BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF LINN COUNTY,
Petitioner,

vs.

LINN COUNTY,
Respondent.

LUBA No. 99-191

FINAL OPINION
AND ORDER

Appeal from Linn County.

Anna Braun, Salem, filed the petition for review on behalf of petitioner.

No appearance by respondent.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

REMANDED 03/30/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals the county's approval of a lot of record dwelling in an Exclusive Farm Use (EFU) zone.

FACTS

The subject property is a vacant 5.11-acre parcel zoned EFU. The soil on the property consists entirely of Clackamas Variant, Class IIw, a high-value soil inventoried in the county's soil survey. Each of the surrounding parcels is also zoned EFU. Airport Road borders the parcel to the south, and separates the subject property from a 91.86-acre parcel used for grazing. A vacant 5.11-acre parcel lies to the east. To the north, a 15-acre parcel is currently planted in hay. To the west lies a 12.29-acre parcel that is developed with two residences.

Harold and Mildren Eriksen (the applicants) have owned the subject property since 1972, and maintained a mobile home on the property until 1988. In 1988, the mobile was removed, but a well, septic system and concrete pad remain. The property has been used as recently as July 1999 for hay production, both alone and in conjunction with the parcel to the north.

In 1999, the applicants applied to the county for a lot of record dwelling pursuant to Linn County Land Development Code (LDC) 933.705, which implements ORS 215.705. On May 11, 1999, the county planning commission approved a conditional use permit allowing the dwelling. Petitioner appealed that decision to the county board of commissioners. The board of commissioners conducted hearings on July 14, 1999, August 11, 1999, and October 13, 1999. On November 23, 1999, the board of commissioners denied the appeal, affirming the planning commission's decision.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county's findings of compliance with ORS 215.705(2)(a)(C)(i) misconstrue the applicable law, are inadequate, and are not supported by substantial evidence.

ORS 215.705(2)(a) allows a county to approve a lot of record dwelling on high-value farmland, subject to the following criteria:

> "* * * a single-family dwelling not in conjunction with farm use may be sited on high-value farmland if:
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> "(A) It meets the other requirements of ORS 215.705 to 215.750;
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> "(B) The lot or parcel is protected as high-value farmland as described under ORS 215.710 (1); and
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> "(C) A hearings officer of a county determines that:
>
> "(i) *The lot or parcel cannot practicably be managed for farm use, by itself or in conjunction with other land, due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity*.
>
> "(ii) The dwelling will comply with the provisions of ORS 215.296 (1).
>
> "(iii) The dwelling will not materially alter the stability of the overall land use pattern in the area." (Emphasis added.)

OAR 660-033-0130(3)(c)(C)(i) elaborates on the "practicably managed" standard at ORS 215.705(2)(a)(C)(i), and states:

> "The lot or parcel cannot practicably be managed for farm use, by itself or in conjunction with other land, due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity. *For the purposes of this section, this criterion asks whether the subject lot or parcel can be physically put to farm use without undue hardship or difficulty because of extraordinary circumstances inherent in the land or its physical setting. Neither size alone nor a parcel's limited economic potential demonstrate that a lot of parcel cannot be practicably managed for farm use*. Examples of "extraordinary circumstances inherent in the land or its physical setting" include very steep slopes, deep ravines, rivers, streams, roads, railroad or utility lines or other similar natural or physical barriers that by themselves or in combination separate the subject lot or parcel from adjacent

> agricultural land and prevent it from being practicably managed for farm use by itself or together with adjacent or nearby farms. *A lot or parcel that has been put to farm use despite the proximity of a natural barrier or since the placement of a physical barrier shall be presumed manageable for farm use.*" (Emphasis added).

The county's findings of compliance with the "practicably managed" standard state:

> "The Board weighed the testimony and found that: [1] because Clackamas soil has productivity limitations according to the Linn County Soil survey: wet, acidic, in this case, not drained and is not prime without improvements; [2] because there were no irrigation rights for the property; [3] because of the lack of farming on adjacent properties; [4] because of the increased traffic on Airport Road; and [5] because the property has been used in the past as a home site and some of the improvements associated with the prior dwelling such as the well, septic system, driveway and concrete pad remain on the property; the property cannot practicably be farmed by itself or in conjunction with other parcels in the area." Record 9.

Petitioner argues that the county's finding of compliance with ORS 215.705(2)(a)(C)(i) misconstrues the applicable law, because it is inconsistent with OAR 660-033-0130(3)(c)(C)(i), and the county failed to adopt any findings at all demonstrating that the subject property is subject to extraordinary circumstances that "do not apply generally to other land in the vicinity."[1] Similarly, petitioner argues that the county's finding is inadequate because it fails to explain the basis for the conclusion that the property cannot practicably be managed for farm use.

We agree with petitioner that the above-quoted finding is inadequate and not responsive to the applicable law. The challenged finding relies on five considerations to conclude that the property cannot practicably be managed for farm use. However, it is not apparent why those five considerations demonstrate that the subject property cannot

[1]Petitioner also argues under this assignment of error that the county misconstrued the applicable law by determining that the subject property could not practicably be managed for "commercial farm use" rather than for "farm use," as the statute and rule require. However, petitioner does not identify any findings in which the county applied the incorrect standard. Instead, petitioner cites to testimony by the applicants during the proceedings below that the property could not be made commercially profitable. Petitioner has not established that the county relied upon that testimony, or otherwise applied an incorrect "commercial farm use" standard. Accordingly, we do not address petitioner's arguments on this point.

practicably be managed for farm use due to "extraordinary circumstances that do not apply generally to other surrounding lands."

With respect to the first consideration, soil productivity, petitioner disputes the evidentiary basis for the county's conclusion that the high-value soils on the property have productivity limitations. However, even if that point were undisputed, the county makes no attempt to explain why those productivity limitations are "extraordinary circumstances" that do not apply generally to other lands in the vicinity. As petitioner points out, the record indicates that the subject property has the same or similar soils as surrounding parcels, and whatever drainage or acidity problems the subject property has are common to the area.

With respect to irrigation rights, the county did not determine whether other lands in the area possess irrigation rights and, if so, whether the subject property could also obtain such rights. Without such points of comparison, the isolated fact that the subject property does not currently possess irrigation rights does little to demonstrate that it cannot practicably be managed for farm use due to extraordinary circumstances inherent in the land or its physical setting that do not generally apply to other lands in the vicinity.

Petitioner also disputes the county's finding that no farming is occurring on adjacent properties, pointing to evidence in the record that the property to the north is planted in hay, the property to the south is used for grazing, and the property to the west is currently being farmed. Even if that point were undisputed, however, the county's finding is inadequate. The rule and statute require consideration of whether the subject property can practicably be managed for farm use, by itself or in conjunction with other land *in the vicinity*. The county apparently considered only whether the property could be managed for farm use with adjacent properties. In addition, with the exception of the fact that Airport Road separates the subject property from the grazing lands to the south, the county's findings do not identify any "barriers" or "extraordinary circumstances inherent in the land or its physical setting" that prevent the subject property from being managed for farm use in conjunction with

adjacent parcels. Without additional explanation, the fact that nearby EFU land is not currently being employed for farm use has little bearing on whether the subject property can be farmed in conjunction with that land.

With respect to the county's findings regarding Airport Road, the county found that Airport Road is a "major thoroughfare" and that it would be difficult to get farm equipment on and off the property because of traffic on the road. Petitioner argues that the traffic on the road is not a barrier to farm use, and points to evidence that nearby farms use the road for access. We agree with petitioner that the county's findings fail to explain why traffic conflicts with farm equipment are an "extraordinary circumstance" that does not generally apply to other property in the vicinity.

The county also relied on the fact that the subject property had, in the past, been used as a homesite. Petitioner argues that past use as a homesite is not an extraordinary circumstance inherent in the land or its physical setting. The only relevant aspect of that history, petitioner argues, is that the well, septic field and concrete pad remaining from the mobile home site reduce the acreage available for agricultural use by approximately one acre. However, petitioner cites to evidence that those improvements can be quickly and cheaply removed, and argues that, in any case, those improvements do not prevent the remaining acres from being farmed. We agree with petitioner that past use of a portion of the property as a homesite, by itself, has no discernible bearing on the inquiry required by ORS 215.705(2)(a)(C)(i). The county could properly consider the extent to which existing improvements on the site limit or preclude farm use; however, as petitioner points out, the county does not explain why those improvements affect farm use of the remaining acreage.

Finally, petitioner argues that the county failed to address the final sentence of OAR 660-033-0130(3)(c)(C)(i), which imposes a presumption that a lot or parcel that has been put to farm use despite existing natural or physical barriers can be managed for farm use. Petitioner cites to evidence in the record that demonstrates the subject property has been

used for farm uses in the past, and as recently as July 1999. We agree with petitioner that the county erred in failing to apply OAR 660-033-0130(3)(c)(C)(i) in general, and in failing to address the presumption imposed by that rule.

For the foregoing reasons, we agree with petitioner that the county's findings are inadequate and not responsive to the applicable law. Given the inadequacy in the county's findings, there is no point in addressing petitioner's challenges to the evidentiary support for those findings. *DLCD v. Columbia County*, 15 Or LUBA 302, 305 (1987); *McNulty v. City of Lake Oswego*, 14 Or LUBA 366, 373 (1986), *aff'd* 83 Or App 275, 730 P2d 628 (1987).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county's finding of compliance with ORS 215.705(2)(a)(C)(ii) misconstrues the applicable law, and is not supported by adequate findings or substantial evidence.

ORS 215.705(2)(a)(C)(ii) allows a lot of record dwelling on high-value farmland if the county determines that "[t]he dwelling will comply with the provisions of ORS 215.296(1)." ORS 215.296(1) requires a finding that the dwelling will not (1) force a significant change in the accepted farm practices on surrounding lands devoted to farm or forest use; or (2) significantly increase the cost of accepted farm practices on surrounding lands devoted to farm or forest use.

The county's findings with respect to ORS 215.296(1) state:

> "The Board weighed the submitted information and determined that: because there is no commercial farm uses on the abutting properties to the north of Airport Road and Airport Road separates the subject property from tax lot 2100, the 91.86 acre cattle ranch to the south; because there is a history of a residence being on the subject property; and, because none of the area property owners submitted comments addressing this criterion, the above criterion is met." Record 7.

Petitioner argues, first, that the above-quoted finding misconstrues the applicable law, because it relies on the absence of *commercial* farm uses on adjacent properties, and fails to

consider noncommercial farm uses. We agree that, to the extent the county confined its consideration of ORS 215.296(1) to commercial farm uses, it employed the wrong standard. *Schellenberg v. Polk County*, 22 Or LUBA 673, 684 (1992).

Second, petitioner contends that the county's finding is inadequate because it fails to identify any accepted farming practices on surrounding lands and thus fails to explain why the proposed dwelling will not force a significant change in or significantly increase the cost of those practices. We agree. *Schellenberg v. Polk County*, 21 Or LUBA 425, 439-40 (1991). Our conclusion in this respect makes it unnecessary to consider petitioner's evidentiary challenges to those findings.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the county's finding of compliance with ORS 215.705(2)(a)(C)(iii) misconstrues the applicable law, and is not supported by adequate findings or substantial evidence.

ORS 215.705(2)(a)(C)(iii) allows a lot of record dwelling on high-value farmland where the county determines that the dwelling "will not materially alter the stability of the overall land use pattern in the area." The stability standard generally requires the county to (1) select a reasonably definite study area including adjacent land zoned for exclusive farm use; (2) examine the types of uses existing in the selected area, sufficient to give a "clear picture" of the existing land use pattern and its stability; and (3) determine whether the proposed nonfarm dwelling will materially alter the stability of the identified land use pattern. *DLCD v. Crook County*, 26 Or LUBA 478, 491 (1994); *Sweeten v. Clackamas County*, 17 Or LUBA 1234, 1245-46 (1989).

The county's findings with respect to the stability standard state:

> "The representative study area (see map attached as *Exhibit A*) that was chosen is a pocket of EFU zoned lands that are characteristic of [a] residential exception area in terms of the parcelization and density of development as

> opposed to the surrounding lands that are primarily larger and used for resource purposes. This pocket includes all that EFU zoned property that exists between Oak Street to the north, Denny School road to the west, Airport Road to the south and the city of Lebanon's urban growth boundary to the east. The study area measures about 1/2 mile wide and 3/4 mile long. Oak street and Denny School Road are identified as minor arterials in the Linn County Transportation Plan and Airport Road is identified as a major collector. Based upon staff observations and testimony presented, there appears to be only one commercial farm use in the study area; a mink farm that is located 1400 feet to the west of the subject property on approximately 50.0 acres.
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> "* * * Staff found that within the study area there are 43 existing tax lots of which 30 contain residences. Of the 30 that contain a residence, 24 are less than 10 acres and of those, 15 are less than 5.11 acres, the size of the subject property. This is an indication that the principal use within the study area is residential. * * * According to County records, all of the residences in the study area were either placed prior to County zoning or were placed between 1972 and 1980 when the zoning was Agriculture, Residential and Timber (ART) which allowed dwellings outright. * * * [The applicant's representative] testified that because of the number of existing residences in the area and since there was a dwelling on the property in the past and the improvements associated with that dwelling remain on the property, that placing a dwelling on this property now will not affect the stability of the overall land use pattern in the area.
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> "* * * * *
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> "The Board weighed the evidence submitted and concluded that: (1) the study area was specific and included all that land within the boundaries of the study area that was zoned Exclusive Farm Use; (2) the uses in the area are primarily residential with 24 out of 30 developed properties being less than 10.0 acres in size and, of those, 15 were less than 5.11 acres with no apparent farm uses visible; and, (3) that returning a dwelling to this property through this approval would not materially alter the stability of the overall land use pattern in the area." Record 9-10.

Petitioner argues that these findings are inadequate and misconstrue the applicable law, because they (1) fail to reasonably define and justify the scope of the study area; (2) fail to provide a clear picture of the existing land use pattern on EFU lands in the study area; and (3) fail to determine the extent to which the proposed dwelling would encourage future nonfarm development in the area.

A. Study Area

In defining a study area for purposes of the "material stability' standard, the local government must explain what justifies the scope and configuration of the study area. *Bruck v. Clackamas County*, 15 Or LUBA 540, 543 (1987). Petitioner argues that the county improperly chose the configuration of the study area to emphasize the small, residentially-developed lands to the north, east and west of the subject property, and failed to include large EFU-zoned parcels adjacent to the subject property to the south.

Attached to the challenged decision is a map entitled "Representative Study Area." Record 11. The identified study area follows the city of Lebanon UGB to the east, Airport Road to the south, Denny School Road to the west, and Oak Street to the north. The subject property is adjacent to Airport Road in the southwest portion of the study area. Immediately to the south of the subject property are several large EFU-zoned parcels that are not included in the study area.

We agree with petitioner that the county's findings fail to explain or justify the scope and configuration of the study area. The county's findings contain no explanation for why it excluded from the study area adjacent lands zoned for and currently in agricultural use, or why it placed the subject property on the margins of the study area. The county's explanation that it chose a "representative" area characteristic of exception lands does not explain why adjacent agricultural lands were excluded. Worse, it suggests that the configuration of the study area reflects a preconceived idea regarding the overall land use pattern. The purpose of the study area is to allow the county to determine what the overall land use pattern *is*, not to justify a preconceived notion regarding the land use pattern.

This subassignment of error is sustained.

B. Land Uses within the Study Area

The county found that all of the dwellings in the area predated zoning or were built prior to 1980 when dwellings were permitted outright, and that most of these dwellings were

on small lots. The county also noted the absence of farm animals or cultivation on parcels adjacent to the subject property. The county concluded from these facts "that the principal use within the study area is residential." Record 9.

Petitioner argues that most of the parcels surrounding the subject property enjoy farm tax deferral, which indicates that the land use of those parcels, and hence the overall land use pattern, is agricultural, not residential.[2] Petitioner argues that the county's findings fail to determine the nature of most land uses on property within the study, and improperly assume from origin of the dwellings and the small size of many of the parcels in the area that the overall land use pattern was residential.

We agree with petitioner that the county's description of land uses in the area is inadequate and fails to draw a "clear picture" of those uses. The county makes no attempt to identify any uses on most of the parcels within the area, but instead assumes that the dominant land use in the area is residential because of the pre-zoning origin of dwellings and the small size of most parcels in the area. However, those two facts are insufficient to support the county's conclusion. As we noted in *Sweeten*, lot or parcel sizes "are not dispositive of, or even particularly relevant to, the nature of the uses occurring on such lots or parcels." 17 Or LUBA at 1245-46. Further, absent further explanation, it is not clear that the fact that a dwelling was built prior to zoning or subject to zoning that allowed dwellings outright indicates anything one way or the other regarding the current use of that land.

This subassignment of error is sustained.

C. Stability of the Land Use Pattern

Finally, petitioner faults the county's ultimate conclusion that the proposed dwelling will not materially alter the stability of the land use pattern in the area. Petitioner argues that

[2]Petitioner notes that the exact number of properties within the study area in farm tax deferral is disputed. One estimate was 57 percent of the properties in the study area; another estimate was 90 percent. The county's findings do not resolve that dispute, or address the consequences of a farm tax deferral on the stability analysis.

the county's analysis is inadequate, because it fails to determine the extent to which a dwelling on the property would encourage future nonfarm development in the area. As we explained in *Hearne v. Baker County*, 34 Or LUBA 176, 186 (1998),

> "[T]he 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."

The gist of the county's findings is that most of the land uses in the area have already been converted from agriculture to residential uses, and thus that the proposed dwelling will not materially alter the stability of that predominantly residential land use pattern. We rejected a similar conclusion in *Hearne*, explaining that such 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 is not appropriate in determining whether a proposed nonfarm dwelling will encourage additional nonfarm development in the area. 34 Or Luba at 186. As we explained recently in *Friends of Linn County v. Linn County*, ___ Or LUBA ___ (LUBA No. 98-226, December 2, 1999), slip op 14, the fact that much of the land within the evaluation area is already developed with dwellings "says nothing about whether additional houses may be introduced into the evaluation area without upsetting the stability of remaining farm uses."

We agree with petitioner that the county's ultimate conclusion with respect to the stability standard is inadequate, because it fails to describe the stability of the land use pattern and explain why the proposed dwelling will not materially alter that stability. Our conclusion that the county's findings are inadequate makes it unnecessary to address petitioner's evidentiary challenges to those findings.

This subassignment of error is sustained.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the county committed procedural errors that substantially prejudiced petitioner's rights. ORS 197.835(9)(a)(B).[3] Petitioner argues, first, that the county failed to list the substantive criteria at the hearing, as required by ORS 197.763(5). Specifically, petitioner alleges that the county failed to list OAR 660-033-0130(3)(c)(C)(i) as an approval criterion. Second, petitioner contends that the county erred in relying on new evidence submitted after the evidentiary record closed without allowing petitioner the opportunity to address that evidence at a subsequent hearing. Third, petitioner argues that the county erred in failing to require the applicant to carry the burden of proof for specific decision criteria.

Petitioner has not established that any of the three alleged procedural errors are in fact errors or have prejudiced petitioner's substantial rights. ORS 197.763(5) requires that the local government announce at the hearing a list of the "applicable substantive criteria," and advise the parties that testimony must be directed toward that criteria or "other criteria in the plan or land use regulations which the person believes to apply to the decision."[4] Read in

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[3]ORS 197.835(9) provides in relevant part:

> "* * * the board shall reverse or remand the land use decision under review if the board finds:
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> "(a) The local government or special district:
>
> "* * * * *
>
> "(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

[4]ORS 197.763(5) provides in relevant part:

> "At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:
>
> "(a) Lists the applicable substantive criteria;
>
> "(b) States that testimony, arguments and evidence must be directed toward the criteria described in paragraph (a) of this subsection or other criteria in the plan or land use regulation which the person believes to apply to the decision[.]"

context, the "applicable substantive criteria" that ORS 197.763(5)(a) requires the county to announce at the commencement of the hearing includes only criteria from its plan or land use regulations, not statutes or rules that may also apply. *See ODOT v. Clackamas County*, 23 Or LUBA 370, 375 (1992) (interpreting the analogous language at ORS 197.763(3)(b) to not require the local government to list applicable statutes or rules in the notice of hearing). Consequently, the county did not err in failing to announce the applicability of OAR 660-033-0130(3)(c)(C)(i) at the commencement of the hearing.

Petitioner also argues that the county erred in refusing to allow petitioner to rebut certain evidence that the county accepted after the close of the record. Petitioner concedes that the county allowed petitioner to submit additional written evidence rebutting that evidence. Notwithstanding, petitioner argues that the county was also required to allow petitioner to provide oral testimony addressing that new evidence. However, petitioner does not identify and we are not aware of the source of the county's obligation to allow rebuttal by oral testimony as well as by submission of written rebuttal evidence.

Finally, petitioner contends that the county erred in failing to require the applicant to carry the burden of proof that the application complied with applicable criteria. However, petitioner does not explain how the county failed to impose the burden of proof on the applicant. None of petitioner's arguments under this assignment provide a basis for reversal or remand.

The fourth assignment of error is denied.

The county's decision is remanded.