BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DONALD STILL, Petitioner, vs. MARION COUNTY, Respondent, and VICTOR C. COBOS, Intervenor-Respondent.	LUBA No. 95-224
	FINAL OPINION AND ORDER

Appeal from Marion County.

F. Blair Batson, Portland, filed the petition for review and argued on behalf of petitioner.

Jane Ellen Stonecipher, Assistant County Counsel, Salem, filed a response brief and argued on behalf of respondent. With her on the brief was Michael J. Hansen, County Counsel.

Michael J. Babbitt, Portland, filed a response brief and argued on behalf of intervenor-respondent.

HANNA, Chief Referee; GUSTAFSON, Referee, LIVINGSTON, Referee, participated in the decision.

REMANDED 09/23/96

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioner appeals the county's approval of a request to partition a 95.21 acre parcel and construct a dwelling on one of the resulting parcels.

MOTION TO INTERVENE

Victor Cobos (intervenor), the applicant below, moves to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

On November 30, 1990, Beatrice Drury applied for a partition of her 95.21-acre parcel to create three parcels, and for approval to build a farm-related dwelling on one of the resulting parcels. A county hearings officer approved a modification of the request, approving a partition to create two parcels and to build one farm-related dwelling. The approved uses of the two resulting parcels were for a vineyard and a woodlot. On June 5, 1991, the county commission affirmed the hearings officer's decision. Petitioner appealed the county's approval, and on November 15, 1991, LUBA remanded the county's decision in Still v. Marion County, 22 Or LUBA 331 (1991) (Still I).

On March 2, 1992, Beatrice Drury died. On February 13, 1994, the Drury estate requested the county grant a hearing on the remanded application. On May 12, 1995, the estate submitted an amendment to the 1990 application, continuing

the request for a farm-related dwelling and a division into two parcels, but replacing the request for a vineyard use to a request for another farm use, that of growing Christmas trees.

The county hearings officer approved the amended application on September 6, 1995. In her decision, the hearings officer described the surrounding property:

> "Properties to the southwest, south and east are zoned SA [special agriculture] and contain a mixture of small farms, woodlots and acreage homesites. Land to the north and northwest is part of the Chinook subdivision and is zoned AR (Acreage Residential). The land to the northwest contains several acreage homesites. The land to the north has yet to be divided." Record 12.

Petitioner appealed the hearings officer's decision to the board of county commissioners, which affirmed the decision. This appeal followed.

PRELIMINARY ISSUES

A. Petitioner's Motion to File Reply Brief

On March 20, 1996, petitioner filed a Motion to File Reply Brief, accompanied by a reply brief. The county and intervenor each object to the reply brief on the ground that, in contravention of OAR 661-10-039, the reply brief does not address a new issue raised in the county's brief. The county and intervenor argue that what petitioner describes as a response to a new issue is petitioner's recharacterization of the county's argument responding to petitioner's second assignment of error.

The county and intervenor are correct. The county did not raise a new issue in its response brief. Petitioner's motion to file a reply brief is denied.

B. Petitioner's Motion to File Memorandum of Additional Authorities

On May 3, 1996, petitioner filed a Motion to File a Memorandum of Additional Authorities (memorandum). In his motion, petitioner notes that after his petition for review was filed, the Court of Appeals issued its decision in East Lancaster Neighborhood Association v. City of Salem, 139 Or App 333, ___ P2d ___ (1996) (East Lancaster), addressing the application of ORS 197.646, the linchpin of petitioner's first assignment of error. The county and intervenor filed responses, objecting to our acceptance of petitioner's memorandum because it raises a new issue not raised in his petition for review.

Because East Lancaster was decided after his petition for review was filed, we accept petitioner's memorandum and consider petitioner's argument to the extent that petitioner argues its interpretation and effect on this case. However, we do not consider petitioner's argument, made for the first time in his memorandum, that the amended application was not subject to the regulations in effect on the date of the original application because the original application was amended. Petitioner did not raise in his petition for review the issue that the application was not complete in 1990 because it was amended in 1995, and we will not

consider that issue now. See Shaffer v. City of Salem, 29 Or LUBA 592, 594 (1995) (holding that a petitioner may not use a reply brief to effectively add an assignment of error to the petition for review). The rationale that limits the filing of a reply brief applies equally to limit our consideration of a memorandum of additional authorities.

Petitioner's motion to file a memorandum of additional authorities is allowed, but our consideration is limited as stated above.

FIRST ASSIGNMENT OF ERROR

In his petition for review, petitioner argues that because the county applied statutes and rules in effect at the time of the application instead of statutes and rules in effect at the time it made the decision, the county failed to make adequate findings and made a decision not supported by substantial evidence in the record as a whole. Petitioner specifically contends that OAR chapter 660, division 33 (effective on March 1, 1994) and Oregon Laws 1993, chapter 792 (effective November 4, 1993) apply to the challenged decision because they were applicable when the county made its decision on October 12, 1995. However, in petitioner's memorandum of additional authorities he states:

> "In East Lancaster, the Court of Appeals rejected the argument that ORS 197.646 made new state land use regulations directly applicable to land use decisions made after the effective date of the new regulations -- at least in the situation where a

> completed application had been submitted prior to the effective date of the new rules."[1] Memorandum of Additional Authorities 2.

The county responds to the petition for review that under ORS 215.428(3), the statutes, rules and ordinances in effect at the time of the application are the applicable criteria, and to allow otherwise would grant revisions to the land use law retroactive effect without such legislative direction.

In effect, petitioner's memorandum concedes the first assignment of error, unless we consider the new issue petitioner advances in his memorandum that the application was not complete in 1990 because it was amended in 1995. As discussed above, we will not consider issues raised for the first time in a memorandum of additional authorities.

The application upon which the challenged decision is based is subject to the state and local standards and criteria in effect on November 30, 1990.[2]

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[1]For purposes of this opinion, we accept petitioner's characterization of East Lancaster.

[2]In Seitz v. City of Ashland, 24 Or LUBA 311, 315 (1992) we construed ORS 227.178(3), the analog of ORS 215.428(3) for cities, as follows:

> "While ORS 227.178(3) does not require that the city allow petitioners to modify their original application, and thereafter review that application based on the standards in effect when the original application was submitted, neither does ORS 227.178(3) or any other statutory provision or authority we are aware of, preclude the city from doing so." See also Kirpal Light Satsang v. Douglas County, 96 Or App 207, 212, 772 P2d 944, modified 97 Or App 614, rev den 308 Or 382 (1979).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that under OAR 660-05-005 to 660-05-020 and the test set forth in Still I, the county has failed to determine if the parcel size is "appropriate to maintain the existing commercial agricultural enterprise within the area." In Still I we distilled former OAR 660-05-005, 660-05-015 and 660-05-020 into a three-step test to determine if the proposed parcel size is appropriate to maintain the existing commercial agricultural enterprise within the area, as follows:[3]

> "1. The relevant 'area' for analyzing the propriety of a proposed farm parcel partition must be identified. That 'area' must be large enough to accurately represent the existing commercial agricultural enterprise. OAR 660-05-015(6)(c).
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> "2. The existing commercial agricultural operations in the area must be identified. A county must distinguish between commercial and noncommercial agricultural operations. OAR 660-05-015(6). Determining whether existing agricultural operations are commercial requires an analysis of 'products produced, value of products sold, yields, farming practices, and marketing practices.[5] OAR 660-05-015(6)(b).
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> "3. Once a county has identified the relevant area and the existing commercial agricultural operations, the county must determine whether

[3]All references in this opinion to OAR 660-05-005 to 660-05-020 are to former OAR 660-05-005 to 660-05-020, which were repealed effective August 7, 1993.

> the proposed partition will result in parcels of sufficient size to 'maintain' or 'continue' the existing commercial enterprise in the area. In making this determination the county may not assume the partition is appropriate, simply because the resulting parcels are of the same size as the smaller commercial agricultural operations in the area. OAR 660-05-020(6)." (Emphasis in original.) Still I, 22 Or LUBA 337-38. See also DLCD v. Yamhill County, 23 Or LUBA 351 (1992) (identical test applied).[4]

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[4]OAR 660-05-005(2) defined "commercial agricultural enterprise" as follows:

> "'Commercial agricultural enterprise' consists of farm operations which will:
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> "(a) Contribute in a substantial way to the area's existing agricultural economy; and
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> "(b) Help maintain agricultural processors and established farm markets;
>
> "(c) When determining whether a farm is part of the commercial agricultural enterprise, not only what is produced, but how much and how it is marketed shall be considered. These are important factors because of the intent of Goal 3 to maintain the agricultural economy of the state."

OAR 660-05-015(6) provided:

> "(a) The minimum lot size(s) needed to maintain the existing commercial agricultural enterprise shall be determined by identifying the types and sizes of commercial farms in the area. When identifying commercial farms, entire commercial farms shall be included, not portions devoted to a particular type of agriculture. The identification of commercial farms may be conducted on a countywide or subcounty basis.
>
> "(b) Commercial agricultural operations to be identified should be determined based on type of products produced, value of products sold, yields, farming practices, and marketing practices.

_____

[5]"Commercial farms may include diversified agricultural operations producing more than [one] crop. Therefore, the correct focus is on entire agricultural enterprises rather than individual parcels or crops. OAR 660-05-015(6)(a)."

A. The Relevant Area

Petitioner contends that the county did not meet the first step, and argues:

"[T]he county erred in limiting the inventory of commercial farms to a 1/2 mile radius because the county failed to either: 1) show how the 1/2 mile radius was representative of the commercial agricultural enterprise in the SA zone or county as a whole; or 2) show how the 1/2 mile radius was a distinct geographic area characterized by a particular type of agriculture -- different from the SA or EFU as a whole." Petition for Review 15-16.

The county contends that it identified the relevant

"(c) Local governments which apply Goal 3's minimum lot size standard on a case-by-case basis may satisfy the commercial identification requirement in subsection (6)(a) of this rule by identifying the sizes and other characteristics of existing commercial farms in an area which is large enough to represent accurately the existing commercial agricultural enterprise within the area containing the applicant's parcel."

OAR 660-05-020(6) provided:

"As used in this rule, 'maintain' or 'continue' do not mean that the new and remaining parcel sizes must have no adverse effects whatsoever on an area's commercial agricultural enterprise. Such an interpretation would probably halt most land divisions. 'Maintain' and 'continue' imply a balance. Land divisions often have both positive and negative effects on an area's commercial enterprise. Goal 3 requires that the new and remaining parcel sizes on balance, considering positive and negative effects, will keep the area's commercial agricultural enterprises successful, and not contribute to their decline."

area by selecting the SA zone, a zone different from the majority of the county's agricultural lands.[5]

> "The county considered the size and type of farm operations in the SA zone and correctly determined that the one-half mile area accurately represented the commercial farming operations 'within the area containing the applicant's parcel.'" Respondent's Brief 7.

It also excluded consideration of land in the AR zone, even when the land in that zone is used for a large-scale farming operation.

In identifying the relevant area, the county's decision focuses on the SA zone.[6] Although Marion County Zoning Ordinance (MCZO) 137.070(a)(1) allows the area of consideration to be limited to the zone in which the subject parcel is located, neither OAR 660-05-015 nor the first step of the Still I test provide for such a limitation.[7] The

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[5]MCZO 137.010 describes the purpose of the SA zone and states:

> "The SA zone is applied in areas characterized by small farm operations as areas with a mixture of good and poor farm soils where the existing land use pattern is a mixture of large and small farm units and some acreage homesites. The farm operations range widely in size and include grazing of livestock, grains and grasses, Christmas trees and specialty crops."

[6]The challenged decision does not identify OAR 660-05-015(6) as a relevant criterion. After setting forth the Still I test, the challenged decision states: "Under MCZO, all zoned land within one half mile of the subject property is a proper study area for judging whether a land division is proper." Record 15. The decision includes additional justification. However, the additional justification is devoted to satisfying the MCZO.

[7]MCZO 137.070(a) states:

challenged decision does not provide a rationale for the selection of the relevant area, other than stating that such a selection is allowed by MCZO 137.070(a)(1). For purposes of MCZO 137.070(a)(1), the county properly determined the relevant area to be studied. However, that determination is inadequate for purposes of the first step of the Still I test and OAR 660-05-015(6)(c). The challenged decision does not explain why the area selected is large enough to

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"Requirements for farm parcels. All new farm parcels shall satisfy the following requirements:

"(1) Any proposed parcel intended for farm use must be appropriate to the continuation of the existing commercial enterprise of the particular area based on the evaluation prescribed in 137.040(g). The evaluation shall include the subject property and commercial agricultural enterprises located in the same zone within one-half mile of the subject property.

"(2) The parcel shall meet the requirements of ORS 215.243.

"(3) Parcel size guideline: New parcels intended for farm use shall generally be 20 acres or more in area. Proposed farm parcels smaller than this 20 acre guideline must be shown to be appropriate for intensive commercial agricultural enterprises such as vineyards, nursery stock, berry farming or specialty orchard crops. In addition, a site development and management program for the proposed commercial farm use shall be provided. The County may request an evaluation of the evidence and the management program by an agricultural specialist to determine if the proposed farm parcel meets the criteria in (1) and (2) above. Reasonable commitments may also be required to ensure that a good faith effort is made to implement the management program.

"(4) If the proposed parcel does not include a dwelling it should include enough Class V through VIII agricultural soils or otherwise unfarmable land, if any, to accommodate the homesite and any nonfarm related improvements."

accurately represent the existing commercial agricultural enterprise, as required by OAR 660-05-015(6)(c).

This subassignment of error is sustained.

B. Identification of Commercial Agricultural Operations

Petitioner argues that when the county identified the types and sizes of commercial agricultural operations, it did not distinguish between the existing commercial and noncommercial agricultural enterprises in the area. Petitioner contends that, based on the definition of "commercial operations" in OAR 660-05-005(2), there are three additional components of the second step of the Still I test that were not addressed by the challenged decision. The additional components are: 1) a definition of the area's existing agricultural economy; 2) a determination of what would constitute a substantial contribution to that economy; and 3) an application of the first two components to each of the identified agricultural operations. Petitioner contends that because the county did not set forth such analysis, it could not conclude that the operations it determined are commercial do, in fact, contribute substantially to the area's existing agricultural economy. Petitioner argues also that the county impermissibly relied on estimated data rather than actual income, sales and yield data, which he alleges is required by OAR 660-05-015(6)(b) when it states "commercial agricultural operations to be identified should be determined based on type of products produced, value of

products sold, yields, farming practices, and marketing practices."

The county does not respond directly to petitioner's first argument. Instead, it describes generally the detailed evaluation set forth in the challenged decision in which intervenor studied farming operations in the identified relevant area. From this study, the county contends the requisite evidence was developed and is reflected in the challenged decision. To petitioner's second argument, the county responds that:

> "OAR 660-05-015(6)(b) provides the identification of commercial farms 'should' be based on these factors, but does not require that only actual data be used. * * * Reliable estimates provide sufficient basis for analysis of commercial farm enterprises." Respondent's Brief 8.

In DLCD v. Yamhill County, 23 Or LUBA 351, 358 (1992) we discussed the difficulties in applying OAR 660-05-015(6)(b), and stated:

> "We * * * note that while OAR 660-05-015(6)(b) identifies several factors to be considered in determining whether agricultural operations are commercial, the rule provides absolutely no guidance in how those factors are to be applied to make the required distinction between commercial and noncommercial farms.[3] Presumably how those factors are to be applied is left to the county, subject to review by LCDC or this Board to determine whether the particular application of the factors is consistent with the overall requirement to distinguish between commercial and noncommercial agricultural operations. (Emphasis in original.)
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> [3]"For example, the rule does not explain how the

> "types of products produced" factor is to be used to distinguish between commercial and noncommercial farms, and we have some difficulty seeing how the type of product produced will have much bearing on whether a particular farm is commercial or noncommercial. The "value of products produced," "yields," "farming practices," and "marketing practices," factors also present problems. One perhaps could develop assumptions for applying each factor to distinguish between commercial and noncommercial farms, but the rule itself provides no guidance in what those assumptions might be."

The county's and intervenor's responses exemplify the practical difficulties in implementing OAR 660-05-015(6)(b) as petitioner proposes. They describe the difficulty of obtaining confidential income and production information from potential competitors who may have no desire or motivation to reveal such information. By requiring an applicant to obtain such information before a dwelling can be approved, we would be granting a neighboring future competitor the power to veto an application. We find no such intent in the rule. OAR 660-05-015(6)(b) does not require the use of actual data in determining when an agricultural enterprise is commercial. Where actual data is not available, the county may rely on reasonable estimates to satisfy this standard.

While we agree with the county and intervenor that OAR 660-05-015(6)(b) does not require actual data, we cannot determine, at this time, whether the county has satisfied the second step of the Still I test. In the prior

subassignment of error, we agreed that the challenged decision does not adequately justify the selection of the size of the relevant area. Because the identification of the commercial farms in the area is predicated on the first step of the Still I test, and that first step has not been justified, we are unable to determine whether the decision complies with the second step.

This subassignment of error is sustained.

C. Parcel Size

Petitioner argues the challenged decision does not meet the third step of the Still I test because the county failed to find that the challenged land divisions would maintain the larger as well as the smaller holdings in the area.

Our review of whether the proposed division will result in parcels of sufficient size to maintain or continue the existing commercial enterprise in the area is predicated on the first step of the Still I test. Because that first step has not been justified, we are unable to review the decision for compliance with the third step.

This subassignment of error is sustained.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

> "The county misconstrued the applicable law, failed to make adequate findings and made a decision not supported by substantial evidence in the record as a whole, by not requiring compliance with former OAR 660-05-030(4) and former MCZO

137.070(a)(3) or ORS 215.283(1)(f)." Petition for Review 23-24.

Petitioner describes two respects in which he alleges the county erred:

A. Purpose of Obtaining a Profit in Money

Petitioner contends:

> "The county did not make findings that the parcel on which the dwelling will be located is currently employed for the primary purpose of obtaining a profit in money; there is not evidence in the record to support such a finding." Petition for Review 24.

In Fleck v. Marion County, 25 Or LUBA 745 (1993) (Fleck) we discussed the requirement that a farm dwelling be allowed only if the parcel on which the dwelling will be located is currently employed for the primary purpose of obtaining a profit in money. We addressed the question before us now, of whether a dwelling could be authorized if the farm use had not yet been established, stating:

> "[T]he county may either (1) require the farm use that the proposed dwelling would customarily be provided in conjunction with to actually exist on the subject property; or (2) determine what constitutes the amount of farm use that the proposed dwelling would customarily be provided in conjunction with and condition its decision by requiring that amount to be established prior to issuance of a building permit." Id. at 751.

If a county chooses the second option:

> "[U]nder OAR 660-05-030(4), a dwelling customarily provided in conjunction with farm use may not be approved until the farm use that justifies such a dwelling exists on the subject property. Forster v. Polk County, 24 Or LUBA 476, 481 (1993)

(Forster II). * * * The county [can] comply with OAR 660-05-030(4) by determining the amount of farm use required by OAR 660-05-030(4), conditioning issuance of a building permit for the farm dwelling on the establishment of that amount of farm use on the property, and requiring that notice and an opportunity for a hearing be provided to all parties with regard to determining compliance with such condition. Forster II, supra, 24 Or LUBA at 482 n 9; see McKay Creek Valley Assoc. v. Washington County, 24 Or LUBA 187, 198 (1992), aff'd 118 Or App 543, rev den 317 Or 272 (1993)."[8] Fleck, 25 Or LUBA at 749.

Thus, as interpreted in Fleck, OAR 660-05-030(4) contemplated a three-step process, as follows:

(1) Determine the amount of farm use necessary to comply with OAR 660-05-030(4).

(2) Condition issuance of a building permit for the farm dwelling on the establishment of the determined amount of farm use on the property.

(3) Specify what procedures will be used to determine compliance with the conditions. Require that notice and an opportunity for a hearing be provided to all parties with regard to determining compliance with the conditions. The conditions must preclude

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[8]OAR 660-05-030(4) states:

"ORS 215.213(1)(g) and 215.283(1)(f) authorize a farm dwelling in an EFU zone only where it is shown that the dwelling will be situated on a parcel currently employed for farm use as defined in ORS 215.203. Land is not in farm use unless the day-to-day activities on the subject land are principally directed to the farm use of the land. Where land would be principally used for residential purposes rather than for farm use, a proposed dwelling would not be "customarily provide in conjunction with farm use" and could only be approved according to ORS 215.213(3) or 215.283(3). At a minimum, farm dwellings cannot be authorized before establishment of farm uses on the land. (citations omitted).

> issuance of a building permit for the proposed farm dwelling prior to the hearing.

The challenged decision states:

> "The general guideline for parcels in the SA zone is 20 acres. The proposed parcel will be approximately 45.5 acres, with 25 acres used for Christmas tree production. As noted above, four Christmas tree operations of eight, 12, 18, and 80 acres were identified within the study area. All were identified as commercial. The proposed 45.5 acre parcel with a 25 acre tree operation is of sufficient size to constitute a commercial agricultural enterprise in this SA zone area."[9] Record 22.

The challenged decision also discusses the analysis under Fleck:

> "According to Fleck v. Marion County, LUBA No. 93-064 (1993), to be considered a dwelling in conjunction with farm use, the use a dwelling will be associated with must be present on the parcel to justify the presence of the dwelling. That use has not yet been established. According to Fleck, the county could approve the request and condition issuance of building permits on the establishment of the proper amount of farm use. The County would then be required to provide notice and an opportunity for a public hearing to determine compliance with the condition.
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> "Based on the factors evaluated above, the requested dwelling would be in conjunction with the farm use, provided the appropriate level of farm use is put in place and sustained through at least one year growth cycle. With a condition of approval requiring establishment of a 25 acre Christmas tree farm, MCZO 136.040(b) [referencing

[9]The challenged decision focuses on MCZO 137.040(a), the local provision that implements OAR 660-05-030. That code provision requires that the property be "in farm use" and be a "commercial farm enterprise."

> farm dwelling standard] can be satisfied." Record 27.

Condition 6(d) states:

> "Prior to receiving a building permit for a farm related dwelling, applicant shall plant 25 acres of Christmas trees on the 44.5 acre parcel. The trees must have matured at least one year prior to the issuance of permits." Record 29.

Findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. Heiler v. Josephine County, 23 Or LUBA 551, 556 (1992); see also, Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-21, 569 P2d 1063 (1977); Vizina v. Douglas County, 17 Or LUBA 829, 835 (1989). However, in the absence of adequate findings, under ORS 197.835(11)(b) we are required to affirm the challenged decision if a party identifies evidence in the record that "clearly supports" the decision. Kunze v. Clackamas County, 27 Or LUBA 130 (1994). "Where the relevant evidence in the record is conflicting, or provides a reasonable basis for different conclusions, such evidence does not 'clearly support' the challenged decision." Waugh v. Coos County, 26 Or LUBA 300, 307, (1993). Moreover, where the standards at issue require the exercise of considerable judgment by the local government, it is less likely that evidence will 'clearly support' a decision that the standards are met under ORS 197.835(11)(b). Id. at 308.

The county's findings are inadequate to establish compliance with OAR 660-05-030(4) because they do not show that when the proposed level of farm activity is established on the subject property, it will be currently employed for farm use as defined in ORS 215.203. In addition, while intervenor points to numerous places in the record in which he states there is a description of the proposed farm use, the evidence does not clearly support a conclusion that the proposed farm use will be for the "primary purpose of obtaining a profit in money" as required by ORS 215.203.

Much of the evidence in the record relied on by intervenor is descriptive of the activities necessary to meet the test of determining whether an operation is a commercial farm enterprise under MCZO 137.040(a). While this evidence can be a foundation for determining that the subject property is in farm use, it does not clearly establish that the extent of the proposed farm use is sufficient to comply with OAR 660-05-030(4). Without this threshold determination, the other steps of the Fleck test cannot be satisfied.

Neither the challenged decision nor the evidence clearly establish a connection between commercial farming operations and the amount of farm activity required to comply with OAR 660-05-030(4). Consequently, the challenged decision does not clearly support the conclusion that, by planting 25 acres of the proposed parcel in Christmas trees,

the proposed parcel will be currently employed for the primary purpose of obtaining a profit in money. Additionally, the challenged decision does not specify what procedures will be used to determine compliance with the condition imposed to assure that the property is in farm use at the time the building permit is issued.

This subassignment of error is sustained.

B. Day-to-Day Activities of the Farm Operator

Petitioner argues:

> "The county did not make findings that the day-to-day activities of the farm operator were [sic] principally directed to the farm use of the land; there is also not evidence in the record to support such a finding." Petition for Review 26.[10]

OAR 660-05-030(4) states in relevant part:

> "ORS 215.213(1)(g) or 215.283(1)(f) authorize a farm dwelling in an EFU zone only where it is shown that the dwelling will be situated on a parcel currently employed for farm use as defined in ORS 215.203. Land is not in farm use unless the day-to-day activities on the subject land are principally directed to the farm use of the land."

The challenged decision states:

> "The tree operation requires planting, spraying shearing harvesting, management, marketing and

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[10]Petitioner states further: "[a]n estate of a deceased person knows nothing about farming; nor can it have aspiration to farm and make a profit from farming." Petition for Review 27. Petitioner appears to argue that only a natural person can qualify as a farm operator. Petitioner provides no support for this argument. An estate is not precluded from meeting the qualifications of OAR 660-05-030(4) solely on the basis that an estate is not a natural person.

> sales. No other dwelling would be on the 45.5 acre parcel, but it is anticipated that equipment and some labor will be shared with the owners of the adjacent tree operation. There would be one owner of the 45 acre parcel. Some seasonal help will be required. The proposed owner plans to manage the tree operation, perform at least part of the spraying, shearing and harvesting, as well as overseeing harvest crews and marketing trees." Record 27.

We do not fully understand petitioner's argument. However, we cannot reach the question of whether the day-to-day activities on the land will be principally directed to the farm use of the land, because such an inquiry is dependent on a determination that the planned use of the land is for the primary purpose of obtaining a profit in money. As discussed above in this assignment of error, that determination has not yet been made.

This subassignment of error is sustained.

The third assignment of error is sustained.

The county's decision is remanded.