

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

3
4 CENTRAL OREGON LANDWATCH,
5 *Petitioner,*

6
7 and

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9 THOMAS BISHOP, DORBINA BISHOP,
10 TRUSTEES OF THE BISHOP
11 FAMILY TRUST,
12 *Intervenors-Petitioners,*

13
14 vs.

15
16 DESCHUTES COUNTY,
17 *Respondent,*

18
19 and

20
21 TUMALO IRRIGATION DISTRICT,
22 *Intervenor-Respondent.*

23
24 LUBA No. 2019-011

25
26 FINAL OPINION
27 AND ORDER

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29 Appeal from Deschutes County.

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31 Rory Isbell, Bend, filed the petition for review and argued on behalf of
32 petitioner.

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34 Jennifer Bragar, Portland, represented intervenors-petitioners.

35
36 D. Adam Smith, Assistant County Legal Counsel, Bend, filed a joint
37 response brief and argued on behalf of respondent.

1 Garrett Chrostek, Bend, filed a joint response brief and argued on behalf
2 of intervenor-respondent. With him on the brief was Bryant, Lovlien & Jarvis,
3 P.C.

4
5 RYAN, Board Chair; RUDD, Board Member, participated in the decision.

6
7 ZAMUDIO, Board Member, did not participate in the decision.

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9 AFFIRMED

08/21/2019

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

NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners approving an application to (1) remove a 541-acre property from the county’s Statewide Planning Goal 5 inventory of significant aggregate resources, (2) change the comprehensive plan designation for the property from Surface Mining to Rural Residential Exception Area, and (3) change the zoning designation from Surface Mining (SM) to Multiple Use Agriculture 10-acre Minimum (MU-10).

REPLY BRIEF

On July 2, 2019, petitioner filed a reply brief to respond to waiver arguments raised in the response brief. OAR 661-010-0039.

FACTS

Intervenor-respondent Tumalo Irrigation District (TID) applied to remove its 541-acre property located ½ mile west of the unincorporated community of Tumalo from the county’s Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources) inventory of significant aggregate resources, and change the plan and zoning designations from SM to MU-10.

The county’s first comprehensive plan zoned “[a]ll lands meeting the definition of agricultural lands” exclusive farm use (EFU), as required by Statewide Planning Goal 3 (Agricultural Lands). Deschutes County Comprehensive Plan (DCCP) (1979); Record 1081. In 1979, the county adopted the county’s zoning map (1979 zoning map) that showed TID’s property zoned

1 SM. The property was placed on the county’s Goal 5 inventory as Site 357. The
2 Economic, Social, Environmental, and Energy (ESEE) analysis required by Goal
3 5 for the property does not specify a post-mining use. Record 55.

4 Prior to adopting the zoning map, in 1978 the county adopted an initial
5 inventory of agricultural lands (1978 inventory map), as required by Goal 3. The
6 initial inventory did not include TID’s property. As part of periodic review in
7 1992, the county submitted and the Land Conservation and Development
8 Commission (LCDC) acknowledged an updated agricultural lands inventory map
9 (1992 updated inventory map) that does not include TID’s property.

10 Beginning around 1947 until approximately 2011, the property was mined
11 for pumice, gravel and cinder. After the resources were exhausted, the property
12 was reclaimed in 2011. In 2019, TID applied to remove the property from the
13 Goal 5 inventory and to change the plan and zoning designations. The hearings
14 officer initially denied the application on transportation-related grounds, and TID
15 and petitioner appealed that decision to the board of county commissioners. The
16 board of county commissioners held a *de novo* hearing on the application and
17 voted to approve the application. This appeal followed.

18 **FIRST ASSIGNMENT OF ERROR**

19 In its first assignment of error, petitioner argues that the property is
20 “agricultural land,” and therefore an exception to Goal 3 is required in order to
21 change the comprehensive plan and zoning designation. Goal 3 defines

1 “agricultural land” to include lands with certain soil classes.¹ According to
2 petitioner, the property is agricultural land because the U.S. Natural Resources
3 Conservation Service (NRCS) maps classify the soils on the property as Class III
4 with irrigation and Class VI without irrigation.

5 **A. Waiver**

6 As explained above, petitioner submitted a NRCS soils map into the record
7 and argued that it established that the TID property is agricultural. As additional
8 support for its argument, petitioner attaches to the petition for review at Appendix

¹ OAR 660-033-0020(1)(a) defines “[a]gricultural [l]and” 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; and

“(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.”

OAR 660-033-0020(1)(b) additionally defines agricultural land to include “[l]and in capability classes other than I-IV/I-VI that is adjacent to or intermingled with lands in capability classes I-IV/I-VI within a farm unit,” even if the land “may not be cropped or grazed.”

1 101 a document that petitioner identifies as the county’s 1979 comprehensive
2 plan map. According to petitioner, the map at App 101 identifies the property as
3 “Agriculture.” Petition for Review 15. TID and the county (together,
4 respondents) respond that petitioner failed to raise the issue that the 1979
5 comprehensive plan map depicts the property as “Agriculture” prior to the close
6 of the initial evidentiary hearing, and for that reason is precluded by ORS
7 197.763(1) from raising it for the first time at LUBA. In the reply brief, petitioner
8 responds that the issue it raised below is that the property is agricultural land, and
9 it is not required to raise every argument in support of that issue in order to satisfy
10 ORS 197.763(1).² We agree with petitioner that it is not precluded from arguing
11 that the map at App 101 shows the property as “Agriculture.” However, as we
12 explain in more detail below, we reject petitioner’s claim that the map
13 demonstrates that the property is agricultural land.

14 **B. The County’s Decision**

15 The board of county commissioners found that the previous,
16 acknowledged decisions demonstrate that the property is not agricultural land.

² We understand respondents to additionally respond that petitioner failed to raise an issue that the map attached to the petition for review at App 101 identifies the property as “Agriculture” in its appeal statement; respondents further argue that under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), *rev den*, 336 Or 615, 90 P3d 626 (2004) and ORS 197.825(2)(a) petitioner is precluded from raising the issue. However, respondents’ argument is not developed sufficiently for our review.

1 Those decisions include: (1) the 1979 zoning map zoning the property as SM, a
2 zone that does not implement Goal 3; (2) the 1978 inventory map of agricultural
3 lands that does not include the property; and (3) the 1992 updated inventory map
4 of agricultural lands that also does not include the property. The board of county
5 commissioners found that the 1978 inventory map of agricultural lands was
6 prepared based on a review of NRCS data, and an area-specific analysis of the
7 soils in the Tumalo area. Petition for Review, App 87. Accordingly, we
8 understand the board of county commissioners to have found the evidence
9 petitioner submitted regarding the NRCS soils map is refuted by prior county
10 decisions that did not classify the property as agricultural land, which were
11 supported by area-specific analyses of the soils in the Tumalo area.

12 As additional support for its conclusion that the property is not agricultural
13 land, the board of commissioners also relied on the ESEE analysis for the
14 property, which is part of the DCCP. The board of county commissioners
15 reasoned that because the ESEE analysis for the property does not specify a post-
16 mining zoning or use, while other ESEE analyses for properties zoned SM
17 specify the post-mining zoning designation and uses as EFU and agriculture, “had
18 the subject property been classified as agricultural land, then the ESEE would
19 have specified EFU zoning.” Record 55.

20 The board of county commissioners also concluded that the SM zoning
21 designation described in the DCCP and the county’s zoning ordinance is
22 additional support for its conclusion that the property is not agricultural land

1 where, as described above, the ESEE analysis does not identify that the post-
2 mining zoning will be EFU. The board of county commissioners concluded that
3 the SM zone includes lands designated “other than ‘resource lands’ (lands subject
4 to Goals 3 and 4).” Record 56 (footnote omitted). The board of county
5 commissioners rejected petitioner’s arguments that the SM zone is a “transitional
6 or temporary” zone and that the SM zoning of the property does not inform the
7 question of whether the property is agricultural land. Record 56, 82.

8 **C. Analysis**

9 Respondents respond that the board of county commissioners correctly
10 rejected petitioner’s arguments based on data and maps petitioner produced from
11 the NRCS website, as not credible. In addition, respondents argue that the board
12 of county commissioners correctly rejected petitioner’s proffered interpretation
13 of the significance of the SM zoning designation and the ESEE analysis for the
14 property included in the DCCP.³ For the reasons explained below, we agree with
15 respondents that the board of county commissioners correctly determined that the
16 property is not “agricultural land.” ORS 197.835(9)(a)(D).

17 First, the county has previously determined in two separate final
18 acknowledged decisions, in 1978 and in 1992, that the property should not be

³ As respondents explain, the NRCS website that petitioner used to prepare the soil maps for the property includes a disclaimer regarding the large scale of mapping, stating that “[e]nlargement of maps beyond the scale of mapping can cause misunderstanding of the detail of mapping and accuracy of soil line placement.” Record 1085.

1 included on the county's inventory of agricultural lands. The first decision in
2 1978 was based on area-specific soils mapping. The second was in 1992 after
3 periodic review and which resulted in an updated inventory that was
4 acknowledged by LCDC. While we disagree with respondents that petitioner's
5 arguments amount to a collateral attack on those previously acknowledged
6 decisions to not include the property on the agricultural lands inventory, we agree
7 with respondents that those previous decisions are substantial evidence that the
8 property is not agricultural land, and it was reasonable for the board of county
9 commissioners to rely on them.

10 We further agree with respondents that the map attached to the petition for
11 review at App 101 does not demonstrate that the property is agricultural land.⁴
12 The map at App 101 to the petition for review is of a scale that makes it difficult
13 to discern anything from it. Moreover, as respondents point out, the map does not
14 include the SM plan designation, although the SM designation was part of the
15 county's original acknowledged comprehensive plan. Accordingly, we place no
16 evidentiary value on the map attached at App 101.⁵

⁴ The map is not included in the record, and petitioner does not move for us to take official notice of the map. Although LUBA will take official notice of law, it will not take notice of adjudicative facts.

⁵ Because the board of county commissioners was not presented with the map (or petitioner's argument) below, the board of county commissioners was not provided with the opportunity to assess its evidentiary value.

1 Second, the board of county commissioners’ interpretation of the ESEE
2 analysis for the property and of the purpose of the SM zoning designation is not
3 inconsistent with the express language of either DCCP provision and we are
4 required to affirm it. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247,
5 259, 243 P3d 776 (2010). The board of county commissioners properly relied on
6 those DCCP provisions as context for its conclusion that the property is not
7 agricultural land. Petitioner provides no textual support for its argument that the
8 SM zone is a “temporary and transient [] zone.” Petition for Review 16. Rather,
9 petitioner argues that no properties zoned SM were subject to an exception to
10 Goal 3 when the DCCP was first acknowledged in 1979, and argues that “[w]hen
11 the County designated the subject property to [SM], no evaluation of whether the
12 subject property meets the definition of agricultural land was made.” Petition for
13 Review 17. That argument is plainly inconsistent with the 1978 inventory map
14 that the record demonstrates was based on area-specific soils data for Tumalo.

15 In *Caldwell v. Klamath County*, 45 Or LUBA 548, 552 (2003), *aff’d*, 192
16 Or App 162, 86 P3d 118 (2004), we rejected a similar challenge to a county
17 decision that approved a zone change from Non-Resource to Rural Residential.
18 We concluded that the proposed zone change from Non-Resource to Rural
19 Residential did not require revisiting the county’s original determination that the
20 property did not qualify as agricultural land, memorialized through a zoning
21 designation that zoned the property Non-Resource, a zone that applied to lands
22 that were not protected by Goals 3 and 4.

1 Here, the county's decision that the property is not agricultural land is
2 similarly memorialized in the 1978 inventory map and 1992 updated inventory
3 map of agricultural lands, which do not include the property. Support for that
4 determination is provided in the designation of the property as SM. Accordingly,
5 the county, having previously determined that the property is not agricultural
6 land, was not required to revisit whether the property is agricultural land. *See also*
7 *Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P 2d 870 (1986)
8 (in making a decision on an application for a plan amendment to authorize
9 development on property that was not included on the county's Goal 5 inventory
10 of open spaces, the county could not be compelled to consider whether the area
11 in question should be added to the county's acknowledged Goal 5 inventory of
12 open spaces).

13 The first assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 DCCP Section 3.3, Rural Housing, provides in relevant part:

16 "As of 2010 any new Rural Residential Exception Areas need to be
17 justified through initiating a non-resource plan amendment and zone
18 change *by demonstrating that the property does not meet the*
19 *definition of agricultural * * * land * * *.*" (Emphasis added.)

20 In its second assignment of error, petitioner argues that the county improperly
21 construed DCCP Section 3.3 in concluding that intervenor was not required to
22 affirmatively demonstrate in the present proceeding, by introducing evidence to
23 respond to petitioner's proffered NRCS soils map, that the property "does not

1 meet the definition of agricultural * * * land[.]” Petition for Review 29; DCCP
2 3.3. According to petitioner, the county’s reliance on its previously
3 acknowledged 1978 inventory map and 1992 updated inventory map to find that
4 intervenor has demonstrated that the property does not meet the definition of
5 agricultural land is inconsistent with the express language of DCCP Section 3.3.
6 ORS 197.835(9)(a)(D). Petitioner also argues that the findings are inadequate to
7 explain why the board of county commissioners concluded that DCCP Section
8 3.3 was met, and that the decision is not supported by substantial evidence
9 because the record does not include a refutation of the NRCS soils map. ORS
10 197.835(9)(a)(C).

11 Respondents respond, and we agree, that the board of county
12 commissioners correctly determined that intervenor satisfied its obligation to
13 “meet[] its burden based on the County’s prior determinations that the property
14 does not constitute agricultural * * * lands” by producing copies of the 1978
15 inventory map and 1992 updated inventory map that do not include the property.
16 Record 46. A reasonable decision maker would rely on the inventories to
17 conclude that the property is not agricultural land, and a reasonable decision
18 maker could determine that the NRCS maps are less credible than the county’s
19 adopted and acknowledged inventories, for the reasons we explained above in
20 our resolution of the first assignment of error. *Dodd v. Hood River County*, 317
21 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 360,
22 752 P2d 262 (1988).

1 The second assignment of error is denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 In addition to approving intervenor’s application to remove the property
4 from the county’s inventory of significant aggregate resource sites that is required
5 by Goal 5 (Significant Resources Inventory), the decision placed the property on
6 the county’s “Non-Significant Mining Mineral and Aggregate Inventory” (Non-
7 Significant Inventory). The Non-Significant Inventory was acknowledged in
8 1979 and has been a part of the DCCP since 1979. Several properties have been
9 added to the Non-Significant Inventory since 1979. Record 31. Deschutes County
10 Code (DCC) 18.128.280 provides approval criteria for surface mining of non-
11 significant resources that are included on the Non-Significant Inventory,
12 including the requirement to obtain a conditional use permit to mine.

13 In its third assignment of error, we understand petitioner to argue that the
14 rules at OAR 660-023-0180 prohibit the county from adding the property to its
15 Non-Significant Inventory because, according to petitioner, Goal 5 categorically
16 prohibits authorizing mining of mineral and aggregate resources that are not
17 included on the Significant Resources Inventory without complying with the
18 Goal 5 rules. Petition for Review 40. In essence, we understand petitioner to
19 argue that OAR 660 Division 23 occupies the field of regulation of surface
20 mining to the exclusion of local governments’ ability to amend an adopted and
21 acknowledged Non-Significant Inventory to add properties to it, or to allow

1 surface mining of properties that are not included on a significant resources
2 inventory.

3 In support of its argument, petitioner cites *Beaver State Sand and Gravel,*
4 *Inc. v. Douglas County*, 187 Or App 241, 65 P3d 1123 (2003). Petitioner also
5 argues that because (according to petitioner) the property is agricultural land,
6 under the holding in *Beaver State Sand and Gravel*, it cannot be mined unless it
7 is included on the Significant Resources Inventory. We discuss *Beaver State Sand*
8 *and Gravel* below.

9 Respondents respond that nothing in the Goal 5 rule cited by petitioner
10 regulates resources other than “significant mineral and aggregate sites” as that
11 term is used in OAR 660-023-0180. Respondents also respond that the holding
12 in *Beaver State Sand and Gravel* applies only to surface mining *on lands zoned*
13 *EFU* and prohibits surface mining on EFU land unless the property is included
14 on the Significant Resources Inventory. 187 Or App 241. Respondents argue that
15 nothing in that holding precludes the county from maintaining its Non-
16 Significant Inventory, adding properties to it, or allowing surface mining on
17 properties included on that inventory pursuant to local code provisions regulating
18 surface mining.

19 We agree with respondents. First, the purpose of OAR 660 Division 23 is
20 to

21 “establish[] procedures and criteria for inventorying and evaluating
22 Goal 5 resources and for developing land use programs *to conserve*
23 *and protect significant Goal 5 resources*. This division explains how

1 local governments apply Goal 5 when conducting periodic review
2 and when amending acknowledged comprehensive plans and land
3 use regulations.” OAR 660-023-0000 (emphasis added).

4 OAR 660-023-0030 describes the inventory process, which requires the local
5 government to determine whether a resource is “significant.” OAR 660-023-
6 0030(6) provides that:

7 “Local governments may determine that a particular resource site is
8 not significant, provided they maintain a record of that
9 determination. Local governments shall not proceed with the Goal
10 5 process for such sites *and shall not regulate land uses in order to*
11 *protect such sites under Goal 5.*” (Emphasis added).

12 In other words, after making a determination that a site is not significant, a local
13 government may not adopt land use regulations that protect a non-significant
14 resource site from conflicting uses under the Goal 5 rules. That seems to us to
15 indicate that local governments have the authority to regulate non-significant
16 sites but may not regulate those sites, or other properties, pursuant to Goal 5 rules
17 that protect significant resources from conflicting uses.

18 We also agree with respondents’ understanding of the holding in *Beaver*
19 *State Sand and Gravel*, 187 Or App 241. That holding determined that ORS
20 215.298(2) prohibits surface mining on EFU lands unless the EFU-zoned
21 property is included on an inventory of significant aggregate sites. It does not
22 stand for the broad proposition that, as petitioner describes it “Goal 5 allows only
23 * * * inventoried significant resources to be surface mined.” Petition for Review
24 40-41.

1 Finally, for the reasons we explained above in our resolution of the first
2 assignment of error, we reject petitioner’s argument that the property is
3 agricultural land and the derivative argument that, as agricultural land, it must be
4 zoned EFU and included on the Significant Resource Inventory in order to be
5 mined.

6 For the reasons explained above, we disagree with petitioner that the
7 county was required to apply any rules implementing Goal 5 to its decision to
8 add the property to the Non-Significant Inventory. ORS 197.835(9)(a)(D).
9 Petitioner’s arguments under the third assignment of error provides no basis for
10 reversal or remand of the decision.

11 The third assignment of error is denied.

12 The county’s decision is affirmed.