

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 STEVE DOOB,
5 *Petitioner,*

6
7 vs.

8
9 JOSEPHINE COUNTY,
10 *Respondent,*

11
12 and

13
14 ROBERT LEONHARDT
15 and LEON OLIVER,
16 *Intervenors-Respondent.*

17
18 LUBA No. 2001-134

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Josephine County.

24
25 Steve Doob, Merlin, filed the petition for review and reply brief and argued on his
26 own behalf.

27
28 Steven E. Rich, Josephine County Counsel, Grants Pass, filed a response brief and
29 argued on behalf of respondent.

30
31 Robert Leonhardt, Grants Pass, and Leon Oliver, Grants Pass, filed a response brief
32 and argued on their own behalf.

33
34 HOLSTUN, Board Member; BRIGGS, Board Chair; BASSHAM, Board Member,
35 participated in the decision.

36
37 REMANDED

01/28/2002

38
39 You are entitled to judicial review of this Order. Judicial review is governed by the
40 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county decision that approves comprehensive plan and zoning map amendments for a 40-acre parcel that is owned by intervenor-respondent Leonhardt.

FACTS

The subject property is designated Forest Resource on the comprehensive plan map and is zoned Woodlot Resource. These comprehensive plan and zoning map designations implement Statewide Planning Goal 4 (Forest Lands). The subject parcel shares its western property line with Interstate 5. The lands across I-5 to the west and the adjoining lands to the east are zoned for rural residential development. The lands to the south are zoned for rural commercial development. The lands to the north are zoned Woodland Resource.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The first two assignments of error concern the county’s findings that under Josephine County Comprehensive Plan (JCCP) Goal 11, Policy 3(A)(2) the subject property is not protected by Goal 3 (Agricultural Lands) and need not be placed in an exclusive farm use zone. JCCP Goal 11, Policy 3(A) is set forth below:

“NON-RESOURCE LAND CRITERIA. Authorized lots or parcels (but not portions thereof) which have been zoned Woodlot Resource or Farm Resource may be designated as non-resource when the application demonstrates compliance with the following criteria and rules:

“A. The land within the lot or parcel is non-farm land because:

“(1) The predominant (greater than 50%) soil or soils are rated Class V or above in the *Soil Survey of Josephine County*, as adopted or amended in the plan data base (soils having both an irrigated and non-irrigated class ratings will be rated based on whether irrigation rights are or are not perfected at the time the application is filed); and

“(2) The land is otherwise unsuitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm

1 irrigation purposes, existing land-use patterns, technological
2 and energy inputs required, or accepted farming practices[.]”

3 It is not disputed that the soils on the subject property are rated Class VI in the county
4 soil survey. Although the soils would receive a productive agricultural rating if the subject
5 property had irrigation rights, the property currently has no water rights. Therefore the
6 subject property qualifies as non-farm land under JCCP Goal 11, Policy 3(A)(1), and
7 petitioner does not argue otherwise. Petitioner does argue the county improperly applied
8 JCCP Goal 11, Policy 3(A)(2) in concluding that the property is otherwise unsuitable for
9 farm use.

10 **A. Lack of Irrigation Water**

11 In his first assignment of error, petitioner contends the subject property is suitable for
12 farm use if it is irrigated and the county has not adequately demonstrated that it is not
13 possible to irrigate the subject property. In considering whether the subject property is
14 unsuitable for farm use because there is insufficient water available for present or future
15 irrigation, a threshold question concerns the types of farm uses that might be possible on the
16 property. The question is relevant because different kinds of farm uses require different
17 levels of irrigation. Once that question is resolved, we consider the county’s findings that
18 there is insufficient ground water available and that surface water sources for irrigation will
19 not be available in the future.

20 **1. Types of Farm Use Possible**

21 The county found that the subject property’s “serpentine soils * * * are not suitable
22 for agricultural uses.” Record 12. The applicant’s expert testified that both of the soil types
23 on the subject property are rated as unsuitable for agriculture without irrigation. Record 90.
24 The applicant’s expert went on to take the position that “the only possible agricultural use on
25 these two soils would be grazing, and the wet spots with their unpalatable reeds and rushes
26 would severely limit even grazing potential.” *Id.*

1 Although petitioner suggests the property might be suitable for growing grapes,
2 which petitioner contends would require less irrigation water, petitioner identifies no
3 evidence that would support that position and neither acknowledges nor directly challenges
4 the applicant's expert's contention that any agricultural potential on the property is limited to
5 grazing.

6 We accept the county's finding that the only type of farm use possible on the subject
7 property is grazing.

8 **2. Groundwater**

9 The county found that well water would not provide a sufficient source of irrigation
10 water to support grazing on the subject property. The application explains:

11 “* * * If this 40 acre parcel were to be irrigated for pasture production it
12 would require .45 inches of irrigation per day at the peak of the irrigation
13 season. This equates to 65,340 cubic feet or 488,743 gallons per day. A well
14 that would provide this quantity of water would have to produce 339 gallons
15 per minute, 24 hours per day. The average well in the area only produces 17
16 gallons per minute * * *. There is no evidence that it is possible to irrigate
17 this parcel adequately for productive farm use.” Record 78

18 Petitioner disputes the above numbers, because the applicant does not “explain where
19 the formula comes from.” Petition for Review 7. The computations based on an assumed
20 need of .45 inches of water per day during the irrigation season peak appear to be correct,
21 and petitioner does not challenge those computations. If petitioner's complaint about the
22 lack of a formula is directed at the assumed need of .45 inches of water per day, petitioner
23 points to nothing in the record that would call that figure into question. The applicant's
24 undocumented contention that .45 inches of water per day is needed during peak irrigation
25 times for pasture use of the property would likely not qualify as substantial evidence (*i.e.*,
26 evidence a reasonable decision maker would believe) if petitioner or some other party had
27 challenged the .45 inch figure. However, in the absence of any such question below, we
28 believe the county could reasonably rely on that figure.

1 Petitioner also argues that the subject property has two existing wells; one well
2 produces eight gallons per minute and the other well produces 60 gallons per minutes.
3 Petitioner contends “there is no dispute that another well could be drilled[.]” Petition for
4 Review 7. We understand petitioner to argue that sufficient water could be provided through
5 existing and additional wells on the subject property.

6 We reject this argument as well. The findings explain that approximately 339 gallons
7 per minute would be needed at peak irrigation times. The production capacity of existing
8 wells falls significantly short of that figure. Petitioner makes no attempt to develop his
9 suggestion that a sufficient number of additional wells could be drilled to meet the need for
10 339 gallons per minute. Petitioner has not demonstrated that the county erred in its
11 conclusion that the lack of sufficient groundwater sources of irrigation water supports a
12 conclusion that the subject property is unsuitable for farm use under JCCP Goal 11, Policy
13 3(A)(2).

14 **3. Surface Water**

15 Under JCCP Goal 11, Policy 3(A)(2), the county was also required to consider
16 whether existing or future surface water rights might permit irrigation of the subject property
17 in the future, and thereby make it suitable for farm use. *Doob v. Josephine County*, 31 Or
18 LUBA 275, 282 (1996). As noted earlier, it is undisputed that the subject property includes
19 no current surface water right. Apparently, any surface water right would have to come from
20 Jumpoff Joe Creek, which is located some distance from the subject property and is a
21 tributary to a section of the Rogue River that is designated as a State Wild and Scenic River.
22 Relying on the Oregon Supreme Court’s decision in *Diack v. City of Portland*, 306 Or 287,
23 759 P2d 1070 (1988), the county found that obtaining a future water right to withdraw water

1 from Jumpoff Joe Creek was sufficiently doubtful that the subject property is unsuitable for
2 farm use under JCCP Goal 11, Policy 3(A)(2).¹

3 We have no way of knowing the relevant facts that would control any future
4 application for surface water rights to irrigate the subject property, and we have no way of
5 knowing what bearing *Diack* might have on such an application. However, given the
6 inherent uncertainty that is associated with seeking a water right to withdraw water from
7 Jumpoff Joe Creek at some unspecified time in the future, and the added uncertainty that
8 *Diack* might present for such an application, we do not believe petitioner has demonstrated
9 that the county erred in its conclusion that the lack of existing surface water rights and the
10 uncertainty of future surface water sources of irrigation water support a conclusion that the
11 subject property is unsuitable for farm use under JCCP Goal 11, Policy 3(A)(2).

12 For all of the reasons explained above, petitioner’s first assignment of error is denied.

13 **B. Failure to Consider the Remaining JCCP Goal 11, Policy 3(A)(2) Factors**

14 Petitioner argues that the county erred by failing to consider all of the JCCP Goal 11,
15 Policy 3(A)(2) factors in concluding that the subject property is unsuited for farm use. The
16 JCCP Goal 11, Policy 3(A)(2) factors were set out earlier and include the following: (1) soil
17 fertility, (2) suitability for grazing, (3) climatic conditions, (4) existing and future availability
18 of water for farm irrigation purposes, (5) existing land-use patterns, (6) technological and
19 energy inputs required, and (7) accepted farming practices.

20 The county considered soil classifications, which in turn address soil fertility (factor
21 1), suitability for grazing (factor 2) and existing and future availability for farm irrigation
22 (factor 4). We also believe the challenged decision adequately discusses existing land-use
23 patterns (factor 5). However, we agree with petitioner that the county did not consider

¹In *Diack*, the Oregon Supreme Court held that the limitations on water diversions that are imposed by ORS 390.835(1) and 536.310(12) apply both to diversions within a designated scenic waterway and to diversions outside a designated scenic waterway, where the diverted water would otherwise enter the scenic waterway. 306 Or at 298.

1 factors 3, 6 and 7. It would appear extremely unlikely that consideration of those factors
2 would overcome the county’s unsuitability conclusion based on the other factors.
3 Nevertheless, as we clearly explained in *Doob*, 31 Or LUBA at 284, all JCCP Goal 11,
4 Policy 3(A)(2) factors must be considered and the county did not do so in the challenged
5 decision. The county must consider *all* the JCCP Goal 11, Policy 3(A)(2) factors in
6 determining whether the subject property is otherwise unsuitable for farm use.

7 The second assignment of error is sustained.

8 **THIRD ASSIGNMENT OF ERROR**

9 Subsection A of JCCP Goal 11, Policy 3 establishes criteria for the county in
10 determining whether the subject property is properly viewed as agricultural land. Subsection
11 A of JCCP Goal 11, Policy 3 was the subject of petitioner’s first two assignments of error
12 discussed above.

13 Petitioner’s third assignment of error concerns subsection B of JCCP Goal 11, Policy
14 3, which establishes criteria for determining whether the subject property is subject to
15 protection under Goal 4. We set out the relevant language from JCCP Goal 11, Policy 3(B)
16 before turning to petitioner’s arguments.

17 “3. **NON-RESOURCE LAND CRITERIA.** Authorized lots or parcels (but not
18 portions thereof) which have been zoned Woodlot Resource or Farm
19 Resource may be designated as non-resource when the application
20 demonstrates compliance with the following criteria and rules:

21 “* * * * *

22 “(B) The land within the lot or parcel is non-forest land because

23 “(1) It is not included within the following definition of
24 forest land:

25 “A lot or parcel is considered forest land when
26 the predominant (more than 50%) soil or soils
27 on the parcel have an internal rate of return of
28 3.50 or higher (if a single forest-rated soil is
29 present), or composite internal rate of return of

1 3.50 or higher (if multiple forest-rated soils are
2 present).

3 “For the purpose of this criterion, any
4 evaluation of the internal rates of return for
5 forest soils shall be made pursuant to the
6 document entitled, *Using The Internal Rate Of*
7 *Return To Rate Forest Soils For Applications In*
8 *Land Use Planning (1985)*, by Lawrence F.
9 Brown, as amended; or

10 “(2) *If a determination cannot be made using the internal*
11 *rate of return system as described in subsection B(1)*
12 *above, the land is shown to be unsuitable for*
13 *commercial forest uses based upon a combination of*
14 *proofs, to include (but not limited to) the site index or*
15 *cubic foot calculations, the testimony of expert*
16 *witnesses, information contained in scientific studies or*
17 *reports from public and private sources, historic market*
18 *data for the relevant timber economy, and any other*
19 *substantive testimony or evidence regarding the*
20 *commercial productivity of the subject land, which*
21 *taken together demonstrate the land is not protected by*
22 *Statewide Goal 4[.]” (Emphasis added.)*

23 Approximately one-half of the soil types that are identified in the county soil survey
24 have been assigned internal rates of return; approximately one-half have not. The two soil
25 types on the subject property have not been assigned internal rates of return. The challenged
26 decision applies JCCP Goal 11, Policy 3(B)(1) and concludes that the subject property
27 includes non-forest soils. The critical, if implicit, assumption that the county relies on in
28 reaching that conclusion is that it is appropriate to assume that soils that have not been
29 assigned internal rates of return in the Lawrence F. Brown internal rate of return study are
30 not forest soils.

31 Petitioner argues that the county’s implicit assumption is erroneous. Petitioner
32 contends that in circumstances where a property includes soils that have not been assigned
33 internal rates of return, “a determination cannot be made using the internal rate of return
34 system as described in subsection B(1)” and the county must proceed under JCCP Goal 11,

1 Policy 3(B)(2), if it wishes to consider whether the soils on the property are properly viewed
2 as forest soils that are subject to protection under Goal 4.

3 As an initial point, we note that there is nothing in the Lawrence F. Brown internal
4 rate of return study that supports the county’s apparent assumption that all soils that are
5 included in the county soil survey, but which are not assigned an internal rate of return, are
6 properly viewed as non-forest soils.² Given that missing support for the county’s position,
7 petitioner’s interpretation of JCCP Goal 11, Policy 3(B) to require application of JCCP Goal
8 11, Policy 3(B)(2) in circumstances where the subject property’s soils have not been assigned
9 internal rates of return is consistent with the language of the policy, and the county’s
10 contrary interpretation appears to be inconsistent with JCCP Goal 11, Policy 3(B)(2). The
11 relevant question appears to be whether “a determination cannot be made using the internal
12 rate of return system as described in subsection B(1)” where the soils have not been assigned
13 internal rates of return.

14 In *Doob*, 31 Or LUBA at 284-85, we considered a similar question regarding an
15 earlier version of JCCP Goal 11, Policy 3(B), which was then codified at JCCP Goal 11,
16 Policy 5(B). The relevant part of our discussion is set out below:

17 “Petitioner challenges the county’s compliance with [JCCP] Goal 11, Policy
18 5(B)(1), which states that land is not forest land if:

19 ““B. The land does not fall within [Statewide Planning] Goal 4
20 requirements as shown by:

21 ““1. The soils have a composite Internal Rate of Return [(CIRR)] of
22 less than 3.50.’

23 “In this case, the soils on the subject property are not rated. However, shortly
24 before intervenor’s initiation of the application in this case, the county
25 planning office adopted a ‘clarifying policy’ interpreting Goal 11, Policy
26 5(B)(1), as follows:

²Indeed, as petitioner points out, the county soil survey descriptions of some unrated soils, including the two unrated soils on the subject property, state that those soils support growth of Douglas fir as a main element of vegetation on those soils. Record 95; Petitioner’s Reply Brief, Appendix C-1-2.

1 “An authorized parcel of land shall be considered Goal #4
2 land (forest land) when the predominant (51%) soils on the
3 parcel have an internal rate of return (IRR) or composite
4 internal rate of return (CIRR) of 3.50 or higher. Lands not
5 meeting this test shall be considered non-forest lands.’ Record
6 114.

7 “In its findings, the county explained the need for this clarifying policy:

8 “The [CIRR] rating system is comparative and the purpose is
9 to determine which soils have “commercial” forest values and
10 are therefore forest resource in value. The numeric threshold
11 established in the study is 3.50. When more than one forest
12 soil is present on a parcel of land, the soils are averaged
13 together to create a “composite” internal rate of return. When
14 only one soil is present, that soil provides the rating number.
15 *When non-forest soils are present no calculation or rating is*
16 *possible because no numeric value exists.*

17 “In this particular case, the soils present on the property are
18 non-forest and no numeric rating exists. *This means it is not*
19 *possible to calculate an internal rate of return or a composite*
20 *internal rate of return to determine whether the soils are below*
21 *3.50. This anomaly has surfaced in other land use cases and*
22 *the Planning Director, under the direction of this Board,*
23 *developed a policy to deal with this problem. The Board*
24 *reaffirms this policy in this case[.]’ Record 13.” (Footnote*
25 *omitted; emphases added.)*

26 The county went on to apply the referenced clarifying policy to conclude that the soils on the
27 subject property were non-forest soils.³

28 The parties agree that what now appears at JCCP Goal 11, Policy 3(B)(1) was
29 adopted to codify the county’s prior “clarifying policy.” The parties also agree that JCCP
30 Goal 11, Policy 3(B)(1) was submitted to the Department of Land Conservation and
31 Development and approved in the county’s most recent periodic review. However, even if
32 simply adopting that clarifying policy, by itself, would have been sufficient to establish a
33 principle that unrated soils can be assumed to be non-forest soils, that is not what the county

³LUBA ultimately held that the county could not rely on its clarifying policy to assume that soils that had not been assigned internal rates of return are non-forest soils. 31 Or LUBA at 286 n 5 (and related text).

1 did.⁴ Instead the county adopted both JCCP Goal 11, Policy 3(B)(1) and (2). JCCP Goal 11,
2 Policy 3(B)(2), by its terms, applies where “a determination cannot be made using the
3 internal rate of return system” under JCCP Goal 11, Policy 3(B)(1). If that language does not
4 mean that JCCP Goal 11, Policy 3(B)(2) applies in cases where the soils have not been
5 assigned an internal rate of return, it is difficult to imagine when JCCP Goal 11, Policy
6 3(B)(2) would ever apply.

7 At oral argument, the county suggested that while JCCP Goal 11, Policy 3(B)(2)
8 would not apply to soils that do not have assigned internal rates of return, so long as those
9 soils are listed in the county soil survey, JCCP Goal 11, Policy 3(B)(2) would apply in cases
10 where soils on a property were not identified in the county soil survey at all. There is
11 nothing in the language of JCCP Goal 11, Policy 3(B)(2) that suggests it was intended to
12 have such limited application. Neither does the challenged decision interpret or explain the
13 board of county commissioners’ understanding of JCCP Goal 11, Policy 3(B)(2), and the
14 record includes no legislative history that would support the county’s suggested meaning of
15 JCCP Goal 11, Policy 3(B)(2).

16 In conclusion, we agree with petitioner the county has not demonstrated under JCCP
17 Goal 11, Policy 3(B) that the soils on the subject property are non-forest soils.

18 The third assignment of error is sustained.

19 **FOURTH ASSIGNMENT OF ERROR**

20 Petitioner argues the county’s findings are inadequate to demonstrate that the
21 challenged decision complies with Goal 5 (Open Spaces, Scenic and Historic Areas, and
22 Natural Resources). The county’s findings include the following:

⁴Without commenting on whether the evidentiary record would support such a position, it would seem to be a relatively simple matter to amend the JCCP to state in a straightforward manner that soils that have not been assigned an internal rate of return may be assumed to be non-forest soils. Both the original clarifying policy and the language at JCCP Goal 11, Policy 3(B)(1) are at best awkward and indirect ways to express that principle.

1 “The record demonstrates that the land has no Statewide [Planning] Goal 5
2 resources. * * *” Record 13.

3 Under this assignment of error, petitioner argues that this finding is “totally unsupported”:

4 “* * * Nowhere in the findings or the record is there an evaluation of the
5 property demonstrating that the locations, quality, and quantity of the many
6 resources listed in goal 5 are protected, and there is not reference to the
7 county’s inventoried resources.” Petition for Review 12.

8 Although petitioner apparently disagrees with the county’s finding that the subject
9 property does not include any inventoried Goal 5 resources, he does not identify any such
10 inventoried Goal 5 resources. Neither does petitioner identify any existing Goal 5 resource
11 protection program that the challenged decision either eliminates or alters.⁵ To the extent
12 petitioner believes the county was obligated to repeat the entire Goal 5 inventory, analysis,
13 and program development process as part of this decision, petitioner makes no attempt to
14 explain why the county was required to assume such a burden in this amendment of its
15 acknowledged comprehensive plan and zoning ordinance. Where the county is not amending
16 its Goal 5 inventory, in adopting a post acknowledgment plan amendment the county is
17 entitled to rely on its acknowledged Goal 5 inventory. *Urquhart v. Lane Council of*
18 *Governments*, 80 Or App 176, 721 P2d 870 (1986); *Friends of Cedar Mill v. Washington*
19 *County*, 28 Or LUBA 477, 487 (1995); *Waugh v. Coos County*, 26 Or LUBA 300, 310
20 (1993).

21 The fourth assignment of error is denied.

22 The county’s decision is remanded.

⁵The county’s decision to amend the County Deer Winter Range Inventory Map to list the subject property as impacted deer winter range may constitute such an action, but petitioner does not argue that it does.