BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JONATHAN WILLIAMS,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

JOEL OCKUNZZI and NANCY OCKUNZZI,
Intervenor-Respondents.

LUBA No. 2007-103

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioner. With her on the brief was Goal One Coalition.

No appearance by Jackson County.

Mark S. Bartholomew, Medford, filed the response brief and argued on behalf of intervenor-respondents. With him on the brief was Hornecker, Cowling, Hassen & Heysell, LLP.

RYAN, Board Member; HOLSTUN, Board Chair, participated in the decision.

BASSHAM, Board Member, did not participate in the decision.

AFFIRMED 11/02/2007

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a county decision approving the partition of a parcel into three parcels, and approving nonfarm dwellings on two of the parcels.

FACTS

Intervenors own a 171.3-acre property in Jackson County that is zoned Exclusive Farm Use (EFU). Intervenors applied to partition the property into three parcels. One parcel is approximately 165 acres in size (Parcel 3), and two smaller parcels are approximately 2.75 acres (Parcel 1) and 3.5 acres (Parcel 2) in size.[1] Intervenors also applied for approval of nonfarm dwellings on Parcel 1 and Parcel 2. The eastern part of the property where Parcel 3 is proposed contains primarily Class IV soils, is irrigated, and is used for grazing. The western part of the parcel where Parcels 1 and 2 are proposed contains primarily Class VI soils and is not irrigated.

Planning staff denied the application, and intervenors appealed to the county hearings officer. The county hearings officer approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

ORS 215.263(4) provides that in areas of Western Oregon outside of the Willamette Valley, a county may approve a division of EFU-zoned land to create up to two new parcels smaller than the minimum lot size that would otherwise apply in the EFU zone for nonfarm dwellings, provided certain approval criteria are met.[2] One of those approval criteria is that any nonfarm dwellings be approved pursuant to ORS 215.284(2). ORS 215.263(4)(a)(A).[3]

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[1] Intervenors' original site plan showed Parcel 2 containing 3.5 acres. During the proceedings below, intervenors submitted a revised site plan that decreased the acreage included in Parcel 2 by 1.64 acres to 1.87 acres. The hearings officer approved the original site plan that showed Parcel 2 containing 3.5 acres. Record 2-3, 24, 27. We discuss that history in more detail in the second assignment of error below.

[2] ORS 215.263(4) provides:

"In western Oregon, as defined in ORS 321.257, but not in the Willamette Valley, as defined in ORS 215.010, the governing body of a county or its designee:

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

"(A) The nonfarm dwellings have been approved under ORS 215.213 (3) or 215.284 (2) or (3);

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

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

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

"(E) The parcels for the nonfarm dwellings are generally unsuitable for the production of farm crops and livestock or merchantable tree species considering the terrain, adverse soil or land conditions, drainage or flooding, 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] ORS 215.284(3) provides:

"In counties in western Oregon, as defined in ORS 321.257, not described in subsection (4) of this section, a single-family residential dwelling not provided in conjunction with farm use may be established, subject to approval of the 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 is situated upon a lot or parcel or 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 may 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;

"(c) The dwelling will be sited on a lot or parcel created after January 1, 1993, as allowed under ORS 215.263 (4);

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

Under ORS 215.284(3)(b), a nonfarm dwelling must be:

> "* * *situated upon a lot or parcel or 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 may 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[.]"

Jackson County Land Development Ordinance (LDO) 4.2.6(H)(3) contains nearly identical language.[4] This requirement is commonly referred to as the generally unsuitable standard. *Lichvar v. Jackson County*, 49 Or LUBA 68, 72 (2005).[5] Petitioner argues that the county's

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

[4] LDO 4.2.6(H) provides in relevant part:

> "Nonfarm Dwelling: A single family dwelling not provided in conjunction with farm use may be approved if the following standards are met:
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> "* * * * *
>
> "3) The dwelling foundation will be situated upon a lot or parcel, or 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) A lot or parcel or portion of the lot or parcel may 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. * * *"

[5] OAR 660-033-0130(4)(c)(B) further defines the generally unsuitable standard for counties outside of the Willamette Valley:

> "(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

decision that the aspplication for the nonfarm dwellings satisfies the generally unsuitable standard is not supported by substantial evidence, for a number of reasons.

First, petitioner argues that the county erred in placing too much importance on the proposed parcels' soil classifications in approving the nonfarm dwellings. Petitioner appears to argue that the Natural Resources Conservation Service (NRCS) survey of the property shows that the area proposed for Parcels 1 and 2 and the nonfarm dwellings contains Class VI Brader-Debenger loams, and that the county soil survey lists such soils as suitable for livestock grazing, hay, and pasture. According to petitioner, if proper management practices were utilized, the land would be suitable for the production of farm crops and livestock.

While we might agree with petitioner if the NRCS survey was the only survey that was available for the county to rely on, intervenors submitted a soil survey from an expert that is much more detailed and accurate than the NRCS survey.[6] Intervenors' soil survey explains that the soils on proposed Parcels 1 and 2 have a much higher percentage of Brader than Debenger loams, and that that higher percentage of Brader soils means that the property is generally unsuitable for the production of farm crops and livestock or merchantable tree species. It was reasonable for the county to rely in intervenors' more accurate survey rather than the NRCS survey.

In a related argument, petitioner also argues that the county's finding that the soils on proposed Parcels 1 and 2 will not support adequate vegetation for grazing are not supported

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> 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[.]"

[6] The soil survey performed by intervenors' expert is an "Order I" soil survey, which is accurate to .25-.50 of an acre. The NRCS survey is an "Order III" survey, which is accurate to 5-10 acres. Record 233-35.

by substantial evidence.[7] According to petitioner, the evidence establishes that cattle grazed on the property and an intensive feed operation was attempted on the property, and therefore the property is not unsuitable for livestock grazing.

The county relied on evidence that the owners had attempted to establish a feedlot in the area where Parcels 1 and 2 are proposed and were unsuccessful, and testimony from neighboring owners that the soils in the area were unproductive for livestock grazing. The county also found, based on testimony from neighboring property owners and intervenors, that any cattle that used the property were strays that had wandered onto the property from other operations. We agree with the county and intervenors that the presence of stray cattle does not establish that the land is suitable for livestock grazing. We also agree with the county that a failed cattle feed operation does not mean the land is suitable for grazing.

The county found that the land on the western part of the property where Parcels 1 and 2 are proposed was generally unsuitable for a number of reasons, including that the attempted feed operation failed, numerous testimonies that the land was unsuitable for livestock grazing, an expert soil survey demonstrating that the land was unsuitable for livestock grazing, and that any cattle that had traversed the property were strays. A reasonable person could rely upon this evidence to conclude that the property is not suitable for livestock grazing.

In another portion of his second assignment of error, petitioner argues that two vacant agricultural buildings located on proposed Parcel 2 could used in conjunction with the

[7] As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *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 and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

agricultural operation that will continue on Parcel 3, or with nearby agricultural operations, and therefore, that the parcels may not be considered generally unsuitable. ORS 215.263(4)(a)(E) and 215.284(3)(b) provide 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." Thus a parcel may not be considered unsuitable *based solely on size or location*, without considering whether it can be used in conjunction with other lands. However, if size or location is not the sole basis for a finding of unsuitability, then whether the parcel can be used in conjunction with other lands is irrelevant. *Epp v. Douglas County*, 46 Or LUBA 480, 485 (2004); *Moore v. Coos County*, 31 Or LUBA 347, 351 (1996).

Intervenors respond that the county did not have to consider whether Parcels 1 and 2 could be put to use in conjunction with other land because it did not find the parcels to be unsuitable "solely" based on size or location. To the contrary, intervenors argue, the county found that the parcels meet the generally unsuitable standard due to adverse soil conditions, which have led to historical failures of farming operations. According to intervenors, because the size or location were not the sole basis for meeting the generally unsuitable standard, whether the proposed parcels could be used in conjunction with other land is irrelevant in applying the generally unsuitable standard. We agree with intervenors.

In the final portion of the first assignment of error, petitioner argues that the county misconstrued the applicable law by deciding whether the land was generally unsuitable "for the production of farm crops and livestock or merchantable tree species," rather than whether the land was generally unsuitable for "farm use." According to petitioner, this distinction is critical because the land found to be generally unsuitable includes the unused agricultural buildings that could be used for farm use. In support of his argument, petitioner relies on the second sentence of ORS 215.284(3)(b), which provides:

> "* * * A lot or parcel or portion of a lot or parcel may 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[.]" (Emphasis added).

We addressed this issue in *Griffin v. Jackson County*, 48 Or LUBA 1 (2004). *Griffin* involved the county's denial of a nonfarm dwelling application. The county denied the application because it found the land was not generally unsuitable for "farm use," based on language in a provision of the former LDO that was nearly identical to the second sentence of ORS 215.284(3)(b) and that used the phrase "generally unsuitable for farm use." In *Griffin*, we held that the proper inquiry under ORS 215.284(3)(b) is whether the land is generally unsuitable "for the production of farm crops and livestock or merchantable tree species," not whether the land is generally unsuitable for "farm use." *Id.* at 8-9. We explained that "* * * caselaw discussing this particular statutory provision uses the language loosely, referring in many instances to 'unsuitability for farm use[,]'" and that "[*f]or simplicity only*, we have referred to the ORS 215.284(3)(b) standard and identically worded standards as requiring a showing that the portion be 'generally unsuitable for farm use.'" *Id.* We noted that an expansive interpretation such as the one relied upon by the county would be contrary to the purpose of ORS 215.284(3) of permitting non-farm dwellings on unproductive portions of land zoned EFU, while preserving large blocks of land zoned EFU for farm use. *Id.* (*citing Dorvinen v. Crook County*, 33 Or LUBA 711, 719 (1997), *aff'd* 153 Or App 391, 957 P2d 180 (1998)).

We think our reasoning in *Griffin* is dispositive in this case, and we do not think that the legislature, in using the phrase "farm or forest use" in the second sentence of ORS 215.284(3)(b), intended to expand the uses that must be analyzed for general unsuitability under the first sentence of that provision. Other than point to the phrase "farm or forest use" in the second sentence of ORS 215.284(3)(b), petitioner has not explained why our holding in *Griffin* was incorrect.

The county approved the application after finding that the generally unsuitable standard had been met. Specifically, the county found that the land was generally unsuitable "for the production of farm crops and livestock or merchantable tree species." ORS 215.263(4)(a)(E) and 215.284(3)(b). The county did not misconstrue the applicable law in determining whether the land is generally unsuitable "for the production of farm crops and livestock or merchantable tree species."

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR.

Intervenors' original application and site plan included in proposed Parcel 2 an approximately 1.8-acre part of the property that contains the existing agricultural buildings and pockets of Class IV soils. Intervenors subsequently submitted a revised site plan that excluded that portion from Parcel 2, and included it in Parcel 3. However, after intervenors' expert conducted the soil survey that indicated there was not nearly as much Class IV soil present in that portion of the property as originally thought, intervenors asked the hearings officer to consider the original site plan and include the 1.8-acre area in proposed Parcel 2 as shown on the original site plan. Petitioner argues the county misconstrued the applicable law by approving a nonfarm dwelling parcel that includes any portion of land that does not meet the generally unsuitable standard.[8]

ORS 215.263(4)(A)(E) requires that in order to partition EFU land for nonfarm dwelling parcels, the parcels must satisfy the generally unsuitable standard. Petitioner argues that because the nonfarm dwelling parcels contain pockets of land that are not generally unsuitable, the generally unsuitable standard cannot be met. According to petitioner, the

[8] Petitioner also argues that the county committed a procedural error by approving a different partition than that originally submitted by intervenors. In order to assign error to a procedural error, someone must have objected to the alleged procedural error below if there was an opportunity to make the objection. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146, 150-51 (1994). Petitioner had the opportunity to object to the approval of the revised partition but did not do so. Therefore, petitioner may not raise the issue before LUBA, and we do not consider it further.

nonfarm dwelling parcels must be "totally 'generally unsuitable'" to satisfy the generally unsuitable standard. Petition for Review 14.

Petitioner is wrong. A parcel can satisfy the generally unsuitable standard even if portions of the parcel contain areas that do not. *Peterson v. Crook County*, 52 Or LUBA 160, 172 (2006) (so stating); *King v. Washington County*, 42 Or LUBA 400, 406 (2002) (same and citing other cases so holding). Petitioner neither cites those cases nor attempts to explain why they were wrongly decided. Absent any argument from petitioner, we need not revisit those cases. The county did not misconstrue the applicable law in finding that a proposed parcel could satisfy the generally unsuitable standard even if some portion of the proposed parcel, standing alone, could not.[9]

The second assignment of error is denied.

The county's decision is affirmed.

[9] In his second assignment of error, petitioner also argues that the county improperly conducted the stability standard test of ORS 215.284(3)(d) due to its misconstruction of the generally unsuitable standard. Because petitioner's argument regarding the generally unsuitable standard fails, we need not address petitioner's argument regarding the stability standard that is based upon that alleged error.