

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 FRIENDS OF DOUGLAS COUNTY
5 and SHELLEY WETHERELL,
6 *Petitioners,*

7
8 vs.

9
10 DOUGLAS COUNTY,
11 *Respondent,*

12
13 and

14
15 KENNETH LAWSON and LUCINDA LAWSON,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2018-052

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Douglas County.

24
25 Sean Malone, Eugene, filed the petition for review and argued on behalf
26 of petitioners.

27
28 No appearance by Douglas County.

29
30 Jeffrey G. Condit, Portland, filed the response brief and argued on behalf
31 of intervenors-respondents. With him on the brief was Miller Nash Graham &
32 Dunn LLP.

33
34 RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board
35 Member, participated in the decision.

36 REMANDED 09/12/2018

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

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NATURE OF THE DECISION

Petitioners appeal a decision by the board of county commissioners determining that a 47-acre property is non-resource land and approving a concurrent comprehensive plan designation and zoning map amendment to allow future rural residential development.

MOTION TO INTERVENE

Kenneth Lawson and Cynthia Lawson (intervenors), the applicants below, move to intervene on the side of respondent. No party opposes the motion, and it is granted.

FACTS

Intervenors applied for an amendment to the comprehensive plan map designation from Agricultural to Rural Residential-5 Acre with a corresponding zone change from Farm Grazing to Rural Residential-5 Acre for a 47-acre property located adjacent to Riversdale, a county-designated rural unincorporated community. The property includes four small hills located in roughly each of the four corners of the parcel, each of which contains stands of oak savanna. The hilly areas have slopes of 25 percent or greater. The property slopes downward from the northwest and northeast in a southerly direction, with a 150-foot elevation change.

A creek that is inventoried as a Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) resource is located on

1 the property and drains to the North Umpqua River. The property has water
2 rights from the North Umpqua River that are available to 8.3 acres in the
3 southern part of the property. Wetlands are also present on the property. The
4 property has been used for rotational grazing under a ten-year lease agreement
5 with Kennedy Ranch, which is based in nearby Oakland, Oregon,
6 approximately 17 miles from the property. Record 121.

7 The board of county commissioners concluded that the subject property
8 is not “agricultural land” as defined in OAR 660-033-0020(1) because the
9 stands of oak savanna and the wetlands present on the property prevented the
10 use of all but four acres of the 47-acre subject property for grazing. This appeal
11 followed.

12 **FIRST ASSIGNMENT OF ERROR**

13 Petitioners’ single assignment of error includes three subassignments of
14 error. We first set out the applicable law before turning to petitioners’
15 subassignments of error.

16 **A. Agricultural Land**

17 Statewide Planning Goal 3 (Agricultural Land) provides, in part:

18 “Agricultural lands shall be preserved and maintained for farm
19 use, consistent with existing and future needs for agricultural
20 products, forest and open space and with the state’s agricultural
21 land use policy expressed in ORS 215.243 and 215.700.”

22 OAR 660-033-0020(1)(a), in turn, defines “agricultural land” for purposes of
23 Goal 3 to include:

1 “(A) Lands classified by the U.S. Natural Resources
2 Conservation Service (NRCS) as predominantly Class I-IV
3 soils in Western Oregon * * *;

4 “(B) Land in other soil classes that is suitable for farm use as
5 defined in ORS 215.203(2)(a), taking into consideration soil
6 fertility; suitability for grazing; climactic conditions;
7 existing and future availability of water for farm irrigation
8 purposes; existing land use patterns; technological and
9 energy inputs required; and accepted farming practices; and

10 “(C) Land that is necessary to permit farm practices to be
11 undertaken on adjacent or nearby agricultural lands.”

12 OAR 660-033-0020(1)(b) additionally defines agricultural land to include
13 “[l]and in capability classes other than I-IV/I-VI that is adjacent to or
14 intermingled with lands in capability classes I-IV/I-VI within a farm unit,”
15 even if the land “may not be cropped or grazed.”

16 The predominant soils on the subject property (64.5 percent) are Class
17 VI-VII soils, with some Class II-IV soils comprising the remaining soils on the
18 property. Therefore, the subject property does not qualify as agricultural land
19 under OAR 660-033-0020(1)(a)(A).

20 The “suitable for farm use” test in OAR 660-033-0020(1)(a)(B) refers to
21 the definition of “farm use” at ORS 215.203(2)(a), which in relevant part
22 means “the current employment of land for the primary purpose of obtaining a
23 profit in money” by engaging in a number of listed agricultural pursuits,
24 including the “feeding, breeding, management and sale of, or the produce of,
25 livestock, poultry, furbearing animals or honeybees or for dairying and the sale

1 of dairy products or any other agricultural or horticultural use or animal
2 husbandry or any combination thereof.”

3 **B. First Subassignment of Error**

4 In their first subassignment of error, petitioners argue that the county
5 improperly construed OAR 660-033-0020(1)(a)(B) when it failed to consider
6 approximately 43 acres of the property that contain oak savanna stands and
7 wetlands in determining whether the subject property is “suitable for farm use”
8 and in particular, “suitabl[e] for grazing.” Petitioners argue that nothing in
9 OAR 660-033-0020(1)(a)(B) allows the county to exclude from consideration
10 of whether the property is suitable for grazing large portions of property that
11 possess oak savanna stands on steep slopes or wetlands, when those areas are
12 not prohibited from being farmed under local, state, or federal laws.

13 Intervenors argued, and the county concluded, that a total of 43 acres of
14 the 47-acre property are “environmentally constrained,” due to the presence of
15 wetlands, stands of oak savanna that are on steeply sloped land with
16 “constrained soils,” and the Goal 5 protected stream and its associated riparian
17 buffer. Record 9. The county also found that removing the oak savanna stands
18 in order to facilitate more intensive grazing of the property would harm
19 “significant wildlife habitat and would be difficult and expensive given the
20 slopes on the site.” *Id.* The county concluded that the stands of oak savanna are
21 a “significant environmental resource and habitat area,” even though the county
22 acknowledges that oak savanna are not identified in the county’s

1 comprehensive plan as a Goal 5 resource. *Id.* The county excluded those 43
2 acres from its analysis of whether the property is “suitable for farm use.” *Id.*

3 According to petitioners, nothing in OAR 660-033-0020(1)(a)(B) allows
4 the county to exclude, due to the presence of oak savanna stands or wetlands,
5 “land in other soil classes” from consideration regarding whether it is “suitable
6 for farm use.” Petitioners argue that farm use and in particular grazing of the
7 oak savanna and wetlands is not prohibited by any local, state, or federal law
8 and that rotational grazing has occurred on those portions of the property. We
9 also understand petitioners to argue that identifying those lands as
10 “environmentally constrained” has no basis in OAR 660-033-0020(1)(a)(B),
11 and that the county’s conclusion that those portions of the property are
12 “environmentally constrained” for farm use is not supported by substantial
13 evidence in the record. Finally, we understand petitioners to argue that the
14 evidence in the record demonstrates that the property is “suitabl[e] for
15 grazing.”

16 Intervenors respond that the “environmental constraints” identified by
17 intervenors are relevant to the consideration of whether a property is “suitable
18 for farm use” under OAR 660-033-0020(1)(a)(B), and that the county properly
19 considered only the four acres scattered throughout the property that
20 intervenors’ land use consultant identified as “unconstrained” by the presence
21 of wetlands or oak savanna in determining whether the property is “suitabl[e]
22 for grazing.”

1 We agree with petitioners that the county improperly construed OAR
2 660-033-0020(1)(a)(B) when it failed to consider whether the 43 acres of the
3 property that include oak savanna stands and wetlands are “suitable for farm
4 use.” As noted, the stands of oak savanna are not identified in the county’s
5 comprehensive plan as resources protected under Goal 5. Although wetlands
6 are a protected Goal 5 resource in the county, the county’s comprehensive plan
7 does not identify any protected wetlands located on the property.¹ In addition,
8 intervenors and the county identify no obvious characteristics of those portions
9 of the property that preclude their suitability for “farm use.” Petitioners note,
10 and intervenors do not dispute, that no regulation prohibits the grazing that has
11 been occurring in any wetlands on the property.² Petition for Review 23.

12 The question that OAR 660-033-0020 requires the county to answer is
13 whether the *subject property* is agricultural land, *i.e.*, “suitable for farm use,”
14 taking into account the seven factors listed in the rule. Where the so-called
15 constrained land is not limited in its use for farming by local, state, or federal
16 law, labeling it as “constrained” does nothing to limit the required analysis

¹ Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill materials into waters of the United States, including wetlands. The CWA exempts normal farming and ranching activities from the requirement to obtain a permit under Section 404 if the activities are part of an established, ongoing operation. Section 404(f)(1).

² Douglas County Land Use and Development Ordinance (LUDO) 3.32.200(3) imposes a *building* setback of fifty feet from a water course such as a wetland.

1 regarding whether the subject property is suitable for farm use.³ Accordingly,
2 the county’s conclusion — that those portions of the property that include oak
3 savanna and non-delineated wetlands should not be included in the evaluation
4 of whether the subject property is “suitable for grazing” — improperly
5 construes OAR 660-033-0020(1)(a)(B).

6 Intervenor’s response and the county’s decision to exclude 43 acres from
7 its analysis are that no reasonable farmer would be motivated to put those so-
8 called “constrained” portions of the subject property to agricultural use,
9 including grazing, “for the primary purpose of obtaining a profit in money.”
10 *Wetherell v. Douglas County*, 62 Or LUBA 80, 83 (2010) (“a factor that a local
11 government may consider in addition to the seven factors listed in the rule is
12 whether a reasonable farmer would be motivated to put the land to agricultural
13 use, including grazing, for the primary purpose of obtaining a profit in
14 money”). However, the county’s initial analytical error in excluding 43 acres
15 from consideration as to whether the property is suitable for farm use or
16 grazing means that the county has not yet answered the question of whether a
17 reasonable farmer would put the subject property to farm use and/or grazing.⁴

³ Intervenor’s may be correct that the oak savanna on steep slopes and the wetlands would be difficult to develop residentially, but that is not the question OAR 660-033-0020 poses.

⁴ Our resolution of this assignment of error makes it unnecessary to address intervenor’s arguments that petitioners are precluded by ORS 197.763(1) and ORS 197.835(3) from raising certain issues.

1 Intervenor offer no other basis for excluding the approximately 43 acres that
2 the county failed to evaluate for whether those lands are “suitable for farm
3 use.” Accordingly, remand is required for the county to correct that analytical
4 error by considering the entire property in determining whether the property is
5 “suitable for farm use” within the meaning of OAR 660-033-0020(1)(a)(B).

6 The first subassignment of error is sustained.

7 **C. Second Subassignment of Error**

8 In their second subassignment of error, petitioners argue that those
9 portions of the property containing Class VI soils are considered usable for
10 pasture land and grazing. Accordingly, petitioners argue, the presence of those
11 soils means that the subject property is “suitable for farm use * * * taking into
12 consideration soil fertility.” OAR 660-033-0020(1)(a)(B).

13 Intervenor respond, and we agree, that the presence of soils that are
14 considered usable for pasture land is not dispositive in conducting the inquiry
15 required under OAR 660-033-0020(1)(a)(B). Rather, the fact that some
16 percentage of soils on the property are considered usable for pasture land is one
17 of the seven considerations that are listed in the rule in determining whether
18 land that is not Class I-IV is “suitable for farm use.” There may be other
19 reasons under other considerations that support a conclusion that property with
20 soils that are considered usable for pasture land is not “suitable for farm use”
21 and/or “suitabl[e] for grazing.”

22 The second subassignment of error is denied.

1 **D. Third Subassignment of Error**

2 OAR 660-033-0020(1)(b) provides that “agricultural land” includes
3 “[l]and in capability classes other than I-IV/I-VI that is adjacent to or
4 intermingled with lands in capability classes I-IV/I-VI within a farm unit,”
5 even if the land “may not be cropped or grazed.” Petitioners argue that grazing
6 on the subject property on a rotational basis has occurred under a ten-year lease
7 from intervenors to Kennedy Ranch, which, as noted, is based in nearby
8 Oakland, Oregon. During the proceedings before the county, petitioners argued
9 that adjacent and nearby properties have been used for grazing by the Kennedy
10 Ranch for several years. Intervenors argue that nothing in the record establishes
11 that the subject property has been used for grazing in conjunction with adjacent
12 or nearby properties.

13 In its findings addressing OAR 660-033-0020(1)(b), the county found:

14 “[T]he only farm use that has been conducted on the Subject
15 Property in the 21 years since [intervenors] purchase[d] the
16 Subject Property is the aforementioned rotational grazing by [the
17 Kennedy Ranch] farming operation in Oakland. As noted above,
18 that use is occurring at a limited and non-commercial level. The
19 physical constraints on the site, including the hills, slopes, stream,
20 wetlands, forested hilltops, and substandard soils make it highly
21 unlikely that the Subject Property would ever be combined with an
22 adjacent farming operation to form a farm unit. For these reasons,
23 the * * * Subject Property is not ‘adjacent to or intermingled with
24 lands in capability classes I-IV within a farm unit’ within the
25 meaning of OAR 660-33-[0020(1)(b)].” Record 11.

26 Petitioners argue that the county’s findings are inadequate to explain why the
27 subject property is “not adjacent to or intermingled with lands in capability

1 classes I-IV * * * within a farm unit,” because the findings improperly focus
2 only on the subject property and do not address the grazing that is occurring on
3 the property as well as on properties adjacent and nearby to the subject
4 property. Record 379, 860.

5 We agree with petitioners. The county’s findings are not responsive to
6 the question posed by OAR 660-033-0020(1)(b), which asks whether the
7 subject property is “agricultural land” because it is “adjacent to or intermingled
8 with lands in capability classes I-IV/I-VI within a farm unit.”⁵ The county’s
9 findings do not determine whether the subject property and adjacent and nearby
10 properties that are being grazed are part of a “farm unit.”
11 *See Riggs v. Douglas County*, 37 Or LUBA 432, 438 (1999), *aff’d* 167 Or App
12 1, 1 P3d 1042 (2000) (“Lands in diverse ownership that are nonetheless jointly
13 managed as a single operating farm unit may constitute a ‘farm unit’ for
14 purposes of OAR 660-033-0020(1)(b)”). On remand, the county must
15 determine whether the subject property is “adjacent to or intermingled with
16 lands in capability classes I-IV/I-VI within a farm unit.”

⁵ 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.”

- 1 The third subassignment of error is sustained.
- 2 The county's decision is remanded.