

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 THURSTON D. INGLIS,
5 *Petitioner,*

6
7 and

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9 HARNEY COUNTY FARM BUREAU,
10 *Intervenor-Petitioner,*

11
12 vs.

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14 HARNEY COUNTY,
15 *Respondent,*

16
17 and

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19 VIRGINIA PHILLIS and TOM PHILLIS,
20 *Intervenor-Respondents.*

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22 LUBA No. 2008-004

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24 FINAL OPINION
25 AND ORDER

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27 Appeal from Harney County.

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29 Jack D. Hoffman, Portland, filed a petition for review on behalf of petitioner. With
30 him on the brief was Dunn Carney Allen Higgins & Tongue, LLP.

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32 Timothy J. Bernasek, Portland, filed a petition for review on behalf of intervenor-
33 petitioner. With him on the brief was Dunn Carney Allen Higgins & Tongue, LLP.

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35 Timothy Colahan, County Counsel, Burns, represented respondent.

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37 Tyler D. Smith, Canby, represented intervenor-respondents.

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

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42 REMANDED

04/16/2008

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

MOTION FOR VOLUNTARY REMAND

The challenged decision approves a non-farm dwelling on a 10-acre parcel zoned for exclusive farm use. Petitioner’s petition for review includes ten assignments of error, arguing in general that the county misconstrued the applicable law and adopted findings that are inadequate and not supported by substantial evidence. Intervenor-petitioner’s petition for review includes three assignments of error that allege similar challenges. Both petitions seek reversal of the challenged decision.

The county and intervenors-respondent (intervenors) move for voluntary remand, stating that, while not conceding error, the county believes that remand is necessary to make sure the county followed the proper procedure and law in making the decision. The county states:

“The County wished to make the proper assurances to the Board and to Petitioner that upon remand, the County intends to ensure that it complies with both state and local law, thus hold a hearing on the arguments about the applicable approval criteria, which would include all the sources of Petitioners’ allegations of error. (*See Angel v. City of Portland*, 20 Or LUBA 541 (1991); *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).” Motion for Voluntary Remand 2.

Petitioner objects to voluntary remand, arguing that at least one of his assignments of error alleges error that cannot be corrected on remand. According to petitioner, the evidence in the record indicates that as a matter of law the subject parcel is “suitable for farm use” for purposes of ORS 215.284(2)(b) and related administrative rules and land use regulations. Petitioner contends that there is no possible evidence that could be submitted on remand that would controvert the evidence already in the record showing that the property is, as a matter of law, suitable for farm use. Because the application can never be approved, petitioner argues, the challenged decision must be reversed rather than remanded. Therefore, petitioner argues, it is inappropriate to remand the decision to the county, because the county

1 proceedings on remand will not be “capable of providing the petitioner with everything he
2 would be entitled to from this Board.” *Angel*, 20 Or LUBA at 543.

3 Intervenorors disagree with petitioner that the evidence in the record demonstrates as a
4 matter of law that the property is suitable for farm use. In any case, intervenors argue that it
5 is inappropriate to have this Board essentially rule on the merits in the process of resolving
6 the motion for voluntary remand. To the extent the Board is inclined to consider petitioner’s
7 legal and evidentiary arguments on the merits, intervenors request that the Board proceed to
8 allow briefing and oral argument on the merits.

9 The county has indicated that it will consider *all* of the arguments made by petitioner
10 and intervenor-petitioner. That would necessarily include petitioner’s arguments that the
11 subject property is “suitable for farm use” and thus the application must be denied. To
12 obtain voluntary remand over a petitioner’s objections, no more is usually required under
13 *Angel* and its progeny than an adequate assurance that the local government will address all
14 of the arguments presented in the petition for review. Petitioner has not demonstrated that a
15 different result is required in the present case. Whether a parcel is “suitable for farm use” for
16 purposes of ORS 215.284(2)(b) and related administrative rules and land use regulations is a
17 highly fact-specific inquiry. Even if the present record does not support a finding that the
18 subject parcel is unsuitable for farm use—a point respondents do not concede and we need
19 not address—petitioner has not established that it is *categorically* impossible to introduce
20 evidence that would support such a finding in the present case. Accordingly, voluntary
21 remand is appropriate.

22 The county’s decision is remanded.