BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL, ROBIN WISDON,
GERALD WISDOM and RICH HOLCOMB,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

GARDEN VALLEY ESTATES LLC,
Intervenor-Respondent.

LUBA No. 2009-094

FINAL OPINION
AND ORDER

Appeal from Douglas County.

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

No appearance by Douglas County.

Zack P. Mittge, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him 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, concurring in the decision.

REVERSED 12/03/2009

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

NATURE OF THE DECISION

Petitioners appeal a decision on remand approving comprehensive plan map and zoning map amendments to allow a 259-acre parcel to be divided into five-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 reply brief is allowed.

FACTS

The challenged decision is on remand from LUBA. *Wetherell v. Douglas County*, 58 Or LUBA __ (LUBA 2008-071, December 31, 2008) (*Wetherell I*). As noted in our opinion:

> "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." Slip op at 2.

Soils on the subject property are predominantly (67 percent) Class V through VII non-agricultural soils. Intervenor-respondent (intervenor), the applicant below, applied to the county for a determination that the property is non-resource land and for that reason not subject to Statewide Planning Goals 3 (Agricultural Lands) or 4 (Forest Lands). As part of that demonstration, intervenor submitted testimony from one of its principals that the annual debt-service payment on intervenor's three-million dollar acquisition of the property in 2006 exceeded the revenue derived from leasing the land for grazing. Based in part on that testimony, the county concluded that grazing the property cannot meet the definition of "farm use" at ORS 215.203(2)(a), and therefore the property is not land that is "suitable for farm use" under the definition of "agricultural land" at OAR 660-033-0020(1)(a)(B).

On appeal by some of the petitioners in the present appeal, LUBA remanded on three grounds. LUBA held that the county erred in relying on a comparison of revenue from grazing leases against intervenor's debt-service payments to conclude that the subject property cannot be grazed with the primary purpose of obtaining a profit in money, and is therefore not land suitable for farm use. In addition, LUBA remanded for findings addressing whether the subject property can be used in conjunction with nearby or adjacent farm properties, and whether the subject parcel remains part of a "farm unit" along with the two other parcels that made up the original 590-acre ranch.

On remand, the county planning commission held an evidentiary hearing on May 21, 2009, limited to the three issues identified in *Wetherell I*. The planning commission denied petitioner Holcomb "party" status under the county's land use ordinance, but allowed him to testify as a "witness." The planning commission again approved the application. The county board of commissioners held a hearing July 22, 2009, to review the planning commission decision, and affirmed it, adopting the planning commission's findings as its own. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county committed procedural error prejudicial to petitioner Holcomb by denying him "party" status at the planning commission remand hearing, which under the county's Land Use and Development Ordinance (LUDO) had the consequence that Holcomb was not permitted to appear before the board of commissioners. According to petitioners, the county's findings critique Holcomb's testimony before the planning commission, and had he been permitted to testify to the commissioners he could have countered those critiques and clarified his testimony.

As defined at LUDO 1.090, a "party" is a person the county finds to be "specially, personally, or adversely affected in the subject matter," as distinguished from a "witness," an undefined term that apparently includes anyone else who submits testimony at a hearing. As

relevant here, the main difference is that only parties may speak at a board of commissioners' hearing, on review of a planning commission decision on a quasi-judicial plan amendment. LUDO 6.900.2.b. Petitioner Holcomb is a rancher who leases land in the vicinity of the subject property. Holcomb appeared at the initial evidentiary proceeding before the planning commission leading to the decision challenged in *Wetherell I*, and was granted "witness" status at that time. Holcomb was not one of the petitioners in *Wetherell I*. On remand before the planning commission, Holcomb sought "party" status, asserting that he is personally and adversely affected by the proposed amendments. The planning commission denied his request pursuant to LUDO 2.200.5, although it accepted his testimony on remand as a witness.[1] Before the board of commissioners, Holcomb again requested party status, but the commissioners declined, and Holcomb was not allowed to speak at the board of commissioners' hearing.

LUDO 2.200.5 provides that:

> "In cases where a matter has been referred back to the Planning Commission from the Board, only those individuals or agencies who were given party status at the first evidentiary hearing on the matter shall be allowed as parties in the matter when reheard by the Commission."

The county apparently understands LUDO 2.200.5 to apply to proceedings on remand, and petitioners do not dispute that understanding.

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[1] The planning commission findings state:

> "At the remand hearing held on May 21, 2009, witness Richard Holcomb sought party status for the first time in these proceedings. Mr. Holcomb had participated in the initial evidentiary hearings on the application as a witness in support of the opponents, and had not disputed his status as a witness or sought recognition as a party prior to the remand hearing. As Mr. Holcomb had already been recognized as a witness in the prior proceedings, he was permitted the opportunity to present testimony on May 21, 2009, while the Commission took the matter of his status under advisement. Having reviewed the materials submitted by Friends of Douglas County on behalf of Mr. Holcomb and based on a legal opinion from County Counsel concerning the same, the Commission finds that LUDO Section 2.200.5 controls and that it bars Mr. Holcomb from seeking party status for the first time in this remand proceeding." Record 8.

Petitioners argue broadly that "a local government may not restrict participation at a hearing on remand," citing *Siporen v. City of Medford*, 55 Or LUBA 29 (2007), and *Lengkeek v. City of Tangent*, 52 Or LUBA 509 (2006). Intervenor responds, and we agree, that neither case supports that broad proposition. In *Siporen*, the city limited participation on remand to persons who participated in the LUBA appeal. We held that "a party who otherwise has standing to participate in the city's land use public hearings under the city's land use legislations may not be denied standing to participate in those remand proceedings, simply because he or she failed to participate in the LUBA appeal." 55 Or LUBA at 52. In the present case, the county limited participation based not on failure to participate in the LUBA appeal but rather on a LUDO provision that expressly limits "party" status in subsequent hearings on a land use matter to those who demonstrate party status at the initial hearing. Our above-quoted statement from *Siporen* is confined to persons "who otherwise ha[ve] standing to participate in the city's land use public hearings under the city's land use legislations," suggesting that a different outcome is possible where the local government's code limits standing to participate.

Similarly, in *Lengkeek* the city limited participation on remand to those who participated in the original appeal. We held that at least where the application is modified on remand, the city could not limit public participation at the remand hearing to the original parties, noting that the city's comprehensive plan guaranteed its citizens the opportunity to comment on the modified application. *Id.* at 512. In the present case, the application was not modified on remand, and petitioners cite to nothing in the county's comprehensive plan, land use regulations or elsewhere that would preclude the county from applying LUDO 2.200.5 on remand to limit Holcomb's participation to that of a witness rather than a party.[2]

[2] We would likely feel differently in the present case if the application had been modified on remand. Modifications to an application can result in impacts to persons who were not impacted by the original proposal, or were not impacted in the same way or to the same degree, and who may have had less incentive or no incentive to participate in the original proceedings. Denying such persons the opportunity to comment on

In addition, intervenor argues that because Holcomb had an opportunity during the initial proceedings to establish party status, but did not, the issue of whether he should be granted party status is waived, under the reasoning in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) (issues that could have been raised, but were not raised during a prior LUBA appeal cannot be raised in an appeal of the decision on remand). We generally agree. For whatever reason, Holcomb did not request party status during the initial proceedings despite having been given an opportunity to do so. Had he sought and been denied party status, he could have raised that issue before the board of commissioners and ultimately to LUBA. We believe that, to preserve the issue of whether Holcomb is entitled to party status under the county's code, he was required to seek party status during the initial proceeding, and his failure to preserve that issue means that denial of party status on remand cannot be raised before LUBA, consistent with the reasoning in *Beck*.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The second assignment of error consists of four sub-assignments of error, challenging the findings adopted on remand that the subject property is not agricultural land protected under Goal 3. The first of those four sub-assignment of error includes three discrete sub-assignments of error within that subassignment of error.

A. Land in Other Soil Classes Suitable for Farm Use

1. Seven Factors of OAR 660-033-0020(1)(a)(B)

In relevant part, "Agricultural Land" under Goal 3 includes land that is "suitable for farm use" as defined in ORS 215.203(2)(a), taking into consideration seven factors, including "soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological

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modified applications, or participate in local appeals of decisions approving or denying such applications, seems inconsistent with at least the spirit of Statewide Planning Goal 1 (Citizen Involvement).

and energy inputs required, and accepted farming practices."[3] Petitioners first argue that the county failed to adopt findings on remand that evaluate the seven factors set out in OAR 660-033-0020(1)(a)(B).[4]

Intervenor-respondent (intervenor) argues that in the county's initial decision it adopted findings addressing the seven factors of OAR 660-033-0020(1)(a)(B), and petitioners failed to challenge the adequacy of those findings in the initial appeal, and therefore cannot challenge them in the present appeal, under the reasoning in *Beck*. According to intervenor, nothing in LUBA's remand in *Wetherell I* required the county to adopt additional findings regarding those seven factors. In addition, intervenor argues that petitioners failed to raise any issues during the remand proceedings regarding the adequacy

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[3] OAR 660-033-0020 provides, in relevant part:

> "For purposes of this division, the definitions in ORS 197.015, the Statewide Planning Goals and OAR chapter 660 shall apply. In addition, the following definitions shall apply:
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> "(1)(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;
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> "(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[.]"

[4] The petition for review twice refers to the seven factors of "ORS 215.203(1)(a)" and once to the seven factors of "OAR 660-033-0020(1)(a)(B)." Petition for Review 9, 13. As explained below, intervenor argues that any issue regarding the seven factors of "ORS 215.203(2)(a)" is waived. Despite the confused references in the petition for review, the subject of the first sub-sub-assignment of error is clearly the adequacy of findings addressing the seven factors set out in OAR 660-033-0020(1)(a)(B), not the statute, which does not include seven factors. *See* n 5, below. We therefore evaluate intervenor's waiver challenge with that understanding.

of the county's findings addressing the seven factors, and thus that issue is waived under ORS 197.763(1) and 197.835(3).

Petitioner Wetherell replies that the issue of the adequacy of the findings addressing the seven factors of OAR 660-033-0020(1)(a)(B) was part of LUBA's remand in *Wetherell I*, citing to slip op 14, where LUBA stated that:

> "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)."

However, the focus of the arguments in *Wetherell I*, and our remand, was the county's consideration of debt-service and other matters affecting the question of profitability, not on the adequacy of the specific findings addressing the seven factors listed in OAR 660-033-0020(1)(a)(B), which are at Record 22-23 (LUBA No. 2008-071). We agree with intervenor that because the issue of the adequacy of the findings adopted to address the seven factors of OAR 660-033-0020(1)(a)(B) was not raised in the initial appeal, and was not one of the issues on remand, that issue cannot be raised for the first time in a challenge to the county's decision on remand, under the reasoning in *Beck*. In any case, even if the issue were not waived, petitioners do not acknowledge, much less specifically challenge, the findings the county adopted in its initial decision considering the seven factors of OAR 660-033-0020(1)(A)(B).

2. Evidence regarding Cost of a Cattle Operation

As noted, OAR 660-033-0020(1)(a)(B) defines agricultural land to include land that is suitable for farm use as defined in ORS 215.203(2)(a). That statute in turn defines "farm use" as "the current employment of land for the primary purpose of obtaining a profit in

money" by engaging in various farming and farming-related activities.[5] Read together, the rule and statute allow a local government to consider "profitability" in determining whether land is suitable for farm use under OAR 660-033-0020(1)(a)(B). *See Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007) (invalidating an administrative rule that prohibited consideration of profitability). As explained, LUBA remanded the county's initial decision in part for the county to reconsider its findings regarding profitability, after concluding that the county erred in considering intervenor's debt-service payments on its $3,000,000 acquisition of the subject property as part of the costs of farming.

On remand, intervenor's agronomic expert submitted a "Cattle Operation Budget Analysis" that compared the estimated revenue and costs for six types of cattle operations on the subject property and concluded that, given the poor soils and other limitations, the subject property could not be operated profitably as a cattle ranch. The study estimated that a cattle operation on the subject property would lose between $67,556 and $83,210 per year. Based on the study, the county concluded that no reasonable farmer would be motivated to attempt to ranch the subject property for the primary purpose of making a profit in money.

a. Findings Addressing Petitioners' Challenges

Petitioners raised a number of challenges below to various assumptions and costs used in the study. The county adopted findings rejecting those challenges, at Record 11-15, and explaining its choice to rely on intervenor's conclusions with respect to each challenge.

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[5] 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. * * *"

On appeal, petitioners repeat the same challenges, but without addressing the county's findings on those issues. Among other things, petitioners argue that the study underestimated the number of animal unit months (AUMs) the property can support, improperly compared average cattle prices over several years to current expenses, and overestimated various expenses, for example assuming the amortized cost of new equipment rather than used equipment. Intervenor responds that the county's unchallenged findings explain why the county rejected petitioners' arguments on these issues, and for the reasons set out in those findings petitioners have not demonstrated that the study is flawed with respect to those issues.

We agree with intervenor. With respect to the amortized cost of new versus used equipment, for example, the county found the study appropriately estimated costs using new equipment, because the study factored in the useful life of equipment, the degree to which it is used in the operation, and its salvage value. Record 14. Petitioners cite to no evidence that the amortized cost of used equipment, with its shorter useful life and maintenance cycles, would differ significantly from the amortized cost of new equipment over the same period. Absent some challenge to the county's findings regarding assumptions and costs, petitioners have not demonstrated that the study is flawed with respect to the above assumptions and costs issues.

b. Repairs to Improvements

Petitioners also argue that the study improperly considered the costs to restore neglected pastures and repair or replace improvements. According to petitioners, the study found that "pasture conditions are judged to be in approximately high poor to fair condition," and stated that "[t]his condition class is assumed to have approximately 25% of the carrying capacity of the same pastures in excellent condition." Record 234. Petitioners note that the study's budget listed costs of $75 per acre for "pasture renovation." Record 237. Similarly, the study lists costs for four types of "improvements": fencing, corral, barn and water

system. Cost for fencing and the barn total $32,500, with a useful life of 30 years. *Id.* Each of the six budgets assumed $1,129 in annual costs for "improvements," which apparently reflects the amortized annual cost to repair or replace the fencing and barn, plus the corrals and a water system. Petitioners cite language in *Wetherell v. Douglas County*, 50 Or LUBA 167, 185 (2005), *rem'd on other grounds*, 204 Or App 732, 132 P3d 41 (2006), *rev'd and rem'd on other grounds*, 342 Or 666, 160 P3d 614 (2007), in which the Board stated:

> "We tend to agree with petitioners that the current neglected status of the property is not the proper baseline for considering whether it is agricultural land. Where land was once maintained at some level of agricultural productivity that has suffered in recent years due to neglect, it is inappropriate to take such neglect into account under OAR 660-033-0020(1)(a)(B). A reasonable rancher, for example, would maintain fences, control brush and weeds and take similar appropriate measures to maintain the productivity of the property. The county erred to the extent it took as its baseline the neglected condition resulting from failure to provide such maintenance. * * *"

However, we ultimately concluded that in fact the county assumed "appropriate management measures" in estimating the subject property's forage productivity, and rejected the argument. *Id.*

Intervenor responds that the study did not conclude that the pastures had been "neglected," and that its finding that the pastures are in "high poor to fair condition" simply reflects the inherent limitations of the soils on the property. With respect to improvements, we understand intervenor to argue that there is no evidence that the need for new fencing and a barn reflects mismanagement or neglect, as opposed to the need to repair or replace fixtures as part of a normal maintenance cycle or at the end of their useful life.

Petitioners have not demonstrated that the county erred with respect to costs to restore neglected pastures and repair/replace improvements. Nothing cited to us in the record suggests that the current state of the pastures, fences and barn is the result of neglect or mismanagement. That the pastures' current condition is "high poor to fair condition" does not necessarily suggest neglect. Even if there were evidence to that effect, it is not clear that any error in relying on the costs of remedying any neglect would warrant remand in the

present case. We note that while the study's discussion of assumptions used in the analysis lists costs of $75 per acre for "Pasture Renovation," none of the actual budgets include a line item for renovating pastures, so it not clear the budget actually considered those costs. The budgets do include a line item of $1,129 in annual costs for repair to improvements, some part of which presumably includes repair/replacement of fences and the barn. Even if the current state of the fences and barn reflect neglect or mismanagement, something petitioners have not established, as explained below we affirm the county's ultimate conclusion that the annual cost of running any cattle operation on the property far exceeds the annual revenue that can reasonably be expected. The $1,129 annual cost for improvements is a fraction of the estimated annual deficit. Therefore, any error in considering the cost to correct neglect or mismanagement would not provide a basis for reversal or remand.

Similarly, petitioners argue that the study estimated $8,000 for a water system, as part of the "improvements" for which the budgets assumed $1,129 in annual costs. Petitioners note that the subject property has seasonal ponds that cover almost three acres, and argues that the county failed to consider whether use of these ponds might reduce or eliminate the cost for any "water system" needed to support a livestock operation. Intervenor responds, initially, that no issue regarding whether the ponds on the property reduce or eliminate the need for a water system was raised below, and is thus waived, under ORS 197.763(1). In any case, intervenor argues, the ponds are unpermitted, seasonally dry, and do not supply all pastures.

In reply to the waiver challenge, petitioner Wetherell argues that the "water issue" was twice raised below. Wetherell cites to a statement at Record 679 that "[t]hese ponds have the capacity to alleviate livestock water concerns. The locations of the ponds enable a potential gravity flow system to the southern portion of the property." Wetherell also cites a similar statement at Record 51 that "[a]ny livestock watering issues that may or may not have

existed in the past have been resolved by the construction of the large water impoundment on the northern portion of the property in recent years."

The cited portions of the record assert the position that the ponds can meet at least some of the livestock watering needs for a cattle operation on the property. However, the issue raised in the petition for review is whether the existing ponds could reduce or eliminate the need for the $8,000 "water system" that is listed in the study. Neither of the statements at Record 51 or 679 refer to the study or the water system listed in the study, although one statement suggests that the southern pastures could be served by a gravity flow "system" from the ponds. It is not clear whether this is the same "water system" the study believed necessary, or whether the study contemplated some other system to water livestock not dependent in part on the ponds for supply. Whatever the case, the statements at Record 51 and 679 do not give "fair notice" to the county and other parties that petitioners believed that the "water system" listed in the study is an unnecessary expense, for purposes of estimating the cost of a grazing operation on the subject property. Further, even if that issue had been raised with sufficient specificity, the cost of the "water system" is part of the $1,129 annual cost for improvements. As explained above, the $1,129 annual cost for improvements is a fraction of the estimated annual deficit. Even if the portion of $1,129 cost attributable to the study's "water system" was included in error, that error would not affect the county's ultimate conclusion with respect to profitability, and therefore any error in that regard would not provide a basis for reversal or remand.

c. Other Issues

Finally, petitioners argue that the county erred in rejecting the alternative budgets submitted by two ranchers, Kennedy and petitioner Holcomb, which describe how they would use the property in conjunction with their existing cattle operations in the county, with the intent of generating a profit. According to petitioners, their testimony is compelling

evidence that the subject property is suitable for farm use under OAR 660-033-0020(1)(a)(B).

The county's findings criticize the budget information submitted by Kennedy and Holcomb, concluding that their budgets do not consider all inputs and expenses, do not consider all limitations on the subject property, and do not undermine the conclusions reached in intervenor's study. Record 15-16.

Where there is conflicting expert testimony in the record, the county is generally entitled to choose which expert to rely upon, as long as the expert testimony relied upon is the kind of expert testimony that a reasonable person could rely upon, considering the evidence in the whole record. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251, 268 (2002). While the budgets and testimony submitted by Kennedy and Holcomb certainly constitute substantial expert evidence upon which the county could have relied to conclude that the subject property is suitable for farm use, we cannot say that that testimony is so compelling or so undermines the study that the county chose to rely upon, as to render the study insubstantial evidence.

3. Land Costs

As noted, LUBA remanded the decision in *Wetherell I* in part for the county to reconsider whether a reasonable farmer would be motivated to attempt to farm the subject property for the primary purpose of making a profit in money, without taking into account intervenor's debt service on its 2006 acquisition of the subject property. We explained that "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." Slip op 12.

On remand, intervenor submitted evidence of an appraisal of the fair market value of the subject property, based on a comparison between the subject property and eight

"comparable" agricultural-zoned properties in the area for which sales data existed. The appraisal concluded that the fair market price of the property as agricultural land is $880,000 with improvements (house, barn, etc.), and $710,000 without improvements. Based on that appraised value, intervenor submitted evidence that, assuming a 35 percent down payment and the current interest rate for agricultural real estate loans, a reasonable farmer seeking to acquire the subject property for farm use would have to pay an annual mortgage of at least $51,109.40. The profitability study included that $51,109.40 mortgage cost in its analysis, under the category of "Overhead." Record 238. That mortgage cost is by far the largest single component of the annual expenses associated with each of the six ranching scenarios considered in the study. As noted, the study estimated annual losses between $67,556 to $83,210.

Petitioners argue that the appraisal method the county relied upon is flawed, because it derives the subject property's land cost from comparisons to recent farm sales in the area, an approach that captures investment and other speculative economic values that may have little or no relationship to the land's value based on its ability to generate agricultural products. We generally agree with petitioners. Although we suggested in *Wetherell I* that some kind of comparison with the lease or fee value of other farm properties in the area might be considered, we cautioned that the focus of such consideration would be "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*[.]" *Id.* at 13 (emphasis added). The fair market value of property zoned for agricultural use incorporates a host of other economic values in addition to the value of the property attributable to its suitability for farm use. Property owned in fee simple grants the owner a bundle of rights and investment potentials, only some of which are related to the economic use of the land in general, or for farm use in particular. Further, an "exclusive farm use" zone is something of a misnomer. ORS chapter 215 authorizes dozens of different non-farm uses in the EFU zone, as permitted or conditionally permitted uses.

The fair market value of any EFU-zoned parcel presumably reflects the potential use of the property for such non-farm uses. Similarly, the EFU zone allows several types of residential uses on EFU lands, some accessory to farm use and others not, and again the fair market value of the land presumably reflects those potential residential uses. In the present case, for example, the fair market price of the subject property presumably reflects the right to replace the existing modest dwelling on the property with a larger, more modern dwelling.

In addition, the fair market value of any unit of land usually reflects the future potential for rezoning and development. While intervenor's appraisal did not assume that rezoning would occur in the present case, the fair market value of any resource property (including comparison property in the area) that is located on the margins of a rural residential area and near an urban growth boundary will almost certainly be inflated at least somewhat by the mere *potential* for future rezoning for rural residential or urban uses.

Finally, the fair market value for land also reflects the appreciation value of land over time. At the end of the mortgage period, the owner not only has recovered the full purchase value but has also benefited, perhaps significantly, from the inherent tendency of land values to appreciate over time.[6] Any estimate of fair market value reflects the probability of such appreciation.

None of the foregoing values have anything to do with the price a reasonable farmer would pay *solely* for the right to use the subject property to produce agricultural products. It seems highly unlikely that any appraisal could reliably separate the various components of the fair market value of fee ownership, or in any reliable manner derive a value that reflects *only* the right to put a parcel to farm use. As we stated in *Wetherell I*, "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

[6] Petitioners point out that Simonis, the owner of the parent 590-acre ranch, sold the ranch in 2000 for $368,000 more than he paid for it in 1995, despite the fact that Simonis testified that farm use of the property during that period was unprofitable.

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." The county had not demonstrated that the estimated annual mortgage expense of $51,109.40 has any relationship to that cost, and therefore the county erred in including it on the expense side of the profitability equation.

However, that error does not necessarily provide a basis for reversal or remand. As noted, the study evaluated six scenarios, and concluded under each scenario that expenses would exceed revenue from the cattle operation by $67,556 and $83,210 per year. Those estimated losses assume $51,109.40 in annual mortgage expense, and are flawed for that reason. Intervenor contends, however, that even if land cost is completely excluded from the profitability analysis, based on the study the county could conclude that no reasonable farmer would be motivated to put the subject property to farm use, with the expectation of obtaining a profit of money. Intervenor appears to be correct. Even after subtracting the estimated $51,109.40 in mortgage expense, the study indicates that farm use of the subject property would result in annual losses ranging from $16,446.60 to $32,100.60. Petitioners argue, probably correctly, that some of the estimated operational expenses in the study may be inflated or unnecessary. However, as explained earlier in this opinion, petitioners have not demonstrated that the county erred in rejecting the ranchers' lower estimates of costs, or that a reasonable person could not rely on the study. Nor have petitioners demonstrated that the disputed costs in the study, if reduced or even subtracted entirely from the equation, would result in a positive value or anything near it. Therefore, petitioners' challenges to the land costs used in the study do not provide a basis for reversal or remand.

B. Use of the Property in Conjunction with Adjacent and Nearby Farms

An additional basis for remand in *Wetherell I* was for the county to consider whether the subject property could be farmed in conjunction with adjacent or nearby farm lands, including the remaining two parcels of the ranch the subject property was formerly part of.

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," and requires that "[n]earby or adjacent land, regardless of ownership, shall be examined" in determining whether land is "suitable for farm use" under OAR 660-033-0020(1)(a)(B).

On remand, the county relied in part on the testimony of a rancher, Simonis, who owned the former 590-acre parent parcel between 1995 and 2000, and conducted a cattle operation in conjunction with his purebred operation on other lands. The county also relied on the testimony of Spencer, who leased the parent parcel for $18,000 per year between 2000 and 2002, and who conducted an independent cattle operation until the owner raised the lease amount. Both Simonis and Spencer testified their operations were not profitable, due to soils, lack of water, and other limitations. In addition, the county relied on intervenor's agronomic study, which evaluated conjoined use of the subject property with adjoining resource parcels, specifically the two remainder parcels of the former ranch and two other adjoining parcels, and concluded that a conjoined operation would annually lose between $72,153.72 and $83,210.82.

Petitioners argue that the subject 259-acre parcel has a long history of grazing use in conjunction with the remainder parcels from the former 590-acre ranch, and that the testimony the county relied upon to conclude that conjoined use of the subject property with adjacent or nearby resource lands would not be profitable is not supported by substantial evidence, particularly in light of the opposing testimony of area ranchers Holcomb and Kennedy.

With respect to Simonis, petitioners argue that his letter does not include any specific information regarding his cattle operation or the purported loss, what kind of expenses were considered, etc. Without specific information, petitioners argue, any loss Simonis experienced over five years may have been for tax purposes only, and may not have considered the value of reciprocal benefits to Simonis' other grazing lands. Similarly,

petitioners argue that Spencer related no details regarding his cattle operation or the expenses considered, and only terminated the lease after three years when the owner decided to raise the annual lease.

We agree with petitioners that, without specific details regarding the Simonis and Spencer cattle operations, including the nature of the expenses incurred, their testimony that conjoined use of the subject property with the two remaining parcels of the former 590-ranch could not be profitable does not carry much if any weight. For example, Simonis does not elaborate on why his cattle operation was not "profitable," and in particular does not indicate whether his views on the profitability of that operation took into account mortgage payments on the parcel's acquisition in 1995. Spencer is similarly vague about what expenses or limitations rendered his cattle operation unprofitable, and his testimony can be read to suggest that the main reason he terminated cattle operations after three years was that the owner intended to increase the $18,000 annual lease amount. We note also that Holcomb and Kennedy submitted budgets with much more specific information. The county criticized those budgets for failure to take some expenses into account, yet found "compelling" the much less detailed testimony submitted by Simonis and Spencer, which describe few if any expenses.

Somewhat stronger support for the county's conclusion with respect to conjoined use comes from intervenor's profitability study. The study evaluated a scenario in which the subject 259-acre parcel is used in conjunction with the two remainder parcels of the former 590-acre parcel, and essentially extrapolated expenses from an independent operation on the subject property to a joint operation. Based on that extrapolation, the study estimated annual losses of $72,153.72 from a joint operation. Record 250. In addition, the study evaluated conjoined use with two other adjoining resource-zoned parcels totaling 109 acres, and estimated an annual deficit of $83,210.38. Both estimates include $51,109.40 in annual mortgage payments for the subject property, and are therefore flawed for the reasons

discussed above. However, even if mortgage costs are completely subtracted and no land costs are assumed at all, the study shows significant annual deficits. Petitioners repeat their challenges to some of the study's assumptions regarding expenses. However, as explained above, those challenges, if sustained, would not result in anything near a positive financial outcome. We cannot say that petitioners' challenges, or the budgets submitted by Holcomb and Kennedy, so undermine the study's conclusions with respect to joint use that the county could not rely upon the study. A reasonable person could conclude, based on the study, that a joint grazing operation of the subject property and adjacent resource properties would likely not yield a profit and therefore the subject property is not suitable for farm use, even considering the possibility of conjoined use with adjacent and nearby properties.

As a final point, petitioners argue that the county erred in rejecting the possibility of conjoined use with parcels in the vicinity owned or leased by Holcomb or Kennedy. The county found that neither Holcomb nor Kennedy identified the location of "nearby" property they own or lease, so the county could not evaluate whether conjoined use is possible with those properties for purposes of OAR 660-033-0030(3). Petitioners cite to a statement by Holcomb that he leases property within two miles of the property, and argues that that property is "nearby" for purposes of OAR 660-033-0030(3).

From Holcomb's and Kennedy's testimony, it seems that one model for cattle ranching in Douglas County is to lease or purchase various noncontiguous parcels, and to ship cattle from one site to another for seasonal grazing, to rest pastures, allow hay to be grown, etc. That in fact was the model under which the subject property was used for many years, with cattle grazed on the property and then shipped to distant pastures during part of the year. However, the focus of OAR 660-033-0030(3) is on conjoined use with "nearby or adjacent" properties. In this context, we think "nearby" means property within a relatively short geographic distance, property that is almost or nearly adjacent. We do not think the county is required by OAR 660-033-0030(3) to consider conjoined use with property that is

miles away from the subject property, or separated by a significant number of other parcels. If that were the standard, there would be no end to the parcels the county must analyze. Accordingly, we disagree with petitioners that the county was required to consider conjoined use with property two miles away from the subject property.

C. Weight Placed on Profitability

Petitioners argue that on remand the county placed an impermissible weight on the question of profitability, and relatively less weight on the factors set out in OAR 660-033-0020(1)(a)(B), in concluding that the subject property is not suitable for farm use. Petitioners note that in *Wetherell v. Douglas County*, __ Or LUBA __ (LUBA No. 2009-004, April 30, 2009), LUBA characterized profitability as a "relatively minor consideration, and one with a large potential for distracting the decision maker and the parties from the primary considerations listed in the rule definition * * *." Slip op 20.

A central focus of the earlier appeal in this case, and of LUBA's remand, was the issue of profitability, so it is not surprising that the county's focus on remand, as reflected in its findings, was on that issue. As discussed above, in the initial decision the county adopted findings addressing all of the factors listed in OAR 660-033-0020(1)(a)(B), concluding that consideration of each factor supports the county's ultimate conclusion that the subject property is not "other lands suitable for farm use." We previously held that petitioners' challenge to those findings in the present appeal were waived. Profitability is a permissible consideration under OAR 660-033-0020(1)(a)(B). We might agree with petitioners that the county placed too much weight on profitability if the county had found that most or all of the factors listed in the rule indicate suitability for farm use, but notwithstanding those considerations the county relied primarily on profitability to conclude that the subject property is not agricultural land. But that is not the case in this appeal. Petitioners have not demonstrated that the county erred in assigning too much weight to the question of profitability.

D. Farm Unit

OAR 660-033-0020(1)(b) defines "agricultural land" to include "[l]and in capability classes other than [I-IV] that is adjacent to or intermingled with lands in capability classes [I-IV] within a farm unit," even if the land "may not be cropped or grazed." *See* n 3. In *Wetherell I*, we discussed recent opinions from the Court of Appeals and LUBA addressing the "farm unit" prong of OAR 660-033-0020(1)(b):

> As *Riggs* [*v. Douglas County*, 167 Or App 1, 8, 1 P3d 1042 (2000)] 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. In our view, the most important additional consideration is whether there is some significant obstacle to resumed joint operation. In *Wetherell* [*v. Douglas County*, 50 Or LUBA 167 (2005)], 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 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)." Slip op 20-21 (footnote omitted).

Accordingly, we remanded the initial decision to the county to consider whether the subject property can be viewed as part of a "farm unit" with the two remainder parcels of the former 590-acre ranch, for purposes of OAR 660-033-0020(1)(b).

On remand, the county concluded that the former 590-acre ranch was not a viable "farm" and therefore the subject 260-acre parcel was not part of a "farm unit" for purposes of OAR 660-033-0020(1)(b). That conclusion was based on the testimony of Simonis and Spencer that the former 590-acre ranch had not operated "profitably" since 1995 and the study's conclusion that future conjoined use would not be profitable.[7]

On appeal, petitioners argue that profitability is not a consideration under the farm unit prong of OAR 660-033-0020(1)(b). Intervenor responds that the term "farm unit" is not defined in the rule or Goal 3, but that the term implicitly incorporates the concept of an economically viable farm operation, which permits the county to consider whether farm use of the former 590-acre ranch has been or is likely to be profitable.

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[7] The county's findings state, in relevant part:

> "The Commission finds that the compelling testimony by Mr. Spencer and Mr. Simonis together with the professional analysis performed by Mr. Caruana, demonstrate convincingly that the property comprising the former 590-acre ranch is not a farm unit containing the subject property. While there is some historic use of the property being managed in conjunction with the other properties to the north and east, the evidence clearly demonstrates that joint management of the 590-acre ranch for grazing and haying activities similar to its historic use is not possible. The evidence reflects that the 590-acre ranch is not suitable for farm use and has not been a single operating farm unit since at least 1995, despite repeated attempts to manage it for that purpose.
>
> "Each rancher of the 590 acres, despite considerable advantages (including alternative irrigated pasture, trucking companies, significant economies of scale, relationships in cattle industry) has found that ranch with its poor soils, poor forage, and lack of water is not suitable for farm use. Expensive efforts have been made in coming to this conclusion including attempts at pasture improvement, water development, and other management activities. All have failed. Goal 3 is intended to preserve large units of agricultural land as agricultural land. It is not intended to preserve as agricultural land units that are not suitable for farm use, simply because they may have been at some time in the past. Since the former 590-acre unit is not a viable farm unit, the Commission finds that the property should not be classed as agricultural land." Record 20.

Petitioners are correct that OAR 660-033-0020(1)(b) does not refer to profitability and, unlike OAR 660-033-0020(1)(a)(B), does not use the phrase "farm use as defined at ORS 215.203(2)(a)," the source of the Supreme Court's holding that profitability can be considered in determining whether land is agricultural land for purposes of OAR 660-033-0020(1)(a)(B). We agree with petitioners that whether or not a "farm unit" has been or can be farmed "profitably" is not a consideration for purposes of the "farm unit" prong. The question under OAR 660-033-0020(1)(b) is whether the subject property is properly viewed as part of a "farm unit," despite the recent cessation of joint use. From *Riggs*, it is clear that the mere fact of partition and the recent cessation of joint use is not sufficient to dismember a "farm unit" for purposes of OAR 660-033-0020(1)(b). In *Wetherell*, 50 Or LUBA 167, we held that where a farm unit was recently broken up, a finding that a parcel no longer forms part of a "farm unit" can be supported by "additional considerations," the most important of which is whether there is some significant obstacle to resumed joint operation. We held that the physical dissimilarities and operational changes between the two halves of the former farm unit at issue in *Wetherell* constituted sufficient impediments to resumed joint use to support a conclusion that the subject parcel was no longer part of a "farm unit."

In the present case, petitioners argue that there are no physical or other impediments to resuming a joint grazing/hay operation on the three parcels of the former 590-acre ranch. According to petitioners, the other two parcels have similar soils and conditions to the subject 260-acre parcel, are still zoned for agricultural use, and continue to be used for pasturing cattle. Petitioners contend that no physical or other relevant changes have occurred in the relationship between the elements of the former ranch in recent years that would preclude resumption of a hay/grazing operation similar to one that operated on the 590-acre ranch for decades.

The county found that:

> "Opponents argue that the property must be considered as part of a farm unit because there is no physical impediment to its joint use. The Commission

> disagrees. The limitations on soil, water and forage within the 590-acre ranch constitute physical limitations which preclude joint farm use on that ranch. The fact that properties have been historically managed together does not make them part of a 'farm unit.' Physical impediments (while they may be considered) are not the only impediments to the viability of a former parcel as a 'farm unit.' The 590-acre ranch has not been suitable for farm use as a unit for at least 14 years. Given this lapse of time and the fact the former elements of the subject property would not be suitable for farm use if they were managed together today, the Commission finds that it is improper to consider the property as part of a 'farm unit' comprising the former 590-acre ranch. Accordingly, the Commission finds that the property is not agricultural land under this standard." Record 20.

Intervenor responds that petitioners do not acknowledge or respond to the above-quoted finding. However, petitioners clearly dispute that there are any physical impediments precluding resumed joint use, and argue that soils and other pertinent conditions on the 590-acres comprising the former ranch have not changed since cessation of joint use. That seems sufficient to challenge the county's conclusion that "limitations on soil, water and forage within the 590-acre ranch constitute physical limitations which preclude joint farm use on that ranch." The county does not identify any changes that have occurred with respect to soil, water or forage on the former 590-acre ranch since the ranch was partitioned that would preclude a resumed hay/grazing operation similar to that conducted on the ranch for many years.

The above-quoted finding also identifies "non-physical" limitations, essentially evidence that cattle operations on the ranch since 1995 have not been profitable and therefore the ranch was not a "viable" farm unit to begin with. However, petitioners argue, and we have agreed, the county erred in considering the profitability of a cattle operation on the former 590-acre ranch for purposes of the farm unit prong of OAR 660-033-0020(1)(b). Again, the relevant questions for purposes of OAR 660-033-0020(1)(b) is whether the subject property is or was recently part of a "farm unit" and, if so, whether there are any significant impediments to continued or resumed joint farm use. Whether the farm unit is or was "profitable" is not a consideration.

There can be no possible dispute that the former ranch was a "farm unit" for purposes of OAR 660-033-0020(1)(b), with a long and a recent history of use for a hay/grazing operation that included the subject property. In such a circumstance, it seems difficult to adopt a sustainable conclusion that the subject property is no longer part of the farm unit due to recent partition and cessation of joint use, absent a finding, supported by substantial evidence, that something fundamental has changed that would preclude a resumption of a farm operation using the elements of the former ranch. The county has identified no such changes, and its finding that the subject property is not "agricultural land" under OAR 660-033-0020(1)(b) is therefore erroneous and not supported by the record.

The second assignment of error is sustained, in part.

CONCLUSION

We recognize that there is an apparent contradiction in (1) affirming the county's conclusion that the subject property is not suitable for farm use as defined in ORS 215.203(2)(a), for purposes of OAR 660-033-0020(1)(a)(B), based in part on evidence that the subject property cannot profitably be used in conjunction with the other parcels of the former 590-acre ranch, and yet (2) rejecting the county's conclusion that the subject property is not agricultural land under the "farm unit" prong of OAR 660-033-0020(1)(b), because evidence of profitability or lack of profitability in a "farm unit" is not a consideration under that prong. However much that appears to defy common sense, it is a product of the particular language of the rules in question. OAR 660-033-0020(1)(a)(B) explicitly refers to the definition of "farm use" at ORS 215.203(2)(a), which in turn incorporates considerations of profitability into the definition. OAR 660-033-0020(1)(b) does not use the term "farm use," refer to ORS 215.203(2)(a), or include any suggestion that the profitability of a "farm unit" is a consideration under that prong of the agricultural land definition. In this regard, OAR 660-033-0020(1)(b) is similar to the first definition of agricultural lands under OAR 660-033-0020(1)(a)(A), which includes lands with

predominantly Class I-IV soils in Western Oregon or Class V-VI soils in Eastern Oregon. Land with soils that qualify under OAR 660-033-0020(1)(a)(A) is agricultural land under the definition, regardless of whether or not it can be profitably farmed.

The reasoning in the Supreme Court's *Wetherell* decision that profitability can be considered for purposes of OAR 660-033-0020(1)(a)(B) could, conceivably, be extended to the farm unit prong of OAR 660-033-0020(1)(b), notwithstanding the textual differences between the rules. However, that would be a significant extension and one that would make the farm unit prong of the definition largely indistinguishable from the "suitable for farm use" prong.

But there is another reason why we believe a conclusion regarding the profitability of conjoined use under OAR 660-033-0020(1)(a)(B) does not compel a similar conclusion regarding whether the subject property is part of a "farm unit" for purposes of OAR 660-033-0020(1)(b). As we explained in *Wetherell I* and other cases, an evaluation of profitability is highly manipulable, with the results depending largely on the assumptions used with respect to revenues and expenses. We have endeavored in this opinion and others to provide some guidelines and sideboards to improve the reliability of a profitability evaluation, but the fact remains that depending on the assumptions employed, it is possible to conclude that almost any unit of less-than-prime farmland can or cannot be profitably farmed. In the present case, petitioners challenged some of the assumptions in the study that the county chose to rely upon, but those challenges, even if sustained, were insufficient to render the study insubstantial evidence. Under the traditional deference LUBA must grant to a local government's evidentiary choices when there is conflicting expert testimony in the record, we rejected petitioners' challenges and affirmed the county's findings with respect to whether the subject property is other land suitable for farm use under OAR 660-033-0020(1)(a)(B), considering the possibility of conjoined use with adjacent and nearby parcels. However, in our view, the inherent manipulability and unreliability of any profitability

evaluation cautions against extending and relying on that type of evaluation in other contexts, such as determining whether the subject property is part of a "farm unit" for purposes of OAR 660-033-0020(1)(b).

Finally, with respect to the disposition of this appeal, this is the second time we have rejected the county's rationale for concluding that the subject property is not agricultural land under the "farm unit" prong of OAR 660-033-0020(1)(b). As we understand the farm unit test, the county could not reach a sustainable conclusion that the subject property is not agricultural land under that prong, based on this record or any likely amendment to the present record. Therefore, we conclude that the county's decision "violates a provision of applicable law and is prohibited as a matter of law," and must be reversed rather than remanded. OAR 661-010-0071(1)(c). Normally, when we reverse a decision under one assignment of error it is unnecessary to reach other, non-dispositive assignments of error. However, in the present case given the unsettled nature and importance of the issues raised, and the likelihood of appeal, we deem it appropriate to consider and resolve all issues.

The county's decision is reversed.

Ryan, Board Member, concurring.

I concur in the majority reasoning and result. With respect to the discussion of land costs in the second assignment of error, third sub-assignment of error, I agree that it is inappropriate to consider debt service costs where that debt service reflects a purchase price that includes other rights associated with acquiring a fee simple interest in agricultural land in evaluating profitability, for the reasons stated in the opinion. I write separately to address a larger and more troubling issue with including any land costs, including lease costs, in calculating profitability under OAR 660-033-0020(1)(a)(B)(1).

As the majority explained, to the extent land costs can be considered at all, the focus must be on the cost a reasonable farmer would pay to obtain the right to put the subject property to farm use, and no other values associated with a property interest in the land.

However, there is a reciprocal relationship between (1) the land cost associated with acquiring the right to use property for farm use, and (2) the expectation of profit that can realized from farm use of that property. Simply put, if due to soils or other limitations a reasonable farmer would not deem it likely that farm use of a parcel could produce a profit over time, then the amount that farmer would pay to lease a parcel *solely* for the right to put that parcel to farm use is essentially zero. Conversely, if a reasonable farmer would pay *any* significant amount over zero in rent solely for the right to put land to farm use, that would seem to be substantial evidence that a reasonable farmer would be motivated to put the property to farm use for the primary purpose of obtaining a profit in money. In other words, its seems to me that a reasonable farmer would determine how much, if any, he would be willing to pay to lease land for farm use *only* after first considering the potential revenue and assumed expenses of a farm operation. That is, the cost that a reasonable farmer would pay to lease farm land seems to be more appropriately a conclusion of the profitability analysis that can be calculated only after taking projected revenues and expenses into account.

For that reason, I question our suggestion in *Wetherell I* that it is appropriate to take *any* land costs into account—either the cost to acquire the fee or the cost to lease land—in evaluating whether land is suitable for farm use as defined in ORS 215.203(2)(a), for purposes of OAR 660-033-0020(1)(a)(B)(1). In the present case, the county did not take lease costs into account in calculating profitability, and in fact explicitly declined to consider evidence regarding lease costs, so the issue of whether and how to consider lease costs is not presented in this appeal. If the issue were presented in this appeal, however, for the reasons set out above I would argue that it is inappropriate to consider lease costs in evaluating profitability under OAR 660-033-0020(1)(a)(B)(1).