BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL, JANELL STRADTNER,
and FRIENDS OF DOUGLAS COUNTY,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

GREAT AMERICAN PROPERTIES
LIMITED PARTNERSHIP,
Intervenor-Respondent.

LUBA No. 2005-045

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Ann V. Wolf, Portland, filed the petition for review and argued on behalf of petitioners.

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 intervenor-respondent. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Monarich and Aitken PC.

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

REMANDED 09/08/2005

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision determining that a 162-acre parcel is not agricultural or forest lands subject to the statewide planning goals, and amending the comprehensive plan and zoning designations to allow five-acre rural residential lots.

FACTS

The subject property is a 160-acre irregularly-shaped parcel south of the Melrose Rural Community, near the City of Roseburg. The property carries a comprehensive plan designation of Farm Forest Transitional and a zoning designation of Exclusive Farm Use—Grazing (FG). Melrose Road borders the property on the west, and Colonial Road on the south. Across Melrose Road is a 195-acre parcel also zoned FG that is used to grow hay. As explained below, that parcel was until recently part of a single ranch that included the subject property. Resource-zoned lands generally lie to the south and east, with a few rural residential-zoned properties directly south. North and north-east lie lands zoned for rural residential use.

Topographically, the subject property slopes up from Melrose Road to a north-south ridge. The ridge slopes down to Champagne Creek, which cuts across the north-eastern portion of the parcel. The subject property consists mainly of unimproved pasture, interspersed with brush, rocky areas, and scattered trees. The property is fenced and cross-fenced, and includes two small spring-fed ponds. A small stand of conifers is located in the southern portion, and trees cover approximately 30 percent of the property. Soils on the subject property consist of 79 acres of Dickerson soils, Class VII, 48 acres of Nonpareil soils, Class VI, 19 acres of Speaker soils, Class III-IV, and 16 acres of Josephine soils, Class II-IV. Approximately 78 percent of the property consists of Class VI and worse soils, and 22 percent Class II-IV soils.

For seventy years, from 1930 to 2000, the subject property was the eastern half of a 387-acre ranch owned by John B. Richards and family. Until 1982, Richards grew hay on the west half of the ranch, and grazed livestock on both halves, including the subject parcel. The west half, which included the 195-acre parcel west of the subject property, consisted of Class I-IV agricultural soils. In 1982, Richards rented the entire ranch to a series of tenants who continued to grow hay on the west half and graze cattle on both halves. However, the productivity of the subject property declined over this period, due to overgrazing and lack of proper maintenance, such as brush control. In 1996, Richards logged a portion of the subject property. In 2000, Richards sold the west half of the ranch to Napier, who continued to grow hay on that half. In 2002, Richards sold the remainder of the ranch, the subject property, to DeCoite. DeCoite grazed 21 heifers on the subject property in 2002. In November 2003, intervenor-respondent (intervenor) acquired the subject property. In December 2003, intervenor advised the county that the property was no longer in farm use and requested that the county remove the preferential tax assessment.

In 2004, intervenor applied to the county for plan map and zone changes, on the basis that the subject property is not agricultural land subject to Statewide Planning Goal 3 (Agricultural Lands) or forest land subject to Goal 4 (Forest Lands). After conducting several public hearings, the county planning commission voted to approve the requested plan and zoning amendments. Petitioners appealed to the board of commissioners, which held a hearing and voted to deny the appeal, approving the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue 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).[1] Petitioners concede

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

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

that the subject property does not possess the soils necessary to qualify as agricultural land under OAR 660-033-0020(1)(a)(A), but argues that the subject property qualifies under OAR 660-033-0020(1)(a)(B-C) and (b).

A. OAR 660-033-0020(1)(b): Lands within a Farm Unit

As noted, from 1930 to 2000, the subject property was part of a larger farm under single ownership and single farm management as a combined hay growing and cattle grazing operation. After the east half of the farm unit, the Napier parcel, was sold in 2000, the two halves were managed separately, the east as a stand-alone hay operation and the west, briefly, as a stand-alone grazing operation. The county found that the subject property and the Napier property are no longer a farm unit, because they are now managed independently, Napier is uninterested in grazing his property, it is unlikely that joint operations will resume, and in any case the intensive management needed to restore the productivity of the subject property makes grazing the property no longer an accepted farming practice.[2]

> "(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;
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> "(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
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> "(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.
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> "(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[.]"

[2] The county's decision states, as relevant:

> "The subject property is not located within a farm unit. Before Richards sold the west half of his original ranch to Napier in 2000, the subject property had been in the same farm unit. But after the sale, the Napier parcel has been managed independently of the subject property. There is no connection between the use of the two properties. Further, it is unlikely that joint management of the Napier parcel and the subject property will resume. The high level of intensive management that was needed to make the overall ranch productive is no longer an

Petitioners argue that the county erred in so concluding, citing *Riggs v. Douglas County*, 167 Or App 1, 8, 1 P3d 1042 (2000), for the proposition that division of a farm unit and cessation of joint operations is not sufficient to destroy a "farm unit" for purposes of OAR 660-033-0020(1)(b).

Riggs involved a 101-acre parcel that from 1950 to 1974 was part of a 337.5-acre sheep ranch in common ownership. In 1974, the ranch was divided into three parcels and conveyed into separate ownership; however, the entire tract continued to be managed as a single sheep operation until 1996. In that year, the manager discontinued ranching operations and sold the 101-acre parcel to a developer, who applied to the county for plan and zoning amendments to allow rural residential development, based on a showing that the parcel was not agricultural land under Goal 3. As in the present case, the 101-acre parcel consisted predominantly of non-agricultural soils, while the remainder of the farm unit possessed more productive soils. As in the present case, the subject parcel was used primarily for seasonal grazing, which required supplemental feeding throughout the year. The county found that the 101-acre parcel was not part of a "farm unit," because it was no longer in common ownership. We rejected that basis, holding that lands in diverse ownership that are nevertheless jointly managed as a single farm operation may constitute a "farm unit." 37 Or LUBA 432, 438 (1999). In a footnote, we observed that the county had made no finding that the property was no longer part of a farm unit by virtue of the cessation of joint farm operations in 1996, expressing no opinion regarding whether such cessation might suffice to show that the property was not part of a farm unit. *Id.* n 3.

The Court of Appeals affirmed our holding that single ownership is not necessary to constitute a farm use, and went further to address the question of cessation of joint farm

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accepted farming practice for the primary purpose of making a profit in money. In the past, the subject property was only grazed seasonally, alternating with grazing on the Napier parcel. Napier will not allow his parcel to be grazed. The subject property has not been part of a farm unit with any other parcel since 1930." Record 30-31.

operation. The court rejected the applicant's argument that because the subject parcel was no longer being used as part of a single farm operation, it was not part of a "farm unit":

> "For example, a parcel would not be part of a 'farm unit' simply because concurrent farm operations occurred on it and nearby land 50 years ago. Conversely, as respondents point out, in *Dept. of Land Conservation* [132 Or App 393, 888 P2d 592 (1995)], we identified the purpose of the rule 'to be the preservation of the unit'; it would be squarely contrary to that purpose to interpret the rule as contemplating that a parcel could cease being part of the unit simultaneously with and simply because of the discontinuation of farm operations on it or its ostensible sale for nonfarm purposes. This case is closer to the latter extreme than the former. LUBA was correct in holding that further proceedings are necessary at the county level to identify the relevant facts." 167 Or App at 8.

Intervenor argues that *Riggs* is distinguishable, because the period of time in *Riggs* between the cessation of the joint farm operation and the filing of the application was less than one year, whereas, here, the joint farm operation ceased at least four years prior to filing of the application. Intervenor also contends that the sheep ranch in *Riggs* was a single operation, conducted over lands with similar soils and conditions. In the present case, intervenor argues, the two halves of the Richards farm feature different soils, conditions and management regimes, with the eastern half being used primarily for growing hay and the western half usable only for seasonal grazing.

Although it is a close question, we agree with intervenors that *Riggs* is distinguishable, and that the county did not err in concluding that the subject property in the present case is not part of a "farm unit." As the Court of Appeals indicated in *Riggs*, the recent cessation of joint farm operations is not sufficient to break up a "farm unit," for purposes of OAR 660-033-0020(1)(b), but the court suggested that there would be no "farm unit" if the last "concurrent farm operations" were "50 years ago." The court did not identify at what point between those two extremes a cessation of joint farm operations eliminates a "farm unit." We need not decide, in the present case, if the three to four year lapse between cessation of joint farm operations and sale for nonfarm purposes would be sufficient, in

itself, to break up the "farm unit," because we believe other salient considerations, taken together, provide an answer.

It is significant, in our view, that in *Riggs* there was a unitary farm operation—sheep grazing—and that the subject property in that case was used in essentially the same manner as the other components of the farm unit. Here, the long-standing farm operation had multiple components—growing hay and grazing cattle—which could be but need not be combined. During the joint operation in the present case, we understand that at least some of the hay grown on the western half of the Richards ranch was used to supplement the forage on the subject property, and the two halves were both used for seasonal grazing. Following the end of joint operations, grazing ceased on the Napier parcel, and that parcel became devoted entirely to growing hay for sale. The subject property was grazed in 2002, but apparently at levels and for a duration that did not require supplemental feeding.

We also think it significant that in *Riggs* no attempt was made to use the subject property for a farm use independent from the other parcels in the farm unit, whereas here the immediate purchaser attempted to run a grazing operation independent from the Napier parcel, following the partition and operational break up of the Richards ranch.

Finally, it also seems important that when the subject property was created by partition in 2000, that partition required county approval and a determination that the parcels are for farm use and either that the parcels are "appropriate for the continuation of the existing agricultural enterprise within the area," or that they satisfy the minimum size established under ORS 215.780, *i.e.*, that the parcels exceeded 160 acres if rangeland. ORS 215.263(2), 215.780(1).[3] In other words, in approving the partition that accompanied

[3] ORS 215.263(2) provides:

> "The governing body of a county or its designee may approve a proposed division of land to create parcels for farm use as defined in ORS 215.203 if it finds:

the cessation of joint farm operations, the county was required to determine, and presumably did so, that the 160-acre subject property was the appropriate size for an agricultural operation or that it met the statutory minimum size for an agricultural operation. It is doubtful that any such determination was made in creating the subject parcel in *Riggs*.

These considerations, combined with the lapse of three to four years between the cessation of joint farm operations and sale of the subject property for nonfarm purposes, together lead us to the conclusion that *Riggs* does not compel a finding that the subject property is part of a "farm unit" within the meaning of OAR 660-033-0020(1)(b). The county did not err in so finding.

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

Petitioners challenge the county's finding that the subject property does not qualify as "other suitable land" under OAR 660-033-0020(1)(a)(B). *See* n 1. According to petitioners, the county erred in finding that the subject parcel is not "suitable for grazing" either alone or in combination with adjoining or nearby parcels, including the Napier parcel. Further, petitioners argue that the county erroneously applied a stringent "net profit" standard in determining that the subject property is not "suitable for farm use as defined in ORS 215.203(2)(a)," for purposes of OAR 660-033-0020(1)(a)(B). Petitioners also fault the county for failing to consider certain forage improvement practices, such as planting subterranean clover, that might increase forage production and hence the property's suitability for grazing. Finally, petitioners argue that the county erred in rejecting the possibility of other resource uses, such as operating a vineyard on the Class II-IV soils on the property.

"(a) That the proposed division of land is appropriate for the continuation of the existing commercial agricultural enterprise within the area; or

"(b) The parcels created by the proposed division are not smaller than the minimum size established under ORS 215.780."

OAR 660-033-0030 prescribes how local governments determine whether land is "agricultural land" under OAR 660-033-0020(1)(a)(B) and (C).[4] Petitioners point out that Goal 3 "attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land" and that "[n]earby or adjacent land, regardless of ownership, shall be examined * * *." OAR 660-033-0030(3). Thus, in addition to assessing the suitability of the subject property in isolation, the county must ascertain the nature of other agricultural uses occurring in the area and determine whether the subject property can reasonably be combined with nearby or adjacent uses and used as part of those operations. *Kaye/DLCD v. Marion County*, 23 Or LUBA 452, 461 (1992). Finally, although petitioners do not cite it, we note that OAR 660-033-0030(5) provides that "profitability or gross farm income shall not be considered in determining whether land is agricultural land or whether Goal 3, 'Agricultural Land,' is applicable." OAR 660-033-0030(5).

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[4] OAR 660-033-0030 provides, in relevant part:

> "(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).
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> "(3) Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land. Nearby or adjacent land, regardless of ownership, shall be examined to the extent that a lot or parcel is either 'suitable for farm use' or 'necessary to permit farm practices to be undertaken on adjacent or nearby lands' outside the lot or parcel.
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> "* * * * *
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> "(5) Notwithstanding 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."

1. Suitability for Grazing

Petitioners contend that the 70-year history of cattle grazing on the subject property demonstrates that the property is "suitable for grazing," and that the county misconstrued the law in concluding the contrary. *See DLCD v. Crook County*, 26 Or LUBA 478, 493 (1994) (past use of property for grazing is a substantial obstacle to finding the property unsuitable for grazing); *Clark v. Jackson County*, 17 Or LUBA 594, 606 (1989) (same). According to petitioners, the county dismisses the historical grazing use of the property by finding that the land had been mismanaged over the past 20 years, which allegedly reduced its limited forage potential below the point where it is not "suitable for grazing," either alone or with nearby or adjacent parcels.[5] Petitioners argue first that it is error to rely on the present degraded state of the property resulting from past substandard management practices, and that doing so merely encourages mismanagement. The correct standard, petitioners contend, is whether

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[5] The county's findings state, in relevant part:

> "Some opponents suggested the subject property could be used for grazing. Because cattle used to be grazed on the subject property, in the opinion of some, it could be grazed again. Mr. Day analyzed the claims and noted that the property could support only a fraction of what was claimed on an annual basis. The Mellors compared the subject property to their own small ranch, which they acknowledge is marginal and which lies just northwest of the Napier parcel. However, according to the NRCS soils maps, the Mellor property is composed predominantly of USDA Class II to IV soils. Mellors' experience that grazing lands within Class II to IV soils may be marginally profitable does not provide significant relevant evidence that grazing is feasibly profitable on the subject property's Class VI to VIII soils.
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> "As Mr. Day noted, the subject property was originally part of a larger farm unit. The unit was divided when Richards sold the west half which had the farm's resource soils to Napier and which continues in production to the present. The subject property was nonproductive. Grazing was abandoned as a use. Cattle could be run on the property as a lifestyle activity, but not with the primary intent of making a profit in money.
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> "Some opposers suggested the subject property could become part of a dispersed farm unit, for example, a rancher could lease several properties and move stock between them. The subject property is not suited because of the low productivity of the soils; the very short growing season for forage; the poor condition of the fences and buildings; and the brush and weed infestation—which would require high technology and energy inputs to overcome, and such property would not customarily be grazed with a primary purpose to make a profit in money. In the past, the low rental value of $550 per month for the 387-acre parent parcel (which included the productive Napier parcel west of the subject property) also evidences the property's low productivity." Record 27-28 (footnote omitted).

the subject parcel is suitable for farm use using reasonable management practices. *See DLCD v. Lane County*, 23 Or LUBA 33, 36 (1992) (in determining capability for producing revenue from forest uses under ORS 197.247(1)(a), the county must assume reasonable management practices). With respect to what would constitute reasonable management practices, petitioners argue that seasonal grazing with supplemental feeding is very common in the county. Petitioners also cite to evidence that relatively simple measures, such as sowing subterranean clover, could be used successfully on the subject property to increase forage capacity. Record 765, 848-50.

With respect to use of the subject property with nearby or adjoining properties, petitioners cite to evidence that neighboring ranchers, the Mellors, are interested in running cattle on the subject property in conjunction with their own operation. Record 760 ("We would be happy to lease the land for our cattle; we would be able to increase the herd significantly"). Petitioners point out that the Mellors rented the Richards ranch prior to 2000, growing hay and conducting a seasonal grazing operation with 60 cow/calf pairs, and that the Mellors currently manage the Napier parcel as well as their own property. Further, petitioners argue that the subject property could be used in conjunction with the 119-acre Trent parcel, which adjoins the property to the east across Champagne Creek. Finally, petitioners argue that while Napier is not currently interested in using his land in conjunction with the subject property, there is no reason why that could not change, and the two halves of the Richards ranch could resume their 70-year history of combined operations.

Intervenor agrees that the question is whether the property is suitable for grazing using reasonable management techniques, but argues that the evidence in the record establishes that the property is not reasonably suited for farm use even using such techniques. Intervenor cites to evidence that the soils on the subject property produce enough forage to

support 211 animal unit months (AUM), or 17.6 animal units on an annual basis.[6] The county found that that level of grazing is below the "accepted farming practices for livestock grazing in western Oregon." Record 23. The only way to increase the number of livestock supported would involve supplemental feeding, pasture maintenance and regular fertilization, measures that the county found would not be cost-effective, if the goal is to make a profit. Record 16. While the property could support a limited number of cattle without such measures, the county found, that number is so low that the operation would be more accurately characterized as a "lifestyle activity" rather than "farm use," *i.e.*, an activity with the primary intent of making a profit in money. Record 27. With respect to using the subject property in conjunction with nearby or adjacent properties, the decision generally dismisses that possibility, citing the subject property's relatively low forage productivity.

For the following reasons, we agree with petitioners that the county's findings that the property is unsuitable for grazing, alone or in conjunction with nearby or adjacent properties, are inadequate and misconstrue the applicable law.

a. Profit in Money

Turning first to the question of profitability, OAR 660-033-0020(1)(a)(B) requires that the county determine whether land with predominantly non-agricultural soils is otherwise "suitable for farm use as defined in ORS 215.203(2)(a)," based on consideration of the listed factors, including suitability for grazing. *See* n 1. ORS 215.203(2)(a) defines "farm use" in relevant part as "the current employment of land for the primary purpose of

[6] An AUM is a measure of forage productive capacity, equivalent to the amount of feed to care for a 1,000 pound cow for a 30-day period. Record 1196. We note, in passing, that the agricultural consultant's report includes a table at Record 1196 that sets out the AUMs supported by the various soils on the subject property. The table assigns zero AUMs to the ten percent (16.1 acres) of the subject property with Josephine Gravelly Loam 3-12 percent slopes (Class II) and Josephine Gravelly Loam 12-30 percent slopes (Class IV). Petitioners advance no evidentiary or other arguments on this point, and we do not consider it in our analysis. Nonetheless, it seems strange that the class VI soils on the property provide some forage and hence a certain number of AUMs per acre, while these class II and IV agricultural soils provide none. The answer may be that, for some reason, these class II and IV soils have not been assigned a rating for forage productivity or AUMs per acre, not that they have zero capacity to produce forage.

obtaining a profit in money" by, among other things, producing livestock.[7] The county's analysis repeatedly cites and relies upon the statutory definition to conclude that, while the subject property is capable of supporting some level of grazing, it is ultimately not "suitable for farm use" because a grazing operation on the subject property would be unprofitable.[8]

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[7] ORS 215.203(2)(a) provides, in relevant part:

> "As used in this section, 'farm use' means 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. 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. * * *"

[8] The county's findings state, in relevant part:

> "The key point of the definition of 'farm use' is that the land be employed for the primary purpose of obtaining a profit in money by farm activities. The history of the subject property showed that it was originally managed as part of a farm unit, and had low productivity at the time. Upon severance from the parent parcel in 2000, the subject property could not support farm use. Farm use requires a consideration of the amount of resource (e.g., feed, fertilizer, fuel) and time inputs relative to the amount of product produced.
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> "An agricultural consultant, Paul E. Day, M.S., studied the subject property and analyzed its agricultural potential. Mr. Day found the subject property had no potential use for grazing or haying as a farm use, using accepted farming practices, with a view to making a profit in money. * * *
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> "As Mr. Day noted, it is important to differentiate farming activity as a lifestyle from farming activity with an intent to make a profit from money. The subject property may well be suitable for farm use as a lifestyle, but it is poorly suited for farm use to make a profit.
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> "* * * * *
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> "Day found the 160-acre subject property could support an average of 17 animal units per year. This stocking level is far below that of accepted farming practices for livestock grazing in western Oregon. The subject property could not be viably managed for grazing or hay production.
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> "* * * * *
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> "Enormous inputs of technology and energy would be required to make the subject property suitable for farming. The site's steep topography, lack of maintenance of fences and buildings, overgrown brush, and weed invasion are additional barriers to the property's suitability for farming. No reasonable application of technology and energy could overcome the limiting characteristics inherent in the subject property, such as lack of irrigation,

That conclusion appears to rest on the relatively small scale of the grazing operation the property can support without improvements, and the relatively high cost of and marginal returns from undertaking improvements to support a larger or more intensive grazing operation.

As noted, 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." 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 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

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steepness, shallow soil, low-water holding capacity of soils, lack of saprolite, to make it a viable agricultural unit.

"Accepted farming practices, such as clearing, burning, and fertilizer application to establish productive pasture, are not practicable on the subject property. Starting with the subject property in its present state, it would not be common for a farmer to undertake to rehabilitate the subject property to a working farm, with the intent to make a profit in money, due to the subject property's unproductive droughty soils, lack of irrigation water, difficult topography, and deferred maintenance needs of pasture and improvements.

"Although farm activities occurred on neighboring rural residential properties, there was no evidence these activities constituted 'farm use' within the meaning of ORS 215.203(2)(a), i.e., an activity with the intent to make a profit in money. The testimony indicated this was a lifestyle chosen by residents; there was no accounting for overhead costs, and the small scale operations typically suffer from the diseconomies of scale described by Mr. Day." Record 22-25.

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.

Intervenor cites *Lovinger v. Lane County*, 36 Or LUBA 1, 16-19, *aff'd* 161 Or App 198, 984 P2d 958 (1999), for the proposition that the county has some latitude to set a threshold level of profitability in determining whether "farm uses" are impracticable under the statutes and administrative rules governing committed exceptions. In *Lovinger*, intervenor explains, we held that whatever latitude the county may have to set such thresholds, the county in that case erred to the extent it set a threshold of profitability based on whether the property is capable of supporting a "commercial" or an "economically self-sufficient" agricultural operation. In the present case, however, intervenor argues that the county properly identified a threshold of profitability short of a "commercial" agricultural operation, and found that the subject property is not capable of meeting that threshold. According to intervenor, the appropriate standard is whether a "reasonable and prudent farmer" would use the subject property for the primary purpose, and expectation, of making a *net* profit in money from grazing operations, after deducting the cost of direct operating expenditures, such as feed, fuel, fertilizer, vehicles, maintenance and labor. Intervenor argues that expert testimony in the record, adopted by the county, demonstrates that the subject property is not capable of producing a net profit in money, given the neglected condition of the property, its current low forage productivity, and the high cost and marginal returns of attempting to increase that productivity to support a larger or more intensive grazing operation.

Lovinger and other cases cited for the proposition that counties have some latitude to define a threshold of profitability all antedate OAR 660-033-0030(5), involve circumstances where the applicant seeks a committed exception to Goal 3, or involve other circumstances where the rule's prohibition on considering profitability did not apply. Such cases are of

limited utility in determining whether property is agricultural land where OAR 660-033-0030(5) applies.

There appears to be no dispute that even in its current neglected condition the subject property produces forage that can support a limited number of livestock on a seasonal basis, even without supplemental feed. There is evidence in the record that seasonal grazing is common in the area, and that it occurs primarily during the spring months. It appears that the soils on the subject property could potentially provide spring seasonal forage for at least 50-60 head of cattle (211 AUMs divided by 4), approximately the same number of cattle that the Mellors seasonally grazed on the property during their tenure.

The county dismisses a grazing operation at that scale and intensity as a "lifestyle activity" rather than as an activity with the "primary purpose of obtaining a profit in money." The county's analysis relies heavily on considerations of profitability or gross farm revenue, considerations that are prohibited by OAR 660-033-0030(5). In addition, the county's analysis appears to be based in part on the view that a certain scale or intensity of grazing is necessary to constitute "farm use." Record 23 ("This stocking level is far below that of accepted farming practices for livestock grazing in western Oregon"). However, Goal 3 protects small-scale agricultural uses as well as large-scale ones. Intervenor argues, and we tend to agree, that land capable of supporting only a "few animals" probably would not constitute land "suitable for grazing" under OAR 660-033-0020(1)(a)(B). However, it is not clear to us and the decision does not explain why land capable of supporting 211 AUMs on a seasonal basis, consistent with its historic use for grazing, and consistent with other grazing operations in the area, is such a *de minimis* level of capability as to fall outside the Goal 3 definition. In short, although the county did not phrase it this way, it appears to have applied what is essentially a "commercial-scale" agricultural operation standard under OAR 660-

033-0020(1)(a)(B). That approach would be error even if OAR 660-033-0030(5) did not apply.[9]

Two other points merit discussion. We tend to agree with petitioners that the current neglected status of the property is not the proper baseline for considering whether it is agricultural land. Where land was once maintained at some level of agricultural productivity that has suffered in recent years due to neglect, it is inappropriate to take such neglect into account under OAR 660-033-0020(1)(a)(B). A reasonable rancher, for example, would maintain fences, control brush and weeds and take similar appropriate measures to maintain the productivity of the property. The county erred to the extent it took as its baseline the neglected condition resulting from failure to provide such maintenance. However, it is not clear that the county did so. As we understand the record, the 211 AUM figure the county relied upon is an estimate of the subject property's forage productivity under appropriate management measures.

Second, in concluding that the subject property is no longer part of a "farm unit" for purposes of OAR 660-033-0020(1)(a)(B), we noted that in approving the subject property's creation in 2000 the county was required under ORS 215.263(2) to find that the subject property is either "appropriate for the continuation of the existing commercial agricultural enterprise within the area," or that it exceeds the minimum size established under ORS 215.780. The apparent intent of ORS 215.263(2) is to ensure that parcels created for farm uses are of sufficient size to continue to contribute to the agricultural economy. Creation of a parcel for farm use pursuant to the findings required by ORS 215.263(2)

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[9] In any case, even if Goal 3 protected only lands capable of supporting large scale agricultural operations, considering the scale of the grazing operation the subject property can support on its own is not sufficient under OAR 660-033-0020(1)(a)(B). If the subject property can be used in conjunction with adjacent or nearby lands then it may be "other suitable land." OAR 660-033-0030(3). *See* n 4. To the extent the scale of agricultural operation is determinative under OAR 660-033-0020(1)(a)(B), OAR 660-033-0030(3) would seem to require the county to consider the scale of the entire potential operation, including adjacent or nearby lands with which the property may be used. As discussed below, the county did not adequately address the possibility of using the subject property in conjunction with adjacent or nearby agricultural operations.

certainly does not preclude a subsequent determination that the parcel so approved is not, in fact, suitable for farm use. However, it further buttresses our view that the relative scale of the agricultural operation the property can support, which is partially related to the size of the property, is not a sufficient basis to conclude that the property is not suitable for farm use.

b. Use in Conjunction with Nearby or Adjacent Land

As noted, OAR 660-033-0030(3) provides that "Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land" and that "[n]earby or adjacent land, regardless of ownership, shall be examined" in determining whether land is "suitable for farm use" under OAR 660-033-0020(1)(a)(B). *See* n 4.

The county's conclusion that the subject property is not "suitable for farm use" under OAR 660-033-0020(1)(a)(B) becomes even more unsupportable when the focus shifts from the subject property in isolation to whether the subject property can be used in conjunction with adjacent or nearby properties, an inquiry that OAR 660-033-0030(3) directs. The decision dismisses the possibility of use in conjunction with the Napier property, the other half of the Richards ranch, because Napier is not interested in joint use. The decision does not address at all the Mellors' stated willingness to lease the subject property in conjunction with their grazing operation. Nor does it adequately address conjoined use with the Trent property, although intervenor cites to a statement in the agricultural consultant's report that due to steep terrain around Champagne Creek the adjoining parcels are "not connected in a practical manner." Record 1197.

In our view, the fact that Napier is not currently interested in conjoined use is not determinative under OAR 660-033-0030(3), if the two adjacent properties can in fact be used together in a combined agricultural operation. There seems to be little question that the two properties could be used together in a joint operation, because there is a 70-year history of such joint use. Similarly, the decision cites no reason why the subject property could not be used in conjunction with the Mellors' nearby property and grazing operation, other than to

describe their property as "marginal." *See* n 5. As to the Trent property, it might be the case that steep terrain between the subject property and the Trent property would preclude joint use, or that the stretch of Colonial Road connecting the two properties does not provide practicable access. It also could be that there is no farm use on the Trent property with which the subject property could combine. However, without more focused findings on this point and the Trent property in general, we agree with petitioners that the county has not demonstrated that the subject property cannot be used in conjunction with the Trent parcel.

2. Forage Improvement Practices

Petitioners next fault the county for failing to address testimony that the forage productivity of the property could be significantly improved by planting subterranean clover.

Intervenor argues that the county adopted findings rejecting the cited testimony because it was general in nature, not specific to the subject property, and was controverted by evidence that techniques advisable elsewhere in the county would not be appropriate on the subject property.[10] Petitioners do not challenge those findings, and we agree with intervenor that petitioners' forage improvement arguments do not provide a basis for reversal or remand.

3. Other Agricultural Uses

The county found that 12 percent or approximately 19 acres of the property has soils, aspects and other features suitable for a "commercial vineyard," but nonetheless concluded

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[10] The county adopted the following statements of intervenor's agricultural consultant as findings:

> "Page Two, Paragraph Two [of petitioner Wetherall's testimony] provides a summary of the general livestock/pasture management practices in Douglas County. However, no reference is made to the specific soils * * * and relatively unique conditions of the subject property as noted in the Kitzrow Report. Mr. Kitzrow pointed out in his report how these conditions detract from the capacity of the subject property in comparison to the general conditions found in Douglas County. He further specifically noted (Kitzrow Addendum dated July 9, 2004, second paragraph) that techniques advisable elsewhere in Douglas County would not be appropriate on the subject property and he provided technical evidence as to why the practices would not be advisable on the subject property." Record 524 (underlining omitted).

that the property as a whole is not suitable for a vineyard "for the primary purpose of obtaining a money in profit," given the poor soils on the remainder, which are not capable of producing commercial quality grapes.[11]

Petitioners again fault the county for relying on a commercial standard of profitability and distinguishing between allegedly noncommercial, "lifestyle" agricultural operations and commercial agricultural operations.[12]

Intervenor responds that the county's decision uses "commercial" in the sense of producing commercial-grade grapes that can be sold on the market, as opposed to lesser quality grapes produced only for domestic consumption that have no ready market value. Intervenor contends that the county did not intend to apply a "commercial" standard of profitability. Instead, intervenor argues, the county concluded that the property as a whole is

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[11] The county adopted the following findings, based on a September 5, 2004 report at Record 538-42:

> "* * * Only 24% of the subject property—generally, the same portions having Class II to IV soils—would have soils suitable for a commercial vineyard. Further, half of this area is in small scattered pockets unsuited for a commercial operation; only about 12% of the subject property is a suitable location for a commercial vineyard. The subject property as a whole is therefore not suitable for use as a vineyard for the primary purpose of obtaining a profit in money. The lack of saprolite and irrigation make it impossible to establish a commercial vineyard on the subject property as the primary use of the land, with the primary intent to obtain a profit in money.
>
> "Opposers' Exhibit 15 was purported to show that the Delfino vineyard was located on the same soil type [Nonpareil] as much of the subject property. The Delfino vineyard was claimed to be a productive nearby vineyard. * * * Even if the Delfino property were located on Nonpareil soils, as Mr. Kitzrow notes, some Nonpareil soils contain saprolite and are much better soils than the ones on the subject property. No soil boring was reported from the Delfino property, and without a detailed study, the evidence is insufficient to make a comparison between the Delfino property and the subject property.
>
> "Further, the Delfino operation is run as a bed and breakfast, with a newly planted vineyard of unproven success, and is typical of a small-scale operation entered into for life style choice, not for the primary purpose of making a profit in money by raising, harvesting, and selling wine grapes. The 160-acre Delfino property has a 15-acre vineyard of 5 varieties planted in 2002, and advertises double occupancy at $115 per night, with an invitation to stroll the vineyard." Record 25-26.

[12] Petitioners also argue under this subassignment of error that the county failed to address the possibility of a mixed forestry/grazing operation. Intervenor responds, and we agree, that petitioners do not develop this argument sufficiently for review. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

not suitable for use as a vineyard, because only a portion of the subject property can produce commercial-grade grapes.

As the findings quoted in n 11 indicate, the county's findings regarding use of the property for a vineyard are permeated with the view, rejected above, that "small-scale" agricultural uses are merely "life-style" activities and cannot also be farm uses for purposes of OAR 660-033-0020(1)(a)(B), because their "primary purpose" is not that of "making a profit in money." As explained, the county's emphasis on profitability is inconsistent with OAR 660-033-0030(5). The findings characterize a nearby 15-acre vineyard as "small-scale" and as a "life-style" activity, in part due to its size and in part because it is associated with a bed and breakfast. However, a 15-acre vineyard is a fairly intensive agricultural enterprise, which may be sufficient in size to support a winery allowed under ORS 215.213(1)(s), 215.283(1)(q) and 215.452. Further, we do not see that the association of such a vineyard with a bed and breakfast means that the vineyard is not a farm use. If the subject property can support a similar 15 or 20-acre commercial vineyard, and intervenor's own evidence suggests that it might be able to, then the county must consider that possibility, under an analysis that is consistent with OAR 660-033-0030(5).

The county's findings also emphasize the fact that a majority of the soils on the subject property are not suitable for a commercial vineyard. Unlike OAR 660-033-0020(1)(a)(A), a determination whether property is "suitable for farm use" under OAR 660-033-0020(1)(a)(B) does not turn on the *predominant* soil classification or characteristics of the property. If a significant portion of a large parcel is suitable for a farm use, then the fact that the remainder of the parcel is not suitable for that particular use does not automatically disqualify the parcel as agricultural land under OAR 660-033-0020(1)(a)(B). While the county must evaluate the whole parcel, if 19 acres of the property are suitable for a commercial vineyard, and a significant portion of the remainder is suitable for seasonal

grazing, for example, then the county must consider that possibility. The fact that the majority of the parcel is not suitable for a commercial vineyard is not dispositive.

C. OAR 660-033-0020(1)(a)(C): Necessary Land

OAR 660-033-0020(1)(a)(C) includes within the definition of "agricultural land" land that is "necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands." *See* n 1. The county's findings discuss many of the surrounding parcels in resource zoning, and conclude, in relevant part, that "[f]arm use on the properties within the notice area is not connected with the subject property in any way." Record 29.

Petitioners challenge that finding, arguing that the county misconstrued the "necessity" standard to require that *farm use* of the property in conjunction with adjacent or nearby properties is necessary to permit farm practices on such adjacent or nearby properties. The proper question under the necessity standard, petitioners contend, is whether keeping the subject property under an agricultural designation is necessary to support farm practices on adjacent or nearby properties. According to petitioners, if the subject property's plan and zoning designations are amended to allow the proposed 32 rural residential dwellings, the ensuing conflicts between residential uses and adjacent and nearby farm practices will hinder or prevent those practices.

Intervenor argues, and we agree, that the county did not construe the necessity standard in the way petitioners allege. As far we can tell from the findings, the county did not presume that *farm use* of the subject property must occur in conjunction with neighboring farm to show that the subject property qualifies as agricultural land under the necessity standard. The county understood, instead, that there must be some connection between the subject property and adjacent or nearby farm practices, such that the subject property must remain as "agricultural land" in order to permit such practices on other lands to be undertaken. We agree with that understanding of the necessity standard. The county found no evidence of any connection between the subject property and adjacent or nearby farm

practices, or that the subject property must remain as "agricultural land" in order to permit such practices to be undertaken. Petitioners cite to no evidence that rural residential use of the subject property on five-acre lots is likely to cause conflicts such that adjacent or nearby farm practices cannot continue or be undertaken. Intervenor notes that resource uses are protected from complaints by rural residents under ORS 30.936, the right to farm statute, which makes it even more unlikely that such conflicts could rise to that level. Petitioners have not demonstrated that the county erred in finding that the subject property is not "agricultural land" under the necessity standard.

D. Conclusion

For the above reasons, the county misconstrued OAR 660-033-0020(1)(a)(B) and failed to adopt adequate findings addressing whether the subject property is agricultural land under that definition. Remand is necessary for the county to apply the correct standard, consistent with OAR 660-033-0030(5).[13]

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioners challenge the county's finding that the subject property is not "forest land" as defined by Statewide Planning Goal 4 (Forest Lands).[14]

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[13] Given our understanding of the facts in this case, and our above-expressed understanding of OAR 660-033-0020(1)(a)(B) and 660-033-0030(5), it seems unlikely that the county can reach a sustainable conclusion that the subject property is not "agricultural land" under OAR 660-033-0020(1)(a)(B). The 70-year history of grazing use in conjunction with the Napier parcel, and the absence of a sufficient reason to believe that the subject property could not be used again with the Napier parcel, or the Mellor parcel, for that matter, would seem to compel the conclusion that the subject property is agricultural land. Nonetheless, the county did not fully consider these matters under the correct standard, and it may be on remand that the county can reach a sustainable conclusion to the contrary. Accordingly, remand rather than reversal is appropriate.

[14] 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 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."

The county adopted four alternative rationales in support of its conclusion that the subject property is not "suitable for commercial forest uses" and hence protected by Goal 4, based on a report by intervenor's consulting forester.[15] According to intervenor, the first

[15] The county's findings state, in relevant part:

> "First, we note that Mark Setchko, M.F., a consulting forester, extensively studied the trees and the subject property to develop an expert opinion as to whether the subject property comprised lands suitable for commercial forestry. Most of the subject property showed no trees have been present since 1950, the date of the earliest aerial photograph. Most of the rest of the subject property showed poor timber growth or the capability of supporting only poor timber growth. The site on the subject property capable of producing good growth was a small localized area along Colonial Road on the south part of the subject property. Mr. Setchko concluded that no commercial timber operator would be interested in attempting to manage the subject property to grow timber. Mr. Kitzrow found the soils on the subject property were predominantly not able to support commercial forestry production. From this we conclude the evidence shows the subject property is not suitable for commercial forestry. * * *
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> "Moreover, the comprehensive plan (Forest Resource Findings 4, page 2-3) employs a standard of 80 cubic feet of wood fiber per acre per year [cf/ac/yr]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. The tree species we considered are Douglas fir, pine and cedar.
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> "* * * * *
>
> "The issue arises as to what site class capability to assign to Dickerson and Nonpareil soils. * * *
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> "Here, the identification of forest land is delegated to the county to determine. The comprehensive plan sets a standard at 80 [cf/ac/yr] for lands growing Douglas fir. The unrated [Dickerson and Nonpareil soils] soil types do not grow forests. There is justification in using a rating of 0 for the purpose of identifying forest lands (even if not justified for applying the forest template test *within* identified forest lands), in that the Dickerson and Nonpareil soils cannot support timber stands. As a second alternative, we adopt the reasoning of Mr. Setchko that the subject property can be expected to produce 26.1 [cf/ac/yr], based on the premise that the nonresource soils will not reasonably produce any timber due to commercial forestry activities, as no such activities would be conducted on such unproductive soils; we therefore interpret the comprehensive plan's 80 cf/ac/yr standard to be computed across the entire subject property, but based on timber production from resource soils.
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> "* * * * *
>
> "There are 56.1 acres of Dickerson and Nonpareil soils which have scattered trees. Individual trees showed growth rates which correspond to a cubic site class index of 130 cf/ac/yr if the stand were fully stocked. However, the sites cannot support full stocking; indeed, the Dickerson and Nonpareil soils could not support more than 50% stocking. Accordingly, we find that the Dickerson and Nonpareil soils with trees would produce no

analysis is a "qualitative" judgment that "no commercial timber operator" would be interested in managing the property for timber production, since most of the property has not historically supported commercial stands of timber, and the majority of the soils on the property are not rated for timber productivity. The remaining analyses are technical estimates of the productivity of the soil types on the subject property, expressed in cubic feet per acre per year (cf/ac/yr). The technical analyses rely on language in finding 4 of the comprehensive plan's Goal 4 element, which the county interprets to provide a minimum standard of 80 cf/ac/yr for commercial forest lands protected by Goal 4.[16]

The Speaker and Josephine soils that comprise about 35 acres or 22 percent of the subject property are capable of producing 114 cf/ac/yr and 129 cf/ac/yr, respectively, based on National Resource and Conservation Service (NRCS) data. Apparently, there are no NRCS timber productivity data for the Dickerson and Nonpareil soils that comprise about 127 acres or 78 percent of the property.

The second analysis assumed that the Dickerson and Nonpareil soils that predominate on the subject property have zero productivity, despite the fact that scattered stands of trees are found on 56.1 acres of those soils on the subject property. Under that assumption, the average per acre productivity for the entire parcel is 26.1 cf/ac/yr.

> more than 65 cf/ac/yr. The 71.5 acres which have grown no trees since 1950 would produce 0 cf/ac/yr in a commercial forestry operation. Under this third alternative line of reasoning, the subject property is able to produce 7900 cf/yr total, or 48.5 cf/ac/yr.
>
> "Mr. Setchko concluded that if all the sites on the subject property that had at least scattered trees were fully stocked, the subject property would produce 70.93 [cf/ac/yr]. This is below the standard of 80 that Douglas County adopted. We believe this line of analysis is unwarrantedly optimistic in assuming that full stocking can be achieved on the Dickerson and Nonpareil soils, but note it is a fourth alternative reasoning." Record 31-34 (table omitted)."

[16] The comprehensive plan finding the county relies upon states:

> "In Douglas County, lands growing Douglas fir which produce less than eighty cubic feet per acre per year are generally not used for commercial uses. This is higher than the national standard for commercially productive forest land, which is twenty cubic feet per acre per year." DCCP 2-3.

The third analysis examined the stands of trees growing on 56.1 acres of Dickerson and Nonpareil soils on the property, and estimated that the soil supporting those stands would yield 130 cf/ac/yr if the stands were fully stocked. However, the consultant found that those areas can support only half stocking, and accordingly halved the estimate to 65 cf/ac/yr. The consultant continued to assume that the 71 acres of Dickerson and Nonpareil soils with no stands of trees have zero capability to grow trees. Under these assumptions, the average productivity for the entire parcel is 48.5 cf/ac/yr.

Finally, the fourth technical analysis assumed that the 56.1 acres of Dickerson and Nonpareil soils supporting scattered trees could in fact be fully stocked, and thus yield 130 cf/ac/yr. Under this assumption, the average productivity for the entire parcel is 70.93 cf/ac/yr. Because none of the three technical analyses showed that the subject property met the 80 cf/ac/yr standard, the county concluded, the subject property is not "suitable for commercial forestry" under the Goal 4 definition.

A. 80 cf/ac/yr

Petitioners first challenge the county's reliance on the 80 cf/ac/yr minimum standard for commercial forest lands that the county interpreted its comprehensive plan to provide. Petitioners contend that the county's interpretation of comprehensive plan language and other local provisions implementing Goal 4 cannot be contrary to the goal. ORS 197.829(1)(d).[17] According to petitioners, interpreting the threshold for lands protected

[17] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

by Goal 4 to be 80 cf/ac/yr is inconsistent with the goal. In addition, petitioners argue that the comprehensive plan policies and land use regulations implementing Goal 4 apply Goal 4 protection to lands capable of producing considerably less than 80 cf/ac/yr, which belies the county's interpretation that 80 cf/ac/yr is the threshold.

Intervenor responds that the county has discretion to define a threshold for lands "suitable for commercial forestry" under Goal 4, and that the acknowledged comprehensive plan does precisely that. Because the county's comprehensive plan is acknowledged to comply with Goal 4, intervenor argues, the consistency of the 80 cf/ac/yr standard with Goal 4 cannot be challenged in this appeal. Further, intervenor argues, LUBA affirmed the county 80 cf/ac/yr standard in two separate cases, both involving the same petitioners in the present case. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757, 760 (2004); *Wetherell v. Douglas County*, 44 Or LUBA 567, 568-9 n 1 (2003).

To take the last point first, we disagree with intervenor that our decisions in *Wetherell* and *Friends of Douglas County* "affirmed" the county's use of the 80 cf/ac/yr comprehensive plan language as the threshold for Goal 4 protection. While we noted the existence of that language in both cases, in neither case was the 80 cf/ac/yr comprehensive plan language at issue. At best our references to the 80 cf/ac/yr comprehensive plan language was *dicta*.

We also disagree more fundamentally with intervenor that the county has in fact defined 80 cf/ac/yr as the threshold for Goal 4 protection. Had the county in fact adopted such a definition in its acknowledged comprehensive plan, then that acknowledged standard would, as a matter of law, be consistent with Goal 4, and the county could apply that standard to determine whether lands are protected by Goal 4, and need not apply Goal 4 directly. *Sommer v. Josephine County,* 49 Or LUBA ___ (LUBA No. 2004-131, April 5, 2005) slip op 5, *aff'd* ___ Or App ___, ___ P3d ___ (2005). In *Sommer,* we held based on

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"(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

the reasoning in *League of Women Voters v. Metro Service Dist.*, 99 Or App 333, 781 P2d 1256 (1989), that the county did not err in applying a comprehensive plan policy defining an objective threshold for commercial forest lands, rather than Goal 4, to determine whether lands are "suitable for commercial forestry." That conclusion was based both on the policy text and legislative history in the record, which made it clear that the objective standards in the policy were intended to replace direct application of Goal 4, at least in certain circumstances, and that the Department of Land Conservation and Development (DLCD) had acknowledged the policy with that understanding.[18]

In the present case, however, it is much less clear that the comprehensive plan language relied upon is intended to define a threshold for Goal 4 protection or to replace any aspect of Goal 4. Moreover, when read in context with the county comprehensive plan policies and land use regulations implementing Goal 4, it is reasonably clear that the cited comprehensive plan language does not adopt a 80 cf/ac/yr threshold for Goal 4 protection, and the county's interpretation to that effect cannot be affirmed under ORS 197.829(1).

Neither Goal 4 nor the Goal 4 rule set forth a precise methodology for determining whether land is "suitable for commercial forestry." *Potts v. Clackamas County*, 42 Or LUBA 1, 5, *aff'd* 183 Or App 145, 52 P3d 449 (2002). In *Potts*, we reviewed several cases indicating that the Goal 4 "suitable for commercial forestry" standard protects nonprime forest lands as well as prime forest lands. *Id.* We discussed cases questioning findings that lands producing 48.48 to 63 cf/ac/yr are not protected by Goal 4.[19] As *Sommer* indicates,

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[18] We ultimately remanded the decision in *Sommer*, after rejecting the county's interpretation that the objective thresholds in the plan policy applied to the circumstances present in that case.

[19] Our conclusion that the county did not adopt 80 cf/ac/yr as the threshold for Goal 4 protection makes it unnecessary to opine whether such a standard, if adopted and properly before us, would be contrary to Goal 4. However, we seriously question whether such a threshold would be consistent with the goal. As we note below, the county's own comprehensive plan policies implementing Goal 4 indicate that the county regards *prime* forest lands to include lands within site class 4, the bottom range of which is approximately 85 cf/ac/yr. We question whether it would be consistent with Goal 4 to locate the minimum threshold for "forest lands" slightly below the level of productivity regarded as prime forest lands.

counties may develop more specific or objective standards as a threshold for Goal 4 protection. If such standards are acknowledged, they may replace or supplement direct application of the Goal 4 standard. However, we believe that the intent to adopt such a standard as the threshold for Goal 4 protection must be more clearly evident from the text, context or relevant legislative history than in the present case.

The comprehensive plan language relied upon states in relevant part that "lands growing Douglas fir which produce less than eighty [cf/ac/yr] are generally not used for commercial uses." *See* n 16. That language does not suggest, much less clearly evince, an intent to adopt 80 cf/ac/yr as the threshold for Goal 4 protection, or as a definition of lands "suitable for commercial forestry." The statement is one of 50 "Forest Resource Findings" that preface the plan policies that actually implement Goal 4. The language reads like most of the other "findings" in that section, as a factual and historical recitation, summing up the relevant facts and considerations that underlie and justify the comprehensive plan policies that follow: in Douglas County, lands growing Douglas fir that produce less than 80 cf/ac/yr are "generally" not used for "commercial uses," unlike other parts of the country with less productive forest lands. It is a statement of historical fact, not a standard or definition of forest lands protected by Goal 4.[20]

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

[20] Although not determinative, we also think it significant that no party has identified any legislative history suggesting that when the county adopted the finding quoted above it intended that that language would function as a threshold for identifying Goal 4 forest lands, or that the county ever represented to DLCD during periodic review or during a post-acknowledgment plan amendment process that the language had that intent, unlike the standards at issue in *Sommer*. We also think it significant that, at least as far as reported cases indicate, the county has not until the present case applied that plan language to determine whether land is subject to Goal 4. That is again in contrast to the standard in *Sommers*, which the county has consistently applied since the standard was adopted in the 1980s, through many rounds of litigation. *See Doob v. Josephine County*, 48 Or LUBA 227, 235-39 (2004) (describing history of the standard and cases applying it). In other words, the county's interpretation that the comprehensive plan language defines the threshold for Goal 4 lands appears to be of relatively recent vintage, perhaps prompted by our references in *Wetherell* and *Friends of Douglas County*.

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[.]"[21] 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.

Consequently, we agree with petitioners that the county erred in relying on the 80 cf/ac/yr as the threshold for Goal 4 protection.

B. Qualitative Analysis

Intervenor argues that the forestry consultant's first analysis is not dependent on the 80 cf/ac/yr threshold or actual measurement of productivity, but instead is a "qualitative" analysis based on the consultant's expert opinion that the subject property is not suitable for commercial forestry. *See* n 15 (findings describing first analysis). Intervenor argues that the

[21] As far as we can tell, the site classification system runs (somewhat counter intuitively) from class 1 (highest) to 6 (lowest). The reference to "5 or below" thus indicates classes 5 or 6, not classes 1 through 5.

first analysis is a sufficient basis to affirm the county's conclusion that the subject property is not protected by Goal 4.

The "first analysis" is apparently based on an April 20, 2004 report that the county adopted as part of its findings, found at Record 1292-94. That report describes two approaches. The first approach notes the lack of NRCS ratings for the Dickerson and Nonpareil soils, cites the 80 cf/ac/yr language in the county's comprehensive plan, and concludes that "[l]ooking at the entire property from the viewpoint of timber production, it can be seen that less than a quarter of the property is capable of growing trees at all." Record 1293. The second approach assumes that Dickerson and Nonpareil soils have zero productivity, yielding an average per acre productivity of 26.08 cf/ac/yr.

As far as we can tell, the first analysis assumes that 80 cf/ac/yr is the relevant standard under Goal 4 and also relies heavily on the fact that there are no NRCS ratings for the Dickerson and Nonpareil soils, two bases that we conclude above and below are insufficient to support a finding that subject property is not forest land protected by Goal 4. Those problems aside, we 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.

C. Zero Productivity for Unrated Soils

The second analysis assumed that the Dickerson and Nonpareil soils, for which NRCS does not provide productivity or site class ratings, have essentially zero capability for producing commercial stands of timber, notwithstanding that 56.1 acres of those soils in fact currently support scattered stands of trees. Petitioners argue that this approach is error, and

that where soils have no published productivity ratings but in fact are capable of supporting trees Goal 4 and the Goal 4 rule require an actual evaluation of productivity.

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.[22] 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.

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.

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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[22] OAR 660-004-0005(2) provides as follows:

> "'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."

OAR 660-006-0010 provides as follows:

> "Governing bodies shall include an inventory of 'forest lands' as defined by Goal 4 in the comprehensive plan. Lands inventoried as Goal 3 agricultural lands or lands for which an exception to Goal 4 is justified pursuant to ORS 197.732 and taken are not required to be inventoried under this rule. 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. Notwithstanding this rule, governing bodies are not required to reinventory forest lands if such an inventory was acknowledged previously by the Land Conservation and Development Commission."

> "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 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. The fact that LCDC requires an "alternative method of determining productivity" when NRCS data is unavailable in determining whether lands qualify for forest template dwellings, and does not allow the county to proceed on the assumption that unrated soils cannot produce timber, is some indication that it is similarly impermissible to adopt that assumption in the context of determining whether lands are subject to Goal 4.

We addressed a related issue in *Sommer* and other cases involving Josephine County's standard for determining whether land is suitable for commercial forestry under Goal 4. In that case, the study supporting the county's standards did not address or evaluate 44 of the 111 soils in the county for which there were no NRCS productivity data. After adopting the standard, the county made several unsuccessful attempts to treat the 44 unrated soils as having zero or near zero productivity. In *Sommer*, we rejected what was essentially the county's most recent attempt. Specifically, we stated:

> "* * * [N]o one has pointed to anything in the NRCS soil survey that explains how NRCS reached a conclusion that only the 67 included soils that are included on Table 6 are 'suitable for commercial tree production.' Perhaps if the [county] had provided that missing explanation, instead of simply

> proceeding as though it were a given that those 44 soils are not forest land within the meaning of Goal 4, we could agree with the county that it can assume that the unrated soils are nonresource lands. However, if some of those 44 soils were not included on Table 6 solely because they are more commonly used for agricultural purposes or because NRCS lacked sufficient data at the time to confirm the suitability of one or more of those 44 soils for commercial forest use, the omission of those soils from Table 6 does not necessarily mean those soils are not suitable for commercial forest use, and it certainly does not mean that parcels with those soils could not fall within the broad Goal 4 definition of forest land." Slip op 20-21.

Sommer indicates that Goal 4 requires some measurement of productivity for unrated soils when determining whether land is forest land, and the goal does not permit counties to simply assume that unrated soils have zero or near zero productivity.

Finally, additional support is provided by OAR 660-006-0010, which intervenor does not address. That rule requires that local governments inventory "forest lands" and include a "mapping of forest site class." Significantly, "[i]f site information is not available then an equivalent method of determining forest land suitability must be used." Thus, in inventorying forest lands, local governments must map "forest land suitability" using a "forest site class" method. The absence of data requires use of an "equivalent method." While OAR 660-006-0010 pertains to the inventory of forest lands, it again shows that LCDC is concerned that determinations of "forest land suitability" be made based on empirical methods, and that counties cannot simply assume from the fact that no NRCS productivity ratings exist for certain soils that such soils are nonresource soils.

In sum, we agree with petitioners that the second analysis, under which the county assumed that unrated soils have zero capacity to produce timber, is not a sufficient basis on which to conclude that the subject property is not forest land under Goal 4.

D. Third and Fourth Analyses

The third and fourth analyses estimate that the subject property is capable of producing an average of 48.5 cf/ac/yr (assuming the 56.1 acres of Dickerson and Nonpareil soils that currently support trees were half-stocked) or 70.93 cf/ac/yr (assuming those acres

could be fully stocked). As discussed above, these analyses are based on the erroneous premise that 80 cf/ac/yr is the county's acknowledged threshold for Goal 4 lands. Remand is necessary for the county to reconsider whether the subject property is "suitable for commercial forestry" without that premise. We address these analyses further only to clarify the issues to be addressed on remand.

First, petitioners offer no focused challenge to the county's conclusion that the 56.1 acres of Dickerson and Nonpareil soils that currently support trees cannot support full stocking levels. Second, petitioners offer no focused challenge to the county's conclusion that the 71.5 acres of Dickerson and Nonpareil soils that have not supported trees for at least the past 50 years cannot in fact produce any trees. As far as petitioners have shown, both of those conclusions are supported by the record.

Second, although petitioners do not assign error to this aspect of the analyses, we note that under the third and fourth analyses the forestry consultant *averaged* the cf/ac/yr data across the entire parcel. Because slightly less than half of the 162-acre subject property, 71.5 acres of Dickerson and Nonpareil soils, have essentially zero productivity, the overall average productivity per acre is relatively low, as low as 48.5 cf/ac/yr. Goal 4 does not specify how such calculations are made. However, as explained above, the 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, 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 these 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.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

OAR 660-004-0040(7), adopted in 2000, provided:

> "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.'"[23]

Pursuant to OAR 660-004-0040(7), in November 2000 the county adopted a Goal 14 exception for its five-acre rural residential plan designation, as a post-acknowledgment plan amendment. The amendments essentially declared that five-acre residential development on septic systems is not an urban use anywhere in the county, and is therefore consistent with Goal 14. Based on that exception, the county concluded in the present case that Goal 14 does not apply to rezoning the subject property to allow for five-acre residential lots.

Petitioners argue that county erred in failing to apply Goal 14 directly to the decision on appeal and either (1) find that allowing five-acre residential development is consistent with the goal, or (2) take an exception to the goal. According to petitioners, because the 2000 Goal 14 exception was county-wide in scope, and did not apply to specific properties, it was not an "exception" as that term is defined in ORS 197.732(8).[24] Therefore, we

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[23] In 2004, OAR 660-004-0040 was amended to require compliance with OAR chapter 660 division 14.

[24] ORS 197.732(8) provides:

> "As used in this section, 'exception' means a comprehensive plan provision, including an amendment to an acknowledged comprehensive plan, that:
>
> "(a) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;
>
> "(b) Does not comply with some or all goal requirements applicable to the subject properties or situations; and

understand petitioners to argue, the 2000 Goal 14 exception is not a basis under OAR 660-004-0040 to avoid direct application of Goal 14 in subsequent property-specific decision-making.

The county and intervenor respond that ORS 197.732(8) defines "exception" to include "specific properties *or* situations" (emphasis added), and is not limited to plan amendments focused on specific properties. According to respondents, a Goal 14 exception focused on five-acre rural residential lands is a "specific * * * situation." In any case, respondents contend, petitioners' argument that the Goal 14 exception is not an "exception" is essentially a collateral attack on the 2000 legislation, which is acknowledged to comply with all applicable goals and administrative rules.

OAR 660-004-0040(7) clearly authorizes the county to adopt, in a legislative decision, an exception to Goal 14 that will allow the county to apply a particular rural residential zone or plan designation to property, without the necessity of applying or taking an exception to Goal 14. The county adopted such an exception in 2000, and applied it in the manner contemplated by the rule. We agree with respondents that an exception justifying a five-acre rural residential plan designation is directed at a specific "situation," and therefore an exception as defined by ORS 197.732(8). Even if the 2000 exception were flawed in some manner, we agree with respondents that arguments to that effect are impermissible collateral attacks on the 2000 decision, and not a basis to reverse or remand the decision before us.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Land Use and Development Ordinance (LUDO) 6.500(2)(b) requires findings that a quasi-judicial plan amendment provides a reasonable opportunity to satisfy a "local need."

"(c) Complies with standards under subsection (1) of this section."

The county adopted findings of compliance with LUDO 6.500(2)(b) and (c) based on letters from local realtors attesting to the demand for 5-acre rural residential lots in the area.

Petitioners argue that the county failed to consider evidence that there are numerous existing vacant parcels in the area that are currently zoned for residential use.

Intervenor responds, and we agree, that the evidence the county relied upon is substantial evidence, *i.e.*, evidence on which a reasonable person could rely. The county cited evidence that 5-acre rural residential lots in the Melrose area had a typical market life of only 2-4 days before being purchased. In other words, the county relied upon the relative scarcity of properties on the market, not the total inventory of vacant lands. Petitioners do not explain why that approach is error, for purposes of demonstrating a "local need" under LUDO 6.500(2)(b), and we do not see that it is.

The fourth assignment of error is denied.

The county's decision is remanded.