BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

EVERETT EVENSON,	)	
	)	
Petitioner,	)	
	)	LUBA No. 98-214
vs.	)	
	)	FINAL OPINION
JACKSON COUNTY,	)	AND ORDER
	)	
Respondent.	)	

Appeal from Jackson County.

Everett Evenson, Medford, filed the petition for review.

No appearance by Jackson County.

BRIGGS, Board Member; and BASSHAM, Board Member, participated in the decision.

AFFIRMED 6/4/99

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a decision by the Jackson County hearings officer to deny an application for a non-farm dwelling.

FACTS

The subject property contains 7.69 acres and is zoned Exclusive Farm Use (EFU). It is surrounded on three sides by property subject to the EFU designation. A rural residential subdivision lies to the south of the subject property. Almost all of the EFU property, with the exception of the subject parcel and an adjacent parcel to the west, are large commercial agricultural holdings. The subject parcel is currently receiving special farm assessment.

Ninety-eight percent of the subject property contains Class IV soils. The remaining two percent is fill (Made-land), comprised of decomposed granite. The fill has a Class V agricultural soils rating. Petitioner proposes to site a non-farm dwelling on the southwest corner of the property, within the fill area.

This is the second time the applicant has filed an application for a non-farm dwelling. In 1990, the county denied the petitioner's request. That decision was not appealed. In 1993, the county adopted amendments to its comprehensive plan map to incorporate the subject property into the residentially committed lands exception to the south. This amendment was adopted in conjunction with the county's periodic review work task, and was therefore subject to review by the Land Conservation and Development Commission (LCDC). LCDC remanded the county's decision regarding the subject property, on the basis that the county had failed to show that the subject property was unsuitable for agricultural use. The remand required the county to retain the property within the agricultural designation. The LCDC remand was not challenged by the county, and its decision became final in late 1997.

In 1998, petitioner filed the subject application with the county. The application was

reviewed by the Jackson County hearings officer, and after a public hearing on the matter, the hearings officer determined that the application must be denied because the applicant had failed to show that the "portion of the property proposed for the homesite is generally unsuitable for the production of farm crops or livestock," pursuant to Jackson County Land Development Ordinance (JCLDO) 218.090(7)(C).

This appeal followed.

ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer erred as a matter of law when he determined that the applicant failed to show that the portion of the property on which the dwelling is to be located is generally unsuitable for the production of farm crops and/or livestock.

To support a denial, the county need only establish the existence of one adequate basis for denial. Roozenboom v. Clackamas County, 24 Or LUBA 433, 437 (1993); Garre v. Clackamas County, 18 Or LUBA 877, 881, aff'd 102 Or App 123, 792 P2d 117 (1990). To successfully challenge the evidentiary basis for the county's denial, it is not sufficient for petitioner to show there is evidence in the record which supports his position; petitioner must show the evidence is such that a reasonable trier of fact could only decide in favor of petitioner's position. Horizon Construction, Inc. v. City of Newberg, 28 Or LUBA 632, 641-42 (1995). Further, in determining whether the evidence meets this standard, LUBA considers all relevant evidence to which it cited in the record, including both that which supports and that which detracts from the county's decision. Heininge v. Clackamas County, 17 Or LUBA 377, 383 (1989).

A. The effect of soils classification on agricultural suitability

JCLDO provides in relevant part:

"218.090 SPECIFIC USE STANDARDS OF ALL ADMINISTRATIVE REVIEW APPLICATIONS:

"* * * * *

"7) NONFARM DWELLING: A nonfarm dwelling as permitted under 218.040(6) may be approved subject to the following findings:

"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.

"B) The dwelling will not materially alter the stability of the overall land use pattern of the area, considering the cumulative impacts of nonfarm dwellings similarly situated in the area.

"C) The dwelling is situated upon a lot or parcel, or portion of a lot or parcel, that is generally unsuitable for the production of farm crops and livestock or merchantable tree species based upon the following:

"i) In determining whether the lot or parcel or a portion of the lot or parcel, is unsuitable for farm use, terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract shall be considered.

"a) A lot or parcel is presumed to be suitable if it is composed predominately of Class I-IV soils.

"b) A lot or parcel is not 'generally unsuitable' simply because it is too small to be farmed profitably by itself.

"c) 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.'

"d) Unsuitability of a lot or parcel for one farm use does not mean it is unsuitable for another farm use."

Petitioner first argues that if one presumes that Class I-IV soils are agricultural lands, then it follows that Class V-VIII are presumed to be non-agricultural lands and that presumption is sufficient evidence that the Class V soil area of the subject parcel is "generally unsuitable" for farm use. We disagree that the agricultural lands definition gives rise to the negative inference or presumption that petitioner posits. The definition of "agricultural lands" in Goal 3 and OAR 660-033-0020(1) provides:

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

"(A) Lands classified by the U.S. Soil Conservation Service (SCS)[1] as predominantly Class I - IV soils in Western Oregon and I - VI soils in Eastern 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; climatic 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/I - VI that is adjacent to or intermingled with lands in capability classes I - IV/I - VI within a farm unit, shall be inventoried as agricultural lands even though this land may not be cropped or grazed[.]"

Under the agricultural lands definition, Class V soils are not presumed to be non-agricultural, nor is the presence of Class V soils determinative, in itself, as to whether land is generally unsuitable for farm use.

B. Evidence regarding suitability for farm use

Petitioner argues next that the hearings officer impermissibly relied upon the testimony of an adjacent land owner and a retired horticulturalist as evidence that the homesite was suitable for farm use. The adjacent land owner, Lowe, testified that he had seen grasses on the property, and had cut hay on the property on various occasions. The retired horticulturalist testified that he had recently visited the site in question, and had seen grasses growing uniformly on the property. Petitioner claims that Lowe's testimony should not be relied upon because it is inconsistent with the testimony provided by others regarding the agricultural use of the property and because there is no written information in the record to support Lowe's testimony. He argues that the horticulturalist's testimony should be

[1]Now, Natural Resources Conservation Service.

discounted because he had not provided sufficient credentials to support his claim to be an expert on agricultural soils.

Petitioner states that the only credible evidence in the record regarding the suitability of soils for agricultural use was from petitioner's soil scientist, Roy Meyer (Meyer), from Trinity Consulting Service. Petitioner relies upon a letter submitted by Meyer located in Record 30 to support a claim that the proposed homesite is generally unsuitable for agricultural use. The soil analysis by Trinity Consulting Services found at Record 133 shows merely that the Class V soil is the portion of the site "best suited for a homesite. * * * The remainder of the property * * * [contains agricultural soils that] are better left as agricultural land." The Trinity Consulting Services report found at Record 30 does conclude that the Class V soils are unsuited for agricultural use; however, that conclusion seems to be based solely on the soil class. The report findings did not state that the Class V soils cannot be farmed, simply that, in itself, Class V soil is not an agricultural soil.

In addition to the report from the soils scientist, petitioner presented letters from adjacent farm operators, stating that they are not interested in either acquiring or renting the parcel in conjunction with their farm activities because the parcel does not have irrigation rights. A former owner of the property testified that the parcel could only be marginally farmed, and that to the extent she and her husband did till the land, it was done to prevent the growth of a "weed patch." An excavator testified he contracted with the previous owner to install an irrigation system on the parcel in 1978 or 1979. When the system failed, the irrigation tank was removed, and the site was backfilled with rock, which contained primarily decomposed granite. He testified that that is the source of the fill on the property.

The record shows that the parcel is predominately composed of Class I-IV soils. Approximately two percent of the property is composed of Class V soil. There is also testimony in the record to show that the parcel could not be profitably farmed by itself, but that it had been profitably farmed as part of a larger agricultural operation in the past. One

party testified that he had participated in harvesting alfalfa and oat hay on the property, and that he could detect no difference in the quality of the grass grown on the Class V soils—they were of similar quality to the grass grown on the other soils. There was evidence from another party that he had witnessed grass growing uniformly on the property, including that area which had the less suitable soils.

The hearings officer found that the predominate soil types on the parcel are agricultural soils, that the entire parcel had been farmed in conjunction with adjacent farm properties, and that there was testimony in the record to support findings that the entire parcel had been used for agricultural activities, despite the presence of Class V soils on two percent of the property. Petitioner did supply information to rebut this testimony, however, the hearings officer determined that the rebuttal was insufficient to show that the portion of the property where the proposed dwelling is to be sited is generally unsuitable for farm use.

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339, 831 P2d 77 (1991). Where we conclude a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, we defer to the local government's choice between conflicting evidence. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988); Angel v. City of Portland, 22 Or LUBA 649, 659, aff'd 113 Or App 169, 831 P2d 77 (1992); Wissusik v. Yamhill County, 20 Or LUBA 246, 260 (1990); Douglas v. Multnomah County, 18 Or LUBA 607, 617 (1990).

The record contains credible, conflicting evidence regarding whether the proposed dwelling site is generally unsuitable for farm use. Petitioner has not shown as a matter of law that his evidence is to be believed over the testimony relied upon by the hearings officer. Horizon Construction, Inc. 28 Or LUBA at 641-42.

The assignment of error is denied.

The county's decision is affirmed.