BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID PETERSON, RAYMOND MALLOTT,
NANCY KNOCHE
and 1000 FRIENDS OF OREGON,
Petitioners,

vs.

CROOK COUNTY,
Respondent,

and

EUGENE GRAMZOW,
Intervenor-Respondent.

LUBA No. 2005-002

FINAL OPINION
AND ORDER

Appeal from Crook County.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioners.

Jeff M. Wilson, Crook County Counsel, Prineville, filed the response brief and argued on behalf of respondent.

Ross Day, Tigard, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Oregonians in Action Legal Center.

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

REMANDED 04/12/2005

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a partition of a 280.33-acre parcel in an exclusive farm use zone to create a 240-acre parcel (parent parcel) and two 20-acre parcels (nonfarm parcels), and the approval of a dwelling on each of the 20-acre parcels.

MOTION TO INTERVENE

Eugene Gramzow (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 property is located approximately six miles southwest of Prineville in the Powell Butte area of Crook County. The following relevant facts are quoted from the planning commission's decision:

> "The property is bordered by [intervenor's] 433 acre parcel to the east and northeast which is not in farm use. Four 80-acre parcels border the property on the north, and four 10-acre nonfarm parcels border the property on the northwest. Two 80-acre parcels and a 160-acre parcel border the property on the west, across Parrish Lane, and a 95-acre parcel and a 5-acre nonfarm parcel border the property on the south.
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> "All lands within one mile of the property are zoned Exclusive Farm Use EFU-3, and have similar soils, terrain, and vegetation * * *. Within one mile of the property there are four 10-acre parcels, one 5-acre parcel, two 25-acre parcels, two 40-acre parcels, ten 80-acre parcels, one 95-acre parcel, one 277-acre parcel, and one parcel over 1000 acres.
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> "There are nine nonfarm parcels within one mile, with five residences. There are seven additional residences on farm deferral parcels measuring less than 80 acres." Record 169.

The following additional facts are also relevant. The Central Oregon Irrigation District canal traverses the subject property and roughly bisects the proposed nonfarm parcels. The subject property has 98.85 acres of irrigation rights, and in May, 2002, a portion of these irrigation rights

were transferred from the proposed nonfarm parcels to the parent parcel, uphill from and to the east of the irrigation canal.

On February 27, 2002, intervenor filed the application seeking the partition and nonfarm dwelling approvals. The planning commission approved the partition and nonfarm dwelling applications. A local appeal was filed, and the county court adopted its own findings and decision affirming the planning commission's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county misconstrued Crook County Code (CCC) 18.24.080 and made a decision unsupported by substantial evidence in concluding that the proposed nonfarm parcels are "generally unsuitable land for the production of farm crops and livestock or merchantable tree species."[1] For the same reasons, petitioners argue that the county's decision is inconsistent with ORS 215.263(5)(a)(E), which CCC 18.24.080 implements.[2]

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[1] CCC 18.24.080 tracks the language of ORS 215.263(5). CCC 18.24.080 provides, in pertinent part:

"Limitations on nonfarm residential uses.

"The county may approve a nonfarm residential dwelling upon a finding that the proposed dwelling:

"(1) Accepted Farm or Forest Practices. Will not seriously interfere with or force a significant change in accepted farm or forest practices, as defined in ORS 215.203(2)(C), on nearby or adjacent lands devoted to farm or forest use, including but not limited to increasing the costs of accepted farm or forest practices on nearby lands devoted to farm use.

"(2) Land Use Pattern. 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, the county shall consider the cumulative impacts of new nonfarm dwellings on other lots or parcels in the area. If the application involves the creation of a new parcel for the nonfarm dwelling, the county shall consider whether creation of the parcel will lead to the creation of other nonfarm parcels, to the detriment of agriculture in the nonfarm parcels, to the detriment of agriculture in the area. To address this standard, the applicant shall:

"(a) Identify a study area representative of the surrounding agricultural area including adjacent and nearby land zoned for exclusive farm use. Nearby lands zoned for rural residential or other urban or nonresource uses shall not be included;

"(b) Identify the types and sizes of all farm and nonfarm uses and the stability of the existing land use pattern within the identified study area; and

"(c) Explain how the introduction of the proposed nonfarm dwelling will not materially alter the stability of the land use pattern in the identified study area.

"The applicant's evidence shall be sufficient to enable the county to make findings on these as well as other applicable requirements.

"(3) Unsuitability for Agriculture.

"(a) The dwelling is situated upon a lot or parcel, or a portion of a lot or parcel, that is generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm use in conjunction with other land. A lot or parcel is not 'generally unsuitable' simply because it is too small to be farmed profitably by itself. If a lot or parcel can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch, it is not 'generally unsuitable.' A lot or parcel is presumed to be suitable if it is composed predominantly of Class I – VI soils. Just because a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use.

"* * * * *"

[2] For simplicity, in this opinion we will refer to ORS 215.263(5), the statute that CCC 18.24.080 implements. It provides, in pertinent part:

"In eastern Oregon, as defined in ORS 321.805, the governing body of a county or its designee:

"(a) May approve a division of land in an exclusive farm use zone to create up to two new parcels smaller than the minimum size established under ORS 215.780, each to contain a dwelling not provided in conjunction with farm use if:

"(A) The nonfarm dwellings have been approved under ORS 215.284 (7);

"(B) The parcels for the nonfarm dwellings are divided from a lot or parcel that was lawfully created prior to July 1, 2001;

"(C) The parcels for the nonfarm dwellings are divided from a lot or parcel that complies with the minimum size established under ORS 215.780;

"(D) The remainder of the original lot or parcel that does not contain the nonfarm dwellings complies with the minimum size established under ORS 215.780; and

"(E) The parcels for the nonfarm dwellings are generally unsuitable for the production of farm crops and livestock or merchantable tree species considering the terrain, adverse soil or land conditions, drainage or flooding,

A. Historic Use

We begin by addressing petitioners' argument that the subject property, including both the nonfarm parcels and the parent parcel, has been used for hay production and grazing in the past. Neighbors of the subject property testified about several decades of historic grazing use of the proposed nonfarm parcels. Record 131, 954, 979. Intervenor's citations to the record do not provide any evidence to the contrary. Intervenor's Response Brief 8.[3] In fact, the planning commission decision in this case, affirmed by the county court, specifically acknowledges that the subject property, including the nonfarm parcels, has been used for grazing.[4]

We have held in a similar circumstance that just because land has been used for farming uses in the past does not necessarily require a conclusion that the land is "suitable for farm use" for purposes of determining whether land is "agricultural land." *See Rutigliano v. Jackson County*, 47 Or LUBA 470, 488 (2004) (that a property may have been briefly used as an elk and deer holding facility "does not necessarily support a conclusion that the subject property is suitable for farm use"). However, we have held that past farming use on a property is a "substantial obstacle" in making a finding that the property is generally unsuitable. *Clark v. Jackson County*, 17 Or LUBA 594, 606 (1989); *see also Adams v. Jackson County*, 20 Or LUBA 398, 407 (1991) (where property has been used for grazing and growing of hay in the past and there is no evidence that anything about the land has changed to make it generally unsuitable for those purposes, there is

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> vegetation, location and size of the tract. A parcel may not be considered unsuitable based solely on size or location if the parcel can reasonably be put to farm or forest use in conjunction with other land."

[3] Intervenor asserts that the record reflects a site visit "in which there was no evidence * * * that cattle were ever present on the proposed new nonfarm parcel sites." Intervenor's Brief 8. The record citation provided by intervenor, Record 392, does not support that assertion. Intervenor also asserts that the presence of a fence suggest that the property has not been used for farming. Intervenor's Brief 8. Again, intervenor's record citation for this statement nowhere mentions fencing. Finally, intervenor cites to testimony that the nonfarm parcels do not add much value to the property. Record 504. In summary, none of the citations provided to contradict petitioners' assertion that there was grazing on the property support intervenor's position.

[4] The planning commission decision states: "The current lessee of the property submitted written testimony in support of the proposal. He stated that [he] has run cattle on the property for two years, *and used the full property*." Record 172 (emphasis added).

substantial evidence to support a finding that the property is not generally unsuitable for the production of livestock). On remand, the county must address the issue of historic use of the nonfarm parcels for grazing.

B. Soils Analysis

In determining whether the nonfarm parcels are generally unsuitable for the production of farm crops and livestock or merchantable tree species, the initial inquiry concerns the classification of the soils on the property. The parties all agree that the parcels are presumed suitable if they are "composed predominantly of Class I-VI soils." OAR 660-033-0130(4)(c)(B)(ii); CCC 18.24.080(3)(a); *see* n 1. The planning commission decision states:

> "The Redmond office of the [Natural Resource Conservation Service (NRCS)] states that all of the soils on the property are in SCS Class VI if non-irrigated, and that 40 percent are in Class III if irrigated. Soils on the proposed nonfarm parcels are almost entirely Class VI, in addition to rock outcrops." Record 170.

Petitioners argue that this finding fails to distinguish between the entire 280-acre parcel and the two 20-acre nonfarm parcels and for that reason the finding fails to determine what percentage of the soils on the proposed nonfarm parcels are Class VI soils or what percentage of those Class VI soils are Class III soils when irrigated.[5] Without that information, we understand petitioners to argue, it is impossible to determine whether the nonfarm parcels satisfy the generally unsuitable standard.

We agree with petitioners that the challenged decision does not clearly delineate what percentage of the nonfarm parcels contain soils that are Class III when irrigated. That failure may be due in part to the county's conclusion that certain land conditions render the property generally unsuitable regardless of soils capability.[6] While the county acknowledges that the parcels are

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[5] The findings that petitioners challenge are those of the county planning commission, not findings specifically adopted by the decision maker, the county court. Although the county court does not incorporate the findings of the planning commission as part of its decision, it does affirm the planning commission's decision and implicitly determines that the planning commission's decision is legally and factually correct. *See* CCC 18.172.110(12)(b) ("The burden of proof is on the appellant to show that the decision below was legally or factually improper or incorrect.").

[6] The planning commission decision states:

presumed "generally suitable" for purposes of ORS 215.263(5)(a)(E) because they are comprised of Class I-VI soils, it then attempts to overcome that presumption, relying on "adverse soil or land conditions" to support its conclusion that the property is generally unsuitable for the production of crops and livestock. Petitioners counter that the NRCS soils ratings take factors such as rock outcrops and shallowness of soils into consideration in rating the soils for a particular property. According to petitioners, those conditions are subsumed in the NRCS ratings for the soils on the subject property.

Although there may be adverse soil and land conditions unrelated to factors considered by the NRCS in rating the soils capability, there is nothing in the record that would support the conclusion that rock outcrops and shallow soils were not considered by the NRCS in rating the soils Class VI when non-irrigated or Class III when irrigated. In fact, the only evidence cited to us in the record supports the opposite conclusion. Record 107, 126-30 ("[s]toniness and shallowness are soil characteristics evaluated by NRCS soil scientists in making a determination of soil capability class"). Further, even assuming intervenor had submitted evidence that these conditions were sufficient to overcome the presumption, it is unclear from the findings or the record what percentage of the property is covered by the rock outcroppings and shallow soils so that we could determine whether the conclusion that those factors render the property generally unsuitable is supported by substantial evidence.[7] Accordingly, we agree with petitioners that the county's findings are inadequate.

> "* * * the presence of large rock outcrops, shallow to non-existent soils, and an irrigation ditch which cuts through both proposed parcels, are land conditions which make it impossible to utilize the Class VI soils which are present for agriculture, and make the parcels generally unsuitable for farm use despite the soil type." Record 176.

[7] We note that the administrative rule implementing the Statewide Planning Goal 3 (Agricultural Lands) definition of "agricultural lands" provides that an applicant, in determining whether land meets the definition of agricultural lands may provide more detailed information than the NRCS soils information. OAR 660-033-0030(6). However, that more detailed information must be "related to" the NRCS land capability classification system.

We turn now to petitioners' argument that "[w]here a subject property contains soils which are rated Class III when irrigated, the county must consider in its soil evaluation the feasibility of providing irrigation to the parcel." Petition for Review 6 (citing *Doob v. Josephine County*, 31 Or LUBA 275 (1996)). The applicant in *Doob* sought approval of a comprehensive plan amendment to change the designation on a property from resource use to non-resource use. Josephine County's comprehensive plan included a policy that allowed an applicant to demonstrate that land is non-resource if the land is "unsuitable for farm use considering soil fertility, grazing, climate, *irrigation*, land use patterns, technology and accepted farm practices." *Id*. at 281 (emphasis added). The county interpreted that provision and concluded that because the property did not currently have irrigation rights, it need not consider the possibility of obtaining irrigation rights or the potential capability of the soils if irrigation were made available to the property. *Id*. While acknowledging our limited scope of review of a local government's interpretation of its own comprehensive plan provision pursuant to ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 514-15, 836 P2d 710 (1992), we remanded the county's interpretation because it was inconsistent with the statewide planning goals. *See* ORS 197.829(1)(d).[8] The comprehensive plan policy at issue implemented Goal 3, and the Goal 3 definition of "agricultural lands" requires

[8] ORS 197.829(1) provides:

> "(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> > "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> > "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> > "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
> >
> > "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

consideration of "existing and future availability of water for farm irrigation purposes."[9] We concluded:

> "Given the express language in Goal 3 that *future* availability of water for irrigation must be considered in evaluating suitability of soils for agricultural uses, the county's interpretation that it need not consider *potential* availability of irrigation in determining soil suitability is incorrect." 31 Or LUBA at 282 (emphasis in original).

In this case, irrigation was available to the nonfarm parcels until intervenor transferred the irrigation rights to other portions of the subject property, *after* he submitted the present application. The county has not considered whether transferring those irrigation rights back to the nonfarm parcels would render them generally suitable for the production of farm crops or livestock. Rather, the county relies on the fact that the nonfarm parcels do not *currently* have established water rights for irrigation and refuses to consider the *potential* capability of the soils if water rights could be and were transferred back to those nonfarm parcels.[10] We conclude that where, as here, the parcels in question had established water rights that were transferred off the property by the applicant, the county, in making its suitability determination under ORS 215.263(5)(a)(E), must consider the

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[9] Goal 3 defines "agricultural land" to be:

> "in eastern Oregon * * * land of predominantly Class I, II, III, IV, V and IV soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, *existing and future availability of water for farm irrigation purposes*, existing land-use patterns, technological and energy inputs required, or accepted farming practices." (Emphasis added.)

[10] The county relies on ORS 215.263(5)(b)(E), which requires a demonstration that "[t]he parcels for the nonfarm dwellings do not have established water rights for irrigation." Record 13. First, the applicable criterion in this case is ORS 215.263(5)(a), not ORS 215.263(5)(b), so that provision does not apply. To the extent the county believes that subsection (5)(b) supports its position that the "generally unsuitable" standard in ORS 215.263(5)(a)(E) does not require consideration of potential irrigation rights, we disagree. Under ORS 215.263(5)(b)(E), the applicant may need to demonstrate that the proposed nonfarm parcels do not currently have established water rights for irrigation. However, that does not necessarily dictate the conclusion that an applicant need not also consider the possibility of obtaining water rights for irrigation in determining whether the parcel is generally unsuitable based on soil capability and other factors listed in ORS 215.263(5)(b)(E) and ORS 215.263(5)(a)(E). The determination of soil *capability*, by definition, requires a consideration of the potential capacity of the soils, which the NRCS acknowledges varies depending on whether or not those soils are irrigated.

feasibility of transferring those irrigation rights back to the property. If it is feasible to transfer irrigation rights back to the property, the county must consider whether the property is generally unsuitable for the production of farm crops and livestock with those irrigation rights.

C. Herbacious Forage Survey

Intervenor hired an expert certified range professional to conduct an herbaceous forage survey for the nonfarm parcels. As far as we can tell, the expert completed two surveys. Record 253, 257. One survey is entitled "Forage Survey Sec. 17, T15S, R15E, Parcel 2 of P.P. No. TL: 100." The map immediately following that survey in the record, Record 256, which appears to be attached to the survey, clarifies that the property surveyed is intervenor's 380.84-acre parcel to the east, not the subject property. The other survey is entitled, "Forage Survey Sec. 17, T 15 S, R 15 E, Parcel 1 of P.P. No. TL 106." Record 257. It is unclear whether the "Parcel 1" to which the study refers is the northern proposed nonfarm parcel, both nonfarm parcels, or some other parcel. That survey concludes that one nonfarm parcel is capable of producing enough forage to support one cow for eighteen days. Record 257.

Petitioners argue that the county erred in relying on the surveys because (1) it is unclear whether the expert was even studying the nonfarm parcels or perhaps was mistakenly studying some other portion of the subject property or another property altogether, and (2) the studies relate only to the current condition of the land, not the capability of the land to produce forage.

We agree with intervenor and respondent that it is for the decision maker to weigh the evidence and determine what weight to give to an expert. *See Simmons v. Marion County*, 22 Or LUBA 759, 768 (1992) (a local government's choice between conflicting evidence will not be disturbed by LUBA). However, in determining whether the surveys constitute substantial evidence, the county and we must be able to determine whether the expert was studying the relevant property. In this case, it is impossible to tell. First, it appears to us that one of the surveys studies a different property altogether; *i.e.*, another property owned by intervenor located to the east of the subject property. Second, as petitioners point out, the survey that arguably describes the subject property

purports to cover "the portion of the subject property located west of the irrigation ditch" but describes the "subject parcel" as "30 acres west of the ditch." Record 257. Petitioners claim that a review of the map at Record 868 indicates that the area of the entire subject property west of the ditch appears to be approximately 60 to 80 acres, and that the area of the proposed nonfarm parcels west of the ditch is approximately 15 acres. At oral argument, petitioners suggested based on color photographs taken of the western portion of the nonfarm parcels that the surveys were perhaps conducted somewhere to the east of the ditch. Because it is impossible to ascertain what area the surveys studied, they do not constitute substantial evidence upon which the county could rely.

Petitioners also challenge the county's reliance on the surveys because they only estimate the forage capacity based on *current* conditions. According to petitioners, the generally unsuitable standard requires a determination of the "inherent capability," which requires analysis of the *potential* herbaceous forage capacity. Petition for Review 11-12. We agree. Our previous conclusion that the suitability determination includes consideration of potential irrigation requires that any herbaceous forage surveys upon the county wishes to rely must also consider potential herbaceous forage capacity if the properties were irrigated. It is unclear to what extent the county's decision relies upon the surveys, but we cannot say that the county would have come to the same conclusion without the surveys, and remand is therefore appropriate.

D. Use in Conjunction with Other Land

The planning commission concluded that the proposed nonfarm parcels cannot reasonably be put to farm use in conjunction with other lands. Record 177-78. That conclusion is based on findings that the nonfarm parcels are not necessary for the agricultural operation on other land, specifically the parent parcel.[11] As petitioners correctly note, those findings erroneously "focus on

[11] The planning commission decision states:

> "A prospective buyer of the property also stated that the proposed nonfarm parcels are not necessary for an agricultural operation on the property.

whether the subject property can support a cattle operation without the proposed nonfarm parcels, rather than on whether the proposed nonfarm parcels can be used in conjunction with the subject property or other lands." Petition for Review 15. We agree with petitioners on this point and, consequently, on their assertion that the findings are inadequate to support the conclusion that the nonfarm parcels cannot reasonably be put to farm use in conjunction with other lands.[12]

Petitioners' first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners challenge the county's conclusions that the nonfarm dwellings on the proposed nonfarm parcels (1) will not force a significant change in or significantly increase the costs of accepted farm practices on nearby or adjacent lands and (2) will not materially alter the stability of the overall land use pattern of the area. ORS 215.284(7).[13]

> "The proposed farm parcel has 141 acres of dry land which can be used for calving and to shelter cattle, making the proposed nonfarm parcels superfluous for that purpose. The present lessee of the property indicates that he can and will continue his agricultural operation irrespective of whether the proposed nonfarm parcels are separated from the property. The proposed nonfarm parcels are not immediately adjacent to other farm parcels. There was no evidence in the record of interest in using the proposed nonfarm parcels for agriculture, except for letters in opposition claiming that there is a shortage of farmland for lease, but offering no specifics." Record 177-78.

The challenged decision affirmed the planning commission's findings on this point:

> "The Planning Commission received testimony from two individuals related to the potential use of the property as a working ranch or in conjunction with other farm ground. The Planning Commission took notice of Mr. Floyd's prospective interest in purchasing the subject property. The Planning Commission specifically noted that Mr. Floyd stated that 'the proposed non-farm parcels are not necessary for a ranching operation on the property * * *' The Planning Commission also took note of written testimony from the Lessee * * * that 'partitioning off the proposed non-farm parcels will not affect his operation and he plans to continue leasing the proposed agricultural [farm] parcel'." Record 11-12.

[12] Petitioners also assert that the challenged decision focuses on the fact that the nonfarm parcels are fenced off from the parent parcel to support its conclusion that the nonfarm parcels are generally unsuitable. Other than a comment in the "Site Description" section of the challenged decision that mentions the fence, it is not clear to us that the challenged decision relies on the fencing to reach its conclusion regarding suitability.

[13] ORS 215.284(7) provides:

> "(7) In counties in eastern Oregon, as defined in ORS 321.805, a single-family residential dwelling not provided in conjunction with farm use may be established, subject to the

A. Accepted Farm Practices

Neighbors of the proposal testified that the proposed dwellings would increase traffic and the number of inconsiderate drivers, interfering with the movement of livestock and farm machinery on the roads. There was also testimony that the transfer of irrigation rights from the nonfarm parcels to the parent parcel uphill from the irrigation canal will result in increased pumping costs. One opponent testified that the nonfarm parcels could house dogs that could interfere with agricultural operations.

Petitioners argue that the county's conclusion that the approval of the nonfarm dwellings will not force a significant change in or increase the costs of accepted farm practices on nearby or adjacent lands relies on an erroneous assumption that the criterion requires a comparison of impacts from farm dwellings and nonfarm dwellings, instead of a comparison of the impacts of new dwellings and no dwellings at all.[14] Intervenor contends that the planning commission's comparison between nonfarm and farm residences was merely intended to clarify that dogs and inconsiderate drivers are not exclusively creatures of nonfarm dwellings. We do not see that the planning commission's finding to which petitioners refer provides a basis for remand or reversal.

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approval of the county governing body or its designee, in any area zoned for exclusive farm use upon a finding that:

"(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 created after January 1, 1993, as allowed under ORS 215.263 (5);

"(c) The dwelling will not materially alter the stability of the overall land use pattern of the area; and

"(d) The dwelling complies with such other conditions as the governing body or its designee considers necessary."

[14] The planning commission decision states:

"[n]o evidence has been presented which indicates that problem dogs and inconsiderate drivers are more likely to accompany nonfarm residences than farm residences." Record 178.

The county court relied on the testimony of the current lessee and a prospective purchaser of the property that "creation of the proposed non-farm parcels will not materially alter their ability to farm." Record 14. Intervenor and respondent argue that the planning commission and county court weighed the evidence regarding the increased costs and potential changes to existing farm practices and concluded that this criterion was satisfied. It is not for us to reweigh that evidence. *See Simmons*, 22 Or LUBA at 768. Accordingly, petitioners' challenge to the county's conclusion regarding this criterion does not provide a basis for reversal or remand.

B. Stability Test

Petitioners argue that the county's conclusion that the development of two additional nonfarm dwellings will not materially alter the land use pattern in the 2000-acre area studied is not supported by substantial evidence. *See* ORS 215.284(7); n 1. Intervenor attempts to frame petitioners' challenge as a disagreement regarding the weight the county chose to give to certain evidence. However, we do not agree. Petitioners' contention is that the planning commission's finding that "[t]here is a potential for construction of as many as 4-5 additional nonfarm residences within the one mile study area, in addition to the proposed residences," is completely unsupported by substantial evidence in the record. Record 179. Petitioners cite to intervenor's application, which provides that "approximately twenty-three nonfarm dwellings could be approved within the study area pursuant to ORS 215.263(5)(a) or (b)," and "a total of five lot-of-record dwellings may be approved within the study area." Record 436. Petitioners' analysis concludes that at least 40 new nonfarm dwellings are possible in the study area. Record 349, 373. Petitioners' analysis relies on potential new dwellings on parcels that are "similarly situated," as required by OAR 660-033-0130(4)(c)(C).[15] According to petitioners, "similarly situated" parcels include other irrigated

[15] OAR 660-033-0130(4)(c)(C) provides, in part:

> "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 by applying the standards set forth in paragraph (4)(a)(D) of this rule. If the application involves the creation of a new parcel for the

parcels that could have their irrigation rights removed, resulting in their being considered generally unsuitable and therefore potential sites for new nonfarm dwellings. Petition for Review 19. Earlier in this opinion we concluded that the county must consider whether water rights can be transferred

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> 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 by applying the standards setforth in paragraph (4)(a)(D) of this rule[.]"

OAR 660-033-0130(4)(a)(D) 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 possible new nonfarm dwellings and parcels on other lots or parcels in the area similarly situated. To address this standard, the county shall:
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> "(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;
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> "(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. 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;
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> "(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."

back to the proposed nonfarm parcels in determining whether those parcels are generally unsuitable for the production of farm crops, and livestock or merchantable tree species. Accordingly, we disagree with petitioners that the "similarly situated" language in OAR 660-033-0130(4)(c)(C) requires an analysis of whether irrigated parcels could have irrigation rights transferred.

We do agree with petitioners, however, that the county's conclusion that the stability test is satisfied is unsupported by substantial evidence. That conclusion is based on the estimate that four or five additional nonfarm residences could be approved within the study area. However, neither intervenor nor respondent has demonstrated a basis in the record for that estimate. Intervenor's own estimate concludes that there is a potential for approximately 28 new nonfarm and lot-of-record dwellings within the study area. Accordingly, the county's conclusion regarding the stability test, which is based on an estimate that apparently has no basis in the record, is not supported by substantial evidence.

Petitioners' second assignment of error is sustained in part and denied in part.

The county's decision is remanded.