

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

3  
4 LORREN HARWOOD and DEBBIE PETREE,                                    )  
5    )  
6                                   Petitioners,                                    )  
7    )  
8                    vs.    )  
9    )                    LUBA No. 92-001  
10 LANE COUNTY,    )  
11    )                    FINAL OPINION  
12                                   Respondent/                                    )                    AND ORDER  
13                                   Cross-Respondent,                                )  
14                    and    )  
15    )  
16 LARRY FOLTZ and CHARLENE FOLTZ,                                    )  
17    )  
18                                   Intervenors-Respondent/                            )  
19                                   Cross-Petitioners,                                )

20  
21                    Appeal from Lane County.

22  
23                    Lorren Harwood, Junction City, filed the petition for  
24 review and argued on his own behalf.

25  
26                    Stephen L. Vorhes, Eugene, filed a response brief and  
27 argued on behalf of respondent/cross-respondent.

28  
29                    David B. Smith, Tigard, filed the briefs and argued on  
30 behalf of intervenors-respondent/cross-petitioners.

31  
32                    KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,  
33 Referee, participated in the decision.

34  
35                    AFFIRMED    04/27/92

36  
37                    You are entitled to judicial review of this Order.  
38 Judicial review is governed by the provisions of ORS  
39 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the board of county  
4 commissioners approving an application for special use  
5 approval for a dwelling in conjunction with farm use.

6 **MOTION TO INTERVENE**

7 Larry Foltz and Charlene Foltz move to intervene on the  
8 side of respondent in this appeal proceeding. There is no  
9 objection to the motion, and it is allowed.

10 **FACTS**

11 The subject parcel consists of 24 acres and is zoned  
12 Exclusive Farm Use (E-30). Intervenors-respondent  
13 (intervenors) filed an application for approval of a  
14 dwelling in conjunction with farm use on the subject parcel.  
15 The application included a farm management plan under which  
16 ten acres of the subject property were to be planted in  
17 Christmas trees over a period of two years.

18 The planning department approved the application, and  
19 petitioners appealed to the hearings officer. Before that  
20 appeal hearing was held, intervenors planted ten acres of  
21 the subject parcel in Christmas trees. After a public  
22 hearing, the hearings officer reversed the decision of the  
23 planning director and denied the application. Intervenors  
24 appealed to the board of county commissioners. After  
25 intervenors appealed to the board of county commissioners,  
26 the hearings officer decided to reconsider his decision and

1 accept further evidence on two issues. After the hearings  
2 officer's reconsideration hearing, the hearings officer  
3 again issued a decision denying the application.

4 Intervenor's appealed to the board of county  
5 commissioners. The board of county commissioners reversed  
6 the hearings officer and approved the application. This  
7 appeal followed.

8 **FIRST AND FOURTH ASSIGNMENTS OF ERROR**

9 ORS 215.213(2)(b)<sup>1</sup> provides the following may be  
10 allowed in an EFU zone:

11 "A dwelling in conjunction with farm use or the  
12 propagation or harvesting of a forest product on a  
13 lot or parcel managed as a part of a farm  
14 operation or a woodlot \* \* \* if the lot or parcel:

15 "(A) \* \* \* [I]s planted in perennials capable of  
16 producing upon harvest an average of at least  
17 \$10,000 in annual gross farm income[.]

18 "\* \* \* \* \*"

19 Lane County Code (LC) 16.212(3) provides nearly identical  
20 requirements for dwellings in conjunction with farm use in  
21 the E-30 zone.

22 Petitioners argue the challenged decision erroneously  
23 determines the subject parcel is in "farm use" and,  
24 therefore, the proposed dwelling cannot be "in conjunction  
25 with" a farm use. According to petitioners, the subject

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<sup>1</sup>Lane County has adopted marginal lands designations and, therefore, must apply ORS 215.213(1) to (3) to lands zoned EFU, rather than ORS 215.283.

1 property is not in "farm use" for two reasons. First,  
2 petitioners contend that under ORS 215.203(2)(a) and  
3 (3)(a),<sup>2</sup> as well as LC 16.212(3), a parcel used for growing  
4 Christmas trees is not in "farm use" unless it is "used  
5 exclusively" for growing Christmas trees. Petitioners state  
6 the decision does not establish the subject parcel is "used  
7 exclusively" for the production of Christmas trees. Second,  
8 petitioners argue the trees planted on the subject parcel do  
9 not constitute "cultured Christmas trees," as defined by ORS  
10 215.203(3), because the decision fails to establish that the

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<sup>2</sup>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 making a profit in money by raising, harvesting and selling crops \* \* \* or any other agricultural or horticultural use \* \* \* . It does not include the use of land subject to [certain taxation statutes] except land used exclusively for growing cultured Christmas trees \* \* \* ." (Emphasis supplied.)

ORS 213.203(3) defines cultured Christmas trees as trees:

- "(a) Grown on lands used exclusively for that purpose, capable of preparation by intensive cultivation methods such as plowing or turning over the soil.
- "(b) Of a species for which the Department of Revenue requires a 'Report of Christmas Trees Harvested' for purposes of ad valorem taxation;
- "(c) Managed to produce trees meeting U.S. No. 2 or better standards for Christmas trees as specified by Agriculture Marketing Services of the United States Department of Agriculture; and
- "(d) Evidencing periodic maintenance practices of shearing for Douglas fir and pine species, weed and brush control and one or more of the following practices: Basal pruning, fertilizing, insect and disease control, stump culture, soil cultivation, irrigation." (Emphasis supplied.)

1 "periodic maintenance practices" required by ORS  
2 215.203(3)(d) have occurred. Finally, petitioners argue the  
3 decision fails to establish the dwelling is necessary for  
4 the farm use of the property.

5 We disagree with petitioners' interpretation of  
6 ORS 215.203(2)(a), (3)(a) and (d) and 215.213(2)(b)(A). The  
7 issue presented is whether the requirements in  
8 ORS 215.203(2)(a) and (3)(a) that land be "used exclusively"  
9 for growing Christmas trees, and in ORS 215.203(3)(d) for  
10 "evidence of periodic maintenance practices," are applicable  
11 to determining whether a proposed dwelling is "in  
12 conjunction with farm use" under ORS 215.213(2)(b)(A), where  
13 the farm use is growing Christmas trees. As first stated in  
14 Rutherford v. Armstrong, 31 Or App 1319, 1321, 572 P2d 1331  
15 (1977), rev den 281 Or 431 (1978), and reemphasized in  
16 Newcomer v. Clackamas County, 92 Or App 174, 181, 758 P2d  
17 450, modified on other grounds, 94 Or App 33 (1988):

18 "ORS 215.203 was originally enacted as part of a  
19 statutory scheme which had the 'primary purpose of  
20 \* \* \* [providing] property tax relief for farm  
21 land and thus protect[ing] such land from being  
22 diverted to other uses.'" (Citations omitted.)

23 In Newcomer, the Court of Appeals went on to state the  
24 following concerning the "current employment" requirement of  
25 ORS 215.203:

26 "Although [ORS 215.203] also has land use  
27 regulatory features, and it is referred to in some  
28 of the other agricultural lands statutes as well  
29 as Goal 3, the 'current employment' requirement  
30 was designed only as a qualification for favorable

1 tax treatment." (Citations omitted.) Id.

2 We believe the provisions of 215.203(2)(a) and (3)(a)  
3 and (d) relating to the "used exclusively" requirement and  
4 the requirement for "evidence of periodic maintenance  
5 practices" concerning land used for cultured Christmas trees  
6 are similarly designed to be qualifications for particular  
7 tax treatment. The basic definition of "farm use" in ORS  
8 215.203(2)(a) as being the use of land primarily for profit  
9 by "raising, harvesting and selling crops \* \* \* or any other  
10 agricultural or horticultural use" would include raising  
11 Christmas trees. The provisions of ORS 215.203(3) and the  
12 reference to "used exclusively" in the final sentence of ORS  
13 215.203(2)(a) were added to the definition of farm use by  
14 1977 Oregon Laws, chapter 893, section 17a. This Act stated  
15 its function as "Relating to property taxation, creating new  
16 provisions \* \* \*." During the same legislative session,  
17 another legislative enactment amended ORS 215.203 in ways  
18 unrelated to this case. The function of that other  
19 legislation is stated as "Relating to county planning and  
20 land use, creating new provisions \* \* \*." 1977 Or Laws,  
21 ch 766, sec 7.

22 We therefore do not believe the "used exclusively"  
23 requirement of ORS 215.203(2)(a) and (3)(a), or the  
24 "evidence of periodic maintenance practices" requirement of  
25 ORS 215.203(3)(d), are standards applicable to permit  
26 applications for dwellings "in conjunction with farm use"

1 under ORS 215.213(2)(b)(A).

2 Finally, nothing in LC 16.212(3) imposes a requirement  
3 that the land upon which Christmas trees are grown must be  
4 used exclusively for such purposes, or that certain  
5 management practices be employed, before a dwelling may be  
6 considered to be in conjunction with farm use. Accordingly,  
7 petitioners' arguments regarding the exclusive use of the  
8 subject parcel and the lack of certain management practices,  
9 provide no basis for concluding the proposed dwelling is not  
10 "in conjunction with farm use."<sup>3</sup>

11 Regarding petitioners' argument that the challenged  
12 decision fails to establish the dwelling is "necessary" for  
13 farm use of the property, there are no statutory or LC  
14 requirements that a farm dwelling be "necessary" to the farm  
15 use. See Forster v. Polk County, \_\_\_ Or LUBA \_\_\_\_ (LUBA No.  
16 91-108, December 2, 1991), slip op 8. Accordingly, that the  
17 decision fails to determine the dwelling is necessary to  
18 farm uses of the subject property, provides no basis for  
19 reversal or remand.

20 The first and fourth assignments of error are denied.

21 **SECOND ASSIGNMENT OF ERROR**

22 "Lane County misconstrued the applicable law,  
23 failed to make adequate findings of fact, and made  
24 a decision not supported by substantial evidence

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<sup>3</sup>There is no dispute that ten acres of the subject parcel have been planted with trees of an appropriate type to eventually produce Christmas trees.

1 in the record as a whole, in concluding that the  
2 proposed dwelling is on property 'planted in  
3 perennials.'

4 Petitioners contend Christmas trees do not constitute  
5 "perennials." According to petitioners, the LC 16.212(3)  
6 and ORS 215.213(2)(b)(A) requirements that the property be  
7 planted in perennials, are not satisfied by evidence that  
8 the property is planted in Christmas trees. Petitioners'  
9 basis for arguing a Christmas tree is not a perennial is  
10 that a Christmas tree is cut and, thereafter, the tree  
11 cannot produce an agricultural product.

12 Because neither the LC nor ORS chapter 215 defines the  
13 term "perennial," the commonly understood meaning of the  
14 term applies. Sarti v. City of Lake Oswego, 106 Or App 594,  
15 597, \_\_\_ P2d \_\_\_ (1991). Websters Third New International  
16 Dictionary defines perennial as follows:

17 "a plant (as a tree or shrub, or an herb renewing  
18 the top growth seasonally) that lives for an  
19 indefinite number of years."

20 No party argues that any variety of Christmas tree fails to  
21 renew its top growth or is unable to survive for an  
22 indefinite number of years, until it is harvested.<sup>4</sup>  
23 Regardless of whether the particular method for harvesting a  
24 perennial plant may stop the plant's growth cycle, Christmas  
25 trees meet the above quoted definition of perennial.

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<sup>4</sup>Further, there is evidence in the record to support the county's determination that a Christmas tree is a perennial.

1 The second assignment of error is denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 "Lane County misconstrued the applicable [l]aw,  
4 failed to make adequate findings of fact, and made  
5 a decision not supported by substantial evidence  
6 in the record as a whole, in concluding that the  
7 applicant's crops were capable of producing an  
8 average gross [annual] income of at least  
9 \$10,000."

10 Petitioners argue the county misinterpreted the income  
11 standard of LC 16.212(3) and ORS 215.213(2)(b)(A).  
12 Petitioners also argue the evidence in the record does not  
13 support the county's determination that the Christmas trees  
14 planted on the parcel are capable of producing an average of  
15 \$10,000 in gross annual income, as required by LC 16.212(3)  
16 and ORS 215.213(2)(b)(A). We address these arguments  
17 separately below.

18 **A. Interpretation**

19 Petitioners argue LC 16.212(3) and ORS 215.213(2)(b)(A)  
20 require findings that a parcel will annually produce \$10,000  
21 in income.

22 We disagree. Both LC 16.212(3) and ORS  
23 215.213(2)(b)(A) require a determination that the parcel is:

24 "\* \* \* planted in perennials capable of producing  
25 upon harvest an average of at least \$10,000 in  
26 annual gross farm income[.]" (Emphasis supplied.)

27 Accordingly, it is only necessary that the trees produce an  
28 average of \$10,000 gross annual income, not \$10,000  
29 annually, as petitioners contend.

30 This subassignment of error is denied.

1           **B.    Evidentiary Support**

2           We have reviewed the evidence cited by the parties  
3 regarding whether the parcel is planted in Christmas trees  
4 capable of producing an average of \$10,000 in gross annual  
5 income. There is conflicting evidence concerning whether  
6 the trees planted on the parcel are capable meeting the  
7 \$10,000 income standard. However, the conflicting evidence  
8 does not so undermine the evidence relied on by the county  
9 such that it is unreasonable for the county to rely on that  
10 evidence. It is well established that the choice between  
11 conflicting believable evidence belongs to the county.  
12 Vestibular Disorder Consult. v. City of Portland, 19 Or  
13 LUBA 94, 103 (1990). We find the evidence in the record is  
14 such that a reasonable person could conclude that the  
15 Christmas trees planted on the subject parcel satisfy the  
16 \$10,000 income standards contained in ORS 215.213(2)(b)(A)  
17 and LC 16.212(3).

18           This subassignment of error is denied.

19           The third assignment of error is denied.

20           **FIFTH ASSIGNMENT OF ERROR**

21           "Lane County misconstrued the applicable law,  
22 failed to make adequate findings of fact, and made  
23 a decision not supported by substantial evidence  
24 in the record as a whole, in concluding that the  
25 property is small enough to qualify for a dwelling  
26 under Lane Code 16.212(3)(b)."

27           LC 16.212(3)(b) authorizes approval of a dwelling in  
28 conjunction with farm use on "a legal lot that is managed as

1 a part of a farm operation \* \* \* that is smaller than  
2 required under LC 16.212(6)(d)." LC 16.212(6)(d) contains  
3 of list of various agricultural enterprises and  
4 corresponding acreages, among which is "Horticultural  
5 Specialties -- 20 acres."

6 As we understand it, petitioners argue that Christmas  
7 trees, as a "horticultural specialty," have a parcel size  
8 under LC 16.212(6)(d) of 20 acres. Petitioners contend that  
9 because the subject parcel is 24 acres in size, it is not  
10 "smaller than required by LC 16.212(6)(d)" and, therefore,  
11 cannot qualify for a dwelling under LC 16.212(3)(b).

12 We disagree with petitioners' interpretation of  
13 LC 16.212(3)(b). Under LC 16.212(3)(b), a farm dwelling may  
14 be authorized where a "farm operation is smaller than  
15 required under LC 16.212(6)(d)." (Emphasis supplied.)  
16 LC 16.212(3)(b) does not require that the lot or parcel on  
17 which the farm dwelling is proposed to be located be smaller  
18 than the acreages provided in LC 16.212(6)(d).

19 The fifth assignment of error is denied.

20 The county's decision is affirmed.<sup>5</sup>

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<sup>5</sup>Under our disposition of this appeal, we need not reach the arguments contained in intervenors' cross petition for review.