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

FRIENDS OF DOUGLAS COUNTY and
SHELLEY WETHERELL,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

KENNETH LAWSON and LUCINDA LAWSON,
Intervenors-Respondents.

LUBA No. 2020-013

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Sean T. Malone, Eugene, filed the petition for review and reply brief and argued on behalf of petitioners.

No appearance by Douglas County.

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

RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board Member, participated in the decision.

REVERSED 08/31/2020

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

Opinion by Ryan.

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 Lucinda Lawson, the applicants below, move to intervene on the side of respondent. No party opposes the motion, and it is granted.

FACTS

The challenged decision is the board of county commissioners' decision on remand from *Friends of Douglas County v. Douglas County*, 78 Or LUBA 180 (2018) (*Lawson I*), determining that intervenors-respondents' (intervenors') property is not agricultural land. We take the pertinent facts from that decision:

> "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.
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> "A creek that is inventoried as a Statewide Planning Goal 5 (Natural

> Resources, Scenic and Historic Areas, and Open Spaces) resource is located on the property and drains to the North Umpqua River. The property has water rights from the North Umpqua River that are available to 8.3 acres in the southern part of the property. Wetlands are also present on the property. The property has been used for rotational grazing under a ten-year lease agreement with Kennedy Ranch, which is based in nearby Oakland, Oregon, approximately 17 miles from the property. Record 121.
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> "The board of county commissioners concluded that the subject property is not 'agricultural land' as defined in OAR 660-033-0020(1) because the stands of oak savanna and the wetlands present on the property prevented the use of all but four acres of the 47-acre subject property for grazing." *Lawson I* at 181-82.[1]

In *Lawson I*, we sustained petitioner's first subassignment of error and concluded that the county improperly construed OAR 660-033-0020(1)(a)(B), set out below, when it failed to consider approximately 43 acres of the property that contain oak savanna stands and wetlands in determining whether the subject property is "suitable for farm use" and, in particular, "suitab[le] for grazing."

We also sustained petitioner's third subassignment of error and concluded that the county's findings were inadequate to explain why the subject property is not agricultural land within the meaning of OAR 660-033-0020(1)(b), which includes "[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." We concluded that the findings

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[1] We refer to the record in *Lawson I* as the "Record" and the record in this appeal as the "Remand Record."

improperly focused only on the subject property and did not address the grazing that was occurring on the subject property as well as on adjacent and nearby properties. Record 379, 860.

On remand, intervenors submitted additional evidence regarding the soils and forage potential on the 43 acres of the subject property that were initially excluded from the analysis under OAR 660-033-0020(1)(a)(B), as well as additional evidence regarding grazing that is occurring on adjacent and nearby lands. The board of county commissioners again approved the application, and this appeal followed.

INTRODUCTION

We briefly describe the applicable law before turning to petitioner's two assignments of error. Statewide Planning Goal 3 (Agricultural Lands) provides, in part:

> "Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state's agricultural land use policy expressed in ORS 215.243 and 215.700."

OAR 660-033-0020(1) was adopted to implement Goal 3 and provides:

> "(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 * * *;
>
> "(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."

The Court of Appeals has explained the different analyses that are required by OAR 660-033-0020(1)(a) and (1)(b):

"OAR 660-33-020(1)(a)(A)[] applies the predominance test in connection with whether the land under consideration itself has the requisite capabilities. OAR 660-33-020(1)(b) is concerned with the different question of whether the land under consideration is adjacent to or intermingled with other land having those capabilities.

" * * * * *

"[T]he question under OAR 660-33-020(1)(b) is locational, *i.e.*, whether land that is not of agricultural quality is interspersed with land that is. In adopting the rule, LCDC could have concluded—and apparently did—that the predominance test is irrelevant to the second question. To qualify as 'agricultural land' under subsection (b), both the higher and lower quality lands must be part of a farm unit. An objective of subsection (b) appears to be to prevent piecemeal fragmentation of farm land and to make all land in the unit part of a contiguous whole. Thus, the rule's purpose is not to measure the quality of particular land in the unit, except to require that the unit contain some class I-IV soils. The fact that all of the land comprises a single operating farm unit makes the quality of particular parts of it a marginal factor in determining whether the unit is 'agricultural,' and a central consideration in identifying the rule's objective to be the preservation of the unit as a whole." *DLCD*

v. Curry County, 132 Or App 393, 397-98, 888 P2d 592 (1995).

SECOND ASSIGNMENT OF ERROR

OAR 660-033-0020(1)(b) provides that "Agricultural Land" includes "[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."[2] Properties to the north and northeast of the subject property, totaling approximately 160 acres, as well as the subject 47-acre property, are used for rotational grazing by the Kennedy Ranch. Remand Record 199, 220, 347. These properties contain soil in capability classes I-IV. *Id.* at 216.

As noted above, in *Lawson I*, we agreed with petitioners that the county's findings were inadequate to explain why the subject property is not "adjacent to or intermingled with lands in capability classes I-IV * * * within a farm unit." *Lawson I*, 78 Or LUBA at 187. On remand, intervenors submitted into the record a report from their consultant (Evans Report) that analyzed adjacent and nearby properties' soil classifications and estimated forage potential based on those soil classes. Remand Record 197-222. The Evans Report concluded:

> "[Intervenors'] property, alone or in combination with potential grazing land in the Riversdale area, provides an insufficient amount of forage to justify participation in any cattle grazing operation. Removal of [intervenors'] 47-acre property will have no material

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[2] The subject property is in western Oregon and, thus, the capability class I-IV language applies to the application.

> negative impact on Kennedy Ranch grazing operations. It does not, as required by OAR 660-033-0020 'contribute in a substantial way to the area's existing agricultural economy.'"[3] *Id.* at 218.

The county's findings rely on the Evans Report's conclusion that the subject property would not add any "significant economic value to grazing operations on adjacent properties." *Id.* at 11. The findings also rely on the definition of "farm unit" in OAR 150-308-1010(2)(a), the Oregon Department of Revenue's administrative rule that applies when a property qualifies for a special property tax assessment under ORS 308A.068 based on "farm use" as defined in ORS 308A.056, to conclude that the subject property is not part of a "farm unit" within the meaning of OAR 660-033-0020(1)(b). *Id.* at 12. OAR 150-308-1010(2)(a) defines "farm unit" as "a farming enterprise which includes all parcels being farmed by a single operator, whether the operator owns or leases the farmland." The findings maintain that there is not a lease because intervenors' arrangement with the Kennedy Ranch is not memorialized in writing and that the "fact [that] Mr. Kennedy has not formalized his relationship with [intervenors] in lease or contract * * * supports [intervenors'] argument that subject property is not part of the Kennedy Ranch." Remand Record 12. The findings also maintain that the property is not a significant part of the Kennedy Ranch operation or part

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[3] The report's quotation of the phrase "contribute in a substantial way to the area's existing agricultural economy" quotes the definition of "Commercial Agricultural Enterprise" in OAR 660-033-0020(2)(a)(A), which is not relevant to the analysis of whether the subject property is "Agricultural Land."

of an existing farm unit because Mr. Kennedy did not object to intervenors' application when "he has objected to past applications involving other properties leased for rotational grazing by Kennedy Ranch." *Id.* The findings further maintain that the use of intervenors' property by the Kennedy Ranch grazing operation is "de minimis." *Id.* The county ultimately concluded that the subject property is not within an existing "farm unit":

> "The Planning Commission concurs with [intervenors'] analysis that the informal nature of the relationship between [intervenors] and the Kennedy Ranch, the de minimis compensation received by [intervenors] for this informal use, and Mr. Evans's conclusion that the property adds no significant grazing value to the surrounding properties all lead to the conclusion that [intervenors'] property is not within an existing farm unit." *Id.*

In the second assignment of error, petitioners argue that the county improperly construed OAR 660-033-0020(1)(b) when it concluded that the subject property is not required to be inventoried as "Agricultural Land." Petitioners argue that the undisputed facts are that the Kennedy Ranch grazing operation includes approximately 160 acres of property located directly to the north and northeast of the subject property, and in fact also includes the subject property. Accordingly, we understand petitioners to argue that the Kennedy Ranch operation is a "farm unit" within the meaning of OAR 660-033-0020(1)(b) as a matter of law, and that the subject property is not only "adjacent to or intermingled with lands in capability classes I-IV/I-VI within a farm unit" but is in fact included within the farm unit. Petition for Review 35.

Intervenors respond that, based on the evidence in the record, the county properly concluded that the subject property is not "adjacent to or intermingled with lands * * * within a farm unit" because there is no written lease between intervenors and the Kennedy Ranch. Intervenors also respond that the minimal amount of compensation that intervenors have received from the Kennedy Ranch demonstrates that the subject property is "not integral" to the ranch operation. Response Brief 21.

We agree with petitioners that the county improperly construed OAR 660-033-0020(1)(b) when it concluded that the property is not agricultural land. As the Court of Appeals noted in *DLCD v. Curry County*, the analysis required by OAR 660-033-0020(1)(b) is one of location, that is, "whether land that is not of agricultural quality is interspersed with land that is." 132 Or App at 398. The subject 47 acres are adjacent to and intermingled with land in capability classes I-IV. More importantly, the subject property is "adjacent to" property that has been and is currently part of the Kennedy Ranch grazing operation. Even under the OAR 150-308-1010(2)(a) definition of "farm unit" on which the county relied—regardless of whether it was correct in doing so, a point on which we express no opinion—the Kennedy Ranch qualifies as a "farm unit" because it is "leased" by the ranch for grazing, which is a "farm use" under ORS 215.203(2)(a). *Riggs v. Douglas County*, 37 Or LUBA 432, 439 (1999), *aff'd*, 167 Or App 1, 1 P3d 1042 (2000) ("ORS 215.203(2)(a) clearly includes the

raising, feeding, management and sale of livestock within the definition of 'farm use'.").

In other words, even if the subject property is not of sufficient agricultural quality to be inventoried as agricultural land in its own right—another point which, as explained below, we need not and do not decide here—we agree with petitioners that the undisputed facts are that the Kennedy Ranch operation is a farm unit, that the subject property is grazed as part of that farm unit, and that the subject property is adjacent to lands in capability classes I-IV within a farm unit. *See Emmons v. Lane County*, 48 Or LUBA 457, 465 (2005) (holding that, where the subject property and adjacent property were farmed together for several decades, they were part of a farm unit as a matter of law). Accordingly, as a matter of law, the subject property is agricultural land as defined in OAR 660-033-0020(1)(b).

The second assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioners challenge the county's conclusion that the subject property is not agricultural land because it is not "suitable for farm use" under OAR 660-033-0020(1)(a)(B). Because we conclude in our resolution of the second assignment of error that the subject property is "adjacent to [and] intermingled with lands in capability classes I-IV/I-VI within a farm unit" under OAR 660-033-0020(1)(b), and therefore agricultural land as a matter of law, even if we agreed with the county that the subject property is not

"suitable for farm use" under OAR 660-033-0020(1)(a)(B), that would not lead us to affirm the decision. Rather, because the county's decision that the subject property is not agricultural land is "prohibited as a matter of law," the appropriate remedy is reversal. OAR 661-010-0071(1)(c).

The county's decision is reversed.