

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county hearings
4 officer denying an application for a farm dwelling.

5 **MOTION TO INTERVENE**

6 The Department of Land Conservation and Development
7 (DLCD) moves to intervene on the side of the respondent.
8 There is no objection to the motion, and it is allowed.

9 **FACTS**

10 The subject property is a 1.5-acre parcel located in
11 the county's Exclusive Farm Use 20 Acre (EFU-20) District.
12 Petitioner, the contract purchaser of the property, applied
13 for a permit to site a farm dwelling there. After a
14 hearing, the county hearings officer denied the application.

15 **INTRODUCTION**

16 To support denial of a land use permit, a local
17 government need only establish the existence of one adequate
18 basis for denial. Horizon Construction, Inc. v. City of
19 Newberg, 28 Or LUBA 632, 635, aff'd 134 Or App 414 (1995);
20 Kangas v. City of Oregon City, 26 Or LUBA, 180 (1993);
21 Rozenboom v. Clackamas County, 24 Or LUBA 433, 437 (1993);
22 Garre v. Clackamas County, 18 Or LUBA 877, 881, aff'd 102 Or
23 App 123 (1990). The challenged decision finds the proposed
24 development fails to comply both with OAR 660-33-135(7) and
25 with certain provisions of Clackamas County Zoning Ordinance
26 (CCZO) 401.04(A). Because we affirm both the county's

1 conclusion that OAR 660-33-135(7) must be applied and its
2 determination of noncompliance with OAR 660-33-135(7), we do
3 not address petitioner's first assignment of error, which
4 states a challenge to the county's application of CCZO
5 401.04(A).

6 **SECOND ASSIGNMENT OF ERROR**

7 Petitioner does not challenge the hearings officer's
8 findings of fact, and concedes that the application does not
9 meet the criteria in OAR 660-33-135(7). Petitioner also
10 does not dispute the county's obligation under ORS 197.646
11 to apply applicable administrative rules to her application.
12 Petitioner challenges only the legal validity of the \$80,000
13 test stated in OAR 660-33-135(7)(a), as that test is applied
14 to her application.

15 OAR 660-33-135(7) provides, in relevant part:

16 "On land identified as high-value farmland^[1], a
17 dwelling may be considered customarily provided in
18 conjunction with farm use if:

19 "(a) The subject tract is currently employed for
20 the farm use, as defined in ORS 215.203, that
21 produced at least \$80,000 (1994 dollars) in
22 gross annual income from the sale of farm
23 products in the last two years or three of
24 the last five years; * * *

25 "* * * * *"

26 Petitioner contends in her petition for review that the

¹"High-value farmland" is defined in OAR 660-33-020(8)(a). It is undisputed that the subject property is high-value farmland.

1 \$80,000 gross annual income requirement was declared invalid
2 in Lane County v. LCDC, 138 Or App 635, 910 P2d 414, on
3 reconsideration 140 Or App 368, ___ P2d ___ (1996).
4 However, the petition for review was filed before the Court
5 of Appeals' decision on reconsideration. In that decision
6 the court said:

7 "[OAR 660-33-120, 660-33-130 and 660-33-135] are
8 invalid only to the extent that they conflict with
9 ORS 215.213. * * * That statute applies to only
10 two counties.^[2] Our opinion, therefore, does not
11 address or affect the validity of the rules as
12 they may apply to counties not subject to ORS
13 215.213."

14 ORS 215.213 contains three separate standards for farm
15 dwellings, none of which is the same as the standard in ORS
16 215.283(1), which governs petitioner's application.^{3,4}

²The two counties are Lane County and Washington County, which adopted marginal lands provisions under ORS 197.247 (1991 Edition). No additional counties may adopt marginal lands provisions. ORS 215.316(1).

³The three different tests for farm dwellings in ORS 215.213 are as follows:

ORS 215.213(1)(g):

"A dwelling customarily provided in conjunction with farm use if the dwelling is on a lot or parcel that is managed as part of a farm operation not smaller than the minimum lot size in a farm zone with a minimum lot size acknowledged under ORS 197.251.

ORS 215.213(2)(a)

"A dwelling in conjunction with farm use or the propagation or harvesting of a forest product on a lot or parcel that is managed as part of a farm operation or woodlot if the farm operation or woodlot.

"(A) Consists of 20 or more acres; and

1 Petitioner contends that notwithstanding the
2 differences between ORS 215.213 and 215.283, the Court of
3 Appeals' analysis with respect to marginal land counties
4 applies equally to non-marginal land counties. We disagree,
5 for reasons stated in DLCD v. Polk County, ___ Or LUBA ___
6 (LUBA No. 96-036, September 10, 1996), slip op 6-14. As we
7 explained, neither Brentmar v. Jackson County, 321 Or 481,
8 900 P2d 1030 (1995), nor Lane County v. LCDC, supra,

"(B) Is not smaller than the average farm or woodlot in the county producing at least \$2,500 in annual gross income from the crops, livestock or forest products to be raised on the farm operation or woodlot."

ORS 215.213(2)(b)

"A dwelling in conjunction with farm use or the propagation or harvesting of a forest product on a lot or parcel that is managed as part of a farm operation or woodlot smaller than required under paragraph (a) of this subsection, if the lot or parcel:

"(A) Has produced at least \$20,000 in annual gross farm income in two consecutive calendar years out of the three calendar years before the year in which the application for the dwelling was made or is planted in perennials capable of producing upon harvest an average of at least \$20,000 in annual gross farm income; or

"(B) Is a woodlot capable of producing an average over the growth cycle of \$20,000 in gross annual income."

⁴ORS 215.283(1) provides, in relevant part:

"The following uses may be established in any area zoned for exclusive farm use:

** * * * *

"(f) The dwellings and other buildings customarily provided in conjunction with farm use.

** * * * **

1 supports a conclusion that the agency rules implementing ORS
2 215.283(1)(f) are invalid. Id. at 13.

3 Because the 215.283(1)(f) standard is considerably less
4 specific than the \$20,000 standard in ORS 215.213(2)(b) that
5 was at issue in Lane County, it lends itself to agency
6 interpretation. See Newcomer v. Clackamas County, 94 Or App
7 33, 764 P2d 927 (1988). OAR 660-33-135(7)(a) specifically
8 requires that a property be "currently employed for the farm
9 use, as defined in ORS 215.203." ORS 215.203(2)(a) limits
10 "farm use" to "the current employment of land for the
11 primary purpose of obtaining a profit in money."⁵ (Emphasis
12 added.)

13 The \$80,000 standard, which the Court of Appeals found
14 conflicts with ORS 215.213(2)(b), is not inconsistent with

⁵ORS 215.203(2)(a) states:

"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 and storage of the products raised on such land for human use and animal use and disposal by marketing or otherwise. "Farm use" also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. 'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic species. It does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in subsection (3) of this section or land described in ORS 321.267 (1)(e) or 321.415 (5)."

1 ORS 215.283(1)(f). It helps to clarify the level of
2 required farm activity for farm dwellings. It "refines the
3 statutory tests and promotes the general statutory policy of
4 restricting farm dwellings to those which are connected with
5 farm use." Newcomer, supra, at 39. The county acted
6 properly in applying OAR 660-33-135(7).

7 The second assignment of error is denied.

8 The county's decision is affirmed.