BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THURSTON D. INGLIS,
Petitioner,

and

OREGON FARM BUREAU FEDERATION,
Intervenor-Petitioner,

vs.

HARNEY COUNTY,
Respondent,

and

VIRGINIA PHILLIS, TOM PHILLIS
and RANDOLPH HOGREFE,
Intervenors-Respondents.

LUBA No. 2008-122

FINAL OPINION
AND ORDER

Appeal from Harney County.

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

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

No appearance by Harney County.

Tyler D. Smith, Canby, filed the response brief and argued on behalf of intervenor-respondents. With him on the brief was Tyler D. Smith P.C.

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

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

REMANDED 11/05/2008

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

Petitioner appeals a decision approving a non-farm dwelling on land zoned for exclusive farm use.

MOTIONS TO INTERVENE

Oregon Farm Bureau Federation (Farm Bureau), moves to intervene on the side of the petitioner in this appeal. There is no opposition to the motion and it is granted.

Virginia Phillis, Tom Phillis and Randolph Hogrefe (intervenors) move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

FACTS

The subject property is a vacant, rectangular 10-acre parcel that is zoned Exclusive Farm and Ranch Use (EFRU-2), fenced, and developed with a stock well. Soils on the property primarily consist of Class VI-s soils. The property is located in a floodplain, and was flooded in the winter of 1983/84.

The surrounding area is also zoned EFRU-2, and primarily used for ranching, farming and haying. Petitioner owns a large adjoining ranch with a cow-calf operation. Virginia Phillis acquired the subject property in 1990 and used it for grazing in conjunction with her adjoining 40-acre property, or leased it to others as grazing land. Currently, the property is used only for grazing Randolph Hogrefe's (Hogrefe's) horse.

In August, 2007, Hogrefe filed an application for an approval of a non-farm dwelling. The county planning commission held a public hearing on the application, and approved it in October 2007. Petitioner appealed the decision to the county court, which held a hearing and denied the appeal, approving the application. Petitioner appealed the county court decision to LUBA. The county moved for voluntary remand, and in April 2008 LUBA remanded the decision.

On remand, the county conducted an additional evidentiary hearing and again approved the application, with the additional condition that the applicants combine the subject 10-acre parcel with the adjoining 40-acre parcel owned by Virginia Phillis. This appeal followed.[1]

FIRST ASSIGNMENT OF ERROR

OAR 660-033-0130(4)(c)(A) and parallel county regulations require that the county find that the proposed non-farm dwelling "will not force a significant change in or significantly increase the costs of accepted farming or forest practices on nearby lands devoted to farm or forest use.

Petitioner argued to the county that the proposed dwelling would force significant changes in and increase the costs of his adjoining cow-calf operation, due to loose dogs, loud noises, and increase of trash blowing onto his pastures. Petitioner testified that noise from the dwelling and residents would stress his calves, causing weight loss and hence loss of income. According to petitioner, the impacts of the dwelling will cause him to abandon use of the pasture closest to the dwelling. The Farm Bureau makes similar arguments.

The county concluded that the dwelling will not force a significant change in or increase the costs of accepted farming practices, based on a document that Hogrefe submitted entitled "Surrounding Area Analysis Overview," found at Record Book A, 43-54.[2] Petitioner

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[1] The record consists of a number of separate folders labeled Book A, B, and C, and others labeled Book 1, 2 and 3, apparently a product of how the record before the planning commission, county court, and on voluntary remand was compiled. Book A and Book 1 consists of two consecutively paginated folders. Other books have non-consecutive pagination. We will therefore include a cite to the relevant book and page number, *e.g.* Record Book A, 10.

[2] The county found, in relevant part:

> "The court agrees with the applicants 'surrounding area analysis overview' in its review of the accepted farming practices and analysis. The practices identified include raising livestock, raising alfalfa hay, horse farming/training/boarding and hobby farming. The analysis of potential impacts, or lack thereof, is discussed at length in the applicant's overview[:]

argues that the "Surrounding Area Analysis Overview" is an unsigned memorandum apparently authored by the applicants' attorney that, according to petitioner, includes more argument than evidence. Petitioner contends that the assertions in the document that the dwelling will not impact petitioner's cow-calf operation do not constitute substantial evidence.

Intervenors respond, and we agree, that the county's conclusions are supported by substantial evidence. The overview discusses the farming activities on petitioner's ranch and notes, among other things, that petitioner's own dwelling is much closer to petitioner's pastures than would be the proposed non-farm dwelling. Intervenors cite to testimony in the record rebutting petitioner's claims that noise from the proposed dwelling would stress petitioner's calves and his claims regarding the impact of loose dogs, and wind-blown trash. While the county might well have chosen to rely on petitioner's testimony rather than the applicants' evidence, we conclude a reasonable person could also have relied on the applicants' evidence to conclude that the proposed dwelling will not significantly change or cause an increase in the cost of accepted farming practices on petitioner's ranch.

The first assignment of error is denied.

> "[1] The Court finds that no significant change in or cost to raising livestock will be caused by having a nearby house. Branding, herding, feeding or providing veterinary care will not increase as a result of this non-farm dwelling.
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> "[2] The Court finds that no significant change in or cost to the raising of alfalfa hay will occur. Applicants' land is already fenced. The transport of baled hay will not have to change because of this proposed dwelling and any vehicle traffic by the applicant will not be significant.
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> "[3] The Court finds that no significant change in or cost to horse farming/training/boarding will occur as a result of this approval. The applicant has a horse on the property in question at this time and is familiar with the associated challenges. No change will be caused to caring for, feeding or training horses on nearby property as a result of this decision. * * *" Record Book A 13.

SECOND ASSIGNMENT OF ERROR

OAR 660-033-0130(4)(c)(B) and parallel county regulations require a finding that the proposed dwelling will be situated on a lot or parcel, or a portion of a lot or parcel, that is "generally unsuitable" for, among other things, the production of livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract.[3] The rule specifies that a 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, or "simply because it is too small to be farmed profitably by itself."

The county found:

> "The Court finds that the subject parcel is generally unsuitable for livestock and farm crops because of its small size: 10 acres AND the poor soils (6s). Additionally, there is a history of flooding on this parcel from the 1983/84 flood event in Harney County that further limits the agricultural development potential on the parcel." Record Book A, 14.

> "The Court finds the subject parcel not only unsuitable because of size, location and history of flooding but is isolated from any other available farm land of 160 acres or greater except the appellant's. Testimony received demonstrated that the subject parcel is not available for lease or sale (at least not at an acceptable price) to the only neighboring property owner of an

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[3] OAR 660-033-0130(4)(c)(B) provides, in relevant part:

> "(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[.]"

> agricultural operation and thus cannot be put to farm use in conjunction with other land." *Id.*

Petitioner challenges those findings, noting that the soils on the subject property are Class VI agricultural soils, and thus presumed as a matter of law to be suitable for farm use under OAR 660-033-0130(4)(c)(B)(ii). Petitioner argues that the subject property has the same soils and general conditions as petitioner's adjoining land, which is suitable for and actually used for grazing. Further, petitioner notes that the subject property has a history of supporting grazing in conjunction with adjacent and nearby lands. Petitioner testified that he is willing to purchase the subject property for its actual market value as grazing land. Petitioner contends that the only relevant difference between the subject property and adjoining property is its small size. However, petitioner argues, OAR 660-033-0130(4)(c)(B)(i) and (ii) provide that the property cannot be considered unsuitable solely because of size or location, or because it is too small to be farmed profitably by itself, if it can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch.

The county's findings list four reasons why the subject parcel is generally unsuitable for farm use: (1) small size, (2) poor soils, (3) history of flooding, and (4) isolation from other ranches in the area other than petitioner's ranch. We agree with petitioner that the last three reasons are at best makeweights and that the only substantive reason identified by the county to conclude that the subject property is generally unsuitable for farm use is the parcel's relatively small size. Accordingly, the county must consider whether the subject parcel can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch.

With respect to soils, as petitioner notes the soils on the property are class VIs soils, which are presumptively suitable for farm use under OAR 660-033-0130(4)(c)(B)(ii). From the soil maps in the record it appears that those soils are the same as or similar to those found on adjoining parcels, including petitioner's large parcel in farm use. Where a large parcel in farm use adjoins a small parcel with the same agricultural soils and general conditions, an

obvious inference is that if something renders the small parcel unsuitable for farm use, it is the small parcel's size. The findings cite nothing about the soils on the subject property that distinguish them from soils on adjacent properties in farm use, or that purports to overcome the rule-based presumption that the soils on the property are suitable for farm use. Intervenor cites to a photograph in the record to argue that the subject parcel has different soil conditions than adjoining parcels, such as bare alkali patches. Response Brief 13, citing to Record Book A, 93. However, the caption of the cited photograph indicates that it shows "surrounding land" south of the subject property. If anything, the cited photograph suggests that soils and conditions on the subject property are similar to surrounding parcels.

The decision next cites a history of flooding on the parcel from the 1983-84 flood event. Again, there is no finding or suggestion that the subject property is different in this respect from adjoining agricultural lands in farm use. Maps in the record indicate that the entire area to the north and west of the subject property, including petitioner's adjoining ranch, are designated Floodplain C (Minimal Flooding).[4] Record Book 1, 46. The decision does not explain why the 1983-84 flood event, which occurred some 24 years ago, precludes grazing of the subject property but does not preclude grazing on the adjoining parcel. Further, we note that the map at Record Book 1, 49 depicts the extent of flooding in the area from the 1984 floods. Significant portions of petitioner's property was flooded, but the map indicates that no portion of the subject parcel was flooded.

Finally, the decision cites the subject property's isolation "from any other available farm land of 160 acres or greater except the appellant's." The point of this finding is not clear. Possibly this finding an attempt to explain why the subject property cannot be "sold,

[4] The floodplain map indicates that the subject parcel is located at the extreme southeastern edge of the area designated Floodplain C, which stretches to the north and west toward a lower elevation lake, the rise of which was apparently the source of the 1983/84 flood. In other words, the subject property appears to be located further away from the source of flood risk, and at a higher elevation, than petitioner's adjoining property to the north and west.

leased, rented or otherwise managed as a part of a commercial farm or ranch," and is not an attempt to identify a factor that in addition to size renders the property generally unsuitable for farm use. To the extent the latter is intended, the finding falls short of identifying a legitimate factor that together with its small size renders the property generally unsuitable for farm use. The entire area surrounding the subject property is zoned for farm use, and it is not clear that the property is "isolated" from farm land in any meaningful sense. The county does not explain why it considers farm land to be "isolated" from farm use and hence generally unsuitable for farm use because it is adjoined by only one parcel that is 160 acres or greater in size. The minimum parcel size in the EFRU-2 zone is 80 acres and most of parcels in the area are less than 160 acres in size.

In sum, the county has not identified any legitimate factor other than the small size of the subject property that might render it generally unsuitable for farm use. Therefore, the county must consider whether the subject property can be "sold, leased, rented or otherwise managed as a part of a commercial farm or ranch." OAR 660-033-0130(4)(c)(B)(i) and (ii).

The county's only finding on this point is the statement that "the subject parcel is not available for lease or sale (at least not at an acceptable price) to the only neighboring property owner of an agricultural operation and thus cannot be put to farm use in conjunction with other land." Petitioner testified that he is willing to purchase the subject property for its fair market value as grazing land, and that he has offered $300 per acre to the owner, based in part on the price he recently paid for similar grazing land across the road from the subject property. Record Book 2, 6. Petitioner and the Farm Bureau argue that where property has some value as farmland if used in conjunction with a neighboring commercial farm or ranch, and the owner of that farm or ranch offers to buy, lease, otherwise manage the property for something approaching its actual market value as farmland, OAR 660-033-0130(4)(c) prohibits a finding that the property is generally unsuitable for farm use. *Ploeg v. Tillamook County*, 43 Or LUBA 4, 21 (2002). That the current property owner is unwilling to sell the

property for its farmland market price, or would prefer to value the property as a site for a non-farm dwelling has no bearing on the issue. *Id.*

Here, the county found that the property is "not available" for sale or lease, at least not at an "acceptable price." Whether the property is presently on the market for sale or lease is not a relevant consideration under OAR 660-033-0130(4)(c). Similarly, whether or not the property owner would find a particular offer "acceptable" is also not relevant. The question is whether the property can be "sold, leased, rented or otherwise managed as a part of a commercial farm or ranch." The evidence that petitioner and the Farm Bureau cite to certainly suggest that it can, and intervenor cites to no evidence to the contrary.

Accordingly, we agree with petitioner that remand is necessary for the county to determine whether the property can be "sold, leased, rented or otherwise managed as a part of a commercial farm or ranch."

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

OAR 660-033-0130(4)(c)(C) requires a finding that the proposed dwelling will not materially alter the stability of the overall land use pattern in the area.[5] Pursuant to the standards and methods set out at OAR 660-033-0130(4)(a)(D), the county considered a 2,000-acre study area and determined that the cumulative impact of nonfarm dwellings on other lots or parcels in the area that are similarly situated would not materially alter the stability of the overall land use pattern.[6]

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

> "The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated by applying the standards set forth in paragraph (4)(a)(D) of this rule. * * *"

[6] OAR 660-033-0130(4)(a)(D) provides:

Petitioner argues that the county's findings are not supported by substantial evidence. Petitioner's initial argument is that the study the county relied upon is not in the record. Intervenors respond that while there may be no single document in the record that is labeled as a "study," the record includes all of the analysis and data required to demonstrate compliance with OAR 660-033-0130(4)(a)(D).

According to intervenors, the record includes a map showing the 2000-acre study area and information on ownership and chain of title for parcels in the study area. Intervenors argue that the stability study "is contained in, and discussed throughout the

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> "The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of possible new nonfarm dwellings and parcels on other lots or parcels in the area similarly situated. To address this standard, the county shall:
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> "(i) Identify a study area for the cumulative impacts analysis. The study area shall include at least 2000 acres or a smaller area not less than 1000 acres, if the smaller area is a distinct agricultural area based on topography, soil types, land use pattern, or the type of farm or ranch operations or practices that distinguish it from other, adjacent agricultural areas. Findings shall describe the study area, its boundaries, the location of the subject parcel within this area, why the selected area is representative of the land use pattern surrounding the subject parcel and is adequate to conduct the analysis required by this standard. Lands zoned for rural residential or other urban or nonresource uses shall not be included in the study area;
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> "(ii) Identify within the study area the broad types of farm uses (irrigated or nonirrigated crops, pasture or grazing lands), the number, location and type of existing dwellings (farm, nonfarm, hardship, etc.), and the dwelling development trends since 1993. Determine the potential number of nonfarm/lot-of-record dwellings that could be approved under subsections (3)(a), (3)(d) and section (4) of this rule, including identification of predominant soil classifications, the parcels created prior to January 1, 1993 and the parcels larger than the minimum lot size that may be divided to create new parcels for nonfarm dwellings under ORS 215.263(4). The findings shall describe the existing land use pattern of the study area including the distribution and arrangement of existing uses and the land use pattern that could result from approval of the possible nonfarm dwellings under this subparagraph;
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> "(iii) Determine whether approval of the proposed nonfarm/lot-of-record dwellings together with existing nonfarm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area[.]"

record," citing to the staff report at Record Book 1, 107. Response Brief 20. Further, intervenors argue that the county court discussed the stability information and that its findings adequately reflect the analysis required by OAR 660-033-0130(4)(a)(D).

The staff report at Record Book 1, 107, includes the following:

> "[Staff] found that in the 2,000-acre Study Area there are currently 5 dwellings and one post office (Princeton): 3 on Non-farm sized parcels and 2 placed on Farm-sized parcels. One Lot-of-Record Dwelling was permitted on June of this year (no. 07-39). There could be another approximately 21 non-farm dwellings on non-farm, small parcels. There are no parcels of more than 160 acres in which a division could occur to create additional 160-acre parcels. This produces a potential 23 [*sic*] total dwellings in the study area.
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> "* * * * *
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> "The cumulative effect of all possible dwellings being built would to some degree effect the possibility of the existing farming operations to expand in the immediate area. Whether or not the existing farming operations desire to expand is unclear." *Id*.

It is not clear from intervenors' argument whether county staff reviewed a separate study or source of information that for some reason is not in the record, or whether the staff report *is* the "study" and the source of the county court's findings regarding the stability standard.

We agree with intervenors that the study required by OAR 660-033-130(4)(a)(D) need not consist of a single document. However, the record must include the information and findings required by OAR 660-033-0130(4)(a)(D)(i) and (ii), and the analysis and determinations required by OAR 660-033-0130(4)(a)(D)(iii). The staff report and maps that intervenors cite to include some of the information required by OAR 660-033-0130(4)(a)(D)(i) and (ii), but not all, as far as we can tell. For example, while the staff report notes that the county has recently approved a lot-of-record dwelling in the study area, the

report does not identify the number of additional lot-of-record dwellings that could be created in the area.[7] Whether that is a material omission or not is less clear.

Even if the record included sufficient information to satisfy OAR 660-033-0130(4)(a)(D)(i) and (ii), we agree with petitioner that the county's findings addressing the ultimate standard at OAR 660-033-130(4)(a)(D)(iii) are inadequate. Petitioner notes that the county found that "the cumulative effect of all possible non-farm dwellings being built may affect the possibility of existing farming operations to expand in the immediate area."[8]

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[7] Although petitioner does not discuss it, we note also that the staff report found (repeated in the county court's findings) that "[t]here are no parcels of more than 160 acres on which a division could occur to create *additional* 160-acre parcels." (Emphasis added.) It is not clear what is meant. The finding seems to suggest that the county believes that new parcels can be created for non-farm dwellings in the EFRU-2 zone only if all the resulting parcels are at least 160 acres in size, which would require a parent parcel of at least 320 acres in size. However, in Eastern Oregon ORS 215.263(5) permits up to two new non-farm parcels that do not comply with the minimum size established under ORS 215.780, if they are created from a parent parcel that exceeds that statutory minimum size, and the remainder complies with that statutory minimum lot size following the partition. ORS 215.780 provides that new parcels zoned for exclusive farm use and not designated rangeland must be at least 80 acres in size; 160 acres if designated rangeland. Thus, a 90-acre parcel not designated rangeland could be divided into one 80-acre remainder parcel and two five-acre non-farm parcels. A 170-acre parcel designated rangeland could be divided into one 160-acre remainder parcel and two five-acre non-farm parcels. As noted the minimum parcel size in the EFRU-2 zone is 80 acres; it is not clear if property in the area is designated rangeland. The record reflects that there are large parcels in the study area that exceed 80 acres and 160 acres in size, *see* Record Book A, 69, but the county apparently did not consider whether such parcels, or any parcels, could be divided under ORS 215.263(5) to create new non-farm parcels.

[8] The county court found, in relevant part:

> "The Court finds that the addition of the proposed non-farm dwelling would NOT materially alter the stability of the overall land use pattern of the area or hinder existing farming operations from conducting their business. [The county concludes] that the subject property (including the adjacent parcel addressed in the next sentence) is an isolated parcel surrounded on two sides by a single landowner and a county road on a third side (east side). The decision of the court to condition approval in this matter by the combining of a contiguous lot will limit any further home development in that area.
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> "The Court finds that the cumulative effect of all possible non-farm dwellings being built may affect the possibility of existing farming operations to expand in the immediate area. However, the court also finds that these parcels are of such a small size, and located in an ownership pattern and proximity to a state highway that the opportunity for the agricultural operations to acquire or lease them is extremely limited mainly by their high value. * * *" Record Book A, 17-18.
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> "The Harney County Planning Department found that in the 2,000-acre Study Area there are currently 5 dwellings and one post office (Princeton): 3 on parcels less than 80 acres in size and 2 placed on 160 acre or greater parcels. One Lot of Record Dwelling was permitted in June of 2007. The analysis shows at this point in time there could be another 21 non-farm

However, the county concluded that such expansion is unlikely given the "high value" of the 21 parcels within the study area that, like the subject property, are less than the 80-acre minimum lot size. Petitioner argues that the county

> "misses the obvious irony in this finding. The 'high value' of these small parcels is only because the Harney County Court continues to approve non-farm dwellings on exclusive farm use [land]. Just as in this case, the subject parcel, ten acres in size, has a value of $300 per acre as grazing land (Record: Book 2, p. 6). However, if the County grants the non-farm dwelling permit, then (according to the owner) the property has a value approaching $1,000 an acre (Record: Book B, p. 15). The County has created this increase in value; it is responsible for adversely affecting the stability of the agricultural land use pattern in this part of Harney County." Petition for Review 25.

We agree with petitioner that the perceived "high value" of the 21 existing sub-minimum parcels in the study area is an insufficient and erroneous basis to conclude "the cumulative effect of existing and potential nonfarm dwellings" will not 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." That perceived high economic value almost certainly reflects the smaller parcels' speculative value as potential non-farm dwelling sites, not their actual value as part of an agricultural operation. One purpose of OAR 660-033-0130(4)(a)(D)(iii) is to ensure that existing and potential nonfarm dwellings do not

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> dwellings placed on already existing parcels of less than 80 acres in size. There are no parcels of more than 160 acres on which a division could occur to create additional 160-acre parcels. This produces 26 (counting existing and potential sites) total possible dwellings in the study area. A number of these parcels are in common ownership by agricultural operations which may limit home development on those parcels. The question is—will the addition of the maximum possible number of dwellings materially alter the overall land use pattern? The land use pattern in the area today and for many decades included these many small parcels and is NOT altered by the applicant's non-farm dwelling.
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> "The opportunity for any existing farming operations in the Study Area to expand, lease or rent property is likely limited by the high value of many of these already existing small acreage parcels. The potential of impacts on neighboring agriculture practices by development is increased on many of these existing small parcels by their direct proximity to Oregon State Highway 78/Lava Bed Road and by the fact that they were created long before Oregon land use laws. Some of these parcels are more at risk for flooding than others which may make them of a low enough value that nearby agricultural operations can acquire them. However there is no guarantee that any other non-farm dwellings would be approved." Record Book A 18.

diminish opportunities for agricultural operations in the area to expand, purchase or lease farmland in the area. The county's approach is antithetical to that purpose, because it essentially concludes that agricultural operations in the area have no opportunity to expand due to existing and potential nonfarm dwellings.

OAR 660-033-0130(4)(a)(D)(iii) also requires a determination whether the cumulative effect of existing and potential nonfarm dwellings will "diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area." From the map at Record Book A, 79, identifying the 2000-acre study area, it appears that there are 30 to 32 parcels wholly or partially within the study area. The county made no finding on what percentage of the acreage in the study area is in "farm use" compared to non-farm uses, but it appears undisputed that the "overall character of the study area" based on acreage and actual use is predominantly farm use. The question before the county is whether the cumulative impact of the three existing and 21 potential non-farm dwellings in the area would destabilize that existing land use pattern. The county did not answer that question directly, but found only "[t]he land use pattern in the area today and for many decades included these many small parcels and is NOT altered by the applicant's non-farm dwelling." Record Book A, 18. However, that focuses on the parcelization pattern, not the *land use* pattern. The county did not address "the land use pattern that could result from approval of the possible nonfarm dwellings[.]" OAR 660-033-0130(4)(a)(D)(ii). If all or even a significant number of the 21 sub-minimum lot size parcels in the area would develop with non-farm dwellings, that would almost certainly impact the land use pattern in the study area, by reducing the acreage that is devoted to farm use, potentially destabilizing the overall character of the area. The county's findings fail to establish that the cumulative impact of existing and potential non-farm dwellings will not "diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area."

Finally, we note that the county required as a condition of approval that the subject parcel be combined with the adjoining 40-acre parcel, which is in common ownership. The county found that this condition will "limit" further non-farm dwelling in the area, apparently by eliminating one of the 21 vacant sub-minimum lot size parcels in the area that could potentially be developed with a non-farm dwelling. By itself, that condition is insufficient to ensure compliance with the stability standard, as it eliminates only one of the potential 21 new non-farm dwellings that could be developed in the area. However, if consistently and meaningfully applied, that approach or some combination of approaches is a possible means of reducing the number of potential non-farm dwellings in the area to a level that is consistent with the stability of the agricultural land use pattern. *See Wolverton v. Crook County*, 39 Or LUBA 256, 274 (2000) (stability standard is met despite potential to approve nonfarm dwellings on many small five-acre lots in an unrecorded subdivision, because county policy encourages consolidation of the small lots in the subdivision into larger lots, the county has approved non-farm dwellings only on larger consolidated lots and denied dwellings on small lots, and due to diverse ownership patterns few consolidated lots of sufficient size are possible).

As we explained in *Young v. Crook County*, __ Or LUBA __ (LUBA No. 2007-250, June 11, 2008), *rev pending* (A139342):

> "[T]he stability standard essentially requires the county to project a full development, worst-case scenario and determine whether under that scenario the agricultural land use pattern would be destabilized at some point in the future. In our view, if the answer to that question is affirmative, the county must either (1) deny the application or (2) identify some reason or mechanism, supported by the record, why that scenario is not likely to occur and nonfarm dwelling development in the study area will not reach levels that destabilize the agricultural land use pattern." Slip op 6.

We noted one possible such mechanism in the county's wildlife habitat density standards, which depending on how it is applied could sharply reduce the number of potential non-farm dwellings that could be approved on small lots in the study area. *Id.* n 3.

In the present case, the study area includes 21 sub-minimum size parcels that are generally collected in three or four ownerships, including a half a dozen parcels owned by the applicants. We leave open the possibility that on remand the county can identify some means to effectively reduce the potential number of non-farm dwellings that could be approved in the area, as in *Wolverton*, or otherwise ensure that the cumulative effect of existing and potential non-farm dwellings in the area will not materially alter the stability of the overall land use pattern of the area.

The third assignment of error is sustained.

FOURTH THROUGH NINTH ASSIGNMENTS OF ERROR

The county applied six "criteria for judging zoning and subdivision matters" listed in the Harney County Comprehensive Plan (HCCP), at HCCP 8.3(5), and found that the proposed non-farm dwelling is consistent with those criteria.[9] Under the fourth through ninth assignments of error, petitioner challenges the county's findings addressing the six HCCP criteria.

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[9] HCCP 8.3(5) provides:

> "The criteria below are to be the basis of consideration and decision making on zoning and subdivision matters. * * *
>
> "a. That the proposed use is in conformance with both the land use map and goals and policies of the [HCCP], or that there was a mistake in the Plan, or that conditions have substantially changed since the Plan was adopted.
>
> "b. That there is a demonstrated public need for the proposed use.
>
> "c. That there are no other appropriately zoned and available lands that could be used to satisfy the public need.
>
> "d. That the particular property is better suited to meet the public need than other potential properties.
>
> "d. That there will be no undue impacts on provisions of public facilities and services, including but not limited to schools, roads, sheriffs, etc.
>
> "f. Comprehensive Plan designations are complied with. This includes the criteria for creation of non-farm and non-forestry uses in the EFFRU zone."

As an initial matter, the county found that the HCCP criteria "specifically refer to zoning or subdivision matters" and that the proposed dwelling is "neither a zoning nor a subdivision matter." Record Book A, 10. Nonetheless, the county applied the HCCP criteria because "these are the standard judging criteria used by this county for many years on all land use decisions." *Id.* In its findings addressing each criterion, however, the county commented that two of the criteria appear to relate only to zone changes.

Intervenor argues that none of the HCCP criteria apply to a conditional use permit and therefore the county's findings of compliance with the HCCP criteria are superfluous and any error or inadequacy in addressing those criteria does not warrant remand.

We tend to agree with intervenor that most if not all of the HCCP criteria appear to be directed at proposed zone changes, and do not readily apply to a proposed conditional use permitted under an existing zone designation. The county specifically found that two HCCP criteria, those at HCCP 8.3(5)(c) and (d), were designed for proposed zone changes and do not "fit" with conditional use permit applications. Record Book A, 11-12. The county goes on to conclude that the proposal complies with HCCP 8.3(5)(c) and (d), to the extent they apply. Petitioner does not challenge the finding that at least HCCP 8.3(5)(c) and (d) do not apply to the proposed non-farm dwelling, and we cannot say that view is inconsistent with the text of HCCP 8.3(5). Accordingly, we deny the sixth and seventh assignments of error, which challenge the county's alternative findings that the dwelling complies with HCCP 8.3(5)(c) and (d).

We assume, for purposes of this opinion, that the remaining HCCP criteria potentially apply to a conditional use permit, and accordingly address the fourth, fifth, eighth and ninth assignments of error, which challenge the county's findings under HCCP 8.3(5)(a), (b), (e) and (f), respectively.

A. HCCP 8.3(5)(a): Conformance with the HCCP Goals and Policies

The county found in relevant part that the proposed dwelling conforms with HCCP Goals and Policies by complying with the conditional use standards for a non-farm dwelling, citing the preface to the EFRU-2 zone, which states that the zone implements the comprehensive plan and the statewide planning goals. Petitioner challenges that finding, arguing that for the reasons set out in the first through third assignments of error the proposed dwelling does not comply with the local conditional use standards that implement OAR 660-033-0130(4)(c), and therefore does not conform with the HCCP.

Intervenors respond, and we agree, that the arguments under the fourth assignment of error are entirely derivative of those under the first through third assignments of error and provide no independent basis for reversal or remand. Accordingly, the fourth assignment of error is denied.

B. HCCP 8.3(5)(b): Demonstrated Public Need

The county found:

> "* * * [T]he Harney County [Comprehensive Plan] Goal 7.3 specifically acknowledges that there is an ongoing public need for rural non-farm housing and that this need is one that the county should recognize and help meet. The County can help meet this need by approving Conditional Use Permits, non-farm dwellings on the small lots in the County that are not in farm production. This continuing need is recognized by Real Estate professionals in the area that have testified before this Court and by Applicant Hogrefe wishing to build a home on the property he is buying to house himself and his elderly father. * * *" Record Book A, 11.

Petitioner argues that there is no testimony in the record from real estate professionals regarding the public need for rural non-farm housing, and that the applicant's desire for a rural dwelling is not sufficient to demonstrate a "public need" for the proposed use.

Intervenors cite to several places in the record where real estate professionals and others testified that there are no areas in the county that are zoned for rural residential use and that there are few lots and parcels available for rural residential use. Petitioner does not acknowledge that evidence or explain why it is not substantial evidence to support the

county's finding of public need, for purposes of HCCP 8.3(5). Accordingly, the fifth assignment of error is denied.

C. HCCP 8.3(5)(e): Undue Impact on Public Facilities and Services

The county found:

> "The Court finds no discussion is really needed on this as all public facilities and services are available in the area or are not needed by the use. There is not any 'undue impact' to schools, law enforcement etc. by the addition of one family." Record Book A, 12.

Petitioner argues that there is no evidence in the record addressing impacts on public facilities and services and the county's finding is therefore not supported by substantial evidence. Further, petitioner cites to testimony that the county currently provides inadequate dog control and garbage, fire, and police services.

Intervenors cites to planning staff testimony that the property is served by utilities and law enforcement services, and that a private well and septic system will provide water and sanitary services. According to intervenors, the county correctly found that the addition of one single family dwelling will not present an "undue impact" on public services, even if current county services in some areas are inadequate.

HCCP 8.3(5)(e) requires that there will be no "undue" impact on public services, not that there will be no impact. Petitioner cites to no evidence that allowing a single-family dwelling will cause an "undue" impact on county services, and there is evidence in the record supporting the county's finding to the contrary. Accordingly, the eighth assignment of error is denied.

D. HCCP 8.3(5)(f): Complies with Applicable Zoning Requirements

The county found that the dwelling complies with all applicable EFRU-2 zone requirements and therefore also complies with HCCP 8.3(5)(f). Petitioner argues that, for the reasons set out in the first, second and third assignments of error, the dwelling does not comply with all applicable zoning approval standards. As with petitioner's arguments under

the fourth assignment of error, the arguments under the ninth assignment of error are derivative and do not provide an independent basis for reversal or remand. Accordingly, the ninth assignment of error is denied.

The county's decision is remanded.