EFU or Timber Grazing (TG), on which are sited 58 dwellings. Seventy of the 85 tax lots receive special farm use or forest assessment. All of the parcels contiguous to the property are developed with dwellings. Petitioners graze sheep on land adjacent to the property.

In April 1997, intervenor filed an application for a conditional use permit to build a nonfarm dwelling on the property. The planning commission approved the application, and petitioners appealed that decision to the county court. On July 16, 1997, the county court made findings of fact and conclusions of law, and denied the appeal, approving the planning commission's decision and the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners challenge the county court's finding that the proposed nonfarm dwelling will not force a significant change in or significantly increase the cost of accepted farming practices on nearby lands devoted to farm use. Baker County Zoning Ordinance (BCZO) 301.06(1).[1] Petitioners argue that the decision fails to state the facts it relies on, and fails to explain how the facts lead to its conclusion that BCZO 301.06(1) is satisfied. Further, petitioners argue that the

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[1]BCZO 301.06(1) provides:

> "The use or activities associated with the use will not force a significant change in or significantly increase the cost of accepted farming practices on nearby lands devoted to farm use."

BCZO 301.06(1) implements ORS 215.284(2)(a), which provides:

> "* * * [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:
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> "(a) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use."

county's finding of compliance with BCZO 301.06(1) is not based upon substantial evidence in the record.

We have held that in order to demonstrate compliance with the significant change/increased cost standard, the county's findings must: (1) describe the farm and forest practices on surrounding lands devoted to farm or forest use; (2) explain why the proposed use will not force a significant change in those practices; and (3) explain why the proposed use will not significantly increase the cost of those practices. Brown v. Union County, ___ Or LUBA ___ (LUBA No. 95-246, November 5, 1996), slip op 8. Further, the county may not assume from an absence of information in the record concerning the nature of surrounding farm practices that there are no adverse farm impacts. The burden is on the county to identify farm and forest practices on nearby lands and to explain why it believes there are no significant adverse impacts and the cost of accepted farm practices would not be increased. Id.

The challenged decision states on this point:

> "The County Court has reviewed a Planning Department analysis of the land use pattern surrounding the subject parcel * * * examining different factors including parcel size, zoning, housing density and type of assessment. * * * The primary farm use in this area is livestock production. There are 46 tax lots larger than the subject property, 27 smaller, and 12 equivalent to the size of the subject property within this area. * * *
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> The applicants have stated that there will be no change in the method or increase in the cost of farm practices due to poor soils and small parcel sizes,

and that the area is committed to small tract rural living.

"Conclusion: The Baker County Court concludes that the primary farm use in this area is livestock production on a small scale. The primary land use in this area is rural residences. In order to sustain a viable commercial livestock operation, large blocks of land are necessary for grazing on the type of land found in the area proposed for development. Because of established parcel sizes, multiple ownerships and amount of residential development in the area surrounding the subject property, the feasibility of obtaining access to large blocks of land for seasonal grazing is considered to be too low. This area is primarily composed of small parcels that are residential or that support limited numbers of livestock. This area is considered to be committed to small tract rural residential living.

"The activities associated with the proposed establishment of a dwelling on the subject property are expected to be similar to the existing uses in the surrounding area. The expected activities include normal activities associated with a dwelling, and the potential for raising livestock on a small scale.

"Therefore, based on the above arguments, the proposed establishment of a dwelling and associated activity will not force a change in, or increase the cost of, the type of farming practices present in the area." Record 8-9.

Petitioners argue first, and we agree, that the challenged decision fails to identify farm and forest practices on nearby lands. The only farm or forest use mentioned is "livestock production," but the decision fails to identify which properties are devoted to livestock production, and what specific practices are involved in livestock production. Absent such identification, the county cannot meaningfully determine whether the proposed nonfarm dwelling will cause a significant change in or increased cost to those

practices. Berg v. Linn County, 22 Or LUBA 507, 511 (1992).

Petitioners argue next that the county's finding of compliance with BCZO 301.06(1) is not based on substantial evidence, particularly given petitioners' testimony that the proposed use would cause significant change in and increased cost to farm practices in the area. Petitioners testified that they farmed the subject property for 20 years; that they pasture sheep next to it; that irrigation water from petitioners' land runs off onto the subject property, creating conflicts with any residential use there; that petitioners have had to stop irrigating a portion of their property because a neighbor built a house on an adjacent parcel and complained about irrigation runoff; that such complaints will either force petitioners to reduce irrigation or to switch from flood irrigation to more expensive sprinklers; and that increased traffic on the roads from residential uses will force petitioners to hire vehicles to haul livestock from pasture to pasture, rather than moving them on foot. Record 111-12, 132; Record Exhibit B (audio tape of planning commission hearing May 22, 1997).

Lead-intervenor responds that the proposed nonfarm dwelling is essentially a proposal for a hobby farm, and that, because the area contains a number of similar hobby farms, the county properly relies on the "hobby farm" character of the area to find that the proposed use is consistent with, and hence will not adversely affect, farming practices in the

area.

We agree with petitioners that the county's finding of compliance with BCZO 301.06(1) is not supported by substantial evidence in the record. Other than the applicant's conclusory statement recited in the decision, all the evidence in the record to which we are directed tends to demonstrate that the proposed use will in fact force significant change in or significantly increase the cost of accepted farming practices in the area.

Further, as noted above, the decision fails to identify the farm and forest practices on parcels in the area. Its conclusion that the area is committed to small-tract rural living and small-scale livestock production, what lead-intervenor characterizes as "hobby farms," appears to be an inference drawn in part from the number of dwellings in the area and the relatively small average tax lot size. However, that inference is built on unexplained suppositions about the nature of the 58 dwellings in the area. The decision makes no effort to determine the relative number or types of farm dwellings and nonfarm dwellings.[2] Further, the decision describes the dominant land use in the area as rural residential, but does not explain why 82 percent of the tax lots in the area receive special farm use or forest

[2]Other types of farm and nonfarm dwellings include accessory farm dwellings permitted under ORS 215.283(1)(f), dwellings not in conjunction with farm use permitted under ORS 215.284(2) or (3), farmworker dwellings permitted under ORS 215.283(1)(p), hardship dwellings allowed under ORS 215.283(2)(k) and residential facilities permitted under ORS 215.283(2)(n).

assessments.[3] We conclude that to the extent the county relies on the consistency between the proposed nonfarm dwelling and surrounding "hobby farm" land uses to find compliance with BCZO 301.06(2), that finding is not supported by substantial evidence.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners challenge the county's finding that the proposed nonfarm dwelling will not materially alter the stability of the land use pattern in the area. BCZO 301.06(2).[4] Petitioners argue that the county fails to

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[3]Lead-intervenor asserts that the parcels in the area on special farm use assessment raise small numbers of horses and cattle as the "farm use" required to qualify for the special farm use assessment. Lead-intervenor also states that most of the horses on farms in the area are for recreation and most of the cows for domestic butchering purposes. Lead-intervenor does not identify where in the record these facts are found. However, even if such facts were in the record, we disagree that the presence of "hobby farms" in the area has the significance suggested by lead-intervenor. Lands within EFU zones receive a special farm assessment only if "used exclusively for farm use as defined in ORS 215.203(2) * * *." ORS 308.370(1). (Emphasis added). ORS 215.203(2) defines "farm use" as "the current employment of land for the primary purpose of obtaining a profit in money" by engaging in listed agricultural activities. (Emphasis added). Generally, the pasturing of animals for private use is not a "farm use" qualifying for the special farm use assessment. See Capsey v. Dept. of Rev., 294 Or 455, 457-58, 657 P2d 680 (1983). Thus, lead-intervenor's argument tends to demonstrate, not that the proposed "hobby farm" is consistent with surrounding farm uses, but that the surrounding hobby farms are not "farm uses." The consistency of the proposed use with surrounding nonfarm uses is irrelevant to whether the proposed use will force a significant change in or significantly increase the cost of accepted farm practices in the area.

[4]BCZO 301.06(2) implements and incorporates, nearly verbatim, the language of ORS 215.284(2)(d) and 660-33-130(4)(c)(C). BCZO 301.06(2) provides:

> "The use does not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated and whether the creation of the parcel will lead to

explain how the facts relied upon lead to the conclusion that the proposed use complies with BCZO 301.06(2); the county failed to select a reasonably definite area for consideration; the county failed to adequately examine the types of uses in the selected area; and the county's finding of compliance with BCZO 301.06(2) is not supported by substantial evidence in the record.

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 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),

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the creation of other nonfarm parcels to the detriment of agriculture in the area will be considered."

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. * * *"

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 states with respect to BCZO 301.06(2):

> "Findings: * * * [T]he area within an approximate one mile radius of the proposed development consists of parcels of similar size. There are less than seven of a total of 32 tax lots in the Section in which the subject parcel is located that do not currently support dwellings. Twenty-five dwellings, both farm and nonfarm dwellings, are located on the tax lots in Section 29 alone. The average tax lot size in Section 29 is 15 acres. The principal land use in the area is residential in nature, on parcels with limited farm use.
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> "Conclusion: * * * [t]he proposed use will be consistent with the overall land use pattern in the area. Analysis of the area suggests that given the type of land use present, there is little or no chance that establishment of an additional dwelling on a parcel surrounded by parcels supporting farm and nonfarm dwellings will alter the stability of the land use pattern in the area to the detriment of agriculture." Record 9.

A. Study Area

Petitioners argue first that the selected study area is not "reasonably definite" because the decision refers to two distinct areas, an area referred to as a "one mile radius"

containing 85 tax lots, and an area referred to as "Section 29" containing 32 tax lots. 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). We agree with petitioners that reference to two distinct areas fails, in this context, to reasonably define the study area. It is not clear from the record where in Section 29 the subject property is located. Unless it is located at or near the middle of Section 29, conclusions about the "area" drawn from the characteristics of parcels within Section 29 are misleading. Nor is it clear whether Section 29 is entirely contained within the one-mile radius study area, and thus whether the 32 tax lots within Section 29 are among the 85 tax lots in the larger study area. In any case, the decision does not explain why limiting the scope of the study area to the arbitrary boundaries of a land section is justified.

B. Identification of Land Uses in the Study Area

Petitioners next argue that the county fails to provide the requisite "clear picture" of the land use pattern in the area and the stability of that pattern. Petitioners contend that the decision focuses solely on tax lot size, with only conclusory findings about land uses on the 85 tax lots within the larger study area.

We agree, for some of the same reasons cited above with respect to the first assignment of error. The decision finds

that the dominant farm use in the area is livestock production, and yet the overall land use pattern is residential. Both findings are conclusory and contradictory. The decision does not describe land uses on any of the 85 tax lots in the study area, how many lots are used for farm, forest or other uses, what those uses are, or how extensive those uses are. Information of this type is necessary to draw a "clear picture" of the land use pattern in the area. See DLCD v. Crook County, 26 Or LUBA at 491.

Moreover, we find the county's description of the land use pattern inadequate because it speaks exclusively in terms of "tax lots" rather than parcels under single ownership or management. We have held that a county may consider lot and parcel sizes, but that lot and parcel sizes are not dispositive of nor even particularly relevant to determination of the land use pattern. Sweeten, 17 Or LUBA at 1246. The same principle applies even more strongly to consideration of tax lots, which need not and often do not correspond to lot or parcel ownership. The county's conclusions drawn from tax lot sizes are meaningless if multiple tax lots are contained within one parcel under single ownership, or if multiple parcels are aggregated together under single ownership or management. Because the second step of the Sweeten analysis is directed at identifying

the land use pattern in an area, the county errs in relying exclusively on the tax lot as the only unit of analysis.

C. Stability of the Land Use Pattern

Finally, petitioners challenge the county's conclusion that the proposed nonfarm dwelling will not materially alter the stability of the land use pattern.

The substance of the county's reasoning is contained in its conclusion that the area is already committed to nonfarm residential living, and thus further approvals of nonfarm uses cannot materially alter the stability of the land use pattern to the detriment of agriculture. The county essentially reasons that the proposed nonfarm dwelling will not materially alter the stability of the land use pattern because prior nonfarm development has already converted or is about to convert the area from agriculture to a de facto rural residential zone.

We agree with petitioners that this conclusion is inconsistent with OAR 660-33-130(4)(c)(C) and our case law interpreting the stability standard. The county's reasoning may be appropriate in the context of an application to take a Goal 3 exception to redesignate and rezone the area from agricultural to non-agricultural uses, but that is not what petitioners applied for.

We have held that the stability standard may be violated "where there is existing residential development and introduction of more such development will make it more

difficult to continue existing agricultural uses." DLCD v. Crook County, 26 Or LUBA at 492. OAR 660-33-130(4)(c)(C) requires the county to evaluate the "cumulative impact" of nonfarm dwellings in the area on other parcels susceptible to similar development pressures. Thus, the stability standard requires the county to examine the history of nonfarm development in the area and to determine the extent to which that development and the current proposal encourage future nonfarm development. If the cumulative effect of historical, current and projected nonfarm development is to materially alter the stability of the land use pattern, then the stability standard is not met.

For these reasons, we conclude that the county erred in its application of the stability standard.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners challenge the county's finding that the proposed nonfarm dwelling will be situated on a parcel or portion of a parcel that is "generally unsuitable" for the production of farm crops and livestock. BCZO 301.06(3).[5]

[5]BCZO 301.06(3) implements and repeats, nearly verbatim, the standard at ORS 215.284(3)(a). We quote the latter:

> "The dwelling is situated upon a lot or parcel or portion of a lot or parcel that is generally unsuitable land for 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."

The decision states the following:

> "Soils on the subject property are described by SCS as being 30% gravelly loam and 70% very cobbly loam. Soils in the analysis area can be characterized as being generally poor due to rocks, but with localized pockets of better high-value soil. * * * The terrain does not appear to be extreme to the degree that it would constitute a limiting factor to livestock production.
>
> "* * * * *
>
> "The applicant describes the parcel proposed for development as 'unsuitable for farming practices due to rocky outcrops and high content of cobbly stones. The main limitation for farming practices is the low water holding capacity of the Langrell soil. The property is comprised mainly of bunch grasses, shrubs and some pine trees.'
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> "Conclusion: The Baker County Court concludes that terrain, adverse soil or land conditions, drainage and flooding, or vegetation do not appear to be limiting factors to the primary farm use of livestock production if considered separately. <u>However, consideration of these factors together with the location and size of the subject parcel, in an entire Section where parcels are generally smaller and the majority support dwellings, makes it unreasonable to expect that this area is suited to farm use on a commercial scale.</u> The Court finds the area to be incapable of supporting a viable commercial livestock operation due to a combination of low forage production on rocky soils and multiple small ownerships of 15 acres average in size. * * *.
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> "<u>The subject parcel could conceivably be used in conjunction with adjacent farm land, but the value to farm production is limited due to the relatively poor soils and impact of development in the area</u> * * *." Record 10-11. (Emphasis added).

Petitioners argue that the county misconstrues the "generally unsuitable" standard by focusing on whether the subject property is suited for farm use on a <u>commercial</u> scale, alone or in conjunction with other property in the area. We

agree. As petitioners note, "[t]he fact that the property cannot be farmed as an economically self-sufficient farm unit is irrelevant if it is otherwise suitable to produce farm crops and livestock." Nelson v. Benton County, 115 Or App 453, 455, 839 P2d 233 (1992), quoting Rutherford v. Armstrong, 31 Or App 1319, 1324 (1977), rev den 281 Or 431 (1978). The record demonstrates that the subject property has historically been used for grazing livestock and for limited production of crops. The county concludes that the property could be used in conjunction with the adjacent farm land, but reasons essentially that even if so used, the area as a whole is so broken up into multiple small tax lots of moderate value for grazing that no combination of lots managed together could support livestock grazing on a "commercial" scale.

The county's analysis misconstrues the generally unsuitable standard. Suitability for commercial agriculture is not the test. The proper inquiry in this context is whether the subject property can reasonably be put to farm or forest use alone or in conjunction with other land. ORS 215.284(3)(a). "Farm use" need not rise to the scale of a commercial agricultural enterprise.

The third assignment of error is sustained.

The county's decision is remanded.