BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

UMPQUA PACIFIC RESOURCES COMPANY, INC.,
Intervenor-Respondent.

LUBA No. 2007-133

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.

Stephen Mountainspring, Roseburg, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich & Aitken, P.C.

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

REMANDED 02/12/2008

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a nonfarm dwelling on resource land.

MOTION TO INTERVENE

Umpqua Pacific Resources Company, Inc. (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion, and it is granted.

FACTS

This case is before us for the second time. We stated the facts in our first opinion, *Wetherell v. Douglas County*, 51 Or LUBA 699, 703-04, *aff'd* 209 Or App 1, 146 P3d 343 (2006) (*Wetherell I*):

> "The subject property is a vacant three-acre parcel zoned Farm/Forest (FF) and designated Farm/Forest Transitional (FFT) in the Douglas County Comprehensive Plan. The subject property is planted in a vineyard, which has been managed commercially for approximately 30 years. The Natural Resource Conservation Service (NRCS) soils classification mapping indicates that the entire property is composed of Rosehaven/215, which is a Class II soil. * * * Lands to the east, south and west of the subject property are used for pastureland."

After our remand of the decision in *Wetherell I*, the county sent the matter back to the planning commission and a public hearing was scheduled for February 15, 2007. Approximately 20 days prior to the public hearing, intervenor submitted new written evidence regarding the application. At the February 15, 2007 public hearing, intervenor presented its case first. Petitioner then presented her case, submitted written evidence consisting of seventeen exhibits into the record, and called an expert witness to testify. Record 595-658. Intervenor then presented additional testimony, including testimony from a soil expert, to respond to some of the evidence presented by petitioner. Intervenor requested that the record be left open to further respond to the written and oral evidence submitted by petitioner at the February 15, 2007 hearing. The planning commission agreed to leave the

record open until March 5, 2007 for intervenor to respond to petitioner's evidence submitted at the hearing, and to deliberate to a decision on March 15, 2007.

At the March 15, 2007 planning commission meeting, the planning commission approved the application. Petitioner appealed to the board of county commissioners, who declined to hear the appeal. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county committed several procedural errors that prejudiced her substantial rights. A procedural error will only serve as a basis for reversal or remand when a petitioner's substantial rights are prejudiced. ORS 197.835(9)(a)(B). Substantial rights include the opportunity to prepare and submit a case and a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). Specifically, petitioner argues the county erred by: (1) being too hostile to petitioner and her witnesses; (2) not allowing petitioner to respond to rebuttal testimony presented by intervenor's expert at the February 15, 2007 hearing; and (3) not allowing petitioner to respond to evidence submitted after that hearing during the period that the record was held open for intervenor.

A. Hostility

Petitioner argues that the planning commission chairman was "hostile, confrontational, and interrupted" her and her witness many times, and "interrupted and intimidated petitioner with questions." According to petitioner, this made it impossible for her to have a reasonable opportunity to submit her case and denied her a full and fair hearing.

While our review of the record certainly shows that the public hearing was contentious, we do not agree with petitioner that she was prevented from submitting her case or was denied a full and fair hearing. Petitioner was able to submit all of her written evidence into the record, and she was able to discuss the evidence with the planning commission, albeit in a contentious atmosphere. To the extent the chairman's interactions

with petitioner can be described as hostile, that hostility did not so interfere with petitioner's ability to present her case as to rise to the level of a procedural error.

This subassignment of error is denied.

B. Responding to Rebuttal Testimony and to New Evidence

At the public hearing, petitioner and her witness submitted written and oral evidence in response to intervenor's written evidence that was submitted prior to the hearing. After petitioner's presentation, intervenor's soil expert testified in response to some of the written and oral evidence submitted by petitioner and her witnesses at the hearing. Petitioner alleges that that testimony included new evidence. Petitioner alleges that she requested the opportunity to respond to the soil expert's rebuttal testimony with her own rebuttal (surrebuttal), but the county rejected her request, and that rejection was a procedural error that prejudiced her substantial rights. Although petitioner's legal theory for why she should have been allowed to respond to the oral rebuttal testimony of intervenor's soil expert is not at all clear, we understand petitioner to argue that under ORS 197.763(6)(b), she was entitled to rebut intervenor's rebuttal testimony and evidence that was submitted during the February 15, 2007 hearing.[1]

In addition, petitioner argues the county committed a procedural error that prejudiced her substantial rights when the planning commission left the record open for an additional seven days for intervenor to respond to the evidence submitted by petitioner and her witnesses at that hearing, but refused to allow petitioner to respond to any new evidence submitted by intervenor during the time the record was left open. Petitioner alleges that pursuant to ORS 197.763(6)(c), she filed a written request on February 20, 2007 that was sufficient under that statute to allow her the opportunity to respond to the new evidence

[1] Petitioner cites *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973) for the proposition that parties at a quasi-judicial hearing are entitled to present and rebut evidence. We discuss the applicability of *Fasano* to the county's procedures later in this opinion.

submitted by intervenor during the period that the record was left open. Intervenor notes, however, that the February 20, 2007 letter is not in the record. Consequently, intervenor asserts, there is no evidence in the record to demonstrate that petitioner in fact requested the opportunity to respond to intervenor's evidence.

While petitioner probably should have moved for permission to submit extra-record evidence under OAR 661-010-0045(1), we believe the record demonstrates that petitioner did in fact submit a written request to respond to new evidence. In the petition for review, petitioner explains that she submitted her written request on February 20, 2007. The minutes of the March 15, 2007 public hearing indicate that planning staff received a letter from petitioner. Record 98. Petitioner then asked whether the planning commission "would act on her request per the [ORS] to provide her an opportunity to respond to the new evidence" submitted by intervenor. *Id*. The county then stated that it would not receive her written request into the record and would not allow petitioner to submit additional evidence. *Id*. at 98-99. The minutes are adequate to establish that petitioner requested an opportunity to respond to intervenor's evidence, even though the written request itself is not in the record.

Intervenor next responds to petitioner's subassignment of error by arguing that the procedural requirements of ORS 197.763(6), including the right to respond to new evidence and testimony, were not applicable to the hearing because this was a hearing after an earlier remand from LUBA. As such, intervenor argues, petitioner has not demonstrated that the county's failure to allow her to rebut that evidence prejudiced her substantial rights.

A threshold question for us to resolve in reviewing petitioner's assignment of error is whether the provisions of ORS 197.763(6) applied to the county's proceedings on remand. ORS 197.763(6) provides:

> "(a) *Prior to the conclusion of the initial evidentiary hearing*, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open

for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.

"(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence."

"(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.

" * * * * *

"(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period shall not be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179." (Emphases added).

If those provisions did not apply to the county's proceedings on remand, then the county's actions could not amount to procedural error under the statute that would warrant reversal or remand of the decision.

Intervenor cites *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994) in support of its argument. In *Citizens*, we found that the provision in ORS 197.763(6) limiting its applicability to the "initial evidentiary hearing" did not refer to an evidentiary hearing conducted by the local government after LUBA remands the local government's decision. 26 Or LUBA at 462. We held that the city did not violate ORS 197.763(6) by failing to grant a request made during a remand hearing that the record be left

open. In reaching that conclusion, we relied on the language of subsection (6), as well as the court's discussion in *Beck v. City of Tillamook*, 313 Or 148, 151, 831 P2d 678 (1992) of the provisions of ORS 197.763. We noted: "[in *Beck*] the court stated that when a local government reopens its record to admit new evidence or testimony after remand of its original decision by LUBA, it does so pursuant to ORS 197.763(7)."[2] 26 Or LUBA at 461.

We continue to believe, as we stated in *Citizens*, that the provisions of ORS 197.763(6) do not apply to hearings on remand. Under subsection (a), *during the initial evidentiary hearing*, any party may request the opportunity to present additional evidence, argument, or testimony. If that request is made *during the initial evidentiary hearing*, subsection (a) directs local governments to choose one of two options, set forth under subsection (b) or (c). First, the local government can choose to proceed under subsection (b), and continue the initial evidentiary hearing. Second, the local government can choose to proceed under (c), and leave the record open. The structure and language of ORS 197.763(6)(a) indicates that subsections (b) and (c) do not operate in isolation from (a). Rather, their provisions apply in the event of a request under subsection (a), which is explicitly limited to requests made *during the initial evidentiary hearing*. *See also Fraley v. Deschutes County*, 32 Or LUBA 27, 36, *aff'd* 145 Or App 484, 930 P2d 902 (1996) (when a local government's decision is remanded by LUBA, the local government need not repeat the procedures applicable to the initial proceedings); *Crowley v. City of Bandon*, 43 Or LUBA 79, 95 (2002) (same).

We believe that our reading of ORS 197.763(6) is also consistent with the Court of Appeals' decision in *Hausam v. City of Salem*, 178 Or App 417, 424, 37 P3d 1039 (2001),

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[2] ORS 197.763(7) provides:

> "When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue."

which the parties do not discuss. In *Hausam*, the court concluded that for purposes of *notice* of an evidentiary hearing conducted after a remand from LUBA, the evidentiary hearing is not "simply another in a string of announced evidentiary hearings on the initial application" and that consequently, the 20-day notice provisions of ORS 197.763(3)(f)(A), rather than the 10-day notice provisions of ORS 197.763(3)(f)(B), applied to notice of an evidentiary hearing on remand. No similar language limiting the statute's application to "the initial evidentiary hearing" is found in ORS 197.763(3), the provision at issue in *Hausam*. As we noted in *Citizens*, "* * * the provision in ORS 197.763(6) limiting its applicability to the 'initial evidentiary hearing' is significant." 26 Or LUBA at 462.

To the extent petitioner argues that ORS 197.763(6)(b) entitled her to respond to intervenor's rebuttal evidence submitted during the February 15, 2007 remand hearing or that ORS 197.763(6)(c) entitled her to respond to intervenor's rebuttal evidence submitted during the period that the record was left open after that hearing, we reject that argument. In so deciding, however, we hold only that the statute does not obligate a local government to conduct those hearings according to ORS 197.763(6). We do not mean to foreclose the possibility that a local government may choose to conduct hearings on remand according to the procedures set forth in ORS 197.763(6).

Although the county left the record open to allow intervenor to respond to petitioner's seventeen written exhibits and other oral evidence presented at the February 15, 2007 hearing, we think that it is reasonably clear that in doing so the county was not acting under ORS 197.763(6)(c). Rather, we think that in doing so, the county was merely allowing intervenor to finish its rebuttal of petitioner's written exhibits and oral testimony presented at the hearing. When the county allowed intervenor the right to rebut petitioner's evidence submitted at the hearing, it specifically limited intervenor's submittals during the open record period to rebuttal of the evidence petitioner submitted at the hearing. Record 148.

As noted above, petitioner cites *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973) for the general proposition that a local government's failure to allow a party to rebut evidence submitted during local quasi-judicial land use proceedings may violate that party's rights, if such an opportunity was requested and denied. Intervenor notes, correctly, that we have recently held that "there is no unlimited right to rebut rebuttal evidence, and *Fasano* does not require endless opportunities to rebut rebuttal evidence." *Rice v. City of Monmouth*, 53 Or LUBA 55, 60 (2006), *aff'd* 211 OrApp 250, 154 P3d 786 (2007).

While we generally agree with intervenor that petitioner had no right under *Fasano* to rebut intervenor's rebuttal evidence, we would resolve the question differently if, during intervenor's rebuttal testimony at the hearing or during the period that the record was left open, intervenor had introduced evidence that was not limited to rebuttal of the evidence that petitioner submitted at the February 15, 2007 public hearing. In that circumstance, petitioner would almost certainly have a right to respond to such new (non-rebuttal) evidence.

Intervenor's submission during the open record period is found at Record 107-131. Although petitioner argues that intervenor's submission included "new evidence," petitioner does not argue that intervenor's submission contained new evidence *that was not limited to rebutting petitioner's written evidence and testimony submitted at the hearing*. Because petitioner did not have the right to surrebuttal of intervenor's rebuttal testimony or evidence, the county did not err in refusing to allow petitioner the opportunity to rebut intervenor's rebuttal evidence, assuming that that evidence was truly rebuttal evidence.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county's decision misconstrues the applicable law, contains inadequate findings, and is not supported by substantial evidence in finding that a portion of the property is not suitable for growing grapes, other farm crops, or for grazing livestock.

A. Findings Regarding Suitability for Grape Production

In her first subassignment of error, petitioner argues that the county's findings regarding the nonfarm dwelling portion of the property's suitability for grape production are inadequate and not supported by substantial evidence. In *Wetherell I*, we sustained petitioner's sub-assignment of error that the county's finding that the nonfarm dwelling portion of the property was unsuitable for grape production was not supported by substantial evidence, because the county relied almost exclusively on intervenor's soil expert report identifying some areas with stunted vines, and jumped to the conclusion that the portion was unsuitable. We held that that finding was not supported by substantial evidence because the report improperly shifted the burden to petitioner to demonstrate that grapes were grown on the portion. 51 Or LUBA at 712-13. The Court of Appeals agreed. 209 Or App at 5-6.

On remand, intervenor's expert submitted additional evidence responding to the deficiencies identified in LUBA and the Court of Appeals' decisions. Initially, petitioner challenges intervenor's soil expert's qualifications to testify whether the soils are capable of growing grapes. Intervenor responds that petitioner tried to raise that issue in *Wetherell I*, but the issue was waived because petitioner had failed to raise it below pursuant to ORS 197.763(1) and ORS 197.835(3). 51 Or App at 712. We agree with intervenor. Therefore, the qualification of intervenor's expert is a settled issue and may not be raised by petitioner. *See Beck v. Tillamook County*, 313 Or at 151 (issues that have been conclusively resolved at a prior point in a single continuous land use proceeding are not reviewable for a second time at a later point in that proceeding).

Petitioner also challenges the evidence the county relied upon to find that the nonfarm dwelling portion of the property is unsuitable for growing grapes. On remand, intervenor provided evidence, including an Order 1 soil survey and other expert testimony and evidence, in order to demonstrate that the nonfarm dwelling portion of the property is unsuitable for grape production. Intervenor's expert concluded that the soils located on the

nonfarm dwelling portion of the property are not suitable for growing wine grapes. Petitioner also provided evidence in support of her argument that the portion is suitable for growing grapes.[3] The county, however, chose to believe intervenor's experts over petitioner and her experts, and adopted detailed findings explaining its reasons for declining to rely on petitioner's evidence. Record 18-37.

As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

We believe the county could have reasonably found for either side. In that circumstance, LUBA cannot substitute our judgment for that of the county even if we would have found differently.

The first subassignment of error is denied.

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[3] For example, petitioner introduced into the record an electronic mail message from a party who is apparently an employee of the Natural Resources Conservation Service (NRCS). Record 608. As noted by intervenor, that email concurs in part with intervenor's soil expert's conclusion that where a particular type of crop is not listed in an NRCS table, it would not be expected to be grown on that soil.

B. Findings Regarding Suitability for Other Farm Crops

Petitioner argues that the county's findings regarding suitability for other farm crops are inadequate and not supported by substantial evidence. In *Wetherell I*, we held that the county's finding that the nonfarm dwelling portion of the property was not suitable for the production of other farm crops was not supported by substantial evidence, because neither the findings nor the soil report addressed whether the "portion is suitable for pastureland or for strawberries, wheat, grain or buckwheat[.]" 51 Or LUBA 714.

Although it is not entirely clear, petitioner appears to argue that the entire parcel, viewed as a whole, is suitable for the production of other farm crops or that the entire parcel could be used in conjunction with other lands for the production of farm crops. The question, however, is whether the portion of the property proposed for the nonfarm dwelling is generally unsuitable for other farm crops. To the extent petitioner's arguments are directed at the entire parcel, they are rejected without further discussion.

The county's findings specifically addressed whether the portion of property proposed for the nonfarm dwelling is suitable for growing other farm crops. Record 11-12. The findings explain that the county relied on evidence submitted by intervenor's expert to conclude that the soils on the nonfarm dwelling portion of the property are not suitable for strawberries or grains. Petitioner again takes issue with the county's findings and argues that the county should have relied on her evidence to deny the application. While the county could have accepted petitioner's evidence, we cannot substitute our judgment for that of the county.

This subassignment of error is denied

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the county violated ORS 215.284(2)(b) by allowing the well, septic system, and driveway serving the dwelling to be located on portions of the property

that are not generally unsuitable. The proposed drain field for the septic system and the well, and water lines running from the well to the proposed dwelling, will lie outside of the 0.3-acre generally unsuitable portion of the property.[4] In addition, the proposed driveway will cross areas that are outside of the generally unsuitable portion to access the adjoining county road. ORS 215.284(2)(b) imposes the following requirement:

> "The dwelling is situated upon a lot or parcel or portion of a lot or parcel that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. * * *"

In *Wetherell I*, in response to the same arguments made by petitioner, we held:

> "In allowing nonfarm dwellings on land that is generally unsuitable, the legislature's assumption was clearly that the dwelling would be located on the generally unsuitable portion and the remainder of the property that is generally suitable would remain available for farm uses. Under the county's interpretation, as long as the dwelling is located on land that is generally suitable, then improvements that will likely be required to make the dwelling functional—such as driveway, well and septic—can be located outside that generally unsuitable portion and can occupy additional lands, presumably lands that are generally suitable for the production of crops, from crop production. We do not believe that is consistent with the purpose of the FF zone or with the state's agricultural land use policy to preserve farmland.
>
> "By allowing nonfarm dwellings on a portion of a parcel that is generally unsuitable, the legislature intended to allow the nonfarm use of land that, although combined with other lands in the parcel that are suitable for the production of farm crops, is not itself generally suitable. Nothing in the statute cited to us suggests that the legislature intended to allow the portion of the property that is suitable for the production of farm crops to be used for the nonfarm use. And it certainly did not intend to allow improvements such as driveways, wells, septic systems and drainfields to occupy lands suitable for growing crops just because the dwelling itself is situated on a portion of the parcel that is generally unsuitable.
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> "* * * On remand, the county must explain how the identified improvements will be located on the generally unsuitable portion." 51 Or LUBA at 715-16.

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[4] Although intervenor maintains that the septic system and drain field will be located entirely within the generally unsuitable portion, the findings allow the drain field to be located on the suitable portion if the soil conditions warrant. Record 19.

As explained earlier, intervenor appealed our decision in *Wetherell I* to the Court of Appeals. The Court upheld our decision that the county's findings that the portion of the parcel where the dwelling will be sited is generally unsuitable for farm use were not supported by substantial evidence. 209 Or App at 6. However, the Court did not reach the issue of whether the well, septic system, drainfield and driveway that will serve the dwelling must also be located on the generally unsuitable portion of the property. *Id.*

On remand, the county again approved the nonfarm dwelling, while again allowing the well, septic system, and driveway serving the dwelling to be located outside of the generally unsuitable portion of the property. Petitioner argues that the county's decision on remand is inconsistent with LUBA's previous decision in *Wetherell I* that improvements that will be needed to make the dwelling functional may not be located on the suitable portion of the property. Intervenor urges us to reconsider our decision in *Wetherell I*. Intervenor argues that the text and context of ORS 215.284(2)(b) support intervenor's assertion that the word "dwelling" as used in the statute means that only the residential structure itself must be located on the generally unsuitable portion of the property, and does not require that ancillary improvements that serve the residential structure also must be located on the generally unsuitable portion.

As we explained in *Wetherell I*, ORS 215.284(2)(b) allows a nonfarm dwelling to be sited on generally unsuitable land, but requires that the remainder of the property must remain available for farm use. We noted our view that to allow other structures or development that serve the nonfarm dwelling to be located on the remaining farm land would not be consistent with the state's agricultural policy to allow dwellings while also preserving farm land. 51 Or LUBA at 716.

The issue before us is whether the term "dwelling" as used in the statute includes infrastructure necessary to serve the dwelling, so that that infrastructure must also be located on the nonfarm dwelling portion of the property. The analytical template for statutory

construction is set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) (*PGE*). Under *PGE*, the first level of analysis is looking at the text and context of the statute. If the meaning of the statute is clear from the text and context, then the analysis ends.

The term "dwelling" is not defined in the statute. "Dwelling" is defined in the Oregon Residential Specialty Code, with reference to the term "dwelling unit."[5] "Dwelling unit" is defined in the Oregon Residential Specialty Code as "a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, *and sanitation*." (Emphasis added.) Thus, the ordinary meaning of dwelling appears to be synonymous with residence, and includes a building that provides amenities typical of a residence, specifically including "sanitation." Sanitation would appear to include both water serving the residence and a method of disposing of waste generated by the residence.

Intervenor argues that the term "dwelling" should be reviewed in the context of the applicable statute, and other relevant provisions such as ORS 215.283 and ORS 215.700 that use the term "dwelling." According to intervenor, the "replacement dwelling" provisions of ORS 215.283(1)(s) support an inference that a "dwelling," as that term is used in ORS 215.284(2)(b), includes only the building structure.[6] Intervenor reaches this conclusion

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[5] The Oregon Residential Specialty Code defines "Dwelling" in relevant part as:

> "Any building that contains one or two *dwelling units* used * * * or that are occupied for living purposes." (Emphasis added).

[6] ORS 215.283(1)(s) provides that the following is a permitted use in an exclusive farm use zone:

> "Alteration, restoration or replacement of a lawfully established dwelling that:
>
> "(A) Has intact exterior walls and roof structure;
>
> "(B) *Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system*;

because the standards governing replacement dwellings refer to discrete parts of the physical structure, and no standards mention nonstructural components such as driveways, septic systems, or wells.

We are not particularly persuaded by intervenor's reference to and reliance on ORS 215.283(1)(s). The purpose of the replacement dwelling provisions is to describe and therefore limit the types of dwellings that qualify for alteration or replacement. A dwelling that does not have all of the required components does not qualify for replacement. It is difficult to infer from ORS 215.283(1)(s) any particular legislative intent regarding what parts of a "dwelling" must be placed on generally unsuitable land under ORS 215.283(2)(b). To the extent some contextual inference from ORS 215.283(1)(s) to ORS 215.283(2)(b) is possible, we note that one of the required components of a qualifying dwelling under ORS 215.283(1)(s) is "indoor plumbing" that is "connected to a sanitary waste disposal system." If anything, that suggests that connection to a water supply and a sanitary waste disposal system is an essential component of a "dwelling."

Intervenor next argues that the term "dwelling" as used in "lot of record" provisions of ORS 215.700 has the same meaning as the term "dwelling" found in ORS 215.284(2)(b). According to intervenor, ORS 215.700 does not include any provisions suggesting that a driveway, well or septic system is part of a lot of record dwelling. While that is true, it is also true that nothing cited to us in the lot of record statutes indicates the contrary. In our view, the context provided by the lot of record provisions does not help resolve the question of whether infrastructure necessary to support a non-farm dwelling allowed under ORS 215.284(2)(b) may be placed outside that portion of the property that is generally unsuitable for farm use.

"(C) Has interior wiring for interior lights;

"(D) Has a heating system[.]" (Emphasis added.)

Finally, intervenor points out that ORS 215.283(1)(e) allows an additional dwelling that will be occupied by a relative of a farm operator to be placed on a farm parcel under certain circumstances, and further specifies that if a mortgage on the second dwelling is foreclosed, the foreclosure operates as a partition of the "homesite" that includes the second dwelling, as the term "homesite" is defined in ORS 308A.053.[7] Intervenor argues that the legislature was aware of the difference between a dwelling and a "homesite," which includes improvements that are "customarily provided in conjunction with a dwelling." Intervenor argues that because the legislature used the word "dwelling" in ORS 215.284(2)(b), rather than "homesite," it did not intend to include any improvements and structures "customarily provided in conjunction with a dwelling."

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[7] ORS 308A.053 provides in relevant part:

> "**Definitions for ORS 308A.050 to 308A.128.** *As used in ORS 308A.050 to 308A.128*:
>
> " * * * * *
>
> "(3) 'Homesite' means the land, including all tangible improvements to the land under and adjacent to a dwelling and other structures, if any, that are customarily provided in conjunction with a dwelling." (Emphasis added.)

ORS 215.283(1)(e) provides in relevant part:

> "(1)The following uses may be established in any area zoned for exclusive farm use:
>
> " * * * * *
>
> "(e) A dwelling on real property used for farm use if the dwelling is occupied by a relative of the farm operator or the farm operator's spouse, which means a child, parent, stepparent, grandchild, grandparent, stepgrandparent, sibling, stepsibling, niece, nephew or first cousin of either, if the farm operator does or will require the assistance of the relative in the management of the farm use and the dwelling is located on the same lot or parcel as the dwelling of the farm operator. Notwithstanding ORS 92.010 to 92.190 or the minimum lot or parcel size requirements under ORS 215.780, if the owner of a dwelling described in this paragraph obtains construction financing or other financing secured by the dwelling and the secured party forecloses on the dwelling, the secured party may also foreclose on the homesite, as defined in ORS 308A.250, and the foreclosure shall operate as a partition of the homesite to create a new parcel."

The definition found in ORS 308A.053 is part of the statute governing preferential tax assessments for resource land, including specific assessments for dwellings in conjunction with farm use. As used in ORS Chapter 308A, the term is used to identify an *area of land* that qualifies for special tax assessment. The language that intervenor cites in ORS 215.283(1)(e) allows a mortgage holder to foreclose a mortgage secured by a relative's dwelling on a farm parcel. The statute provides that the foreclosure partitions the farm property to create a new parcel that includes and corresponds in size to the homesite. Interestingly, ORS 308A.128(2)(a) provides that certain exemptions from tax assessments do not apply to "homesites," which as used in that subsection only means "not more than one acre of land upon which are constructed nonfarm dwellings and appurtenances." Thus, the term "homesite" has one meaning that is specific to nonfarm dwellings, as well as a similar meaning that is specific to farm or forest dwellings.

Intervenor is correct that the above statutes distinguish between a "homesite," an area of land that includes a dwelling and its improvements, and the dwelling itself. By specifying that the area of land comprising the "homesite" includes the dwelling *and* (1) improvements under or adjacent to the dwelling as well as (2) structures customarily provided with a dwelling, ORS chapter 308A suggests that a "dwelling" is a distinct from such appurtenances, for some purposes. Intervenor argues that both the EFU statute and the tax statute use the same or similar terms, "dwelling" or "single family residential dwelling," and presumably the legislature intended those similar terms to have similar meanings. Therefore, intervenor reasons, in allowing a "single family residential dwelling" to be situated upon a portion of a lot or parcel that is generally unsuitable under ORS 215.284(2)(b), the legislature was referring only to the residential structure itself, not including any improvements under or adjacent to the dwelling, such as septic fields, and structures customarily provided with a dwelling, such as garages, sheds, swimming pools, etc.

However, that argument proves too much. If "dwelling" as used in ORS 215.284(2)(b) does not include improvements, structures and appurtenances such as septic fields and garages, then such improvements are not permitted under the statute. Nothing in ORS 215.284(2)(b) or elsewhere cited to our attention purports to authorize infrastructure or improvements that are accessory to nonfarm dwellings in an EFU zone as a separate category of permitted uses. Certainly, there is nothing that would purport to authorize locating such improvements on land that is suitable for farm use. Such improvements are permitted, if at all, only as part of the "dwelling." Because the "dwelling" is authorized only on that portion of the farm parcel that is generally unsuitable for farm use, it would seem to follow that essential or accessory components of that dwelling, *e.g.*, septic drainfield, garage, etc., are also limited to that portion that is generally unsuitable. As a practical matter, that means that the portion of the parcel that is "generally unsuitable" must be large enough to include not only the dwelling, but essential or accessory components of that dwelling.

Viewed in context, it is reasonably clear that the relevant statutes cited by intervenor distinguish between a "dwelling" and a "homesite" for very particular purposes: to identify an area of land that can be taxed at a different rate than the surrounding farm parcel (ORS Chapter 308A) or, in the case of ORS 215.283(1)(e), to identify an area of land that can be partitioned from the main farm parcel through foreclosure. In both instances, the intent is to identify an *area of land* that encompasses not only the dwelling itself but all improvements and structures associated with it. Particularly in the case of ORS 215.283(1)(e), identifying the area of land that can be foreclosed is crucial, because the statute authorizes multiple farm dwellings on one legal parcel, and it would be difficult to secure financing for constructing an additional dwelling without the ability of the mortgage holder to create new parcels through foreclosure.

That intent and purpose play no role in authorizing a dwelling not in conjunction with farm use under ORS 215.284(2)(b). There is no need to identify an area of land or specify

what can be included in that area of land, since the statute limits the new dwelling to "generally unsuitable" portions of the farm parcel. Presumably, for that reason, the legislature chose to use the term "dwelling" rather than the term "homesite." For those reasons, we reject intervenor's argument that the legislature intended a "dwelling" authorized under ORS 215.284 to refer only to the four walls of the structure, while implicitly authorizing essential or accessory improvements or structures on portions of the farm parcel that are suitable for farm use. In our view, the term "dwelling" as used in ORS 215.284 includes any essential or accessory improvements or structures and, therefore, like the dwelling itself, those essential or accessory improvements and structures are authorized only on portions of the farm parcel that are generally unsuitable for farm use.

That said, we agree with intervenor that our decision in *Wetherell I* went too far in including access roads or driveways as accessory improvements that must be located on the portion of the property that is generally unsuitable. The Oregon Residential Specialty Code definition of "dwelling unit" makes no mention of access to and from the residence. Although access to and from a residence is required as a practical matter, an improvement such as a driveway is not necessary to make a dwelling a residence. Further, where only a portion of the farm parcel consists of land that is generally unsuitable, in many cases any access to the dwelling must cross land that is suitable for farm use. Finally, access roads or driveways for farm use are outright permitted uses in the EFU zone. In many cases, the access road for the nonfarm dwelling will use existing or permitted farm access roads. For example, in the present case, as discussed below, intervenor argues that the proposed access driveway will follow existing access ways through the vineyard. Thus, we conclude that we erred in *Wetherell I* to the extent we held that driveways or access roads serving the proposed nonfarm dwelling must be located on the portion of the parcel that is generally unsuitable for farm use. We note, however, that merely because the driveway is not required to be located on the generally unsuitable portion does not mean that the impacts of the driveway are

exempt from review. The impact of the driveway must be considered in the analysis under ORS 215.284(2)(a) of whether "the dwelling *or the activities associated with the dwelling*" will force a significant change in or the costs of accepted farming practices. *See* Fourth Assignment of Error.

The third assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

ORS 215.284(2)(a) requires that the proposed development will not "force a significant change in or significantly increase the cost of accepted farming * * * practices." Petitioner argues that the county's findings are inadequate to establish that the proposed improvements and dwelling will not force a significant change in or the costs of farming practices on nearby farmlands, including the existing vineyard. Petitioner's argument is limited to impacts on farming practices on the subject property. According to petitioner, the effects on the subject property will include: soil compaction, septic system drainage, pesticide spraying, and bird damage.

A. Soil Compaction

The proposed driveway will be constructed in part over a 12-foot access row between the existing vines. According to petitioner, this will result in soil compaction which will have a deleterious effect on some of the vines, thereby making them less productive. The county's findings state:

> "The applicant has obtained an access permit from the [county] for the use of the existing private driveway. The applicant presently has almost completely unrestricted access to any portion of his property via the 12-foot wide aisles running between each row of vines in the vineyard. Most private driveways in rural areas are less than 12 feet wide, so any and all of the existing aisles in the vineyard can and do provide adequate width and clearance to function as an access road. The applicant testified that he intends to install an all-weather road surface (gravel) in one of the existing aisles to provide year-round access to the dwelling site. The graveled aisle (driveway) will not cause any vines to be removed, nor will it otherwise interfere with the kinds of farm practices that presently occur within the aisle, including pruning, fertilizing, spraying

and harvesting, or anywhere else in the vineyard. The driveway will have no conceivable effect on other nearby land employed in farm use." Record 19.

Petitioner's argument appears to be that the soil compaction required to turn one of the aisles into a gravel driveway, with its accompanied use, will damage the roots in the vicinity of the driveway and cause the vines to be less productive. Petitioner does not argue that this will force a significant change in accepted farming practices or the cost of those farming practices. Therefore, petitioner's arguments do not provide a basis for reversal or remand. Even if a decrease in production were likely under ORS 215.284(2)(a), we agree with intervenor that the county could have reasonably found that it would not cause a *significant* change to what is presently occurring.

This subassignment of error is denied.

B. Septic System

Intervenor believes it is likely that the septic system can be sited within the generally unsuitable portion of the subject property. The county, however approved siting the septic system in the suitable portion of the property if necessary.[8] Petitioner argues that siting the septic system in the suitable portion of the property will result in too much moisture and nitrogen for the vines and will result in too much growth which prevents the fruit from ripening.

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[8] The county's findings state:

> "* * * the applicant anticipates that the septic tank and drain field can be confined to the unsuitable portion of the property. However, if the very poor soil conditions within the unsuitable portion preclude placing the drain field there, the leach lines can be extended into the suitable portion of the property without causing any interference with the farm practices previously described. The applicant testified that he has consulted with several professionals who are knowledgeable about drainfield requirements, and has been advised that it would be possible to run a single leach line down the middle of each of several aisles between vine rows without causing any problems for the vines on either side of the leach line, or to the leach line itself. By placing the leach line in the center of an aisle, it will always be straddled by any equipment using the aisle, thus avoiding any crushing or compaction of the absorption zone. Since the septic system and drain field will be completely underground they will not change or interfere with the farm practices being constructed on the applicant's property or on other nearby lands employed in farm use." Record 19.

In resolving petitioner's third assignment of error, we concluded that the septic system must be located on the generally unsuitable portion of the property. Therefore, we need not decide whether siting the septic system on the suitable portion of the property might "force a significant change in accepted farming practices or the cost of those farming practices."

C. Spraying Pesticides

Petitioner argues that because the existing vineyard will be in close proximity to the proposed dwelling, intervenor will be forced to change its pesticide spraying practices. According to petitioner, this will increase the costs of accepted farming practices.

Evidence in the record introduced by intervenor explains that the pesticides it currently uses have exceedingly low human toxicity, and there will be no need to change the current practices because of the proposed dwelling. Petitioner does not explain how this will increase the costs of accepted farming practices. Petitioner's arguments do not provide a basis for reversal or remand.

This subassignment of error is denied.

D. Bird Damage

Petitioner argues that intervenor will be required to adopt more expensive programs to prevent bird damage to the grapes. According to petitioner, with the proximity of the proposed dwelling to the vineyard, intervenor will not be able to use bird alarms, air cannons, or other noise-producing devices and will instead have to install more expensive nets. The county's findings state:

> "The Pinot Noir grape, which is the principal variety grown in the applicant's vineyard, is an early-ripening fruit that is harvested in advance of the arrival of most grape-eating migratory birds. Bird damage in the applicant's vineyard is therefore minimal, and netting is not used. Bird alarms, air canons and other types of noise producing devices are not employed in the applicant's vineyard. The applicant testified that the proposed dwelling will reduce the need to employ such measures by allowing the applicant to reside on the property and thus observe the presence of greater than acceptable numbers of

> birds in the vineyard. In such instances, the applicant can take immediate steps to correct the problem. The applicant noted that in large vineyards, or vineyards where the owner/manager is not present on a daily basis, it is sometimes necessary to use a propane cannon or other noise-making device operated by a timer, thus causing frequent loud noises on a sustained basis throughout the entire day, even when no birds are actually in the vineyard." Record 18.

Petitioner's argument appears to be that because there will be a dwelling near the vineyard, the cost of accepted farming practices will increase because more expensive netting, as opposed to cheaper noise-producing devices, will have to be used to control bird damage. As the record and the county's findings demonstrate, however, neither netting nor noise-producing devices are currently used. We therefore do not see how the proposed dwelling could possibly increase the cost of bird damage control. If anything, the evidence indicates that costs would go down. There is certainly substantial evidence to support the county's decision that the proposed dwelling will not increase the cost of accepted farming practices to control bird damage.

This subassignment of error is denied.

The fourth assignment of error is denied.

The county's decision is remanded.