BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL,
ROBIN WISDOM and GERALD WISDOM,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

GARDEN VALLEY ESTATES, LLC,
Intervenor-Respondent.

LUBA No. 2008-071

FINAL OPINION
AND ORDER

Appeal from Douglas County.

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

No appearance by Douglas County.

Douglas M. DuPriest and Zack P. Mittge, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With them on the brief was Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock P.C.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 12/31/2008

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 approving comprehensive plan map and zoning map amendments to allow a 259-acre parcel to be divided into 5-acre residential lots.

MOTION TO FILE REPLY BRIEF

Petitioner Wetherell moves to file a reply brief to address waiver issues raised in the response brief. The motion and brief are allowed.

FACTS

The subject 259-acre parcel is designated Agriculture and zoned Exclusive Farm Use-Grazing (FG). The parcel was formerly part of a 590-acre livestock ranch. In 2005, the county approved a partition that created the subject parcel, along with two other farm parcels that lie to the north and east. Following partition each of the three parcels were managed separately, with the subject property used for seasonal grazing. The subject property is developed with a dwelling and barns, and includes two ponds. It has no water or irrigation rights.

The National Resource Conservation Service (NRCS) soils map for Douglas County indicates that the subject property consists predominantly of soils with an agricultural capability rating Class I-IV. In 2001, the then-owner of the parent 590-acre parcel hired a soils consultant to evaluate the soils on the parent 590-acre parcel. Intervenor-respondent (intervenor) acquired the subject property in 2006, and hired the same consultant to conduct a more specific evaluation of the soils on the subject parcel. The consultant concluded that soils on the subject property are predominantly (67 percent) Class V through VII non-agricultural soils and not capable of growing timber. Based on that study intervenor applied to the county for a determination that the subject property is non-resource land not subject to Goal 3 (Agricultural Lands) or Goal 4 (Forest Lands). Intervenor requested a comprehensive

plan map amendment from Agriculture to Rural Residential-5 Acre, and a zone change from FG to Rural Residential 5-Acre.[1]

The planning commission conducted hearings on the application and on March 20, 2008, approved the requested comprehensive plan and zoning map amendments. The board of county commissioners conducted a hearing on the application and on April 23, 2008, voted to affirm the planning commission decision. This appeal followed.

ASSIGNMENT OF ERROR

Petitioners challenge the county's findings that the proposed parcel is not agricultural land or forest land protected by Goals 3 and 4.

A. Goal 3 Agricultural Land

OAR 660-033-0020(1) defines "Agricultural Land" subject to Goal 3 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.
>
> "(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[.]"

[1] Intervenor also requested a reasons exception to expand the Riversdale Unincorporated Community to include the subject property. That application was subsequently bifurcated from the plan and zoning map amendment application and deferred to a later date.

Further, OAR 660-033-0030, entitled "Identifying Agricultural Land," sets out standards and considerations for determining whether land is agricultural land.[2] OAR 660-033-0030(5) provides that "[m]ore detailed data on soil capability than is contained in the [NRCS] soil maps and soil surveys may be used to define agricultural land," if related to the NRCS classification system.

1. OAR 660-033-0020(1)(a)(A): Predominantly Class I-IV soils

The county found, based on the 2007 soils study, that the property is not agricultural land under the OAR 660-033-0020(1)(a)(A) definition, because it is predominantly composed (67 percent) of Class V through VII soils. Petitioners argue that the county cannot rely on the 2007 soils study, because (1) the 2007 soil study is a refinement of and relies

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[2] OAR 660-033-0030 provides, in relevant part:

"* * * * *

"(2) When a jurisdiction determines the predominant soil capability classification of a lot or parcel it need only look to the land within the lot or parcel being inventoried. However, whether land is 'suitable for farm use' requires an inquiry into factors beyond the mere identification of scientific soil classifications. The factors are listed in the definition of agricultural land set forth at OAR 660-033-0020(1)(a)(B). This inquiry requires the consideration of conditions existing outside the lot or parcel being inventoried. Even if a lot or parcel is not predominantly Class I-IV soils or suitable for farm use, Goal 3 nonetheless defines as agricultural 'lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands.' A determination that a lot or parcel is not agricultural land requires findings supported by substantial evidence that addresses each of the factors set forth in OAR 660-033-0020(1).

"(3) Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land. Nearby or adjacent land, regardless of ownership, shall be examined to the extent that a lot or parcel is either 'suitable for farm use' or 'necessary to permit farm practices to be undertaken on adjacent or nearby lands' outside the lot or parcel.

"* * * * *

"(5) More detailed data on soil capability than is contained in the U.S. Natural Resources Conservation Service (NRCS) soil maps and soil surveys may be used to define agricultural land. However, the more detailed soils data shall be related to the U.S. Natural Resources Conservation Service (NRCS) land capability classification system."

upon the 2001 soils study of the larger parent parcel, which is not in the record, and (2) there are flaws and inconsistencies in the 2007 soils study.

Intervenor responds, and we agree, that petitioners have not established that the absence of the 2001 soil study from the record undermines the county's reliance on the 2007 soil study. While the soil consultant reviewed the 2001 study and characterized the 2007 study as a refinement or supplement focused specifically on the subject property, the 2007 study is apparently intended to stand on its own. Petitioners do not identify any critical information that is missing from the 2007 study of the subject parcel that is presumably found in the 2001 study of the parent parcel and that is necessary to support the 2007 study.

Turning to petitioners' critique of the 2007 study, petitioners first argue that although many field data sheets for test sites on the subject property are attached to the 2007 study, a number of them are missing from the record. Intervenor responds in part that a county may rely on an expert's opinion even if the record does not include all of the evidence the expert relied upon. *ODOT v. Clackamas County*, 27 Or LUBA 141, 146 (1994). We agree with intervenor that petitioners have not explained why the missing field data sheets undermine the 2007 study or the soils consultant's conclusions.

Petitioners next argue that the Department of Land Conservation and Development (DLCD) and the Oregon Department of Agriculture (ODA) submitted testimony requesting additional information and offering several criticisms of the 2007 study, and that the county failed to adopt findings addressing those criticisms. Record 777-79.[3] County staff responded to the DLCD/ODA letter, providing the requested additional information and

[3] Specifically, DLCD/ODA disputed the consultant's claim that the absence of NRCS data on a given crop yield on a given soil type means that the crop is not suited for growth on that soil, and the consultant's claim that "saprolite" (chemically weathered rock) that is apparently absent from soils on the property is necessary for agricultural soils. The agency letter also questions the preponderance of "lithic" (stony) soils claimed by the consultant. Record 778.

offering some responses to the state agencies' criticisms. Record 659-64. However, the state agencies did not correspond further, as far as the record shows.

Petitioners do not explain what obligates the county to adopt findings addressing the state agencies' criticisms of the 2007 study. Where LUBA is able to determine that a reasonable decision maker could rely on the evidence the decision maker chose to rely on, findings specifically addressing conflicting evidence are unnecessary. *Tallman v. Clatsop County*, 47 Or LUBA 240, 246 (2004). While the DLCD/ODA letter is expert testimony that appears to disagree with portions of the 2007 study, petitioners have not demonstrated that, based on the record as a whole, a reasonable person would not rely upon the 2007 study. *See Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251, 268 (2002) (county is generally entitled to choose which conflicting expert testimony to believe); *Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258, 890 P2d 455 (1995) (same).

Petitioners next argue that the 2007 study is inconsistent with a purported NRCS "rule of thumb" that soils less than 20 inches in depth are generally classified as Class VI soils. We understand petitioners to argue that an inverse correlation of that rule of thumb is that soils greater than 20 inches in depth are generally Class I through V soils. According to petitioners, the 2007 study erred in classifying some soils with depths greater than 20 inches as Class VI soils. Petitioners contend that they raised this issue, at Record 1572, but the county failed to adopt findings addressing the issue.

Intervenor disputes that the "rule of thumb" issue was adequately raised at Record 1572, but in any case argues that the NRCS "rule of thumb" is only that, and does not mandate that soils greater than 20 inches in depth must be classified as Class I through V soils. We agree with intervenor that petitioners have not established that the cited "rule of thumb" necessarily implies that soils greater than 20 inches in depth are better than Class VI soils, or that the county was obligated to adopt findings addressing that argument.

Petitioners next argue that they noted below discrepancies between the 2007 study and some of the data sheets from the 2001 study that were incorporated into the 2007 study. According to petitioners, the 2001 data sheets sometimes indicate good farm soils in areas where the 2007 study finds poor soils. Petitioners argue that the county failed to adopt findings addressing these discrepancies.

Petitioners have not established that the county was obligated to adopt findings addressing the issue of discrepancies between the 2001 and 2007 studies. In any case, as the 2007 study explains, the 2001 study resulted from a less intensive survey than the 2007 study, and it is not unreasonable to expect some differences. Petitioners have not demonstrated that any differences undermine the reliability of the 2007 study or that remand is warranted to require findings resolving any discrepancies between the two studies.

The remaining arguments under this subassignment of error criticize the 2007 study for its conclusions regarding the "suitability" of various soils for grazing or raising hay. Those arguments have no obvious bearing on the question of whether the soils on the subject property are predominantly Class I-IV, and thus agricultural land under the OAR 660-033-0020(1)(a)(A) definition. Therefore we address those arguments below, in considering petitioners' challenges to the county's conclusion that the subject property is not "[l]and in other soil classes that is suitable for farm use" for purposes of OAR 660-033-0020(1)(a)(B).

For the above reasons, petitioners have not demonstrated that the county erred in concluding that the subject property is not agricultural land under the OAR 660-033-0020(1)(a)(A) definition. This sub-assignment of error is denied.

2. OAR 660-033-0020(1)(a)(B): Land in Other Soil Classes Suitable for Farm Use

OAR 660-033-0020(1)(a)(B) provides that "agricultural land" includes

> "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[.]"

Petitioners challenge the county's findings under OAR 660-033-0020(1)(a)(B), under several sub-assignments of error.

a. Suitable for Farm Use as Defined at ORS 215.203(2)(a)

ORS 215.203(2)(a) defines "farm use" as "the current employment of land of the primary purpose of obtaining a profit in money" by various specified farm-related activities.[4] In *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007), the Oregon Supreme Court invalidated an administrative rule that prohibited counties from considering "profitability or gross income" in determining whether land is agricultural land protected by Goal 3. The Court held that:

> "* * * in determining whether land is 'suitable' for 'farm use'—defined in ORS 215.203(2) as 'the current employment of the land for the primary purpose of obtaining a profit in money' by engaging in specified farm or agricultural activities—a local government may not be precluded from considering the costs or expenses of engaging in those activities. * * *" *Id*. at 680.

The Court went on to conclude:

> "The factfinder may consider 'profitability,' which includes consideration of the monetary benefits or advantages that are or may be obtained from the farm use of the property and the costs or expenses associated with those benefits, to

[4] ORS 215.203(2)(a) provides in relevant part:

> "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. 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. 'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. 'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. * * *"

> the extent such consideration is consistent with the remainder of the definition of 'agricultural land' in Goal 3." *Id*. at 682.

In essence, the Court concluded that the local government may consider as one factor under the "suitable for farm use" test not only gross income (consistent with earlier judicial opinions) but also net income or "net profit," after subtracting costs associated with producing gross farm revenue.

Based on *Wetherell*, the county considered testimony on whether it is "profitable" to use the subject property for livestock grazing, and concluded that "the subject property cannot be employed for obtaining a profit in money." The county relied most heavily on the testimony of one of intervenor's principals, Brian Heinze, who leased the property from intervenor for $5,000 per year for use as seasonal grazing, in conjunction with his cattle operation.

> "* * * Mr. Heinze is a professional agronomist and the owner of Lookingglass Red Angus, a pure-bred cattle ranching operation. Mr. Heinze has been attempting to conduct a portion of his cattle ranching operations on the subject property. Mr. Heinze concludes that the subject property cannot be grazed to obtain a profit in money due to a variety of physical limitation[s] on the property. In particular, Mr. Heinze states that the property can only be grazed during a fairly narrow window of approximately three months in the spring, due to lack of rainfall to support forage on the property, the lack of irrigation water rights for the subject property, and the tendency of soils on the property to dry out rapidly. Mr. Heinze also states that the property has only two stock watering ponds and no water rights for livestock watering, and that the forage produced on the subject property is not quality forage due to the poor soils and lack of minerals. Mr. Heinze points out that his own cattle are currently provided with mineral supplements to make up for this deficiency. * * * Mr. Heinze concludes that the property might derive $5,000 in gross profit, but that there is no net profit derived from the operation." Record 13-14.

The county also cited testimony from one of intervenor's consultants that the gross profit from leasing the subject property for grazing use would be approximately $3,885 per year, and opposing testimony from two area ranchers, who stated that they would be willing to pay a rental value of approximately $30 to $50 per acre, which would amount to a lease payment of $7,770 to $12,950 per year. Record 14-15. The latter figures suggest that those area

ranchers believe that the property could generate a gross profit considerably higher than Mr. Heinze's estimate of $5,000.

The county found Mr. Heinze's testimony the most credible, and adopted his lease terms of $5,000 as the most reasonable estimate of gross income. The county also relied on his testimony that $5,000 in gross income would not yield a "net profit" to the landowner and thus would not be "profitable." The county also concluded, in the alternative, that even if the county relied upon the higher gross revenue estimates provided by the area ranchers, gross annual revenue of $7,770 to $12,950 would not result in a "net profit" to the applicant, based again on Mr. Heinze's testimony. Record 15-16.

Mr. Heinze's testimony that gross revenue from leasing the land would not yield a "net profit" for the landowner is apparently based on subtracting from the $5,000 gross revenue derived from leasing: (1) annual property taxes and insurance on the property and (2) annual debt-service payments on intervenor's acquisition of the subject property. Record 1123. Petitioners cite to evidence that the property tax on the portion of the subject property that is unimproved (excluding the dwelling) was less than $1,000 in 2006. Record 946-47. The record does not include figures on intervenor's insurance costs or annual debt-service payment, but petitioners note that the 2006 purchase price was three million dollars, which petitioners argue bears no relationship to the actual value of the parcel as farm land, but instead reflects its speculative value as rural residential land.

Petitioners advance several challenges to the county's finding that "the subject property cannot be employed for obtaining a profit in money." Petitioners first argue that 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." According to petitioners, it is the farm use of land with the *purpose* to obtain a profit that is key, not whether or not the landowner in fact makes a profit in any given year. Petitioners argue that the subject property has historically been used for the primary purpose of obtaining a profit in money, and that at

least two area ranchers have expressed an interest in leasing the property for grazing, with the obvious purpose of making a profit in money. Petitioners contend that, in contrast, the applicants have never intended to use the property for farm use, and their intent and purpose is instead to develop the property for residential use.

Second, petitioners argue that if intervenor can buy farm land for far more than its agricultural value and argue that because of those high land costs it cannot make a profit farming the land and the land is therefore not agricultural land, then that would circumvent a central purpose of Oregon's land use program, to protect agricultural land.

We generally agree with petitioners that annual debt-service payments on the purchase price of the subject property in 2006 are not properly considered as part of the costs of producing farm income and cannot be considered for purposes of determining whether the subject property could be profitably farmed under OAR 660-033-0020(1)(a)(B). Intervenors do not contend that the 2006 purchase price has anything to do with the value of the land for farm use, or dispute petitioners' contention that the three million dollar purchase price instead reflects the speculative value of the land for rural residential use. It is doubtful that any land that is otherwise "suitable for farm use" under OAR 660-033-0020(1)(a)(B) could possibly show a net profit from farm use if the costs of acquiring the land at its value as rural residential land is considered, particularly if the land is subject to development pressures that are attributable to its proximity to nearby urban growth boundaries and rural unincorporated communities, as in the present case.

We generally agree with petitioners that determining whether land is agricultural land under OAR 660-033-0020(1)(a)(B) must be based initially on the objective considerations set out in the rule. The particular motivations of the landowner/applicant, or the particular financial circumstances of the landowner/applicant, are irrelevant. After the considerations set out in OAR 660-033-0020(1)(a)(B) are examined, under the Supreme Court's decision in *Wetherell* it is appropriate to consider whether, given those considerations, a reasonable

farmer would be motivated to attempt to farm the subject property for the primary purpose of making a profit in money.[5] In doing so, it may be appropriate for the county to consider the land costs that a reasonable farmer could be expected to pay for that opportunity, just as it could consider seed costs, labor costs, and other costs of farming that a reasonably motivated farmer would encounter in attempting to profitably farm the subject 259 acres. However, that is not what the county has done here. The applicant's and the county's theory is that the property cannot be profitably farmed unless the property can be leased for an amount that is sufficient to offset intervenor's particular expenses (including debt service) and still leave a net profit. That is an irrelevant inquiry under OAR 660-033-0020(1)(a)(B).

For purposes of determining whether the property is suitable for farm use under OAR 660-033-0020(1)(a)(B), it is legally irrelevant whether the landowner acquired the property by inheritance and has no annual debt service, or purchased it as part of a development speculation on a short term, high-interest loan with large annual debt-service payments, or somewhere in between those two extremes. As explained, to the extent land cost enters the equation under OAR 660-033-0020(1)(a)(B) at all, it must be limited to the land cost that reasonable farmers in the area would pay for the opportunity to attempt to put property such as the subject 259 acres to profitable farm use. As a practical matter, that would equal the lease payment or the debt service that is incurred by reasonable farmers in the area to lease or purchase comparable land for farm use. Intervenor's purchase price and debt service would only have a bearing on land costs under OAR 660-033-0020(1)(a)(B) if it was established that intervenor's purchase price was equal to what a reasonable farmer would have paid for the 259 acres for farm use.

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[5] Petitioners argue, and we agree, that the scale or size of the intended profit in money is immaterial. At several points, the county's decision cites to testimony that the subject property is not suitable for "commercial" farming, or is suitable only for "hobby" farming. The county does not define what it means by those terms, but it is important to note that any type of farming, at whatever scale, is nonetheless "farm use" for purposes of ORS 215.203(2)(a), if it is done with the primary purpose of obtaining a net profit in money, whether that expected net profit is large or small.

Intervenor suggests that hypothetical acquisition cost and annual debt-service payments based on the farm value of the land could be derived from the recent county property tax assessment, if it assumed that the landowner purchased it at that value, with an assumed interest rate of 5 percent. However, the county did not take that approach, and it is unclear that the county tax assessor's valuation is an accurate basis for assessing the farm value of the subject property. For example, the tax assessor's land valuation may be based on an assumption that the property is predominantly composed of class I-IV soils, as the county soil study indicates. If the soils are instead non-agricultural soils, as intervenor's more detailed soils study concluded, then the price that a reasonable farmer would pay for the land, solely for the purpose of obtaining a profit in money from farm use of the land, and excluding improvements and any speculative value of the land for non-farm uses, would presumably be considerably lower.

In addition, there is a second general problem with the county's approach of considering testimony regarding the lease value of the subject property for grazing to determine gross revenue, and then deducting from that gross revenue the landowner's property tax, insurance and debt-service expenses.

Considering lease income to a non-farming landowner/lessor as the only element of gross income both understates gross income and considers the wrong gross income. From the perspective of the area rancher/lessee, the annual lease payment is an expense, one of many, perhaps, and that rancher presumably expects that the actual gross income derived from farm use of the property will exceed all expenses, including the farmer's lease expense, to generate a net income. From the perspective of the landowner lessor, there are none of the usual expenses of producing gross farm revenue, because the landowner is not engaged in farm use of the property at all.

For these reasons, we believe the county's focus on the income intervenor could expect from leasing the subject property to a farmer is not an acceptable substitute for an

analysis of whether a reasonable farmer could use the subject property for farm use to generate a net profit, considering gross income generated by that farm use and reasonable expenses necessary for that farmer to produce that gross farm income. That is not to say that evidence regarding the land cost of farming the 259 acres (lease or mortgage payment) could not be relevant in making that determination, only that the county cannot misdirect the focus of the profitability from the lessee farmer to the lessor landowner. The relevant question is not whether intervenor's purchase price, insurance costs and property taxes can be covered by a lease to a farmer and leave a net profit. The relevant question is whether a reasonable farmer could lease or purchase the property for a lease or mortgage payment that reflects the property's farm value and, with the other expenses that would be required to farm the property added to that lease or mortgage payment, generate farm income that would be sufficient to make a profit.

In sum, we agree with petitioners that the county erred in concluding that the property cannot be employed for the primary purpose of obtaining a profit in money, based on Heinze's testimony that the landowners' debt-service payments exceed the revenue generated from leasing the land for grazing. Consideration of the landowner's debt service appears to have played a significant role in the county's analysis of the various factors listed in OAR 660-033-0020(1)(a)(B), and the county's findings do not suggest that consideration of the other factors provides an independent basis to conclude that the property is not suitable for farm use under OAR 660-033-0020(1)(a)(B). Therefore, remand is necessary for the county to adopt findings, supported by substantial evidence, that consider profitability without relying on intervenor's debt-service payments, unless and until intervenor can demonstrate that the debt-service payments reflect the fair market value of the subject property that a reasonable farmer would have taken on to purchase the subject property for farm use. This sub-assignment of error is sustained.

b. Historic Use of the Property

Petitioners next argue that the historic use of the property for grazing and hay production in conjunction with the original parent parcel "establishes conclusively" that the subject property is suitable for farm use. Petition for Review 22. However, that the subject property was historically grazed and managed as part of a larger parcel does not *necessarily* mean that it is suitable for farm use when considered in isolation. We disagree with petitioners that the historic use of the property for grazing land "conclusively" establishes that the property is suitable for farm use. This sub-assignment of error is denied.

c. Use in Conjunction with Nearby or Adjacent Land in Other Ownerships

OAR 660-033-0030(3) provides that "Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land. Nearby or adjacent land, regardless of ownership, shall be examined to the extent that a lot or parcel is either 'suitable for farm use' or 'necessary to permit farm practices to be undertaken on adjacent or nearby lands' outside the lot or parcel."

Petitioners argue that the subject property is similar to adjacent and nearby properties used for grazing, and the subject property has a history of grazing use in conjunction with at least two of those adjoining parcels, the remainder of the original parent ranch. According to petitioners, the county's findings do not address whether the subject property could be used in conjunction with these or other adjacent or nearby parcels in grazing use, as required by OAR 660-033-0030(3).

Intervenor responds, initially, that petitioners failed to raise any issue below regarding OAR 660-033-0030(3), and therefore any issue under that rule provision is waived. ORS 197.763(1).[6] Petitioner Wetherell replies that at Record 1577 she argued to the county

[6] ORS 197.763(1) provides:

that "[t]he applicant has not shown what is different from the subject property than the adjacent properties that are in use as pasture land or why the subject property cannot be used in conjunction with adjacent properties." She also pointed out that ranchers who lease nearby land have expressed interest in leasing the subject property to use in conjunction with their grazing operations. Record 379. As discussed below, she also raised similar issues with respect to whether the subject property is still part of a "farm unit" for purposes of OAR 660-033-0020(1)(b).

Petitioner Wetherell apparently did not cite OAR 660-033-0030(3) below, although her testimony appears to be directed at the substance of the rule. While it is a close question, we agree with petitioner Wetherell that her testimony that the applicant has not shown why the subject property cannot be used in conjunction with adjacent and nearby properties was sufficient to raise the issue raised in this sub-assignment of error, and afford the county and the parties an adequate opportunity to respond to that issue.

On the merits, intervenor responds that petitioners have not demonstrated that the subject property can be used in conjunction with adjacent or nearby grazing lands. Intervenor cites to testimony from Heinze that intervenor approached several ranchers in the area about leasing the subject property, but all declined. Intervenor also points out that Heinze is an area rancher and testified that it was not profitable to graze livestock on the property as part of his cattle operation.

The county made no findings with respect to OAR 660-033-0030(3) or whether the subject property could be used in conjunction with adjacent and nearby grazing lands. As petitioners note, two area ranchers testified that they were interesting in using the property in

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> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

conjunction with their grazing operations. It may be, as intervenor argues, that the county could nonetheless find that the property cannot be used in conjunction with adjacent or nearby ranches, based on other evidence in the record. However, we agree with petitioners that remand is necessary for the county to address the question in the first instance.

This sub-assignment of error is sustained.

d. Suitable for Wine Grape Production

The soils on the property are suitable for growing wine grapes. However, the county found that due to the lack of irrigation and the high initial costs of establishing a commercial vineyard (up to $30,000 per acre) the subject property cannot be used with the primary purpose of obtaining a profit in money from raising wine grapes.

Petitioners challenge that finding, arguing that dry land vineyards are common in the Umpqua Valley and that there is no need to fully irrigate established vineyards. Petitioners admit that some irrigation is necessary to establish the vines in the first couple of years, but argue that such initial irrigation could be satisfied by the existing ponds on the property supplemented by constructing one or more additional small ponds filled by stored runoff. The county rejected that suggestion, citing to evidence that constructing a new pond of the size needed to irrigate 40 acres of vineyards would cost over a million dollars. Further, the county noted that the property has no water rights and cannot obtain any water rights during July through November because the property is hydrologically connected to the already over-allocated North Umpqua river system. The county found that capturing runoff using "a water impoundment of any appreciable size would likely require an irrigation water right." Record 19. Without some irrigation to establish even a dry land vineyard, the county found, there is little or no potential to use the property as a commercial vineyard.

Intervenor responds in relevant part that even if new ponds could be constructed, using them to store runoff would require a water permit, which could not be obtained, because all runoff from the property is part of the over-allocated North Umpqua river system.

According to intervenor, the existing ponds on the property are unapproved and have no water rights associated with them, and cannot lawfully be used to establish a new agricultural use. Petitioners dispute that capturing spring runoff from the property and storing it in the existing or newly constructed ponds would require a water permit.

It is not clear to us whether new or existing water impoundments necessary to provide water to establish a vineyard on the property would require a new water right under the applicable state administrative rules, or whether such a water right could be obtained. The county found to the contrary, and there is some evidence supporting that conclusion. Petitioners have not met their burden to demonstrate that the county erred in relying on that evidence. We cannot say that the county erred in relying on the uncertainty over whether irrigation necessary to establish a new vineyard is available, combined with the high cost of establishing a new commercial vineyard and the higher risks of dry-land viniculture, to conclude that the property is not suitable for growing wine grapes, for purposes of OAR 660-033-0020(1)(a)(B) and ORS 215.203(2)(a). This sub-assignment of error is denied.

3. OAR 660-033-0020(1)(b): Adjacent or Intermingled Lands within a Farm Unit

OAR 660-033-0020(1)(b) defines "agricultural land" to include "[l]and 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," even if the land "may not be cropped or grazed[.]" Petitioners argue that until 2005 the subject property was part of a 590-acre ranch under single ownership and management with a history of grazing and hay production dating back to the 1920s. According to petitioners, mere partition of a farm unit and cessation of joint operations is not sufficient to destroy a farm unit for purposes of OAR 660-033-0020(1)(b). *Riggs v. Douglas County*, 167 Or App 1, 8, 1 P3d 1042 (2000) (county must consider whether two parcels on which longstanding joint operations ceased less than one year prior to the application remains a "farm unit").

In *Riggs*, the Court of Appeals held that:

> "[A] parcel would not be part of a 'farm unit' simply because concurrent farm operations occurred on it and nearby land 50 years ago. Conversely, as respondents point out, in *Dept. of Land Conservation* [*v. Curry County*, 132 Or App 393, 398, 888 P2d 592 (1995)], we identified the purpose of the rule 'to be the preservation of the unit'; it would be squarely contrary to that purpose to interpret the rule as contemplating that a parcel could cease being part of the unit simultaneously with and simply because of the discontinuation of farm operations on it or its ostensible sale for non-farm purposes. This case is closer to the latter extreme than the former. LUBA was correct in holding that further proceedings are necessary at the county level to identify the relevant facts." 167 Or App at 8.

Intervenor responds that *Riggs* is distinguishable and that the present facts more resemble those in *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005), than those in *Riggs*. *Wetherell* involved a 160-acre parcel that once was commonly owned and managed with an adjacent 195-acre parcel. The adjoining 195-acre parcel was flat, comprised of Class I-IV soils and used for growing hay. The subject 160-acre parcel was hilly, comprised of Class VI soils, and used for seasonal grazing, supplemented by hay grown on the flat parcel. Joint operation of the two parcels ceased three to four years prior to the application, during which time each had been separately owned and managed, one for hay production and the other for seasonal grazing. We distinguished *Riggs* based on the absence of joint management during the three to four years preceding the application and three additional considerations. First, we noted that *Riggs* involved a unitary sheep operation in which all parcels were used in similar fashion, whereas *Wetherell* involved two parcels with dissimilar agricultural characteristics and different farm uses that need not be jointly managed. Second, we distinguished *Riggs* on the basis that in that case no attempt at independent management had occurred. Third, we noted that, unlike the circumstances in *Riggs*, when the county created the subject property it necessarily determined that the 160-acre parcel either was the appropriate size for continuation of the agricultural enterprise in the area or that it satisfied the statutory minimum parcel size.

Intervenor argues that the present facts resemble those in *Wetherell* more than *Riggs*, at least with respect to (1) more than one year since cessation of joint management, (2) an

attempt at independent management, and (3) the county presumably determined in the 2005 partition that the 260-acre parcel was appropriate in size for the continuation of the agricultural enterprise in the area or that it complied with the statutory minimum parcel size.

In *Wetherell* we characterized it as a "close question" whether the two parcels at issue in that case can be considered a farm unit for purposes of OAR 660-033-0020(1)(b). The present case is also a close question, but one that we believe falls toward the other side. OAR 660-033-0030(3) instructs that "Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land," and further requires that "nearby or adjacent land be examined for the possibility of conjoined use, regardless of ownership, when considering whether the subject parcel is either 'suitable for farm use' or 'necessary to permit farm practices to be undertaken on adjacent or nearby lands' outside the lot or parcel." We believe a similar policy underlies the question of under what circumstances parcels that have historically been managed as a single farm unit may no longer be considered a farm unit.

As *Riggs* suggests, the passage of an extended period of time between the lapse of joint operation is sufficient to render the subject parcel no longer part of a farm unit for purposes of OAR 660-033-0020(1)(b). Where the farm unit has only recently been broken up, other factors must be considered.[7] In our view, the most important additional consideration is whether there is some significant obstacle to resumed joint operation. In *Wetherell*, the subject parcel and the remainder of the original farm unit had very different soil and topographic conditions, and had been used in different ways within the original farm unit. Following cessation of joint use the two portions of the original farm were devoted to

[7] Intervenor and the county stress the third factor we cited in *Wetherell* to distinguish *Riggs*, that the county determined in approving the partition of the parent farm unit either that the subject parcel was the appropriate size for continuation of the agricultural enterprise in the area or that it satisfied the statutory minimum parcel size. However, that circumstance will be present in all partitions that have occurred in recent decades, and was cited in *Wetherell* primarily to distinguish *Riggs*, where the partition occurred in 1974, prior to statutory minimum parcel sizes or many of the elements of the current land use program.

different types of farm operations, with the remainder portion devoted exclusively to hay production and the subject property used for seasonal grazing, with little or no supplemental forage.

In the present case, it appears that the original 590-acre ranch was used for a combined grazing and hay operation, with approximately 300 cow-calf pairs, that employed the subject parcel for seasonal grazing and some hay production. In this respect, the subject property is more similar to the properties in *Riggs* than the properties in *Wetherell*. Petitioners assert that the remaining parcels within the original farm unit, adjoining to the north and east, are zoned farm grazing and continue in farm use as pastureland. There may be some reason why the former elements of the original farm unit cannot continue to be used jointly for a grazing and hay operation, similar to its historic use, but if so the decision and the respondents do not cite any. Given the relatively short interval since cessation of joint operations and filing of the application (less than two years), and the fact that separate management of the subject property and other portions of the original farm unit appears to be consistent with historic use of the original farm unit, we agree with petitioners that the county has not established that the subject property is not part of a "farm unit" for purposes of OAR 660-033-0020(1)(b).

This subassignment of error is sustained.

B. Goal 4 Forest Land

The county found that Goal 4 does not apply to the proposed redesignation and rezoning, because (1) the subject property is not part of the county's Goal 4 inventory of forest lands and, in the alternative, (2) the property does not satisfy the Goal 4 definition of "forest land." Petitioners challenge both conclusions, and argue that the county failed to adequately evaluate whether the subject property is forest land subject to Goal 4.[8]

[8] Goal 4 provides, in relevant part:

We need not address whether the county erred its initial alternative finding, because we agree with intervenor that the record supports the county's second finding that the property is not "forest land" as defined by Goal 4.

The county found:

> "The subject property is not land that is suitable for commercial forest use. The applicant has provided empirical evidence in the form of a detailed soils report analysis demonstrating that the subject property is not suitable for commercial forest use. This study identified only two small isolated pockets of soils potentially suitable for forestry on the subject property and limited areas that were suitable for either farm or forestry, and concluded that, due to shallow, lithic soils and predominantly south and west aspect of the subject property, over 80% of the subject property was unsuitable for commercial forest use. The commission finds this detailed soils analysis to be substantial evidence that the subject property is not land suitable for commercial forest use. It is particularly persuasive in light of Douglas County's own inventory evaluation (in conjunction with the Oregon Department of Forestry) which arrived at the same conclusion." Record 28.

Petitioners argue that the soils study is not reliable, because it is not clear that the author has the credentials to evaluate forest productivity. Intervenor responds in part by noting that the record also includes an evaluation by a forestry consultant, who concurred with the author of the soils study that the subject property is not suited for commercial forestry. Record 1106.

Petitioners also challenge the last sentence of the above finding, where the county notes that it has recently inventoried the subject property, among other areas, in conjunction with the Oregon Department of Forestry, and determined that the subject property is not forest land. Petitioners argue that that re-inventory has not yet been acknowledged by the Land Conservation and Development Commission. However, we see no reason why the

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> "Forest lands are those lands acknowledged as forest lands as of the date of adoption of this goal amendment. Where a plan is not acknowledged or a plan amendment involving forest lands is proposed, forest land shall include lands which are suitable for commercial forest uses including adjacent or nearby lands which are necessary to permit forest operations or practices and other forested lands that maintain soil, air, water and fish and wildlife resources."

county cannot cite and rely on that unacknowledged plan inventory for its evidentiary value, in supporting other evidence in the record indicating that the subject property is not forest land.

This subassignment of error is denied.

The assignment of error is sustained, in part.

The county's decision is remanded.