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. 2006-011

FINAL OPINION
AND ORDER

Appeal from Crook County.

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

David M. Gordon, County Counsel, Prineville, filed a response brief and argued on behalf of respondent.

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

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

AFFIRMED 06/27/2006

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 a county decision affirming, after remand from LUBA, an earlier 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

We quote the relevant facts from our earlier opinion.

> "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:
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> > '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.
> >
> > '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.
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> "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." *Peterson v. Crook County (Petersen I)*, 49 Or LUBA 223, 225 *aff'd* 200 Or App 414, 115 P3d 988 (2005).

Intervenor sought approval for the partition and nonfarm dwellings. The county's approval was appealed to this Board, and we remanded to the county. Intervenor appealed our decision to the Court of Appeals, which affirmed without opinion. The county conducted a hearing on remand and affirmed its previous determination approving the subject applications.[1] This appeal followed.

FIRST ASSIGNMENT OF ERROR

In eastern Oregon, a county may approve a division of land to create up to two new parcels for siting nonfarm dwellings. ORS 215.263(5).[2] An applicant for such an approval

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[1] The county identified the following six issues to be addressed on remand:

> "1. Whether past farming uses ever occurred on the subject property, and if so, does such prior use create a 'substantial obstacle' in making a finding that the property is generally unsuitable for agricultural purposes (hereafter 'generally unsuitable').
>
> "2. What percentage of the nonfarm parcels contain soils that are Class III when irrigated.
>
> "3. What effect, if any, the feasibility of transferring irrigation rights back to the property will have on the Court's suitability determination under ORS 215.263(5)(a)(E).
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> "4. What the 'inherent capability' of the land is, which requires analysis of 'potential' herbaceous forage capacity.
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> "5. Whether the proposed nonfarm parcels can be used in conjunction with the parent property or other lands put to farm use.
>
> "6. Whether the stability test is satisfied." Record 1050.

[2] ORS 215.263(5) 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:
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> "(A) The nonfarm dwellings have been approved under ORS 215.284 (7);

must demonstrate that the proposed nonfarm parcels are "generally unsuitable land for the production of farm crops and livestock or merchantable tree species." ORS 215.263(5)(a)(E). In *Peterson I*, petitioners argued that the county misconstrued ORS 215.263(5)(a)(E) and Crook County Code (CCC) 18.24.070(2) and (4) in determining that the proposed nonfarm parcels are "generally unsuitable land for the production of farm crops and livestock or merchantable tree species."[3] In many respects, we agreed with petitioners and remanded to the county.[4]

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

In *Peterson I*, we cited LUBA decisions that have held that past farming use on a particular property is a substantial obstacle to concluding that the property is generally unsuitable for the production of farm crops and livestock or merchantable tree species. *Peterson I*, 49 Or LUBA at 229. The record indicated that the proposed nonfarm parcels had been used for grazing. Accordingly, we remanded to the county to consider the historic farm use on the proposed nonfarm parcels.

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

For simplicity, in this opinion we will refer to ORS 215.263(5), the statute that CCC 18.24.080 implements.

[4] We will summarize the pertinent portions of that opinion where they are relevant to respond to petitioners' assignments of error in this appeal.

On remand, the county first addresses the question whether past farming practices had occurred on the property. The county includes a lengthy discussion of *Rutigliano v. Jackson County*, 47 Or LUBA 470, 488 (2004), and the evidence supporting and contradicting the occurrence of past farming practices.[5] The county dismisses testimony of opponents and the applicant regarding past use, and relies on an affidavit of intervenor's expert, a certified public range professional.[6] The expert states that, in his professional opinion, he does not believe a viable livestock operation has occurred on the property in the past 20 years. The challenged decision finds corroboration of the expert's opinion in a letter from the individual who currently leases the proposed nonfarm parcels, which states that the lessee has never used the forty acres "because the land is in such poor condition that he actually fears for the safety of his livestock." Record 1051. The county relies on the expert's opinion and the lessee's letter to support its conclusion that the proposed nonfarm parcels have not been used for or with an agricultural operation in the past 20 years, and that use before that time and recent intermittent grazing does not create a substantial obstacle to concluding that the proposed nonfarm parcels are generally unsuitable for the production of crops or livestock.

Petitioners rely on testimony confirming past grazing use and point to color photographs in the record that show cattle grazing on the nonfarm parcels. They contend that the expert's affidavit is not substantial evidence sufficient to overcome the opponents' recollection of past practices because the expert's herbaceous forage survey bears no

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[5] In *Rutigliano*, we held that the fact that a property had 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.

[6] The county found:

> "The 'historic use' of property is subject to selective recollection by proponents and opponents of a particular land use application. In other words, 'historic use' testimony – such as the testimony in this case – is highly unreliable, because those who 'remember the historic use' may do so with ulterior motives. There is no better example of this phenomenon than the testimony in this case: opponents of the application remember the proposed parcels being used for grazing in the past, while the proponents of the application claim otherwise. The Court finds the testimony of both sides of the application to be of little persuasive value." Record 1051.

apparent relevance to the proposed nonfarm parcels and therefore no reasonable decision maker would rely on it.

As discussed in more detail below, we conclude that the record establishes that the expert's herbaceous forage survey did study the proposed nonfarm parcels. Further, the testimony about farming practices on the nonfarm parcels in the past 20 years is conflicting. The county was entitled to dismiss as unreliable the testimony of the applicant and opponents regarding past farm practices and to rely instead on the expert's opinion that farm practices had not occurred on the property within the past 20 years.[7] *See Tournier v. City of Portland*, 16 Or LUBA 546, 553 (1988) (A local government's decision is supported by substantial evidence if contrary evidence in the record does not so detract from the weight or undermine the credibility of the evidence relied on by the local government as to render it not substantial.).

B. Soils Analysis

The parties all agree that the proposed nonfarm parcels are presumed suitable for the production of crops and livestock if they are "composed predominantly of Class I-VI soils." CCC 18.24.080(3)(a); *see* n 3; OAR 660-033-0130(4)(c)(B)(ii).[8] All parties also appear to

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[7] The challenged decision also relies on commentary in the affidavit advising that merely seeing livestock on a parcel does not mean the property is being used in conjunction with an agricultural operation. Record 1051.

[8] OAR 660-033-0130(4)(c)(B) provides that a nonfarm dwelling may be approved outside the Willamette Valley where it adopts findings demonstrating, among other things, the following:

> "(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

agree that the NRCS ratings for the proposed nonfarm parcels identify the soils as Class I-VI soils. In *Peterson I*, intervenor attempted to overcome that presumption by relying on the rockiness and shallowness of the soils. He hired an expert certified range professional who prepared an herbaceous forage survey. Petitioners argued that the NRCS soil ratings for the soils on the property take rock outcroppings and shallowness of soils into consideration when rating particular soils and that intervenor could not merely conclude that the soils are rocky and shallow to overcome the NRCS ratings.

In *Peterson I*, we agreed with petitioners that the record did not reflect that those adverse conditions were not already part of the ratings. We also determined that it was not clear what percentage of the proposed nonfarm parcels were covered by rock outcroppings so that we could determine whether the county's conclusion that the nonfarm parcels are not suitable is supported by substantial evidence in the record. Further, we agreed with petitioners' argument that intervenor's removal of irrigation rights from the nonfarm parcels required the county to consider the feasibility of returning those rights, and if feasible, to analyze the suitability of the parcels with the irrigation. Finally, we determined that the herbaceous forage survey did not constitute substantial evidence because (1) we could not tell whether the survey was conducted on the proposed nonfarm parcels or another part of the parent parcel and (2) the survey failed to consider potential forage capacity and only provided an estimate of the forage capacity based on current conditions.

1. NRCS Ratings

On remand, the county explained its rationale supporting its conclusion that the NRCS ratings do not take into consideration rocky outcroppings and that the introduction of evidence of rocky outcroppings is therefore permissible as a means of overcoming the

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'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[.]"

presumption that the nonfarm parcels are suitable for the production of farm crops and livestock or merchantable tree species.[9]

Petitioners once again question the county's conclusion that the NRCS ratings take the rocky outcroppings and shallow soils into consideration.[10] They assert that intervenor produced no new evidence supporting the county's explanation. Petitioners do not directly challenge the explanation provided by the county, however, nor do they point to anything in the record that would require the result they propose. The explanation provided by the county supporting its conclusion that the shallowness and rocky condition of the soils are characteristics that are not included in the NRCS soil ratings is reasonable and is supported

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[9] The county findings state:

> "The NRCS description of the Class VI soils reveals otherwise:
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> > "This unit consists of nearly level to steep, well-drained, stony or channery soils that are shallow to deep over bedrock or hardpan. Permeability is rapid to slow, and the moisture-holding capacity and fertility are low * * * these soils are not suitable for irrigation or for dry-farming. (Ex 4, pg 21.)
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> "The NRCS classification system describing Class VI soils as 'stony or channery' does not take into account the presence of rock outcroppings on the subject property. According to the NRCS, soils that are 'stony' consist of stones that are spherical, cubelike or equiaxial in shape, and are 250-600 mm in diameter. Soils that are 'channery' have flat fragments approximately 2-150 mm long. Neither of these specifications describes the rocky outcroppings present on the subject property.
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> "Accordingly, the presence of rocky outcroppings, in addition to the shallowness of the soils, present soil conditions not contemplated in either the Class III or Class VI soil classifications and may be considered by the County in determining whether the soils on the subject property are 'generally unsuitable' for agriculture. Because of the presence of rocky outcroppings and shallow soil, the County Court finds that the proposed nonfarm parcels are generally unsuitable for agriculture." Record 1053-54.

[10] We note that in *Peterson I*, we did not hold, as the challenged findings state, that "the NRCS classification of the soils as Class VI takes into account shallowness of the soils and rock outcroppings on the subject property." Record 1053. Rather, we concluded that, as far as we were made aware, the record did not reflect that the NRCS had not considered those soil conditions in its ratings:

> "[T]here 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')." *Peterson I* , 49 Or LUBA at 230-31.

by substantial evidence in the record. Accordingly, the county did not err in considering the shallow soils and rocky outcroppings when applying the generally unsuitable test to the proposed nonfarm parcels.

2. Irrigation

Shortly after filing his application with the county for the proposed partition and nonfarm dwellings, intervenor transferred irrigation rights associated with the proposed nonfarm parcels to another portion of the parent parcel. In *Peterson I*, petitioners argued that, for purposes of determining whether the proposed nonfarm parcels are generally unsuitable, the county was required to consider the feasibility of transferring the irrigation rights back to the nonfarm parcels. We agreed and held 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 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." *Peterson I*, 49 Or LUBA at 233.

On remand, several opponents of the application testified regarding the feasibility of transferring the irrigation rights back to the nonfarm parcels. The challenged findings do not address the feasibility of returning the water rights, and appear to assume that those rights can be transferred back to the nonfarm parcels. The challenged decision does explain, however, that the water rights were initially transferred from the nonfarm parcels "because irrigating the proposed nonfarm parcels proved to be extremely inefficient and an overall waste of water resources." Record 1054. The county concludes that moving irrigation rights back to the nonfarm parcels would have no effect on the county's suitability determination because of "the shallowness of the soil combined with the abundance of rocky outcroppings on the subject property." Record 1054-55.

Petitioners challenge those findings, which they assert are internally inconsistent because they indicate, on the one hand, that illegal irrigation in the 1990's resulted in a viable grazing operation on the nonfarm parcels, and on the other hand, that farm use is not viable on the property due to the rocky and shallow condition of the soils, with or without irrigation.[11] Accordingly, they contend that the findings are not supported by substantial evidence.

While we agree with petitioners that the findings could be read as internally inconsistent on this point, we disagree that any apparent inconsistency necessarily means that the challenged decision is unsupported by substantial evidence. Although the entire parent parcel has approximately 100 acres of irrigation rights, the record reflects that only approximately 10 acres were transferred from the nonfarm parcels. The findings establish that the 10 acres of irrigation were originally removed from the nonfarm parcels because (1) irrigating the proposed nonfarm parcels "proved to be extremely inefficient and an overall waste of water resources," Record 1054, (2) the nonfarm parcels consist of 85% bare ground, rock, litter, cheat grass and desert moss, Record 1052, and (3) moving irrigation back would provide no benefit to the proposed nonfarm parcels, Record 1054. The record also reflects that the irrigation rights applied to a portion of the southern nonfarm parcel on the west side of the Central Oregon Irrigation District canal, which bisects that southern parcel. *See* Diagram I, attached at the end of this opinion. Even assuming those irrigation rights were returned to the property, and that such irrigation resulted in productive land for grazing, it

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[11] The findings state:

> "The evidence in the record demonstrates that the only 'successful' or economically viable farming operation on the parent parcel in recent memory, which included the proposed nonfarm parcels, occurred not because of present land conditions, but rather as a result of illegal irrigation that occurred in part on the proposed nonfarm parcels. After a water audit was performed in the early 1990s, it was determined that there was an illegal use of approximately 200 acres of water on the subject property. Since the completion of the audit and the correction of the use of water on the property, no farming operation has used the proposed nonfarm parcels for any agricultural use." Record 1054.

would only provide at most, 10 acres of productive grazing land. The remaining approximately 30 acres east of the canal would remain unsuitable for grazing. Thus, at least 75% of the property would remain unproductive, and the property would properly be considered "generally unsuitable." *King v. Washington County*, 42 Or LUBA 400, 406 (2002) (The fact that a small portion of an EFU-zoned parcel can theoretically generate some farm income does not necessarily compel a conclusion that the property as a whole is suitable for farm use.). The county's findings that returning the irrigation to the subject property would not render the nonfarm parcels generally suitable for producing farm crops or livestock are supported by substantial evidence.

3. Herbaceous Forage Survey

We remanded the county's decision in *Peterson I* in part because the herbaceous forage survey upon which the conclusion regarding suitability relied did not constitute substantial evidence because (1) it was unclear whether the expert was studying the right property and (2) the survey analyzed current instead of potential forage capability.

a. Clear Indication of Area Surveyed

On remand, intervenor submitted an affidavit prepared by Wayne Elmore, the author of the herbaceous forage survey, clarifying that the survey was, in fact, a study of the proposed nonfarm parcels.[12] Petitioners continue to question whether the expert was actually

[12] The affidavit provides:

> "5. The area that I surveyed is designated as Parcel 1 and Parcel 2, located on Exhibit B to this affidavit. * * *
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> "* * * * *
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> "10. In addition, the survey which is attached as Exhibit A to this affidavit, is a survey of the herbaceous forage capacity and physical condition of Parcel 1 and Parcel 2 so designated on Exhibit B.
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> "11. Based upon my survey of the parcels, I concluded that the current herbaceous forage capacity of the parcels would support one cow for eighteen days." Record 1173-74.

viewing a portion of the parent parcel east of the proposed nonfarm parcels. They continue to point to color photographs that they assert illustrate that the nonfarm parcels are not merely bare ground, rock, litter, cheat grass and desert moss, as the survey states. However, the affidavit clearly indicates that the survey was a study of the proposed nonfarm parcels, and the county apparently believed the sworn testimony of the expert over the color photographs. Because there is conflicting believable evidence, it is not within our purview to second-guess the local decision-maker on this point.

b. Potential vs. Current Capability

In *Peterson I*, we determined that the herbaceous forage survey did not provide substantial evidence in part because it was based on the current condition of the land and not on the land's potential forage capacity.[13] On remand, the county adopted findings that the subject property has no inherent capability because of the shallow soils and rocky outcroppings.[14] Petitioners argue that the challenged decision fails to respond to LUBA's

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Exhibit B identifies the proposed nonfarm parcels as Parcels 1 and 2. Record 1177; *see* Diagram I.

[13] We stated:

> "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. We agree. Our previous conclusion that the suitability determination includes consideration of potential irrigation requires that any herbaceous forage surveys upon [which] 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." *Peterson I*, 49 Or LUBA at 235 (emphasis in original; citation omitted).

[14] The challenged findings provide, in relevant part:

> "The inherent forage capacity of the subject property, as defined by the NRCS survey, does not take into account the shallowness of the soils on the subject property, nor does the NRCS survey take into account the presence of rocky outcroppings on the subject property. Notwithstanding the classification of the soils on the subject property, the shallowness of the soil and the presence of rocky outcroppings adversely affects the forage capability of the subject property. Soil performs a variety of functions in an agricultural operation. Soil regulates water, sustains plant life, filters pollutants, and cycles nutrients.

ruling that the herbaceous forage survey does not address the inherent or potential productivity of the proposed nonfarm parcels. Petition for Review 11.

While intervenor did not introduce new evidence on this issue, our remand of this issue in *Peterson I* relied upon our holding that the county was required to consider potential herbaceous forage capacity if the properties were irrigated. As discussed above, the county explained that even with irrigation, the proposed nonfarm parcels would be unproductive. Those findings demonstrate that the county did, in fact address the potential or inherent capability of the nonfarm parcels, not merely the current capability, as required by the "generally unsuitable" standard.

c. Suitability of Nonfarm Parcels as a Whole

Petitioners contend that the herbaceous forage survey does not constitute substantial evidence because it does not demonstrate that the entire forty acres of the proposed nonfarm parcels are generally unsuitable for the production of farm crops or livestock. They assert that ORS 215.263(5)(a)(E) requires consideration of the suitability of the parcels as a whole, not merely the suitability of the portions of the parcels on which the dwellings will be

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> "Shallow soil is unable to regulate water, sustain plant life and cycle nutrients because there simply is insufficient soil to allow the soil to perform its ordinary functions. Accordingly, because the soils on the subject property are shallow, the soils' ability to regulate water and sustain plant life necessary to sustain an agricultural operation is severely limited.
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> "The presence of lava blisters has a similar effect as the presence of shallow soils. Lava blisters, by definition, lack the physical characteristics of soil, and therefore lack the physical capabilities of soil. Lava blisters are unable to regulate water, sustain plant life, or cycle nutrients. The presence of lava blisters on the subject property reduces the total amount of soil on the subject property, which limits the ability of the land to sustain herbaceous forage. "Wayne Elmore states that the subject parcels have lost their productivity and forage potential. Mr. Stafford states that he does not and will not use the proposed nonfarm parcels because the property is and will be unproductive.
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> "Based upon the evidence in the record, there is substantial evidence to support the County's conclusion and the County Court finds that the 'inherent' or 'potential' capability of the property is such that the proposed nonfarm parcels are generally unsuitable for use in conjunction with an agricultural operational." Record 1055 (citation omitted).

located.[15] Petitioners' argument relies on their assertion, discussed above, that the herbaceous forage survey fails to clearly indicate what land was surveyed. However, as discussed above, the expert's affidavit clarifies that the survey did, in fact, study the proposed nonfarm parcels, not some other land and not merely a portion of the nonfarm parcels.

Accordingly, petitioners' argument that the county erred in relying on the expert's herbaceous forage survey does not provide a basis to reverse or remand the challenged decision.

C. Use in Conjunction with Other Land

ORS 215.263(5)(a)(E) provides that "[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." In *Peterson I*, the county adopted findings supporting its conclusion that the proposed nonfarm parcels cannot reasonably be put to farm use in conjunction with other lands. We held that those findings were inadequate because the county evaluated whether surrounding ranching operations required the proposed nonfarm parcels as part of their operations instead of whether the proposed nonfarm parcels could be used in conjunction with those operations. *Peterson I*, 49 Or LUBA at 235-36.

On remand, the challenged decision notes, initially, that if the property is considered unsuitable for reasons other than size or location, such as adverse soil conditions or terrain, then the county is not required to consider whether the proposed nonfarm parcels can be used in conjunction with adjacent agricultural operations. Record 1056, citing *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002); *see also Epp v. Douglas County*, 46 Or LUBA 480, 485 (2004) (When a proposed nonresource parcel is found to be unsuitable for farm or forest use

[15] Intervenor misunderstands petitioners' argument to contend that the county must consider the suitability of the entire parent parcel. That is not how we understand petitioners' argument, and petitioners clarified at oral argument that they are merely contending that the county erred in failing to consider the suitability of the two twenty-acre proposed nonfarm parcels.

based solely on terrain, adverse soils and land conditions, rather than size and location, a local government need not consider whether the parcel could be put to farm or forest use in conjunction with other land.). The county also made alternative findings, and concluded that the property cannot be used with adjacent farming operations in any event. Relying again on the adverse soil conditions, the county concludes that the property cannot be used in conjunction with nearby grazing operations.

Petitioners contend again that the county's findings are inadequate because they rely on the "anomalous conditions previously identified in the herbaceous forage survey[.]" Petition for Review 14. As discussed above, however, the county's reliance on those conditions is not misplaced and is supported by substantial evidence. We also do not agree with petitioner that where, as here, the record reflects that at least 75% of the property is incapable of supporting grazing, the county is required to specifically consider whether another competent rancher could use the proposed nonfarm parcels in conjunction with other ranch land. *C.f. Reed v. Lane County*, 19 Or LUBA 276, 284 (1990) (one resource manager's inability to manage land profitably is at best indirect evidence of whether the land itself is unsuitable for resource management).[16]

SECOND ASSIGNMENT OF ERROR

Petitioners challenge the county's conclusions that the nonfarm dwellings on the proposed nonfarm parcels will not materially alter the stability of the overall land use pattern of the area (stability test). ORS 215.284(7).[17] In *Peterson I*, we sustained petitioners'

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[16] We need not decide whether the county was *required* to consider whether the proposed nonfarm parcels can reasonably be put to farm or forest use in conjunction with other land. Even if the county was required to consider that possibility, the county's conclusion that the proposed nonfarm parcels cannot be used in conjunction with nearby grazing operations is supported by substantial evidence.

[17] ORS 215.284(7) provides:

> "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

second assignment of error, in which petitioners argued that the county misapplied the stability test. We held that the county's conclusion that the stability test was satisfied was not supported by substantial evidence because it was based on an estimate that four or five nonfarm dwellings could be approved within the 2000-acre study area, and that estimate had no basis in the record. *Peterson I*, 49 Or LUBA at 240-41. We noted that intervenor's own estimate found a potential for 28 new nonfarm and lot-of-record dwellings within the study area. *Id*. at 240.

A. Cumulative Impact of Potential New Nonfarm Dwellings

On remand, the county adopted a detailed analysis based on intervenor's original 28-figure estimate and concluded that the stability test was satisfied. Petitioners allege that the county failed to consider the potential cumulative impact of the potential new nonfarm dwellings. They assert that the challenged decision considers the impact of only the applicant's two proposed dwellings.

Intervenor disagrees with petitioners' characterization of the decision. According to intervenor, the county found that the potential non-farm buildout within the study area will occur, if at all, south and east of the proposed non-farm parcels. It also found that the majority of existing agricultural practices occur west and north of the proposed non-farm parcels. It therefore concluded that, given the location of Wiley Road, Parrish Road and the

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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."

Prineville Highway, which would allow non-farm residents to avoid agricultural areas, the potential non-farm buildout to the south and east of the proposed non-farm parcels would not alter the stability of the study area.[18]

We agree with intervenor that the challenged decision did consider the potential impacts that the potential new 28 dwellings would have on the study area. Based on the analysis summarized above, it concluded that even considering those potential 28 dwellings and the proposed two dwellings, the overall stability of the land use pattern would not be altered.

B. Similarly Situated

In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county must consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated. OAR 660-033-0130(4)(c)(C). In *Peterson I*, petitioners argued that, pursuant to the above requirement to analyze potential nonfarm dwellings on "similarly situated" properties, the county was required to consider potential nonfarm dwellings on parcels that could have their irrigation rights removed, as intervenor had done on the subject property. We rejected that argument, concluding that such parcels were not "similarly situated" because we had already determined that the county was required to consider the possibility of transferring the water rights back to the property, and whether the property would be generally suitable if the water

[18] The challenged decision provides, in part:

> "[T]he County Court concludes and finds that the application will not alter the stability of farming practices in the area. Of the nonfarm dwellings that might be approved, the overwhelming majority will be east of properties where farm uses currently exist. The parcels that are eligible for nonfarm dwellings are served by transportation routes that will direct traffic and other incompatible uses away from current farm uses. Finally, the number of potential nonfarm dwellings that could be built is highly speculative, in that soil conditions and other factors may preclude such development. Because of the location and relatively small number of potential nonfarm dwellings that could be developed in the study area, the factors discussed establish that creation of two nonfarm dwellings will not alter the stability of the study area." Record 1062.

rights were transferred back. Accordingly, we held that the properties that petitioner argued had to be considered were not "similarly situated" for purposes of the stability test.

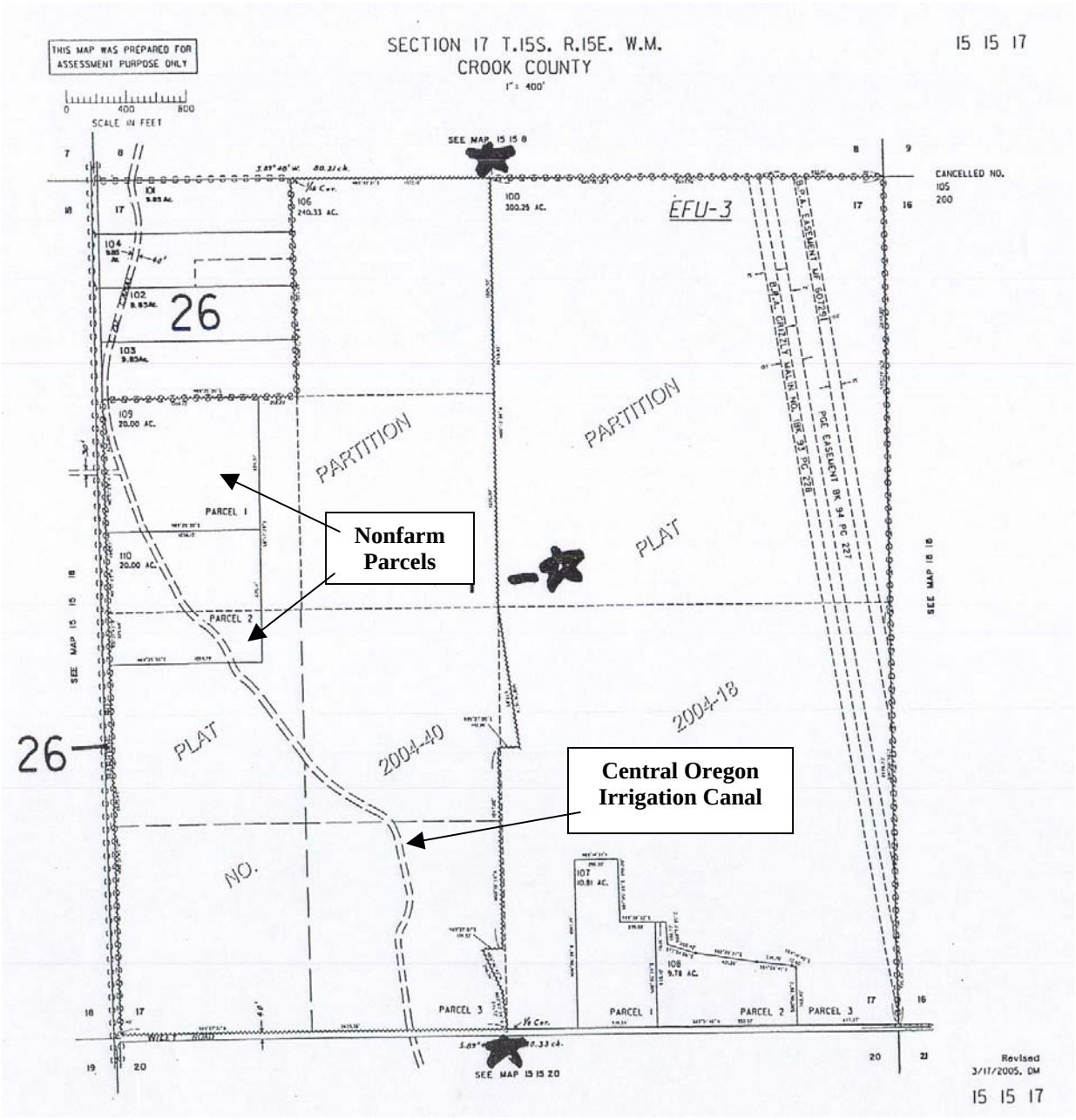
Petitioners renew their argument that such parcels must be considered "similarly situated" and the impacts of possible nonfarm dwellings on those parcels considered. Intervenor moves to strike that argument, presumably because LUBA rejected that argument in *Peterson I*. Although we do not agree that striking the argument is the appropriate remedy, we do agree with intervenor that the issue was decided against petitioners in *Peterson I*. Our opinion in *Peterson I* was affirmed without opinion by the Court of Appeals. We therefore decline petitioners' invitation to revisit that issue.

Petitioners' second assignment of error is denied.

The county's decision is affirmed.

1

Diagram I


THIS MAP WAS PREPARED FOR ASSESSMENT PURPOSE ONLY
SECTION 17 T.15S. R.15E. W.M.
CROOK COUNTY
15 15 17
SCALE IN FEET
SEE MAP 15 15 8
CANCELLED NO. 105 200
EFU-3
26
PARTITION
PARTITION
PLAT
PARCEL 1
PARCEL 2
Nonfarm Parcels
2004-40
2004-18
PLAT
NO.
Central Oregon Irrigation Canal
PARCEL 3
PARCEL 1
PARCEL 2
PARCEL 3
SEE MAP 15 15 20
SEE MAP 15 15 18
Revised 3/17/2005. DM
15 15 17