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

On remand from the Court of Appeals.

Ann V. Wolf, Portland, represented petitioners.

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

Stephen Mountainspring, Roseburg, represented intervenor-respondent.

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

REMANDED 08/01/2007

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.

INTRODUCTION

The present appeal is on remand from the Oregon Court of Appeals and Oregon Supreme Court. In *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005) (*Wetherell I*), this Board remanded the county's determinations that the subject property is not agricultural land protected under Statewide Planning Goal 3 (Agricultural Lands) or forest land protected under Statewide Planning Goal 4 (Forest Lands). Our analysis of petitioners' arguments directed at the county's Goal 3 findings relied, in part, on OAR 660-033-0030(5), which provides:

> "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."

The county's Goal 3 findings relied heavily on the definition of "farm use" in ORS 215.203(2)(a), which defines that term in relevant part to include listed activities that are conducted with the "primary purpose of obtaining a profit in money[.]" The county concluded in relevant part that subject property was not suitable for grazing or other agricultural uses because such activities likely could not obtain a net "profit in money." We held that the county's emphasis on profitability was inconsistent with OAR 660-033-0030(5), which appeared to prohibit consideration of "profitability or gross farm income" in determining whether land is agricultural land.

The Court of Appeals reversed our decision in part and affirmed in part, agreeing with intervenor-respondent Great American Properties Limited Partnership (intervenor) that

OAR 660-033-0030(5) is inconsistent with Goal 3 to the extent it prohibits consideration of "gross income." *Wetherell v. Douglas County*, 204 Or App 732, 132 P3d 41 (2006) (*Wetherell II*). However, the Court of Appeals disagreed with intervenor that the rule's prohibition on consideration of "profitability" in the sense of "net profit" is inconsistent with ORS 215.203(2)(a). The Court of Appeals remanded the appeal to LUBA to recraft remand instructions in light of the court's partial invalidation of OAR 660-033-0030(5).

Intervenor appealed the Court of Appeals' decision to the Oregon Supreme Court, which reversed that decision in part, and remanded this appeal and a related appeal back to LUBA for further proceedings. *Wetherell v. Douglas County*, 342 Or 666, ___ P3d __ (May 24, 2007) (*Wetherell III*). As discussed below, the Court invalidated OAR 660-033-0030(5) in its entirety, concluding that the rule's prohibition on consideration of "profitability" is inconsistent with ORS 215.203(2)(a). The Court directed LUBA to reconsider its decision in light of the Court's conclusion that OAR 660-033-0030(5) is invalid and the Court's interpretation of the relevant statutes and rules.

FACTS

We repeat the relevant facts from our decision in *Wetherell I*:

> "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.
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> "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.
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> "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] 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." 50 Or LUBA at 170-71.

FIRST ASSIGNMENT OF ERROR

OAR 660-033-0020(1)(a)(B) defines "agricultural land" in relevant part to include:

> "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[.]"

As framed by the parties, whether the subject property is "suitable for farm use" and hence agricultural land under OAR 660-033-0020(1)(a)(B) turns on whether it is suitable for grazing or for a commercial vineyard. The opponents argued that the property has a 70-year history of seasonal grazing at various levels of intensity, and there is no reason why the property cannot continue to be used for seasonal grazing, either alone or in conjunction with nearby grazing operations. With respect to a commercial vineyard, the opponents noted evidence that 12 percent or approximately 19 acres of the property has soils, aspects and

other features suitable for a commercial vineyard, and cited to the existence of a nearby, similarly-sized commercial vineyard on a 160-acre parcel with the same soils.

The county rejected both possibilities. With respect to grazing, the county found that "[c]attle could be run on the property as a lifestyle activity, but not with the primary intent of making a profit in money." With respect to a commercial vineyard on part of the subject property, the county rejected that possibility in part because the subject property as a whole is not suitable for use as a vineyard. The county also rejected comparisons with the nearby vineyard, asserting that it 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."

As noted, we concluded that the county's findings and the evidence in the record failed to establish that the subject property is not "suitable for farm use" under OAR 660-033-0020(1)(a)(B), in part because the county's findings relied heavily on considerations of profitability. *Wetherell III* establishes that it is in fact permissible to consider profitability, among other considerations. Specifically, the Court ruled that "[t]he factfinder may consider 'profitability,' which includes consideration of the monetary benefits or advantages that are or may be obtained from the farm use of the property *and* the costs or expenses associated with those benefits, to the extent such consideration is consistent with the remainder of the definition of 'agricultural land' in Goal 3." 342 Or at 682 (emphasis in original).

On remand, our task is to re-evaluate our disposition of the first assignment of error in light of the Court's interpretations in *Wetherell III*. In our view, remand is still necessary under the first assignment of error for the following reasons.

First, we held that the county's conclusion that the property is not agricultural land was based on an approach that "would be error even if OAR 660-033-0030(5) did not apply." 50 Or LUBA at 185. Specifically, we found that the county had erroneously applied a "commercial-scale" approach that considered the property suitable for farm use only if it

could support grazing or other farm uses at a relatively large scale or intensity.[1] Neither the Court of Appeals' nor the Supreme Court's opinions disturb that portion of our decision. We continue to believe that the county erred in that regard. If 50-60 cattle can be seasonally grazed on the subject property (consistent with historic use of the property) or a small vineyard established with a reasonable expectation of yielding a profit in money, the fact that the cattle operation or vineyard and any resulting profit may be relatively small in size is not a sufficient basis to conclude that the subject property is not suitable for farm use under the Goal 3 rule. Because the county's findings repeatedly dismiss small-scale farm uses as "lifestyle" farm uses, without appearing to recognize that such small-scale uses may in fact constitute "farm use" as defined in ORS 215.203(2)(a), remand is necessary to adopt findings free of that error.

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[1] We stated in *Wetherell I*:

> "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 [neighboring ranchers] seasonally grazed on the property during their tenure.
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> "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." *Id.* at 184-85 (footnote omitted).

Second, we held in *Wetherell I* that the county's findings failed to adequately address OAR 660-033-0030(3), which provides that "Goal 3 attaches no significance to 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). Specifically, we concluded that the county erred in summarily dismissing use of the property in conjunction with the adjacent Napier property, the other half of the ranch that the subject property was part of until 2000. Further, the county failed to address conjoined use with the Mellors' property, nearby ranchers who formerly leased the subject property and who expressed interest in leasing it again for use in conjunction with their ranch operation. Again, neither the Court of Appeals' nor Supreme Court's opinions disturbed that aspect of *Wetherell I*, and we continue to believe that error among others identified in the first assignment of error warrants remand.

In sum, though the county did not err in considering "profitability," the county's findings nonetheless fail to demonstrate that the subject property is not "suitable for farm use" under OAR 660-033-0020(1)(a)(B). On remand, the county must adopt findings free of the errors identified in *Wetherell I*, as modified by this opinion, and consistent with the Court's holdings in *Wetherell III*.

The first assignment of error is sustained, in part.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

Our dispositions of the second, third and fourth assignments of error were not disturbed on appeal. For the reasons stated under the second assignment of error, which challenges the county's Goal 4 findings, the county's decision must be remanded.

The county's decision is remanded.