BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALFRED DAVID DOWRIE,
Petitioner,

and

DON HUNTER,
Intervenor-Petitioner,

vs.

BENTON COUNTY,
Respondent,

and

GERALD D. CORK,
Intervenor-Respondent.

LUBA No. 99-169

FINAL OPINION
AND ORDER

Appeal from Benton County.

Alfred David Dowrie, Philomath, filed a petition for review and argued on his own behalf.

Don Hunter, Philomath, filed a petition for review and argued on his own behalf.

No appearance by Benton County.

George B. Heilig, Corvallis, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Cable, Huston, Benedict, Haagensen, and Lloyd.

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

REMANDED 5/25/2000

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 county decision approving an application for a conditional use permit for a nonfarm dwelling in an exclusive farm use (EFU) zone.

FACTS

The subject property is a 6.57-acre lot located on a west-facing slope approximately three miles south of the City of Philomath. The property is zoned EFU. The county has assessed one acre of the subject property at a residential rate and the remainder is assessed at "forest land" value. The county soil survey map shows that the subject property is comprised of one-half Bellpine silty clay loam, capability class IVe-1; one-quarter Veneta silt loam, capability class IIIe-1; and one-quarter Bellpine silty clay loam, capability class IIe-2.

In February 1999, the county received an application for a conditional use permit to place a nonfarm dwelling on the subject property. The county planning commission denied the application because the applicant had not submitted sufficient evidence to demonstrate compliance with the soils or stability criteria at ORS 215.284(1)(b) and (d). *See* n 1. The applicant appealed to the county board of commissioners (commissioners). On *de novo* review, the commissioners reversed the decision of the planning commission and granted the request for a conditional use permit. The commissioners found that the evidence that the applicant submitted was sufficient to demonstrate compliance with the soils criteria and demonstrate that the dwelling would not materially alter the stability of the land use pattern of the area. This appeal followed.

ASSIGNMENT OF ERROR (PETITIONER)

SECOND, THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR (INTERVENOR-PETITIONER)

The Benton County Development Code (BCC) requires applicants for a nonfarm dwelling on land zoned for exclusive farm use to show that the proposed "dwelling does not

materially alter the stability of the overall land use pattern of the area." BCC 55.220(1)(c). This provision implements the statutory requirement of ORS 215.284(1)(d).[1] OAR 660-033-0130(4)(a)(D) provides the analysis that a local government must apply when reviewing an application for a nonfarm dwelling in the Willamette Valley.[2]

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[1]ORS 215.284(1) provides:

> "In the Willamette Valley, 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;
>
> "(b) The dwelling will be sited on a lot or parcel that is predominantly composed of Class IV through Class VIII soils that would not, when irrigated, be classified as prime, unique, Class I or Class II soils;
>
> "(c) The dwelling will be sited on a lot or parcel created before January 1, 1993;
>
> "(d) The dwelling will not materially alter the stability of the overall land use pattern of the area; and
>
> "(e) The dwelling complies with such other conditions as the governing body or its designate considers necessary."

[2]OAR 660-033-0130(4)(a)(D) provides that a county may approve a nonfarm dwelling if:

> "The dwelling will 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, a county shall consider the cumulative impact of possible new nonfarm dwellings and parcels on other lots or parcels in the area similarly situated. To address this standard, the county shall:
>
> "(i) Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other, adjacent agricultural areas. Findings shall describe the study area, its boundaries, the location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard. Lands zoned for rural residential or other urban or nonresource uses shall not be included in the study area;
>
> "(ii) Identify within the study area the broad types of farm uses (irrigated or nonirrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, nonfarm, hardship, etc.), and the dwelling development trends since 1993.

As a preliminary matter, petitioners[3] assert, and we agree, that because BCC 55.220(1)(c) parallels and implements the statutory standard, the county's discretion to interpret its local criteria is constrained, and the county's interpretation and application of BCC 55.220(1)(c) must be consistent with the statutory provisions that it implements.[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

Petitioners challenge the county's determination that the proposed nonfarm dwellings will not "materially alter the stability of the overall land use pattern of the area." ORS 215.284(1)(d).

Sweeten v. Clackamas County, 17 Or LUBA 1234 (1989) describes 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:

> Determine the potential number of nonfarm/lot-of-record dwellings that could be approved under subsections (3)(a), (3)(d) and section (4) of this rule, including identification of predominant soil classifications, the parcels created prior to January 1, 1993 and the parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings under ORS 215.263(4). The findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible nonfarm dwellings under this subparagraph;
>
> "(iii) Determine whether approval of the proposed nonfarm/lot-of-record dwellings together with existing nonfarm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area[.]"

[3]Petitioner's assignment of error and intervenor-petitioner's second, third, fourth and fifth assignments of error make substantially similar challenges to the county's decision, and we discuss them together. For ease of reference, we refer to petitioner and intervenor-petitioner as "petitioners."

[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, rather than the corresponding local provisions. *Wilbur Residents v. Douglas County*, 151 Or App 523, 525 n 1, 950 P2d 368 (1997), *rev den* 327 Or 83 (1998).

> "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 1245-46.

The *Sweeten* standard requires "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). OAR 660-033-0130 essentially codifies the *Sweeten* analysis.

The challenged decision addresses the stability standard as follows:

> "An analysis of all parcels within a one-mile radius surrounding the property was conducted to determine if there were similarly situated parcels or lots with respect to soils, topography, timber cover, configuration, size and existing parcelization.
>
> "The findings in the analysis clearly demonstrate that no other vacant parcel in the entire one-mile radius study area has a predominance of class IV soils that would qualify it for a nonfarm dwelling permit. No other parcel is similarly situated with respect to odd configuration and steeply sloping timberland either.
>
> "This application does not require the creation of a new lot or parcel for a non-farm dwelling but rather involves a legal lot that was formerly used for a dwelling and that contains all of the services necessary to support a dwelling except a septic system.
>
> "The potential for cumulative impact does not exist in this case because there are no similarly situated parcels that would qualify for a non-farm dwelling permit.
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> "The [BCC] specifies a separation of 300 feet or the greatest extent practical as being adequate to protect resource uses from adjacent residential encroachment. Due to the subject property's configuration a 300-foot setback from all adjacent resource-zoned property is not possible. A dwelling located more than 200 feet from the Christmas tree farm to the north and more than 200 feet from the llama and sheep operation to the west is the greatest extent practical and will not alter the stability of the area.

> "The [commissioners conclude] this nonfarm dwelling [will be] located more than 200 feet from farm properties north and west of the subject property and is similar in nature to the development on adjacent parcels. Such a distance would adequately separate the nonfarm dwelling from the farm uses occurring to the west and north. Therefore, this dwelling will not materially alter the stability of the overall land use pattern of the area." Record 11 (underlining in original omitted).

1. The Study Area

Petitioners argue that the "analysis" the county cites in its findings is merely the applicant's statements in the application and that no study to support that analysis is included in the record. Petitioners argue that the county failed to identify and adequately describe the study area.

The decision refers to "[a]n analysis of all parcels within a one-mile radius surrounding the property." Such a study area is large enough to comply with OAR 660-033-0130(4)(a)(D)(i).[5] However, we agree with petitioners that the county has failed to adequately describe and identify the study area. OAR 660-033-0130(4)(a)(D)(i) provides in part:

> "Findings shall describe the study area, its boundaries, the location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard."

Nothing in the county's findings explains why "a one-mile radius surrounding the property" is representative of the land use pattern surrounding the subject property or is adequate to conduct the analysis required by OAR 660-033-0130(4)(a)(D). In defining an area to study, the county's findings must justify the study area that is selected. *DLCD v. Crook County*, 34 Or LUBA 243, 251 (1998). The decision does not explain why the area within a circle with a

[5]OAR 660-033-0130(4)(a)(D)(i) requires a study area of "at least 2000 acres," which equals 3.13 square miles. A circle with a one-mile radius has an area of 3.14 square miles. The county's findings create some question as to the actual size of the study area, as the findings refer to a study area of both a one-mile *radius* and a one-mile *diameter*. Record 11, 16. Because no study or study area map is included in the record, we are unable to determine the true size of the study area.

one-mile radius is an appropriate study area. The county's delineation of the study area is inadequate.

2. Description of the Land Use Pattern

Petitioners contend that the decision fails to adequately describe the overall land use pattern in the area. Petitioners argue that the county's findings identify the existing land uses only on adjacent property and describe the existing land use pattern of the remaining study area in a conclusory manner.

We agree with petitioners that the decision fails to describe land uses in the study area as required by OAR 660-033-0130(4)(a)(D)(ii). *See* n 2. The county fails to identify the number, location and type of existing dwellings and the dwelling development trends since 1993. The county fails to identify "the potential number of nonfarm/lot-of-record dwellings" that could be lawfully approved in the area. OAR 660-033-0130(4)(a)(D)(ii). The decision also fails to describe "the land use pattern that could result from approval of the possible nonfarm dwellings." *Id.*

3. Materially Alter Stability of the Land Use Pattern

Petitioners challenge the county's conclusion that the proposed nonfarm dwelling will not materially alter the overall land use pattern of the area. Petitioners argue that the county cannot reach this portion of the *Sweeten* and OAR 660-033-0130 analysis because it failed to adequately select a study area, did not adequately identify existing uses, and did not identify the parcels that could be developed with additional nonfarm dwellings.

In *DLCD v. Crook County*, the Board detailed the required analysis that a county must undertake in deciding whether a proposed nonfarm dwelling will not materially alter the overall land use pattern:

> "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 660-033-0130(4)(c)(C).[6] 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* [*v. Douglas County*], 32 Or LUBA [388,] 395[, *dis* 148 Or App 511, 941 P2d 558 (1997)].
>
> "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 "threshold" or balance between resource and nonresource uses. * * * OAR 660-033-0130(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." 34 Or LUBA at 253.

The county concluded that the "potential for cumulative impact does not exist in this case because there are no similarly situated parcels that would qualify for a nonfarm dwelling permit." Record 11. We agree with petitioners that in the absence of an adequately defined study area and identification of potential nonfarm dwellings within that area, the county cannot reach supportable conclusions as to the stability of the land use pattern required by OAR 660-033-0130(4)(a)(D) and our cases.

This subassignment of error is sustained.

B. The Suitability Standard

Petitioners challenge the county's determination under BCC 55.220(1)(d) that the proposed nonfarm dwelling is situated on land "generally unsuitable" for the production of farm crops and livestock, considering, *inter alia*, the "location and size of the tract."

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[6]For counties outside the Willamette Valley, OAR 660-033-0130(4)(c)(C) requires findings that address the standards provided in OAR 660-033-0130(4)(a)(D). OAR 660-033-0130(4)(c)(C) provides:

> "The dwelling will 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, 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 pursuant to paragraph (4)(a)(D) of this rule[.]"

BCC 55.015(4) defines "tract" as "one or more contiguous lots or parcels in the same ownership." Petitioners argue that the subject property is in the same ownership as two adjacent lots and that the three lots form a "tract" under the county code. Therefore, petitioners argue, consideration of general unsuitability must consider the tract, consisting of the subject property and the two adjacent lots in the same ownership.

BCC 51.020(39) defines "owner" for purposes of BCC chapters 51 to 100 as "the person on record with the Benton County Assessor as owning real property, or who is a contract purchaser of record of real property." The county's findings do not state whether the subject property is part of a larger "tract" under BCC 55.015(4). Petitioner Dowrie argued below that the applicants have a tract composed of three parcels. Record 218, 220. In *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992), LUBA held that "findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below." The decision includes no findings addressing whether the subject property is part of a tract. Respondent has not pointed to evidence in the record that clearly demonstrates that the subject property is not part of a tract. ORS 197.835(11)(b).

This subassignment of error is sustained.[7]

C. Generally Unsuitable for Timber Production

BCC 55.220(1)(d) provides that, for parcels under forest assessment, the proposed dwelling must be located "upon generally unsuitable land for the production of merchantable tree species." A portion of the subject property is under forest assessment. The decision states that the property is generally unsuitable for the production of timber because of the location, topography and size of the parcel. *Smith v. Clackamas County*, 313 Or 519, 836 P2d 716 (1992) (when applying the generally unsuitable standard, the county must consider the

[7]Because the county made its determination on the suitability standard based on consideration of the subject property alone, without deciding whether that property was part of a larger tract, there is no purpose in reviewing the county's findings regarding the suitability standard.

general unsuitability of the entire parcel, not just the unsuitability of the portion of the property on which the development is to be located).

The county's findings are inadequate. *See Le Roux v. Malheur County*, 30 Or LUBA 268, 271 (1995) (findings are adequate if they (1) identify the relevant approval standards, (2) set out the facts relied upon and (3) explain how the facts lead to the conclusion that the request satisfies the approval standard). The findings do not explain what the county believes the relevant facts to be and do not explain why those facts lead the county to conclude that land under forest assessment is land generally unsuitable for the production of timber. Furthermore, as we decided above, the county's findings are inadequate to show that the subject property is not part of a larger tract that is the relevant area to consider in determining whether the land is generally unsuitable.

Because we hold that the findings are inadequate to show compliance with this criterion, we need not review whether those findings are supported by substantial evidence. *Storey v. City of Stayton*, 15 Or LUBA 165, 185 (1986).

Petitioner's assignment of error and intervenor-petitioner's second, third, fourth and fifth assignments of error are sustained.

FIRST ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)

Intervenor-petitioner contends that the county misconstrued applicable law by concluding that the proposed dwelling is consistent with the intent and purpose set forth in the agricultural land use policy provided in ORS 215.243, as required by BCC 55.220(1)(a).[8] The decision states:

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[8]ORS 215.243 provides in part:

"The Legislative Assembly finds and declares that:

"(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.

> "This proposal also conforms with the intent of the agricultural policy contained in ORS 215.243 inasmuch as it does not remove any land that is involved in the production of food and/or fiber. The other major tenet of ORS 215.243 is to maintain land in large 'blocks' necessary for maintaining the agricultural economy of the state and for providing food and fiber for this state and nation. This lawfully existing parcel has no history for farming and is too small compared to the prototypical agricultural enterprises in the area, which include: Christmas trees, grass hay, grain, grass seed, and livestock. A one-mile radius study around the property revealed that this site is atypical with respect to relatively low site index soils and heavy timber cover. This proposed expansion does not constitute an expansion of urban development into a rural area." Record 9.

Although the county's finding relies in part upon the study area that we held to be inadequately defined above, intervenor-petitioner did not challenge the adequacy of the finding. Intervenor-petitioner only contends that the county misconstrued ORS 215.243. Once error has been assigned, the argument in support of the assignment of error must supply the legal reasoning for sustaining the assignment. *Dougherty v. Tillamook County*, 12 Or LUBA 20, 33 (1984); *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). Intervenor-petitioner does not do so here.

Intervenor-petitioner's first assignment of error is denied.

The county's decision is remanded.

> "(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.
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> "(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.
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> "(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones."