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. 2008-074

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.

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

REMANDED 09/17/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision that grants approval for a nonfarm dwelling on a .3-acre portion of a three-acre Farm Forest zoned parcel.

MOTION TO INTERVENE

Umpqua Pacific Resources Company, Inc., the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion, and it is granted.

FACTS

This is the third time a county decision approving the disputed nonfarm dwelling has been appealed to LUBA. The county's Farm Forest zone is an exclusive farm use (EFU) zone. Approval of nonfarm dwellings in EFU zones is strictly regulated by statute. One of the statutory standards for approval of nonfarm dwellings on EFU-zoned land requires that such dwellings must be located on "generally unsuitable land for the production of farm crops and livestock or merchantable tree species." ORS 215.284(2)(b). In this opinion we will refer to that statutory standard as the generally unsuitable for farm use standard.

In *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006) (*Wetherell I*), we remanded the county's first decision in this matter. We concluded in *Wetherell I* that the county's findings that a .3-acre portion of the parcel satisfies the generally unsuitable for farm use standard were not supported by substantial evidence. *Wetherell I*, 51 Or LUBA at 714. We also agreed with petitioner that "improvements such as driveways, wells, septic systems and drainfields" for the nonfarm dwelling could not be located on the part of the three-acre parcel that was suitable for farm use, simply "because the dwelling itself is situated on a portion of the parcel that is generally unsuitable." 51 Or LUBA at 716. We concluded that "[o]n remand, the county must explain how the identified improvements will be located on the generally unsuitable portion." *Id*.

The applicant, who is the intervenor in this appeal, appealed our decision in *Wetherell I* to the Court of Appeals. The Court of Appeals affirmed LUBA's *Wetherell I* decision. *Wetherell v. Douglas County*, 209 Or App 1, 146 P3d 343 (2006). The Court of Appeals rejected intervenor's challenge to LUBA's conclusion that the evidentiary record did not support the county's finding that the .3-acre part of the property is generally unsuitable for farm use. The Court of Appeals did not reach the part of LUBA's *Wetherell I* decision where LUBA concluded that in addition to the nonfarm dwelling, the well, septic system, and driveway that will serve the dwelling also must be located on land that is generally unsuitable for farm use.

Following our decision in *Wetherell I*, the county accepted additional evidence and again found that the .3-acre portion of the property is generally unsuitable for farm use and again did not require that the well, septic system and driveway serving the dwelling be located on the part of the three acres that is generally unsuitable for farm use. Petitioner filed a second LUBA appeal to challenge that decision. In our second decision, we concluded that the expanded record on remand was adequate to demonstrate that the .3-acre portion of the three-acre property is generally unsuitable for farm use. *Wetherell v. Douglas County*, ___ Or LUBA ___, LUBA No. 2007-133, February 12, 2008), slip op 10-12 (*Wetherell II*). However, in *Wetherell II* we concluded for the second time that the septic and water systems that would serve the dwelling must be located on the generally unsuitable portion of the property. In doing so we rejected intervenor's argument that the water system and septic system that will serve the nonfarm dwelling need not be located on the generally unsuitable portion of the property:

> "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." *Wetherell II*, slip op at 20.

However, with regard to the driveway, we concluded that we erred in *Wetherell I*. *Id*. We concluded that the driveway that will serve the property need not be located entirely on land that satisfies the generally unsuitable for farm use standard.

Following our remand in *Wetherell* II, the county held a hearing, limited to the previously compiled record, to hear legal arguments from the parties. At that hearing, petitioner argued that the evidentiary record should be reopened to allow her to submit additional evidence to establish "that in 2006, the applicant drilled a well for domestic purposes which is not located on the [generally unsuitable] .3-acre part of the property." Record 10.[1] Petitioner went on to state that she had evidence that intervenor intends to use the well and a septic system that have been recently developed on the suitable portion of the property to serve the disputed nonfarm dwelling.

The county rejected petitioner's request to reopen the evidentiary record, and again approved the disputed non-farm dwelling. This appeal followed.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to arguments by intervenor that petitioner waived certain issues that are raised in petitioner's second assignment of error. Those issues are whether the septic system and water system that will serve the dwelling "can be, will be, or are" located on the generally unsuitable portion of the property. The reply brief has two appendices. The first is a transcript of petitioner's oral testimony to the board of county commissioners on remand. The second is a county zoning clearance regarding the disputed nonfarm dwelling that was approved by the county on June 30, 2008. Intervenor moves to strike two portions of the reply brief and both reply brief appendices.

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[1] The record in this appeal of the county's third decision in this matter includes the records in *Wetherell I* (LUBA No. 2005-174) and *Wetherell II* (LUBA No. 2007-133). All citations to the record in this opinion are to the 28-page record that was compiled by the city following our remand in *Wetherell II*.

A reply brief is appropriate to respond to waiver arguments. *Caine v. Tillamook County*, 24 Or LUBA 627 (1993). For the reasons explained below, except for one part of the reply brief and the second reply brief appendix, petitioner's reply brief is allowed.

The second appendix is a zoning clearance that was issued by the county after the decision on review became final and long after the evidentiary record in this appeal closed. Because our review is limited to the decision and the record that supports that decision, we may not consider the zoning clearance. Intervenor's motion to strike the second appendix and lines 19-22 of page 2 of the reply brief which rely on that appendix is granted.

We understand the first reply brief appendix to be a transcript of petitioner's testimony before the board of county commissioners, which petitioner prepared from the audio-recording of that hearing. Although the board of county commissioners ultimately decided to reject petitioner's invitation to open the record and accept new evidence before it rendered its third decision in this matter, our rules expressly allow parties to prepare transcripts from the tapes of local hearings and attach those transcripts to their briefs. OAR 661-010-0030(5) ("verbatim transcript" may be attached to petition for review as "appendix"); 661-010-0035(2) (respondent's brief "shall conform to the specifications of the petition for review"). The argument that appears at lines 1-7 of page 2 of the reply brief is consistent with the transcript and consistent with the minutes of the board of county commissioners' May 1, 2008 hearing, which appear at Record 9-11.

The reply brief is allowed in part.

FIRST ASSIGNMENT OF ERROR

Petitioner first argues the county erred by refusing to reopen the record following our remand in *Wetherell II*, to allow her to submit evidence that a well, septic tank and septic tank drain field have been developed on the portion of the three acres that is suitable for farm use and that intervenor intends to connect the proposed nonfarm dwelling to that existing well, septic tank and drainfield.

As petitioner correctly points out, the county could have reopened the record to receive additional relevant evidence before rendering its third decision in this matter. DLCD *v. Klamath County*, 40 Or LUBA 221, 232-33 (2001). However the relevant question in this appeal is whether the county was obligated to do so. As we explained in *Neighbors 4 Responsible Growth v. City of Veneta*, 52 Or LUBA 325, 338-39 (2006):

> "A local government is entitled to conduct its proceedings on remand and adopt a new decision, *without* reopening the evidentiary record, so long as no additional evidence is required to respond to LUBA's remand. *Dimone v. City of Hillsboro*, 44 Or LUBA 698, 719 (2003); *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185, 209 (2001). But if a local government applies new criteria, the evidentiary record must be reopened to allow all parties an opportunity to respond to the new criteria. *Nicholson v. Clatsop County*, 32 Or LUBA 399, 413-14 (1997). Similarly, if a local government adopts a new interpretation of law on remand that could not reasonably have been anticipated in the initial proceeding, the local government may be obligated to reopen the evidentiary record. *McFall v. City of Sherwood*, 46 Or LUBA 735, 747 (2004). * * *" (Emphasis in original.)

Our remand in *Wetherell II* required the county to clearly establish that its decision approving the nonfarm dwelling does not authorize the applicant to locate the water or sewage disposal systems for the nonfarm dwelling on the part of the three acres that is suitable for farm use. The county did not need to reopen the evidentiary record to do that. Neither did the county apply new criteria or adopt a new interpretation on remand. The county did not err by refusing to reopen the evidentiary record following our remand in *Wetherell II*.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under this assignment of error, petitioner argues the county's findings that "the nonfarm dwelling can and will be located on the 0.3-acre 'generally unsuitable' portion of the subject property" are inadequate and are not supported by substantial evidence. Petitioner first argues there is no "evidence in the record which shows the dwelling's amenities can, will be, or are located on the 'generally unsuitable' portion of the property."

Petition for Review 7. We find it unnecessary to try to sort out the parties' evidentiary arguments or intervenor's waiver arguments and turn directly to the dispositive issue under the second assignment of error, which petitioner did not waive.

Our decisions in *Wetherell I* and *Wetherell II* both determined that a county decision to approve a nonfarm dwelling on the subject property must limit development of any septic system or water system that serves the nonfarm dwelling to the generally unsuitable .3-acre portion of the property. Therefore the dispositive question in this appeal is: Does the county's third decision to approve the nonfarm dwelling make it clear that the septic system and water system that will be required to serve the disputed nonfarm dwelling must be located on the generally unsuitable .3-acre portion of the property? So long as the challenged decision clearly imposes that requirement, it does not matter whether the applicant has taken actions while this matter has been pending that may be inconsistent with that limitation. Such actions, if they have occurred or if they do occur in the future, may provide a basis for an appropriate enforcement action, but so long as such actions are not authorized by the nonfarm dwelling approval decision that is before us in this appeal, such actions would not provide a basis for reversal or remand of the only decision that is before us in this appeal.

In the challenged decision, the county first quotes from portions of its second decision in this matter, in which the county previously explained that intervenor was hopeful that the water system and septic system could be sited on the generally unsuitable portion of the property. But as we have already explained earlier in this opinion, the second county decision in this matter did not make it clear that the water and septic system *must* be located on the generally unsuitable .3-acre portion of the property. In fact, to the contrary, the county's second decision expressly provided that parts of the water system and septic system could be sited on the suitable portion of the property if necessary, so long as in doing so the applicant did not "remove any of the suitable portion of the property from farm use" or

"interfere with the farm practices being conducted on the applicant's property * * *." Record 3 (water system); 4 (septic system). As we have already noted, it was the county's failure to appropriately limit the water and septic system that will be needed to serve the nonfarm dwelling to the generally unsuitable portion of the property that led to our remand decision in *Wetherell II*.

The county's third decision (the decision that is before us in this appeal) includes the following findings:

> "The Land Use Board of Appeals has concluded that '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 the portions of the farm parcel that are generally unsuitable'. LUBA 2007-133, page 20. Accordingly the Board finds that the proposed non-farm dwelling, and *any essential or accessory improvements or structures to be built or installed with the dwelling* (except for a driveway providing access to the dwelling), *including the service lines connecting the dwelling to the water system and the septic system*, will be located on the unsuitable portion of the property." Record 5 (emphases added; original italics omitted).

In her second assignment of error, petitioner argues that the challenged decision does not make it clear that the water system and septic system for the disputed nonfarm dwelling must be sited entirely on the .3-acre generally unsuitable portion of the property. Petitioner argues:

> "The [County's] Findings of Fact state:
>
> "'The dwelling and essential or accessory improvements or structures *to be built or installed in conjunction with the dwelling* (except for a driveway providing access to the dwelling), *including the service lines connecting the dwelling to the water system and the septic system*, will be located on the unsuitable portion of the property.' Rec. 5
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> "The wording of 'to be built or installed' in the finding does not preclude the proposed non-farm dwelling from being serviced by the existing water or any possibly existing septic system that have been installed on the 'generally suitable' portion of the subject property. This finding merely restricts any new construction of any essential or accessory improvements." Petition for Review 8 (emphases added).

What the petitioner refers to above as a finding of fact above is actually the first of six conditions of approval. Record 5. We understand petitioner to argue that Condition No. 1 could be interpreted to require that only the water and sewer lines that would be required to connect the disputed nonfarm dwelling to the existing well and septic systems must be located on the generally unsuitable portion of the property. The result of such an interpretation could be that the nonfarm dwelling would be served by the existing water system and septic system, which petitioner contends are both located in large part on the suitable portion of the property, so long as the short lines and any other improvements that will be needed to connect the nonfarm dwelling to the existing water and septic system are located entirely on the generally unsuitable .3-acre portion of the property.

Although it seems implausible that anyone could believe that interpreting Condition No. 1 in that way would be consistent with our decisions in *Wetherell I* and *Wetherell II*, we agree with petitioner that the way Condition 1 is worded, it is possible to interpret it in that way. As we have already explained, petitioner argued to the county that intervenor was taking the position that the disputed nonfarm dwelling could utilize the existing water system and septic systems, even though major portions of the water and septic systems are located on the part of the property that is suitable for farm use.[2] While the county may not have been obligated to accept additional evidence to confirm or dispute intervenor's actual intent regarding the existing well, septic tank and septic drainage field on the suitable portion of the property, the county is not entitled to insert an ambiguity into its findings and conditions of approval that would assist intervenor in avoiding the clear requirement in *Wetherell I* and

[2] The zoning clearance that was attached to reply brief seems to confirm petitioner's argument. Because we grant intervenor's motion to strike that document, our decision does not rely on that document. Petitioner's argument to the board of county commissioners was sufficient to put the board of commissioners on notice that its condition needed to be worded in a way that would ensure that the water and septic systems that would serve the disputed nonfarm dwelling are limited to the generally unsuitable portion of the property.

Wetherell II that the water system and septic system for the disputed nonfarm dwelling must be located on the generally unsuitable .3-acre portion of the property.

In hopes of finally putting this matter to rest, we now hold for the third time that the water system and the septic system that will be needed to serve the disputed nonfarm dwelling must be located entirely on the .3-acre generally unsuitable portion of the property. No portion of those systems can be located on the suitable portion of the property. If intervenor chose to proceed with construction of portions of a septic system and a well and water lines while this matter has been pending before the county and LUBA, those septic and water facilities can only be used by the nonfarm dwelling if the entire water system and septic system that ultimately serve the nonfarm dwelling are located on the generally unsuitable portion of the property. If they are not located entirely on the .3-acre generally unsuitable portion of the property, the disputed nonfarm dwelling may not be connected to those systems. Because the challenged nonfarm dwelling decision does not make that limitation clear, and in fact seems to have been drafted to make that limitation ambiguous, another remand is required so that the county can eliminate the ambiguity.

The second assignment of error is sustained.

The county's decision is remanded.