BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

BRIAN STANDLEY and DARLA STANDLEY,
Intervenor-Respondents.

LUBA No. 2005-070

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Shelley Wetherell, Umpqua, filed the petition for review and argued on her own behalf.

Paul E. Meyer, County Counsel, Roseburg, filed a response brief and argued on behalf of respondent.

Stephen Mountainspring, Roseburg, filed a response brief and argued on behalf of intervenors-respondent.

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

REVERSED 08/25/2005

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision that finds that 55 acres of a 135-acre parcel do not
4 qualify as "agricultural land," within the meaning of Statewide Planning Goal 3 (Agricultural Land) or
5 "forest lands," within the meaning of Goal 4 (Forest Land). Based on those findings, the county
6 approved intervenor-respondents' application to have the existing Goal 3 and Goal 4
7 comprehensive plan and zoning map designations changed to nonresource designations that would
8 permit subdivision of the 55 acres and rural residential development of the lots created by that
9 subdivision.

10 **MOTION TO INTERVENE**

11 Brian Standley and Darla Standley, the applicants below, move to intervene on the side of
12 respondent. There is no opposition to the motion, and it is allowed.

13 **MOTION TO ALLOW REPLY BRIEF**

14 Petitioner moves for permission to file a reply brief to respond to arguments in intervenor-
15 respondents' brief that she waived issues below by failing to raise them. The motion is granted.

16 **FACTS**

17 The critical facts in this case are undisputed and relatively straightforward. Intervenor-
18 respondents Standley (hereafter the Standleys) own a 135-acre parcel that the parties refer to as
19 the Parent Parcel.[1] That 135-acre Parent Parcel carries two comprehensive plan map designations
20 and two zoning map designations. Those comprehensive plan and zoning map designations
21 implement Goals 3 and 4. If the 135-acre parent parcel is viewed as a whole, its soils are

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[1] The term Parent Parcel in this case could be misleading. As we understand the facts, the 135-acre parcel exists as one undivided unit of land and existed in that form on the date the disputed application was approved. We understand the use of the term Parent Parcel to reflect the Standleys' plan to divide the 55 acres of the Parent Parcel into a number of approximately five-acre lots under the nonresource planning and zoning that was approved by the challenged decision, leaving a remainder of 80 acres in a single parcel that will remain planned and zoned for farm and forest use.

1 predominantly Class I-V and the Parent Parcel falls within the Goal 3 definition of agricultural land.[2]
2 If the 135-acre Parent Parcel is viewed as a whole, there also is no dispute that 80 of those acres
3 are currently in commercial forest use and the Parent Parcel therefore falls with the Goal 4 definition
4 of forest land.[3] If the 135-acre Parent Parcel must be analyzed as a whole parcel, the county could
5 not remove the Goal 3 and Goal 4 planning and zoning designations that currently apply to the
6 property, or apply the nonresource comprehensive plan and zoning map designations that were
7 approved by the challenged decision, unless the county first demonstrated that the property qualifies
8 for exceptions to both Goals 3 and 4.
9 A different result is possible if the 55 acres that the Standleys wish to subdivide is analyzed
10 separately from the 80 acres that is currently being used for forest purposes. The Standleys' soil
11 scientist submitted a report in which he finds that the soils on the 55-acre portion of the Parent
12 Parcel do not qualify as agricultural land or forest lands, within the meaning of Goals 3 and 4.[4] In

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[2] Goal 3 provides the following definition:

> "**Agricultural Land** -- in western Oregon is land of predominantly Class I, II, III and IV soils and in eastern Oregon is land of predominantly Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land-use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands, shall be included as agricultural land in any event.
>
> "More detailed soil data to define agricultural land may be utilized by local governments if such data permits achievement of this goal.
>
> "Agricultural land does not include land within acknowledged urban growth boundaries or land within acknowledged exceptions to Goals 3 or 4."

[3] Goal 4 provides the following definition:

> "Forest lands are those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources."

[4] Petitioner disputes those findings.

approving the disputed application, the county rejected petitioner's contention that the entire 135-acre Parent Parcel, rather than the 55-acre portion of that parcel, is the unit of land that must be considered when determining whether lands qualify as agricultural lands or forest lands, for purposes of Goals 3 and 4.

FIRST ASSIGNMENT OF ERROR

We turn to petitioner's contention that the Parent Parcel is the required unit of land for analysis under Goal 3. If petitioner is correct about that, we do not understand respondents to dispute that the 135-acre Parent Parcel, viewed as a whole, is "land of predominantly Class I, II, III and IV soils," and for that reason agricultural land subject to Goal 3.

The Goal 3 definition of agricultural land is set out at n 2. The definition is actually a three-pronged definition that defines agricultural land in terms of (1) predominant soils class, (2) suitability for farm use regardless of soil class, and (3) whether land is necessary to permit farm practices to be undertaken on adjacent or nearby lands. The Land Conservation and Development Commission (LCDC) has adopted an administrative rule that largely duplicates the Goal 3 definition of agricultural land but also adds a fourth category of agricultural land, "intermingled lands."[5] For brevity, in this opinion we refer to the Goal 3 and the LCDC administrative rule definitions of agricultural land as simply "the definition."

The "predominant soils class" prong of the definition cannot be applied until a unit of land is selected to determine whether Class I-IV soils are predominant within that unit of land. Neither the Goal 3 definition of agricultural land nor LCDC's parallel definitional rule, which appears at OAR 660-033-0020(1), specifies a particular unit of land that must be used in applying the "predominant soils class" prong of the definition. Respondents contend the county is only required to consider the

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[5] OAR 660-033-020(1)(b) requires the following lands to be considered agricultural lands:

> "Land 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, shall be inventoried as agricultural lands even though this land may not be cropped or grazed[.]"

1 affected land, which in this case is the 55 acres that are to be planned and zoned for non-resource
2 use, in applying the "predominant soils class" prong of the definition. In support of that position
3 respondents cite *Lemmon v. Clemens*, 57 Or App 583, 588-89, 646 P2d 633 (1982) and *Flury*
4 *v. Land Use Board*, 50 Or App 263, 267, 623 P2d 671 (1981).

5 Before turning to those cases, and subsequent cases that have cited and discussed them, we
6 note some important terms that are not always used consistently. A "lot" is "a single unit of land that
7 is created by a subdivision of land." ORS 92.010(3). A parcel is "a single unit of land that is
8 created by a partitioning of land." ORS 92.010(5). ORS 215.010(1) further qualifies the definition
9 of parcel to require that a parcel have been legally created and adds units of land that were created
10 legally by deed or land sales contract. For present purposes, a lot and a parcel are essentially the
11 same thing, a unit of land, the main difference being the method that was employed to create them.

12 A "tract" is composed of more than one lot or parcel. A tract is defined in ORS
13 215.010(2) to mean "one or more contiguous lots or parcels in the same ownership." For example
14 if a single owner owns four contiguous parcels, those four parcels would make up a single tract.

15 Finally, while it is not important for purposes of this opinion, we note that "farm units" may
16 be a relevant consideration in determining whether land is properly viewed as agricultural land. *See*
17 n 5. A farm unit could be located on a single parcel or lot, but more commonly farm units are
18 located on more than one parcel or lot. If the same person or persons own all those parcels, and
19 those parcels are contiguous, the farm unit would be located on a tract. If the parcels that make up
20 a farm unit are not all contiguous or additional leased parcels are included in that farm unit, the farm
21 unit would be larger than the tract. We now turn to the central question in this appeal.

22 *Flury* is the only case that we have found that is sufficiently factually similar to this case to
23 lend support to respondents' position. *Flury* concerned a proposed subdivision in Douglas County
24 at a time when the county's comprehensive plan and land use regulations had not yet been
25 acknowledged. Prior to acknowledgment, the statewide planning goals applied directly to the
26 county's land use decisions, including subdivision approval decisions. The proposed subdivision

would have divided an 860-acre ranch into 13 lots, twelve 40-acre lots and one 380-acre lot. *1000 Friends of Oregon v. Douglas County Board of Commissioners*, 1 Or LUBA 42, 46 (1980), *aff'd sub nom Flury v. Land Use Board*, 50 Or App 263, 623 P2d 671 (1981).[6] The relevant legal questions in *Flury* were whether Goal 3 applied to the property and, if so, whether the county's decision to approve the subdivision was consistent with Goal 3. Citing *Meyer v. Lord*, 37 Or App 59, 586 P2d 367 (1978), LUBA held that the county erred by failing to apply the "predominant soils class" prong of the definition to the entire 860 acres. 1 Or LUBA at 48. Because 78% of the 860 acres were Class II, III and IV soils, LUBA concluded that Goal 3 applied. *Id*.

Although in *Flury* the Court of Appeals affirmed LUBA's ultimate decision to reverse the county's decision, it rejected LUBA's application of the "predominant soils class" prong of the definition:

> "While *Meyer v. Lord*, 37 Or App at 69, does state that in determining the suitability of land for farm use the land affected by the proposed change 'should not be considered as if it were an isolated tract [sic parcel],' the suitability of land for farm use is a different matter from the preliminary and more mechanical question whether the land consists predominantly of soils in capability classes I-IV. Only the land to be subdivided need be examined to determine whether it falls predominantly within classes I-IV and would thus be presumed agricultural." 50 Or App at 267.[7]

Meyer v. Lord, which LUBA relied on in its decision in *1000 Friends of Oregon v. Douglas County* and the Court of Appeals distinguished in *Flury*, concerned a 250-acre farm that was made up of a number of contiguous parcels in the same ownership, one of which was a 70-acre parcel. The applicant in *Meyer v. Lord* sought to have the 70-acre parcel rezoned from exclusive

[6] Although neither LUBA's nor the Court of Appeals' decision clearly states that the 860-acre ranch was made up of a single 860-acre parcel, both decisions suggest that was the case.

[7] While technically it was the 860-acre parcel that was being subdivided, we understand the Court of Appeals to have concluded that only the 480 acres slated for subdivision into 40-acre lots and development had to be considered in applying the "predominant soils class" prong of the definition. Stated differently, the court held that the 360 acres that were to remain in a single lot and remain zoned for agricultural use did not have to be considered. 50 Or App at 267. The Court of Appeals ultimately held that even if the analysis were limited to the 480 acres, the record showed those 480 acres were predominantly Class I-IV soils. *Id*.

1 farm use zoning to a zoning designation that would allow rural residential development. The court in
2 *Flury* noted that *Meyer v. Lord* stands for the principle that when applying the "other lands suitable
3 for farm use" prong of the definition it is not appropriate to consider the 70-acre parcel in isolation
4 from the larger 250-acre tract. But the "other lands suitable for farm use" prong of the definition
5 was not at issue in *Flury*. Instead, the propriety of applying the "predominant soils class" prong to
6 only part of an existing parcel was the issue. In *Meyer v. Lord*, the "predominant soils class" prong
7 of the definition had been applied to the 70-acre parcel, rather than the 250-acre tract. Therefore,
8 the issue of whether it is permissible to apply the "predominant soils class" prong of the definition to
9 a *portion* of an existing parcel rather than to the *entirety* of an existing parcel was simply not an
10 issue in *Meyer v. Lord*. However, in citing and distinguishing *Meyer v. Lord*, the Court of Appeals
11 in *Flury* does not expressly recognize that it is applying the "predominant soils class" prong of the
12 definition differently from the way it was applied in *Meyer v. Lord*.

13 *Lemmon*, the other case cited by respondents, concerned a county decision that approved
14 a conditional use permit for a commercial use on two tax lots that occupied 1.5 acres of a "15-acre
15 tract" that included three tax lots and was zoned for farm use under Goal 3. 57 Or App at 585.[8]
16 *Lemmon* was another pre-acknowledgment case and was decided based on the "other lands
17 suitable for farm use" prong of the definition, not the "predominant soils class" prong. The court
18 applied the "other lands suitable for farm use" prong to the entire 15-acre tract rather than the 1.5-
19 acre commercial area. *Lemmon* does not add to *Flury*.

20 The Court of Appeals next considered its decision in *Flury* in *1000 Friends of Oregon v.*
21 *Wasco County Court*, 67 Or App 418, 679 P2d 320 (1984). In that case petitioners challenged

[8] Although the Court of Appeals refers to the 15 acres as a "tract,' it is not clear to us whether the 15 acres actually constituted a tract composed of multiple lots or parcels. The Court of Appeals' decision does not elaborate on its description of the 15 acres as a tract. LUBA's opinion describes the 15 acres as a "parcel" that was made up of three "tax lots." *Clemens v. Lane Cty.,* 4 Or LUBA 63, 68 (1981). Tax lots are a creature of the county assessor and may or may not be "lots" or "parcels," as those terms are defined by ORS 92.010. We cannot tell from LUBA's or the Court of Appeals' decision if the individual "tax lots" were also "lots" or "parcels," within the meaning of ORS 92.010.

1 LUBA's ruling that in applying the "predominant soils class" prong of the definition the county was
2 required to apply it to the entire 64,000 acre Rancho Rajneesh rather than the 2,135 acres that
3 were the subject of the decision to incorporate the City of Rajneeshpuram. In holding that LUBA
4 erred in that regard, the Court of Appeals cited and relied on its decisions in *Flury* and *Lemmon*.
5 In responding to arguments that those cases were wrongly decided the court stated, "[r]espondents
6 invite us to overrule *Flury* and *Lemmon*, and we decline." 67 Or App at 431.

7 The Court of Appeals decision in *Wasco County Court* was appealed to the Supreme
8 Court. In its decision, the Supreme Court explained its view of the "predominant soils class" prong
9 in some detail. We set out that discussion below:

> 10 "The soil classification system referenced in Goal 3 was developed by the United
> 11 States Soil Conservation Service. The system is designed to identify, based upon
> 12 objective, scientific information, the predominant capability classification of soil in
> 13 any given area. Soils classified I-IV in western Oregon, or I-VI in eastern Oregon,
> 14 are presumptively 'agricultural' under Goal 3. The soil classification system
> 15 identifies the nature of the soil, without consideration of other environmental factors
> 16 which may affect its use.
>
> 17 "The question under Goal 3 of whether an area is suitable for farm use is entirely
> 18 different. The suitability determination requires a governing body to look beyond
> 19 the scientific soil classification taken alone to other factors such as 'soil fertility,
> 20 suitability for grazing, climatic conditions, existing and future availability of water for
> 21 farm irrigation purposes, existing land use patterns, technological and energy inputs
> 22 required, or accepted farming practices.' Land with soil scientifically classified as a
> 23 priority soil class, *e.g.*, Class I, may be unsuitable for farm use because of other
> 24 factors, such as slope. Conversely, land consisting of low priority soil classes may
> 25 nonetheless be determined to be suitable for farm use when other factors are
> 26 considered, or because that land is necessary to permit farm practices to be
> 27 undertaken on adjacent or nearby lands.
>
> 28 "Both *Lemmon v. Clemens*, *supra*, and *Meyer v. Lord*, *supra*, the Court of
> 29 Appeals cases cited by LUBA, held that in determining suitability for farm use, the
> 30 entire tract and not merely the particular parcel must be examined. However, in
> 31 *Flury v. Land Use Board*, 50 Or App 263, 623 P2d 671 (1981), a case not cited
> 32 by LUBA, the Court of Appeals held that in determining predominant soil
> 33 classification, only the particular *parcel*, and not the entire *tract*, must be examined,
> 34 stating:

> "'While *Meyer v. Lord*, 37 Or App at 69, does state that in determining the suitability of land for farm use the land affected by the proposed change 'should not be considered as if it were an isolated tract [sic parcel],' the suitability of land for farm use is a different matter from the preliminary and more mechanical question whether the land consists predominantly of soils in capability classes I-IV. Only the land to be subdivided need be examined to determine whether it falls predominantly within classes I-IV and would thus be presumed agricultural.' 50 Or App at 267, 623 P2d at 673.

"Before LUBA, 1000 Friends claimed that the county court misapplied Goal 3 in concluding that the land to be incorporated was not predominantly agricultural, based upon the contention that the county court should have examined the soil, for soil capability classification purposes, on the entire ranch. In sustaining this claim of error, the LUBA order simply states:

> "' * * * Petitioners have alleged that the findings fail to consider the ranch as a whole in concluding that Goal 3 does not apply. Petitioners are correct in this assertion. Petitioners' Fourth Assignment of Error is sustained.'

"Insofar as Goal 3 soil classification is examined by a county in an incorporation context, we agree with *Flury v. Land Use Board*, *supra*, in this respect: In deciding whether it is reasonably likely that a newly incorporated city can and will exercise its land use planning responsibilities in a manner not inconsistent with Goal 3, the county court must look only to the land within the area proposed for incorporation when identifying the predominant soil capability classifications. We reject 1000 Friends' contention and LUBA's holding that the soil of the entire ranch must be considered when determining whether the soil is predominantly Classes I-VI." *1000 Friends of Oregon v. Wasco County Court*, 299 Or 344, 371-73, 703 P2d 207 (1985) (emphases in original deleted; emphases in third paragraph added).

If there remained any room for confusion after *Meyer v. Lord*, *Flury*, and *Lemmon*, after the Supreme Court's decision in *Wasco County Court* there could be no confusion that when considering whether Goal 3 applies to a pre-acknowledgment application for approval of development of part of a larger property, the "predominant soils class" prong of the definition and the "other lands suitable for farm use" prong are applied differently. The former is applied to the part of the larger property that is to be developed and the latter is applied in a way that considers

1 the entirety of the larger property. However, we do not know whether the 2,135 acres at issue in
2 *Wasco County Court* represented one or more parcels or whether they represented a part of an
3 existing parcel. It seems highly unlikely the entire 64,000 acre Rancho Rajneesh was made up of a
4 single parcel. Returning to the "portion of a parcel within a parcel" and "parcel within a tract"
5 distinction, the Supreme Court's description of the holding in *Flury*, which is quoted above, is
6 worth repeating:

> 7 "However, in *Flury v. Land Use Board*, 50 Or App 263, 623 P2d 671 (1981), a
> 8 case not cited by LUBA, the Court of Appeals held that in determining predominant
> 9 soil classification, only the particular *parcel*, and not the entire *tract*, must be
> 10 examined[.]" (Emphases added.)

11 That language suggests that the Supreme Court viewed the principle in *Flury* to apply in a "parcel
12 within a tract" case, whereas *Flury* in fact was a "portion of a parcel within a parcel" case.

13 To summarize, *Meyer v. Lord* applied the "predominant soils class" prong of the definition
14 to a single parcel within a larger multi-parcel tract. *Flury* cites *Meyer v. Lord* in holding that the
15 "predominant soils class" prong is properly applied to a portion of an existing parcel, without
16 acknowledging that *Meyer v. Lord* did not consider or decide that issue. The Supreme Court in
17 *Wasco County Court* apparently understood *Flury* to present a case of multiple parcels within a
18 single tract, when it did not. And finally, it is not possible to tell from the Supreme Court's Decision
19 in *Wasco County Court* whether it was a "parcel within a tract" case or a "portion of a parcel
20 within a parcel" case.

21 Notwithstanding the apparent confusion about the scope of the holding in *Flury*, we likely
22 would be bound by that holding and agree with respondents that the "predominant soils class" prong
23 of the definition can be applied to a portion of a parcel if nothing had occurred since *Flury* to raise
24 further questions about the scope and continued validity of that holding. We next consider whether
25 subsequent litigation in a related area of land use law, and statutory amendments and rulemaking in
26 response to that litigation and subsequent rulemaking regarding how agricultural land is to be
27 inventoried effectively overrules the holding that respondents find in *Flury*.

1 In *Smith v. Clackamas County*, 313 Or 519, 836 P2d 716 (1992), the Supreme Court
2 considered a county approval criterion that implemented statutory standards for approval of
3 nonfarm dwellings on lands zoned for exclusive farm use. The statutory standard, which at the time
4 of the *Smith* decision was worded identically to the county standard, appeared at ORS
5 215.283(3)(d) and required a finding that the proposed nonfarm dwelling:

6 "Is situated upon generally unsuitable land for the production of farm crops and
7 livestock, considering the terrain, adverse soil or land conditions, drainage and
8 flooding, vegetation, location and size of the tract * * *."

9 The issue in *Smith* was how to apply the above criterion to a farm located on a 54-acre parcel. A
10 road crossed that parcel leaving 47 acres on one side and 7 acres on the other side. The critical
11 question was whether the applicant had to demonstrate that the 54-acre farm was generally
12 unsuitable for farm use or whether it was sufficient to demonstrate that the physically separated 7-
13 acre portion of that 54-acre parcel where the house was to be sited was generally unsuitable for
14 farm use. The Supreme Court ultimately held that the county correctly interpreted the criterion to
15 require that the entire 54-acre parcel be found to be generally unsuitable. 313 Or at 528.[9]

16 The Supreme Court's *Smith* decision admittedly deals with a different general inquiry (Is
17 land generally unsuitable for farm use?) and not with the relevant general inquiry in this case (Is land
18 predominantly Class I-IV?). But the same interpretive ambiguity is present under both inquiries. In
19 both cases it is impossible to conduct the required inquiry until an area for analysis is identified, and
20 in both cases the pertinent statutes and rules do not specify how that area is to be identified. The
21 legislature adopted statutes that, in part, effectively reversed the Supreme Court's holding in *Smith*.
22 That legislation significantly altered and expanded the way nonfarm dwellings are regulated in EFU
23 zones. However, as relevant here, the legislation eliminated the ORS 215.283(3)(d) generally
24 unsuitable lands standard and replaced it with the following:

[9] LUBA and the Court of Appeals had reached the same conclusion. *Smith v. Clackamas County*, 19 Or LUBA 171, *aff'd* 103 Or App 370, 797 P2d 1058 (1990).

> "The dwelling is situated upon a lot or parcel *or 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* may 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[.]" Oregon Laws 1993, chapter 792, section 14 (emphases added).

This same language now appears at ORS 215.284(3)(b). LCDC has also adopted rules that include the same language. OAR 660-033-0130(4)(c)(B)(i).

From the above, it is clear that both the legislature and LCDC recognized and reacted to the *Smith* decision that the generally unsuitable lands nonfarm dwelling criterion could not be applied to a portion of a parcel. That reaction was to amend relevant law to allow that criterion to be applied to part of an existing parcel.

Following LUBA's, the Court of Appeals' and the Supreme Court's decisions in *Smith*, LCDC also re-adopted rules that specifically address "Identifying Agricultural Land." As relevant, OAR 660-033-0030 provides:

> "(1) All land defined as 'agricultural land' in OAR 660-033-0020(1) shall be inventoried as agricultural land.
>
> "(2) When a jurisdiction determines the predominant soil capability classification of a *lot or parcel* it need only look to the land within the *lot or parcel* being inventoried. However, whether land is 'suitable for farm use' requires an inquiry into factors beyond the mere identification of scientific soil classifications. The factors are listed in the definition of agricultural land set forth at OAR 660-033-0020(1)(a)(B). This inquiry requires the consideration of conditions existing outside the *lot or parcel* being inventoried. Even if a *lot or parcel* is not predominantly Class I-IV soils or suitable for farm use, Goal 3 nonetheless defines as agricultural 'lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands.' A determination that a *lot or parcel* is not agricultural land requires findings supported by substantial evidence that addresses each of the factors set forth in OAR 660-033-0020(1)." (Emphases added.)

While the above rule language admittedly does not expressly mandate inventorying agricultural land by lot or parcel and does not expressly prohibit inventorying agricultural land at a

sub-parcel or sub-lot level, it appears to assume that such inventories will examine whole lots and parcels rather than portions of lots or parcels.

OAR 660-033-0030(2) was adopted in 1992, after the Supreme Court's decision in *Smith* and at the same time statutes and rules were being amended to overrule the result in *Smith* and expressly authorize application of the generally unsuitable lands nonfarm dwelling standard to sub-areas within an existing parcel or lot. OAR 660-033-0030(2) was adopted to replace OAR 660-005-0010(2). OAR 660-033-0130(2) was materially identical to OAR 660-005-0010(2), with one telling exception. Where the words "lot or parcel" appear in OAR 660-0033-0030(2) the word "tract" appeared in OAR 660-005-0010(2). Whereas OAR 660-005-0010(2) described an inventory based on "tracts," OAR 660-033-0030(2) describes an inventory based on "lots or parcels."

Given that LCDC certainly was aware of the whole parcel vs. sub-parcel ambiguity in the generally unsuitable lands criterion context, it is fair to assume that LCDC would not have written OAR 660-033-0130(2) as it did, if it had intended to allow *parts* of existing lots or parcels to be inventoried as nonagricultural land in cases where the existing parcel, viewed as a whole, is predominantly Class I-IV soils. If LCDC had intended that result, we believe it is much more likely LCDC would have worded OAR 660-033-0030(2) in the same way it worded OAR 660-033-0030(4)(c)(B)(i). With that context, we do not believe OAR 660-033-0030(2) allows portions of existing parcels that are predominantly class I-IV soils to be analyzed on a sub-parcel basis so that sub-areas with that parcel can be eliminated from the county's acknowledged inventory of agricultural land.

In *Flury* and the other cases discussed above that cite *Flury*, the courts were reviewing pre-acknowledgment decisions that were required to apply the statewide planning goals directly to individual development or incorporation proposals. In that context, *ad hoc* inventories were necessary to determine whether Goal 3 applied, but those *ad hoc* inventories were but an incidental step in considering the development application or incorporation at hand. For the reasons set out

1 above, we believe the apparent holding in *Flury* is at least suspect. Even if respondents' view of
2 the holding in *Flury* is correct, OAR 660-033-0130(2) was adopted long after the Court of
3 Appeals' decision in *Flury*. It was adopted specifically to address problems that are likely to be
4 encountered in inventorying agricultural land, and takes a different approach in applying the
5 "predominant soils class" prong from the one that was apparently approved in *Flury*. Because we
6 believe that rule precludes the approach the county took in this case in applying the "predominant
7 soils class" prong of the definition, we sustain subassignment of error 1(a) under the first assignment
8 of error.[10]

9 The record establishes that under a correct application of the "predominant soils class"
10 prong of the Goal 3 agricultural land definition the 135-acre parcel is agricultural land. Accordingly,
11 an exception to Goal 3 will be required to apply nonresource planning and zoning that the county
12 applied and the county's decision to do so without an exception must be reversed. Because we
13 reverse the county's decision, we need not and do not address petitioner's remaining assignments
14 and subassignments of error.

15 The county's decision is reversed.

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[10] Because no question is presented in this appeal concerning whether the 135 acre parcel can be divided under the existing planning and zoning designations, we express no view on that question. If such a division is possible, we express no view on whether the "predominant soils class" prong of the definition necessarily would require that all such new parcels be included on the county's inventory of agricultural land.