

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

3  
4 SHELLEY WETHERELL,  
5 *Petitioner,*

6  
7 vs.

8  
9 DOUGLAS COUNTY,  
10 *Respondent,*

11 and

12  
13  
14 TIMOTHY FOLEY and MERYLUZ FOLEY,  
15 *Intervenor-Respondents.*

16  
17 LUBA No. 2006-122

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from Douglas County.

23  
24 Shelley Wetherell, Umpqua, filed the petition for review and argued on her own  
25 behalf.

26  
27 No appearance by Douglas County.

28  
29 Stephen Mountainspring, Roseburg, represented intervenor-respondents.

30  
31 BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

32  
33 REMANDED

10/09/2006

34  
35 You are entitled to judicial review of this Order. Judicial review is governed by the  
36 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a comprehensive plan amendment and zone change to designate property as nonresource land.

**MOTION TO INTERVENE**

Timothy Foley and Meryluz Foley (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

**FACTS**

The subject property is a 76.21-acre parcel located northwest of Roseburg. The soils on the property have agricultural ratings between class III and class VI. Eighty percent of the soils do not have a capability class rating between I and IV. The property contains a dwelling, garage, and shop. The property has been used for grazing and minimal grape growing in the past. There is no merchantable timber currently on the property. Lands to the south and southeast are primarily zoned rural residential and are generally in residential use. Lands to the west, north, and northeast are zoned farm forest and farm grazing. Lands to the west and north are in farm use as pastureland.

The property was originally designated agriculture in the comprehensive plan and zoned exclusive farm use grazing. The challenged decision amends the plan designation and zoning to rural residential 5-acre minimum. The planning commission and board of county commissioners approved the comprehensive plan and zone change over petitioner's objections. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

As we explained in *DLCD v. Klamath County*, 16 Or LUBA 817, 820 (1988), there are two ways a county can justify a decision to allow nonresource use of land previously designated and zoned for farm or forest uses. One is to take an exception to Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands). The other is to adopt findings which

1 demonstrate the land does not qualify either as forest lands or agricultural lands under the  
2 statewide planning goals. When a county pursues the latter option, it must demonstrate that  
3 despite the prior resource plan and zoning designation, neither Goal 3 or Goal 4 applies to  
4 the property. *Caine v. Tillamook County*, 25 Or LUBA 209, 218 (1993); *DLCD v. Josephine*  
5 *County*, 18 Or LUBA 798, 802 (1990). Petitioner argues that the county erred in determining  
6 that the subject property is neither farm or forest land.

7 **A. Farmland**

8 Goal 3 defines “agricultural land” as follows:

9 “Agricultural land in western Oregon is land of predominantly Class I, II, III  
10 and IV soils \* \* \* as identified in the Soil Capability Classification System of  
11 the United States Soil Conservation Service, and other lands which are  
12 suitable for farm use taking into consideration soil fertility, suitability for  
13 grazing, climatic conditions, existing and future availability of water for farm  
14 irrigation purposes, existing land-use patterns, technological and energy  
15 inputs required, or accepted farming practices. Lands in other classes which  
16 are necessary to permit farm practices to be undertaken on adjacent or nearby  
17 lands, shall be included as agricultural land in any event.”

18 OAR 660-033-0020(1) largely duplicates the Goal 3 definition of “agricultural  
19 lands”:

20 “(1)(a) ‘Agricultural Land’ as defined in Goal 3 includes:

21 “(A) Lands classified by the U.S. Natural Resources Conservation Service  
22 (NRCS) as predominantly Class I-IV soils in Western Oregon \* \* \*;

23 “(B) Land in other soil classes that is suitable for farm use as defined in  
24 ORS 215.203(2)(a), taking into consideration soil fertility; suitability  
25 for grazing; climatic conditions; existing and future availability of  
26 water for farm irrigation purposes; existing land use patterns;  
27 technological and energy inputs required; and accepted farming  
28 practices; and

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

31 “(b) Land in capability classes other than I-IV/I-VI that is adjacent to or  
32 intermingled with lands in capability classes I-IV/I-VI within a farm  
33 unit, shall be inventoried as agricultural lands even though this land  
34 may not be cropped or grazed[.]”

1 Under the rules, land is considered agricultural land under four circumstances: (1) if it  
2 has the requisite soil classifications; (2) if it is necessary to permit farm practices to be  
3 undertaken on adjacent or nearby lands; (3) if it is suitable for farm use; or (4) if it is  
4 intermingled with or adjacent to class I-IV land within a farm unit. Petitioner argues that the  
5 county erred by not finding the subject property to be agricultural land under the second and  
6 third circumstances listed above.

7 **1. Other Suitable Lands**

8 OAR 660-033-0020(1)(a)(B), quoted earlier, lists a number of factors to consider in  
9 determining whether land is suitable for farm use, commonly referred to as “other suitable  
10 lands.” A county must evaluate all of the factors under OAR 660-033-0020(1)(a)(B) before  
11 it can determine whether the subject property constitutes other suitable lands for farm use.  
12 *Doob v. Josephine County*, 31 Or LUBA 275, 284 (1996). The list of factors that the county  
13 must consider includes grazing. The county identified land to the west that is in farm use for  
14 grazing. Petitioner submitted evidence that the soils on the property are suitable for hay  
15 production and pasturing even though they are not class I-IV. Lands to the north are also in  
16 farm use. Petitioner argued that there was no reason to believe the subject property is not  
17 suitable for grazing.

18 The county’s only finding regarding Goal 3 does not address, let alone explain, why  
19 the property cannot be used for grazing like nearby properties.<sup>1</sup> The decision and the soil  
20 survey rely on the conclusion that 80% of the property is not class I-IV soils. The decision

---

<sup>1</sup> The county’s only finding regarding Goal 3 provides:

“The [soil survey] concluded that approximately 80 percent of the subject property does not consist of Class I-IV soils, is generally unsuitable for farm use and does not meet the definition of farm land. The subject property is not part of a farm unit, and is not necessary to permit farm practices on adjacent or nearby lands. Therefore, the subject property does not meet the Goal 3 definition of resource lands, is not subject to protection under Goal 3, and does not require an exception to Goal 3 to be converted to a nonresource designation.” Record 107.

1 does not address or respond to petitioner’s arguments. Because we agree with petitioner that  
2 the county’s findings are inadequate to respond to petitioner’s argument under OAR 660-  
3 033-0020(1)(a)(B), we need not and do not consider her evidentiary challenge under this  
4 subassignment of error. The decision does not demonstrate that the subject property is not  
5 “land in other soil classes that is suitable for farm use.”

6 This subassignment of error is sustained.

7 **2. Necessary to Permit Farm Practices on Adjacent or Nearby Lands**

8 OAR 660-033-0020(1)(a)(C), quoted above, provides that land is agricultural land if  
9 it is “necessary to permit farm practices to be undertaken on adjacent or nearby lands.”  
10 Petitioner argued below that the subject property is necessary to permit farm practices to be  
11 undertaken on adjacent and nearby lands that are in farm use. Although the decision states  
12 that the property is not necessary to permit such farm practices, it neither explains why nor  
13 makes any attempt to describe the adjacent and nearby farm practices. When the decision  
14 does not describe adjacent or nearby agricultural use, it does not demonstrate that the  
15 property is not necessary to permit adjacent and nearby farm practices to continue.  
16 *Kaye/DLCD v. Marion County*, 23 Or LUBA 452, 461-62 (1992). While it may well be that  
17 the subject property is not necessary to allow adjacent and nearby farm practices to continue,  
18 the decision does not respond to petitioner’s arguments other than to conclude without  
19 explanation that the subject property is not necessary to allow those farm practices to  
20 continue. Again, without any assistance from the county or intervenors, we will not search  
21 the record for evidence to support the county’s conclusion. The decision does not establish  
22 that the property is not necessary to permit farm practices to be undertaken on adjacent or  
23 nearby lands.

24 This subassignment of error is sustained.

1           **B.     Forest Land**

2           To amend the plan and zoning designation of a resource parcel to nonresource from a  
3 resource designation, the county must demonstrate that the subject property is neither  
4 agricultural lands nor forest lands, even if the property is planned and zoned for one or the  
5 other. *Westfair Associates Partnership v. Lane County*, 25 Or LUBA 729, 732 (1993).  
6 Petitioner argued that the subject property also constitutes forest land because it is suitable  
7 for commercial forest uses. The findings merely state that the property is not forest land and  
8 is unsuitable for commercial forestry. Record 107-108. Although the subject property may  
9 well not be suitable for commercial forest uses, the decision does not address or respond to  
10 petitioner’s arguments that the property can support commercial forestry. In the absence of  
11 any assistance from the county or intervenors, we conclude the decision fails to establish that  
12 the subject property is not forest land.

13           This subassignment of error is sustained.

14           The first assignment of error is sustained.

15           The county’s decision is remanded.