



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

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1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of a conditional use application to mine soil on  
4 property within an Exclusive Farm Use (EFU) zone.

5 **MOTION TO INTERVENE**

6 Peter Kenagy, Duane L. Coyier, Shirley M. Coyier, Robert E. Frenkel, Liz Frenkel,  
7 Cliff Kenagy, Mary Eichler, Robert L. Rickert, Gwen Rickert, Stanley P. Snyder, and Louise  
8 H. Snyder move to intervene on the side of respondent. There is no opposition to their  
9 motions, and they are allowed.

10 **FACTS**

11 The subject property is a 30-acre portion of a 132-acre parcel zoned EFU that has  
12 been farmed for more than 50 years. The soils on the subject property consist almost entirely  
13 of high-value Class II soils. On June 3, 1998, petitioner filed a conditional use permit  
14 application with the county to mine the top six feet of topsoil of the subject property and sell  
15 the topsoil offsite for landscaping purposes. After the topsoil is removed, petitioner proposes  
16 to reclaim the subject property by converting it for use as a wetland and wildlife habitat.

17 The county planning commission denied petitioner's application. Petitioner then  
18 filed a circuit court action seeking a judgment declaring that creation of a wetland including  
19 the removal of topsoil is an outright permitted use under ORS chapter 215. The circuit court  
20 ruled that the proposed use was not limited to creation of a wetland, but also included a  
21 proposal to mine material, including soil, from the subject property. The circuit court ruled  
22 that such mining is an activity that ORS chapter 215 subjects to county regulation. The court  
23 decided that petitioner must obtain a conditional use permit to conduct the proposed soil  
24 removal.

25 After the circuit court's decision, petitioner reactivated a pending appeal of the  
26 planning commission's denial to the county board of commissioners. On April 27, 1999, the

1 board of commissioners voted to deny the appeal, affirming the planning commission's  
2 denial of the application. This appeal followed.

### 3 **ASSIGNMENT OF ERROR**

4 Benton County Code (BCC) 53.215 provides that a decision to approve a conditional  
5 use permit must satisfy three criteria.<sup>1</sup> The county found that the proposed use complied  
6 with all criteria in BCC 53.215 with the exception of BCC 53.215(1), which requires a  
7 demonstration that the proposed use does not seriously interfere with "the purpose of the  
8 zone."

9 In the challenged decision, the county examined the purpose statement of the EFU  
10 provisions at BCC 55.005(1).<sup>2</sup> The county found that BCC 55.005(1) is designed to  
11 implement Statewide Planning Goal 3 (Agricultural Lands)<sup>3</sup> and the state's agricultural land

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<sup>1</sup>BCC 53.215 provides:

"The decision to approve a conditional use permit shall be based on findings that:

- "(1) The proposed use does not seriously interfere with uses on adjacent property, with the character of the area, or with the purpose of the zone.
- "(2) The proposed use does not impose an undue burden on any public improvements, facilities, utilities, or services available to the area; and
- "(3) The proposed use complies with any additional criteria which may be required for the specific use by this code."

<sup>2</sup>BCC 55.005(1) provides that the purpose of the county's EFU zone is to:

"preserve and protect lands for continued and future commercial agricultural production and related uses, and conserve and protect open space, wildlife habitats, and other uses associated with agriculture. Except as otherwise provided by this code, the Exclusive Farm Use Zone shall preserve and maintain areas classified for farm use free from conflicting nonfarm uses and influences."

<sup>3</sup>Goal 3 is

"To preserve and maintain agricultural lands.

"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."

1 use policy at ORS 215.243(2).<sup>4</sup> Accordingly, the county looked at the purposes of those  
2 provisions in determining the purpose of the county’s EFU zone. The county then found that

3 “to remove the top six feet of Class II soil from the subject property will  
4 seriously interfere with the purpose of Goal 3 and the EFU zone. As provided  
5 in statute, Goal 3, and the BCC, the purpose of the agricultural zone is to  
6 preserve agricultural lands for farm use consistent with the existing and future  
7 needs for agricultural products. Removal of the high-value top soil from the  
8 subject property for no agricultural purposes is not compatible with the goal  
9 of preserving such land. This is not a situation where Applicant proposes to  
10 stockpile the high-value soil, remove some lesser quality soil or aggregate,  
11 and then replace the stockpiled high-value soil. Rather, the Applicant has  
12 stated that the high-value soil will be removed and sold for landscaping  
13 purposes.” Record 17.

14 Petitioner contends, on two grounds, that the county erred in concluding that the  
15 proposed mining use will seriously interfere with the purpose of the EFU zone. The petition  
16 for review clearly states the first ground; the second one is stated much less clearly. At oral  
17 argument, petitioner advanced additional arguments and grounds for reversal or remand that  
18 were not stated in and cannot be reasonably inferred from the petition for review. We do not  
19 consider arguments or grounds for reversal or remand that are raised for the first time at oral  
20 argument. OAR 661-010-0040(1).

21 Petitioner argues, first, that the proposed mining operation falls within the terms of  
22 ORS 215.283(2)(b)(B), which lists nonfarm uses that the county may approve in an EFU  
23 zone.<sup>5</sup> Petitioner acknowledges that uses listed in ORS 215.283(2) are not uses allowed

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<sup>4</sup>In ORS 215.243(2), the Legislative Assembly finds and declares that:

“The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.”

<sup>5</sup>ORS 215.283(2)(b)(B) provides:

“The following nonfarm uses may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use subject to ORS 215.296:

1 outright in the EFU zone, but are uses subject to the county’s approval under criteria that  
2 may be more stringent than otherwise set forth in ORS chapter 215. *Brentmar v. Jackson*  
3 *County*, 321 Or 481, 496, 900 P2d 1030 (1995); *R/C Pilots Association v. Marion County*, 33  
4 Or LUBA 532, 538 (1997). Petitioner does not appear to dispute, at least in the abstract, that  
5 the county can apply to the proposed use “more stringent” criteria than provided in ORS  
6 chapter 215. However, we understand petitioner to argue that the county cannot, as a matter  
7 of law, apply BCC 55.215(1) to find that the proposed use seriously interferes with the  
8 purposes of the EFU zone because, when the legislature listed mining operations under ORS  
9 215.283(2), it necessarily deemed such operations to be consistent with Goal 3 and the  
10 purpose of an EFU zone. Consequently, petitioner argues, the proposed mining operation  
11 cannot, as a matter of law, “seriously interfere” with the purpose of the county’s EFU zone.

12 We disagree. The listing of nonfarm uses in ORS 215.283(2) may carry some  
13 implication that the uses can be consistent with the purposes of the EFU zone, but that listing  
14 does not imply that listed uses in general are *necessarily* consistent with the purposes of the  
15 EFU zone.<sup>6</sup> See ORS 215.296(1) (prohibiting counties from approving uses listed in ORS  
16 215.283(2) unless the county finds that the use will not force a significant change in accepted  
17 farm practices on surrounding lands or significantly increase the cost of accepted farm  
18 practices on surrounding farm land); ORS 215.296(10) (authorizing counties to establish

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“\* \* \* \* \*

“(b) Operations conducted for:

“\* \* \* \* \*

“(B) Mining, crushing or stockpiling of aggregate and other mineral and other  
subsurface resources subject to ORS 215.298.”

<sup>6</sup>It is also possible that listed uses are simply exceptions to the general purpose of the EFU zone and the fact of listing carries no implication whatsoever regarding consistency with the purpose of the EFU zone. We express no opinion on this matter, other than to reject petitioner’s argument that listed uses are as a matter of law consistent with the purpose of the EFU zone and thus the county cannot require that such uses not “seriously interfere” with that purpose.

1 standards governing approval of uses listed in ORS 215.283(2) in addition to those set forth  
2 in ORS 215.296(1)). There is certainly nothing about the legislature’s decision to list mining  
3 as a category of use that is allowed as a nonfarm use under ORS 215.283(2) that suggests  
4 that a particular mining proposal is necessarily consistent with the purpose of the EFU zone.  
5 Nothing in ORS 215.283(2) or elsewhere directed to our attention prohibits the county from  
6 requiring that particular proposed nonfarm uses “not seriously interfere” with the purpose of  
7 the EFU zone.

8           Petitioner’s second argument is a variant of the first. As amplified at oral argument,  
9 we understand petitioner to contend that, notwithstanding that the county may apply BCC  
10 53.215(1) to require that proposed mining operations “not seriously interfere” with the  
11 purpose of the EFU zone, the county’s application of the “serious interference” standard goes  
12 too far. According to petitioner, the county essentially determined that any nonfarm use that  
13 destroys the capacity of agricultural land for future agricultural uses will “seriously interfere”  
14 with the purpose of the EFU zone, which the county found to be the preservation of  
15 agricultural land for farm use consistent with existing and future needs for agricultural  
16 products. However, petitioner argues, any mining operation on EFU land pursuant to ORS  
17 215.283(2)(b)(B) necessarily involves removal of topsoil to reach subsurface minerals,  
18 effectively rendering the affected lands unusable for future agricultural use. Under the  
19 county’s standard, petitioner argues, mining operations in an EFU zone will never be  
20 approved, because they will always entail removal of the topsoil that gives EFU land its  
21 agricultural potential, and thus will always “seriously interfere” with the purpose of the EFU  
22 zone. The county’s application of the “serious interference” standard is inconsistent with  
23 ORS 215.283(2), petitioner concludes, because it effectively prohibits *all* mining operations  
24 on EFU land.<sup>7</sup>

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<sup>7</sup>Petitioner’s argument presumes that counties cannot completely prohibit uses listed in ORS 215.283(2).  
*See R/C Pilots Association*, 33 Or LUBA at 540-41 (LUBA assumed without deciding that counties cannot

1           Petitioner’s argument ignores the portion of the county’s findings, quoted above,  
2 where it distinguishes petitioner’s proposal to mine the topsoil for sale offsite from other  
3 potential operations that remove and stockpile agricultural topsoil in order to mine for lesser-  
4 quality soil or minerals and then replace the topsoil. Thus, it appears the county has not  
5 interpreted or applied the “serious interference” standard in a manner that would effectively  
6 prohibit all mining operations listed at ORS 215.283(2)(b)(B). Petitioner has not established  
7 that the county’s application of the serious interference standard, as articulated in this case, is  
8 inconsistent with ORS 215.283(2).<sup>8</sup>

9           The assignment of error is denied.

10          The county’s decision is affirmed.

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completely prohibit uses allowed by ORS 215.283(2)). Although it is not clear petitioner’s presumption is correct, for purposes of this opinion we assume, without deciding, that it is.

<sup>8</sup>At oral argument, petitioner referred to testimony of Allen Throop, a representative of the Department of Geological and Mineral Industries, before the board of commissioners. Throop’s testimony is contained on an audiotape of the proceeding before the commissioners. Petitioner claims that Throop testified that it was a common practice for mining operations to strip off the topsoil and sell it offsite, rather than try to reclaim the site for farm use with that topsoil, as the county’s findings suggest. However, petitioner could not direct this Board to the location of that testimony in the audiotape in the record. Without some assistance from petitioner, we will not search for that testimony on the audiotape. *Best Buy in Town v. Washington County*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 98-051, February 2, 1999). Even if Throop testified that mining operations commonly do not reclaim land for farm use, as petitioner claims, and even if that testimony were undisputed, that fact would have no bearing on the legal question of whether the county can determine under its regulations that proposed mining operations in EFU zones that do not reclaim the site for farm use by restoring topsoil will “seriously interfere” with the purpose of the county’s EFU zone.