BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

RANDY WALKER and
DANNETTE WALKER,
Intervenor-Respondents.

LUBA No. 2005-075

FINAL OPINION
AND ORDER

On remand from the Court of Appeals.

Shelley Wetherell, Umpqua, represented herself.

Paul E. Meyer, Douglas County Counsel, Roseburg, represented respondent.

Stephen Mountainspring, Roseburg, represented intervenor-respondents.

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

REMANDED 07/25/2007

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

Opinion by Holstun.

INTRODUCTION

This appeal is before us on remand from the Court of Appeals and Supreme Court. *Wetherell v. Douglas County*, 50 Or LUBA 275 (2005), *aff'd in part, rem'd in part* 204 Or App 778, 132 P3d 50 (2006), *aff'd in part, rev'd in part*, 342 Or 666, ___ P3d ___ (2007). The appeal concerns a 26-acre parcel that the county found does not qualify as either agricultural land or forest land. Based on those findings the county found that the property need not be zoned for exclusive farm use under Statewide Planning Goal 3 (Agricultural Lands) or zoned for forest use under Goal 4 (Forest Lands). The county then granted comprehensive plan and zoning map amendments from a mixed farm and forest zone to a rural residential zone that would allow the property to be partitioned into parcels as small as 5 acres and developed with rural residences.

LUBA rejected petitioner's second, third and fourth assignments of error. In those assignments of error, petitioner argued that the county's decision violates Goal 14 (Urbanization), Douglas County Land Use and Development Ordinance (LUDO) requirements for quasi-judicial land use amendments, and a LUDO provision that petitioner understood to obligate the board of county commissioners to consider additional evidence in their appeal of the planning commission's decision in this matter to the board of county commissioners. LUBA's rulings on the second, third and fourth assignments of error were sustained on appeal and we do not consider those assignments of error further.

Petitioner's first assignment of error had two parts. First, petitioner argued that the county improperly found that the subject property does not qualify as agricultural land under Goal 3. Second, petitioner argued that the county improperly found that the subject property does not qualify as forest land under Goal 4. Unless and until the county can establish that the subject property is neither agricultural land nor forest land, petitioner argued the subject property must be protected for resource uses under those goals. LUBA sustained both parts

of petitioner's first assignment of error. LUBA's ruling with regard to the Goal 4 issues under the first assignment of error were sustained on appeal. LUBA's reliance on an administrative rule in sustaining petitioner's Goal 3 challenge was reversed by the Court of Appeals and Supreme Court.

A. LUBA's Decision

Based on the facts that have been established during the course of this appeal, the subject property qualifies as "agricultural land," within the meaning of Goal 3 (Agricultural Lands) and OAR 660-033-0020(1), only if it meets the test set out in OAR 660-033-0020(1)(a)(B).[1] In LUBA's initial decision in this matter, in reviewing the county's findings that the subject property is not suitable for farm use, and therefore does not qualify as agricultural land under OAR 660-033-0020(1)(a)(B), LUBA concluded that "it [is] reasonably clear that the county applied 'profitability' as a direct consideration in the challenged decision." 50 Or LUBA at 281-82. Citing OAR 660-033-0030(5), LUBA concluded that it was improper for the county to consider "profitability" in determining whether the subject property qualifies as agricultural land under OAR 660-033-

[1] Goal 3 generally requires that agricultural land located outside urban growth boundaries be protected by zoning such lands for exclusive farm use. As defined by Goal 3 and OAR 660-033-0020(1), agricultural land includes a number of different types of land. One of those types of land is described in OAR 660-033-0020(1)(a)(B) as follows:

> "Land in * * * soil classes [other than U.S. Natural Resources Conservation Service Classes I-IV] 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[.]" (Emphasis added.)

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

0020(1)(a)(B).[2] LUBA held that on remand the county must determine "whether the subject property qualifies as agricultural land * * * without directly considering profitability." 50 Or LUBA at 282.

B. The Court of Appeals' Decision

In its memorandum opinion in this appeal, the Court of Appeal relied on its decision in an identically named and closely related appeal. *Wetherell v. Douglas County*, 204 Or App 732, 132 P3d 41 (2006). In that decision, the Court of Appeals concluded that by precluding consideration of "gross profit or profitability," OAR 660-033-0030(5) is inconsistent with Goal 3. Relying in large part on its decision in *1000 Friends v. Benton County*, 32 Or App 413, 575 P2d 651, *rev den*, 284 Or 41 (1978), the Court of Appeals concluded that while "'profit,' in the sense of income exceeding expenses," is not a permissible consideration in determining whether land is suitable for farm use, "gross income" is a permissible consideration, notwithstanding OAR 660-033-0030(5).[3] 204 Or App at 747. The Court of Appeals concluded that LUBA erred in directing the county on remand to follow OAR 660-033-0030(5) in determining on remand whether the subject property qualifies as agricultural land:

> "LUBA * * * specifically directed the county on remand to reconsider the issue in light of OAR 660-033-0030(5). For that reason, we must remand this matter to LUBA so that it may recraft its remand instructions to the county in light of our conclusion that OAR 660-033-0030(5) is invalid insofar as it precludes consideration of 'gross income.' 204 Or App at 748.

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[2] OAR 660-033-0030(5) provides that "[n]otwithstanding the definition of 'farm use' in ORS 215.203(2)(a), profitability or gross farm income shall not be considered in determining whether land is agricultural land or whether Goal 3, 'Agricultural Land,' is applicable."

[3] Although it has always been a somewhat nebulous concept, we understand gross income in this context to include "money receipts" from sale of agricultural products without regard to the costs that may have been incurred in growing the crops that generated those money receipts. *1000 Friends v. Benton County*, 32 Or App at 429.

C. The Supreme Court's Decision

On appeal, the Supreme Court partially reversed the Court of Appeals' interpretation and application of OAR 660-033-0030(5). The Supreme Court viewed the relevant question as follows:

> "* * * Under Goal 3, land must be preserved as agricultural land if it is suitable for 'farm use' as defined in ORS 215.203(2)(a), which means, in part, 'the current employment of land for the primary purpose of obtaining a *profit in money*' through specific farming-related endeavors. OAR 660-033-0030(5), however, expressly *prohibits* consideration of 'profitability or gross farm income' as factors in Goal 3 land determinations. If application of the statutory phrase 'profit in money' permits or requires a local government to consider 'profitability or gross farm income,' then the rule directly conflicts with the statute (and with Goal 3, which refers to the statute) and the rule is invalid. The question then is whether such a conflict exists." 342 Or at 677.

The Supreme Court ultimately concluded that, as used in ORS 215.203(2)(a), "'profit' does not mean 'gross income.'" 342 Or at 680. The Supreme Court reasoned that "'profit in money' must include some consideration of expenses or costs, as well as of revenues or income." 342 Or at 679. The Supreme Court ultimately broadened the Court of Appeals holding to make it clear that in determining whether the subject property is suitable for farm use, the county can consider the subject property's potential "profitability," as well as its potential to generate "gross farm income."

> "The only issue that we decide today is whether 'profitability' or 'gross farm income' can be considered by the local government in making its land use decision, and our decision is limited to holding that the rule prohibiting the local government even from considering such evidence is invalid." 342 Or at 683.

DECISION

The county's findings that the subject property is not "agricultural land," as Goal 3 uses and defines that term, were extensive and discuss a number of characteristics that generally limit its suitability for farm use and discuss the property's potential for particular farm uses. We set out some of those findings below:

"A key requirement of the definition [of agricultural land] is that the land must be employed for the primary purpose of obtaining a profit in money by farm activities. The history of the subject property shows that it has never been managed as a farm unit or a part of one, as the site's low productivity makes it impossible to obtain a profit in money.

"The subject property has low fertility due to its south aspect, very shallow soils, lack of irrigation water, infertile sandstone and siltstone bedrock that is durable to weathering, predominate lack of saprolite, and lack of deep alluvial soils. The soils have almost no true topsoil and little clay to hold water.

"The low fertility cannot be overcome by accepted farming practices. Clearing and/or burning would not improve pasture conditions because of the susceptibility of the thin soils to severe erosion. Fertilization would not significantly increase the subject property's fertility to productive levels because the soils on this site are generally less than 24" to bedrock; moreover, the underlying bedrock is hard and the soils are inherently very infertile. The lack of irrigation water makes it impractical to capitalize on additional productivity from fertilization. Application of fertilizer is also impracticable because of the steep topography of the subject property.

"The south aspect magnifies the dry nature of the subject property due to the lack of irrigation and the soil's inability to hold water. This significantly reduces the effective growing season for forage.

"The site is unsuitable for grazing as a farm use because its soils are shallow, infertile, highly erodible, and steeply sloped. Tillage likely would reduce the site's limited fertility because it would damage the thin soil layer, cause unacceptable erosion, and be hampered by hard bedrock which begins in many places as near as 12" from the surface.* * *" Record 21-22.

In rejecting arguments that the subject property is suitable for a vineyard or Christmas tree production, the county relied in part on the testimony of the owner of a nearby vineyard and an owner and manager of a large Christmas tree farm:

"The subject property is unsuitable for commercial vineyards or Christmas tree production due to the soil and terrain limitations. On-site evaluations of the subject property's capability for vineyard and Christmas tree production were conducted by Wayne Parker, owner of Melrose vineyards, and George Bickel, former owner and manager of a 280-acre Christmas tree farm in the county. We adopt as findings the reports by Parker and Bickel * * *.

"* * * * *

"[Opponents] mention their submitted data show that the majority of Christmas trees grown in Douglas County are Douglas firs. We don't see that

> in the data. The data are not specific to the county as to Christmas tree species. We do however note that [opponents'] data show the average Christmas tree farm in the county is 60 acres in size; Mr. Bickel's 280 acre farm comprised 14% of the total Christmas tree farm acreage in the county. We deem this to be a material and significant percentage, further credentialing Mr. Bickel as a knowledgeable expert in the field of Christmas tree management. We note the record shows that [an opponent's] Christmas tree farm is under 10 acres, suggesting limited expertise in this field.
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> "* * * * *
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> "The [opponents] submitted preliminary data from a study of Umpqua Valley vineyards by Dr. Jones, supposedly to show that some vineyards grow on the same soil type as the NRCS mapped for the subject property. While this may be true, a number of variables besides soil type impact the suitability of a site for wine grape productivity. We accept the statement by Mr. Kitzrow based on his in-depth study that the subject property is not suited for wine grape production. It appears wine grapes grow well on Nonpareil Loam which is underlain by saprolite; they don't grow well when saprolite is lacking and the soil is very shallow, as is the case here. These situations are not distinguished in the Jones study. * * * There is no representation that any vineyard in the Umpqua Basin grows on the same soil type as is present on the subject property, let alone at a comparable elevation, aspect, irrigation regime, or bedrock and groundwater situation. The Jones data are mute as to whether the vineyards examined were actually being operated with an intent to make a profit. We decline to give any weight to the preliminary data [opponents] provided from the Jones study." Record 22-25

Now that the Supreme Court has ruled that profitability can be taken into consideration in determining whether the subject property is suitable for farm use, we agree with intervenor that the above findings are adequate to support the county's decision that the subject property is unsuitable for farm use. Although there is conflicting evidence in the record concerning the property's suitability for farm use, we conclude that a reasonable decision maker could rely on the evidence the county chose to believe. Record 377-86, 421-23.

There is one remaining issue to resolve. Petitioner argues that the county improperly applied a "commercial" agricultural standard. As we have explained on numerous occasions, although Goal 3 was adopted to preserve commercial agricultural enterprises, Goal 3's protection is not limited to farms that are of sufficient size and productivity to be part of the

existing commercial agricultural enterprise in a county. *See 1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508, 517-18 (1994) (Goal 3 protects both commercial and noncommercial farms and in granting an exception to Goal 3 suitability for noncommercial farm use must be considered). The issue of profitability adds the potential for some confusion, but property that is suitable for smaller, less profitable, noncommercial farms is also protected by Goal 3. Goal 3's protection is not limited to property that is suitable for large, highly profitable, "commercial" farms that would be sufficiently profitable to provide the sole or primary source of income for a property owner.

There is some language in the challenged decision that can be read to suggest that the county applied an impermissible commercial agriculture standard in concluding that the subject property is not suitable for farm use.[4] However, when that language is viewed in context with the balance of the county's findings in this case and the evidence the county relied on, it is reasonably clear that the county' occasional use of the term "commercial" was not an attempt to impose an improper "commercial" agriculture standard in concluding the subject property is not suitable for farm use. Rather it was a poor choice of terminology in this context to distinguish property that is suitable only for vineyards that are capable of producing a quality and quantity of grapes that are suitable for "home consumption," from property that is suitable for vineyards that are capable of growing a quantity and quality of grapes that can be sold for a "profit in money." [5] While any use of the term "commercial" is

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[4] The county's findings include the following:

> "The subject property is unsuitable for commercial vineyards or Christmas tree production due to the soil and terrain limitations." Record 22.

[5] The applicant's soil scientist offered the following opinion on the property's suitability for vineyard use;

> "* * * These Nonpareil soils found directly over bedrock **will not** produce commercial wine grapes under any conditions. These soils lack the available root space, fertility and water holding capacities required for commercial grape production. The Walker ownership is comprised ***only*** of the shallower Nonpareil soils fond directly over hard sandstone bedrock. Under no circumstances will these harsher Nonpareil soils produce commercial wine grapes.

risky in this context, we understand the county to have intended its occasional references to "commercial vineyards" to distinguish between land that is suitable for profitable vineyards from land that is not suitable for a profitable vineyard, in the sense that a vineyard on the subject property would not produce grapes of a quality and quantity that could be sold for a price that would exceed the cost of production. Under the Oregon Supreme Court's decision in this matter, that distinction is relevant.

The county's reference to commercial Christmas tree farms presents an even closer question, but we conclude the county was merely trying to distinguish land that is suitable for Christmas tree production (because it could be expected generate income that exceeds expenses) from land that is not suitable for Christmas tree production (because it could be expected to cost more to raise the trees than they can be sold for). We do not understand the county to have improperly applied a commercial agriculture standard in concluding that the subject property is not suitable for farm use.

For the reasons explained above, we conclude that the county has adequately demonstrated that the subject property is not suitable for farm use. Therefore, we deny petitioner's subassignment of error A(1).

In our initial decision in this appeal, we sustained subassignments of error A(1) and B(1) under the first assignment of error, denied petitioner's other subassignments of error under the first assignment of error, and denied petitioner's second, third and fourth assignments of error. Based on the Court of Appeals' and Supreme Court's decisions, we now deny subassignment of error A(1) under the first assignment of error. Otherwise, our initial decision is unaffected by this decision. Therefore, the county's decision is remanded in accordance with our resolution of subassignment of error B(1) in our initial decision.

Soft bedrock or saprolite IS NOT present. The Walker parcel, therefore, is NOT suited for wine grape production as a whole. The property would grow wine grapes at levels suitable for home consumption only." Record 378 (italics, underling, bold lettering and all capital lettering in original).

The county's decision is remanded.