BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES DOHERTY,
MICHAEL POWELL and ALICE POWELL,
Petitioners,

vs.

WHEELER COUNTY,
Respondent,

and

HUGH EISELE,
Intervenor-Respondent.

LUBA No. 2007-236

FINAL OPINION
AND ORDER

Appeal from Wheeler County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners. With her on the brief was Goal One Coalition.

No appearance by Wheeler County.

Victor W. VanKoten, Hood River, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Annala, Carey, Baker, Thompson & VanKoten, P.C.

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

AFFIRMED 04/23/2008

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 decision rezoning a 130-acre parcel from Exclusive Farm Use (EFU) to Rural Residential-10 (RR-10)

MOTION TO INTERVENE

Hugh Eisele (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject parcel is located four or five miles east of the City of Spray. It is bordered on the west by Highway 19 and on the other three sides by land owned by the Bureau of Land Management. Across the highway to the west is a small parcel also owned by intervenor that is adjacent to the John Day River and in hay production.

The subject property's soils are predominantly Class VII and VIII agricultural soils, with 20 acres (15 percent) comprising Class VI soils. The property is unfenced on three sides, has no irrigation rights, and has not been used for any farm use for more than 30 years. Approximately 41 percent of the property consists of rimrock or steep areas not accessible to livestock.

In 2006, intervenor applied to the county for comprehensive plan map and zoning map amendments from agricultural to residential use, pursuant to a proposed "reasons" exception to Statewide Planning Goal 3 (Agricultural Land). The county planning commission denied the application, but on appeal the county court approved it. The county court approval was appealed to LUBA, and subsequently remanded pursuant to the parties' stipulation.

On remand, intervenor abandoned the "reasons" exception approach, and instead submitted a soils study and a forage assessment as evidence that the subject parcel is not "agricultural land," as defined under OAR 660-033-0020(1), and therefore Goal 3 does not

require that the property be protected for farm use and no statewide planning goal exception is necessary. The county court approved the application on remand, concluding that the subject property is not agricultural land. This appeal followed.

ASSIGNMENT OF ERROR

OAR 660-033-0020(1) defines "Agricultural Land" in relevant part as follows:

> "(a) 'Agricultural Land' as defined in Goal 3 includes:
>
> > "(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon;
> >
> > "(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
> >
> > "(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.
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> "(b) Land in capability classes other than I-IV/I-VI that is adjacent to or intermingled with lands in capability classes I-IV/I-VI within a farm unit, shall be inventoried as agricultural lands even though this land may not be cropped or grazed[.]"

The county court adopted the following finding, among others, addressing OAR 660-033-0020(1)(a)(A-C):

> "Based on the Soil Investigation Report and the Resource Assessment & Analysis prepared by [intervenor's consultant and the consultant's testimony], the Court finds that this parcel is predominantly Class VII and VIII soils; that the only possible farming use therefore is grazing; that grazing could occur only in the Spring months and the total 130-acre parcel will support only 25 AUMs [animal unit months]; that 25 AUMs is not sufficient to be profitable; and that this parcel is not suitable for farm use. The Court further finds that this parcel has not been used for any farming purposes for at least 30 years; that all the land adjoining this Property is BLM [Bureau of Land Management] land, except for Tax Lot 4500, which abuts a small potion of the Northwest boundary of this parcel; that Tax Lot 4500 is not owned by applicant, has not been farmed in recent history, and is physically unrelated to applicant's parcel; that the other land owned by applicant is located across

> Highway 19 from this parcel, is farmed as hay ground, and is unrelated to this parcel; that this parcel is therefore not necessary to permit farm practices to be undertaken on any adjacent or nearby agricultural lands; and that this parcel has never been managed or operated with other land as part of a farm unit." Record 31-32.

There is no contention in this appeal that the subject property is "agricultural land" under OAR 660-033-0020(1)(a)(A), OAR 660-033-0020(1)(a)(C) or OAR 660-033-0020(1)(b). Petitioners contend, however, that the county misconstrued the applicable law and made a decision not supported by substantial evidence, in concluding that the subject property is not "agricultural land" under OAR 660-033-0020(1)(a)(B), which includes lands in Classes VII and higher that are nonetheless "suitable for farm use as defined in ORS 215.203(2)(a)," taking into consideration various factors, including the land's "suitability for grazing."

ORS 215.203(2)(a) defines "farm use" to mean "the current employment of land for the primary purpose of obtaining a profit in money by," among other things, "the feeding, breeding, management and sale of, or the produce of, livestock[.]"[1] Subsection (b) of

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

> "(a) As used in this section, 'farm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. * * *
>
> "(b) 'Current employment' of land for farm use includes:
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> "(A) Farmland, the operation or use of which is subject to any farm-related government program;
>
> "(B) Land lying fallow for one year as a normal and regular requirement of good agricultural husbandry;
>
> "* * * * *
>
> "(E) Wasteland, in an exclusive farm use zone, dry or covered with water, neither economically tillable nor grazeable, lying in or adjacent to and in

ORS 215.203 provides that the "current employment of land for farm use" includes a number of different activities or circumstances, some of which do not readily fall within the definition of "farm use" at ORS 215.203(2)(a). Among them is listed "wasteland," defined as land that is neither "economically tillable nor grazeable, lying in or adjacent to and in common ownership with a farm use land and which is not currently being used for any economic farm use." *See* n 1.

A. Wasteland

Petitioners contend first that the subject property is "wasteland" as defined by ORS 215.203(2)(b)(E), because it is "adjacent to and in common ownership with farm use land," that is, the parcel that intervenor owns across Highway 19 that is in hay production.[2]

Intervenor responds that the subject property is not "wasteland" for purposes of ORS 215.203(2)(b)(E), and even if it is, that does not mean that the subject property is "suitable for farm use as defined in ORS 215.203(2)(a)" and therefore agricultural land under

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> common ownership with a farm use land and which is not currently being used for any economic farm use;
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> "(F) Except for land under a single family dwelling, land under buildings supporting accepted farm practices * * *;
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> "(G) Water impoundments lying in or adjacent to and in common ownership with farm use land;
>
> "(H) Any land constituting a woodlot, not to exceed 20 acres, contiguous to and owned by the owner of land specially valued for farm use even if the land constituting the woodlot is not utilized in conjunction with farm use;
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> "(I) Land lying idle for no more than one year where the absence of farming activity is due to the illness of the farmer or member of the farmer's immediate family. * * *;
>
> "* * * * *
>
> "(K) Land used for the primary purpose of obtaining a profit in money by breeding, raising, kenneling or training of greyhounds for racing[.]"

[2] The county's findings do not address this issue, probably because—as far as we can tell—it was not raised below. However, intervenor does not argue that the issue is waived under ORS 197.763(1) and we therefore consider the issue on the merits.

OAR 660-033-0020(1)(a)(B). According to intervenor, whether land is Goal 3-protected "agricultural land" is determined by the Goal and the administrative rule, not the statute. While OAR 660-033-0020(1)(a)(B) refers to land that is "suitable for farm use as defined in ORS 215.203(2)(a)," it does not make any reference to the ORS 215.203(2)(b) list of circumstances that are included in the phrase "current employment." Intervenor argues that the subsection of the rule that addresses circumstances where low productivity land is intermingled with or adjacent to land in higher soil capability classes is found at OAR 660-33-0020(1)(b). OAR 660-033-0020(1)(b) includes within the definition of "agricultural land" land in soil capability classes greater than Class VI in eastern Oregon if it is adjacent to or intermingled with land in capability classes I-VI "within a farm unit." Intervenor argues that OAR 660-033-0020(1)(b) does not apply in the present case because there is no dispute that the two parcels owned by intervenor have never been used as a "farm unit."

We agree with intervenor that even if the subject property is "wasteland" for purposes of ORS 215.203(2)(b)(E), that does not signify that it is "suitable for farm use as defined by ORS 215.203(2)(a)" for purposes of OAR 660-033-0020(1)(b). It is important to recognize that the structure of ORS 215.203(2) reflects its history, and that under an earlier statutory scheme one of the functions of the definition of "farm use" in ORS 215.203(2) was to determine which properties qualified for preferential farm tax assessment. In 1999, that function was given to a statute devoted exclusively to that purpose, ORS Chapter 308A. *See* ORS 308A.056 (defining "farm use" for purposes of preferential farm tax assessment); ORS 308A.056(3)(e) (providing that land is "currently employed for farm use" if the land is "wasteland," defined in identical terms to ORS 215.203(2)(b)(E)). However, the structure of ORS 215.203(2) continues to reflect that earlier statutory scheme, even though ORS 215.203(2) no longer has anything to do with qualifying land for farm tax assessment. As noted above, many of the circumstances listed in ORS 215.203(2)(b) do not readily fall within the terms of the definition of "farm use" in ORS 215.203(2)(a). Some of them,

including "wasteland," involve no agricultural "use" of land at all, much less one that has the "primary purpose of obtaining a profit in money" by engaging in the agricultural activities listed in ORS 215.203(2)(a).

In any case, whatever the current relationship between the "farm use" definition in ORS 215.203(2)(a) and the "current employment" definition in ORS 215.203(2)(b), the immediate question for purposes of OAR 660-033-0020(1)(a)(B) is whether the subject property is *suitable* for farm use as defined by ORS 215.203(2)(a), not whether the land qualifies under ORS 215.203(2)(b)(E) as the "current employment" of land for farm use. Thus, the question is whether the land is *suitable* for being used 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, etc, not whether the property qualifies as "wasteland," or "land lying fallow" or falls within one of the other circumstances listed in ORS 215.203(2)(b). As a practical matter, it is difficult to imagine any circumstance where land that is indeed "wasteland," *i.e.*, land that is "neither economically tillable nor grazeable," could possibly be "suitable for farm use" within the meaning of OAR 660-033-0020(1)(a)(B).

Further, we agree with intervenor that the administrative rule comprehensively addresses all circumstances under which land qualifies as agricultural land subject to Goal 3. OAR 660-033-0020(1)(a) directly implements the definition of "agricultural land" in Goal 3 itself. OAR 660-033-0020(1)(b) addresses circumstances where land that does not qualify as agricultural land under Goal 3 itself or any element of OAR 660-033-0020(1)(a) is nonetheless deemed to be protected under Goal 3 if it is "adjacent to or intermingled" with lands that are agricultural lands by virtue of their soil class. Given the terms of OAR 660-033-0020(1)(b), it seems likely that the Land Conservation and Development Commission (LCDC) intended subsection (b) to govern circumstances where land that is neither economically tillable nor grazeable is deemed by operation of law to be protected by Goal 3,

not the "suitable for farm use" provisions of OAR 660-033-0020(1)(a)(B). As noted, petitioner does not claim that the subject parcel is agricultural land under the OAR 660-033-0020(1)(b) definition. Accordingly, we reject petitioners' argument that, because the subject property might qualify as "wasteland" for purposes of ORS 215.203(2)(b)(E), as a matter of law it is therefore "suitable for farm use" under OAR 660-033-0020(1)(a)(B).

B. History of Grazing

Intervenor's consultant noted the scarcity and poor quality of the forage on the portions of the subject property that are accessible to livestock, and stated in relevant part:

> "[w]ithout extensive research, it appears that this site was used as a holding pasture or winter feeding area and severely overgrazed in areas accessible to livestock. This disturbance has resulted in the loss of the HNPC [historic native plant community] and much of the surface soil that is rich in organic matter and nutrients." Record 60.

Petitioners argue based on the above statement that previous owners at some point must have engaged in grazing or feedlot operations on the subject property, presumably with the intent of obtaining a profit in money. According to petitioners, that past history of grazing indicates that the property is "perfectly suitable to livestock raising activities undertaken with the purpose of making a profit." Petition for Review 6.

It is not clear whether this argument alleges misconstruction of law or an evidentiary challenge to the county's finding that the subject property is not "suitab[le] for grazing." OAR 660-033-0020(1)(a)(B). To the extent petitioners allege a misconstruction of law, petitioners have not established that use of the property sometime in the past for a "holding pasture or winter feeding area" of unknown intensity or duration compels the legal conclusion that the subject property is suitable for grazing or suitable for farm use as defined in ORS 215.203(2)(a). To the extent petitioners advance an evidentiary challenge, intervenor argues and we agree that petitioners have not established that the county's decision is unsupported by substantial evidence.

According to the consultant's soil study and forage assessment, neither of which petitioners dispute, 41 percent of the property is inaccessible to livestock, and the portion that is accessible was severely overgrazed sometime in the past and lost much of its surface soil and native plant community. The county found that the forage on the accessible portions of the 130-acre subject property can support only 25 animal unit months (AUMs) of spring grazing, which we understand to mean a maximum of approximately six cow-calf pairs during the three-month spring season. The county found that "25 AUMs is not sufficient to be profitable[.]" Record 31. That finding is supported by the consultant's testimony, who stated that after spending over $5,000 to fence the property its use if rented for grazing land would yield at most $250 to $400 per year. Record 94. Petitioners do not cite to any countervailing evidence. As intervenor notes, the relevant question under OAR 660-033-0020(1)(a)(B) is whether the property is capable of farm use "with a reasonable expectation of yielding a profit in money." *Wetherell v. Douglas County*, 54 Or LUBA 646, 652 (2007). The county answered that question in the negative. Absent a more focused challenge to that finding or citation to countervailing evidence, petitioners have not demonstrated that the county erred in concluding that the subject property is not "suitable for farm use" under the factors listed in OAR 660-033-0020(1)(a)(B).

C. Comprehensive Plan Policy 3g

Finally, petitioners argue that Wheeler County Comprehensive Plan (WCCP) Policy 3g requires the county to take an exception to Goal 3 to rezone the subject property to nonresource uses, even if the property is not Goal 3-protected agricultural land under any of the OAR 660-033-0020(1) definitions.

WCCP Policy 3g states that it is the county's policy "[t]o assure that non-agricultural development in rural areas, other than that permitted in an Exclusive Farm Use Zone, shall be based upon a demonstrated public need and Goal 2 Exceptions Plan Amendment." The county adopted findings responding to this issue, concluding that nothing in the WCCP

prohibits rezoning the property from EFU to rural residential use, and that the WCCP does not require a Goal 2 exception to rezone non-agricultural land for non-agricultural development. Record 32-33. Intervenor argues that that interpretation of the WCCP is consistent with the relevant comprehensive plan text, and therefore LUBA must affirm it. ORS 197.829(1).[3]

As intervenor notes, Policy 3g is part of Section 3 of the WCCP, which governs "Agricultural Land." Policy 3g appears to implement the plan goal to "preserve and maintain agricultural lands." Intervenor argues that Policy 3g is part of a scheme that is clearly directed at preservation of *agricultural* lands, and therefore Policy 3g has no applicability to lands that the county has determined are not agricultural lands.

Petitioners make no attempt to challenge the county's findings that the WCCP does not require an exception to Goal 3 for lands that are not protected by Goal 3, or to explain why the text or context of Policy 3g compels a different conclusion. Absent a more focused challenge, we agree with intervenor that we must affirm the county's interpretation as not inconsistent with the comprehensive plan text, purpose or policy. ORS 197.829(1).

The assignment of error is denied.

The county's decision is affirmed.

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[3] ORS 197.829(1) provides, in relevant part:

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