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

THURSTON D. INGLIS,
Petitioner,

vs.

HARNEY COUNTY,
Respondent,

and

JIM GILMOUR and SUSAN GILMOUR,
Intervenors-Respondents.

LUBA No. 2025-017

FINAL OPINION
AND ORDER

Appeal from Harney County.

Thurston D. Inglis filed the petition for review and argued on behalf of themselves.

No appearance by Harney County.

Steven G. Liday filed the intervenor-respondent's brief and argued on behalf of intervenors-respondents. Also on the brief was Miller Nash LLP.

WILSON, Board Member; ZAMUDIO, Board Chair; BASSHAM, Board Member, participated in the decision.

AFFIRMED 06/20/2025

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

Opinion by Wilson.

NATURE OF THE DECISION

Petitioner appeals county approval of a nonfarm dwelling on land zoned for exclusive farm use.

MOTION TO INTERVENE

Jim Gilmour and Susan Gilmour (intervenors), the applicants below, move to intervene on the side of the county in this appeal. There is no opposition to the motion and it is allowed.

MOTION FOR ADDITIONAL AUTHORITIES

On June 11, 2025, after briefing and oral argument were complete, petitioner filed a Motion for Additional Authorities. Our rules do not provide for a party to file additional authorities or briefing. However, in some instances, we have allowed and considered a motion to submit memorandum of additional authority after oral argument where the memorandum alerts us to intervening case law that may impact the resolution of the appeal. Petitioner's motion does not identify any new case law and instead contains late, supplemental briefing supporting petitioner's assignments of error. "A petitioner may not, after the petition for review has been filed and the deadline for filing the petition for review expires, supplement the arguments presented therein." *Taylor v. City of Canyonville*, 55 Or LUBA 681 (2007) (citing *Fechtig v. City of Albany*, 27 Or LUBA 480, 483, *aff'd*, 130 Or App 433, 882 P2d 138 (1994), *rev den*, 320 Or 507 (1995)); *see also Nicita v. City of Oregon City*, 78 Or LUBA 1084, 1088-89

(2018) (denying petitioner's motion to file a memorandum of additional points and authorities as impermissible supplemental briefing). We do not consider the arguments in the Motion for Additional Authorities or attachments thereto in deciding this appeal.

Petitioner's Motion for Additional Authorities is denied.

FACTS

The subject property is a vacant, 39.09-acre parcel zoned Exclusive Farm and Range Use-2 (EFUR-2) that is developed with a stock well, and located in a remote area of Harney County, approximately 40 miles southeast of Burns. The surrounding area is also zoned EFUR-2 and primarily used for grazing livestock and farming hay and alfalfa. Petitioner owns and operates a large adjoining ranch with a cow-calf operation.

In July 2024, intervenors applied to the county for a nonfarm dwelling on the subject property. Intervenors' application included a report from a soil scientist who conducted an on-site investigation of the soils on a 2.5-acre homesite within the 39-acre property and concluded that the homesite is comprised of Class VII soils. Intervenors propose to locate the dwelling on the 2.5-acre portion of the property containing the Class VII soils.

The planning commission held a public hearing and approved the application. Petitioner appealed the planning commission's decision to the county court, which held a hearing and denied the appeal, approving the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

ORS 215.284(2)(a), OAR 660-033-0130(4)(c)(A), and parallel county regulations,[1] provide that a county may approve a nonfarm dwelling if the county finds that the dwelling, or activities associated with the dwelling, "will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use[.]" Petitioner argues that the county's findings that the proposed dwelling will not force a significant change in or significantly increase the cost of accepted farming practices in the surrounding area, including petitioner's ranching operation, are not supported by substantial evidence.

LUBA may reverse or remand a land use decision that is not supported by substantial evidence. ORS 197.835(9)(a)(C). Substantial evidence is evidence in the whole record that a reasonable person would rely upon to reach a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). The substantial evidence standard is a deferential standard. Where a reasonable person could reach the decision reached by a local government, viewing the evidence in the whole record, LUBA will defer to the local government's choice between conflicting evidence, notwithstanding that reasonable people could draw different conclusions from the evidence. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988).

---

[1] Harney County Zoning Ordinance (HCZO) 3.020(6)(B)(a).

To satisfy the farm impacts test, the local government must: (1) identify common farm practices on surrounding agricultural lands and (2) determine if a proposed nonfarm dwelling would conflict with those farming operations to force a significant change in or increased cost in identified farming practices. A significant change or increase in cost "is one that will have an important influence or effect on the farm." *Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 458, 435 P3d 698 (2019) (*Stop the Dump Coalition*). In considering whether there would be a significant change in or significantly increase the cost of farm practices, the local government must consider the impacts on individual farms rather than merely the entire surrounding area. *Id.* at 457-58.

Under the first prong of the farm impacts test, petitioner argues that the county erred in its analysis by grouping together the potential farm impacts for three surrounding hay/alfalfa farms and addressing them collectively, rather than analyzing the impacts on an individual farm-by-farm basis, as required by *Stop the Dump Coalition*. In identifying the common farming practices on the agricultural land in the surrounding area, the county identified three hay/alfalfa farms located to the south, southwest, and southeast of the subject property and the farm practices on those properties, as well as petitioner's adjoining ranch and ranching operations. Record 8-9. According to petitioner, the county improperly grouped together the farm practices and potential impacts for the hay/alfalfa farms rather than addressing them individually. The findings identify the farming practices on the hay/alfalfa fields and conclude that the proposed nonfarm

dwelling will not have a significant impact on hay/alfalfa farming practices or on costs because the nearest hay/alfalfa farm is 1500 feet away. *Id.* The county found that the hay/alfalfa farms all have the same farming practices and that those practices would not be affected by the proposed nonfarm dwelling.

Stop the Dump Coalition held that the farm impacts test must consider impacts to induvial farms rather than to a more general supply of agricultural land, supply of food, or farm profitability. 364 Or at 445. In other words, the county must consider the impacts to specific farming operations not just impacts to the greater farming community. In this case, the findings demonstrate that the county considered the impacts to all the individual farm operations in the surrounding area. The county merely found that the impacts to all three hay/alfalfa farms would be same – that there would not be any significant impacts because of the distance from the proposed nonfarm dwelling. Petitioner does not argue that the impacts to any of the three hay/alfalfa would be different than that of the others. Absent any evidence that there would be different impacts to the different hay/alfalfa farms, the county's findings are consistent with *Stop the Dump Coalition.*

The county found that the proposed dwelling will not impact farming practices in large part because of the dwelling's significant distance from those practices, specifically, the county found that the proposed dwelling will be located approximately 1200 feet from the closest barn/pen, 660 feet from the closest pasture, and 1500 feet from the closest farm. Record 9-10. The county

also found that the proposed dwelling would have no impact with regard to concerns raised by petitioner about dogs on the subject property, shooting predators, weaning calves, spread of noxious weeds, burning brush, and herbicide spraying. Record 11-12. In addition, the county adopted as part of its findings intervenors' farm impacts analysis, which came to similar conclusions. Record 8, 172-77.

Under the second prong of the farm impacts test, petitioner argues that the county's conclusion that the proposed dwelling's distance from surrounding farming practices is sufficient to mitigate potential impacts to those practices is not supported by substantial evidence.

The county found:

> "[T]he proposed dwelling will not impact the surrounding farming practices in large part because of the home's distance from those agricultural operations. As shown below, the new house will be 1,200 feet from the closest barn/pen, 660 feet from the closest pasture, and 1,500 feet from the closest hay farm. Further, there are already six homes within the same proximity of these agricultural operations as the proposed homesite and thus, the establishment of the one additional dwelling will not result in any impact beyond those already caused by the existing homes.
>
> "* * * * *
>
> "(1) the proposed dwelling will not impact the identified practices any more than [petitioner's] own dwelling, (2) there are three other existing homes closer to [petitioner's] rangeland than the proposed dwelling, and thus, the farming practices are already compatible with dwellings in the surrounding area, (3) the identified practices would not be affected by the proposed dwelling because of the large distance between the proposed homesite and [petitioner's] land, and

(4) most of the practices are impacted to a greater extent by the agricultural activities already allowed on the surrounding land, including on the parcel at issue." Record 9-10.

Petitioner does not specifically challenge these findings. Instead, petitioner repeats the arguments he made below that the county did not find persuasive. In particular, petitioner does not challenge the finding that there are three other existing homes that are much closer to petitioner's property, in addition to petitioner's home, than the proposed nonfarm dwelling that have not significantly affected farming practices or costs. A reasonable person could find that the distance between the proposed nonfarm dwelling and surrounding farm uses supports a conclusion that there would not be a significant impact on farm practices or costs.

Petitioner next argues that the county's decision that the proposed nonfarm dwelling would not significantly affect his ranching practices and costs is not supported by substantial evidence. Petitioner argues his ranching practices would be significantly impacted by the proposed nonfarm dwelling because it could result in dogs being near his property line which could lead to animal harm or loss during calving season.

The county found that "there is no reason to assume that property owners will not properly control the animal[,]" and that such alleged impacts would already arise from the other existing homes that are closer to petitioner's ranching operation. Record 11. The county also found that other noise, such as petitioner's own home, the public road adjacent to petitioner's ranching operation, the three

closer homes, and common agricultural activities allowed in the area would have a greater noise impact on petitioner. *Id.* Petitioner does not specifically address or challenge these findings. A reasonable person could reach the conclusion that the alleged potential of barking dogs would not significantly impact petitioner's farming practices or costs.

Petitioner argues that the county's findings are not supported by substantial evidence rejecting his allegation that he will not be able to spray for noxious weeds and insects up to the fence line out of fear of harm to new residents. The county found that "[t]he 660-foot distance between the homesite and the closest boundary line is much greater than the largest buffer mandated by the herbicides used in the area" and that "there are already four homes * * * that are closer to or on [petitioner's] rangeland." Record 12. Petitioner does not address or challenge these findings. A reasonable person could reach the conclusion that the alleged fear of not being able to spray for weeds or insects would not significantly impact petitioner's farming practices or costs.

Petitioner argues that the county's findings are not supported by substantial evidence regarding miscellaneous other alleged impacts such as the potential for trash to be blown onto his pastureland, alleged increased wildfire risk, and potential lowering of the water table. As with the other issues raised, petitioner merely makes speculative assertions without any supporting evidence. Even if there were some evidence in support of these assertions, petitioner does not explain how the alleged impacts would result in significant impacts to his farming

practices or costs. A reasonable person could reach the conclusion that the proposed nonfarm dwelling would not cause a significant impact to farming practices or costs in the surrounding area.

Finally, petitioner raises a number of issues that do not provide a basis for reversal or remand. First, petitioner argues that the county failed to consider the increased cost of buying agricultural land based on the value of land for a potential nonfarm dwelling. This is not a relevant consideration for the farm impacts test because it is directed at the cumulative impact of hypothetical future development rather than the proposed dwelling. The farm impacts test concerns existing farming practices on land that is already devoted to farm use. *See Frazee v. Jackson County*, 45 Or LUBA 263, 272 (2003) (the potential costs of acquiring farmland has at best an indirect and speculative relationship to ongoing farm practices).

Second, petitioner argues that his fear of nuisance claims from occupants of the proposed nonfarm dwelling would significantly impact his ranching practices and increase costs because of potential legal fees. The county's findings explain that these types of nuisance claims are barred by state law and local code and do not give rise to significant impacts. Record 12. Petitioner does not challenge this finding. The county was not required to consider such potential threats of nuisance litigation. *See Ploeg v. Tillamook County*, 43 Or LUBA 4, 23-24 (2002) (threats of nuisance claims do not rise to level of significant impacts).

Finally, petitioner argues that the county erred by not considering that some of the nonfarm dwellings within the same proximity of surrounding agricultural operations as the proposed nonfarm dwelling are occupied by farmers or ranchers who are less likely to cause the potential impacts of which petitioner complains. According to petitioner, because the other nonfarm dwelling occupants are actually involved in farming they are less likely to complain about nuisance type activities. Even if that were so, petitioner did not challenge the county's findings on this issue and the threat of nuisance claims does not rise to the level of significant impacts. Petitioner's arguments do not provide a basis to remand the decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

OAR 660-033-0130(4)(c)(B) and parallel county regulations require a finding that the proposed non-farm dwelling will be situated on a lot or parcel, or a portion of a lot or parcel, that is "generally unsuitable" for the production of farm crops and livestock, considering, among other things, "the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract."[2] OAR 660-033-0130(4)(c)(B)(i). The rule specifies that a lot or parcel or

---

[2] OAR 660-033-0130(4)(c)(B) provides, as relevant here:

> "(i) The dwelling, including essential or accessory improvements or structures, is situated upon a lot or parcel, or, in the case of an existing lot or parcel, upon a portion of a lot or parcel, that is

a 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[,]" or "simply because it is too small to be farmed profitably by itself." OAR 661-033-0130(4)(c)(B)(i)-(ii). We refer to this standard as the "generally unsuitable" standard. *Lichvar v. Jackson County*, 49 Or LUBA 68, 71-72 (2005). The generally unsuitable standard is more narrow than the farm impacts test in that it does not require land to be demonstrably unsuitable for all farm uses, but rather only generally unsuitable for the production of crops and livestock (or merchantable trees, which is not applicable here). *See Williams v. Jackson County*, 55 Or LUBA 223, 231 (2007) (so stating); *Moore v. Coos*

> 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
>
> "(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 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[.]" *See also* HCZO 3.020(6)(B)(b)(I)-(II).

County, 144 Or App 195, 197, 925 P2d 927 (1996) (same). In the context of rangeland, this means whether the land can be used to produce meaningful quantities of forage. *See Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 136, 145, *aff'd*, 295 Or App 451, 438 P3d 855 (2018) (affirming county hearings officer decision that homesite was generally unsuitable even though some grazing was possible and some grazing had likely occurred in the past).

Petitioner argues that the county misconstrued the applicable law and that the county's finding that the nonfarm dwelling site is generally unsuitable is not supported by substantial evidence. The county found that the 2.5-acre portion of the lot or parcel on which the nonfarm dwelling would be located is generally unsuitable for farm use for the following reasons:

> "• **Adverse soil conditions:** Professional soil classifier and soil scientist, Gary Kitzrow, conducted an on-site investigation of the soils on the proposed 2.5-acre homesite. He determined that the soils on half the site (adjacent to the alkaline wetlands) had extremely high boron, salinity, and alkalinity levels, resulting in toxic conditions that had 'permanently destroyed' the soil structure. On the other half of the homesite, Mr. Kitzrow found soil with unusually high amounts of sand and very low amounts of clay and silt, resulting in insufficient water-holding capability necessary to grow crops or pasture forage in Eastern Oregon. Accordingly, Mr. Kitzrow concluded in his report that all the soils on the homesite fall within the parameters of Capability Class [VII] soil, and regardless of classification, are unsuitable for the production of crops or forage for livestock.
>
> "• **Lack of vegetation for grazing:** The evidence in the record shows that the homesite (and subject parcel in general) have very little vegetation suitable for grazing and are covered by greasewood and puncturevine.

"• **Lack of water rights:** The Application record also shows that the subject parcel does not have water rights and will not be able to obtain water rights in the future because it is part of the Greater Harney Valley Groundwater Area of Concern. *See* OAR 690-512-0020 (restricting new water rights in the Greater Harney Valley Groundwater Area of Concern to only exempt, nonirrigation uses).

"• **Unique drainage and land conditions:** The evidence in the record indicates that the poor soils and lack of forage on the homesite appear to be related to the seasonal alkaline wetlands/playas that border the homesite area. Documents submitted into the record explain that these geological features have high concentrations of toxic elements such as boron and arsenic, are devoid of vegetation, and negatively impact the adjacent soils and vegetation.

"• **Historical non-use of the property for agricultural purposes:** There are many written comments in the record by current and past owners of the subject parcel and people who state they attempted to use the parcel in the past for grazing livestock or otherwise have personal knowledge of the property that state (1) the subject tract of land is not suitable for grazing, (2) past attempts to use the land for grazing were unsuccessful, and (3) at almost all times during the last few decades, the property has not been used for agricultural purposes." Record 13-14 (footnotes omitted, boldface in original).

The county found that those five reasons, taken together, were sufficient to support its conclusion that the homesite is generally unsuitable for farm use. In addition, the county found that intervenors' soil report, which concluded that all of the soils on the 2.5-acre homesite are Class VII and, regardless of classification, are unsuitable for the production of crops or livestock, alone, was adequate to demonstrate unsuitability. Record 14.

Petitioner first argues that the county misconstrued the applicable law because intervenors' soil report does not comply with ORS 215.211 and OAR

660-033-0030(5)(b) and OAR 660-033-0045, which generally require certain soil assessments to undergo review and certification by the Department of Land Conservation and Development (DLCD).[3] According to petitioner, because intervenors' soil report was not reviewed by DLCD, the soil survey is invalid and may not be relied upon as evidence to support a finding that the 2.5-acre homesite is generally unsuitable. Petitioner argues that without the soil survey, the National

---

[3] ORS 215.211(1) provides:

> "If a person concludes that more detailed soils information than that contained in the Web Soil Survey operated by the United States Natural Resources Conservation Service [(NRCS)] would assist a county to make a better determination *of whether land qualifies as agricultural land*, the person must request that the [DLCD] arrange for an assessment of the capability of the land by a professional soil classifier who is:
>
> "(a) Certified by and in good standing with the Soil Science Society of America; and
>
> "(b) Chosen by the person." (Emphasis added.)

OAR 660-033-0030(5)(b) provides:

> "If a person concludes that more detailed soils information than that contained in the Web Soil Survey operated by the NRCS, would assist a county to make a better determination of *whether land qualifies as agricultural land*, the person must request that the department arrange for an assessment of the capability of the land by a professional soil classifier who is chosen by the person, using the process described in OAR 660-033-0045." (Emphasis added.)

OAR 660-033-0045 generally describes who qualifies as a professional soil classifier, what is required in a soil survey, and how that survey is reviewed.

Resources Conservation Service (NRCS) classification of the property as Class VI soils means the proposed homesite is not generally unsuitable for the production of crops and livestock.

However, ORS 215.211, OAR 660-033-0030(5)(b), and OAR 660-033-0045 do not apply to an application for a nonfarm dwelling. That statute and related administrative rules apply only to proposed changes to a property's agricultural zoning designation and other land use applications that require a county determination that land zoned exclusive farm use (EFU) does not meet the definition of "agricultural land" under OAR 660-033-0020(1)(a)(A). OAR 660-033-0030(5)(c).[4] In an application for a nonfarm dwelling on EFU-zoned property, the county is not required to make a determination that the subject property does not meet the definition of agricultural land. Rather, the correct inquiry is whether the EFU-zoned property, or a portion of the EFU-zoned

---

[4] OAR 660-033-0030(5)(c) provides:

> "This section and OAR 660-033-0045 apply to:
>
> "(A) A change to the designation of a lot or parcel planned and zoned for exclusive farm use, forest use or mixed farm-forest use to a non-resource plan designation and zone on the basis that such land is not agricultural land; and
>
> "(B) Excepting land use decisions under section (7) of this rule, any other proposed land use decision in which more detailed data is used to demonstrate that a lot or parcel planned and zoned for exclusive farm use does not meet the definition of agricultural land under OAR 660-033-0020(1)(a)(A)."

property, on which the dwelling is proposed is generally unsuitable for farm use. *Williams*, 55 Or LUBA at 228. Therefore, the fact that DLCD did not review the soil report does not mean that the soil report is not evidence the county could rely upon in determining whether the homesite is generally unsuitable for farm use.

The county found that the soil report was an independent basis for determining that the proposed homesite is generally unsuitable for the production of crops or livestock. Petitioner does not challenge the substance of the soil report or its conclusions that the soil conditions on the 2.5-acre homesite render that location generally unsuitable for farm use.

Even if petitioner had challenged the substance of the soil report, and demonstrated that it does not constitute substantial evidence, we agree with intervenors that the decision is supported by other substantial evidence. The additional findings identify five reasons the county concluded that the homesite is generally unsuitable for farm use: (1) adverse soil conditions; (2) lack of vegetation for grazing; (3) lack of water rights; (4) unique drainage and land conditions; and (5) historical non-use for agricultural purposes. Record 13-14. Petitioner advances several arguments for why the county should not have found the homesite to be generally unsuitable for farm use, but those arguments generally do not challenge the identified five reasons.

Petitioner first argues that even if the 2.5-acre homesite contains Class VII soils as intervenors' soil report concluded, the remainder of the 39-acre subject property is composed of Class VI soils, according to the NRCS survey, and

therefore presumed to be suitable for farm use under OAR 660-033-0130(4)(c)(B)(ii). However, the suitability of the remainder of the subject property is irrelevant to a determination that the 2.5-acre homesite is generally unsuitable for farm use. OAR 660-033-0130(4)(c)(B)(i) requires the county to find that the proposed nonfarm dwelling will be situated on a lot or parcel, *or a portion of a lot or parcel*, that is generally unsuitable for farm use. Here, the county concluded that the proposed 2.5-acre homesite, a portion of the lot or parcel, is generally unsuitable for farm use. Petitioner's argument regarding the rest of the current parcel does not provide a basis for reversal or remand.

Petitioner next argues that the county's findings regarding poor forage quantity and quality and toxic soils are "unsubstantiated" in the record. Petitioner also argues that the lack of water rights is immaterial as irrigation is not necessary for livestock forage. The county found that the lack of forage on the site, the impact of alkali wetlands, and the property's lack of prior use for grazing renders the proposed homesite generally unsuitable for the production of crops or livestock. The record contains extensive evidence on these points, including: (1) photos and technical reports showing how the proposed homesite is overrun with inedible and toxic greasewood and puncturevine; (2) written testimony from more than 30 individuals, including most of the people who have attempted to use the property for agricultural purposes over the last 30 years, stating that the tract of land has not been historically used for grazing and the few attempts to do so were unsuccessful; and (3) extensive information on the deleterious effects of

alkaline wetlands adjacent to the proposed homesite. Record 184-86, 456-69, 72, 77-96, 167-70, 200-01, 224-25, 249-50, 284-85, 440. A reasonable person could conclude that the proposed homesite is generally unsuitable for the production of crops or livestock based on this evidence.

Petitioner finally argues that the size of the 2.5-acre homesite, alone, cannot be the determining factor for unsuitability if the property can be sold, leased, rented, or otherwise managed as part of a commercial farm or ranch under OAR 660-033-0130(4)(c)(B)(ii), and that petitioner has attempted to purchase the subject property for agricultural use, but has been unable to. The county's findings for why the proposed homesite is generally unsuitable for the production of crops or livestock do not include the size or location of the homesite. OAR 660-033-0130(4)(c)(B)(ii) provides that whether 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, is a consideration only if the local government relies only on the size or location of the lot or parcel, or portion of the lot or parcel, to find that the lot or parcel or portion of the lot or parcel is generally unsuitable. Because the county did not identify the homesite's size or location as a reason for concluding that the homesite is generally unsuitable, it was not required to consider whether the homesite could be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch. *Central Oregon Landwatch v. Crook County*, 77 Or LUBA 202, 209-10; *aff'd*, 294 Or App 762, 432 P3d 1161 (2018), *rev den*, 364 Or 723 (2019) (explaining that the county need not consider

conjoined use if size or location is not the basis of the county's suitability determination). Petitioner's argument does not provide a basis to reverse or remand the decision.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

OAR 660-033-0130(4)(c)(C) and parallel county regulations require a finding that the proposed dwelling will not "materially alter the stability of the overall land use pattern in the area."[5] In making that determination, the county is required to consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area that are similarly situated by applying the standards and methods set out in OAR 660-033-0130(4)(a)(D).[6] We refer to this test as the "stability standard."

---

[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. * * *." *See also* HCZO 3.020(6)(B)(c).

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

> "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:

"(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;

"(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 subsection (3)(a) 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), ORS 215.263(5), and ORS 215.284(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; and

"(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

The stability standard requires the county to determine whether approval of the proposed nonfarm dwelling will create a precedent that other owners in the area could rely on for approval of additional nonfarm dwellings to such an extent that the existing agricultural nature of the surrounding area would be jeopardized. *Wolverton v. Crook County*, 39 Or LUBA 256, 268 (2000). The stability standard "requires (1) selection of an area for consideration; (2) examination of the types of uses in the selected area; and (3) a determination whether the proposed nonfarm dwelling will materially alter the stability of the existing uses in the selected area." *Id.*

The county considered a 4,064-acre study area and determined that the cumulative impact of possible new nonfarm dwellings and parcels on other lots or parcels in the area similarly situated to the subject property will not alter the stability of the overall land use pattern in the area for three independent reasons:

> "(1) there are no similarly situated parcels in the surrounding area, (2) even if there were numerous similar parcels, approval of the proposed non-farm dwelling would not lead to meaningful development in the surrounding area, and (3) even if development occurred, it would not alter the land use pattern of the area." Record

---

> 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[.]"

16.

The county also adopted intervenors' study and analysis as additional findings. Record 16, 189-206.

With regard to its first independent finding that there are no similarly situated parcels within the 4,064-acre study area, the county found:

> "[T]here are no other 'similarly situated' parcels in the study area that could rely on an approval of the [a]pplication as precedent for a future non-farm dwelling application because almost all of the other parcels are entirely composed of capability Class [VI] soils that are presumed to be suitable for the production of crops or livestock, and the small area of soil in the study area designated as Class [VII] is located on a butte face/rock outcroppings with slopes that preclude development." Record 16 (footnote omitted).

Petitioner argues that this finding is not supported by substantial evidence because it relies on the intervenors' soil report, which does not comply with ORS 215.211, OAR 660-033-0030(5)(b), and OAR 660-033-0045. In our resolution of the second assignment of error, we rejected petitioner's argument about the soil report's compliance with ORS 215.211, OAR 660-033-0030(5)(b), and OAR 660-033-0045, and for the same reasons stated earlier, we reject petitioner's argument here.

Petitioner also argues that this finding is not supported by substantial evidence because many other properties in the study area might also have portions of Class VII soil like the proposed homesite. While intervenors acknowledge that petitioner may have a rhetorical point, they point out that the Class VII soils on the subject property are highly unusual. Intervenors explain

that the record demonstrates that the subject property is unique because of the alkaline wetlands. According to the National Wetlands Inventory, there are only two other parcels in the study area that have such alkaline wetlands – both owned by petitioner. Intervenor-Respondent's Brief 45-46 (citing Record 201). Intervenors argue that the record also demonstrates that it is unlikely a more detailed soil survey would find that petitioner's parcels are Class VII as those properties are currently used as pastureland and petitioner testified that all of their land is accurately described as Class VI. Record 39, 197-98. A reasonable person could conclude that the other properties in the study area do not contain similar Class VII soils.

Even if petitioner were correct that other land in the study area might actually be Class VII, the HCZO and state administrative rules only require the county to consider parcels that could potentially be approved based on the current "predominant soil classifications." HCZO 3.020(6)(B)(c)(II); OAR 660-033-0130(4)(a)(D)(ii); OAR 660-033-0130(4)(c)(C).The fact that a future soil report might determine that there are Class VII soils in the study area does not change the fact those properties are currently designated Class VI, which means they are presumed to be ineligible for a nonfarm dwelling and do not need to be considered under the stability standard. Petitioner's argument does not provide a basis to reverse or remand the decision.

Petitioner argues that the county identified two other smaller parcels within the study area with similar characteristics to the subject property, but erred in

finding that those properties are not "similarly situated." The findings state that "the smaller parcels in the surrounding area are also not 'similarly situated' because of their relative size and impacts on the density of development compared to the subject parcel." Record 17. The findings further state: "[E]ven ignoring the soil classification, [intervenors'] surrounding area study * * * shows that there are only two parcels that share the same relevant characteristics of the [p]roperty, *i.e.*, road frontage, lack of water rights, moderate size, and the presence of alkaline wetlands, negatively impact surrounding soils." Record 16 n 14.

Petitioner argues that the county erred in considering size as a distinguishing factor. In general, the similarity of parcels is determined by examining characteristics that have a bearing on the approval criteria. *Lichvar*, 49 Or LUBA at 76. The size of other parcels can be a distinguishing factor because the development of smaller parcels typically has a higher impact on the stability of the land use pattern, so smaller parcels are less likely to be approved for a nonfarm dwelling under the stability standard. *See Wolverton*, 39 Or LUBA at 273-75 (reasoning that five-acre lots in the study area were not similarly situated to a 20-acre property because they were not likely to comply with the stability standard). Furthermore, the county also found that the two parcels were not similarly situated due to the Class VII soils. A reasonable person could conclude that the there were no other similarly situated parcels.

We conclude that the county's independent finding that there are no similarly situated parcels within the study area, and therefore the proposed dwelling will not materially alter the stability of the overall land use pattern of the area, is supported by substantial evidence.

Petitioner argues that the county's second independent finding that even if there were numerous similarly situated parcels, approval of the proposed non-farm dwelling would not lead to meaningful development in the surrounding area, is not supported by substantial evidence. The county relied on the following evidence:

> "• **Lack of historical development.** [Intervenors'] surrounding area study (adopted as findings here) shows that there are only six homes in the entire 4,064-acre study area and only two of them were sited within the last 30 years.
>
> "• **No future grants of water rights.** The evidence in the record shows that the past residential development was connected with the establishment of irrigated farms. The analysis and supporting evidence in the record shows that there will not be further grants of irrigation water rights in the area, and thus, no demand for homes arising therefrom.
>
> "• **Distance from urban employment centers.** The analysis and evidence in the record also shows that there is little demand for residential development in the study area because it is 35 miles from the Burns/Hines employment and population centers.
>
> "• **Low population density.** The extent of housing development is in large part determined by the total population of an area. Given the extremely low population density in Harney County, the demand for development in any particular rural area is typically low.

> "• **Forecasted population decline.** The evidence in the record shows that Harney County will likely experience a decline in population in future years, particularly in rural areas, which means lower demand for new housing." Record 17 (boldface in original).

Petitioner disagrees with the county's reasoning that, even if there were similarly situated parcels that approval of the proposed nonfarm dwelling would not lead to meaningful development in the surrounding area, but petitioner merely repeats his arguments from below. While petitioner provides evidence for his position, he does not explain why a reasonable person could not rely on the evidence the county relied upon. A reasonable person could conclude that even if there were similarly situated parcels that approval of the proposed nonfarm dwelling would not lead to meaningful development in the surrounding area.

Petitioner argues that the county's third independent finding that even if development occurred it would not alter the land use pattern in the area is not supported by substantial evidence. The county adopted as findings the analysis in the application narrative that even in an unrealistic scenario where half of the total 32 parcels without a residence were developed with homesites of three acres each, residential use of the land would still account for only 48 acres of the 4,060-acre study area – which would not materially alter the stability of the overall land use pattern of the area. Record 15-16, 205-06. Petitioner argues that such development would eliminate existing agriculture operators' ability to expand, reduce water availability, and increase conflicts with neighbors. While petitioner raises arguments in favor of his position, he does not explain why a reasonable person would not reach the conclusion that the county reached. A reasonable

person could conclude that even if development occurred that it would not materially alter the stability of the land use pattern in the area.

The county adopted three independent bases for concluding that the stability standard was satisfied. While the county need only prevail on one of these bases, we conclude that all three bases are supported by substantial evidence.

The third assignment of error is denied.

The county's decision is affirmed.