BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

RANDY WALKER and
DANNETTE WALKER,
Intervenor-Respondents.

LUBA No. 2005-075

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, Douglas 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 the intervenor-respondent. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich & Aiken, P.C.

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

REMANDED 09/30/2005

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision that an approximately 26-acre parcel is neither agricultural nor forest land and therefore need not be protected for farm or forest uses under the statewide planning goals. The county's decision also grants the applicant's request that the comprehensive plan and zoning map designations for the property be changed to allow five-acre rural residential lots.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to intervenors arguments in their brief that petitioner waived its right to raise any issues concerning Statewide Planning Goal 14 (Urbanization) in this appeal because she did not raise those issues in an appeal of a prior county decision. The motion is granted.

FACTS

An adequate summary of the relevant facts is set out in the petition for review.

> "The property proposed for redesignation and rezoning is a 26.3 acre parcel * * *. The property is located on the west side of Elgarose Road No. 53, northwest of the rural community of Melrose. The property is a rectangular parcel with a long east-west axis on a south-facing slope with a seasonal drainage running north-south in the eastern third of the property. A steep ridge in the western portion of the parcel has 30-60% slopes. A power line crosses the western portion of the property from northeast to southwest within a 125' easement. The subject property contains a single-family dwelling and related improvements on the eastern third of the parcel where it borders Elgarose Road.
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> "Most of the property is covered with a dense stand of oak and madrone with a 5% mix of conifers. The property is not currently in farm or forest resource use. The subject property is comprised of soils in agricultural capability classes 2-6. 65% of the soils on the subject site have an agricultural capability class rating of 6.
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> "Lands to the west of the property are in farm use as a vineyard and pastureland. Lands to the immediate north, east, and southeast of the property are generally developed with residential uses. Adjacent to the south of the property [is a 25-acre property] that was recently rezoned from AW to 5R, and has been partitioned into two 5-acre and one 15-acre parcel.

"* * * * *

"An application was originally filed April 24, 2003, for the same requested action as in the present proceeding, but based on the theory that the subject property qualified for an Irrevocably Committed Exception to Goals 3 and 4. * * * The decision was appealed to LUBA and remanded to the county on April 28, 2004. The applicant filed a modified application November 16, 2004, requesting the same plan and zone changes, but based on a non-resource determination." Petition for Review 2-3 (record citations omitted).

FIRST ASSIGNMENT OF ERROR

Under her first assignment of error, petitioner challenges the county's findings that the subject property is not agricultural or forest land within the meaning of Statewide Planning Goals 3 (Agricultural Land) or 4 (Forest Lands). We address petitioner's Goal 3 and Goal 4 subassignments of error separately below.

A. Goal 3 Agricultural Land

Petitioner argues that the county erred in concluding that the subject property is not "agricultural land" as that term is defined in OAR 660-033-0020(1)(a).[1] Petitioner concedes that the subject property does not include "predominantly Class I-IV soils," and for that reason does not

[1] OAR 660-033-0020(1) provides:

"(a) 'Agricultural Land' as defined in Goal 3 includes:

"(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern 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; climatic 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.

"(b) 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[.]"

qualify as agricultural land under subsection A of OAR 660-033-0020(1)(a). However, subsections B and C of OAR 660-033-0020(1)(a) provide two other standards under which land may qualify as agricultural land. Petitioner argues that the subject property qualifies under both of those standards and that the county erred by concluding otherwise.

1. OAR 660-033-0020(1)(a)(B): Other Land Suitable for Farm Use

Petitioner first challenges the county's findings that the subject property does not qualify as other land that is suitable for farm use under OAR 660-033-0020(1)(a)(B). Petitioner alleges that the county failed to address or inadequately addressed the factors that must be considered under OAR 660-033-0020(1)(a)(B). Petitioner also contends that a number of county findings addressing those factors are not supported by substantial evidence. While petitioner challenges almost every one of the county's findings, we turn first to petitioner's contention that the county should have applied a gross income standard and erred by applying a different income standard.

As we explained in a recent decision involving a different property but the same petitioner and respondent that are before us in this appeal, OAR 660-033-0030 provides guidance in determining whether land qualifies as agricultural land. OAR 660-033-0030(5) provides that "[n]otwithstanding the definition of 'farm use' in ORS 215.203(2)(a), profitability or gross farm income shall not be considered in determining whether land is agricultural land or whether Goal 3, 'Agricultural Land,' is applicable."[2] We described the role that OAR 660-033-0030(5) assigns to profitability as follows:

> "* * * We are not aware of any cases construing OAR 660-033-0030(5), and it is not clear to us how far its prohibition on considering profitability or gross farm income extends, in determining whether land is agricultural land under Goal 3. Under the most extreme interpretation, land capable only of the most minimal farm uses generating gross revenue could qualify as agricultural land. We need not

[2] As relevant, ORS 215.203 defines farm use as "the current employment of land *for the primary purpose of obtaining a profit in money* by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. * * *." (Emphasis added.)

> decide the full meaning of OAR 660-033-0030(5) or how it might be applied in such extreme circumstances, because extreme circumstances are not present here. It seems relatively clear that the rule operates to de-emphasize, if not eliminate, the role that the 'primary purpose of obtaining a profit in money' language in ORS 215.203(2)(a) otherwise might play, in determining whether land is agricultural land under OAR 660-033-0020(1)(a)(B). The county in the present case relied heavily on that statutory language to conclude, not that the subject property could not generate revenue from grazing, but essentially that it could not generate *enough* revenue to qualify as a bona fide as opposed to a 'lifestyle' farm operation." *Wetherell v. Douglas County*, ___ Or LUBA ___ (LUBA No. 2005-045, September 8, 2005) (hereafter *Wetherell* (2005-045)), slip op 14.

In *Wetherell* (2005-045) we ultimately remanded the county's decision because it was apparent from the county's findings that the county relied heavily in that case on a distinction it drew between small-scale or "life-style" farming (which the county found not to be farm use within the meaning of ORS 215.203(2)(a)) and farming that is primarily for a profit in money (which the county found to qualify as farm use under the statute). The county expressly used that distinction in *Wetherell* (2005-045) to set what appeared to us to be a relatively substantial revenue-generating test and to find that because the property in that case failed that test it need not be considered agricultural land.

Intervenors in this appeal make many of the same arguments that the intervenor presented in *Wetherell* (2005-045) in defense of applying something more than a gross income test in determining whether to inventory land as agricultural land under OAR 660-033-0020(1)(a)(B). We reject those arguments here for the same reason we rejected them in *Wetherell* (2005-045). As we explained in *Wetherell* (2005-045), not only is application of a heightened income standard in determining whether land qualifies as agricultural land improper, gross income and profitability are not to be considered directly in that task at all.

Although the decision in this appeal seems to rely less on profitability than did the decision in *Wetherell* (2005-045), the challenged decision in a number of places seems to consider profitability as a direct consideration. After quoting the ORS 215.203(2)(a) definition of farm use, *see* n 2, the challenged decision makes the following point:

> "A key requirement of the definition is that the land must be employed for the primary purpose of obtaining a profit in money by farm activities. The history of the subject property shows that it has never been managed as a farm unit or a part of one, as the site's low productivity makes it impossible to obtain a profit in money.
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> "The subject property has low fertility due to its south aspect, very shallow soils, lack of irrigation water, infertile sandstone and siltstone bedrock that is durable to weathering, predominant lack of saprolite, and lack of deep alluvial soils. The soils have almost no true topsoil and little clay to hold water." Record 21.

The factors noted in the second paragraph are all appropriate considerations that tend to show that the property has physical constraints that might support a conclusion that the subject property is not properly viewed as land in soil classes V and higher that is nevertheless suitable for farm use, within the meaning of OAR 660-033-0020(1)(a)(B). The observation that the property has never been a farm unit or part of a larger farm unit has an indirect bearing on the inquiry required by OAR 660-033-0020(1)(a)(B) and is directly relevant to the inquiry required by OAR 660-033-0020(1)(b). *See* n 1.

The finding in the first paragraph that "[a] key requirement of the definition is that the land must be employed for the primary purpose of obtaining a profit in money by farm activities" is a correct description of the ORS 215.203 definition of farm use. But as we have already noted, for purposes of OAR 660-033-0020(1), OAR 660-033-0030(5) prohibits direct consideration of profitability. The above findings and some of the other findings the county adopted in concluding the subject property does not qualify as agricultural land under OAR 660-033-0020(1)(a)(B) make it reasonably clear that the county applied profitability as a direct consideration in the challenged decision.[3] That direct consideration of profitability in applying OAR 660-033-0020(1)(a)(B) was improper and requires that we sustain this subassignment of error.

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[3] In its findings addressing the suitability of the property for Christmas tree production, the county found that "one of the opposers is a nonprofit organization who has no business raising Christmas trees with the intent to make a profit." Record 23. In considering data that opponents submitted to show the property is suitable for use as a vineyard, the county found "[t]he Jones data are mute as to whether the vineyards examined were actually being operated with an intent to make a profit." Record 25.

On remand, the county must decide whether the subject property qualifies as agricultural land under OAR 660-033-0020(1)(a)(B), without directly considering profitability. In remanding the county's decision, we emphasize that we express no view on the merits concerning whether the subject property qualifies as agricultural land under OAR 660-033-0020(1)(a)(B). The applicant's experts identified a number of physical constraints that appear to severely limit the farm use potential of the subject property. Even without considering profitability, it may well be that those constraints support a conclusion that the subject property does not qualify as agricultural land under OAR 660-033-0020(1)(a)(B).

Because we must remand so that the county can apply OAR 660-033-0020(1)(a) without considering profitability, we need not and do not resolve the parties dispute concerning whether the county also applied an impermissible "commercial agriculture" test in determining that the subject property does not qualify as agricultural land under OAR 660-033-0020(1)(a)(B). *See Riggs v. Douglas County*, 37 Or LUBA 432, 443 (1999), *aff'd* 107 Or App 1, 1 P3d 1042 (2000). (the test under OAR 660-033-0020(1)(a)(B) is not whether property is suited to commercial scale agriculture but rather whether the "property can reasonably be put to farm use alone or in conjunction with other land"). There is language in the challenged decision that can be read to suggest that the county may have improperly applied a commercial agriculture test.[4] On remand, the county must make it clearer in its decision than is presently the case, that it is not applying OAR 660-033-0020(1)(a)(B) to protect only those properties that are suitable for commercial scale agriculture.[5]

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[4] In rejecting petitioner's contention that the subject property is suitable for a vineyard and Christmas tree production, the county found "[t]he subject property is unsuitable for commercial vineyards or Christmas tree production due to the soil and terrain limitations." Record 22. One of the reports prepared by Gary Kitzrow, which the county expressly relies on, draws a distinction between "non-commercial wine grape soils," and "commercial wine grapes." Record 377-78. Kitzrow ultimately concludes that the subject property "would grow wine grapes at levels suitable for home consumption only." Record 378.

[5] There is language elsewhere in the Kitzrow report that can be read to suggest that Kitzrow used the "commercial" and "home consumption" descriptions to distinguish between soils that are suitable for

We offer the following additional observations regarding OAR 660-033-0020(1)(a)(B) to assist the parties on remand. While OAR 660-033-0020(1)(a)(B) requires consideration of specified factors, the ultimate legal standard, "suitability for farm use," is quite subjective. While that standard is subjective, it would be a mistake to assume the county has broad latitude to interpret the "suitability for farm use" standard in a way that would exclude soils in classes V and above from its agricultural land inventory simply because the soils have some limitations that would have to be accommodated or overcome to put the property to farm use. Because such soils are not included in classes I-IV, it is almost a given that those soils will have some limitations for farm use.

The structure of OAR 660-033-0020(1), which first applies an objective soil classification threshold to define agricultural land and then applies several other standards to require that land with poorer classification soils nevertheless be inventoried as agricultural land, demonstrates an intent that the county cast a relatively large net when inventorying agricultural land. At least some properties with soils that are not well suited for farm use are nevertheless to be inventoried as agricultural land. While OAR 660-033-0020(1)(a)(B) lists specific factors that must be considered, it provides no explicit guidance for how the county is to apply those factors to make the ultimate "suitability for farm use" determination. OAR 660-033-0020(1)(a)(B) does not mandate any particular approach to making the required ultimate legal determination. However, where the subject property has not been used for farm purposes in recent memory, as is the case here, it would seem particularly appropriate for the county to consider the class V and higher lands have historically been put to farm use in the county and to consider whether any new farm uses in the county are making use of such class V and higher lands. For example, after considering the required factors and identifying any farm use constraints, in making the ultimate legal determination under OAR 660-033-0020(1)(a)(B) the county could determine whether other properties in the county with similar constraints have nevertheless been put to farm use. If they have, that suggests that the property

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production of a quantity and quality of grapes that could be used to establish a winery on-site or sold to off-site wineries and soils that are not suitable such production. If so, that intent can be clarified on remand.

should be inventoried as agricultural land under OAR 660-033-0020(1)(a)(B). On the other hand, if they have not, that suggests that the property should not be inventoried as agricultural land under OAR 660-033-0020(1)(a)(B). In addition, if there are new farm uses that are beginning to make use of these poorer quality lands that historically were not put to farm use in the county, such poorer quality lands may now qualify as agricultural land under OAR 660-033-0020(1)(a)(B), despite their soil classifications.[6] While we do not mean to say that the county must approach OAR 660-033-0020(1)(a)(B) in this way, it is an approach to applying the subjective "suitability for farm use" standard that seems both workable and consistent with the underlying policy of Goal 3.[7]

Subassignment of error A(1) is sustained.

2. OAR 660-033-0020(1)(a)(C): Land Necessary to Permit Farm Practices to be Undertaken on Adjacent or Nearby Agricultural Lands

In finding that the subject property does not qualify as agricultural land under subsection C of OAR 660-033-0020(1)(a), *see* n 1, the county adopted the following findings:

> "The subject property is not employed in farm activities. Two adjacent parcels to the west are in farm use as a vineyard and a pasture. There is no management connection between the subject property and the farm operations on the adjacent parcels. There is a substantial topographic barrier and the BPA easement which isolates the subject property from the adjacent farm uses. There is no evidence or any known reason that the subject property is in any way necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands." Record 10.

Petitioner complains that the above findings do not mention the Christmas tree farm located some distance to the north of the subject property. Petitioner also contends that the county's

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[6] In fact the county essentially took this approach in considering whether the property's Nonpareil soils may be suitable for use as a vineyard. Nonpareil soils apparently are used in some locations in the county for growing grapes. The applicant's expert took the position that the Nonpareil soils on the subject property lack saprolite, which is decayed rock. According to the applicant's expert, Nonpareil soils that do not have a layer of saprolite between the topsoil and bedrock are not suitable for growing commercial wine grapes.

[7] As relevant, Goal 3 provides:

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

findings are inadequate because they rely on an absence of evidence and fail to identify the farm activities on adjacent and nearby properties. Intervenors respond as follows:

> "As to petitioner's first point, the county described the farm use of the adjacent and nearby properties as 'vineyards'; a 'Christmas tree farm'; and a joint vineyard-pasture operation. The county provided a general description of the farm use of the adjacent and nearby lands. Petitioner has not explained her argument—how is stating that a property is farmed as a vineyard, Christmas tree farm, or pasture not a sufficient description of the farm practices on the property for purposes of Goal 3?
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> "Relying upon basic evidence [in the record] the findings explain that farming operations on the adjacent properties had no connection with the subject property, and that no property had been identified for which the subject property was claimed to be necessary.
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> "* * * * *
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> "The county also found that there was 'no management connection' between the subject property and the adjacent farm operations, as well as a substantial topographic barrier. The county found there has been no farm use of the subject property in historic times, a point which petitioner does not challenge.
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> "A map of the farm uses in the vicinity of the subject property shows that, except for vineyards, the adjacent farm uses are so small as to be negligible. The Christmas tree operation is a one-acre operation located 650 feet from the subject property, and is the only Christmas tree farm in the one-square mile section. The adjacent area in pasture amounts to about 5 acres west of the subject property, with the remainder of the parcel used as a vineyard; a significant topographic barrier separates it from the subject property.
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> "Petitioner points to no contrary evidence in the record. Substantial evidence in the record supports the decision." Intervenor-Respondents' Brief 17-18.

We agree with intervenors.[8]

Subassignment of error A(2) is denied.

[8] Petitioner also objects that the county failed to consider farm practices that might be carried out in the future on adjacent and nearby lands. Intervenors contend that petitioner did not raise this issue below and therefore has waived the objection. We agree with intervenors. We also agree with intervenors that OAR 660-033-0020(1)(a)(C) does not require consideration of all potential future farm practices.

B. Goal 4 Forest Land

Under Goal 4 the county must adopt and amend its comprehensive plan and land use regulations to conserve forest lands. Goal 4 defines forest lands as follows:

> "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 which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources."

We separately consider below the county's determinations that the subject property is neither "suitable for commercial forest uses" nor "other forested lands that maintain soil, air, water and fish and wildlife resources."

1. Land Suitable for Commercial Forest Uses

Under OAR 660-006-0010 the county is required to prepare an inventory of its forest lands:

> "Governing bodies shall include an inventory of 'forest lands' as defined by Goal 4 in the comprehensive plan. * * * Outside urban growth boundaries, this inventory shall include a mapping of forest site class. If site information is not available then an equivalent method of determining forest land suitability must be used. * * *"

In concluding that the subject property does not qualify as forest land, the county adopted a number of findings and assumptions. After we resolve a threshold dispute between the parties, we separately discuss the county's key assumptions and findings below.

a. Cubic Feet Per Acre Per Year

Petitioner contends that the county must base its decision whether to retain the subject property on its inventory of forest lands on the productive capacity of the property. Specifically, petitioner contends that the county must utilize USDA Natural Resource Conservation Service (NRCS) data, which is expressed in cubic feet per acre per year (cf/ac/yr).[9] As noted below, the

[9]OAR 660-006-0005(2) provides:

predominant Nonpareil soils on the subject property are not rated for forest productivity by NRCS. In that circumstance, petitioner argues, under OAR 660-006-0005(2) any alternate method that county develops to estimate productivity must provide "equivalent data" and must be "approved by the Department of Forestry." *See* n 9. We substantially rejected a similar argument in *Wetherell* (2005-045):

> "In support of that argument, petitioners cite to OAR 660-006-0005(2), defining the term 'cubic foot per acre,' and OAR 660-006-0010, which imposes an obligation on local governments to inventory forest lands, using a forest site class or equivalent method. Petitioners cite *Carlson v. Benton County*, 34 Or LUBA 140, 149, *aff'd* 154 Or App 62, 961 P2d 248 (1998), for the proposition that for purposes of determining forest productivity, OAR 660-006-0005(2) requires that, where NRCS data is not available, an alternative method for determining productivity must be used that provides 'equivalent data' and that is approved by the Department of Forestry.
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> "Intervenor responds that *Carlson* and OAR 660-006-0005(2) both relate to the analysis necessary to determine whether property is qualified for a forest template dwelling under OAR 660-006-0027(1)(d). According to intervenor, OAR 660-006-0005(2) does not apply to determinations whether land is 'forest land' under Goal 4.
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> "In *Dept. of Transportation v. Coos County*, 35 Or LUBA 285, 293-4 (1998), *rev'd on other grounds* 158 Or App 568, 976 P2d 68 (1999), we stated:
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> > "'We agree with intervenor that the definition of cf/ac/yr at OAR 660-006-0005(2) is not an approval criterion with respect to whether land is forest land under Goal 4. The preface to the definitions in OAR 660-006-0005 provides that those definitions apply '[f]or purposes of this division[.]' Thus, the cf/ac/yr definition at OAR 660-006-0005(2) applies only to the extent it is used in OAR chapter 660, division 6. Intervenor is correct that the only place that definition is used in division 6 is with respect to forest dwellings. It follows that, while measurements of productivity are

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"'Cubic Foot Per Acre' means the average annual increase in cubic foot volume of wood fiber per acre for fully stocked stands at the culmination of mean annual increment as reported by the USDA Natural Resource Conservation Service (NRCS). Where NRCS data are not available or are shown to be inaccurate, an alternative method for determining productivity may be used. An alternative method must provide equivalent data and be approved by the Department of Forestry."

> relevant and perhaps essential to any inquiry into whether land is 'suitable for commercial forest uses,' nothing in division 6 or Goal 4 directed to our attention requires that the county apply the restrictive definition of cf/ac/yr in OAR 660-006-0005(2) in determining whether the subject property consists of 'forest lands.' * * *' *Id.* (footnotes omitted).

> "While OAR 660-006-0005(2) is not directly applicable to a determination whether land is 'suitable for commercial forestry' under Goal 4, it is relevant context. As we noted in *Dept. of Transportation*, 'measurements of productivity' may be 'essential to any inquiry into whether land is 'suitable for commercial forest uses.'' *Id.* at 294. * * *" Slip op at 31-33.

We continue to believe that in adopting or modifying a forest land inventory, the mandate in OAR 660-006-0005(2) does not directly apply. It follows that the requirement in OAR 660-006-0005(2) that any "alternative method" that is used to supply "equivalent data" that is not available from NRCS must be approved by the Department of Forestry does not apply. However, as we held in *Wetherell* (2005-045), OAR 660-066-0010 does apply when making inventory decisions regarding forest lands. The text of OAR 660-066-0010 is set out above and while that rule does not require that the method of producing that equivalent data be approved by the Department of Forestry, it does suggest that the inventory decision is to be based at least in part on productivity. OAR 660-066-0010 also provides that where site class information is absent, an equivalent method of determining productivity is to be used.

b. Historical Use

The county adopted the following finding, which we understand to have been adopted as one of its justifications for finding that the subject property is not suitable for commercial forest use:

> "[T]here is no evidence the subject property has ever been managed for commercial forestry purposes, or that timber has ever been harvested there. While at some point back in time it is possible the subject property had timber, it is presently covered with oak, madrone, and brush, and for over 100 years has not been managed for forest uses. These indicate very low potential as timberland resources. Property in this county which has not produced any timber in over 100 years is not suitable for commercial forestry uses." Record 28.

The above finding infers from the lack of historical forest use of the property that the subject property is not suitable for commercial forest use. We do not believe that an inventory decision may be based solely on historical use. As we explained in *Wetherell* (2005-045), OAR 660-006-0010 seems to call for that decision to be based in part on productivity:

> "[W]e question whether a purely 'qualitative' analysis is consistent with Goal 4. As discussed below, Goal 4 and the Goal 4 rule strongly suggest that determinations of suitability for commercial forestry must be made based on published productivity data or, in the absence of such data, on an 'equivalent method of determining forest land suitability.' OAR 660-006-0010. An expert opinion that is not based on published productivity data or equivalent data, but instead relies heavily on the absence of such data, is not a sufficient basis for concluding that land is not subject to Goal 4." Slip op 31.

As we explain in section B(1)(a) above, OAR 660-006-0010 appears to require that Goal 4 inventory decisions be based on objective measures of productivity. The county's reliance on lack of historical forest use of the subject property as forest land is even less defensible than the county's reliance on a qualitative analysis in *Wetherell* (2005-045).

c. Eighty Cubic Feet Per Acre Per Year Standard

A critical finding that the county adopted was its finding that the Douglas County Comprehensive Plan provides that unless soils are capable of producing 80 cf/ac/yr of woodfiber, those soils are not suitable for commercial uses:

> "The comprehensive plan identifies soils and the corresponding site class as the most important indicators of a site's suitability for commercial forestry use. The plan (Forest Resources Findings 4, page 2-3) sets 80 cubic feet of wood fiber per acre per year as the standard for identifying commercial forestry lands in the county. We apply this threshold as a standard to the average site class capability of the subject property to determine whether it comprises forest lands protected by Goal 4. We note that LUBA endorsed our application of this standard. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757, 760 (2004)." Record 26-27.

In *Wetherell* (2005-045), slip op 26-30, we rejected the county's similar finding in that case. We do not set out that reasoning in full here, but we squarely rejected the county's position that the plan provisions it cites establish a standard for identifying or inventorying lands subject to

Goal 4. In fact, as we noted in *Wetherell* (2005-045), the county's plan makes it clear that it extends Goal 4 protection to lands that produce less than 80 cf/ac/yr:

> "The county's view that the 80 cf/ac/yr plan language defines the threshold of lands protected by Goal 4 becomes even more tenuous when the comprehensive plan policies that actually implement Goal 4 are considered. As petitioners point out, the Policy Implementation section describes two plan designations applicable to forest lands: the first, Timberlands, is intended for prime forest lands, and includes '[f]orest lands which are predominantly cubic foot site class 1 through 4 in southern Douglas and 1 through 3 in central and northern Douglas County.' Petitioners explain that site class 4 includes lands capable of producing 85 to 119 cf/ac/yr. The second plan designation, Farm/Forest Transitional, is intended for nonprime forest lands, and includes '[f]orest lands which are predominantly cubic foot site class 5 or below in southern Douglas County and 4 through 5 in northern, central, and coastal Douglas County[.]' Site class 5 includes lands capable of producing 50 to 84 cf/ac/yr, while site class 6 includes lands capable of producing 20 to 49 cf/ac/yr. There is no dispute that both the Timberland and Farm/Forest Transitional plan designations are Goal 4 designations. The fact that comprehensive plan designations implementing Goal 4 include lands capable of producing 85 cf/ac/yr as *prime* forest lands, and include lands capable of producing considerably less than 85 cf/ac/yr as nonprime forest lands nonetheless protected by Goal 4 strongly undercuts the county's interpretation that 80 cf/ac/yr is the threshold standard for Goal 4 protection." *Wetherell* (2005-045), slip op at 29-30 (emphasis in original; footnote omitted).

The important point we made in *Wetherell* (2005-045) above is that the county's Timberland designation is applied to the county's best forest land. That designation is applied to lands with site class I-IV, which translates to productivity of 85 cf/ac/yr or more. The Farm/Forest designation is applied to lands with poorer soils. Setting a threshold for identifying lands suitable for commercial forest use that is only 5 cf/ac/yr lower than the standard set for the designation applied to the county's best forest land is inconsistent with both the county's comprehensive plan and Goal 4. The county erred in applying an 80 cf/ac/yr threshold.

d. Unrated Nonpareil Soils

The Rosehaven, Sutherlin, Speaker, and Bellpine soils that occupy 9.6 acres or approximately 36 percent of the 26-acre property are rated to produce between a low of 98 cf/ac/yr to a high of 160 cf/ac/yr. The Nonpareil soils that occupy the remaining 16.7 acres or 64

percent of the 26-acre property are unrated by the NRCS. The county found that it could assume that those unrated soils would produce zero cf/ac/yr.

In *Wetherell* (2005-045) we rejected the county's conclusion that it could assume that soils that lack a productivity rating by NRCS will produce zero cf/ac/yr. Slip op 31-34. We reject the county's similar conclusion in this case for the same reasons.

The county's decision can also be read to conclude that the Kitzrow report can be relied on to find that the Nonpareil soils will produce zero cf/ac/yr. Record 28-29 (fourth finding). We do not read the Kitzrow report to support that assumption. The Kitzrow report does state that the Nonpareil soils will produce less than 50 cf/ac/yr and that that level of production falls short of the county's 80 cu/ft/ac/yr standard. Record 378 ("Nonpareil soils will produce less than 50 cubic feet per acre per year as determined by the USDA-NRCS in their original forestry work completed in Douglas County in the 1980s"); Record 383 ("* * * Nonpareil soils produce less than 50 cubic feet per acre per year (threshold for commercial timberland according to the Douglas County Comprehensive Plan"). We will address the county's calculations based on that 50 cf/ac/yr estimate below.

e. The County's Calculations of Forest Productivity for the Site

The challenged decision includes tables that produce two estimates of average per acre productivity for the subject 26-acre site. First, if the Nonpareil soils are assigned a 50 cf/ac/yr rating, the site average productivity is 73.5 cf/ac/yr. Record 30. Second, if the Nonpareil soils are assigned a zero cf/ac/yr rating, the site average productivity rating is 41.8 cf/ac/yr. Next, the county points out that a 125-foot wide power line easement crosses the property. The terms of that easement allow agricultural use but prohibit forest use. If zero productivity is assumed for the soils

that are subject to that easement, the first 73.5 cf/ac/yr productivity rating drops to 68.4 cf/ac/yr and the second 41.8 cf/ac/yr productivity rating drops to 41.1 cf/ac/yr.[10]

Turning first to the estimates that include the easement assumption, the county estimates that assume zero productivity for the land subject to the power line easement are so close to the estimates that do not include the assumption that the assumption makes no material difference. However, if we were required to review the propriety of the county's easement assumption, we tend to agree with petitioner that such an assumption is improper. While we assume that easement is permanent, it may well be that in the future BPA will no longer need that easement. In that event, there is no reason that part of the property could not be put to forest use. The physical characteristics that make that land either suitable for or unsuitable for commercial forest use are not affected by the easement. At least for purposes of inventorying relatively large parcels that are crossed by power line easements, such easement restrictions are not a proper consideration in deciding whether to inventory the larger property as forest land.[11]

Turning next to the 41.8 cf/ac/yr productivity estimate, the county may not rely on that estimate because it improperly assumes zero productivity for the Nonpareil soils. Turning to the 73.5 cf/ac/yr productivity rating, that rating is simply too close to the 85 cf/ac/yr cutoff that the county applies to identify its best forest land.

Finally, we note that in our *Wetherell* (2005-045) decision we questioned whether the kind of site productivity *averaging* that was applied there, which is also applied in this case, is the correct methodology under the county's comprehensive plan:

> "[T]he comprehensive plan element implementing Goal 4 describes what kinds of lands may be included in two types of Goal 4 plan designations. As relevant here,

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[10] The easement crosses 2.4 acres of Nonpareil soils and .1 acre of Bellpine soils. Because the power line easement is located mostly on the Nonpareil soils that the county rates very lowly, the assumption regarding the easement has a relatively small effect on the average site productivity rating.

[11] Given the improved power line that occupies the easement, it may well be that a non-Goal 4 comprehensive plan and zoning designation could be justified through a "built" or "committed" exception to Goal 4.

> both plan designations include lands that 'predominantly' consist of specified cubic foot site classes. On remand, the county may wish to consider whether, in light of the standards for placing lands within [the county's] two Goal 4 plan designations, the approach taken by the consultant in calculating the *average* productivity of the parcel is the correct approach, or whether calculating the productivity or cubic foot site class of the *predominant* portion of the subject property is more consistent with the comprehensive plan Goal 4 element." *Wetherell* (2005-045), slip op 35 (emphases in original).

We also note that the Kitzrow study includes discussion that the Nonpareil soils that predominate on the subject property may have far less productivity than the 50 cf/ac/yr that was used to compute the averages discussed above. Record 383. If that is the case, there may be a stronger case for concluding that the soils on the subject property are not suitable for commercial forest use.

Subassignment of error B(1) is sustained.

2. Other Forested Lands That Maintain Soil, Air, Water and Fish and Wildlife Resources

The subject 26.3-acre property is almost surrounded by land that is planned and zoned for rural residential use. The property contains few merchantable trees. The majority of trees on the subject property are scrub oak and madrone. The county found that such property does not qualify as "other forested lands that maintain soil, air, water and fish and wildlife resources." We agree with the county.

Subassignment of error B(2) is denied.

The first assignment of error is sustained in part.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county erred in finding that the challenged comprehensive plan and zoning map amendments to allow rural residential development are consistent with Goal 14 (Urbanization).

The challenged decision applies the county's 5R Rural Residential 5-Acre zone to a 26.3-acre parcel. In *Wetherell* (2005-045), we found that the county has adopted an acknowledged exception to Goal 14 pursuant to OAR 660-004-0040(7)(i)(B), which permits the county to apply

that zone to rural property without the necessity of taking a Goal 14 exception.[12] Based on that finding in *Wetherell* (2005-045), the second assignment of error must be denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Douglas County Land Use and Development Ordinance (LUDO) 6.500(2) provides the following requirements for quasi-judicial plan amendments:

> "The application shall address the following requirements which shall be the standard for Amendment:
>
> "* * * * *
>
> "b. That the amendment provides a reasonable opportunity to satisfy a local need for a different land use. A demonstration of need for the change may be based upon special studies or other factual information.
>
> "c. That the particular property in question is suited to the proposed land use, and if an exception is involved, that the property in question is best suited for the use as compared to other available properties."

Petitioner argues that the county's findings concerning the LUDO 6.500(2)(b) "local need" standard misinterpret that standard and are inadequate and unsupported by substantial evidence. Petitioner also contends that the county's finding regarding the LUDO 6.500(2)(c) suitability standard are inadequate and unsupported by substantial evidence.

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[12] OAR 660-004-0040(7)(i) provides:

> "For rural residential areas designated after the effective date of this rule, the affected county shall either:
>
> "(A) Require that any new lot or parcel have an area of at least ten acres, or
>
> "(B) Establish a minimum size of at least two acres for new lots or parcels in accordance with the requirements for an exception to Goal 14 in OAR 660, Division 014. The minimum lot size adopted by the county shall be consistent with OAR 660-004-0018, 'Planning and Zoning for Exception Areas.'"

A. LUDO 6.500(2)(b) "Local Need" Standard

Citing *Still v. Board of County Comm'rs*, 42 Or App 115, 600 P2d 433 (1979), petitioner contends the county erroneously interpreted its local need standard to be satisfied by a showing of market demand for rural housing in the area. Intervenor responds:

> "*Still* involved an analysis of the first prong of a reasons exception. 42 Or App at 122. The first prong required 'compelling reasons and facts . . . why these other [nonresource] uses should be provided for.' *Id*. *Still* found that evidence of a market demand did not constitute a 'need' for it, 'as that word is used in Goal 2'. *Id*.
>
> "In contrast, LUDO 6.500(2)(b) does not require 'compelling reasons and facts—it only requires a 'reasonable opportunity to satisfy a local need for a different land use.' The leading evidence for the finding of the local need is the testimony of three real estate broker[s] familiar with the market for rural residential properties in the Melrose area. Their testimony clearly establishes a strong need for more rural residential property." Intervenor-Respondent's Brief 40.

We agree with intervenors that the county's interpretation of its local need standard is not reversible under ORS 197.829(1). As the county interprets that standard, we also agree with intervenors that the county's findings that LUDO 6.500(2)(b) is met in this case are adequate and supported by evidence a reasonable person would believe.

Subassignment of error 3(A) is denied.

B. LUDO 6.500(2)(c) Suitability Standard

The county adopted the following findings in addressing the LUDO 6.500(2)(c) suitability standard:

> "The subject property is suited to the proposed land use because of its physical characteristics, nonresource soils, availability of necessary public services and facilities, absence of potential hazards, access to local and regional transportation facilities, compatibility with nearby land use activities, and location in the Melrose area, which has a strongly rural residential character." Record 37.

Petitioner reads LUDO 6.500(2)(c) to require much more detailed findings addressing a number of suitability factors. Petitioner contends the above findings fail to address suitability for septic systems and that the county's Goal 11 findings which do state that there are suitable sites for

septic systems are not supported by any evidence in the record. Petitioner also contends that the county's findings do not address adequacy of "school capacity" or "school transportation" to serve the new lots that will be made possible. Petitioner contends that the county's findings fail to demonstrate that police and fire protection services are adequate. With regard to adequacy of the county's findings regarding transportation adequacy, petitioner contends it is not possible to find what part of the incorporated findings the county is relying on. Finally, petitioner faults the county's Goal 13 (Energy Conservation) findings.

Initially, we agree with intervenors that petitioner fails to recognize that LUDO 6.500(2)(c) is a local standard, and the county's interpretation of that standard is entitled to deference under ORS 197.829(1). It is clear that the county does not interpret LUDO 6.500(2)(c) to impose the detailed multi-factor analysis that petitioner interprets LUDO 6.500(2)(c) to require. Intervenors note that other findings concerning the site's suitability were adopted in support of the zoning map change. Those finding appear on the same page of the record as the findings that petitioner challenges:

> "* * * The suitability of the subject property for the proposed zoning, and promotion of the general public health, safety, and welfare have been demonstrated by and through addressing compliance with Statewide Planning Goals 3 and 4 (compatibility with surrounding uses), 6 (air, water, and land quality), 7 (absence of potential hazards), 11 (availability of public services), 12 (adequate transportation facilities), and 13 (energy). Record 37.

We agree with intervenor that when the findings that petitioner challenges are read with the above findings, those findings are adequate to explain why the county believes the requested map property is suitable for the residential uses the new plan and map designations authorize. In addition, with regard to petitioner's contention regarding a lack of evidence concerning septic suitability, intervenor notes that the county's Goal 14 exception which is noted in our discussion under the second assignment of error and was incorporated into the challenged decision, finds that 5 acre lots "are sufficient for both primary and replacement drainfield areas." Record 198. Given the

general nature of the 6.500(2)(c) suitability standard, we agree with intervenors that that is sufficient evidence of septic suitability.

With regard to petitioner's specific challenges concerning schools, police and fire protection and transportation and energy conservation, intervenors contend that none of these issues was raised below and petitioner therefore has waived her right to raise them as specific issues in this appeal. Petitioner does not respond to intervenor's waiver argument, and we therefore agree with intervenor that any issues concerning inadequacies in the county's findings to address these specific factors are waived.[13]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The board of commissioners heard petitioner's appeal of the planning commission's decision in this matter based on the evidentiary record that was compiled before the planning commission. Under her fourth assignment of error, petitioner first cites LUDO 6.900 and 2.700, which petitioner contends are inconsistent.[14] We understand petitioner to suggest that LUDO

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[13] We also agree with intervenors that the decision adequately adopts the Supplemental Application as findings. Record 32. The Goal 12 findings in the Supplemental Application appear at pages 365-68 of the record, under the heading "Goal No. 12 – Transportation." We agree with intervenors that the decision adequately identifies and adopts those Goal 12 findings in a way that reasonably allows petitioner to find them. We reject petitioner's argument to the contrary.

[14] As relevant, LUDO 6.900 provides:

"**SECTION 6.900 Board Action**

"* * * * *

"2. Within 30 days of a signed Plan Amendment decision for which an exception is required under ORS 197.732 or which involves lands designated under a statewide planning goal addressing agricultural lands or forestlands, the Board shall hold a hearing, limited to the record established by the lower authority, at a public meeting *unless the Board elects to review the decision on their own motion or Notice of Review has been filed*. * * *

"3. If a Notice of Review is filed with the Director, the Board shall review the decision *pursuant to §2.500 and 2.700* and the hearing procedure provided in Chapter 2 of the Ordinance." (Emphases added).

6.900(2) requires the board of commissioners to conduct its own evidentiary hearing in cases like this one where a notice of review has been filed and that LUDO 2.700 limits the board of commissioners to the evidentiary record compiled by the planning commission. Petitioner suggests those provisions are inconsistent.

The county and intervenors argue that petitioner misreads LUDO 6.900(2) and that the clause that begins with the word "unless" modifies the obligation to consider the application within 30 days, not the requirement that the hearing be limited to the record established by the lower authority. When LUDO 6.900(2) is viewed in context, we agree with the county and intervenors. LUDO 6.900(3) cross references LUDO 2.700. LUDO 2.700(2) expressly provides that the board of commissioners' review is to be limited to the record. LUDO 2.700(5) provides that the board of commissioners *may* remand the matter to the lower body if it finds that proffered evidence could not have been presented below.

As relevant, LUDO 2.700 provides:

"**SECTION 2.700 Review by the Board**

"1. Review by the Board shall be *confined to arguments of the parties and the record of the proceeding below* * * *

"2. Review by the Board shall be a *de novo review of the record* limited to the grounds relied upon in the notice of review, or cross review, if the review is initiated by such notice.

"* * * * *

"5. The Board *may* remand the matter if it is satisfied that testimony or other evidence could not have been presented at the hearing below. In deciding such remand, the Board shall consider and make findings and conclusions respecting:

"a. Prejudice to parties;

"b. Convenience or availability of evidence at the time of the initial hearing;

"c. Surprise to opposing parties;

"d. Date notice was given to other parties as to an attempt to admit; and

"e. The competency, relevancy and materiality of the proposed testimony or other evidence." (Emphases added.)

Petitioner also argues that the board of county commissioners erred by not considering new evidence that she wished to present "for the limited purpose of determining whether remand to the lower hearing authority" was warranted under LUDO 2.700(5). Petition for Review 35.

The county responds:

> "The Board of Commissioners has for years interpreted [LUDO 2.700(5)] to mean that the Board may, but is not required to, remand a matter to the Planning Commission and, if it decides to do so, then it needs to make findings to satisfy the five remand standards. If the Board does not remand a Planning Commission decision, then it need not make findings on the remand standards and need not consider the 'competency, relevancy and materiality of the proposed testimony or other evidence.'
>
> "In the pending matter, the petitioner did not request the Board to consider remanding the decision to the Planning Commission. Rather, she argued that she had the right to present new evidence to the Board. The only mention of remand made by petitioner to the Board is that she 'would not object to the Board remanding for additional evidence if the Board thinks it is necessary * * * to do so. [Supplemental Record 7]." Respondent's Brief 8-9.

We agree with respondent that LUDO 2.700(5) does not obligate the board of commissioners to consider new evidence that is offered for the first time following an appeal of a planning commission decision to the board of commissioners. LUDO 2.700(5) provides the board of commissioners with that option, if it wishes to exercise that option; but the board of commissioners is not obligated to consider new evidence to determine whether the findings required under LUDO 2.700(5) can be made. We also agree with respondent and intervenors that even if LUDO 2.700(5) can be read to impose such an obligation, petitioner in this case did not make a request for remand under LUDO 2.700(5).

The fourth assignment of error is denied.

The county's decision is remanded.