BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

TIMOTHY FOLEY, and MERYLUTZ FOLEY,
Intervenors-Respondent.

LUBA No. 2007-073

FINAL OPINION
AND ORDER

Appeal from Douglas County.

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

No appearance by Douglas County.

Timothy Foley, and Merylutz Foley, Roseburg, filed the response brief. Timothy Foley argued on his own behalf.

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

REMANDED 08/08/2007

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

Petitioner appeals a county decision, on remand from LUBA, that approves comprehensive plan map and zoning map amendments to designate property as nonresource land.

FACTS

We repeat the facts from our earlier decision in this appeal.

> "The subject property is a 76.21-acre parcel located northwest of Roseburg. The soils on the property have agricultural ratings between class III and class VI. Eighty percent of the soils do not have a capability class rating between I and IV. The property contains a dwelling, garage, and shop. The property has been used for grazing and minimal grape growing in the past. There is no merchantable timber currently on the property. Lands to the south and southeast are primarily zoned rural residential and are generally in residential use. Lands to the west, north, and northeast are zoned farm forest and farm grazing. Lands to the west and north are in farm use as pastureland.
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> "The property was originally designated agriculture in the comprehensive plan and zoned exclusive farm use grazing. The challenged decision amends the plan designation and zoning to rural residential 5-acre minimum. * * *" *Wetherell v. Douglas County*, 52 Or LUBA 677, 678 (2006) (*Wetherell I*).

LUBA remanded the decision in *Wetherell I* because the findings and evidence failed to demonstrate that (1) the subject property is not "suitable for farm use" and thus not agricultural land as defined at OAR 660-033-0020(1)(a)(B),[1] (2) the subject property is not

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[1] OAR 660-033-0020(1) defines "agricultural land" for purposes of Statewide Planning Goal 3 (Agricultural Land) as follows:

> "(a) 'Agricultural Land' as defined in Goal 3 includes:
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> > "(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon * * *;
> >
> > "(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and

"necessary to permit farm practices" on nearby lands under OAR 660-033-0020(1)(a)(C), and (3) the property is not forest land as defined under Statewide Planning Goal 4 (Forest Lands). With respect to farm use under OAR 660-033-0020(1)(a)(B), we found the county's findings failed to address whether the subject property is suitable for grazing, and did not explain why the property cannot be used for grazing like the three adjacent properties.

On remand, the county planning commission conducted a hearing and accepted additional evidence, including an addendum submitted by intervenors' soil scientist opining that the subject property is not suitable for grazing. The planning commission adopted additional findings and again approved the application. On March 21, 2007, the county board of commissioners adopted the planning commission decision as its own. This appeal followed.

ASSIGNMENT OF ERROR

Petitioner challenges the county's conclusions that the subject property is not "agricultural land" under the OAR 660-033-0020(1)(a)(B) and OAR 660-033-0020(1)(a)(C) definitions, and is not "forest land" under Goal 4.

A. Suitable for Grazing

Petitioner argues that the record and the county's decision again fail to demonstrate that the subject property is not suitable for grazing, or explain why adjacent lands with the same soils and slopes can be used for seasonal grazing, but the subject property cannot.

As petitioner notes, the property is bordered on the east by an 82.5-acre parcel with the same or similar soils and slope, that is used for seasonal grazing. On the west, the property is bordered by an 81.58-acre parcel with the same or similar soils and slope, that is also used for seasonal grazing. To the north is a 379-acre tract, again with the same or similar soils, that is used for livestock grazing. The county's decision does not address

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

agricultural activities on these properties, except to dismiss them as being "limited to seasonal livestock grazing." Record 10. The soil study and addendum likewise do not address these adjacent properties or explain why adjacent parcels with the same or similar soils and conditions can be used for grazing, but the subject property cannot.[2]

Petitioner notes that the addendum discusses several "management limitations" listed in the county soil survey for two of the major soil units on the property, the Philomath-Dixonville complex 189E and 189F, such as erosion and compaction. However, petitioner argues that the soil scientist failed to note that the soil survey lists "[h]ay and pasture" among the major uses of both soil units, and further that the survey describes measures to overcome the listed management limitations, such as using proper stocking rates, and limiting grazing to drier periods. Original Record 308-09. Petitioner notes that the county soil survey elsewhere describes Philomath and Dixonville soils as productive pasture lands. Original Record 314-15. Petitioner cites to evidence that the 189E and 189F soil units comprise over 35,000 acres in the county, and are widely used for livestock grazing.

We agree with petitioner that the record does not support the county's conclusion that the subject property is not suitable for grazing. The subject property has been grazed in the past, and is located between two similarly sized parcels with the same soils and apparently similar conditions that are currently used for seasonal grazing. For all the record establishes,

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[2] The addendum states, in relevant part:

> "Grazing on the 189E and 189F soil map units has surfaced as an issue. The Soil Survey of Douglas County Area, Oregon (SSDGA), pages 308 and 309, describes 'Major Management Limitations' for these units. These limitations are hazards of erosion and compaction, steepness of slope, slow permeability, high shrink-swell potential, depth to rock and low soil strength. Additional limitations that were found on the project site are bedrock outcrops, surface stones and high rock fragment content. This site is also on the low end of the precipitation range given in the map unit descriptions of the SSDGA. This would result in lower than average forage values. Grazing should be limited to the drier periods to protect the soil. This gives a very narrow time frame to graze forage that has a high value nutrient content. Although grazing is possible, these multiple limitations make grazing an unreasonable agricultural practice. Sustained grazing could not continue over a long period of time without deterioration of the soil resource. * * *" Record 127.

the same "management limitations" that apply to the two major soil units on the subject property also apply to the adjacent properties. The county and the soil scientist concluded that seasonal livestock grazing on property subject to those "management limitations" is an "unreasonable agricultural practice." Record 9, 127. However, as petitioner notes, the applicant's soil scientist does not purport to be an agricultural expert or an expert on what level of grazing would or would not be "reasonable." There is no substantial evidence cited to us indicating that the subject property is not suitable for seasonal grazing consistent with past use and adjoining livestock operations, taking into account any relevant "management limitations" together with reasonable measures to overcome those limitations. The county and soil scientist appear to believe as a general proposition that property suitable only for seasonal as opposed to year-round grazing is not "suitab[le] for grazing" as that phrase is used in the OAR 660-033-0020(1)(a)(B) definition of agricultural land. If that is the county's view, they cite no legal authority for that view and we are aware of no such legal authority.

This sub-assignment of error is sustained.

B. Necessary to Permit Farm Practices to be Undertaken on Adjacent or Nearby Lands

Petitioner challenges the county's conclusion that the subject property is not "[l]and that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands," under OAR 660-033-0020(1)(a)(C).

The county's findings cite three reasons supporting that conclusion: (1) two adjoining ranchers submitted letters stating that the subject property is not necessary to permit grazing on their property, (2) three of the adjoining landowners with livestock operations recently received approval to site two one-acre nonfarm dwellings on each of their parcels, and (3) the subject property is separated from the parcel to the west by a steep ridge, which precludes joint livestock use. Petitioner challenges only the second reason, arguing that the fact that two nonfarm dwellings have been sited on each of the adjoining farm

parcels has nothing to do with whether the subject property must remain in a resource designation to permit farm practices on those adjoining parcels. According to petitioner, unlike OAR 660-033-0020(1)(a)(C), the criteria for obtaining approval for a nonfarm dwelling and partition do not require a finding regarding whether the affected property is necessary to permit farm practices on adjoining parcels.

It is not clear to us from the county's findings why the county believed that the existence of nonfarm dwellings on one-acre parcels created from adjoining farm parcels supports a conclusion that the subject property is not necessary to permit farm operations on those adjoining parcels. However, we need not resolve petitioner's contentions on this point, because petitioner does not challenge the county's other reasons for concluding that the subject property is not "agricultural land" under OAR 660-033-0020(1)(a)(C). The adjoining farmers' testimony that the subject property is not necessary to allow their farm operations to continue and the fact that those operations have been conducted in the past without use of the subject property is substantial evidence in support of the county's finding that land is not "agricultural land" under OAR 660-033-0020(1)(a)(C). Petitioner cites to no evidence that contradicts those statements, or suggests any reason why the subject property must remain in resource zoning in order to permit continued farm use of the adjoining parcels.

This subassignment of error is denied.

C. Forest Land

Goal 4 defines "forest lands" in relevant part as land that suitable for commercial forest uses. The county concluded that the subject property is not suitable for commercial forest uses based primarily on a letter from a forester that states, in relevant part:

> "The intent of this appraisal is to determine the capability of the land to support a stand of coniferous timber. * * *
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> "The trees on the property are almost entirely oaks. Only a very small number of conifers were observed, and they were of very poor vigor. By measuring some of these trees, and using site quality tables, I concluded that the area is of site quality IV. (Site I being the best, and Site V being the poorest).

> "In researching the original government survey notes (of 1853), the surveyor noted that the land was 'hilly prairie and oak openings' and the soil was 'third rate.'
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> "Based on all of the above, I conclude that this property never has in the past supported a stand of conifer timber; and would not likely support one in the future. A soil scientist would likely confirm these findings." Record 135.

The soil scientist did not evaluate the soils on the property for timber productivity, but did include as part of some "General Observations" in his original report a conclusion that commercial forestry is "not a viable land management option." Original Record 86. Based on the forester's letter and the soil scientist's observations, the county found:

> "The [forester's letter] concludes that the subject property has never in the past supported a stand of conifer timber. We found this conclusion to be consistent with the 'General Observations' contained in [the soil scientist's] 2005 Order 1 Soil Survey, which concluded that commercial forestry is not a viable land management option for the subject property, and that conifers on the subject property constitute less than 5 percent of the total parcel area. We found that the conifers occurring on the subject property are 'micro sites,' and not indicative of the parcel as a whole." Record 10.

Petitioner challenges that finding, arguing that the question under Goal 4 is not whether the subject property has in the past supported timber, but its capability or potential for producing commercial tree species. *Potts v. Clackamas County*, 42 Or LUBA 1, 5, *aff'd* 183 Or App 145, 52 P3d 449 (2002). Petitioner argues that the forester found based on existing conifers on the property that the "area" is of "site quality IV." Petitioner cites to evidence that soils within site class IV can produce 85 to 119 cubic feet per acre per year, a level of productivity considered "medium" by the Oregon Department of Forestry. Petitioner further cites to evidence that at least some of the soils on the subject property have productivity ratings consistent with commercial forestry. According to petitioner, the forester failed to provide any objective measurement of the property's capability for producing timber, and the only non-qualitative evidence in the record indicates that the subject property is forest land under the Goal 4 definition.

With respect to the soil scientist's report, petitioner argues that the soil scientist did not evaluate site class or conduct any objective productivity analysis of the soils on the property. Finally, petitioner disputes the county's finding that the portions of the property where conifers grow are "micro-sites" and thus not indicative of the property as a whole. According to petitioner, that finding derives from a statement by the soil scientist at the hearing, in which the soil scientist speculated that the forester's determination that the "area" is "site quality IV" was based on "micro-sites" rather than the property as a whole.

We agree with petitioner that the relevant question under the Goal 4 definition is whether the property is suitable for producing commercial stands of timber, not whether the property is currently or has historically produced commercial timber. The forester's letter is based primarily if not exclusively on the present and apparently historical scarcity of conifers on the property.

We also agree that some objective measurement of productive capacity is required in determining whether land is "forest land" under the Goal 4 definition, either based on published data for particular soils or on an empirical evaluation, if published data is not available or not indicative of the property's actual capacity or potential for producing timber. A purely qualitative evaluation is not sufficient. *Oregon Shores Conservation Coalition v. Coos County*, 50 Or LUBA 444, 466-67 (2005), *aff'd* 204 Or App 254, 129 P3d 804 (2006); *Wetherell v. Douglas County*, 50 Or LUBA 167, 200, (2005), *rev'd and rem'd on other grounds* 204 Or App 732, 132 P3d 41 (2006), *rev'd in part, aff'd in part*, 342 Or 666, __P3d __ (2007). Here, the forester made little effort to objectively evaluate the property's potential for producing commercial stands of timber. Apparently, the forester did measure some of the conifers growing on the property, and concluded that the "area is of site quality IV," presumably meaning site class IV. However, the only evidence cited to us in the record indicates that property or soils within site class IV are suitable for commercial forestry.

It seems likely that the "area" the forester referred to as being site class IV is the five percent of the property where conifers currently are found, and was not intended to suggest that the parcel as a whole is site class IV. However, the forester's letter does not make that clear, and the soil scientist's subsequently expressed belief that the forester was referring to "micro-sites" is, as petitioner points out, mere speculation. Even if it were clear that the forester evaluated only the five percent of the property where conifers currently grow, the forester apparently made no objective assessment of the remainder of the property.

Finally, the county also relied on a statement in the soil scientist's report that "[c]ommercial forestry" is "not a viable land management option." Original Record 86. However, as petitioner notes, the soil scientist did not determine the site class of the soils or otherwise provide an objective assessment of timber productivity. The soil scientist's conclusion that commercial forestry is not a viable land management option is a purely qualitative assessment that is not sufficient to demonstrate that the subject property is not forest land under the Goal 4 definition.

This subassignment of error is sustained.

The assignment of error is sustained, in part.

The county's decision is remanded.