BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHAN PLOEG and VERONIKA PLOEG,
Petitioners,

vs.

TILLAMOOK COUNTY,
Respondent,

and

WILLIAM DECHERT,
Intervenor-Respondent.

LUBA No. 2005-079

FINAL OPINION
AND ORDER

Appeal from Tillamook County.

Lois A. Albright, Tillamook, filed the petition for review and argued on behalf of petitioners. With her on the brief was Albright and Kittell, PC.

William K. Sargent, County Counsel, Tillamook, filed a joint response brief and argued on behalf of respondent.

Daniel Kearns, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief was Reeve Kearns, PC.

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

REMANDED 12/02/2005

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a non-farm dwelling.

FACTS

The challenged decision is on remand from LUBA. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002). We described the property and its environs as followed:

> "The subject property is a 25.6-acre parcel that is roughly rectangular in shape, and zoned Farm (F-1), an exclusive farm use (EFU) zone. Soils on the property consist of 67 percent Winema silt loam (WmF—Class VIe), 23 percent Winema silt loam (WeC—Class IIIe) and 10 percent Winema silt loam (WeD—Class IVe). In the middle of the property is a knoll approximately 80 feet higher than the surrounding Nestucca River floodplain. At the top of the knoll is a five-acre pasture. Approximately two-thirds of the parcel is covered in second-growth trees, with the remainder open pasture. The property is developed with a barn and farm shed.
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> "The land surrounding the subject parcel is also zoned F-1. Two small parcels developed with dwellings lie to the north, and Highway 101 is further north. To the northeast is a small rural residential area, separated from the subject property by land zoned F-1. To the east is the Higdon farm, a 150-acre dairy farm. To the west is the Seymour farm, a 240-acre dairy farm. To the south lies Redberg Road. Lands south of Redberg Road include a 29-acre parcel developed with a dwelling, and several other large parcels that are part of the Higdon and Seymour farms. With the exception of the knoll on the subject property, the topography of land north of Redberg Road is generally flat, open pastureland. The topography of land south of Redberg Road generally consists of steep tree-covered hills." *Id.* at 6.

The subject property was once part of the 90 acre Edmonds farm, and was leased to neighboring dairy farmers and used for growing hay and as pastureland during the 1960s and 1970s. In 1980, Highway 101 was relocated across the northern portion of the 90-acre parcel, bisecting it. At approximately the same time, a lender to the property owner foreclosed on a loan secured by the property. In 1982, the county board of commissioners agreed to the lender's request to consider rezoning the portion of the parcel south of the highway to allow rural residential development. At the request of area farmers, however, the county decided to retain agricultural zoning for most of the parcel, but to allow a partition to provide a maximum of four dwellings on the

parent parcel, if each parcel could meet the applicable approval criteria.[1] In 1984, the county approved a partition of the remaining portion of the parent parcel south of the highway into three parcels, resulting in a 25-acre parcel south of the subject property (tax lot 801), the subject property (tax lot 802), and a 15-acre parcel to the north (tax lot 700). The owners of tax lot 700 subsequently applied for, and obtained, county approval for a dwelling on that parcel. Petitioners reside on tax lot 700.

In the late 1980s the subject property was acquired by Korevaar, who constructed the barn and shed and used the property to pasture two to four horses for personal use. At one point Korevaar grazed a few beef cattle on the property, but abandoned the attempt. In 1999, Korevaar and a potential buyer of the property applied for a conditional use permit to build a nonfarm dwelling. The county approved the application, and petitioners appealed to LUBA. In 2000, LUBA granted the county's request for voluntary remand.

Korevaar requested a remand hearing in 2001. The county conducted the hearing and in March 2002 again approved the non-farm dwelling. Petitioners again appealed to LUBA. In our September 2002 decision, the Board denied four assignments of error, and sustained two assignments of error in whole or part. Specifically, the Board remanded to the county to (1) conduct the study required by OAR 660-033-0130(4)(a)(D) (part of the "stability" standard, discussed below) and (2) address whether the subject property could be used in conjunction with the adjoining dairy farms, for purposes of OAR 660-033-0130(4)(c)(B) (part of the "suitability" standard, discussed below). Because remand required additional evidentiary proceedings and findings, we did not address petitioners' remaining challenges to the existing record and findings.

In 2003, Korevaar logged many of the trees on the subject parcel. In 2004, Korevaar sold the property to William Dechert (intervenor) for $156,000. At intervenor's request, a neighboring

[1] Apparently as a compromise the county agreed to creation of a one-acre parcel in the northeast corner of the 90-acre parent parcel and to rezone that parcel for rural residential use, which was subsequently done. The dwelling on that one-acre parcel is apparently the fourth dwelling that the county contemplated in 1982.

dairy farmer grazed cattle on the subject property on two occasions during 2004. In November 2004, intervenor requested a remand hearing, which the county board of commissioners conducted on January 26, 2005. Intervenor submitted additional evidence addressing the stability and suitability standards at OAR 660-033-0130(4). The commissioners held the record open for several weeks, during which intervenor submitted a revised study, and petitioners submitted rebuttal evidence. At the March 15, 2005 continuation hearing, county staff presented a written "independent analysis" of the evidence regarding the stability standard, dated March 14, 2005. Staff also presented a verbal summary of that analysis. Petitioners objected that the staff analysis was new evidence and requested an opportunity for rebuttal. The board of commissioners declined, and after conducting deliberations voted to approve the application. The board of commissioners signed the final written decision on April 27, 2005. This appeal followed.

NINTH ASSIGNMENT OF ERROR

Petitioners contend that the written and oral staff analysis submitted at the March 15, 2005 hearing is new evidence submitted after the evidentiary record closed, and that the county erred in refusing to allow parties an opportunity to rebut the staff analysis. Petitioners also argue that the March 14, 2005 analysis is essentially a supplemental staff report, and therefore the county erred in failing to make the March 14, 2005 analysis available at least seven days prior to the hearing, as required by ORS 197.763(4)(b).[2]

The minutes of the March 15, 2005 hearing indicate that county planning staff submitted a five-page document dated March 14, 2005 labeled "Farm Impact Analysis." Record 609-613. At a commissioner's request, staff also verbally summarized the March 14, 2005 document. As noted, petitioners objected to consideration of the written and oral staff analysis and requested an

[2] ORS 197.763(4)(b) provides, as relevant:

> "Any staff report used at the hearing shall be available at least seven days prior to the hearing. If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. * * *"

opportunity for rebuttal. The county declined, conducted deliberations and voted to approve the application.[3]

Respondents argue that, notwithstanding the presence of the March 14, 2005 document in the record, and the indication in the March 15, 2005 minutes that the document was before the board of commissioners, it is not clear that the document was actually submitted to the

[3] The minutes of the March 15, 2005 hearing state, in relevant part:

> "[Community Development Director Bill Campbell] stated that the hearing was closed to public testimony and believed it was the intent of the Board of Commissioners to review the written materials submitted. He again stated that the public hearing had been closed to testimony, and the Board of Commissioners' deliberation should begin, with concurrence from counsel. He explained that the Board of Commissioners could direct any questions for clarification to the applicant, the appellant, county counsel or to staff. Mr. Campbell added the other topic discussed was the independent analysis of the expanded analysis area, completed by department staff and provided to the Board of Commissioners, as requested, on the 14th of March, 2005.
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> "* * * * *
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> "* * * Commissioner Labhart asked Mr. Campbell to summarize the March 14, 2005 document provided to the Commissioners.
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> "* * * * *
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> "Mr. Campbell read the bulleted summary that was attached to the March 14, 2005 letter. He explained that in the summary staff did not see the approval of the non-farm dwelling request materially altering the stability of the overall area. * * * He stated that staff's conclusion was that the findings required for a non-farm dwelling have been satisfied and staff still recommends approval.
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> "[Petitioners' attorney Lois Albright] went on record and objected to the introduction of new evidence. She felt this information should have been part of the January 26th staff report. She stated she had not seen this report and felt it was new evidence that needed to be reviewed and commented on by both the appellants and applicants. She felt it was procedurally out of line for staff to make an independent analysis after the public hearing had been closed. * * *
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> "Chair Hurliman asked counsel for direction. * * *
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> "[County counsel William Sargent] mentioned to Chair Hurliman that he understood Ms. Albright's objection but he could not recommend, based on that objection, not to proceed. He stated that Ms. Albright made her objection and if this issue goes to a higher authority then they will deal with the issue.
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> "Commissioner Josi asked counsel about extending the hearing for one week and Mr. Sargent did not agree. He preferred that the commission make their decision based on the information they had before them. There were no further questions." Record 605-07.

commissioners. According to respondents, no copy of the March 14, 2005 document was provided to either petitioners' attorney or intervenor's attorney until long after the county's final decision. Further, respondents note, the findings addressing petitioners' request for rebuttal refer only to staff's *verbal* analysis, not the written document. Respondents argue that the minutes are in error in suggesting that the March 14, 2005 document was ever submitted to the commissioners. Because no written document was submitted, respondents argue, there can be no possible violation of ORS 197.763(4)(b).

In any case, respondents argue, neither the written or oral staff analysis included new evidence. Finally, even if either analysis included new evidence, respondents argue that the county adopted findings that rely solely on intervenor's analysis to determine whether the application complies with the stability standard.[4] Because the decision makers did not consider the staff analysis

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[4] The county's findings state, in relevant part:

> "At the March 15th final public meeting at which the Board deliberated and made a tentative decision to approve this application, the Ploegs objected to staff's verbal assessment of the parties' final submissions and requested the opportunity to rebut staff's assessment. The Board denied this request for several reasons.
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> "First, the appellants had already received a time extension on their final submission, which included a relatively detailed review and rebuttal of the applicants' revised farm impacts analysis. The extra time afforded the appellants forced staff and the applicant to compress their reviews of the appellants' final submission and required that they prepare their final summaries with less than enough time. This prevented staff from preparing a separate written report on the final submissions and allowed staff only enough time to make an oral presentation to the Board at the March 15th meeting. In the Board's view, the appellants knew when their extension request was granted that staff's final comments would likely be in verbal form at the final meeting with no opportunity for any party to review those comments in advance or rebut them.
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> "Second, staff's comments at the March 15th Board meeting did not take the form a written 'staff report' that might otherwise be subject to the 7-day requirement in ORS 197.763(3)(i). As such, no party was legally entitled to review or rebut staff's comments in this matter.
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> "Third, staff's comments at the March 15 hearing did not constitute new evidence, which might otherwise give rise to a rebuttal right. Instead, staff's comments were an evaluation of the applicant's revised farm impacts analysis and the appellants' rebuttal. It is noteworthy that staff disagreed with aspects of the positions of both parties, but staff reached the same general conclusion as the applicant. This is the proper function of staff, *viz.*, to assess the various arguments presented by both sides and present an evaluation of both, without introducing new evidence.

at all, respondents contend, any procedural error the county may have committed did not prejudice petitioners' substantial rights.

The minutes of the March 15, 2005 hearing clearly indicate that the March 14, 2005 document was submitted to the board of commissioners, and was actually before them.[5] Petitioners clearly objected to both the written and oral staff analysis. We see no basis to assume that those minutes are erroneous. For unexplained reasons, the county's findings addressing petitioners' objection refer only to staff's verbal testimony. However, that is more likely an omission in drafting the findings than an error in the minutes. Further, as far as we can tell from the minutes of the March 14, 2005 hearing, the commissioners accepted and considered the March 14, 2005 document for purposes of reaching their tentative decision to approve the application. Certainly, the minutes reflect no action to reject the document or the staff testimony.

It also seems relatively clear that the March 14, 2005 document, and quite likely the staff oral summary, includes new evidence. The staff analysis differs considerably from intervenor's revised farm impact analysis at Record 707-17 in how it characterizes and analyzes the properties considered, although it reaches the same general conclusion that the application is consistent with the stability standard. For example, the revised analysis uses a study area of 2,120 acres, finds 15

> "Finally, and to the extent that staff's evaluation could be viewed as new evidence or something that might give rise to a rebuttal right, the Board has not placed any weight on staff's comments and does not consider them in this matter. Staff ultimately validated the applicants' approach, but the burden of proof remains with the applicants. In this order, the Board approves this application because the applicants met their burden of proving with substantial evidence in the whole record that all of the approval criteria were met. The applicant's evidence alone—without any input from staff—was and remains sufficient to convince the Board that the approval criteria are met. Staff's comments at the March 15th meeting did not, and do not, change the Board's ultimate conclusion with regard to the approval criteria or its view of the evidence in the record. In that light, the Board gives no weight to staff's comments and disregards them completely in making this decision." Record 583-84.

[5] Respondents do not appear to dispute that, if the March 14, 2005 document was in fact submitted to the commissioners, it is properly viewed as a "staff report" or a supplement to the staff report that is subject to the requirements of ORS 197.763(4)(b). We need not and do not reach that issue, because in our view even if the March 14, 2005 document is subject to ORS 197.763(4)(b) and the county erred in failing to make it available seven days prior to the hearing, that error, if any, is subsumed in the larger procedural error of accepting new evidence without allowing other parties a chance to rebut or respond.

nonfarm dwellings and 12 farm dwellings within the area, and estimates the average size of parcels supporting non-farm dwellings to be 10.62 acres. The staff analysis uses a study area of 2,055 acres, finds 7 non-farm dwellings and 18 farm and farm help dwellings, and estimates the average size of parcels supporting non-farm dwellings to be 19.66 acres.

It is certainly permissible, even during a non-evidentiary phase of the proceedings, for staff to assist the decision maker by expressing the staff position with respect to whether evidence in the record demonstrates compliance with applicable criteria. However, the March 14, 2005 document appears to go far beyond such assistance. The document differs from intervenor's and petitioners' analyses in various particulars, and proposes a different method of analysis reaching very different factual conclusions.

When a local government receives new evidence after the evidentiary record is closed, even from staff, the local government must either: (1) reopen the record to allow other participants an opportunity to respond to the new evidence; or (2) reject the new evidence as untimely. *Wal-Mart Stores, Inc. v. City of Oregon City*, __ Or LUBA __ (2004-124, September 1, 2005) slip op 12 (*citing ODOT v. City of Mosier*, 36 Or LUBA 666, 683 (1999)); *Brome v. City of Corvallis*, 36 Or LUBA 225, 234-35, *aff'd sub nom Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999). Here, the board of commissioners did neither, at least during the March 15, 2005 hearing. At that hearing the board of commissioners noted petitioners' objection, but proceeded to deliberate and reach a tentative decision without explicitly rejecting the March 14, 2005 staff analysis or the verbal summary. As far as we can tell from the minutes of that hearing, the board of commissioners relied in part on that staff analysis and verbal summary to reach its tentative decision. *See* n 3 (county counsel recommendation that the board "make their decision based on the information they had before them").

It is true, as respondents point out, that the county's final written decision includes findings declaring that the board of commissioners did not regard the verbal staff summary as new evidence and, in any case, the board chooses not to consider that summary and instead relies on the

applicant's evidence to support its conclusions regarding compliance with the stability standard. However, those findings address only the verbal summary and not the March 14, 2005 document. In any case, we believe that the time to reject or accept the evidence to be relied upon is before the decision maker deliberates and reaches a tentative decision. The adoption of the final written decision is often a perfunctory task involving little or no actual consideration of the evidence.

The county's failure to either reject the staff analysis or re-open the record to allow petitioners an opportunity to respond to the analysis prejudices petitioners' substantial rights, and requires remand to open the evidentiary record and allow an opportunity for rebuttal. In the usual case, where LUBA sustains a procedural assignment of error that requires remand to re-open the evidentiary record and that will probably require adoption of additional findings, LUBA does not proceed further to address other assignments of error that challenge the existing record and findings. However, it seems unlikely that remand solely under this assignment of error would result in a significantly different evidentiary record, significantly different findings, or a different ultimate conclusion. Further, this case has now been before LUBA three times. We deem it to be more consistent with the statutory policy to reach finality in land use decisions and with sound principles of judicial review to resolve the remaining assignments of error.

The ninth assignment of error is sustained.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Under these assignments of error, petitioners argue that the county misconstrued the applicable law, made inadequate findings not supported by the record in concluding that the subject property is "generally unsuitable" for the production of farm crops or livestock.

OAR 660-033-0130(4)(c)(B) allows approval of a dwelling in conjunction with farm use outside the Willamette Valley if the dwelling is situated on a parcel, or portion of a lot or parcel, that is "generally unsuitable land for the production of farm crops and livestock."[6] The county must

[6] We will follow the parties in using the shorthand phrase "generally unsuitable for farm use." OAR 660-033-0130(4)(c)(B) requires findings that:

consider "the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract." The rule states that if a lot or parcel "can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch," then the lot or parcel is not generally unsuitable. The rule also states a presumption that a lot or parcel or portion thereof is suitable for farm use if, in Western Oregon, it is composed predominantly of Class I-IV soils.

A. The County's Findings

The county's finding that the subject property is generally unsuitable for farm use is based on the predominant nonfarm soils and slopes, the potential for erosion if cultivated or grazed, and recent history of attempted farm use.[7] The county's findings first note that only 33 percent of the

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> "(i) 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 or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel or portion of a lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land; and
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> "(ii) A lot or parcel or portion of 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 or portion of a lot or parcel can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch, then the lot or parcel or portion of the lot or parcel is not 'generally unsuitable.' A lot or parcel or portion of a lot or parcel is presumed to be suitable if, in Western Oregon it is composed predominantly of Class I-IV soils or, in Eastern Oregon, it is composed predominantly of Class I-VI soils. Just because a lot or parcel or portion of a lot or parcel is unsuitable for one farm use does not mean it is not suitable for another farm use[.]"

[7] The county's findings state:

> "The Board finds that the property is generally unsuitable for any farm uses, including grazing, hay or silage production, or manure disposal primarily because of its predominance of poor soils (*i.e.*, >50%), adverse terrain and land conditions (*i.e.* steep slopes), and the dominant vegetation (*i.e.*, second growth trees). The property's primary shortcomings are the soil and slopes—two characteristics that generally are not found elsewhere in the survey area and tend to characterize the remnants of the Edmunds Farm. On these issues, the Board accepts and adopts the discussion in the February 10, 2005 (p5) and March 8, 2005 letters (pp 3-4), from the applicants' lawyer.
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> "A significant difference between the applicants' revised Farm Impacts Analysis and previous iterations is that size and location are not factors in our determination that this parcel is generally unsuitable for farm use. The parcel is suitably located in a farm area and appears to be large enough to serve as a feed lot, manure disposal site or for the production of hay or silage—much as the opponents suggest. However, the parcel's poor soils, steep slopes and

soils on the subject property are Class I-IV agricultural soils, and concludes therefore that the presumption in OAR 660-033-0130(4)(c)(B)(ii) evaporates and shifts to an assumption that the property is generally unsuitable for farm use.[8] The decision then discusses language from the 1969

> predominant tree growth that remains on much of the property, in our view, preclude those and all other farm uses.
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> "State law presumes that in Western Oregon land is suitable for farm use if it is composed predominantly of Class I-IV soils. If the lot is not composed predominantly of Class I-IV soils, as is the case here, then the presumption evaporates and shifts to an assumption that the property is generally unsuitable for farm use because the property is predominantly nonfarm soils. In this case, the soils analysis shows that this parcel's soils are predominately not suitable for farm use. Approximately 67% of the site, or 17.2 acres of the 25.6 acres, is composed of Winema silt loam (WmF) soil. The Soil Conservation Service [SCS] classifies WmF soils as Class VIe soils. These soils are generally found on slopes ranging from 20% to 40%. On the subject property the steep hillsides and knoll in the center of the property are WmF soils.
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> "The 'Soils Survey, Tillamook, Oregon,' published by the USDA [SCS], reports that Class VI soils have 'severe limitations that make them generally unsuitable for cultivation' and that limit their use to pasture or range, woodland or wildlife cover. Subclass VIe soils are 'severely limited, chiefly by risk of erosion, if the protective cover is not maintained.' * * * Because 67% of the subject property is Class VIe soil, *i.e.*, not farm soils, the Board finds that the subject property is predominantly unsuitable for farm use. This conclusion is corroborated by the applicants' testimony that farming efforts on the property have been fruitless for more than 20 years.
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> "Approximately 10% of the property, or 2.5 acres, mainly at the northwest and southwest corners, are classified as Winema silt loam (WeD) Class IVe soil. * * * These soils are also '*subject to very severe erosion*' if they are not cultivated and not protected. Even though the Class IVe soils barely qualify as 'farm soils' their limitations require them to be cultivated in order to achieve their agriculture potential. Here, however, the predominant farm use in this part of Tillamook County is dairy cattle grazing not cultivation. If grazed rather than cultivated, Class IVe soils are subject to 'very severe erosion.' The steep slopes on the property exacerbate this problem by making cultivation even more difficult and by facilitating erosion. The Board finds this combination of circumstances contributes to the conclusion that the property is generally unsuited for farm uses.
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> "Approximately 23% of the property, or 5.98 acres, in the southwest corner of the property along Redberg Road, is classified as Winema silt loam (WeC) a Class IIIe soil type. Class IIIe soils also have '*severe limitations that reduce the choice of plants*' or require special conservation practices, or both, are subject to '*severe erosion*' if cultivated and not protected. Consequently, of those portions of this steeply sloped site that have suitable farm soils, those soils have documented severe erosion potential, which makes these soils of limited utility for the predominant farm practice in the area, *i.e.*, cattle grazing." Record 587-88 (underline and italics in original, footnotes omitted).

[8] Petitioners do not assign error to the county's belief that a parcel composed predominantly of Class V and above soils in western Oregon is presumed to be generally unsuitable for farm use. However, we question whether that view is correct. While the rule's presumption that land is generally suitable certainly evaporates, we are aware of no authority that the presumption shifts to the opposite.

Soil Conservation Service (SCS) soil survey for the county indicating that Class VIe soils are suitable only for pasture or woodland and are "severely limited" by risk of erosion if a protective cover is not maintained.[9] The decision cites the SCS survey for the proposition that even the Class IVe soils on the property are subject to "very severe erosion" if they are *not* cultivated. Noting that grazing rather than cultivation is the predominant farm use in the county, the county reasons that the Class IVe soils will erode if grazed rather than cultivated. Accordingly, the county concludes that the presence of Class IVe soils on the property supports a finding that the property is generally unsuitable for farm use. With respect to the Class IIIe soils, the county notes language from the SCS survey indicating that such soils are subject to erosion if *cultivated* and not protected. Given the potential for "severe erosion," the county concludes, the Class IIIe soils on the property are of "limited utility" for the predominant farm practice, grazing.

In addition, the county finds "particularly persuasive" intervenor's testimony relating the efforts of an adjoining dairy farmer, Seymour, to graze cattle on the property on two occasions in 2004. According to intervenor, on both occasions the available forage on the property was

[9] The SCS is now the Natural Resources Conservation Service (NRCS).

exhausted in a matter of days, and the cattle were removed.[10] From this and other evidence, the county concluded that the subject property is generally unsuitable for farm use.[11]

As noted, one basis for our remand of the 2002 decision was to consider whether the subject property could be used in conjunction with adjoining dairy farms, pursuant to OAR 660-033-0130(4)(c)(B). On remand, petitioners submitted an affidavit from one of the adjoining farmers, Higdon, whose family leased the subject property in the 1960s and 1970s, stating that the farmer believes that the subject property could have 20 acres of pastureland on it, which, if he owned it, would allow him to expand his herd by at least 40 head. Record 846. Two other dairy farmers in the area submitted affidavits averring that the subject property would be a useful addition to their or other dairy farms. The county, however, declined to consider that evidence, or the issue of conjoined use generally, because it found that the subject property is generally unsuitable for farm use regardless of its size or location. The county found that, although the property is "large enough to serve as a feed lot, manure disposal site or for the production of hay or silage," because of poor soils and the other limitations described above the property is unsuitable for farm use even if used in conjunction with adjoining farms.

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[10] The findings state, in relevant part:

> "On the issue of this parcel's capacity for farm use, we find to be particularly persuasive the current owner's actual attempts to graze cattle. In a letter submitted into the record and testimony given at the January 26th hearing, [intervenor] testified about Rob Seymour's use of this land to graze 70 calves on multiple occasions in 2004. His unrebutted testimony shows that the calves were first grazed in June on the portion of the property that is flat and has the best (farm) soils along the south and west sides (approximately 6 acres). The calves apparently exhausted the available forage in six days, and Mr. Seymour was forced to remove the calves. He tried again in August, but this time on the entire parcel. The evidence shows that the forage was exhausted in only four days and the animals had to be removed again. This is actual evidence of this parcel's farm use potential in combination with a nearby farm operation. Based on this and other evidence, we find that this parcel is generally unsuitable for farm uses for the above-stated reasons, none of which includes size or location. * * *" Record 590.

[11] The county also cited the apparent lack of farm use on petitioners' property, which adjoins the subject property and shares some of the same soils and slopes, as evidence that the subject property is generally unsuitable for farm use. We address that issue under the eighth assignment of error.

For the following reasons, we generally agree with petitioners that the county's analysis is flawed in several particulars, and that its ultimate conclusion that the property is generally unsuitable for farm use is not supported by substantial evidence.

B. Generally Unsuitable for the Production of Farm Crops or Livestock

Under the first and second assignments of error, petitioners challenge the county's conclusion that the subject property, considered in isolation, is generally unsuitable for farm use, considering terrain, adverse soil or land conditions, drainage and flooding, and vegetation. According to petitioners, the county committed several analytical errors, failed to address specific issues raised by petitioners, and adopted findings not supported by substantial evidence in the whole record. Respondents contend that the county conducted the proper analysis under OAR 660-033-0130(4)(c)(B) and that its conclusions under the generally unsuitable standard are supported by substantial evidence.

1. Soil Classifications

A significant factor in the county's analysis was its view that the three soil types on the property, including the Class IIIe and IVe soils, have limited value for pasture, particularly given the potential for erosion on steep slopes. That view is based on language from the SCS soil survey. Petitioners argue that the county erred in relying on that language, and cite to affidavits from neighboring farmers and a letter from the regional NRCS soil conservationist disputing the county's claim that grazing on the three soil types poses an erosion risk. Petitioners note that the adjoining dairy farms both share some of the same soil types and slopes as the subject property, and use those soils for pasture without erosion. Petitioners also cite to affidavits from neighboring dairy farmers indicating that even steeper slopes than those found on the subject property can, with good husbandry, be used for pasture without risk of erosion.

We agree with petitioners that the county's reliance on the language in the SCS survey is overstated, at least, and plainly erroneous in one particular. The language cited is not found in the specific soil descriptions of the Winema series, found at Record 138, but rather in a general

description of soil classes, duplicated at Record 131. With respect to Class VI soils in general, the SCS survey states that such soils are "generally unsuitable for cultivation" and that their use is limited to pasture, range or woodland. *Id.* Sub-Class VIe soils are "severely limited, chiefly by risk of erosion if the protective cover is not maintained." *Id.* The SCS describes a further sub-class that includes the soil that predominates on the subject property as consisting of "[d]eep to moderately deep, well-drained soils on rolling natural grass-covered uplands." *Id.* Nowhere in that description does the SCS survey suggest that Class VIe soils are unsuitable for grazing, or that grazing is a risk factor for erosion. On the contrary, the specific description of the Winema (WmF) soils that predominate on the subject property states that "[i]t is used mainly as native pasture for sheep." Record 138.

The county's characterization of the Winema (WeD) Class IVe soils on the property is simply not supported by the SCS survey. The initial farm impact analysis cites the general description of the Class IVe soils at Record 131 as stating that such soils are subject to very severe erosion "if they are *not* cultivated and not protected. See Record 131[.]" Record 1044 (emphasis added). That statement is repeated in the applicant's submittals and ends up in the county's findings. *See* n 7 (finding that the Class IVe soils on the subject property must be cultivated to prevent erosion, and thus there is potential for very severe erosion if the soils are grazed rather than cultivated). However, the description of Class IVe soils at Record 131 says just the opposite, that Class IVe soils are "subject to very severe erosion *if they are cultivated* and not protected." Record 131 (emphasis added). The decision inserts a negative that as far as we can tell is not in the original, and relies on that negative to conclude that the Class IVe soils on the property have essentially no farm use.

The county's discussion of the Winema (WeC) Class IIIe soils that comprise 23 percent of the subject property accurately quotes the SCS to the effect that such soils are subject to severe erosion "if they are cultivated and not protected." Record 131. However, the county's findings go on to conclude that Class IIIe soils have "documented severe erosion potential, which makes these

soils of limited utility for the predominant farm practice in the area, *i.e.*, cattle grazing." Record 588 (quoted at n 7). Again, nothing in the SCS cited to us indicates that grazing on Class IIIe soils is a risk factor for erosion. The specific description for Winema (WeC) soils states that "the hazard of erosion is slight" and the soil "is used almost entirely for improved pasture and hay." Record 138. Further, as petitioners point out, both the WeD and WeC soils that comprise one-third of the property are classified as high value farmland in the county if used in conjunction with a dairy operation under certain circumstances, and both soils are found on the adjoining dairy farms, where they are used for pasture. In addition, petitioners cite to the letter from the NRCS soil conservationist, stating that the principal risk of erosion stems from cultivation, and that grazing greatly reduces the risk, because it maintains a permanent vegetative cover. Record 876. Petitioners also cite affidavits from neighboring farmers, indicating that they use the same or similar soils with similar or steeper slopes for grazing without erosion.

In sum, the county's decision misstates the SCS soil classification descriptions to erroneously inflate the risk of erosion from grazing the three soil types on the property. If anything, the SCS soil survey is consistent with the affidavits and other evidence submitted by petitioners, to the effect that the soils on the property are suitable for grazing.

2. Recent History of Grazing

The county found "particularly persuasive" intervenor's testimony regarding Seymour's use of the property for grazing on two occasions in 2004. *See* n 10. The first attempt, in June 2004, involved 70 400-pound calves on the six-acre portion of the property with Class IIIe soils. Intervenor testified that Seymour told him that the forage on that portion was exhausted in six days. Record 686. The second attempt involved an unknown number of cattle on the entire property, in August 2004, and intervenor testified that Seymour told him that the forage was exhausted in four days.[12] *Id.* The county cited this experience as "actual evidence of this parcel's farm use potential"

[12] Apparently, Seymour also grazed cattle on the property in January 2005. For some reason, the findings do not discuss that occasion.

and relied on that experience as a partial basis for its conclusion that the subject property is generally unsuitable for farm use. Record 590.

Petitioners note that intervenor's testimony regarding Seymour's experience is hearsay, and argues in any case that the substance of that testimony is rebutted by affidavits from neighboring farmers, as well as the long historical use of the property for grazing. Petitioners cite to affidavits from Higdon, an adjoining dairy farmer, noting that the pasture on the subject property has not been managed or improved for productivity, and relating his experience when it has been improved with fertilizer.[13] Higdon also submitted an affidavit citing his family's history in farming the subject property, the history of grazing on the property since its creation in 1984, and opining that the property could be used in conjunction with his farm operation. Record 843-47. That affidavit relates a conversation with Seymour in January 2005 indicating that Seymour planned to run his cows on the property for a month or so to rest his pastures, and that Seymour regretted that one or both of the two farmers had not purchased the subject property and split it between their farms.

Respondents argue that hearsay is allowed in land use proceedings and may be relied upon as substantial evidence. According to respondents, the county properly relied on intervenor's testimony regarding Seymour's experience grazing the property, as well as the experiences of Korevaar, who was unable to pasture his horses and cattle year-round on the property without supplemental feed.

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[13] Higdon submitted a "rebuttal affidavit" responding in part to intervenor's testimony, stating, in relevant part:

> "All dairy farmers in Tillamook County import some hay. Any grass production helps to keep down the amount of imported hay. The real issue here is management and fertilization. This property has not been managed to increase production. In the past, Mr. Korevaar asked me to spread manure on his property, if I had any to spare. While I really didn't have any 'extra' manure to spare, I did haul a few loads and apply them to the property. The results were as I expected—dramatic. There were green lush stripes where the manure was applied. My experience across the fence has taught me that this land can be quite productive, the soil just needs nitrogen and organic matter." Record 673.

Respondents are correct that the rules of evidence do not apply to land use proceedings, and that hearsay evidence may constitute substantial evidence on which a local government can rely to reach a decision. *Reagan v. City of Oregon City*, 39 Or LUBA 672, 678-79 (2001). That said, we tend to agree with petitioners that intervenor's testimony regarding Seymour's grazing experience does little by itself to support the county's conclusion that the subject parcel is generally unsuitable, and what it does contribute is significantly undercut by other evidence in the record. There is no affidavit or statement from Seymour in the record, and intervenor admittedly is not a farmer. Intervenor's testimony suggests that Seymour's experience proves that the subject property produces substandard amounts of forage. However, the findings and the record do not provide a comparison or standard against which to measure the forage capacity on the subject property. For all the record shows, it may be entirely reasonable to expect that 70 400-pound heifers will in six days exhaust six acres of forage on even the best soils in the area. Intervenor's apparent view that Seymour was discouraged in his farm use of the property is belied by Higdon's sworn statement that Seymour planned to run his cattle on the property for a month or so in January 2005 and that he regretted that he or Higdon did not own the property. As discussed below, Higdon's affidavits state that both he and Seymour have expressed interest in acquiring the subject property for use in conjunction with their farms, if it could be acquired at farm values and not for its value as the site for a non-farm dwelling. *See* n 15.

In addition, as Higdon and other farmers noted, the pasture on the subject property has not been maintained or improved for over 20 years. Higdon related his experience that fertilizing the subject property yields "dramatic" improvements in forage production. As we stated recently in a similar context,

> "Where land that was once maintained at some level of agricultural productivity has suffered in recent years due to neglect, it is inappropriate to take such neglect into account [for purposes of determining whether land is agricultural land] under OAR 660-033-0020(1)(a)(B). A reasonable rancher, for example, would maintain fences, control brush and weeds and take similar appropriate measures to maintain the productivity of the property. The county erred to the extent it took as its baseline the neglected condition resulting from failure to provide such maintenance."

Wetherell v. Douglas County, ___ Or LUBA ___ (LUBA No. 2004-045, September 8, 2005), slip op 17, *appeal pending*.

We see no reason to reach a different conclusion in applying the generally unsuitable standard at OAR 660-033-0130(4)(c)(B). The focus under the generally unsuitable standard is whether the land can produce crops or livestock, not whether a particular farmer can do so. *Moore v. Coos County*, 31 Or LUBA 367, 350, *rev'd and rem'd on other grounds* 144 Or App 195, 925 P2d 927 (1996). That is, the focus is on what the land is capable of under appropriate agricultural management. Thus, evidence that land once maintained as pasture but neglected in recent years produces what may be a relatively small quantity of forage says little about its *capacity* for producing forage, particularly where there is evidence that the forage capacity would dramatically improve if the land were appropriately managed.

3. Conclusion

Reduced to essentials, the evidence the county chose to rely on consists of the SCS soil survey, the current condition of the property, and the statements of intervenor and his predecessor, neither of whom claim to be farmers. The county's conclusion that the subject property, considered in isolation, is generally unsuitable for farm use is based in large part on several misreadings of the SCS soil survey. The remaining evidence the county relied upon is not particularly compelling. That evidence might or might not constitute substantial evidence that the property is generally unsuitable for farm use, if it were the only evidence in the record on that issue. However, petitioners submitted detailed affidavits and evidence from neighboring farmers and other agricultural experts, attesting that whatever its limitations and current condition the subject property is suitable for farm uses it has historically supported and that occur on neighboring farms around the property. In contrast, we are not cited to a single farmer or other agricultural expert who submitted testimony in support of intervenor's claim that the property is generally unsuitable for farm use.

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v.*

State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); *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 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).

In our view, after taking into account the county's misreading of the SCS soil survey, and considering all the evidence in the record, a reasonable person would not rely on the evidence the county did to conclude that the property is generally unsuitable for farm use.

C. Use in Conjunction with Other Lands

Under the third assignment of error, petitioners argue that the county erred in failing to consider whether the subject property could be used in conjunction with neighboring commercial farms. Relatedly, under the first and second assignments of error, petitioners argue that the county erred in failing to consider whether the subject property is suitable for manure disposal under a Confined Animal Feeding Operation (CAFO) permit. Because both issues involve use of the property in conjunction with other lands, we address these arguments together.

1. Whether the County Must Consider Conjoined Use

As noted, we remanded the 2002 decision for the county to consider whether the property could be used in conjunction with the adjacent dairy farms, pursuant to OAR 660-033-0130(4)(c)(B)(i) and (ii). Citing to *Moore v. Coos County*, 31 Or LUBA at 351, we stated that "the county must consider conjoined use, unless it first finds that the parcel is generally unsuitable for farm use, regardless of size or location." On remand, the county took the approach suggested in the above-quoted sentence, and attempted to avoid considering conjoined use by first finding that the subject property is generally unsuitable for farm use, regardless of size or location. *See* n 7, second paragraph. Apparently as an alternative, the county went on to consider whether the

subject property could reasonably be used in conjunction with nearby farms, and concluded that it could not.[14]

Petitioners argue that the county is required to consider conjoined use, and that the findings and record fail to demonstrate that the subject property cannot reasonably be put to farm use in conjunction with adjacent or nearby farms. According to petitioners, the county in fact relied on the size of the subject property, its protestations to the contrary notwithstanding. Noting that the subject parcel was used once for pasture and growing hay as part of a larger farm, petitioners contend that none of the salient characteristics of the land— its soil and slopes—changed in 1982 when that larger farm was partitioned. If the subject property cannot be profitably farmed now, petitioners argue, it can only be due to its reduced size. Consequently, petitioners argue, OAR 660-033-0130(4)(c)(B)(i) and (ii) require the county to consider conjoined use, and the county cannot ignore the evidence indicating that neighboring farmers are willing to use the property in conjunction with their farms.

Respondents argue that LUBA has consistently held that a county need not consider conjoined use under OAR 660-033-0130(c)(B)(i) and (ii) if size and location are not factors in the county's conclusion that the property is generally unsuitable. *See, e.g., Epp v. Douglas County*, 46 Or LUBA 480, 485 (2004). Even if consideration of conjoined use is required, respondents

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[14] The county's decision states, in relevant part:

> "Statements submitted by the opponents indicating potential use that nearby farmers might make of the property are limited to grazing, producing hay and silage and spreading manure. However, those uses would be severely limited by the predominant steep slopes and well-developed tree cover. If the trees were removed for grazing, hay production or manure disposal, the soil manual indicates that the soils are highly erosive—a characteristic that would lead to damaging results in terms of soil loss and runoff from the parcel to nearby streams and farms. As it stands, however, the record indicates there has been no legitimate interest in leasing or farming this property by any neighboring farmer since the property was split in 1980. The affidavits submitted by the opponents from nearby farmers do not change that conclusion. These affidavits represent after-the-fact statements of what some surrounding farmers might be willing to do if asked. However, the record contains no evidence of any actual offers to use, farm, lease or purchase this land and put it to a legitimate farm use. * * *" Record 589-90 (underline in original).

argue that in the findings quoted at n 14 the county in fact concluded that the subject property could not reasonably be used in conjunction with other lands.

OAR 660-033-0130(4)(c)(B) requires the county to consider the "location and size of the tract," among other factors. The last sentence of OAR 660-033-0130(4)(c)(B)(i) requires counties to consider conjoined use where the subject property is considered unsuitable "solely because of size or location." Respondents are correct that in *Epp*, *Moore* and other cases we have read the last sentence of OAR 660-033-0130(4)(c)(B)(i) and similar statutory language to implicitly absolve counties from the obligation to consider conjoined use where the county does not take size or location into consideration. We now question whether those cases correctly construe the rule.

The last sentence of OAR 660-033-0130(4)(c)(B)(i) does not state, at least explicitly, that a county need not consider conjoined use where it does not take size or location into account. As noted, the rule *requires* counties to take size and location into account. Further, OAR 660-033-0140(4)(c)(B)(ii) states in unqualified terms that if a lot or parcel "can be sold, leased, rented or otherwise managed as part of a commercial farm or ranch," that lot or parcel is not generally unsuitable for farm use. In addition, we tend to agree with petitioners that it will be a rare circumstance where size and the proximity of farm operations on other lands do not play some role in any conclusion that property is generally unsuitable for farm use. Indeed, unless land has almost no intrinsic agricultural value, the suitability or unsuitability of that land for farm use is mostly a function of its size and location. For example, one-third of the subject property consists of Class III and IV agricultural soils that, under specified circumstances, can be classified as high-value farmland, and according to the SCS survey even the non-agricultural soils support grazing. There seems little doubt that if the relative proportion of soils and other characteristics on the property remained the same, but the property were double or triple its current size, it would be considerably more difficult to adopt a sustainable conclusion that the entire parcel is unsuitable for farm use.

Nonetheless, we need not and do not consider in the present case whether *Epp* and our other cases correctly construe OAR 660-033-0130(4)(c)(B). We held above that the record and

the decision fail to demonstrate that the property is generally unsuitable for farm use, considering the other factors specified in the rule,—terrain, adverse soil or land conditions, drainage and flooding, and vegetation. It follows that, if the subject property is generally unsuitable, it can only be so due to its size or location. Under that circumstance, there is no question that OAR 660-033-0130(4)(c)(B) requires the county to consider conjoined use. Accordingly, we turn to the county's alternative finding that the property cannot reasonably be used in conjunction with other lands.

As noted, petitioners submitted affidavits from several area farmers opining that the subject property would be a valuable addition to dairy farms in the area, for grazing, early pasturing in spring when lowlands are too wet, silage production, and manure disposal. The most specific is Higdon's, who states his interest in acquiring or using the property in conjunction with his adjoining dairy farm, and describes how it could be so used. The county's finding, quoted at n 14, criticizes these affidavits for failure to include "evidence of any actual offers to use, farm, lease or purchase this land and put it to a legitimate farm use." However, we do not see that evidence of actual offers to buy or lease land is essential to a determination whether land can reasonably be used in conjunction with other lands. As Higdon's affidavit explains, neither intervenor nor his predecessor has shown any interest in selling the subject property for its value as farm land, which Higdon estimates to be about half its value as a site for a non-farm dwelling.[15] We agree with petitioners

[15] Higdon's rebuttal affidavit states, in relevant part:

> "Mr. Dechert has owned the property since April 2004. Mr. Dechert has not shown any indication that he was desirous of selling or leasing the land since he purchased it in April 2004. Therefore, it is not surprising that he has not received any offers since the purchase. Furthermore, I would like to state that at no time since this parcel was created in 1984 has this land been for sale at what I would consider to be farm value prices. This is understandable since the owners have consistently valued this parcel as a buildable lot." Record 675.
>
> "Following the purchase of this property by Mr. Dechert in April 2004, Mr. Seymour stopped by my house and said that we should have gone in together and purchased the property and split it between our farms. Both the Seymours and myself have been interested in adding this property to our farms. The concern, of course, is cost. When people are willing to pay twice what the property is worth on the speculation that they can build a house, it really prevents this land from being utilized as farmland." Record 676.

that the county has not demonstrated that the property cannot reasonably be used in conjunction with adjoining or nearby dairy farms.

a. Confined Animal Feeding Operation (CAFO) Permits

Finally, petitioners argue that the county failed to address whether the subject property could be used for manure disposal under a CAFO permit. As petitioners explain, the number of animals that a dairy farm can support is limited by CAFO permits, which ensure that the farmer's land can support disposal of the manure the herd generates, particularly when the herd is confined in barns during the winter. The more land under a farmer's control that is suitable for manure disposal, the larger the herd the farmer can have. The record includes a letter from the CAFO program manager at the state Department of Agriculture, stating that he is familiar with the subject property and that it "would have agricultural value" if included in a CAFO permit for a dairy farm. Record 660. The record also includes affidavits from Higdon and other farmers in the area stating that the subject property is valuable farm land for that reason, because it would allow any dairy farmer, even those whose farms do not adjoin the property, to expand their herd. Record 676, 846, 882, 893. One of the affidavits explains that low-lying lands often cannot be used for manure disposal and that higher elevation lands, such as the subject property, are therefore especially valuable for that purpose. Record 882.

Petitioners contend that the county failed to address the issue of whether the subject property is suitable for manure disposal under a CAFO permit, other than to claim that any farm use including manure disposal would be "severely limited by the predominant steep slopes and well-developed tree cover." Record 589; *see* n 14. Petitioners cite to evidence that much of the subject property is suitable for manure disposal notwithstanding the slopes, and argue that the reference to "well-developed tree cover" must refer to the condition of the property prior to its recent logging, which removed many of the trees from the steepest slopes.

Respondents do not specifically respond to petitioners' arguments regarding the property's suitability for use for manure disposal under a CAFO permit. As far as we can tell from the

affidavits and other evidence cited to us, manure disposal is a critical element of the agricultural economy in the county, an essential farm practice that also introduces fertilizer to the soil and increases soil productivity. We agree with petitioners that the county's findings do not adequately explain why the subject property, or most of it, is unsuitable for manure disposal under a CAFO permit. There is no evidence, other than the county's misreading of the SCS survey, suggesting that use of the property for grazing or manure disposal presents a risk of erosion. The county's speculation that logging the trees on the property will cause erosion has no basis in the record that is cited to us, and is belied by affidavits stating that the logging that occurred in 2004 on the steepest slopes on the property caused no erosion. Record 846, 882.

In sum, given the importance of manure disposal and CAFO permits for dairy farming—overwhelmingly the dominant agricultural industry in the county—if the property is suitable for manure disposal that fact would seem to have at least some bearing on whether the property is generally unsuitable for farm use. The county erred in failing to adequately consider the property's suitability for manure disposal under a CAFO permit.

The first, second and third assignments of error are sustained.

FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR

These assignments of error challenge the county's conclusion that the proposed nonfarm dwelling will not "materially alter the stability of the overall land use pattern," under OAR 660-033-0130(4)(c)(C) and 660-033-0130(4)(a)(D).[16] Under the administrative rule, the county must

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[16] OAR 660-033-0130(4)(a)(D) sets out the procedures and standards for determining whether the material stability standard at OAR 660-033-0130(4)(c)(C) is satisfied. It provides, in relevant 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 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

among other things identify a study area of 1000 to 2000 acres, describe the types of uses and dwellings within the area, and determine the number of potential new nonfarm or lot-of-record dwellings that could be approved in the area and the number of potential new parcels for nonfarm dwellings. Finally, the county must determine whether the cumulative effect of the proposed nonfarm dwelling, existing nonfarm dwellings and potential nonfarm dwellings will make it "more difficult for the existing types of farms in the area to continue operation" for several listed reasons, including "diminished opportunities to expand, purchase or lease farmland." *See generally Elliott v. Jackson County*, 43 Or LUBA 426, 436-42 (2003) (describing the analysis required under OAR 660-033-0130(4)(a)(D)).

The county's 2002 approval did not specifically address the requirements of OAR 660-033-0130(4)(a)(D). As an initial problem, the county's analysis was based on a study area of only 276 acres. Accordingly, we remanded for the county to identify and base its analysis on the 1000 to 2000-acre study area required by OAR 660-033-0130(4)(a)(D)(i). *Ploeg I*, 43 Or LUBA at

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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. 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."

15-16. Because the analysis resulting from a 1,000 to 2,000 study area would likely differ considerably from that based on a 276-acre study area, we did not reach the remainder of petitioners' challenges to the county's conclusion that the application satisfied the stability standard. *Id.*

When the application was re-activated in October 2004, intervenor submitted a farm impact analysis based on a study area over 2000 acres. Petitioners' consultant, a former county planning director, reviewed the October 2004 analysis and identified a number of analytical errors. Record 855-70. In response, intervenor's attorney revised the farm impact analysis and submitted the revised analysis to the county in a letter dated February 10, 2005. Record 707-40. The revised analysis attempts to correct many of the errors identified by petitioners' consultant.[17] The county's final decision adopts the February 10, 2005 letter as the basis for its conclusion that the stability standard is met. The decision also adopts the applicants' final written argument, a letter from intervenor's attorney dated March 8, 2005, as part of its analysis.

The revised farm impact analysis states that 1,077 acres of the study area consist of nine farm tracts that are active dairy farms, zoned F-1, with a total of 12 farm dwellings. The remaining 1,042 acres are also resource-zoned, and include approximately 43 tax lots, including 13 tax lots totaling 438 acres that are part of a wildlife refuge owned by the federal government and leased for grazing by neighboring farmers. Of the remaining 30 tax lots, 15 are developed with dwellings, and 15 are vacant. The revised analysis characterizes all 15 of those dwellings as nonfarm dwellings, whereas petitioners characterize only nine of them as nonfarm dwellings. Of the 15 vacant tax lots, the revised analysis finds that only one parcel other than the subject property is likely to develop with a nonfarm dwelling or a lot of record dwelling. The analysis concludes that the "predominance of nonfarm dwellings in the study area will not change significantly with the addition of one more nonfarm dwelling." Record 709.

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[17] For example, the original study area and analysis apparently included lands zoned for rural residential use, contrary to OAR 660-033-0130(4)(a)(D)(i). The revised analysis does not.

Based on the revised analysis, the county concluded, in relevant part:

> "From this information and analysis, we conclude that about half of the study area is composed of a few (9) large farm units with approximately 12 farm related dwellings. The balance of the study area is made up of small lots (30) that are not put to farm use and contain approximately 15 nonfarm dwellings. Even though some lots and some dwellings could be categorized as either farm or nonfarm, the above-described general pattern remains. Given the requirements of state law for dwellings on resource land we agree with the applicants' conclusion that only one lot in the study area is clearly eligible for a dwelling, *i.e.*, Horn's property (TL 801) for which the County approved a nonfarm dwelling in 1992 (CU-92-44a) and which has since expired without being vested. All other lots and parcels would have to meet either the generally unsuitable for farm use requirement, nonfarm soil requirement, and/or could not be in actual resource use. The soil map, lot size and other data in the record appear to preclude all other lots in the study area for a dwelling for one or more of these reasons." Record 592.

Petitioners contend that the county misconstrued OAR 660-033-0130(4)(a)(D) in a number of particulars, and adopted inadequate findings that are not supported by substantial evidence.

A. OAR 660-033-0130(4)(a)(D)(i)

Under the fifth assignment of error, petitioners challenge the study area identified by the county, arguing that the county fails to explain how the "selected area is representative of the land use pattern surrounding the subject parcel." According to petitioners, the study area identified in the analysis skews the number of parcels and the average parcel size to emphasize nonfarm uses in the area. Petitioners argue that a more "logical" study area with different boundaries would more accurately reflect the overall land use pattern surrounding the subject property, which petitioners characterize as consisting primarily of active dairy farms.

Respondents argue, and we agree, that there are many ways a 2,000-acre study area could be configured, with an almost infinite variety of different boundaries. Petitioners have not demonstrated that the study area chosen by the county is inconsistent with OAR 660-033-00130(4)(a)(D)(i). The subject property is located in the approximate middle of a large, roughly square study area, in an area with a range of mixed topography and land uses, including forested

hills, floodplains, wildlife refuges, large dairy farms, and smaller parcels. Under such circumstances, many different configurations could be "representative of the land use pattern surrounding the subject property." We cannot say that the study area chosen by the county is inconsistent with the administrative rule.

B. OAR 660-033-0130(4)(a)(D)(ii)

Under the fourth and sixth assignments of error, petitioners contend that the county erred in several respects in determining the potential number of nonfarm or lot-of-record dwellings and the number of potential new parcels that could be approved, under OAR 660-033-00130(4)(a)(D)(ii).

With respect to potential new parcels created for nonfarm dwellings, petitioners argue that the county made no attempt to address that question. Petitioners appear to be correct. ORS 215.263(4) sets out two means by which new parcels for nonfarm dwellings may be created in western Oregon outside the Willamette Valley. Under ORS 215.263(4)(a) and its implementing rules, counties may approve two new parcels for nonfarm dwellings from a parent parcel that exceeds the minimum size established under ORS 215.780, generally 80 acres. Under ORS 215.263(4)(b), counties may approve two new parcels for nonfarm dwellings from a parent parcel that is less than the minimum size but equal to or larger than 40 acres, where the new parcels are, among other things, composed of at least 90 percent Class VI through VIII soils. It is unclear to us whether any potential new parcels could be created from parent parcels in the study area under ORS 215.263(4)(a) or (b), because nothing cited to us in the decision or the revised analysis considers or resolves that question.[18]

[18] The closest discussion we can find is the following passage from the challenged decision:

> "The most significant feature of this application that leads us to conclude that this dwelling will not materially alter the stability of the overall land use pattern of the study area is the fact that no new parcel is created. The dominant features of the land use pattern appear to be the lotting pattern, *i.e.*, the number and size of parcels in the study area, and the presence of dwellings. In our view, the creation of substandard sized lots would destabilize this land use pattern because it would increase the parcelization and create new dwellings on small nonfarm lots. * * * This application * * * will not create a new substandard sized parcel. Approval of this nonfarm dwelling will not change the lotting pattern of the area. * * * [T]he credible

Respondents contend that the county implicitly addressed that issue when it found, as discussed below, that the prevalence of high-value farm soils in the area makes it unlikely that any existing parcel could qualify for a nonfarm dwelling under the generally unsuitable standard or under the standards governing lot-of-record dwellings. According to respondents, in order to approve a partition under ORS 215.263(4)(a) or (b), the county must find that the *parent parcel* is generally unsuitable for farm use. However, that is not the case. Both ORS 215.263(4)(a)(E) and 215.263(4)(b)(F) require only that "[t]he parcels for the nonfarm dwellings are generally unsuitable" for farm use, and do not require a finding that the parent parcel is generally unsuitable. Petitioners apparently asserted below, and it seems likely, that even the large dairy farms around the subject property include small areas of poor soils or steep slopes that may qualify under the "generally unsuitable" standard. If so, the county must consider whether new parcels for nonfarm dwellings could be created on those parent parcels under ORS 215.263(4)(a) or (b).

With respect to existing parcels in the study area, petitioners argue that the county misconstrued the law in concluding that at most one new nonfarm dwelling could be approved on the 15 existing vacant parcels in the study area. The basis for the county's conclusion is not clear to us. The decision states simply that "[g]iven the requirements of state law for dwellings on resource land * * * only one lot in the study area is clearly eligible for a dwelling[.]" Record 592. The revised farm impact analysis appears to reject the possibility of more than one new nonfarm or lot-of-record dwelling on existing parcels in the study area because of the "predominant high value farmland soils, the current actual farm use, [or] their inclusion as part of a tract that already has a dwelling." Record 713. We understand respondents to argue that it is unlikely that more than one

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evidence in the record shows that this situation will remain stable until state law changes or a significant number of Measure 37 claims are made." Record 592.

The foregoing states that creation of new nonfarm parcels would destabilize the land use pattern, but appears to justify not considering whether new nonfarm parcels could be created in the study area because no new nonfarm parcel is proposed by intervenor's application. However, we have held that the county must consider whether new nonfarm parcels could be created in the study area under ORS 215.263 even if the application does not propose a new parcel. *Elliot*, 43 Or LUBA at 439-41.

new nonfarm dwelling could be approved on existing vacant parcels in the area under the generally unsuitable standard, because many of the vacant parcels at issue consist predominantly of farm soils and even high-value farm soils, or are actively farmed notwithstanding poor soils.

That argument again ignores the fact that the generally unsuitable standard applies not only to a lot or parcel, but to a "portion of a lot or parcel." OAR 660-033-0130(4)(c)(B). In other words, to satisfy the generally unsuitable standard, the applicant need not demonstrate that the entire parcel is generally unsuitable, but may focus the analysis on a portion of the parcel.[19] As a consequence, if a county determines whether a nonfarm dwelling satisfies the stability standard based on whether or not vacant parcels in the study area can satisfy the general unsuitability standard, it is not enough to consider only whether such vacant parcels as a whole are generally unsuitable. The county must also consider whether there are areas of poor soils or other circumstances indicating that a *portion* of such parcels may satisfy the generally unsuitability standard. *See Lichvar v. Jackson County*, 49 Or LUBA 68, 76 (2005) (under the stability standard, counties must consider whether other lots or parcels in the study area are similarly situated, that is, include generally unsuitable land that would provide a possible nonfarm dwelling site). As noted above, petitioners apparently asserted below that many of the vacant parcels in the area, including parcels that are part of farm tracts, include portions with limited soils and steep slopes. Certainly, nothing cited to us in the decision or record indicates such areas of limited soils and steep slopes do not exist.

The revised farm impact analysis also cites "inclusion as part of a tract that already has a dwelling" as a basis for concluding that no new nonfarm dwellings may be approved on a vacant parcel that is part of a tract on which a dwelling already exists. However, the basis for that conclusion is not explained. With respect to lot-of-record dwellings, OAR 660-033-0130(3)(a)(C)

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[19] In almost all cases, the evidentiary burden of showing that a *portion* of a lot or parcel is generally unsuitable will be easier to meet than attempting to show that the entire lot or parcel is generally unsuitable. It is unclear to us in the present case why the applicant chose to assume the more difficult burden of showing that the entire 25-acre parcel is generally unsuitable, rather than, say, a two or five-acre portion.

requires a finding that no dwelling exists on another lot or parcel that was part of a tract that existed on November 4, 1993.[20] No similar requirement exists with respect to nonfarm dwellings under OAR 660-033-0130(4). Nothing cited to us in the rule or elsewhere prohibits a nonfarm dwelling on a vacant parcel, simply because that parcel is within a tract that includes another legal lot or parcel on which a dwelling already exists.

Finally, the revised farm impact analysis states that many of the vacant parcels in the study area are in active farm use. That an entire parcel is currently in farm use certainly would belie any attempt to declare the parcel as a whole generally unsuitable for farm use. But, again, the statute and rule allow nonfarm dwellings on *portions* of lots or parcels that are generally unsuitable, even if other portions are suitable for farm use and even if those other portions are currently in farm use. As noted, the findings and the revised analysis do not discuss whether the 15 identified vacant parcels have portions that are generally unsuitable for farm use.

The fifth assignment of error is denied. The fourth and fifth assignments of error are sustained.

SEVENTH ASSIGNMENT OF ERROR

Under the seventh assignment of error, petitioners argue that the county erred in considering the subject property's partition history. According to petitioners, the county clearly felt "bound" by the actions it took in 1984 to approve partition of the Edmunds parcel to allow dwellings on the parcels created. Petitioners contend that the county's decision to approve the present application was based not on the currently applicable criteria but rather on the county's belief that its prior actions committed the county to approve the requested dwelling.

Respondents argue that the county's findings address this issue and explain that the county did not feel "bound" to approve the dwelling based on its actions in 1984.[21] According to the

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[20] OAR 660-033-0020(10) defines "tract" to mean "one or more contiguous lots or parcels in the same ownership."

[21] The county's finding state, in relevant part:

findings, the county considered the subject property's partition history because that history supports the county's conclusion under the currently applicable criteria that the subject property is "generally unsuitable" for farm use.

The county's decision addresses the applicable criteria, and concludes under those criteria that the subject property is "generally unsuitable" for farm use. An earlier county decision approving creation of the subject property in contemplation of a nonfarm use could have at least a tangential bearing on whether the property is currently "generally unsuitable" for farm use. The county's findings state that the county is not "bound" by its prior actions and considers those actions to the extent they have a bearing on the applicable criteria. Nothing we are cited to in the record persuades us to look beyond the face of that declaration. We agree with respondents that petitioners have not demonstrated that the county improperly based its decision on considerations other than the applicable criteria.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioners contend that the county erred in relying on evidence of the history of petitioners' property, evidence which petitioners argue is false and prejudicial.

> "We find that prior actions created this parcel and establish the conditions that make it generally unsuitable for farm use. * * * We are not bound in any way to follow our past precedent pursuant to which the Edmunds Farm was partitioned and dwellings approved. However, we find the County's findings and bases for those decisions to be substantial evidence supporting the conclusion that TL 802 is generally unsuitable for farm use. Those [1984] decisions are contained in the record and consis tently were based on the predominantly nonfarm soils, steep slopes and predominant tree growth—a collection of characteristics unique in the area and which made these properties generally unsuitable for farm use. The applicants' evidence and analysis confirm, and are consistent with, those prior decisions and show that the factors still exist that made this and the other lots from the Edmunds Farm generally unsuitable for farm use." Record 589.

In a footnote, the county quotes a "policy" adopted in 1982 indicating that the county would give "careful consideration" to rezoning the Edmunds Farm to allow "a degree of nonfarm development." According to the county,

> "Again this policy is not binding, and we reevaluate its relevance on an case-by-case basis. This policy provides additional evidence about the farm use potential for the parcels that constituted the original Edmunds Farm. * * *" *Id.*

Petitioners own the 15-acre parcel north of the subject property, once part of the Edmunds Farm, and reside there on a dwelling approved in 1992 as a dwelling in conjunction with farm use. Petitioners' property shares some of the soils and characteristics of the subject property, and is also zoned F-1. At several points, the challenged decision asserts that petitioners do not farm their property, and relies upon that assertion to support its conclusions under the stability and suitability standards. For example, under the suitability standard, the decision concludes that the apparent difficulty of farming petitioners' property, with similar soils and characteristics, supports the county's conclusion that the subject property is generally unsuitable. Record 590. With respect to the stability standard, the county notes that some dwellings in the study area that were approved as farm dwellings are located on parcels where no apparent farm activity takes place, and concludes that such dwellings should be categorized as nonfarm dwellings. The decision cites to petitioners' dwelling as an example and asserts that petitioners "do not farm their property as state law, the County code and their permit require." Record 591.

Petitioners dispute any statement that their use of their property is inconsistent with applicable law or the permit that authorized their dwelling, and also dispute the assertion that no farm use occurs on their property. In any case, petitioners argue, the current use of their property has nothing to do with the criteria governing the subject application.

We agree with petitioners that the *legal* issue of whether current use of their property is consistent with applicable law and the permit that authorized their dwelling is irrelevant to the criteria the county applied to the subject application. Petitioners also dispute the *factual* premise to that legal issue, the county's belief that petitioners do not currently farm their property.

Whether and to what extent petitioners have been able to farm their parcel, which has soils and characteristics similar to the subject property, could have indirect evidentiary bearing on whether the subject property is generally unsuitable for the production of farm crops and livestock. However, the evidence we are cited to regarding the use of petitioners' property is extremely

limited, and in our view would not support a finding either that petitioners' property is in farm use or that it is not.

That said, it is not clear to us that any error in the findings directed at petitioners' property or the lack of evidentiary support for those findings provide an independent basis for reversal or remand. As far as we can tell, the county's findings with respect to the use of petitioners' property are trivial and unnecessary aspects of the decision. The lack of evidentiary support for such findings would seem to be harmless error. We see no purpose served in remanding the decision to develop evidence on a point so tangential to the decision.

The eighth assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

Petitioners argue that the county failed to provide written notice of the remand hearing to a number of persons who either live within the 750-foot notice either or who participated in the proceedings leading up to the county's 2001 decision and were entitled to notice on that basis.

Respondents argue that even if the county erred in failing to provide notice to persons entitled to it, petitioners received written notice of the remand hearing and participated in the proceedings, and therefore petitioners' substantial rights were not prejudiced by the county's error. Respondents argue, and we agree, that under ORS 197.835(9)(a)(B), procedural error regarding parties other than the petitioners do not provide a basis for reversal or remand.

The tenth assignment of error is denied.

The county's decision is remanded.