BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

BILL SPROUL,
Intervenor-Respondent.

LUBA No. 2017-114

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by Lane County.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, P.C.

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

AFFIRMED 05/08/2018

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a decision determining that a 33-acre property is non-resource land and approving a concurrent comprehensive plan designation and zoning map amendment to allow rural residential development.

FACTS

The challenged decision is Lane County's approval of intervenor-respondent's (intervenor's) request for an amendment to the comprehensive plan map designation from forest land to nonresource land, and a corresponding zoning map amendment from Impacted Forest Land (F-2) to Rural Residential 10-acre minimum (RR-10) for a 33-acre tract located in the foothills of the Coburg Hills, east of Coburg and I-5. The subject property consists of two parcels -a 20-acre parcel designated tax lot 102, developed with a single-family dwelling, and a 13-acre portion of an adjoining parcel designated TL 111. The remainder of TL 111 (which is not part of this appeal) is zoned RR-10 and developed with a dwelling. Both parcels are also developed with several agricultural buildings, some of which had been used as part of a former owner's alpaca operation that ended in 2004. The subject property has no irrigation rights and is located in a restricted groundwater area.

Based on a soil study provided by intervenor's expert, the county concluded that the subject property is not predominantly composed of agricultural soils, and based on several other factors, the county concluded the

property is not suitable for farm use. On appeal, petitioner challenges that conclusion.

ASSIGNMENT OF ERROR

Statewide Planning Goal 3 (Agricultural Land) provides, in part:

> "Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state's agricultural land use policy express in ORS 215.243 and 215.700."

OAR 660-033-0020(1)(a), in turn, defines "agricultural land" for purposes of Goal 3 to include:

> "(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon * * *;
>
> "(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climactic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices[.]"

The predominant soils on the subject property are Class VI soils, and therefore the subject property does not qualify as agricultural land under OAR 660-033-0020(1)(a)(A). The "suitable for farm use" test in OAR 660-033-0020(1)(a)(B) refers to the definition of "farm use" at ORS 215.203(2)(a),[1]

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[1] ORS 215.203(2)(a) provides:

> "As used in this section, 'farm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding,

which in relevant part means "the current employment of land for the primary purpose of obtaining a profit in money" by engaging in a number of listed agricultural pursuits, including the "harvesting and selling crops," or the "feeding, breeding, management and sale of, or the produce of, livestock, poultry, furbearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof.

For purposes of determining whether land is agricultural land under OAR 660-033-0020(1)(a)(B), a factor that a local government may consider in addition to the seven factors listed in the rule is whether a reasonable farmer

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> management and sale of, or the produce of, livestock, poultry, furbearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. 'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. 'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. 'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. 'Farm use' does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in subsection (3) of this section or land described in ORS 321.267(3) or 321.824(3)."

would be motivated to put the land to agricultural use, for the primary purpose of obtaining a profit in money. *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007). The suitability for farm use inquiry must also consider the potential for use in conjunction with adjacent or nearby land. OAR 660-033-0030(3).

Under a single assignment of error, petitioner argues that the findings regarding suitability for farm use are "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 In.*, 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 (1994).

Specifically, under three sub-assignments of error, petitioner argues that despite the soil characteristics of the subject property, the county's findings fail to demonstrate that the applicant could not put the subject property to

profitable "farm use" by (1) growing and processing marijuana; or (2) continuing the previous property owner's operation by feeding, breeding, managing and selling livestock, such as alpacas. ORS 215.203(2)(a). Finally, petitioner argues the county's findings fail to demonstrate that the subject property cannot qualify as "agricultural land" because the findings fail to adequately demonstrate a lack of "existing and future availability of water for farm irrigation purposes." OAR 660-033-0020(1)(a)(B). We address each of petitioner's arguments in turn.

A. Marijuana as a Crop.

As set forth above, the definition of "farm use" includes "the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops * * *." ORS 215.203(2)(a); *see* n 1. In turn, state statute defines marijuana as "[a] crop for the purposes of 'farm use' as defined in ORS 215.203." ORS 475B.526(1)(a). Lane County Code (LC) provides that marijuana production, wholesale distribution and research are permitted uses on the subject property, subject to its current impacted forest lands zoning (F-2). LC 16.211(2)(p)-(r); LC 16.420. Therefore, according to petitioner, the county erred in approving intervenor's request to re-designate the subject property from resource to non-resource land, because the county's findings fail to demonstrate the subject property could not be put to the farm use of marijuana cultivation.

Further, petitioner argues the county failed to address the testimony it submitted below, which argued that marijuana production is a viable farm use or crop on the subject property because it can be cultivated regardless of the existing soil type on the property. As petitioner testified, marijuana cultivation "typically will utilize cloth pots or buckets, and, therefore, the suitability or agricultural class of the soils is not a relevant inquiry for marijuana production. Many types of soils specifically for marijuana are readily available." Supplemental Record (Record) 64. Petitioner argues the county's findings failed to demonstrate that "technology or energy cannot allow for production of viable economic crops" such as marijuana, and therefore the county's findings are insufficient. Record 65.

In response, intervenor contends the standard at issue, OAR 660-033-0020, which gives effect to Goal 3, focuses on the *land* and its suitability for farm use, not on whether a particular *crop* can be grown on the site regardless of the qualities of the land. Second, intervenor asserts there is "nothing in Goal 3 or the Goal 3 Rule that even remotely suggests" that Oregon law requires property owners "to commit a federal crime and risk forfeiture of their property to the federal government in order to receive a nonresource designation for the land because, as Petitioner contends, marijuana can be grown anywhere and under any conditions because its production is totally divorced from the land or property." Response Brief 12. We agree with intervenor.

The first step in the analysis under the rule is to determine whether the predominant *soil* type located on the subject property classifies the property as "agricultural *land*." OAR 660-033-0020(1)(a)(A)(emphasis added). Here, there is no dispute that because the predominant soil type is not within Classes I-IV, the subject property is not "agricultural land." *Id.* Under OAR 660-033-0020(1)(a)(B), the next step (sometimes referred to as the "other suitable lands" test) is to determine whether the *land* is, despite its non-agricultural soil classification, nevertheless "suitable for farm use":

> "Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility, suitability for grazing; climactic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices[.]" *Id.*

Pursuant to *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009), "[t]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." (Internal citations omitted.) The focus of the text of the rule is clearly on the *soil*, or *land* itself, and whether, despite poor agricultural soils, the land is nonetheless "suitable for farm use" given other specified factors. The obvious error in petitioner's interpretation of the rule is that some uses, like marijuana cultivation, are entirely separate and disconnected from the *land*. As intervenor points out, marijuana cultivation

"can occur equally as well on a parking lot as it could on 80 acres of high value farmland." Response Brief 13-14.

Statewide Planning Goal 3 is to "preserve and maintain agricultural lands." In turn, Goal 3's definition of "agricultural lands" is primarily based upon soil type. Only when the subject property's soil type does not qualify as agricultural land, is the local government to look to other factors—each of which focus on whether those "other *lands* [] are suitable for farm use * * *." (Emphasis added.) To adopt petitioner's suggested interpretation would render the rule and its focus on the land itself meaningless. We decline to adopt such an interpretation. *Thompson v. IDS Life Ins. Co.*, 274 Or 649, 656, 549 P2d 510 (1976).

Because we have rejected petitioner's interpretation of the rule to require the county to consider whether the property is suitable for farm use based on the cultivation of marijuana (or any other crop) in ways that are entirely removed from the agricultural qualities of the land, it follows that the county's failure to adopt findings addressing that issue does not provide a basis for reversal or remand.

This subassignment of error is denied.

B. Suitability for Animal Husbandry

Under the second subassignment of error, petitioner argues the county's decision should be remanded because the county's findings related to the subject property's suitability for animal husbandry are inadequate. ORS

215.203(2)(a); *see* n 1. During the proceedings below, petitioner supplied testimony that prior to 2004 a previous owner operated an alpaca farm on portions of the subject property. When selling the property in 2004, the previous owner advertised that the subject property generated revenue ranging from $12,000 to $120,000 per year. Record 128. Further, petitioner pointed to agricultural buildings already existing on the property, which were previously identified as being used for purposes of animal husbandry. Finally, petitioner presented evidence that the former owner received a farm tax deferral for TL 111. According to petitioner, "[a]ll of this information demonstrates that the subject property has a history of farm uses, and nothing has changed to demonstrate that such uses cannot continue. Therefore, the property should remain agricultural land." Record 64.

In response, intervenor pointed the county to contrary evidence regarding the poor suitability of the land on the subject property for grazing based on a soils analysis. Record 20, 351, 357. Intervenor further pointed to evidence in the record that demonstrates that although the former owner attempted to run a profitable alpaca farm, if anything, they "gave it a good shot, but totally failed at making the farm commercially viable prior to selling the property in 2004." Response Brief 21; Record 131, 138-39. Finally, intervenor argued that testimony from county staff indicated that the farm tax deferral was a property tax designation assigned by the county assessor, given at an unknown time, and was therefore inconclusive evidence as to the property's

suitability for grazing. Record 741. The county was persuaded by intervenor's evidence and argument over petitioner's, and adopted detailed findings explaining its reasoning for declining to rely on petitioner's evidence. As the county's findings state:

> "The inability to match livestock grazing to the period of maximum nutrient value of the forage available without being destructive to soil and plant resources, and the inability to use the area as holding/feeding for all of the wet season contribute to the lack of suitability for farm use.
>
> "* * * * *
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> "The actual grazing history of the property offers solid, practical substantiation for the evaluation of the soil scientist that the soils on the subject property are not suitable for farm use.
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> "Climatic conditions combined with soil conditions create poor conditions for grazing. * * *" Record 200.

In reviewing the evidence, 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*, 305 Or at 358-60. Where evidence is conflicting and the contrary evidence does not so undermine the evidence relied upon by the local decision maker that it is unreasonable for the decision maker to rely upon it, the choice between such conflicting believable evidence belongs to the local government decision maker, and LUBA will not disturb that choice. *Harwood v. Lane County*, 23 Or LUBA 191, 198 (1992).

While both petitioner and intervenor presented evidence in support of their positions, the county found intervenor's evidence more credible. We conclude that petitioner's evidence does not so undermine intervenor's evidence as to make the county's decision to rely on intervenor's evidence unreasonable. The county's findings addressing the "other suitable lands" test are supported by substantial evidence.

This subassignment of error is denied.

C. Future Availability of Water for Farm Irrigation Purposes

In its third subassignment of error, petitioner argues that the county failed to demonstrate that that the subject property cannot qualify as "agricultural land" based on "existing and future availability of water for farm irrigation purposes[.]" OAR 660-033-0020(1)(a)(B).

During the proceedings below, petitioner pointed to evidence in the record, which petitioner contends establishes adequate water exists on the property. Petitioner pointed out that the property was used for agricultural uses in the past and argued that water is available for agricultural use in the future. Petition for Review 17-18. According to petitioner, the record includes evidence that the various watercourses run through the property, including two intermittent creeks and associated seasonal wetlands and ponds. Further, petitioner contends prior property owners used these watercourses for agricultural uses. Petition for Review 28. Petitioner also presented evidence of

irrigation used to supply various domestic uses such as a vegetable and flower garden, small orchard and greenhouse.

The county's findings state: "No irrigation water exists. Existing wells are for residential use only." Record 20. According to intervenor, the record contains no evidence that irrigation rights of any kind exist on the property. The county evidently agreed with the intervenor's position, which is that without a recorded irrigation water right, no water may be drawn for agricultural irrigation purposes from either surface or ground water. Record 348. We do not understand petitioner to dispute otherwise.

Thus, the existence of some surface water on the property at certain times of the year does not undermine the county's finding that the subject property is not suitable for farm use considering the "existing and future availability of water for farm irrigation purposes[.]" Petitioner cites to no evidence that it is possible for intervenor to obtain an agricultural water right to use water from seasonal sources on the property. Petitioner's arguments regarding the availability of water for irrigation do not provide a basis for reversal or remand of the challenged decision.

This subassignment of error is denied.

The assignment of error is denied.

The county's decision is affirmed.