BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHRISTINE CLARK KING,
DANIEL LOGAN and JOYCE T. STRIDE,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

MICHAEL JAMIESON,
Intervenor-Respondent.

LUBA No. 2002-034

FINAL OPINION
AND ORDER

Appeal from Washington County.

Jack D. Hoffman, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Dunn, Carney, Allen, Higgins and Tongue, LLP.

No appearance by Washington County.

John C. Pinkstaff, Portland, filed the response brief and argued on behalf of intervenor-respondent.

BRIGGS, Board Member; BASSHAM, Board Member, participated in the decision. HOLSTUN, Board Chair, did not participate in the decision.

AFFIRMED 07/18/2002

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

Petitioners appeal a hearings officer's decision that approves a nonfarm dwelling on a 17.38-acre parcel located within the county's Exclusive Farm Use (EFU) zone.

MOTION TO INTERVENE

Michael Jamieson (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject 17.38-acre parcel is located in an area of mixed farm and forest use in northeastern Washington County. Approximately five and one-half acres of the site contain soils that are rated as high value on the Natural Resource and Conservation Service (NRCS) soil survey. Most of the high value soils are located on the western portion of the property; however, there is a pocket of high value soils on the eastern portion of the property, near Shadybrook Road, a county road. Access to the property is through an easement from Shadybrook Road, across property to the south of the subject parcel. The site slopes 15 to 40 percent to the southeast, although one portion of the site is flat enough to support a building site. The subject property is currently undeveloped and a majority of the property is covered by a mature stand of trees. Trees on the site range from 100 to 140 years in age. In the past the property has been managed for timber production as part of a larger farm operation.

In 2001, intervenor applied for a nonfarm dwelling on the subject property. The planning director administratively approved the application. Petitioners appealed the planning director's approval to the county hearings officer, arguing that the property is suitable for farm uses and that approval of a nonfarm dwelling on this parcel will interfere with resource uses on nearby parcels by increasing the price of land and by adding additional traffic to Shadybrook Road and other rural roads in the vicinity. The hearings officer affirmed the planning director's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

ORS 215.213(3) provides, in relevant part:

> "In counties that have adopted marginal lands provisions * * * a single-family residential dwelling not provided in conjunction with farm use may be established * * * upon written findings showing * * *:
>
> "* * * * *
>
> "(b) The dwelling is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, location and size of the tract. A lot or parcel shall not be considered unsuitable solely because of its size or location if it can reasonably be put to farm use in conjunction with other land." [1]

Specifically, petitioners argue that the hearings officer failed to properly apply ORS 215.213(3)(b).[2] Petitioners argue that for the hearings officer the dispositive issue was the

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[1] ORS 215.213(3)(b) is codified in the county's ordinance at Community Development Code (CDC) 430-85.2. The hearings officer addressed the county standard. But there is no dispute that CDC 430-85.2 should be interpreted consistently with the statute. Therefore, we shall address the statutory standard rather than the identical county standard. *Kenagy v. Benton County*, 112 Or App 17, 20 n 2, 826 P2d 1047.

[2] The hearings officer's findings state, in relevant part:

> "The hearings officer finds that, although some of the site is suitable for limited agricultural use, the site is 'generally unsuitable for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, location and size of the tract.' * * *
>
> "a. The applicant's assertion that the site can be more profitably managed for timber is irrelevant. The only issue is whether the site is generally unsuitable for production of farm crops and livestock, not whether alternative resource uses on the site would be more profitable.
>
> "* * * * *
>
> "ii. The fact that this site is currently covered with timber is relevant in determining its suitability for the production of farm crops and livestock. The applicant must clear the site, removing the trees, stumps and brush, in order to farm the site. The applicant estimated that clearing the site for farming would cost between $1,500 and $2,000 per acre. However, the costs of clearing the site may be offset in whole or in part by the value of the marketable timber on the site. A reasonable farmer would include the value of the timber in any analysis of the cost-effectiveness of preparing the site for farming.

relationship between the parcel size and the portion of the parcel that is suitable for farm use.

"b. The presence of laminated root rot on the site makes it unsuitable for Christmas tree production. The fungus currently exists in scattered pockets on the site. However, the applicant must clear and cultivate the site to prepare it for planting of Christmas trees. Cultivation of the site is likely to spread the fungus throughout the site. Although it may be feasible to plant resistant tree species on this site * * *, such species are not grown for Christmas tree production in Washington County. Christmas tree species grown in Washington County are predominantly Douglas, Grand and Noble fir, all of which are susceptible to laminated root rot.

"i. Mr. Logan testified that laminated root rot has not been a problem on his property located near the site on which he raises Christmas trees. However, as noted by the applicant, Mr. Logan's family cleared their property and cultivated farm crops for 20 years or more before they planted Christmas trees. The USDA technical bulletin states that the laminated root rot fungus survives for as long as 50 years in larger roots and stumps and in relatively small-diameter roots for at least eight years. The fungus presumably disappeared from Mr. Logan's property due to the absence of susceptible tree species during the 20-year period that his family farmed the property before planting Christmas trees.

"c. A portion of the site may be suitable for production of certain farm crops. The report by Andy Gallagher of Red Hills Soils concludes that three to four acres of the site may be suitable for wine grape production, producing a gross income of $3,700 [to] $5,500 per acre. Although grapes would require a substantial upfront investment, roughly $20,000 per acre according to Mr. Thompson's estimate, the applicant could amortize this one-time cost over many years. However, the hearings officer finds that the farmable area of the site is small and does not reflect the general character of the site. The three to four acre farmable area constitutes less than 25 percent of the * * * site. Therefore the hearings officer finds that the site is 'generally unsuitable land for the production of farm crops and livestock considering the terrain, adverse soil * * * conditions, * * * and size of the tract. * * *

"i. This is a very close call. The hearings officer might reach a different conclusion if the farmable area constituted a large proportion of the overall site, (*e.g.*, three to four acres of a five-acre property), or if a larger contiguous area of the site were farmable, (*e.g.*, a 20-acre area within a 100-acre property). However, those conditions are not present in this case.

"d. Mr. Thompson's report demonstrates that it is not feasible to raise other farm crops or livestock on this site due to the steep slopes, lack of ground water for irrigation and the location and relatively small size of the farmable area of the site. There is no substantial evidence to the contrary.

"e. The hearings officer further finds that the site cannot reasonably be put to farm use in conjunction with other land. The site abuts an existing Christmas tree farm to the west. * * * However, the owner of [that property] testified that he is not interested in extending his tree farming operation onto the site. * * * The farmable area of the site is separated from farm parcels to the north, east and south by steep slopes on the site and intervening non-farm properties. Therefore, the hearings officer finds that it is not feasible to farm this site in conjunction with adjacent properties." Record 13-14.

Petitioners contend this issue placed an undue focus on the size of the parcel and the area that could be used for farm production. Petitioners argue that the proper focus is on all of the factors of ORS 215.213(3)(b) together and, when considered together, the subject parcel is capable of generating a respectable farm income. Therefore, petitioners conclude, the property is generally suitable for farm use and the hearings officer erred by concluding otherwise.

ORS 215.213(3)(b) requires consideration of whether the entire parcel is unsuitable for farm use, considering the listed factors. *Smith v. Clackamas County*, 103 Or App 370, 375-76, 797 P2d 1058 (1990), *aff'd* 313 Or 519, 836 P2d 716 (1992); *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990); *Futornick v. Yamhill County*, 13 Or LUBA 216, 227 (1985). The size of the parcel may have some bearing on its suitability for farm use. *Smith*, 103 Or App at 375. At least where the size of the parcel is an issue, there must be evidence that the subject parcel may not be combined with another parcel for farm purposes. *Nelson v. Benton County*, 23 Or LUBA 392, *aff'd* 115 Or App 453, 839 P2d 233 (1992). Further, the site where the proposed nonfarm dwelling is to be situated must not be suitable for farming. *Hearne v. Baker County*, 89 Or App 282, 748 P2d 1016 (1988).

Petitioners argue that the hearings officer misconstrued the "generally unsuitable" standard and that, properly understood, that standard requires that if *any* part of the parcel is suitable for farming, then the parcel as a whole cannot be "generally unsuitable." Along the same lines, petitioners argue that the hearings officer erred in considering the relative proportion of the land within the parcel that could grow grapes to the larger portion that is not suitable for any crops, as well as the relatively small size of the parcel.

We disagree with petitioners' view of the generally unsuitable standard. In *Hearne*, we affirmed the county's finding of general unsuitability regarding a 20-acre parcel, 12 acres of which had limited irrigation rights and minimal suitability for grazing. On appeal to the Court of Appeals, the court rejected a categorical argument that a parcel cannot be "generally

unsuitable" for farm use unless a majority of the parcel is unsuitable.[3] In *Smith*, the court rejected an argument that the county must base its "generally unsuitable" determination only upon the characteristics of a seven-acre portion of a parcel proposed to be partitioned for a nonfarm dwelling, not the entire 54-acre parcel. The court affirmed LUBA's conclusion that the relevant question is whether the entire 54-acre parcel is "generally unsuitable" for farm use. However, nothing in *Smith* retracts any part of *Hearne*, or suggests that the "generally unsuitable" standard can be met only if each acre of the parcel is unsuitable for farm use. Reading *Hearne* and *Smith* together, we find no support for petitioners' categorical argument to that effect.

Accordingly, that a small portion of the subject property can theoretically generate some farm income does not necessarily compel a conclusion that the property as a whole fails the generally unsuitable standard. As the quoted portion of *Hearne* indicates, the proportion of farmable land to nonfarmable land within a parcel is a relevant consideration, among others, as is the size of the entire parcel. Here, the hearings officer considered all of the relevant factors of ORS 215.213(3)(b), including (1) the steep topography of the site; (2)

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[3] In *Hearne*, the court stated, in relevant part:

> "[T]here is some logic to [petitioner's] underlying view that few parcels can be generally unsuitable for farm use if more than half of their land is suitable. It may be that petitioner's view is predictively accurate of how local government should resolve most of the suitability questions which come before them. However, we do not agree that that probability should be converted into a universally applicable test. ORS 215.283(3)(d) spells out several considerations which are relevant to the determination of whether land is generally unsuitable for farm use, *i.e.*, terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of tract. Those considerations, independently and in combination, are not conducive to an across-the-board 'majority of the parcel' test. To illustrate, adverse land conditions on one acre of a five-acre parcel are likely to have a more profound effect on its overall suitability for farming than would identical conditions on one acre of a 50-acre parcel. Even comparing parcels of the same size, the general unsuitability calculus could be quite different if one acre on the periphery of the parcel contained rocky soils than if the same problem infected the same total quantity of land, but the rocky soil was interspersed throughout the parcel. Moreover, as this case demonstrates, it is not always possible to ascertain what percentage of the parcel is unsuitable under the combination of considerations which enter into the determination. Different parts of the parcels have different problems, all of which could have affected the county's ultimate view of the suitability of the various parts and the whole." 89 Or App at 287-88.

the limited access to irrigation water; (3) the relatively small parcel size; (4) the size of the farmable area on the subject parcel; and (5) the inability to combine farm operations on the subject property with other farm operations. For the foregoing reasons, petitioners have not demonstrated that the hearings officer misconstrued the applicable law in reaching the conclusion that the parcel is generally unsuitable for farm use.

The first assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer erred in concluding that the subject property could not reasonably be put to farm use in conjunction with other land. Petitioners contend that there is no evidence in the record that shows why farm operations on the subject property could not be combined with farm activities on nearby parcels owned by intervenor and his family; or that the property could not be combined with the adjacent Christmas tree farm to the west of the subject parcel.

With respect to the adjacent tree farm, intervenor argues that the hearings officer properly relied upon a letter from the operator of the adjacent Christmas tree farm stating that the farm operator was not interested in expanding his operations to include the subject property. With regard to the nearby property owned by intervenor's family, intervenor argues that the hearings officer considered evidence that the nearby property that was owned by members of intervenor's family at the time the application was submitted was physically separated from the subject property by steep slopes so as to make a combined farm operation with properties to the north, east and south unlikely. Finally, intervenor argues that there is no evidence suggesting that any other farm operations could be expanded to include the subject property. For those reasons, intervenor contends that the hearings officer's findings are adequate with respect to combining the subject property with other farms.

Petitioners contend that the current unwillingness of the current owners of adjacent or nearby farmland to farm the subject property in conjunction with their property is not

dispositive of whether the subject property can be farmed in conjunction with those lands under ORS 215.213(3)(b). The proper question, petitioners argue, is whether the subject parcel is reasonably *capable* of producing crops or livestock in conjunction with other lands, not whether a particular farmer is currently willing to try. *See Reed v. Lane County*, 19 Or LUBA 276, 284 (1990) (under the general unsuitability standard, whether a particular farmer can make a profit at a particular period in time on a particular piece of farm land is at best indirect evidence of whether the land itself is suitable for the production of crops and livestock). Petitioners cite to evidence that the owner of the adjacent Christmas tree farm is a part-time farmer who is retiring from the Christmas tree business, and argue that the owner's unwillingness to extend his tree farm to the subject property is prompted solely by that reason rather than any objective difficulty in farming the two properties together.

Even if petitioners are correct that the adjacent owner's current unwillingness to farm the subject property in conjunction with his own is insufficient to demonstrate that the two properties cannot be farmed together, that would provide no basis for reversal or remand in the present case. We conclude in discussing the second assignment of error that the record supports the hearings officer's finding that the presence of laminated root rot on the subject property is inconsistent with use of the property as a Christmas tree farm. Given that conclusion, the hearings officer did not err in rejecting the possibility that an adjoining landowner could extend his Christmas tree farm to the subject property.

The hearings officer considered whether there are farm operations on adjacent properties that could be expanded to include the subject property. *See* n 2. The findings demonstrate that the hearings officer considered the topography and the existing adjacent uses to conclude that the subject property cannot reasonably be combined with adjacent farm properties, and there is no evidence in the record to show that other farm activities in the vicinity could be reasonably expanded onto the subject parcel. The hearings officer's findings are adequate to satisfy the requirement that "a lot or parcel shall not be considered

unsuitable solely because of its size or location if it can reasonably be put to farm use in conjunction with other land." ORS 215.213(3)(b).

The third assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer's findings with respect to the general unsuitability of the property for farm use are not supported by substantial evidence. Petitioners argue that the property is suitable for growing wine grapes and Christmas trees. Petitioners concede that Christmas tree yield may be somewhat limited by the presence of laminated root rot but argue that, with proper management, the effect of laminated root rot can be limited. Petitioners also argue that the hearings officer found that wine grapes could be grown on the property and that the evidence is that those wine grapes, even if grown on a small percentage of the property, will result in revenue that will justify retaining the entire property as a farm parcel.

As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

The hearings officer considered the evidence that Christmas trees could be planted on the property despite the presence of laminated root rot. He concluded that the contrary evidence presented by intervenor, an expert forester, undermined that testimony. The

hearings officer's findings adequately explain why he found intervenor's testimony more credible. We conclude, therefore, that the hearings officer's conclusions regarding the viability of planting Christmas trees on the subject property are supported by substantial evidence.

As for the evidence petitioner King presented regarding the viability of wine grape production, it is clear from the findings that the hearings officer relied on that testimony and on the testimony of intervenor's expert to conclude that grapes could be grown on a three to four-acre portion of the property. Petitioners argue that that evidence compels the conclusion that the subject property is suitable for farm uses. However, as we explained in discussing the first assignment of error, petitioners' view of the law on that point is mistaken. Petitioners have not demonstrated that the hearings officer's findings, or the ultimate conclusion that the subject property is generally unsuitable for farm use, is not supported by substantial evidence.

The second assignment of error is denied.

The county's decision is affirmed.